****

**Energy Performance Contracts**

**Handbook**

**Sample Document: Energy Performance Contract**

**December 2013**

Dated the day of 2013

**[Client]**

**[ESCO]**

**ENERGY PERFORMANCE CONTRACT**

**ENERGY PERFORMANCE CONTRACT**

**Table of Contents**

[**1.** **Definitions & Interpretation** 4](#_Toc373844431)

[**2.** **The ESCO’s Financial Arrangements** 9](#_Toc373844432)

[ **Part 1 – The Works** 10](#_Toc373844433)

[**3.** **The Works** 10](#_Toc373844434)

[**4.** **Interim Period Savings** 11](#_Toc373844435)

[**5.** **Delay and Liquidated Damages** 11](#_Toc373844436)

[**6.** **Environmental Conditions** 11](#_Toc373844437)

[**7.** **Environmental Incentives** 12](#_Toc373844438)

[**8.** **Existing Equipment** 12](#_Toc373844439)

[**9.** **Equipment Ownership** 12](#_Toc373844440)

[**10.** **Equipment Warranties** 13](#_Toc373844441)

[**11.** **ESCO Warranty** 13](#_Toc373844442)

[**12.** **Hazardous Materials** 14](#_Toc373844443)

[**13.** **Testing and Commissioning** 14](#_Toc373844444)

[**14.** **Substantial Completion and Acceptance of the Works** 15](#_Toc373844445)

[ **Part 2 – The Services** 16](#_Toc373844446)

[**15.** **The Services** 16](#_Toc373844447)

[**16.** **Training During Guarantee Period** 16](#_Toc373844448)

[**17.** **Malfunction, Emergencies & Repair of Equipment** 16](#_Toc373844449)

[**18.** **Maintenance, Replacement and Handover of Equipment and Existing Equipment** 17](#_Toc373844450)

[**19.** **Availability of Equipment** 18](#_Toc373844451)

[ **Part 3 – Measurement, Verification, Guarantee & Payment** 19](#_Toc373844452)

[**20.** **Adjustment of Values for the Baseline Energy Consumption** 19](#_Toc373844453)

[**21.** **Guarantee** 19](#_Toc373844454)

[**22.** **Energy Savings Calculation & Payment** 20](#_Toc373844455)

[ **Part 4 - Miscellaneous** 22](#_Toc373844456)

[**23.** **Variations** 22](#_Toc373844457)

[**24.** **Value Engineering** 22](#_Toc373844458)

[**25.** **Obligations of the ESCO** 23](#_Toc373844459)

[**26.** **Intellectual Property Rights** 23](#_Toc373844460)

[**27.** **Licences, Permits, Approvals & Coordination** 24](#_Toc373844461)

[**28.** **Client Representative** 24](#_Toc373844462)

[**29.** **Insurances** 24](#_Toc373844463)

[**30.** **Tax Clearance Certificates in relation to Public Sector Contracts** 25](#_Toc373844464)

[**31.** **Limitation on Liability & Idemnity** 25](#_Toc373844465)

[**32.** **Force Majeure** 25](#_Toc373844466)

[**33.** **Suspension** 26](#_Toc373844467)

[**34.** **Termination** 27](#_Toc373844468)

[**35.** **Consequences of Termination** 27](#_Toc373844469)

[**36.** **ESCO as Prime Contractor, Project Governance, Assignment & Subcontracting** 29](#_Toc373844470)

[**37.** **No Agency** 29](#_Toc373844471)

[**38.** **Representations and Warranties** 30](#_Toc373844472)

[**39.** **Change in Law** 30](#_Toc373844473)

[**40.** **Transferring Employees** 31](#_Toc373844474)

[**41.** **Confidentiality** 31](#_Toc373844475)

[**42.** **Waiver** 32](#_Toc373844476)

[**43.** **Notice** 32](#_Toc373844477)

[**44.** **Severability** 33](#_Toc373844478)

[**45.** **Cooperation** 33](#_Toc373844479)

[**46.** **Conflicts, Registrable Interests and Corrupt Gifts** 33](#_Toc373844480)

[**47.** **Media** 33](#_Toc373844481)

[**48.** **Pay and Conditions of Employment** 33](#_Toc373844482)

[**49.** **Entire Agreement and Priority of Documents** 34](#_Toc373844483)

[**50.** **Governing Law** 34](#_Toc373844484)

[**51.** **Dispute Resolution** 34](#_Toc373844485)

[**52.** **Expert Determination** 35](#_Toc373844486)

[**Schedule 1** 37](#_Toc373844487)

[Guarantee & Shared Savings Threshold 37](#_Toc373844488)

[**Schedule 2** 38](#_Toc373844499)

[Baseline and Measurement & Verification of Energy Savings 38](#_Toc373844500)

[**Schedule 3** 39](#_Toc373844501)

[Investment Grade Audit 39](#_Toc373844502)

[**Schedule 4** 40](#_Toc373844503)

[Works Schedule 40](#_Toc373844504)

[**Schedule 5** 41](#_Toc373844505)

[Services Schedule 41](#_Toc373844506)

[**Schedule 6** 42](#_Toc373844507)

[Client Information Schedule 42](#_Toc373844508)

[**Schedule 7** 43](#_Toc373844509)

[The Premises 43](#_Toc373844510)

[**Schedule 8** 44](#_Toc373844511)

[Design Documents 44](#_Toc373844512)

[**Schedule 9** 45](#_Toc373844513)

[Roles and Responsibilities 45](#_Toc373844514)

[**Schedule 10** 46](#_Toc373844515)

[Rates of Pay & Conditions of Employment 46](#_Toc373844516)

**THIS Energy Performance Contract** made the day of 20[ ] between:

1. **[ ]** having its registered office at [ ] (the "**Client**"); and
2. **[ ]** having registered office at [ ] (the “**ESCO**");

each a **“Party”** and collectively the **“Parties”**.

**WHEREAS:**

1. The Client is the owner[[1]](#footnote-2) of the Premises and wishes to reduce the energy consumption and associated costs at the Premises.
2. The Client has carried out a preliminary survey of the energy consumption of the Premises and provided this information as part of a competitive dialogue tender process inviting bids from interested energy services companies.
3. As part of its tender submission the ESCO carried out an assessment of the energy consumption characteristics of the Premises and the Existing Equipment as set out in the Investment Grade Audit prepared by the ESCO.
4. Following the completion of the competitive dialogue tender process the ESCO has been declared the successful bidder.
5. The Client wishes to engage the ESCO to procure, install, operate and maintain certain energy-saving equipment and to provide other services described in this Agreement and the attached Schedules for the purpose of achieving reductions in the energy consumed at the Premises.

**NOW IT IS HEREBY AGREED** as follows:

1. **Definitions & Interpretation**
	1. The following words and expressions shall have the following meanings respectively:

 **“Acceptance Date”** means the date on which the Client has accepted Substantial Completion of the Works.

**“Affected Employees”** means those employees in respect of whom the Transfer Regulations may be deemed to apply in connection with this Agreement.

 **“Applicable Laws”** means any and all statutes, laws, codes, rules, regulations, decrees, permits or orders as may be amended, repealed or updated from time to time concerning, relating to or having jurisdiction over the activities to be performed pursuant to this Agreement.

 **“Baseline”** is defined in Schedule 2.

 **“Baseline Adjustment Notice”** means a written notice from the ESCO to the Client of an adjustment to the Baseline in accordance with Clause 20.3.

 **“Building Regulations”** means the Building Control Acts 1990 to 2007 and all subordinate legislation pursuant thereto.

 **“Commencement Date”** means the date from which the Energy Savings shall be calculated under this Agreement being the earlier of:

1. the first day of the first calendar month immediately following the Acceptance Date; and
2. the day following the Longstop Date.

 “**Confidential Information”** means confidential and/or proprietary information including but not limited to systems, services or planned services, suppliers, data, financial information, computer software, processes, methods, knowledge, ideas, marketing promotions, current or planned activities, research, development and other information which should reasonably be considered to be confidential or commercially sensitive with respect to the information holder’s business or operations.

 **“Construction Regulations”** means the Safety, Health and Welfare at Work (Construction) Regulations 2006 to 2012.

 **“Design Documents”** means the design documentation (including operating instructions) related to the Works as developed by the ESCO and set out in Schedule 8. Any development. refinement or updating of the Design Documents may only be carried out with the express written agreement of the Client.

 **“Energy Savings”** means the reduction in the monthly energy costs at the Premises saved as a result of the Works determined by comparing the actual energy costs after the Works for the relevant Guarantee Month to the previously established Baseline energy costs calculated in accordance with Clause 22.3 in respect of each energy type.

 **"Environmental Incentives"** means all rights, credits (including tax credits), rebates, grants, benefits, reductions, offsets, and allowances and entitlements of any kind, howsoever entitled or named (including carbon credits and allowances), whether arising under national, European or international law, international treaty, trade association membership or the like, arising from the Works and the resulting reduction of energy usage at the Premises. Without limiting the foregoing, "Environmental Incentives" includes utility rebates or incentive programmes, green tags, renewable energy credits, tradable renewable certificates, portfolio energy credits, the right to apply for (and entitlement to receive) incentives under any state tax credit programme and grants from non-governmental organisations.

 **“Equipment”** means the goods, materials and equipment to be installed at the Premises by the ESCO, as set out in Schedule 3 attached hereto, together with any and all additions and modifications made thereto during the Term.

 “**ESCO Representative**” means a project manager appointed by the ESCO who shall have experience and authority to administer this Agreement on behalf of the ESCO and to furnish information as reasonably requested by the Client and to agree upon procedures for coordinating the ESCO’s efforts with those of the Client.

 **“Existing Equipment”** means the energy related equipment owned by the Client and installed at the Premises prior to the execution of this Agreement as set out in Schedule 3.

 **“Fixed Percentage”** means:

1. [75][[2]](#footnote-3)% for the Initial Reconciliation Period; and
2. the Energy Savings in excess of the Guarantee (if any) achieved during the previous Reconciliation Period expressed as a percentage of the difference between the Guarantee and the Shared Savings Threshold for each subsequent Reconciliation Period (where those Energy Savings fail to meet the Guarantee the Fixed Percentage shall be deemed to be 0% and where those Energy Savings are in excess of the Shared Savings Threshold the Fixed Percentage shall be deemed to be 100%).

 **“Guarantee”[[3]](#footnote-4)** means the Energy Savings guarantee set out in Schedule 1.

 **“Guarantee Period”** means the period of [ ][[4]](#footnote-5) years from the Commencement Date.

 **“Hazardous Materials”** means any materials or substances generally known as hazardous or deleterious to health and safety in accordance with either the current Irish or British Standards and Code of Practice.

 **“Intellectual Property”** means any designs, formulas, patterns, devices, secret inventions or processes, copyrights, patents, database rights, moral rights, trademarks, service marks, domain names, know-how, utility model, unregistered design or other intellectual or proprietary rights or similar items of property.

