CITY FUNDED CONSTRUCTION CONTRACT BETWEEN
THE CITY OF HUNTINGTON BEACH AND
ENERGY SYSTEMS GROUP, LLC.
FOR
ENERGY EFFICIENT CONTRACT (PERFORMANCE-BASED)
FOR IMPLEMENTATION OF ENERGY CONSERVATION MEASURES

THIS AGREEMENT ("Agreement") is made and entered into by and between the City of Huntington Beach, a municipal corporation of the State of California, hereinafter referred to as "CITY," and ENERGY SYSTEMS GROUP, LLC, a Limited Liability corporation, hereinafter referred to as "CONTRACTOR."

WHEREAS, CITY has solicited bids for a public works project, hereinafter referred to as "PROJECT," more fully described as FACILITIES ENERGY AND COST SAVINGS PROJECT in the City of Huntington Beach; and

CONTRACTOR has been selected to perform said services,

NOW, THEREFORE, in consideration of the promises and agreements hereinafter made and exchanged the parties covenant and agree as follows:

1. STATEMENT OF WORK; ACCEPTANCE OF RISK

CONTRACTOR shall complete and construct the PROJECT pursuant to this Agreement and the Contract Documents (as hereinafter defined) and furnish, at its own cost and expense, all labor, plans, tools, equipment, supplies, transportation, utilities and all other items, services and facilities necessary to complete and construct the PROJECT in a good and workmanlike manner.

CONTRACTOR agrees to fully assume the risk of all loss or damage arising out of the nature of the PROJECT, during its progress or prior to acceptance by CITY, from the action of the elements, from any unforeseen difficulties which may arise or be encountered in the prosecution of work, and for all other risks of any description in connection with the work,

including, but not limited to, all expenses incurred by or in consequence of the suspension or discontinuance of work, except such as are herein expressly stipulated to be borne by CITY, and for well and faithfully completing the work within the stipulated time and in the manner shown and described in this Agreement, and in accordance with the requirements of CITY for the compensation set forth in the accepted bid proposal.

2. ACCEPTANCE OF CONDITIONS OF WORK; PLANS AND SPECIFICATIONS

CONTRACTOR acknowledges that it is fully familiar with all the terms, conditions and obligations of this Agreement and the Contract Documents (as defined below in this Section), has inspected the location of the job site, and the conditions under which the work is to be performed, and that it enters into this Agreement based upon its thorough investigation of all such matters and is relying in no way upon any opinions or representations of CITY.

It is agreed that the Contract Documents are incorporated into this Agreement by this reference, with the same force and effect as if the same were set forth at length herein, and that CONTRACTOR and its subcontractors, if any, shall be bound by the Contract Documents insofar as they relate in part or in any way, directly or indirectly, to the work covered by this Agreement.

"Contract Documents" as defined herein mean and include:

A. This Agreement;

B. Bonds covering the work herein agreed upon;

C. The CITY's standard Plans and Specifications and special contractual provisions, including those on file in the office of the Department of Public Works of CITY, and any revisions, amendments or addenda thereto;

D. The edition of *Standard Specifications for Public Works Construction*, published by Builders' News, Inc., 10801 National Boulevard, Los Angeles, CA 90064, and all amendments thereto, written and promulgated by the Southern California chapter of the American Public Works Association and the Southern California District Associated General Contractors of the California Joint Cooperative Committee as specified in the particular Plans, Specifications, Special Provisions and Addendum applicable to the Project;

E. Bid documents including the Notice Inviting Bids, the Special Instructions to Bidders and the CONTRACTOR's proposal, (which is attached hereto as **Exhibit "A"** and incorporated herein by this reference);

F. The particular Plans, Specifications, Special Provisions and Addenda applicable to the PROJECT. Anything mentioned in the Specifications and not indicated in the Plans or indicated in the Plans and not mentioned in the Specifications, shall be of like effect as if indicated and mentioned in both. In case of a discrepancy between any Plans, Specifications, Special provisions, or Addenda, the matter shall be immediately submitted by CONTRACTOR to the Director of Public Works of CITY or his or her written designee (hereinafter referred to as "DPW"), and CONTRACTOR shall not attempt to resolve or adjust the discrepancy without the decision of DPW, save only at its own risk and expense.

Should there be any conflict between the terms of this Agreement and the bid or proposal of CONTRACTOR, then this Agreement shall control and nothing herein shall be considered as an acceptance of the terms of the bid or proposal which is in conflict herewith.

3. COMPENSATION

CITY agrees to pay and CONTRACTOR agrees to accept as full compensation for the faithful performance of this Agreement, subject to any additions or deductions made under the provisions of this Agreement or the Contract Documents, a sum not to exceed FOUR HUNDRED FORTY NINE THOUSAND ONE HUNDRED TWENTY THREE Dollars ($449,123), as set forth in the Contract Documents, to be paid as provided in this Agreement.

4. COMMENCEMENT OF PROJECT

CONTRACTOR agrees to commence the PROJECT within ten (10) working days after the Notice To Proceed is issued and diligently prosecute the PROJECT to completion within TWO HUNDRED (200) consecutive Working days from the day the Notice to Proceed is issued by DPW, excluding delays provided for in this Agreement.

