

# General Terms and Conditions (GTC 04/2017)

## EXHIBIT C

1. APPROVAL: This Agreement is of no force or effect until signed by both parties and approved by the Department of General Services, if required. Contractor may not commence performance until such approval has been obtained.
2. AMENDMENT: No amendment or variation of the terms of this Agreement shall be valid unless made in writing, signed by the parties and approved as required. No oral understanding or Agreement not incorporated in the Agreement is binding on any of the parties.
3. ASSIGNMENT: This Agreement is not assignable by the Contractor, either in whole or in part, without the consent of the State in the form of a formal written amendment.
4. AUDIT: Contractor agrees that the awarding department, the Department of General Services, the Bureau of State Audits, or their designated representative shall have the right to review and to copy any records and supporting documentation pertaining to the performance of this Agreement. Contractor agrees to maintain such records for possible audit for a minimum of three (3) years after final payment, unless a longer period of records retention is stipulated. Contractor agrees to allow the auditor(s) access to such records during normal business hours and to allow interviews of any employees who might reasonably have information related to such records. Further, Contractor agrees to include a similar right of the State to audit records and interview staff in any subcontract related to performance of this Agreement. (Gov. Code §8546.7, Pub. Contract Code §10115 et seq., CCR Title 2, Section 1896).
5. INDEMNIFICATION: Contractor agrees to indemnify, defend and save harmless the State, its officers, agents and employees from any and all claims and losses accruing or resulting to any and all contractors, subcontractors, suppliers, laborers, and any other person, firm or corporation furnishing or supplying work services, materials, or supplies in connection with the performance of this Agreement, and from any and all claims and losses accruing or resulting to any person, firm or corporation who may be injured or damaged by Contractor in the performance of this Agreement.
6. DISPUTES: Contractor shall continue with the responsibilities under this Agreement during any dispute.
7. TERMINATION FOR CAUSE: The State may terminate this Agreement and be relieved of any payments should the Contractor fail to perform the requirements of this Agreement at the time and in the manner herein provided. In the event of such termination the State may proceed with the work in any manner deemed proper by the State. All costs to the State shall be deducted from any sum due the Contractor under this Agreement and the balance, if any, shall be paid to the Contractor upon demand.

8. INDEPENDENT CONTRACTOR: Contractor, and the agents and employees of Contractor, in the performance of this Agreement, shall act in an independent capacity and not as officers or employees or agents of the State.
9. RECYCLING CERTIFICATION: The Contractor shall certify in writing under penalty of perjury, the minimum, if not exact, percentage of post-consumer material as defined in the Public Contract Code Section 12200, in products, materials, goods, or supplies offered or sold to the State regardless of whether the product meets the requirements of Public Contract Code Section 12209. With respect to printer or duplication cartridges that comply with the requirements of Section 12156(e), the certification required by this subdivision shall specify that the cartridges so comply (Pub. Contract Code §12205).
10. NON-DISCRIMINATION CLAUSE: During the performance of this Agreement, Contractor and its subcontractors shall not deny the contract's benefits to any person on the basis of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status, nor shall they discriminate unlawfully against any employee or applicant for employment because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status. Contractor shall insure that the evaluation and treatment of employees and applicants for employment are free of such discrimination. Contractor and subcontractors shall comply with the provisions of the Fair Employment and Housing Act (Gov. Code §12900 et seq.), the regulations promulgated thereunder (Cal. Code Regs., tit. 2, §11000 et seq.), the provisions of Article 9.5, Chapter 1, Part 1, Division 3, Title 2 of the Government Code (Gov. Code §§11135-11139.5), and the regulations or standards adopted by the awarding state agency to implement such article. Contractor shall permit access by representatives of the Department of Fair Employment and Housing and the awarding state agency upon reasonable notice at any time during the normal business hours, but in no case less than 24 hours' notice, to such of its books, records, accounts, and all other sources of information and its facilities as said Department or Agency shall require to ascertain compliance with this clause. Contractor and its subcontractors shall give written notice of their obligations under this clause to labor organizations with which they have a collective bargaining or other agreement. (See Cal. Code Regs., tit. 2, §11105.)  
  