 **“Interim Period”** means the period from date of execution of this Agreement to the Commencement Date.

 **“Investment Grade Audit”** means a study by ESCO carried out as part of its tender submission which includes *inter alia* an analysis of the energy usage at the Premises prior to the Works, detailed consumption data, existing equipment, proposed equipment, calculations for defining the projected Energy Savings proposed to be made by the Client as a result of the Works and Services, which is attached hereto at Schedule 3.

 **“Invitation to Tender”** means the invitation to tender issued by the Client on [ ].

 “**Longstop Date”[[5]](#footnote-6)** means [ ] by which the ESCO shall successfully achieve Substantial Completion of the Works which may only be extended in accordance with the provisions of this Agreement;

 **“Material Change”** shall include any change in or to the Premises whether structural, operational or otherwise in nature which could reasonably be expected to increase or decrease annual energy consumption at the Premises by at least [20%][[6]](#footnote-7) after adjustments for climatic variations. Actions by the Client which may result in a Material Change include but are not limited to the following:

1. manner of use of the Premises by the Client;
2. hours of operation for the Premises or for any Equipment or Existing Equipment operating at the Premises;
3. occupancy of the Premises;
4. structure of the Premises;
5. modification, renovation or construction at the Premises;
6. the Client’s failure to provide maintenance of and repairs to the Existing Equipment in accordance with Clause 8.5.

 **“Materials”** means any and all reports, data manuals and/or other materials (including without limitation all and any audio or audio visual recordings, transcripts, books, papers, records, notes, illustrations, photographs, diagrams) produced for the purposes of this Agreement.

 **“Monthly Payment”** means the monthly fee referred to in Clause 22.2 which shall be based on the Fixed Percentage of the difference between the Guarantee and the Shared Savings Threshold calculated at the Unit Price for each energy type on a pro-rata calendar monthly basis (and which shall be proportionately adjusted further if the payment relates to a partial month at the beginning or end of the Guarantee Period).

 **“Operations Manual”** means the operations and maintenance manual setting out the procedures for operating and maintaining the Equipment, the Works and the Services prepared by the ESCO in both electronic and hard copy format.

 **"Performance Guarantee Payment"** means the difference between the Guarantee and the Energy Savings during the relevant Reconciliation Period calculated at the Unit Price for the relevant energy type.

 **“Premises”** means the Client’s premises more particularly described in Schedule [ 7].

 **“Reconciliation Period”** means:

1. the period from the Acceptance Date up to the end of the calendar month in which the Acceptance Date occurs together with the next 3 (three) whole calendar months (the “Initial Reconciliation Period”); and
2. each [6 month/annual][[7]](#footnote-8) period thereafter

for the measurement and/or calculation of the Energy Savings for the purposes of Clause 22.3.

 **“Relevant Legislation”** means any relevant environmental or energy related legislation that may be enacted during the Term which has or may have a material impact on either;

1. the ability of either Party to carry out its obligations under this Agreement; or
2. the Energy Savings being achieved by the ESCO.

 **“Services”** meansthe services to be performed by the ESCO during the period from the Acceptance Date until the earlier of:

1. the expiry of the Guarantee Period as set out in Schedule [ 5]; and
2. the date of termination of this Agreement,

 as more particularly described in Schedule [5].

 **“Shared Savings Threshold”** means the shared savings threshold of the Energy Savings as set out in Schedule 1.

 **“Snag List”** means minor items of the Works to be completed no later than [1 (one) month][[8]](#footnote-9) after Substantial Completion which do not prevent the Works and the Equipment from being used for the purpose for which they are intended and which will not prevent the issuance of applicable permits or certificates for such use.

 **“Subcontractor”** means any party to whom the ESCO has subcontracted any part of the Works or Services in accordance with Clause 36.

 **“Substantial Completion”** means the Works have been completed to the extent that they can be used for their intended purpose notwithstanding those minor Works items noted on the Snag List.

 **“Taxes Act”** means the Taxes Consolidation Act, 1997.

 **“Term”** means the period commencing on the date of execution of this Agreement and running until the date of expiry of the Guarantee Period or such later date as may be agreed in writing between the Parties.

 **“Transfer Regulations”** means the European Communities (Protection of Employees’ Rights on Transfer of Undertakings) Regulations 2003 (S.I. No. 131 of 2003) and Council Directive 2001/23/EC.

 **“Unit Price”** means the unit price applicable to the monetary calculation of Energy Savings for each energy type which shall be:

 €[ ][[9]](#footnote-10) per kWh for electricity;

 €[ ][[10]](#footnote-11) per kWh for gas;

 €[ ][[11]](#footnote-12) per kWh for other(s).

 **“Variation Estimate”** means the ESCO’s detailed estimate of the impact to this Agreement of a variation to the Works and/or Services and/or an adjustment to the Shared Savings Threshold and/or extension to the Guarantee Period requested by the Client or the ESCO in accordance with the provisions of Clause 23.1 or Clause 23.2 which shall include:

1. its proposal for implementing the variation to the Works and/or Services;
2. a detailed estimate of cost to the ESCO of implementing the proposed variation;
3. any proposed adjustment to the Shared Savings Threshold and/or extension of the Guarantee Period; and
4. the programme for implementing the proposed variation.

 **“Weather Measurement”** for a calendar month means each of the following:

1. the number of days with rainfall exceeding 10 (ten) millimetres;
2. the number of days with minimum air temperature less than 0 (zero) degrees Celsius; and
3. the number of days with a maximum mean 10 (ten) minute wind speed exceeding 15 (fifteen) metres per second

 as recorded at the nearest weather station to the Premises that records the relevant Weather Measurement.

 **“Works”** means the management, procurement, construction, installation, testing and commissioning works to be carried out by the ESCO during the Interim Period up to the Acceptance Date as more particularly described in Schedule [4].

 **“Works Schedule”** means the schedule for the Works as at the date of this Agreement set out in Schedule [4] which may be amended by agreement between the parties from time to time and references to the Works Schedule will be deemed to include any amendments made following the date of this Agreement.