5. TIME OF THE ESSENCE

The parties hereto recognize and agree that time is of the essence in the performance of this Agreement and each and every provision of the Contract Documents.

CONTRACTOR shall prepare and obtain approval as required by the Contract Documents for all shop drawings, details and samples, and do all other things necessary and incidental to the prosecution of its work in conformance with the progress schedule set forth in the Contract Documents. CONTRACTOR shall coordinate its work with the work of all other contractors, subcontractors, and CITY forces working on the PROJECT in a manner that will facilitate the efficient completion of the PROJECT and in accordance with the terms and provisions of this Agreement. CITY shall have complete control of the premises on which the work is to be performed and shall have the right to decide the time and order in which the various portions of the work shall be performed and the priority of the work of other contractors,

subcontractors and CITY forces and, in general, all matters concerning the timely and orderly conduct of the work of CONTRACTOR on the premises.

6. CHANGES

CONTRACTOR shall adhere strictly to the plans and specifications set forth in the Contract Documents unless a change therefrom is authorized in writing by DPW. CONTRACTOR agrees to make any and all changes, furnish materials and perform all work necessary within the scope of the PROJECT as DPW may require in writing. Under no condition shall CONTRACTOR make any changes without the prior written order or acceptance of DPW, and CITY shall not pay any extra charges made by CONTRACTOR that have not been agreed upon in writing by DPW.

When directed to change the work, CONTRACTOR shall submit immediately to DPW a written cost proposal reflecting the effect of the change. Should DPW not agree to such cost proposal, the work shall be performed according to the changes ordered in writing by DPW and the proper cost thereof shall be negotiated by the parties upon cost and pricing data submitted by CONTRACTOR; thereupon, CITY will promptly issue an adjusted change order to CONTRACTOR and the contract price will be adjusted upward or downward accordingly.

7. NOTICE TO PROCEED

No work, services, material, or equipment shall be performed or furnished under this Agreement unless and until a Notice to Proceed has been given to CONTRACTOR by CITY. CITY does not warrant that the work will be available on the date the Notice to Proceed is issued. In the event of a delay in commencement of the work due to unavailability of the job site, for any reason, relief to CONTRACTOR shall be limited to a time extension equal to the delay due to such unavailability.

8. BONDS

Only bonds issued by California admitted sureties will be accepted. CONTRACTOR shall, prior to its performance of this Agreement, furnish the following two (2) bonds approved by the City Attorney: One in the amount of one hundred percent (100%) of the contract price to guarantee the CONTRACTOR's faithful performance of the work, and one in the amount of one hundred percent of the contract price to guarantee payment of all claims for labor and materials furnished.

In addition, CONTRACTOR shall submit to CITY a bond in the amount of one hundred percent (100%) of the final contract price, including all change orders, to warrant such performance for a period of one (1) year after CITY's acceptance thereof within ten (10) days of filing of the Notice of Completion.

9. WARRANTIES

CONTRACTOR unconditionally guarantees all work done under this Agreement including, but not limited to, any workmanship, installation, fabrication, material or structural facilities constructed. CONTRACTOR, within ten (10) days after notice by CITY of any defect in the work, shall have the option to make appropriate repairs or replace the defective item or items. Upon expiration of such ten (10) day period, CITY may then make appropriate repair or replacement at CONTRACTOR's risk and own cost and expense.

10. INDEPENDENT CONTRACTOR

It is understood and agreed that CONTRACTOR is, and shall be, acting at all times hereunder as an independent contractor and not an employee of CITY. CONTRACTOR shall secure at its own cost and expense, and be responsible for any and all payment of all taxes, social security, state disability insurance compensation, unemployment compensation and other

payroll deductions for CONTRACTOR and its officers, agents and employees and all business licenses, if any, in connection with the PROJECT and/or the services performed hereunder.

11. LIQUIDATED DAMAGES/DELAYS

It is agreed by the parties hereto that in case the total work called for hereunder is not in all parts and requirements finished or completed within the number of calendar days as set forth herein, damage will be sustained by CITY; and that it is, and would be, impractical and extremely difficult to ascertain and determine the actual damage which CITY would sustain in the event of and by reason of such delay. It is, therefore, agreed that CONTRACTOR will pay to CITY, as liquidated damages and not as a penalty, the sum of ONE THOUSAND DOLLARS ($1,000) per each calendar day's delay in completing the work in excess of the number of working/calendar days set forth herein, which represents a reasonable endeavor by the parties hereto to estimate a fair compensation for the foreseeable damages CITY would sustain in the event of and by reason of such delay; and CONTRACTOR agrees to pay these damages herein provided, and further agrees that CITY may deduct the amount thereof from any monies due or that may become due to CONTRACTOR hereunder.

CONTRACTOR will be granted an extension of time and will not be assessed damages for any portion of the delay in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of CONTRACTOR, including, but not limited to, acts of God or of the public enemy, fire, floods, epidemics, quarantine restrictions, strikes, unsuitable weather, or delays of subcontractors due to such causes.

CONTRACTOR shall, within fifteen (15) days from the beginning of any such delay (unless DPW shall grant a further period of time), notify DPW in writing of the cause of the delay and CITY shall extend the time for completing the work if, in its judgment, the

findings of fact thereon justify the delay; and the decision of DPW shall be conclusive on the parties hereto.