Contractor shall include the nondiscrimination and compliance provisions of this clause in all subcontracts to perform work under the Agreement.
11. CERTIFICATION CLAUSES: The CONTRACTOR CERTIFICATION CLAUSES contained in the document CCC 04/2017 are hereby incorporated by reference and made a part of this Agreement by this reference as if attached hereto.
12. TIMELINESS: Time is of the essence in this Agreement.

13. COMPENSATION: The consideration to be paid Contractor, as provided herein, shall be in compensation for all of Contractor's expenses incurred in the performance hereof, including travel, per diem, and taxes, unless otherwise expressly so provided.
14. GOVERNING LAW: This contract is governed by and shall be interpreted in accordance with the laws of the State of California.
15. ANTITRUST CLAIMS: The Contractor by signing this agreement hereby certifies that if these services or goods are obtained by means of a competitive bid, the Contractor shall comply with the requirements of the Government Codes Sections set out below.
  - a. The Government Code Chapter on Antitrust claims contains the following definitions:
    - 1) "Public purchase" means a purchase by means of competitive bids of goods, services, or materials by the State or any of its political subdivisions or public agencies on whose behalf the Attorney General may bring an action pursuant to subdivision (c) of Section 16750 of the Business and Professions Code.
    - 2) "Public purchasing body" means the State or the subdivision or agency making a public purchase. Government Code Section 4550.
  - b. In submitting a bid to a public purchasing body, the bidder offers and agrees that if the bid is accepted, it will assign to the purchasing body all rights, title, and interest in and to all causes of action it may have under Section 4 of the Clayton Act (15 U.S.C. Sec. 15) or under the Cartwright Act (Chapter 2 (commencing with Section 16700) of Part 2 of Division 7 of the Business and Professions Code), arising from purchases of goods, materials, or services by the bidder for sale to the purchasing body pursuant to the bid. Such assignment shall be made and become effective at the time the purchasing body tenders final payment to the bidder. Government Code Section 4552.
  - c. If an awarding body or public purchasing body receives, either through judgment or settlement, a monetary recovery for a cause of action assigned under this chapter, the assignor shall be entitled to receive reimbursement for actual legal costs incurred and may, upon demand, recover from the public body any portion of the recovery, including treble damages, attributable to overcharges that were paid by the assignor but were not paid by the public body as part of the bid price, less the expenses incurred in obtaining that portion of the recovery. Government Code Section 4553.
  - d. Upon demand in writing by the assignor, the assignee shall, within one year from such demand, reassign the cause of action assigned under this part if the assignor has been or may have been injured by the violation of law for which the cause of action arose and (a) the assignee has not been injured thereby, or (b) the assignee declines to file a court action for the cause of action. See Government Code Section 4554.