* 1. Clause headings do not form part of this Agreement and shall not be taken into account in the construction or interpretation of this Agreement.
	2. References to any statute or statutory provision will be construed as a reference to the same as it may have been, or may from time to time be, amended, modified or re-enacted.
1. **The ESCO’s Financial Arrangements**
	1. The ESCO shall be solely responsible for financing all costs in carrying out the Works and the Services under this Agreement.
	2. There can be no liens or encumbrances on the Equipment and under no circumstances can the Equipment be used in any way by the ESCO as collateral or security for the repayment of any obligations of the ESCO to any third party.
* **Part 1 – The Works**
1. **The Works**
	1. The ESCO shall carry out the Works with all the skill, care, diligence, efficiency and professional conduct reasonably to be expected from a professional with the qualifications and experience suitable for the carrying out of the Works and in the appointment and monitoring of its agents, employees and Subcontractors and shall do so in accordance with the Works Schedule, the Design Documents and the terms and conditions set out in this Agreement.
	2. The ESCO shall supervise and direct the Works and shall ensure that the completed Works are fit for their intended purpose and shall be responsible for all construction and installation means, methods, techniques, sequences and procedures and for coordinating all elements of the Works under this Agreement.
	3. The ESCO shall procure the Equipment together with all labour, personnel, tools, construction equipment and machinery, transportation and other facilities and services necessary for the proper execution and completion of the Works.
	4. Save as to the extent that may be required under the Design Documents or as may be otherwise required under this Agreement the ESCO shall carry out the Works in such a manner so as not to harm the structural integrity of the Premises or its operating systems. The ESCO shall without delay and at its own expense repair and restore to its original condition any damage to the Premises caused by the ESCO or its Subcontractors or agents.
	5. The ESCO shall appoint the ESCO Representative who on the date of execution of this Agreement shall be [ ][[12]](#footnote-13). The ESCO may replace the ESCO Representative with a person of equivalent experience and expertise with the prior written consent of the Client which shall not be unreasonably withheld or delayed.
	6. In carrying out the Works the ESCO shall comply with its obligations under the Construction Regulations.
	7. The ESCO shall complete the Works in accordance with the programme for the Works set out at Schedule 4 and the Design Documents and shall comply with all applicable legislation, regulations, guidelines, by-laws, standards and codes of practice including, but not limited to the Construction Regulations and the Building Regulations.
	8. The ESCO undertakes that upon installation the Equipment shall satisfy the up to date published Sustainable Energy Authority of Ireland energy efficiency criteria (Triple E Register or equivalent).
	9. [The Client hereby appoints the ESCO as [project supervisor for the construction stage and project supervisor for the design stage][[13]](#footnote-14) for the Works in accordance with the Construction Regulations and the ESCO hereby accepts the appointment which shall continue as long as the Client is required to have a [project supervisor for the construction stage and project supervisor for the design stage][[14]](#footnote-15) in place for the Works.
	10. The ESCO represents and warrants that it is and will continue to be competent to act as [project supervisor for the construction stage and project supervisor for the design stage][[15]](#footnote-16) for the Works and further represents and warrants that it will allocate sufficient resources to enable it to comply with the relevant requirements of the Construction Regulations.
	11. The ESCO acknowledges that it shall not be entitled to any additional costs, fees or expenses in acting as [project supervisor for the construction stage and project supervisor for the design stage][[16]](#footnote-17) for the Works and that all such costs, fees or expenses are deemed to be included in any payments made to it by the Client under this Agreement.
	12. The ESCO warrants and represents that the insurances required under Clause 29 include cover for its liability in respect of its role as [project supervisor for the construction stage and project supervisor for the design stage][[17]](#footnote-18) for the Works.][[18]](#footnote-19)
2. **Interim Period Savings**
	1. For the purposes of Clause 27 where the ESCO achieves Energy Savings during the Interim Period such savings shall be added to the calculation of the Energy Savings for the first Guarantee Year.
3. **Delay and Liquidated Damages**
	1. The Client shall be entitled to recover liquidated damages at the pro-rata daily rate value of the Guarantee calculated at the Unit Price for each day Substantial Completion of the Works is delayed beyond the Longstop Date which shall be due and payable by the ESCO to the Client upon demand.
	2. If the ESCO is delayed in carrying out and completing the Works due to a *force majeure* event set out in Clause 32 or any negligent act or omission of the Client the ESCO shall be entitled to a reasonable extension to the Longstop Date as may be agreed in writing between the Parties prior to the resumption of Work by the ESCO following the delay.
	3. Where the Parties cannot agree to an extension of the Longstop Date under Clause 5.2 the matter shall be referred to dispute resolution in accordance with Clause 51.
	4. The Parties agree that it would be extremely difficult and impracticable under the presently known and anticipated facts and circumstances to fix with precision the actual damages the Client would incur in the event of any such delay, and that the liquidated damages identified in this Clause 5 are a good faith and reasonable estimate of the damages and loss the Client would suffer.
	5. The Parties acknowledge that any remedies under this Clause 5 shall not act as a sole right of recourse against the other Party and shall be in addition to any other remedies that may be available under this Agreement.
4. **Environmental Conditions**
	1. The ESCO undertakes that the Works shall not under any circumstances compromise the quality of the indoor environment existing at the Premises at the date of execution of this Agreement[[19]](#footnote-20).
	2. Where existing indoor environmental conditions at the Premises at the date of execution of this Agreement exceed accepted industry standards as set out in the current Chartered Institution of Building Services Engineers (CIBSE) guidelines and the Works will lower those conditions the ESCO must advise the Client and obtain the Client’s prior written agreement to the lowering of such conditions.
	3. The ESCO undertakes that following Substantial Completion of the Works the resulting indoor environmental conditions at the Premises shall not fall below the higher of:
		1. those specified in the Invitation to Tender (if any); or
		2. accepted industry standards as set out in the current standards of the Chartered Institution of Building Services Engineers (CIBSE) guidelines as of the date of execution of this Agreement.
	4. The ESCO shall comply with all reasonable directions of the Client provided always that the Client has no obligation to consent to the lowering of such conditions.
5. **Environmental Incentives**
	1. The Client shall own, and may assign or sell in its sole discretion, all right, title, and interest associated with the Environmental Incentives.
	2. For the avoidance of doubt the Environmental Incentives will not be included within any calculation of savings or otherwise reduce the ESCO's responsibility for achieving the Guarantee.
6. **Existing Equipment**
	1. The Existing Equipment shall remain the property of the Client even if it is replaced or its operation made unnecessary as a result of the Works or Services.
	2. The ESCO shall advise the Client in writing where in the ESCO’s opinion any of the Existing Equipment needs to be replaced or removed from the Premises during the Term which it could not have been reasonably expected to identify during the preparation of its Investment Grade Audit, giving reasons for such replacement or removal, and the Client shall at the earliest opportunity designate in writing to the ESCO which elements of the Existing Equipment (if any) should be replaced by ESCO and/or disposed of off-site from the Premises. For the avoidance of doubt the replacement or removal of Existing Equipment under this Clause 8.2 shall not be deemed to contribute to any Material Change under this Agreement.
	3. [Any disposal or replacement of the Existing Equipment instructed by the Client under Clause 8.2 shall be carried out by the ESCO [at the ESCO’s/Client’s cost][[20]](#footnote-21)][[21]](#footnote-22).
	4. [The Client shall be responsible for the disposal of any Existing Equipment designated by it under Clause 8.2 as disposable off-site.][[22]](#footnote-23)
	5. The ESCO has advised the Client in the Investment Grade Audit of any reasonable operational or maintenance changes it requires the Client to adopt in respect of the Existing Equipment to ensure it operates efficiently in conjunction with the Equipment being installed by the ESCO and the Parties agree to liaise and cooperate to ensure such operational efficiency.
	6. The Client shall designate the location and storage at the Premises for any Existing Equipment that is to be replaced by the ESCO but is not to be disposed of off-site.
7. **Equipment Ownership**
	1. Title to the Equipment or any part thereof together with any materials, licenses, powers and privileges purchased and installed by the ESCO for the purpose of this Agreement shall remain vested in the ESCO but the Parties agree that the Client shall have the option to purchase the Equipment for
		1. €1 upon the expiry of this Agreement; or
		2. the current market value of the Equipment at the date of termination of this Agreement under the provisions of Clause 34 and Clause 35 .
	2. Where the Client exercises the option referred to in Clause 9.1 title to the Equipment shall pass to the Client immediately upon payment to the ESCO of the relevant amount.
	3. All additions to, changes, replacements, modifications, upgrades or alterations of the Equipment and/or the Existing Equipment carried out during the Term shall become part of the Equipment and/or the Existing Equipment.
8. **Equipment Warranties**
	1. The ESCO hereby assigns to the Client all available manufacturer warranties relating to the Equipment (including warranties relating to spare parts used and installed when repair is necessitated by malfunction) and the ESCO shall deliver such written warranties to the Client as soon as is practicable.
	2. Where any defect or fault occurs in the Equipment during the Term the Client hereby grants the ESCO the authority to make all necessary manufacturer warranty claims in relation to the Equipment on behalf of the Client as soon as reasonably possible following the discovery of such defect or fault.
	3. The Client may in writing direct the ESCO to rectify and make good any defect or fault in the Equipment and may include a stipulation in respect of a reasonable and proportionate timeframe within which a defect or fault must be rectified and made good by the ESCO and the ESCO shall rectify and make good any such defect or fault within the time stipulated.
	4. Without restricting any warranty or guarantee implied or imposed by law or contained in this Agreement the ESCO shall at its own expense rectify and make good any defect or fault that appears in the Works or the Equipment.
9. **ESCO Warranty**
	1. The ESCO warrants and undertakes to the Client that materials and Equipment furnished under this Agreement will be of good and merchantable quality, fit for purpose and new unless otherwise required or permitted by this Agreement and that the Works will be free from faults and defects not inherent in the quality required or permitted.
	2. For the avoidance of doubt none of the provisions of the Sales of Goods Acts 1893 and 1980 shall be excluded or limited by the provisions of this Agreement.
	3. The ESCO warrants and undertakes that the Equipment and the Works will conform with the requirements of this Agreement and the Design Documents.
	4. The ESCO’s warranty excludes remedy for damage or defect to the extent caused by:
		1. abuse by the Client or any agent or employee of the Client;
		2. modifications made or authorised by the Client and not approved or executed by the ESCO or Subcontractors;
		3. improper or insufficient maintenance or operation by or on behalf of the Client that is not in accordance with this Agreement; or
		4. normal wear and tear under normal usage.
	5. If required by the Client the ESCO shall furnish satisfactory evidence as to the kind and quality of materials and Equipment and the recommended maintenance thereto to meet the requirements of this Clause 11 and if necessary shall update the Operations Manual accordingly.