Should CONTRACTOR be delayed in the prosecution or completion of the work by the act, neglect or default of CITY, or should CONTRACTOR be delayed by waiting for materials required by this Agreement to be furnished by CITY, or by damage caused by fire or other casualty at the job site for which CONTRACTOR is not responsible, or by the combined action of the workers, in no way caused by or resulting from default or collusion on the part of CONTRACTOR, or in the event of a lockout by CITY, then the time herein fixed for the completion of the work shall be extended by the number of days CONTRACTOR has thus been delayed, but no allowance or extension shall be made unless a claim therefor is presented in writing to CITY within fifteen (15) days of the commencement of such delay.

No claims for additional compensation or damages for delays, irrespective of the cause thereof, and including without limitation the furnishing of materials by CITY or delays by other contractors or subcontractors will be allowed and an extension of time for completion shall be the sole remedy of CONTRACTOR.

12. DEMANDS FOR ADDITIONAL TIME OR MONEY.

A. Definitions.

(1) "Change Order" means a document signed by the CONTRACTOR and CITY which authorizes an addition, deletion or revision in the work, or an adjustment in the Compensation under Section 3, or the Completion Time specified at Section 4.

(2) "Demand" means a written demand for a Change Order by the CONTRACTOR for any of the following:

(a) A time extension;

(b) Payment of money or damages arising from work done by, or on behalf of, the CONTRACTOR pursuant to this Agreement and payment of which is not expressly permitted pursuant to Section 3 of this Agreement;

(c) Payment of an amount the CITY disputes;

(d) Any disputes and other matters relating to the acceptability of the work performed or the interpretation of the Contract Documents;

(e) A request for a time extension or additional payment based upon differing site conditions, such as subsurface or latent physical conditions at the job site differing materially from those indicated in this Agreement or the Contract Documents, or unknown physical conditions at the job site, of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inherent to work of the PROJECT; or

(f) A request for a time extension or additional payment based upon acts of neglect by CITY or due to fires, floods, labor disputes, epidemics, abnormal weather conditions or acts of God.

B. A Demand for a time extension or payment of money or damages may only be granted by a Change Order.

C. No Change Order may be granted except where the Contractor has submitted a Demand to the DPW (or his or her written designee). All Demands shall be submitted promptly, but in no event later than thirty (30) days after the occurrence of the event giving rise to the Demand. The Demand shall be in writing and include all documents necessary to substantiate the Demand. The DPW shall act on the Demand within fifteen (15) days after receipt, including by requesting additional information from the CONTRACTOR to determine whether to approve the Change Order the Demand seeks. The DPW shall act on the Demand

within fifteen (15) days after receipt of the additional information or within a period of time no greater than the time the CONTRACTOR took to produce the additional information requested, whichever is greater.

D. Notwithstanding the thirty (30) days to submit a Demand under Subparagraph C, in the case of differing or unknown site conditions, immediately upon encountering the conditions, CONTRACTOR shall notify the DPW in writing of the conditions, so that the CITY may promptly investigate the conditions.

E. If the CONTRACTOR disputes the DPW's written response on the Demand, or the CITY fails to respond within the time prescribed, the CONTRACTOR may so notify the City Engineer, in writing, either within fifteen (15) days of receipt of the City Engineer's response or within fifteen (15) days of the DPW's failure to respond within the time prescribed, respectively, and request an informal conference to meet and confer for settlement of the Demand. Upon the CONTRACTOR's request, the DPW shall schedule a meet and confer conference within thirty (30) days to seek to resolve.

F. CITY and CONTRACTOR shall execute appropriate Change Orders covering changes to the time or price by executing the Change Order by mutual agreement. If the CITY and CONTRACTOR are unable to reach a mutual agreement, then the City Engineer shall issue a written decision on the claim within a reasonable time.

G. Following the meet and confer conference, if the Demand remains in dispute, the CONTRACTOR may file a claim with the City as provided in Chapter 1 (commencing with Section 900) and Chapter 2 (commencing with Section 910) of Part 3 of Division 3.6 of Title 1 of the Government Code. For purposes of those provisions, the running of the period of time within which a claim must be filed shall be tolled from the time the

CONTRACTOR submits his or her Demand until the Demand is denied as a result of the meet and confer process, including any period of time utilized by the meet and confer process.

13. VARIATIONS IN ESTIMATED QUANTITIES

The quantities listed in the bid schedule will not govern final payment. Payment to CONTRACTOR will be made only for the actual quantities of contract items used in construction of the PROJECT, in accordance with the plans and specifications. Upon completion of the PROJECT, if the actual quantities used are either more than or less than the quantities listed in the bid schedule, the bid price shall prevail subject to the provisions of this Section. DPW may, at its sole discretion, when warranted by the facts and circumstances, order an equitable adjustment, upwards or downwards, in payment to CONTRACTOR where the actual quantities used in construction of the PROJECT are in variation to the quantities listed in the bid schedule. No claim by CONTRACTOR for an equitable adjustment in price or time for completion shall be allowed if asserted after final payment under this Agreement. If the quantity variation is such as to cause an increase in the time necessary for completion, DPW shall ascertain the facts and circumstances and make such adjustment for extending the completion date as in its sole judgment the findings warrant.