16. CHILD SUPPORT COMPLIANCE ACT: For any Agreement in excess of \$100,000, the contractor acknowledges in accordance with Public Contract Code 7110, that:
  - a. The contractor recognizes the importance of child and family support obligations and shall fully comply with all applicable state and federal laws relating to child and family support enforcement, including, but not limited to, disclosure of information and compliance with earnings assignment orders, as provided in Chapter 8 (commencing with section 5200) of Part 5 of Division 9 of the Family Code; and
  - b. The contractor, to the best of its knowledge is fully complying with the earnings assignment orders of all employees and is providing the names of all new employees to the New Hire Registry maintained by the California Employment Development Department.
17. UNENFORCEABLE PROVISION: In the event that any provision of this Agreement is unenforceable or held to be unenforceable, then the parties agree that all other provisions of this Agreement have force and effect and shall not be affected thereby.
18. PRIORITY HIRING CONSIDERATIONS: If this Contract includes services in excess of \$200,000, the Contractor shall give priority consideration in filling vacancies in positions funded by the Contract to qualified recipients of aid under Welfare and Institutions Code Section 11200 in accordance with Pub. Contract Code §10353.
19. SMALL BUSINESS PARTICIPATION AND DVBE PARTICIPATION REPORTING REQUIREMENTS:
  - a. If for this Contract Contractor made a commitment to achieve small business participation, then Contractor must within 60 days of receiving final payment under this Contract (or within such other time period as may be specified elsewhere in this Contract) report to the awarding department the actual percentage of small business participation that was achieved. (Govt. Code § 14841.)
  - b. If for this Contract Contractor made a commitment to achieve disabled veteran business enterprise (DVBE) participation, then Contractor must within 60 days of receiving final payment under this Contract (or within such other time period as may be specified elsewhere in this Contract) certify in a report to the awarding department: (1) the total amount the prime Contractor received under the Contract; (2) the name and address of the DVBE(s) that participated in the performance of the Contract; (3) the amount each DVBE received from the prime Contractor; (4) that all payments under the Contract have been made to the DVBE; and (5) the actual percentage of DVBE participation that was achieved. A person or entity that knowingly provides false information shall be subject to a civil penalty for each violation. (Mil. & Vets. Code § 999.5(d); Govt. Code § 14841.)



20. LOSS LEADER: If this contract involves the furnishing of equipment, materials, or supplies then the following statement is incorporated: It is unlawful for any person engaged in business within this state to sell or use any article or product as a “loss leader” as defined in Section 17030 of the Business and Professions Code. (PCC 10344(e).)

## **EXHIBIT D**

### **Special Terms and Conditions**

#### **1. AGREEMENT MANAGEMENT**

- A. Contractor may change Project Manager, but the Energy Commission reserves the right to approve any substitution of the Project Manager.
- B. The Energy Commission may change the Energy Commission Agreement Manager (CAM) at any time and will send a written notice to the Contractor signed by the Energy Commission Agreement Officer (CAO).
- C. Energy Commission staff will be permitted to work side by side with Contractor's staff to the extent and under conditions that may be directed by the CAM. In this connection, Energy Commission staff will be given access to all data, working papers, etc., which Contractor may seek to utilize.
- D. Contractor will not be permitted to utilize Energy Commission personnel for the performance of services, which are the responsibility of Contractor unless the CAM previously agrees to such utilization in writing and an appropriate adjustment in price is made. No charge will be made to Contractor for the services of Energy Commission employees while performing, coordinating or monitoring functions.
- E. If the Schedule of Deliverables and Due Dates needs to be revised after the execution of the Agreement, the revised dates cannot extend beyond the term end date of the Agreement. Contractor shall work with the CAM to agree on the new deliverable due dates. The CAM shall issue the revised Schedule of Deliverables and Due Dates to the Contractor and the CAO. Although the dates can be revised, the deliverables cannot be changed through this process.

#### **2. STANDARD OF PERFORMANCE**

Contractor shall be responsible in the performance of Contractor's/subcontractor's work under this Agreement for exercising the degree of skill and care required by customarily accepted good professional practices and procedures. Any costs for failure to meet these standards, or otherwise defective services, which require reperformance, as directed by CAM or its designee, shall be borne in total by the Contractor/subcontractor and not the Energy Commission. In the event the Contractor/subcontractor fails to perform in accordance with the above standard the following will apply. Nothing contained in this section is intended to limit any of the rights or remedies which the Energy Commission may have under law.

- A. Contractor/subcontractor will reperform, at its own expense, any task, which was not performed to the reasonable satisfaction of the CAM. Any work reperformed pursuant to this paragraph shall be completed within the time limitations originally set forth for the specific task involved. Contractor/subcontractor shall work any overtime required to meet the deadline for the task at no additional cost to the Energy Commission.
- B. The Energy Commission shall provide a new schedule for the reperformance of any task pursuant to this paragraph in the event that reperformance of a task within the original time limitations is not feasible.