1. **Hazardous Materials**
	1. In the event that the ESCO discovers Hazardous Materials at the Premises which it could not reasonably have been expected to discover during the preparation of the Investment Grade Audit or otherwise prior to commencing the Works at the Premises it shall immediately notify the Client and may suspend the relevant portion of the Works and/or the Services and remove all ESCO staff or Subcontractors from the affected area of the Premises.
	2. In the event that the Client discovers Hazardous Materials at the Premises it shall immediately notify the ESCO and the ESCO may where necessary suspend the relevant portion of the Works and/or the Services and remove all ESCO staff or Subcontractors from the affected area of the Premises.
	3. The Client shall be responsible for the storage, handling, use, transportation, treatment, disposal, discharge, leakage, detection, removal or containment of any Hazardous Materials at its expense and the ESCO shall undertake no further work on the Premises until notified by the Client in writing that the Hazardous Materials have been removed from the Premises and it is safe for the ESCO to proceed with the Works and/or the Services.
	4. In the event of a suspension of the Works due to the discovery of Hazardous Materials in accordance with Clause 12.1 or 12.2 the ESCO shall be entitled to an extension to the timelines in the Works Schedule and the Longstop Date equal to the period of such suspension together with a reasonable period for remobilisation.
	5. If any suspension under this Clause 12 lasts for more than 6 (six) months then either Party shall be entitled to terminate this Agreement with immediate effect upon delivery of written notice to the other subject to the provisions of Clause 35.
	6. Notwithstanding anything to the contrary set forth in this Clause 12 if any Hazardous Materials are introduced to the Premises by the ESCO its Subcontractors or any party for whom they may be liable as the result of the negligent carrying out of the Works or the Services then the ESCO at its sole cost and expense shall be liable for any response, removal, cleanup, or other remedial action required either under this Agreement or by applicable law.
2. **Testing and Commissioning**
	1. When the Works are nearing Substantial Completion the ESCO shall notify the Client no less than 7 (seven) days in advance in writing of the schedule for commissioning and testing of the relevant part of the Works and/or Equipment and the Client and/or its nominee shall have the right to be present at any or all such tests conducted by the ESCO and/or manufacturers of the Equipment.
	2. The ESCO shall ensure that it supplies all necessary documents, information, suitably qualified and experienced personnel, power, consumables and instruments required to carry out the commissioning and tests. The ESCO shall comply with all and any protocols as to testing and commissioning agreed with the Client from time to time.
	3. The ESCO shall correct any deficiencies in the Works and/or the Equipment that may be observed during the commissioning and testing procedures (including the pursuit of any manufacturer warranty claims as set out in Clause 10.2).
	4. The ESCO shall deliver a written report on the testing and commissioning of the Works and the Equipment to the Client and shall provide the Client with all appropriate testing documentation (including testing and commissioning certificates) along with all operations and maintenance documentation for the Equipment to the Client on or before Substantial Completion of the Works.
3. **Substantial Completion and Acceptance of the Works**
	1. The ESCO will successfully achieve Substantial Completion of the Works by the Longstop Date which shall only be extended by agreement in writing between the Parties or as otherwise provided herein.
	2. If the ESCO fails to achieve Substantial Completion of the Works by the Longstop Date the Client shall have the right to terminate the Agreement in accordance with the provisions of Clause 34.2.1.
	3. The ESCO acknowledges that the Commencement Date will occur regardless of whether the ESCO has achieved Substantial Completion of the Works by the Longstop Date.
	4. When the ESCO believes that the Works have reached Substantial Completion it will submit a certificate of Substantial Completion and a Snag List to the Client in a form pre-agreed by the Client.
	5. If the Client agrees that the Works have achieved Substantial Completion it will accept the Works by signing the certificate of Substantial Completion and Snag List and returning both to the ESCO specifying the Acceptance Date within 10 (ten) business days and the ESCO shall promptly proceed to complete all items on the Snag List.
	6. If the Client does not agree that the Works have achieved Substantial Completion and/or that the Snag List is not complete or correct then the Client shall notify the ESCO in writing of any discrepancies within 10 (ten) business days. To the extent the ESCO does not dispute the discrepancies raised by the Client the ESCO shall:
		1. promptly and diligently correct the Works to conform to the description of the Works set forth herein and resubmit the certificate of Substantial Completion to the Client; and/or
		2. promptly complete all items on the Snag List.
	7. If the Client fails to respond to the ESCO within 10 (ten) business days of receipt of the certificate of Substantial Completion and Snag List the ESCO shall notify the Client of such failure. If such failure by the Client continues for a further 5 (five) business days following such additional notification the Client will be deemed to have agreed to, signed and returned the certificate of Substantial Completion and Snag List. In such circumstances the Acceptance Date shall be deemed to be the day following the expiry of 15 (fifteen) days from receipt by the Client of the certificate of Substantial Completion and Snag List.
	8. If the ESCO disagrees with any or all of the discrepancies raised by the Client under Clause 14.6 the ESCO shall notify the Client of a dispute which shall be referred to expert determination in accordance with Clause 52.
	9. The ESCO shall furnish the Operations Manual to the Client upon Substantial Completion of the Works and shall be responsible for keeping it up to date during the Term of this Agreement to take account of any additions, changes, replacements, modifications, upgrades or alterations to the Equipment and/or the Existing Equipment including any updated software
* **Part 2 – The Services**
1. **The Services**
	1. The ESCO shall commence the Services on the day following the Acceptance Date and shall provide the Services until the expiry of the Guarantee Period.
	2. The ESCO shall perform the Services with all the skill, care, diligence, efficiency and professional conduct reasonably to be expected from a professional with the qualifications and experience suitable for the performance of the Services and in the appointment and monitoring of its agents, employees and Subcontractors and shall do so in accordance with the provisions of this Agreement.
	3. In performing the Services the ESCO shall be obliged to keep updated any and all software to be used in connection with the Equipment and/or Existing Equipment subject to the provisions of Clause 26.
2. **Training During Guarantee Period[[23]](#footnote-24)**
	1. The ESCO shall no later than 10 (ten) days following Substantial Completion of the Works provide training to the Client’s staff on the proper operation and maintenance procedures for the Works, the Equipment and/or Existing Equipment including any software replacement or upgrade.
	2. The training referred to in Clause 16.1 shall take place at the Premises at a time to be agreed by the Parties acting reasonably and the costs of such training shall be borne by the ESCO.
	3. If the ESCO adds to, changes, replaces, modifies, upgrades or alters any of the Equipment and/or the Existing Equipment in accordance with Clause 24 then it shall as soon as possible and at its own expense provide all necessary training to the Client’s staff on such addition, change, replacement, modification, upgrade or alteration to the Equipment and/or Existing Equipment including any upgraded software.
3. **Malfunction, Emergencies & Repair of Equipment**
	1. The Client shall use reasonable endeavours to notify the ESCO of it becoming aware of the occurrence of any malfunction or emergency condition affecting the operation of the Equipment or Existing Equipment that might materially impact upon the Energy Savings and the ESCO shall respond and proceed with corrective measures within:
		1. [6 hours][[24]](#footnote-25) if such notification is received during normal business hours being Mondays to Fridays inclusive from 9.00hrs to 17.00hrs; or
		2. [12 hours][[25]](#footnote-26) if such notification is received outside of normal business hours being Mondays to Fridays inclusive from 17.00hrs to 9.00hrs, weekends or public holidays.
	2. When requested in writing by the Client the ESCO shall provide a written record of all service work performed pursuant to this Clause 17 upon written request by Client. This record shall include amongst other things the reason for the service, description of the problem, the corrective action performed and the outcome of the corrective action.
	3. The Client shall take reasonable steps to protect the Equipment and the Existing Equipment from damage, harm, theft or misuse during the Term of this Agreement.
	4. Notwithstanding the foregoing the Client may take reasonable steps to protect the Equipment and the Existing Equipment if due to an emergency it is not practical to notify the ESCO before taking any such actions. In the event of such an emergency the Client may take reasonable steps to protect the Equipment and the Existing Equipment from damage or injury and shall follow reasonable instructions for emergency action provided in advance by the ESCO[[26]](#footnote-27).
	5. If it is necessary to effect repairs or replacements as a result of a major malfunction or breakdown of any of the Equipment and/or Existing Equipment caused by any negligent act by the Client or breach of its obligations under this Agreement, the ESCO shall upon prior written approval by the Client:
		1. take any necessary corrective action the cost of which shall be recoverable from the Client upon delivery by the ESCO of all relevant invoices and any other information as may reasonably be requested by the Client; and
		2. subject to the provisions of Clause 20 either adjust the Shared Savings Threshold or extend the Term of this Agreement.
	6. The ESCO shall have no liability to the Client for any interruption to the energy supply to the Premises where such interruption of supply is due to a *force majeure* event as set out in Clause 32.
	7. The Client shall comply with its obligations under this Clause 17 in accordance with and having regard to the Operations Manual.
	8. During the Term of this Agreement the Client will not without the prior written consent of the ESCO (such consent not to be unreasonably withheld or delayed) add or install any accessory, device or other object on any of the Equipment and/or the Existing Equipment if such addition or installation will or is likely to significantly change or impair the originally intended functions or use of the Equipment and/or the Existing Equipment.
4. **Maintenance[[27]](#footnote-28), Replacement and Handover of Equipment and Existing Equipment**
	1. The ESCO shall be responsible for the maintenance and upkeep of the Equipment [and the Existing Equipment] and is obliged to carry out any technical, administrative and management measures during the lifecycle of any item (including but not limited to any part, component, device, sub-system, functional unit, operating equipment or system which can be looked at discretely) of the Equipment [and/or the Existing Equipment] to maintain or restore its operative condition.
	2. The Client shall incur no cost for the maintenance, servicing or adjustment of the Equipment or the Existing Equipment provided however that when such need arises due to the negligence or misconduct of the Client or any employee or other agent of the Client then the Client shall be liable for the cost of such maintenance, servicing or adjustment insofar as such cost is not covered by any warranty or insurance proceeds.
	3. Upon the expiry of the Term of this Agreement the ESCO shall hand over the Equipment and Existing Equipment in a condition which can be regarded as secure and operative taking account of normal wear and tear. [The condition of the Equipment and Existing Equipment shall be comparable to the condition which is generally to be expected in the case of comparable services, comparable service lives and proper maintenance in accordance with [ ][[28]](#footnote-29)].
	4. In addition to its maintenance obligations under this Agreement the ESCO undertakes to replace any item of Equipment and/or Existing Equipment at its own expense upon expiry of its life cycle during the Term of this Agreement. The ESCO acknowledges that the life cycle of any item of Equipment and/or Existing Equipment may expire prior to the end of the Term of this Agreement and has taken this into account in the preparation of the Investment Grade Audit.
5. **Availability of Equipment**
	1. Where any of the Equipment and/or Existing Equipment is underperforming or unavailable for any reason during the Term of this Agreement any reduction in energy consumption resulting from such underperformance or unavailability shall not be deemed to be an Energy Saving for the purposes of this Agreement and the Baseline shall be adjusted in accordance with Clause 20 to take account of such underperformance or unavailability.
* **Part 3 – Measurement, Verification, Guarantee & Payment**
1. **Adjustment of Values for the Baseline Energy Consumption**
	1. In the calculation of Energy Savings the Baseline shall subject to the provisions of this Agreement remain constant for the duration of this Agreement, except in circumstances where there is:
		1. a change in the use of all or part of the Premises;
		2. a change in the occupancy rate of the Premises;
		3. a modification to or enlargement of the Premises;
		4. implementation of new standards and/or any kind of regulation governing lighting, temperature, relative humidity or ventilation conditions in the Premises;
		5. additional enhancements to or reduction of the scope of the Works requested by the Client which differ from those proposed in the Investment Grade Audit and Design Documents;
		6. replacement or repair of the Equipment and/or Existing Equipment in order to improve its efficiency or functionality; or
		7. additional work requested in writing by the Client that results in an increase or decrease in the amount of Energy used within the Premises.
	2. After consultation with and upon prior written approval by the Client the ESCO may, if it deems it necessary, increase or decrease the Baseline as a result of any of the changes referred to in Clause 20.1.
	3. If the Baseline is adjusted under Clause 20.2 the ESCO shall provide the Client with a Baseline Adjustment Notice summarising the new values within 20 (twenty) days.
	4. If the Client advises the ESCO Representative in accordance with Clause 20.2 that it does not approve the adjusted Baseline all payments to be made by the Client shall continue to be calculated on the basis of the values that existed immediately prior to the Baseline Adjustment Notice and the matter shall be referred to expert determination in accordance with Clause 52
2. **Guarantee**
	1. The terms of the Guarantee are detailed in Schedule 1.
	2. Subject to the adjustments provided for in Clause 20 the ESCO has formulated and guaranteed the annual level of Energy Savings to be achieved as a result of the Works and the Services provided for in this Agreement in accordance with the methods of savings measurement and verification as set out in Schedule 2.
	3. The Guarantee will terminate on the earlier of:
		1. the expiry of the Guarantee Period; or
		2. the date of termination of this Agreement.
3. **Energy Savings Calculation & Payment**
	1. The Client will continue to make payments directly to any and all suppliers for energy supplied or received at the Premises.
	2. From the Commencement Date the Client shall pay the ESCO the Monthly Payment which shall be payable by the Client within 15 days of the end of the calendar month to which the payment relates.
	3. Energy Savings shall be measured and/or calculated by the ESCO and approved by the Client for each Reconciliation Period during the Guarantee Period as specified in Schedule 2.

* 1. Within [5 (five) days] after the end of each Reconciliation Period the ESCO will send a measurement and verification report in the form set out in Schedule 2 to the Client detailing the Energy Savings for each energy type achieved at the Premises during that Reconciliation Period together with a valid VAT invoice for payment in accordance with the provisions of this Clause 22.
	2. Where the Energy Savings achieved at the Premises for a particular energy type calculated in accordance with Clause 22.3 for a Reconciliation Period are less than the Guarantee the ESCO shall pay the Performance Guarantee Payment to the Client together with an amount equal to the aggregate of all Monthly Payments made to it by the Client under Clause 22.2 for that Reconciliation Period.
	3. Where the Energy Savings achieved at the Premises for a particular energy type calculated in accordance with Clause 22.3 for a Reconciliation Period are equal to or greater than the Guarantee but less than or equal to the Shared Savings Threshold the ESCO will be entitled to 100% of the excess of such Energy Savings over and above the Guarantee calculated at the Unit Price for the relevant Reconciliation Period.
	4. Where the amount the ESCO is entitled to under Clause 22.6 is less than the aggregate amount of the Monthly Payments made by the Client during the relevant Reconciliation Period the ESCO shall repay the Client the difference between the two amounts.
	5. Where the amount the ESCO is entitled to under Clause 22.6 is greater than the aggregate amount of the Monthly Payments made by the Client during the relevant Reconciliation Period the Client shall only be obliged to pay the ESCO the difference between the two amounts.
	6. Where the Energy Savings achieved at the Premises for a particular energy type calculated in accordance with Clause 22.3 for a Reconciliation Period exceed the Shared Savings Threshold the ESCO will be entitled to an amount equal to:
		1. 100% of the excess of such Energy Savings for that energy type over and above the Guarantee up to the Shared Savings Threshold calculated at the Unit Price; and
		2. [50][[29]](#footnote-30) % of the excess of such Energy Savings for that energy type over and above the Shared Savings Threshold for the relevant Reconciliation Period calculated at the relevant Unit Price

less the aggregate amount of all Monthly Payments made to it by the Client under Clause 22.2 for that Reconciliation Period.