14. PROGRESS PAYMENTS

Each month DPW will make an estimate in writing of the work performed by CONTRACTOR and the value thereof. From each progress estimate, five percent (5%) will be deducted and retained by CITY and the remainder of the progress estimate, less the amount of all previous payments since commencement of the work, will be paid to CONTRACTOR.

When CONTRACTOR has, in the judgment of DPW, faithfully executed fifty percent (50%) or more of the value of the work as determined from the bid schedule, and if DPW finds that satisfactory progress has been and is being made, CONTRACTOR may be paid such

sum as will bring the payments of each month up to one hundred percent (100%) of the value of the work completed since the commencement of the PROJECT, as determined in its sole discretion by DPW, less all previous payments and less all previous retained amounts. CITY's final payment to CONTRACTOR, if unencumbered, or any part thereof unencumbered, shall be made thirty-five (35) days after the acceptance of the work and the filing of a Notice of Completion by CITY. Provided, however, that in the event of a dispute between CITY and CONTRACTOR, CITY may withhold from the final payment an amount not to exceed 150 percent of the value of any disputed amount of work. Payments shall be made on demands drawn in the manner required by law, each payment to be accompanied by a certificate signed by DPW, affirming that the work for which payment is demanded has been performed in accordance with the terms of the Agreement and that the amount stated in the certificate is due under the terms of the Agreement. Partial payments on the contract price shall not be considered as an acceptance of any part of the work.

15. WITHHELD CONTRACT FUNDS, SUBSTITUTION OF SECURITIES

At the request and at the sole cost and expense of CONTRACTOR, who shall retain beneficial ownership and receive interest, if any thereon, CITY shall permit the substitution and deposit therewith of securities equivalent to the amount of any monies withheld by CITY to ensure performance under the terms of this Agreement.

16. AFFIDAVITS OF SATISFACTION OF CLAIMS

After the completion of the work contemplated by this Agreement, CONTRACTOR shall file with DPW its affidavit stating that all workers and persons employed, all firms supplying materials and all subcontractors working upon the PROJECT have been paid in full and that there are no claims outstanding against the PROJECT for either labor or material, except certain items, if any, to be set forth in CONTRACTOR's affidavit covering disputed

claims, or items in connection with Notices to Withhold, which have been filed under the provisions of the statutes of the State of California.

17. WAIVER OF CLAIMS

The acceptance by CONTRACTOR of the payment of the final certificate shall constitute a waiver of all claims against CITY under or arising out of this Agreement.

A. The CITY has ascertained from the Director of Industrial Relations of the State of California the general prevailing rate of per diem wages and the general prevailing rate for legal holiday and overtime work in the locality in which the work is to be performed for each craft or type of work needed to execute this Agreement, and the same has been set forth by resolution on file in the office of the City Clerk of CITY. CONTRACTOR and any subcontractor under it shall pay not less than said prevailing wage rates to all workers employed on this public works Agreement, as required by California Labor Code Sections 1771 and 1774. In accordance with the provisions of Section 3700 of the California Labor Code, CONTRACTOR agrees to secure payment of compensation to every employee.

B. Pursuant to this Agreement and in accordance with Section 1774 and 1775 of the California Labor Code, CONTRACTOR shall, as penalty to CITY, forfeit twenty-five dollars ($25) for each calendar day or portion thereof for each worker paid (either by CONTRACTOR or any of its subcontractors) less than the prevailing wage rate established for that particular craft or type of work.

18. CALIFORNIA PREVAILING WAGE LAW

A. The CITY has ascertained from the Director of Industrial Relations of the State of California the general prevailing rate of per diem wages and the general prevailing rate for legal holiday and overtime work in the locality in which the work is to be performed for each craft or type of work needed to execute this Agreement, and the same has been set forth by

resolution on file in the office of the City Clerk of CITY. CONTRACTOR and any subcontractor under it shall pay not less than said prevailing wage rates to all workers employed on this public works Agreement, as required by California Labor Code Sections 1771 and 1774. In accordance with the provisions of Section 3700 of the California Labor Code, CONTRACTOR agrees to secure payment of compensation to every employee.

B. Pursuant to this Agreement and in accordance with Section 1774 and 1775 of the California Labor Code, CONTRACTOR shall, as penalty to CITY, forfeit twenty-five dollars ($25) for each calendar day or portion thereof for each worker paid (either by CONTRACTOR or any of its subcontractors) less than the prevailing wage rate established for that particular craft or type of work.

19. CALIFORNIA EIGHT-HOUR LAW

A. California Labor Code, Sections 1810 *et seq*, shall apply to the performance of this Agreement; thereunder, not more than eight (8) hours shall constitute one day's work and CONTRACTOR and each subcontractor employed by its hereunder, shall not require more than eight (8) hours of labor per day or forty (40) hours per week from any one person employed by it hereunder, except as stipulated in California Labor Code Section 1815. CONTRACTOR and each subcontractor employed by it hereunder shall, in accordance with California Labor Code Section 1812, keep an accurate record, open to inspection at all reasonable hours, showing the name and actual hours worked each calendar day and each calendar week by each worker employed in connection with the PROJECT.