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- C. If the Energy Commission directs the Contractor not to reperform a task; the CAM and Contractor shall negotiate a reasonable settlement for satisfactory services rendered. No previous payment shall be considered a waiver of the Energy Commission's right to reimbursement.

#### 3. SUBCONTRACTS

Contractor shall enter into subcontracts with the following firms and/or individuals and shall manage the performance of the subcontractors.

DAV Energy Solutions, Inc.

Edward L. Vine

ENERlite Consulting, Inc

SourceOne Communications

#### AND

- A. Nothing contained in this Agreement or otherwise, shall create any contractual relationship between the State and any subcontractors, and no subcontractors and no subcontract shall relieve Contractor of its responsibilities and obligations hereunder. Contractor agrees to be as fully responsible to the State for the acts and omissions of its subcontractors and/or persons either directly or indirectly employed by any of them as it is for the acts and omissions of persons directly employed by Contractor. Contractor's obligation to pay its subcontractors is an independent obligation from the State's obligation to make payments to Contractor. As a result, the State shall have no obligation to pay or to enforce the payment of any monies to any subcontractor.
- B. Contractor shall be responsible for establishing and maintaining contractual agreements with and the reimbursement of each of the subcontractors for work performed in accordance with the terms of this Agreement. Contractor shall be responsible for scheduling and assigning subcontractors to specific tasks in the manner described in this Agreement; coordinating subcontractor accessibility to Energy Commission staff, and submitting completed products to the CAM.
- C. Contractor shall not allow any subcontractor to assign any portion of a subcontract related to this Agreement to a third party or subsequent tier subcontractor (lower tier subcontractor) without first obtaining the written consent of the CAM and following the procedures below "Process for New Subcontractors".
- D. All subcontracts entered into pursuant to this Agreement shall be subject to examination and audit by the Bureau of State Audits for a period of three (3) years after final payment under the Agreement.
- E. Upon request by the CAM or CAO, Contractor shall provide copies of all contractual agreements with subcontractors and lower tier subcontractors.

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- F. Contractors who are subcontracting with University of California or California State University may use the terms and conditions negotiated by the Department of General Services with University of California/ California State University for their subcontracts. Contractors who are subcontracting with the Department of Energy's (DOE) Lawrence Livermore National Laboratory, Lawrence Berkeley National Laboratory, and the Sandia National Laboratories may use the terms and conditions negotiated with the Department of General Services. Contractors who are subcontracting with all other DOE laboratories may use the terms and conditions negotiated by the Energy Commission with DOE for their subcontracts.
- G. Upon the termination of any subcontract or lower tier subcontract, Contractor shall notify the CAM and CAO immediately in writing.
- H. In addition to any other flow-down provisions required by this Agreement, all subcontracts shall contain the following: 1) the audit rights and non-discrimination provision stated in the General Terms and Conditions (Exhibit C) and in D above; and 2) further assignments shall not be made to any lower tier subcontractor without written consent of the CAM.
- I. **Process for New Subcontractors**
- The Energy Commission reserves the right to replace a subcontractor, request additional subcontractors, and approve additional subcontractors requested by Contractor. A replaced subcontractor and an added subcontractor are both defined as a "new" subcontractor. Such changes shall be subject to the following conditions:
- 1) The new subcontractor shall be selected using either: (a) A competitive bid process with written evaluation criteria by obtaining three or more bids and advertising the work to a suitable pool of subcontractors including without limitation: California Contracts Register; Contractor's mailing lists; mass media; professional papers or journals; posting on websites; and telephone or email solicitations; or (b) Non-competitive bid (sole source) process with a specific subcontractor.
  - 2) Contractor may also need to comply with Disabled Veteran Business Enterprise requirements for the proposed subcontractor.
  - 3) When a new subcontractor is proposed the CAM shall complete and submit to the CAO a "Subcontractor Addition" form. The proposed subcontract can be executed only after the CAO approves the Subcontractor Addition form. This form identifies the new subcontractor and bidding method used (competitive or non-competitive), the tasks the new subcontractor will be performing and the following shall be attached: resumes and completed Energy Commission budget forms.
  - 4) Labor Rates & Classifications: Personnel of new subcontractors must fit within a classification and be equal to or less than a rate already listed in the Agreement budget and the rate cannot exceed the subcontractor's actual rate. Adding classifications and/or higher rates for the new subcontractor

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other than ones currently listed in the Agreement requires a formal amendment.