* 1. Where the Client approves the contents of the ESCO’s report submitted under Clause 22.4 it shall make the relevant payment due under Clause 22.6, Clause 22.8 or Clause 22.9 within 15 (fifteen) days of the receipt of such report.
	2. The provisions of the Prompt Payment of Accounts Act 1997 and the European Communities (Late Payment in Commercial Transactions) Regulations, 2012 shall apply to all payments under this Agreement. Incorrect or incomplete invoices will be returned by the Client to the ESCO for correction with consequential effects on the due date of payment.
	3. Both parties acknowledge that the calculation of Energy Savings is in part dependent upon the weather conditions that apply. In the event of any period of extreme weather events where in a calendar month during the Guarantee Period a Weather Measurement exceeds the number of days for the same item, the same weather station, and the corresponding month in “Weather Events WE 1.0” published by [www.constructionprocurement.gov.ie](http://www.constructionprocurement.gov.ie) on the Commencement Date and as may be updated from time to time the parties agree to review the payment terms with a view to minimising the potential overpayment or underpayment which relates to the effectiveness of the energy efficiency. If agreement is not reached within 7 days of any adjustment, the parties may refer the matter to under Clause 52 for determination.
	4. Wherever any sum of money is recoverable from or payable by the ESCO under this Agreement (including any sum which the ESCO is liable to pay to the Client in respect of any breach of this Agreement), the Parties may agree to deduct that sum from any sum then due, or which at any later time may become due to the ESCO under this Agreement or under any other agreement or contract with the Client. Any overpayment by either Party shall be a sum of money recoverable by the Party who made the overpayment from the Party in receipt of the overpayment.
	5. Any disputes in relation to payment under this Clause 22 shall be determined under the dispute resolution procedure in Clause 52.
* **Part 4 - Miscellaneous**
1. **Variations**
	1. Where the Client wishes to implement a Material Change at the Premises it shall notify the ESCO in writing as soon as practical and in any event no later than 15 (fifteen) business days before the Material Change is implemented and the ESCO shall deliver a Variation Estimate to the Client within 5 (five) days of receipt of such notice.
	2. Where the ESCO requires a material variation to the Works and/or Services and/or an adjustment to the Shared Savings Threshold due to:
		1. a *force majeure* event as set out in Clause 32;
		2. the occurrence of a Material Change which has not been notified by the Client under Clause 23.1; or
		3. any inaccuracies or deficiencies in the information provided to the ESCO as part of the Invitation to Tender as set out in Schedule 6 which was not reasonably identifiable or verifiable by the ESCO at the time of preparation of the Investment Grade Audit and which has been discovered no later than the expiry of 1 (one) year from the Commencement Date,

it shall submit a Variation Estimate to the Client.

* 1. As soon as practicable after receipt by the Client of a Variation Estimate under either Clause 23.1 or Clause 23.2 the Parties will meet to discuss and agree its contents (with or without modification) and in particular whether any costs that will be incurred by the ESCO as a result of such variation shall be recoverable:
		1. by way of an adjustment to the Shared Savings Threshold (either on a temporary basis or for the remainder of the Guarantee Period);
		2. by an extension to the Guarantee Period; or
		3. directly from the Client upon delivery by the ESCO of all relevant invoices and any other information as may reasonably be requested by the Client.
	2. Where the Parties agree to the final contents of the Variation Estimate following the discussions under Clause 23.2 they shall confirm their agreement in writing at the earliest opportunity and the variation to the Works and/or Services shall have effect from the date of such agreement.
	3. Where the Parties cannot agree to the final contents of the Variation Estimate the matter shall be referred to dispute resolution in accordance with Clause 51.
1. **Value Engineering**
	1. The ESCO may give the Client a written value engineering proposal that if adopted will either:
		1. adjust the percentage set out in Clause 22.9.2;
		2. adjust the Shared Savings Threshold; and/or
		3. extend the Guarantee Period.
	2. The ESCO’s value engineering proposal shall include any proposed changes to this Agreement and/or the attached Schedules.
	3. The Client shall as soon as practicable notify the ESCO in writing of its acceptance or rejection of the ESCO’s value engineering proposal.
	4. Where the Client accepts the ESCO’s value engineering proposal this Agreement shall be amended accordingly and the ESCO shall implement the value engineering measures from such date as the Parties agree in writing.
2. **Obligations of the ESCO**
	1. The ESCO shall use a selection process for Equipment, installers, and/or Subcontractors that provides the best value to the Client by using a transparent competitive approach which will be subject to audit and review by the Client.
	2. The competitive selection processes referred to in Clause 25.1 may be waived for the following reasons and only after written approval is granted by the Client:
		1. it can be clearly demonstrated that only one supplier is capable of providing the service or product that meet the requirements of the Works or the Design Documents; or
		2. an emergency situation in order to restore building services to the Premises or mitigate pending interruption of building services to the Premises.
3. **Intellectual Property Rights**
	1. Neither Party shall acquire any interest in the Intellectual Property of the other Party by virtue of this Agreement.
	2. The ESCO warrants that it owns or is licensed to use all Intellectual Property necessary for the completion of the Works and the Services and that such Intellectual Property does not infringe, misappropriate, dilute or otherwise violate the rights of any third party.
	3. The ESCO hereby indemnifies the Client from any and all third party Intellectual Property claims against the Client relating to the use by the ESCO or the Client of any Intellectual Property necessary for the completion of the Works and/or the Services under this Agreement.
	4. The ESCO hereby grants to the Client a royalty-free non-exclusive licence for any and all software or other Intellectual Property rights (including by way of present assignment of future copyright) necessary for the Client to continue to operate, maintain, and repair the Equipment and/or Existing Equipment.
	5. The Client grants to the ESCO a royalty-free non-exclusive licence (but with no right to grant sub-licences save for with the prior written consent of the Client) to use the Client’s pre-existing Intellectual Property rights during the currency of this Agreement to the extent necessary to enable the ESCO to fulfil its obligations under this Agreement.
	6. The ESCO undertakes that all and any necessary consents and/or licences for any software, instrument, modality or methodology are obtained and in place before use for the purposes of this Agreement and shall ensure that the Client shall be vested with all such necessary rights to enable the Client to enjoy the benefit of the Works and/or Services.
	7. The ESCO shall waive or procure a waiver of any moral rights subsisting in copyright produced under or in connection with the performance of this Agreement.
	8. The ESCO hereby acknowledges and confirms that all Intellectual Property rights, title and interest in the Materials (or any part or parts thereof) shall vest in the Client. For the avoidance of doubt the ESCO hereby assigns to the Client all Intellectual Property rights, title and interest it may be deemed by law to have in the Materials (including by way of present assignment of future copyright).
	9. Upon the expiry or termination of this Agreement for whatever reason the ESCO shall immediately deliver up to the Client all Materials prepared up to the date of expiry or termination and the ESCO may retain one paper copy of the Materials in its legal files for the purpose of and only to the extent necessary for ensuring compliance with its obligations under this Agreement.
4. **Licences, Permits, Approvals & Coordination**
	1. The Client shall provide reasonable assistance to the ESCO in obtaining all necessary licences, permits and approvals for the carrying out of the Works and the performance of the Services and the ESCO shall bear the cost of obtaining all such permits and approvals.
	2. The Equipment and the operation of the Equipment and the Existing Equipment by the ESCO shall at all times comply with all relevant statutory and legal requirements.
	3. Nothing in Clause 27.1 shall imply or import any financial obligations on or any commitment by the Client of resources or materials or imply or import any obligation on the Client to implement any material change to the Works or Services governed by and/or contemplated by this Agreement.
	4. For the avoidance of doubt the ESCO acknowledges that nothing in this Agreement shall imply or import or be deemed to imply or import any obligation on the Client to introduce or propose any legislative or regulatory reform for the purpose of enabling the ESCO to obtain any necessary licences, permits or approvals as the case may be.
	5. The ESCO shall coordinate the activities of its employees, Subcontractors, equipment installers and service providers with those of the Client, its employees and agents.
5. **Client Representative**
	1. The Client hereby nominates [ ][[30]](#footnote-31) as the “Client Representative” who will have the authority to act on the Client’s behalf in carrying out the Client’s obligations under this Agreement and shall act as first point of contact for the ESCO.
6. **Insurances**
	1. From the date of execution of this Agreement and throughout the Term the ESCO shall maintain in full force and effect, and at its expense the following insurances from a reputable insurance company licensed to write business in Ireland:
		1. Professional Indemnity Insurance of €[ ] million ( million euro) for each and every claim for 6 (six) years after the Acceptance Date;
		2. Public Liability Insurance of €[ ] million ( million euro) for each and every claim for the Term of this Agreement; and
		3. Employer’s Liability Insurance of €[ ] million ( million euro) for each and every claim for the Term of this Agreement.
	2. Upon the Client’s request the ESCO shall immediately provide documentary evidence satisfactory to the Client to show that the insurance policies required under this clause are being maintained.
	3. The ESCO shall immediately inform the Client in writing upon any change to its insured status.
7. **Tax Clearance Certificates in relation to Public Sector Contracts**
	1. The ESCO will comply with all relevant obligations referred to in Section 1095 of the Taxes Act (Tax clearance certificates in relation to public sector contracts) and will provide the Client with an appropriate Tax Clearance Certificate referred to in that Section and will comply with all relevant obligations under the scheme referred to in that Section.
	2. In the event of any of the foregoing obligations not being complied with or actions not being undertaken or in the event of non-continuation of compliance by the ESCO, the Client may suspend or refuse to make payments under this Agreement until such date as the ESCO demonstrates to the Client’s satisfaction that the ESCO is fully in compliance with Section 1095 of the Taxes Act.
8. **Limitation on Liability & Idemnity**
	1. The Client shall not be liable to the ESCO for any loss including but not limited to special, indirect, consequential, remote, punitive or exemplary loss or loss of profit or revenue, loss of use or similar damages suffered by the ESCO arising out of, under or in connection with this Agreement.
	2. The ESCO hereby irrevocably indemnifies and holds harmless the Client from and against any costs, claims, demands, damages, expenses, losses, liabilities, fines, proceedings, actions, charges, penalties directly or indirectly suffered and/or incurred by the Client which arise out of, in connection with, in consequence upon or relate to:
		1. the performance and/or non-performance by the ESCO of its obligations under this Agreement; and/or
		2. the acts, errors, omissions, recklessness or negligence of the ESCO or its officers, contractors, Subcontractors, employees, agents or personnel.
	3. The liability of the ESCO arising out of, under or in connection with this Agreement other than in respect of personal injury or death shall not exceed [ ] for [any one claim]/[each and every claim] in any one calendar year.
	4. Except as otherwise expressly provided by this Agreement, all remedies available to either Party for breach of this Agreement are cumulative and may be exercised concurrently or separately, and the exercise of any one remedy shall not be deemed an election of such remedy to the exclusion of other remedies.
9. **Force Majeure**
	1. Notwithstanding any other provisions of this Agreement, neither Party shall be liable to the other for any non-performance or delay in the performance of this Agreement due to events including but not limited to:
		1. war;
		2. revolution;
		3. civil commotion;
		4. labour disputes (save for disputes at the ESCO, its agents or Subcontractors);
		5. floods;
		6. hurricanes, similar storms or other actions of the elements;
		7. acts of God or the public enemy;
		8. vandalism;
		9. restriction or restraints of governmental authorities whether State or local; or
		10. acts of civil or military authorities

provided that for the purposes of this Agreement such events must be exceptional in nature such that they could not have been avoided or overcome by either Party exercising due and proper care and diligence.