B. Pursuant to this Agreement and in accordance with California Labor Code Section 1813, CONTRACTOR shall, as a penalty to CITY, forfeit twenty-five dollars ($25) for each worker employed hereunder by CONTRACTOR or any subcontractor for each calendar day during which such worker is required or permitted to work more than eight (8) hours in any

one (1) calendar day or forty (40) hours in any one (1) calendar week in violation of California Labor Code Section 1815.

20. PAYMENT OF TRAVEL AND SUBSISTENCE ALLOWANCE

Section 1773.8 of the California Labor Code, regarding the payment of travel and subsistence allowance is applicable to this PROJECT.

21. EMPLOYMENT OF APPRENTICES

Section 1777.5 of the California Labor Code, regarding the employment of apprentices is applicable to this PROJECT.

22. PAYROLL RECORDS

CONTRACTOR agrees to keep accurate payroll record showing the name, address, social security number, work classification, straight time and overtime hours worked each day and week, and the actual per diem wages paid to each journeyman, apprentice or worker employed by it in connection with the PROJECT and agrees to require each of its subcontractors to do the same. CONTRACTOR further agrees that its payroll records and those of its subcontractors, if any, shall be available at all reasonable times to the CITY, and the employee or his representative, and the Division of Labor Standards Enforcement and the Division of Apprenticeship Standards, and to comply with all of the provisions of California Labor Code Section 1776, in general.

23. INDEMNIFICATION, DEFENSE, HOLD HARMLESS

CONTRACTOR hereby agrees to protect, defend, indemnify and hold harmless CITY, its officers, elected or appointed officials, employees, agents, and volunteers from and against any and all claims, damages, losses, expenses, judgments, demands, defense costs, and consequential damage or liability of any kind or nature, however caused, including those resulting from death or injury to CONTRACTOR's employees and damage to CONTRACTOR's

property, arising directly or indirectly out of the obligations or operations herein undertaken by CONTRACTOR, caused in whole or in part by any negligent act or omission of the CONTRACTOR, any subcontractors, anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable, including but not limited to concurrent active or passive negligence, except where caused by the active negligence, sole negligence, or willful misconduct of the CITY, its officers, elected or appointed officials, employees, agents, and volunteers. CONTRACTOR will conduct all defense at its sole cost and expense and CITY shall approve selection of CONTRACTOR's counsel. This indemnity shall apply to all claims and liability regardless of whether any insurance policies are applicable. The policy limits do not act as a limitation upon the amount of indemnification to be provided by CONTRACTOR.

24. WORKERS' COMPENSATION AND EMPLOYER'S LIABILITY INSURANCE

Pursuant to California Labor Code Section 1861, CONTRACTOR acknowledges awareness of Section 3700 *et seq.* of this Code, which requires every employer to be insured against liability for workers' compensation; CONTRACTOR covenants that it will comply with such provisions prior to commencing performance of the work hereunder.

CONTRACTOR shall obtain and furnish to City workers' compensation and employer's liability insurance in an amount of not less than the State statutory limits.

CONTRACTOR shall require all subcontractors to provide such workers' compensation and employer's liability insurance for all of the subcontractors' employees. CONTRACTOR shall furnish to CITY a certificate of waiver of subrogation under the terms of the workers' compensation and employer's liability insurance and CONTRACTOR shall similarly require all subcontractors to waive subrogation.

25. INSURANCE

In addition to the workers' compensation and employer's liability insurance and CONTRACTOR's covenant to defend, hold harmless and indemnify CITY, CONTRACTOR shall obtain and furnish to CITY, a policy of general public liability insurance, including motor vehicle coverage covering the PROJECT. This policy shall indemnify CONTRACTOR, its officers, employees and agents while acting within the scope of their duties, against any and all claims arising out or in connection with the PROJECT, and shall provide coverage in not less than the following amount: combined single limit bodily injury and property damage, including products/completed operations liability and blanket contractual liability, of One Million Dollars ($1,000,000) per occurrence. If coverage is provided under a form which includes a designated general aggregate limit, the aggregate limit must be no less than One Million Dollars ($1,000,000) for this PROJECT. This policy shall name CITY, its officers, elected or appointed officials, employees, agents, and volunteers (the "Additionally Insured Parties") as Additional Insureds, and shall specifically provide that any other insurance coverage which may be applicable to the PROJECT shall be deemed excess coverage and that CONTRACTOR's insurance shall be primary and non-contributory with any other valid and collectible insurance or self-insurance available to the Additionally Insured Parties. Any available insurance proceeds in excess of the minimum coverage amount specified herein shall be available to the Additionally Insured Parties. All coverage available to CONTRACTOR shall also be available to the Additionally Insured Parties. Under no circumstances shall said above-mentioned insurance contain a self-insured retention without the express written consent of CITY; however an insurance policy "deductible" of Five Thousand Dollars ($5,000.00) is permitted.

CONTRACTOR shall be responsible for causing all Subcontractors to maintain the same types and limits of insurance coverage as that required of CONTRACTOR by this Agreement.

26. CERTIFICATES OF INSURANCE; ADDITIONAL INSURED ENDORSEMENTS

Prior to commencing performance of the work hereunder, CONTRACTOR shall furnish to CITY certificates of insurance subject to approval of the City Attorney evidencing the foregoing insurance coverages as required by this Agreement; the certificates shall:

1. Provide the name and policy number of each carrier and policy;
2. State that the policy is currently in force; and
3. Promise to provide that such policies will not be canceled or modified without thirty (30) days' prior written notice of CITY.