- 5) Non-Labor Rates: The non-labor rates (such as fringe, indirect overhead, general and administrative, profit) charged by the new subcontractor shall be equal to or less than the existing non-labor rates already listed in the Agreement budget and cannot exceed subcontractor's actual non-labor rates. Adding higher non-labor rates for the new subcontractor than ones currently listed in the Agreement requires a formal amendment.
- 6) Other Direct Operating Expenses: The new subcontractor may charge other direct operating expenses (such as material or equipment) as already identified in the Agreement budget. No new types of operating expenses are allowed to be charged by the new subcontractor. Adding new types of operating expenses for the new subcontractor requires a formal amendment.

#### 4. **DISABLED VETERAN BUSINESS ENTERPRISE (DVBE) AND SMALL BUSINESS REQUIREMENTS**

##### A. **Certification Report**

If Contractor made a commitment to achieve DVBE participation for this Agreement with DVBE subcontractor(s), then upon completion of the work or upon the Agreement end date, whichever is earlier, Contractor shall certify in a DVBE Subcontracting Report to the CAO that DVBE subcontractor participation under this Agreement is in compliance with the goals specified at the time of award of the Agreement or with any subsequent amendment. The report shall include: (1) the total amount the Contractor received under this Agreement; (2) the name and address of the DVBE(s) that participated in the performance of the Agreement and the Agreement number; (3) the amount and percentage of work the Contractor committed to provide to one or more DVBEs under the requirements of the Agreement and the amount each DVBE received from the Contractor; (4) that all payments under the Agreement have been made to the DVBE(s); and (5) the actual percentage of DVBE participation that was achieved. Upon request by the Commission, the Contractor shall provide proof of payment for the work. A person or entity that knowingly provides false information shall be subject to a civil penalty for each violation. Military & Veterans Code section 999.5(d).

##### B. **Withholding**

###### 1) \$10,000 Withholding

If Contractor made a commitment to achieve DVBE participation for this Agreement with DVBE subcontractor(s), then the Commission shall withhold \$10,000 (or full payment if less than \$10,000) from Contractor's final payment, pending receipt of the certification report in A above. This withholding is in addition to retention, if any, in Exhibit B, para 4.

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2) Failure to comply with Certification Report

In addition to any other rights and remedies available to the Commission, if Contractor fails to comply with the certification report, Contractor shall, after notice by the Commission, be allowed to cure the defect. Notwithstanding any other law, if, after at least 15 calendar days but not more than 30 calendar days from the date of notice, Contractor refuses to comply with the certification report requirements, the Commission shall permanently deduct \$10,000 from the final payment (or the full payment if less than \$10,000). Military & Veterans Code section 999.7(a) and (c). For purposes of this paragraph, time is of the essence; Contractor is deemed to have refused to comply with the certification report requirements, if the Commission does not receive the report within 30 calendar days from the date of the notice.

C. **Substitution of DVBE**

Contractor shall use each DVBE identified in its proposal or listed in this Agreement. Contractor understands and agrees that if DVBE(s) were identified in its proposal or listed in this Agreement, award of this Agreement is based in part on its commitment to use the DVBE subcontractor(s). If Contractor believes an identified DVBE must be replaced or substituted, Contractor shall request a substitution in writing to CAM and CAO, including the reason for the DVBE substitution. Contractor shall complete revised DVBE certification forms (provided by the CAO) identifying the proposed new DVBE. A DVBE subcontractor may only be replaced by another DVBE subcontractor and must be approved by the Commission and the Department of General Services (DGS). Any work by the proposed new subcontractor can be performed only after written approval by the Commission and DGS. The substitution shall maintain, at minimum, the level of DVBE participation stated in the original Proposal. Military and Veterans Code section 999.5(g); 2 California Code of Regulations 1896.73.