* 1. In the event of any failure, interruption or delay in the performance of either Party’s obligations (or of any of them) resulting from any *force majeure* event the affected Party shall promptly notify the other Party in writing specifying:
		1. the nature of the *force majeure* event;
		2. the anticipated delay in the performance of obligations;
		3. the action proposed to minimise the impact of the *force majeure* event; and

the affected Party shall not be liable or have any responsibility of any kind for any loss or damage thereby incurred or suffered by the other Party; provided always that the affected Party shall use all reasonable efforts to minimise the effects of the same and shall resume the performance of its obligations as soon as reasonably possible after the removal of the cause.

* 1. If the *force majeure* event continues for 60 (sixty) days either Party may terminate at 10 (ten) days’ written notice. In circumstances where the ESCO is the affected Party the Client shall be relieved from any obligation to make payments under this Agreement save to the extent that payments are properly due and payable for obligations actually fulfilled by the ESCO in accordance with the terms and conditions of this Agreement.
1. **Suspension**
	1. The Client shall be entitled to suspend the Works and/or the Services upon written notice to the ESCO.
	2. In the event of a suspension of the Works under Clause 33.1 the ESCO shall be entitled to an extension to the timelines in the Works Schedule and the Longstop Date equal to the period of such suspension.
	3. If any suspension under Clause 33.1 lasts for more than 6 (six) months then either Party shall be entitled to terminate this Agreement with immediate effect upon delivery of written notice to the other subject to the provisions of Clause 35.
	4. If the Client fails to pay any amount due to the ESCO under Clause 22.9 the ESCO may submit a written demand for payment to the Client notifying the Client of its intention to suspend the Services if the payment has not been made within 7 (seven) business days of the receipt of such written demand.
	5. A notice from the ESCO under Clause 33.4 shall specify:
		1. the grounds on which the ESCO intends to suspend the Services; and
		2. the date on which the proposed suspension is to begin.
	6. The ESCO shall immediately resume the Services following payment by the Client of the outstanding amount being the subject of the written demand under Clause 33.4.
	7. If any suspension under Clause 33.4 lasts for more than 6 (six) months then either Party shall be entitled to terminate this Agreement with immediate effect upon delivery of written notice to the other subject to the provisions of Clause 35.
	8. Where the Services are suspended in accordance with the provisions of this Clause 33 the period of such suspension shall not be taken into account in the calculation of the Guarantee and the Parties acting reasonably may agree to extend the Guarantee Period by the duration of such suspension.
2. **Termination**
	1. The Client shall be entitled to terminate the ESCO’s obligations under this Agreement at its election on 20 (twenty) business days’ notice to the ESCO.
	2. The Client shall be entitled to terminate this Agreement by written notice to the ESCO during the Term of this Agreement if:
		1. the ESCO fails to achieve Substantial Completion of the Works by the Longstop Date;
		2. the ESCO fails to achieve the Guarantee for a total of [12[[31]](#footnote-32)] months or more within any [18[[32]](#footnote-33)] month period during the Guarantee Period;
		3. the ESCO commits any material breach of the terms hereof and fails to remedy same within 15 (fifteen) days after receipt of written notice of such breach having been served by Client; or
		4. the ESCO becomes bankrupt, or makes a composition or arrangement with creditors or has a winding up order made (except for the purposes of amalgamation or restructuring) or has a liquidator (provisional or otherwise), receiver, manager or examiner of its business or undertaking duly appointed.
	3. The right of the Client to terminate this Agreement shall be without prejudice to any other rights or remedy either Party may have in respect of the breach concerned or any other breach.
3. **Consequences of Termination**
	1. If the Agreement is terminated under Clause 33.3, Clause 33.7 or Clause 34.1 either during the Interim Period or within the first three years of the Guarantee Period the Client shall pay the ESCO an amount being [% of][[33]](#footnote-34) the difference between the Guarantee and the Shared Savings Threshold multiplied by the number of years comprising the Guarantee Period less any amounts already paid by the Client to the ESCO under this Agreement up to the date of such termination.
	2. If the Agreement is terminated under Clause 33.3, Clause 33.7 or Clause 34.1 during the fourth year or later of the Guarantee Period the Client shall pay the ESCO an amount equal to [% of][[34]](#footnote-35) the average of the aggregate amounts paid by the Client to the ESCO in accordance with Clause 22for the previous three years of the Agreement multiplied by the number of years comprising the Guarantee Period less any amounts already paid by the Client to the ESCO.
	3. In addition to the amounts payable by the Client under Clause 35.1 or Clause 35.2 the Client shall pay the ESCO:
		1. any outstanding payments due and payable by the Client to the ESCO under this Agreement at the date of such termination; and
		2. the ESCO’s reasonably and properly incurred vouched costs of demobilisation and vacation of the Premises supported by such written evidence as may be requested in writing by the Client.
	4. Any amounts payable under Clauses 35.1, 35.2 and/or 35.3 shall be paid within 60 (sixty) business days of the date of termination of the Agreement.
	5. Upon termination of this Agreement under Clause 34.2.1, Clause 34.2.2, Clause 34.2.3 or Clause 34.2.4 the Client shall pay the ESCO:
		1. the current market value of the Equipment at the date of such termination less the aggregate amount of all payments made by the Client to the ESCO under this Agreement up to the date of termination if the Client wishes to obtain title to the Equipment in accordance with Clause 9.1; and
		2. any outstanding payments due and payable by the Client to the ESCO under this Agreement at the date of such termination.

Such payment will be made within 60 (sixty) business days of the date of such termination of the Agreement. The current market value of the Equipment referred to in Clause 35.5.1 shall be agreed between the Parties acting reasonably or in the absence of such agreement shall be determined by expert determination in accordance with Clause 52 of this Agreement.

* 1. Upon termination of this Agreement under Clause 12.5 or Clause 32.3 the Client shall pay the ESCO:
		1. an amount equal to the cost of the Works carried out up to the date of termination together with an additional [ ][[35]](#footnote-36)% thereof less the aggregate amount of all payments made by the Client to the ESCO under this Agreement up to the date of termination along with any reasonable demobilisation costs upon delivery of all relevant invoices and any other information as may reasonably be requested by the Client;
		2. any outstanding payments due and payable by the Client to the ESCO under this Agreement at the date of such termination
		3. the current market value of the Equipment at the date of such termination if the Client wishes to obtain title to the Equipment in accordance with Clause 9.1..

Such payment will be made within 60 (sixty) business days of the date of such termination of the Agreement.

* 1. The ESCO shall remove all employees, staff, Subcontractors and other persons for whom the ESCO is responsible under this Agreement together with any plant, equipment, machinery, tools and other property of the ESCO from the Premises in an orderly manner as soon as reasonably possible following termination or expiry of this Agreement and shall ensure that those parts of the Premises from which the ESCO removes its plant, equipment, machinery, tools and other property are left in a clean and tidy condition.
	2. If requested, the ESCO shall, upon the termination of this Agreement for any reason or prior to the expiry of the Agreement, promptly furnish such anonymised information relating to the terms and conditions of the employment of all persons providing the Services as may be required by the Client. The ESCO agrees to the Client releasing any such anonymised information to third party tenderers for the purposes of any procurement competition for the provision of the Services upon expiry of the Agreement or earlier termination of this Agreement for whatever cause.
1. **ESCO as Prime Contractor, Project Governance, Assignment & Subcontracting**
	1. The ESCO is deemed to be the prime contractor under this Agreement and the ESCO assumes full responsibility for the delivery of the Works and/or the Services and shall assume all the duties, responsibilities and obligations associated with the position of prime contractor.
	2. The ESCO as prime contractor hereby assumes liability for its employees, agents and Subcontractors and undertakes that its employees, agents and Subcontractors shall comply in all respects with the relevant terms of this Agreement to the extent that they are retained by the ESCO.
	3. The ESCO agrees to keep the Client Representative advised of any matter which may materially impact on the ESCO’s obligations under this Agreement and to comply with the reporting arrangements and governance protocols required by the Client from time to time. The roles and responsibilities of the parties are detailed in Schedule 9. The ESCO shall advise the Client in writing of any material alterations to its governance, Works and Services delivery and business continuity processes and procedures.
	4. The ESCO shall not assign and/or subcontract the benefit and/or burden of this Agreement in whole or in part to any third party without the prior written approval of the Client (such approval not to be unreasonably withheld or delayed and subject to the Client’s obligations at law) provided always that the ESCO shall remain primarily liable to the Client for the due performance of all of its obligations under this Agreement.
	5. The ESCO shall require its employees, agents and Subcontractors to exercise due skill, care, diligence, efficiency and professional conduct in the carrying out of any obligations allocated, assigned or subcontracted by the ESCO to its employees, agents and Subcontractors pursuant to its obligations under this Agreement.
2. **No Agency**
	1. The ESCO will at all times be an independent contractor and nothing in this Agreement will be construed (and the ESCO will not hold out its relationship) as constituting a partnership, joint venture, representation, agency or employer and employee relationship between the Client and the ESCO or any of the ESCO’s or its Subcontractors’ employees.
3. **Representations and Warranties**
	1. The ESCO warrants, represents and undertakes to the Client that:
		1. it has all requisite power, authority, licences, permits, and franchises, corporate or otherwise, to execute and deliver this Agreement and perform its obligations hereunder;
		2. its execution, delivery and performance of this Agreement have been duly authorised by or are in accordance with its organic instruments and this Agreement has been duly executed and delivered for it by the signatories so authorised and it constitutes its legal, valid, and binding obligation;
		3. its execution, delivery and performance of this Agreement will not breach or violate, or constitute a default under any contract, lease or instrument to which it is a party or by which it or its properties may be bound or affected;
		4. it has not received any notice, nor to the best of its knowledge is there pending or threatened any notice, of any violation of any Applicable Laws, which would materially and adversely affect its ability to perform hereunder;
		5. before commencing performance of this Agreement it shall have provided proof and documentation of required insurance pursuant to this Agreement;
		6. it shall make available, upon reasonable request by the Client, all documents relating to its performance under this Agreement, including all contracts and subcontracts entered into;
		7. the Works will meet or exceed the provisions set out in the programme for the Works and
		8. the Equipment is or will be compatible with all other mechanical and electrical systems, subsystems, or components with which the Equipment interacts, and that, as installed, neither the Equipment nor such other systems, subsystems, or components will materially adversely affect each other as a direct or indirect result of Equipment installation or operation.
	2. The Client warrants, represents and undertakes to the ESCO that it shall provide all access to the Premises reasonably required by the ESCO to carry out its obligations under this Agreement. The ESCO shall be granted immediate access to the Premises to make emergency repairs or corrections as it may in its discretion determine are needed.
4. **Change in Law[[36]](#footnote-37)**
	1. Where a change in Relevant Legislation which is not foreseeable on the date of execution of this Agreement occurs or is about to occur either Party may give the other written notice of its opinion as to any:
		1. change to the Works and/or the Services, and/or
		2. decrease to the Guarantee, and/or
		3. adjustment of the Shared Savings Threshold, and/or
		4. change to the terms of this Agreement

necessitated by the change in Relevant Legislation.