CONTRACTOR shall maintain the foregoing insurance coverages in force until the work under this Agreement is fully completed and accepted by CITY.

The requirement for carrying the foregoing insurance coverages shall not derogate from the CONTRACTOR's defense, hold harmless and indemnification obligations as set forth under this Agreement. CITY or its representative shall at all times have the right to demand the original or a copy of all the policies of insurance. CONTRACTOR shall pay, in a prompt and timely manner, the premiums on all insurance hereinabove required.

CONTRACTOR shall provide a separate copy of the additional insured endorsement to each of CONTRACTOR's insurance policies, naming CITY, its officers, elected and appointed officials, employees, agents and volunteers as Additional Insureds, to the City Attorney for approval prior to any payment hereunder.

27. NOTICE OF THIRD PARTY CLAIM

Pursuant to Public Contracts Code §9202, CITY shall provide notice to CONTRACTOR of receipt of any claim filed with CITY or a court of competent jurisdiction

which arises out of performance of this agreement within ten (10) days of receipt of such claim or claims.

28. DEFAULT AND TERMINATION

If CONTRACTOR fails or refuses to prosecute the work hereunder with diligence, or fails to complete the work within the time specified, or is adjudged bankrupt or makes an assignment for the benefit of creditors or becomes insolvent, or violates any provision of this Agreement or the Contract Documents, CITY may give CONTRACTOR notice in writing of its intention to terminate this Agreement. Unless the violation is cured within ten (10) days after such Notice of Intention has been served on CONTRACTOR, CITY may, without prejudice to any other remedy it may have, terminate this Agreement upon the expiration of that time. Upon such default by CONTRACTOR, CITY may elect not to terminate this Agreement; in such event CITY may make good the deficiency in which the default consists and deduct the resulting costs from the progress payments then or to become due to CONTRACTOR.

If it is subsequently determined by a court of competent jurisdiction that CITY's termination of this Agreement under this Section was wrongful, such termination shall be converted to a termination for convenience under Section 29 and any damages shall be assessed as set forth in Section 29.

29. TERMINATION FOR CONVENIENCE

CITY may terminate this Agreement for convenience at any time with or without cause, and whether or not PROJECT is fully complete upon seven (7) calendar days written notice to CONTRACTOR. In the event of termination, under this Section CITY shall pay CONTRACTOR for value of work in place on the PROJECT through the termination period less all such payments already made. In case of such termination for convenience, the CONTRACTOR shall be entitled to receive payment for work executed, and costs incurred by

reason of such termination. In no event shall CONTRACTOR be entitled to recover overhead, profit or CONTRACTOR's fee on work not performed. Such payment by CITY shall be CONTRACTOR's sole and exclusive remedy for termination by CITY for its convenience and CITY shall have no further obligation to CONTRACTOR.

30. DISPOSITION OF PLANS, ESTIMATES AND OTHER DOCUMENTS

CONTRACTOR agrees that upon completion of the work to be performed hereunder, or upon expiration or earlier termination of this Agreement, all original plans, specifications, drawings, reports, calculations, maps and other documents pertaining to this Agreement shall be delivered to CITY and become its sole property at no further cost.

31. NONASSIGNABILITY

CONTRACTOR shall not sell, assign, transfer, convey or encumber this Agreement, or any part hereof, or any right or duty created herein, without the prior written consent of CITY and the surety.

32. CITY EMPLOYEES AND OFFICIALS

CONTRACTOR shall employ no CITY official nor any regular CITY employee in the work performed pursuant to this Agreement. No officer or employee of CITY shall have any financial interest in this Agreement in violation of the California Government Code.

33. STOP NOTICES; RECOVERY OF ADMINISTRATIVE COSTS

CITY shall be entitled to all reasonable administrative costs and necessary disbursements arising out of the processing of Stop Notices, Notices to Withhold, or any similar legal document. This obligation shall be provided for in the labor and materials payment bond required of CONTRACTOR. CITY may charge an administrative fee of One Hundred Dollars ($100) for every Stop Notice filed in excess of two (2), regardless of whether or not CITY is named in an action to enforce such stop notices. CITY may set off any unreimbursed cost or

expense so incurred against any sum or sums owed by CITY to CONTRACTOR under this Agreement.

34. NOTICES

Any notices, certificates, or other communications hereunder shall be given either by personal delivery to CONTRACTOR's agent (as designated in Section 1 hereinabove) or to CITY as the situation shall warrant, or by enclosing the same in a sealed envelope, postage prepaid, and depositing the same in the United States Postal Service, to the addresses specified below; provided that CITY and CONTRACTOR may designate different addresses to which subsequent notices, certificates or other communications will be sent by notifying the other party via personal delivery, reputable overnight carrier or U. S. certified mail-return receipt requested:

TO CITY:	TO CONTRACTOR:
City of Huntington Beach ATTN: Director of Public Works 2000 Main Street Huntington Beach, CA 92648	ENERGY SYSTEMS GROUP, LLC. ATTN: Robert Cho 9250 Reseda Blvd., #500 Northridge, CA 91324

35. SECTION HEADINGS

The titles, captions, section, paragraph and subject headings, and descriptive phrases at the beginning of the various sections in this Agreement are merely descriptive and are included solely for convenience of reference only and are not representative of maters included or excluded from such provisions, and do not interpret, define, limit or describe, or construe the intent of the parties or affect the construction or interpretation of any provision of this Agreement.