D. **Amendment**

This Agreement shall be amended if a DVBE must be substituted and DGS has given approval. This Agreement shall be amended if there are changes to the scope of work that impact the DVBE subcontractor(s) identified in the proposal or listed in this Agreement. If there are modifications for additional work, the same percentage of DVBE participation is required as in the original Agreement. The Commission shall document the modification and DVBE participation. 2 California Code of Regulations 1896.76.

E. **Compliance with Law; Grounds for Termination; Damages; Penalties**

Contractor shall comply with all applicable statutory and regulatory DVBE requirements, which include in part, adherence to the DVBE participation level identified in the Proposal or listed in this Agreement, and seeking substitution of a DVBE if necessary. Failure of Contractor to comply with or violation of statutory, regulatory and Agreement requirements may be cause for: termination of this Agreement; recovery of damages and penalties due to the State; loss of

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certification; bidding suspension; sanctions; imprisonment; penalties; and civil actions. Military and Veterans Code sections 999.5, 999.9 and Public Contract Code section 10115.10.

**F. Commercially Useful Function**

During the course of the Agreement, Contractor shall ensure that all DVBEs performing work under the Agreement maintain a commercially useful function related to the work scope. Military and Veterans Code section 999; 2 California Code of Regulations section 1896.71.

**G. Records Retention**

Contractor shall retain all records related to DVBE participation for this Agreement for a minimum of six years following final payment under the Agreement. Military and Veterans Code section 999.55.

**H. DVBE Name for this Agreement:** DAV Energy Solutions, Inc., and SourceOne Communications

**I. Small Business Reporting.** If the Agreement includes small business participation, upon completion of the Agreement, Contractor shall report to the Energy Commission the percentage of small business participation achieved.

**5. PROCESS FOR OFFERING WORK**

If the Energy Commission or Contractor requires the replacement of a person listed in the Agreement to provide a particular service, or requires that a new person is added, the Contractor shall:

- A. First offer the work to qualified persons already listed in this Agreement (either an employee of Contractor or a subcontractor).
- B. If there is no available qualified person listed in this Agreement who can perform the work, then Contractor shall provide documentation from all the persons who were offered and declined the work to the CAM. Then, Contractor may request to add a new person to the Agreement in accordance with Exhibit B, Rates & Classifications: Changes in Contractor Personnel or Subcontractor Personnel. A person added to the Agreement is thereafter treated as a person listed in this Agreement and can be offered future work without first offering it to originally listed people.
- C. If the person to be replaced or substituted was identified in the Agreement as a Disabled Veteran Business Enterprise (DVBE) firm, refer to the DVBE provision above for changes to DVBEs.
- D. If the person added is a new subcontractor, Contractor shall use the process outlined in the Subcontracts provision, Process for New Subcontractors.

**6. PERFORMANCE EVALUATION**

Consistent with Public Contract Code Sections 10367 through 10371, the Energy Commission shall, upon completion of this Agreement, prepare a performance evaluation of the Contractor. Upon filing an unsatisfactory evaluation with the Department of General Services, Office of Legal Services (DGS) the Energy

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Commission shall notify and send a copy of the evaluation to the Contractor within 15 days. The Contractor shall have 30 days to prepare and send statements to the Energy Commission and the DGS defending his or her performance. The Contractor's statement shall be filed with the evaluation in the Energy Commission's Contract file and with DGS for a period of 36 months and shall not be a public record.