* 1. The Parties shall meet within 10 (ten) days of the written notice referred to in Clause 39.1 to discuss and agree any of the proposed changes set out in the notice and in the absence of such agreement the Parties shall refer the matter to dispute resolution in accordance with Clause 51.
1. **Transferring Employees[[37]](#footnote-38)**
	1. The ESCO shall comply with all applicable obligations arising pursuant to the Transfer Regulations and failure to so comply shall constitute a material breach of this Agreement.
	2. The ESCO shall indemnify, hold harmless and keep the Client indemnified from and against all liabilities (including the cost of wages, salaries and other remuneration or benefits, expenses, taxation, PRSI payments, health contributions, levies, losses, claims, demands, actions, fines, penalties, awards, (including legal expenses on an indemnity basis)) from, or incurred by reason of any claims made against the Client under the Transfer Regulations by any Affected Employees.
2. **Confidentiality**
	1. This Agreement creates a confidential relationship between the ESCO and the Client and both Parties acknowledge that in carrying out their duties and obligations under this Agreement each will have access to Confidential Information of the other.
	2. Each of the Parties to this Agreement agrees to hold confidential all information, documentation and other material received, provided or obtained arising from their participation in this Agreement and shall not disclose same to any third party unless authorised in writing by the other Party except:
		1. to its professional advisers subject to the provisions of this Clause 41;
		2. as may be required by law;
		3. as may be necessary to give effect to the terms of this Agreement subject to the provisions of this Clause 42; or
		4. in the case of the Client by request of any person or body or authority whose request the Client or persons associated with the Client (including but not limited to the Legislature and/or the Executive and/or the Civil Service) considers it necessary or appropriate to so comply.
	3. Neither Party shall disclose any Confidential Information to any third party unless authorised in writing by the other Party. The ESCO may only make copies of Confidential Information where necessary for the performance of the Services.
	4. Upon cessation of the Works and/or Services, upon termination or expiration of this Agreement or upon either Party’s written request, each Party shall return or destroy to the other Party all Confidential Information in their control and the ESCO shall erase any Confidential Information held by it in electronic form. The ESCO shall furnish a certificate to that effect as soon as possible if requested by the Client in writing.
	5. The ESCO undertakes to comply with all reasonable directions of the Client with regard to the use and application of all and any Confidential Information and shall execute the Confidentiality Agreement simultaneously with the execution of this Agreement.
	6. The obligations in this Clause 41 will not apply to any Confidential Information:
		1. in the ESCO’s possession (with full right to disclose) before receiving it from the Client;
		2. which is or becomes public knowledge other than by breach of this clause;
		3. is independently developed by the ESCO without access to or use of the Confidential Information; or
		4. is lawfully received from a third party (with full right to disclose).
	7. The ESCO undertakes to comply with all directions as to local security arrangements deemed reasonably necessary by the Client including, if required, completion of documentation under the Official Secrets Act, 1963 and to comply with any vetting requirements of the Client including by police authorities.
	8. The ESCO acknowledges that the security of the State and its information is of paramount importance to the Client. Accordingly the ESCO confirms that it will, from time to time, during the currency of this Agreement as may be requested by the Client submit full personal details (including those of Subcontractors) of persons assigned to provide the Works and/or the Services (or any part thereof) under this Agreement. The ESCO further acknowledges that checks may be carried out in relation to all such personnel by police authorities and the ESCO shall comply with all reasonable directions of the Client arising therefrom.
	9. In circumstances where the Client is subject to the provisions of the Freedom of Information Acts, 1997 and 2003, then in the event of the Client receiving a request for information related to this Agreement, the Client shall consult with the ESCO in respect of the request. The ESCO shall identify any information that is not to be disclosed on grounds of commercial sensitivity, and shall state the reasons for this sensitivity. The Client will consult the ESCO about this sensitive information before making a decision on any Freedom of Information request received.
	10. The terms of this Clause 41 shall survive expiry, completion or termination for whatever reason of this Agreement.
3. **Waiver**
	1. Failure of either Party to enforce or exercise at any time or for any period any term of this Agreement does not constitute and shall not be construed as a waiver of such term and shall not affect that Party’s right to enforce such term or any other term contained in this Agreement at a later date.
4. **Notice**
	1. Any notice required or permitted hereunder shall be deemed sufficient if given in writing and delivered personally or sent by registered or certified mail to the address shown below or to such other persons or addresses as are specified by similar notice.

To the ESCO: Attention: [ ]

Include copy to: [ ]

To the Client: Attention: [ ]

Include Copy to: [ ]

1. **Severability**
	1. The invalidity or unenforceability of any term of or any right arising pursuant to this Agreement shall not adversely affect the validity or enforceability of the remaining terms and rights.
2. **Cooperation**
	1. Each Party will cooperate with and assist the other Party, its advisors, consultants, legal advisors, employees, agents, and representatives at all times during the Term of this Agreement.
3. **Conflicts, Registrable Interests and Corrupt Gifts**
	1. The ESCO confirms that it has carried out a conflicts of interest check and is satisfied that it has no conflicts in relation to the Works and/or Services and its obligations undertaken under this Agreement. The ESCO hereby undertakes to advise the Client forthwith should any conflict or potential conflict of interest come to its attention during the currency of this Agreement and to comply with the Client’s directions in respect thereof.
	2. Any registrable interest involving the ESCO (and any Subcontractor or agent as the case may be) and the Client, the Ceann Comhairle (Speaker), any member of the Government, any member of the Oireachtas or their relatives must be fully disclosed to the Client immediately upon such information becoming known to the ESCO and the ESCO will comply with the Client’s directions in respect thereof to the satisfaction of the Client. The terms “registrable interest” and “relative” shall be interpreted as per Section 2 of the Ethics in Public Office Act, 1995 (as amended).
	3. The ESCO shall not offer or agree to give any public servant or civil servant any gift or consideration or commission of any kind as an inducement or reward for doing or forbearing to do or for having done or forborne to do any action in relation to the obtaining or execution of this or any other public contract.
	4. Any breach of Clause 46.3 or the commission of any offence by the ESCO, any subcontractor, agent or employee under the Prevention of Corruption Acts, 1889 to 2005 shall entitle the Client to terminate this Agreement forthwith and to recover the amount of any loss resulting from such cancellation, including but not limited to recovery from the ESCO of the amount or value of any such gift, consideration or commission.
4. **Media**
	1. No media releases, public announcements or public disclosures relating to this Agreement or its subject matter, including but not limited to promotional or marketing material, shall be made by the ESCO without the prior written consent of the Client.
5. **Pay and Conditions of Employment**
	1. The ESCO shall ensure that the rates of pay and the conditions of employment (as set out at Schedule 10 and which may be adjusted from time to time), including pension contributions, comply with all applicable law. This applies to workers who are posted workers (within the meaning of Directive 96/71/EC of the European Parliament and the Council of the 16 December 1996 concerning the posting of workers in the framework provision of services), except that the ESCO’s obligation to make pension contributions under registered employment agreements does not apply to posted workers who already contribute, or whose contributions are paid, to a supplementary pension scheme established in another member state of the European Union.
	2. The ESCO shall keep proper records showing the wages and other sums paid to and the time worked by each worker, deductions from each worker’s pay and their disposition, and pension and other contributions made in respect of each worker, and shall produce these records for inspection and copying by any persons authorised by the Client whenever required by the Client.
	3. The ESCO undertakes to observe, in relation to the employment of workers on the Site, the Safety, Health and Welfare at Work Act, 2005 and all employment law including the Employment Equality Act 1998, the Industrial Relations Acts 1946 to 2004, the National Minimum Wage Act 2000, and regulations, codes of practice and legally binding determinations.
	4. Upon written request of the Client the ESCO shall provide written confirmation of compliance with the provisions of this Clause48. The Client reserves the right (without prejudice to any other right or remedy under this Agreement or at law), which is hereby acknowledged and confirmed by the ESCO, to inform the competent authorities of any breach of this Clause 48.
	5. If the ESCO does not comply with this Clause it shall pay to the Client any costs the Client incurs in investigating and dealing with such non-compliance.
6. **Entire Agreement and Priority of Documents**
	1. This Agreement when executed together with all Schedules attached hereto or to be attached hereto as provided for by this Agreement together with the Invitation to Tender shall constitute the entire contract between both Parties and supersedes and replaces any previous agreements, arrangements or understandings between the Parties in respect of the subject matter hereof.
	2. In the event of any conflict or discrepancy between the provisions of this Agreement and/or the Schedules attached hereto or to be attached hereto and/or the Invitation to Tender the following priority of documents shall apply (in descending order):
		1. this Agreement
		2. the Schedules
		3. the Investment Grade Audit
		4. the Invitation to Tender
	3. This Agreement may not be amended or modified except by a written agreement signed by both Parties.
7. **Governing Law**
	1. This Agreement shall be governed by and confirmed in all respects in accordance with the laws of Ireland.
8. **Dispute Resolution**
	1. Subject to the provisions of Clause 52 if a dispute or difference arises between the Parties with regard to or in connection with this Agreement, such dispute shall be referred in writing to senior members of each of the Client and the ESCO who will use good faith efforts to resolve such dispute within 30 (thirty) days of such referral.
	2. If the Parties are unable to resolve the matter within the thirty (30) day period in Clause 51.1 the Client and the ESCO will attempt to resolve the dispute in question by mediation. Any such mediation will be conducted by a mediator to be mutually agreed upon between the Parties or in the absence of such agreement upon the request of either Party to be appointed by the President for the time being of Engineers Ireland. If a settlement of the dispute is not achieved through the mediation process within three months either Party may refer the dispute to arbitration in accordance with Clause 51.3.
	3. Where the Parties are unable to resolve any dispute which may arise under or in connection with this Agreement either through good faith efforts or mediation as set out in Clauses 51.1 and 51.2 either Party may by provision of notice in writing refer the matter to arbitration. The final decision of who will act as arbitrator will be mutually agreed upon between the Parties or in the absence of such agreement the decision as to who to appoint as arbitrator will be referred upon the request of either Party to the President for the time being of Engineers Ireland. Every such reference shall be deemed to be a submission to arbitration within the meaning of the Arbitration Act 2010 or any statutory amendment therefore for the time being in force.
9. **Expert Determination**
	1. Where a dispute arises under or in connection with this Agreement in relation to:
		1. Substantial Completion of the Works;
		2. the Snag List;
		3. the calculation of Energy Savings in any Guarantee Year;
		4. the method of measurement and verification;
		5. the adjustment of the Baseline; or
		6. the calculation of the current market value of the Equipment under Clause 35.5.1,

the Parties agree in the first instance to use good faith efforts to resolve the dispute within 10 (ten) days as set out in Clause 51.1. If the dispute is not resolved in that time then either Party may submit the matter to an independent expert for determination.