36. IMMIGRATION

CONTRACTOR shall be responsible for full compliance with the immigration and naturalization laws of the United States and shall, in particular, comply with the provisions of United States Code Section 1324*a* regarding employment verification.

37. LEGAL SERVICES SUBCONTRACTING PROHIBITED

CONTRACTOR and CITY agree that CITY is not liable for payment of any subcontractor work involving legal services, and that such legal services are expressly outside the scope of services contemplated hereunder. CONTRACTOR understands that pursuant to Huntington Beach City Charter Section 309, the City Attorney is the exclusive legal counsel for CITY; and CITY shall not be liable for payment of any legal services expenses incurred by CONTRACTOR.

38. ATTORNEY'S FEES

In the event suit is brought by either party to construe, interpret and/or enforce the terms and/or provisions of this Agreement or to secure the performance hereof, each party shall bear its own attorney's fees, such that the prevailing party shall not be entitled to recover its attorney's fees from the non-prevailing party.

39. INTERPRETATION OF THIS AGREEMENT

The language of all parts of this Agreement shall in all cases be construed as a whole, according to its fair meaning, and not strictly for or against any of the parties. If any provision of this Agreement is held by an arbitrator or court of competent jurisdiction to be unenforceable, void, illegal or invalid, such holding shall not invalidate or affect the remaining covenants and provisions of this Agreement. No covenant or provision shall be deemed dependent upon any other unless so expressly provided here. As used in this Agreement, the masculine or neuter gender and singular or plural number shall be deemed to include the other

whenever the context so indicates or requires. Nothing contained herein shall be construed so as to require the commission of any act contrary to law, and wherever there is any conflict between any provision contained herein and any present or future statute, law, ordinance or regulation contrary to which the parties have no right to contract, then the latter shall prevail, and the provision of this Agreement which is hereby affected shall be curtailed and limited only to the extent necessary to bring it within the requirements of the law.

40. GOVERNING LAW

This Agreement shall be governed and construed in accordance with the laws of the State of California.

41. DUPLICATE ORIGINAL

The original of this Agreement and one or more copies hereto have been prepared and signed in counterparts as duplicate originals, each of which so executed shall, irrespective of the date of its execution and delivery, be deemed an original. Each duplicate original shall be deemed an original instrument as against any party who has signed it.

42. CONSENT

Where CITY's consent/approval is required under this Agreement, its consent/approval for one transaction or event shall not be deemed to be consent/approval to any subsequent occurrence of the same or any other transaction or event.

43. SURVIVAL

Terms and conditions of this Agreement, which by their sense and context survive the expiration or termination of this Agreement shall so survive.

44. MODIFICATION

No waiver or modification of any language in this Agreement shall be valid unless in writing and duly executed by both parties.

45. SIGNATORIES

Each undersigned represents and warrants that its signature hereinbelow has the power, authority and right to bind their respective parties to each of the terms of this Agreement, and shall indemnify CITY fully for any injuries or damages to CITY in the event that such authority or power is not, in fact, held by the signatory or is withdrawn.

46. GOVERNMENT CODE §4217 COMPLIANCE

This Agreement is executed pursuant to California Government Code §4217.10 et.seq. The City Council of the City of Huntington Beach, following public notice and hearing, has determined that the anticipated cost to the City for the service provided hereunder will be less than the anticipated marginal costs to the City of electrical and thermal energy that would have been consumed in the absence of this project. The Council has authorized this Agreement as being in the best interests of the City.

47. ENTIRETY

The parties acknowledge and agree that they are entering into this Agreement freely and voluntarily following extensive arm's length negotiation, and that each has had the opportunity to consult with legal counsel prior to executing this Agreement. The parties also acknowledge and agree that no representations, inducements, promises, agreements or warranties, oral or otherwise, have been made by that party or anyone acting on that party's behalf, which are not embodied in this Agreement, and that that party has not executed this Agreement in reliance on any representation, inducement, promise, agreement, warranty, fact or circumstance not expressly set forth in this Agreement. This Agreement, and the attached **Exhibit "A"**, contain the entire agreement between the parties respecting the subject matter of this Agreement, and supersede all prior understandings and agreements whether oral or in writing between the parties respecting the subject matter hereof.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed by and through their authorized officers on _____, 20____.

CONTRACTOR:
ENERGY SYSTEMS GROUP, LLC

By:_____

(print name)

ITS: Chairman / President / Vice-President
(circle one)

AND

By:_____

(print name)
ITS: Secretary / Chief Financial Officer
Asst. Secretary / Treasurer
(circle one)

CITY OF HUNTINGTON BEACH, a municipal corporation of the State of California

_____
Mayor

_____
City Clerk

INITIATED AND APPROVED:

_____
Director of Public Works

REVIEWED AND APPROVED:

_____
City Manager

APPROVED AS TO FORM:

_____
City Attorney

Exhibit A – Energy Conservation Measures (ECMs) Scope of Work

A. Overview

This Exhibit defines the Energy Conservation Measures (ECMs) to be implemented by Energy Systems Group, LLC ("Contractor") under the City-Funded Construction Contract executed pursuant to California Government Code §4217.10 et seq. The Contractor shall provide turnkey services including engineering, design, procurement, installation, testing, commissioning, warranty, and closeout of all measures. Contractor assumes full design-build responsibility and risk for performance, cost, and schedule.