* 1. Where a matter is to be referred to an independent expert under this Agreement for determination, the independent expert shall be an independent engineer (or other person with relevant expertise) agreed upon by the Parties, or, if agreement is not reached within five days of either Party giving notice to the other that it wishes to refer a matter to an independent expert, such independent engineer or other person with relevant expertise will be nominated by the President for the time being of Engineers’ Ireland upon the request of either Party.
	2. The Parties are entitled to make submissions to the independent expert (including oral submissions) and will provide (or procure that others provide) the independent expert with all such assistance and documents as the independent expert may reasonably require for the purpose of reaching a decision. Each Party shall with reasonable promptness supply each other with all information and give each other access to all documentation and personnel as the other Party reasonably requires to make a submission under this clause.
	3. The Parties agree that the independent expert may in its reasonable discretion determine such other procedures to assist with the conduct of the determination as it considers appropriate.
	4. The independent expert shall act as an expert and not as an arbitrator. The independent expert's decision shall be final and binding on the Parties in the absence of fraud or manifest error.
	5. Each Party shall bear its own costs in relation to the reference to the independent expert. The independent expert’s fees and any costs it properly incurs in arriving at its determination (including any fees and costs of any advisers appointed by the independent expert) shall be borne by the Parties in equal shares or in such proportions as the independent expert shall direct.
	6. Pending final resolution of any dispute under this Agreement the ESCO will proceed diligently with the performance of its duties and obligations under this Agreement and the Client will continue to make payments of all undisputed amounts in accordance with this Agreement. Any disputed calculation will not take effect until final determination of the dispute in accordance with Clause 51 or 52 (as appropriate).

**Schedule 1[[38]](#footnote-39)**

Guarantee & Shared Savings Threshold

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
|  | Electricity Use (kWh/year) | Electricity Cost (€/year) | Gas Use (kWh/year) | Gas Cost (€/year) | Other Use (kWh/year) | Other Cost (€/year) |
| Baseline |  |  |  |  |  |  |
| Guarantee |  |  |  |  |  |  |
| Shared Savings Threshold |  |  |  |  |  |  |
| Total savings |  |  |  |  |  |  |

**Unit Prices[[39]](#footnote-40)**

Electricity: [ ]€/kWh

Gas: [ ]€/kWh

Other: [ ]€/kWh

**Schedule 2[[40]](#footnote-41)**

Baseline and Measurement & Verification[[41]](#footnote-42) of Energy Savings

1. **Baseline**
2. **Measurement & Verification methodology and report structure**

**Schedule 3[[42]](#footnote-43)**

Investment Grade Audit

1. **Investment Grade Audit**
2. **Equipment**
3. **Existing Equipment**

**Schedule 4[[43]](#footnote-44)**

Works Schedule

**Schedule 5[[44]](#footnote-45)**

Services Schedule

**Schedule 6**

Client Information Schedule[[45]](#footnote-46)

**Schedule 7**

The Premises[[46]](#footnote-47)

**Schedule 8[[47]](#footnote-48)**

Design Documents

**Schedule 9[[48]](#footnote-49)**

Roles and Responsibilities

**Schedule 10[[49]](#footnote-50)**

Rates of Pay & Conditions of Employment

IN WITNESS whereof this deed was executed on the day and year first herein written.

|  |  |
| --- | --- |
| GIVEN under the common seal of**the Client** | \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_Director/Company Secretary |
| \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_Print name |
| \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_Director |
| \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_Print name |

|  |  |
| --- | --- |
| GIVEN under the common seal of**the ESCO**  | \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_Director/Company Secretary |
| \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_Print name |
| \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_Director |
| \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_Print name |

1. To be adjusted if Client is not the legal owner of the Premises. [↑](#footnote-ref-2)
2. Fixed by the Client for the 3 month period prior to the first reconciliation [↑](#footnote-ref-3)
3. Guarantee will be in kWh – should be broken down into 66 monthly or annual periods depending on what the Reconciliation Period is going to be. [↑](#footnote-ref-4)
4. Insert number of years. [↑](#footnote-ref-5)
5. Consider whether this date would be fixed by client, proposed by ESCO as part of bid or agreed by parties prior to signing contract. [↑](#footnote-ref-6)
6. Indicative figure only – to be set by Client. [↑](#footnote-ref-7)
7. Appropriate M&V frequency to be decided by the Parties – can be discussed during dialogue phase. [↑](#footnote-ref-8)
8. Can be set by Client or discussed during dialogue – will vary depending on scale of works [↑](#footnote-ref-9)
9. Energy price to be fixed by Client in tender docs. [↑](#footnote-ref-10)
10. Energy price to be fixed by Client in tender docs. [↑](#footnote-ref-11)
11. Energy price to be fixed by Client in tender docs – could also be at market price [↑](#footnote-ref-12)
12. Name to be inserted [↑](#footnote-ref-13)
13. Amend text in square brackets as appropriate where ESCO is acting as PSCS and/or PSDP under Construction Regulations [↑](#footnote-ref-14)
14. Amend text in square brackets as appropriate where ESCO is acting as PSCS and/or PSDP under Construction Regulations [↑](#footnote-ref-15)
15. Amend text in square brackets as appropriate where ESCO is acting as PSCS and/or PSDP under Construction Regulations [↑](#footnote-ref-16)
16. Amend text in square brackets as appropriate where ESCO is acting as PSCS and/or PSDP under Construction Regulations [↑](#footnote-ref-17)
17. Amend text in square brackets as appropriate where ESCO is acting as PSCS and/or PSDP under Construction Regulations [↑](#footnote-ref-18)
18. Clauses 3.9 to 3.12 inclusive are to be included if the ESCO is carrying out the role of PSCS and/or PSDP under the Construction Regulations. [↑](#footnote-ref-19)
19. Stipulate range of temperature and lux levels – could be specified in tender docs. [↑](#footnote-ref-20)
20. Consider which party will bear cost of such replacement. [↑](#footnote-ref-21)
21. Delete 8.3 or 8.4 as appropriate. [↑](#footnote-ref-22)
22. If client does take responsibility Clause 8.3 can be deleted. [↑](#footnote-ref-23)
23. Clause may be rendered unnecessary if ESCO is assuming full operational and maintenance responsibility – would be deleted and marked ‘not used’. [↑](#footnote-ref-24)
24. Indicative timeframe only – clients should consider including a more detailed programme of response times if necessary in respect of key equipment at their facilities. [↑](#footnote-ref-25)
25. Indicative timeframe only. [↑](#footnote-ref-26)
26. Obligation on ESCO to provide emergency action plan. [↑](#footnote-ref-27)
27. ESCO’s maintenance responsibilities will be discussed during dialogue and can be specified in Client requirements in tender documents – will vary on project by project basis. [↑](#footnote-ref-28)
28. Insert relevant standard. [↑](#footnote-ref-29)
29. Client may consider it appropriate to have a nonlinear shared saving. Thus, the Clause could read *“50% of the excess of such energy savings for the first X kilowatt and 25% of the excess of such of energy savings for any further savings, for that energy type over and above the shared savings threshold for the relevant guarantee month calculated at the relevant unit price”.* [↑](#footnote-ref-30)
30. To be confirmed. [↑](#footnote-ref-31)
31. Indicative figure only – to be determined by Client. [↑](#footnote-ref-32)
32. Indicative figure only – to be determined by Client. [↑](#footnote-ref-33)
33. Consider % reduction – this figure should exclude the % value of the Equipment. [↑](#footnote-ref-34)
34. Consider % reduction – this figure should exclude the % value of the Equipment. [↑](#footnote-ref-35)
35. Cost plus. [↑](#footnote-ref-36)
36. Provision to be inserted. [↑](#footnote-ref-37)
37. Optional clause – if not applicable delete text and mark as ‘Not Used’. [↑](#footnote-ref-38)
38. This schedule will be populated from the ESCO’s tender and IGA – it will clearly set out the level of guaranteed savings to be provided by the ESCO together with the shared savings threshold after which savings are shared between the parties. These must each be set out by each energy type as per the IGA, submitted as part of the tender bid. The table set out above is indicative only and the Client may ask the ESCO to produce a more detailed breakdown of the guarantee. [↑](#footnote-ref-39)
39. Will be same as per defined term – set by Client in tender docs. [↑](#footnote-ref-40)
40. This schedule clearly sets out how measurement and verification of savings will be performed during the contract. Again this may be populated from the ESCO’s tender submission. and/or IGA. The baseline will be set out here again for clarification purposes (which should be the same as the baseline set out in Schedule 1) and the method for adjusting it will be clearly recorded here. [↑](#footnote-ref-41)
41. The Parties should adopt the International Performance Measurement & Verification Protocol (IPMVP) as their basis for M&V Plan. [↑](#footnote-ref-42)
42. The ESCO’s IGA will be attached as a contract document in this schedule. In the interests of clarity the information under the headings set out above should be extracted and clearly set out – these headings are defined terms within the contract and they must be followed by the parties when preparing the contract. [↑](#footnote-ref-43)
43. The Works being carried out by the ESCO during the Interim Period must be clearly set out in this schedule. These will be extracted from the ESCO’s IGA and tender – all references to ‘Works’ in the contract will be those listed here and care must be taken when populating this schedule. The ESCO’s programme for the Works will also be set out here. [↑](#footnote-ref-44)
44. The Services being performed by the ESCO during the Interim Period must be clearly set out in this schedule. These will be extracted from the ESCO’s tender bid – all references to ‘Services’ in the contract will be those listed here and care must be taken when populating this schedule. [↑](#footnote-ref-45)
45. Extracted information from Technical File and Baseline Data which Client will retain responsibility for – e.g. historical occupancy rates. [↑](#footnote-ref-46)
46. Set out description of Client’s Premises here. [↑](#footnote-ref-47)
47. The finalised design documents against which the ESCO will carry out the Works will be set out here – this could be done by either attaching all documents, or, if this is overly burdensome, an agreed design document register clearly identifying the relevant documents may be attached here. Again, this information will come from the ESCO’s IGA and tender. [↑](#footnote-ref-48)
48. The parties shall discuss and agree their respective roles and responsibilities which shall be incorporated into a RACI matrix to be set out at this Schedule. [↑](#footnote-ref-49)
49. The ESCO shall provide its proposed rates of pay and supporting documentation in relation to conditions of employment as part of its ITT and once agreed with the Client those rates and such supporting documentation shall be set out here. [↑](#footnote-ref-50)