B. ECM Summary

• ECM 1 – Circulating Block Heater Replacement: Replace sixty-one (61) existing thermosiphon-type block heaters at various City flood stations, wells, and reservoirs with new circulating type heaters equipped with built-in pumps for improved heat distribution.

• ECM 2 – LED Lighting Upgrades: Retrofit lighting fixtures in the Utility Yard Administration Building and associated areas with direct-wired LED lamps.

C. Technical Standards and Performance

• All work shall comply with Title 24, NEC, ASHRAE 90.1, and applicable City and State building codes.

• All equipment shall be new, current model, and ENERGY STAR or CEE Tier 1 certified where applicable.

• Contractor responsible for all required permits, inspections, and coordination with Southern California Edison and/or SoCalGas as applicable.

D. Warranty and Training

• Minimum Warranties: Circulating Block Heaters – 5 years; Lighting Fixtures and Lamps – 5 years.

• Contractor shall provide minimum 8 hours of hands-on training for City operations staff and deliver all O&M manuals, warranty certificates, and as-built documentation (PDF & native CAD formats).

E. Additional Requirements

• Contractor shall ensure all systems are fully commissioned and integrated into facility maintenance operations.

• Contractor shall ensure safe disposal or recycling of replaced equipment per environmental regulations.

• Contractor shall comply with all City safety, site access, and reporting protocols.

• All incentive or rebate proceeds accrue to the City; Contractor shall assist with applications and documentation.

• All exclusions inconsistent with this Exhibit or the Contract are void.

Exhibit B – Measurement & Verification (M&V) Plan

A. Purpose

To establish the methodology and responsibilities for verifying energy and operational savings from implemented ECMs. M&V shall conform to the International Performance Measurement & Verification Protocol (IPMVP, EVO 10000-1:2022).

B. Baseline Development

• Establish pre-installation baseline using at least 12 months of historical energy data.
• Define independent variables such as ambient temperature, hours of operation, and equipment load.
• Baseline assumptions and adjustment methodology shall be documented and approved prior to installation.

C. M&V Methodology

• Option A – Retrofit Isolation (Key Parameter Measurement): Used for Circulating Block Heaters and LED Lighting.
• Reporting Frequency: Annual M&V Reports for three (3) years post-acceptance, detailing verified kWh, kW, and therm savings, compared to baseline.

D. Calculations

Savings = Baseline Energy – Post-Installation Energy ± Adjustments.
• For heaters: based on measured kW reduction and runtime profiles.
• For lighting: based on wattage reduction and operational hours.
• Adjustments shall only be made for verified changes in operating conditions.

E. Reporting

• Initial Verification Report within 60 days of completion.
• Annual Reports summarizing verified savings, avoided cost, and simple payback.
• Contractor shall retain all raw and processed M&V data for five (5) years and provide full access to City.

F. Remedies

• If verified savings fall below guaranteed levels, Contractor shall reimburse the City for the shortfall in cash or energy-equivalent credit within 60 days of verification.
• Repeated shortfalls constitute material breach subject to contract remedies.

Exhibit C – Commissioning & Completion Schedule

- Project Duration: 90 Working Days from Notice to Proceed (NTP).
- Milestones:
  - NTP & Submittal Phase (0–15 days)
  - Equipment Procurement & Installation (16–60 days)
  - Testing & Commissioning (61–75 days)
  - Final Acceptance & Reporting (76–90 days)
- Contractor shall submit a detailed procurement log within 10 days of NTP.

Exhibit D – Price & Payment Schedule

Total Contract Value: $449,123

Funding Source: Utility Enterprise Fund

Approximate Distribution:
- Circulating Block Heaters – $330,956
- Utility Yard LED Lighting – $118,167

Utility Incentives: $16,470 (to be assigned to City).

Payment Terms:
- Progress payments per Section 14 of the Agreement.
- 5% retainage until final acceptance.
- City may withhold up to 150% of disputed work.
- Schedule of Values to be approved prior to first pay application.

Exhibit E – Council Resolution (Government Code §4217)

City Council Resolution confirming:

- Public notice and hearing held per §4217.12.
- Findings that total cost to City is less than anticipated marginal energy cost absent project.
- Authorization of contract and execution in the City's best interest.

Additional Provisions

- Indemnity Compliance: Design-professional indemnity limited to proportionate fault per Civil Code §2782.8.
- Insurance: Minimum coverages—CGL $2M/$4M; Auto $1M; Umbrella $5M; Professional Liability $2M; Pollution $2M; Builder's Risk full contract value.
- Data Ownership: City retains all rights to energy and M&V data, controls databases, and associated documentation.
- Rebates/Incentives: All incentives, rebates, or related credits accrue to City.
- Default: Failure to meet M&V verification, warranty, or schedule constitutes material default.