#### 7. REPORTS

- A. **Progress and Final Reports:** Contractor shall prepare progress reports summarizing all activities conducted by Contractor to date on a schedule as provided in Exhibit A. At the conclusion of this Agreement, Contractor shall prepare a comprehensive Final Report, on a schedule as provided in Exhibit A.
- B. **Title:** Contractor's name shall only appear on the cover and title page of reports as follows:
  - California Energy Commission
  - Project Title
  - Contractor Number
  - By (Contractor)
- C. **Ownership:** Each report shall become the property of the Energy Commission.
- D. **Nondisclosure:** Contractor will not disclose data or disseminate the contents of the final or any progress report without written permission of the CAM, except as provided in E, below. Permission to disclose information on one occasion or at public hearings held by the Energy Commission relating to the same shall not authorize Contractor to further disclose and disseminate the information on any other occasion. Contractor will not comment publicly to the press or any other media regarding its report, or the Energy Commission's actions on the same, except to Energy Commission staff, Contractor's own personnel involved in the performance of this Agreement, or at a public hearing, or in response to questions from a legislative committee. Notwithstanding the foregoing, in the event any public statement is made by the Energy Commission or any other party, based on information received from the Energy Commission as to the role of Contractor or the content of any preliminary or final report, Contractor may, if it believes the statement to be incorrect, state publicly what it believes is correct.
- E. **Disclosure:** Ninety days after any document submitted by the Contractor is deemed by the CAM to be a part of the public records of the State, Contractor may, if it wishes to do so at its own expense, publish or utilize a report or written document but shall include the following legend:

#### "LEGAL NOTICE"

**"This report was prepared as a result of work sponsored by the California Energy Commission. It does not necessarily represent the views of the Energy Commission, its employees, or the State of California. The Energy Commission, the State of California, its employees, contractors, and subcontractors make no warranty, express or implied, and assume no legal**



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**liability for the information in this report; nor does any party represent that the use of this information will not infringe upon privately owned rights."**

#### 8. **CONFIDENTIAL CONTRACTOR INFORMATION**

##### A. **Identification of Confidential Contractor Information**

For the purposes of this Section, "Confidential Contractor Information" refers to information the Contractor has satisfactorily identified as confidential and the Energy Commission has agreed to designate as confidential under Title 20 California Code of Regulations Section 2505. If applicable, all Contractor information considered confidential at the commencement of this Agreement is designated in an Attachment to this Exhibit.

##### B. **Confidential Deliverables: Labeling and Submitting Confidential Information**

Prior to the commencement of this Agreement, if applicable, the parties have identified in an Attachment to this Exhibit, specific Confidential Contractor Information to be provided as a deliverable. All such confidential deliverables shall be marked, by the Contractor, as "Confidential" on each page of the document containing the Confidential Contractor Information and presented in a sealed package to the Commission Agreement Officer. (Non-confidential deliverables are submitted to the Accounting Office.) All Confidential Information will be contained in the "confidential" volume: no Confidential Information will be in the "public" volume.

##### C. **Submittal of Unanticipated Confidential Contractor Information as a Deliverable**

The Contractor and the Energy Commission agree that during this Agreement, it is possible that the Contractor may obtain or develop additional data or information not originally identified as a confidential deliverable. In this case, Contractor shall follow the procedures for a request for designation of Confidential Information specified in 20 CCR 2505. The Energy Commission's Executive Director makes the determination of confidentiality. Such subsequent determinations may be added to the list of confidential deliverables in an Attachment to this Exhibit.

##### D. **Disclosure of Confidential Contractor Information**

Disclosure of Confidential Information by the Energy Commission may only be made pursuant to 20 CCR 2506 and 2507. All confidential data, records or deliverables that are legally disclosed by the Contractor or any other entity become public records and are no longer subject to the above confidentiality designation.

#### 9. **RECEIPT OF CONFIDENTIAL INFORMATION AND PERSONAL INFORMATION**

- A. **Application:** These special terms and conditions set forth information privacy and security requirements Contractor must follow if Confidential Information or Personal Information as defined herein is disclosed to Contractor, or is collected, created,

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maintained, stored, transmitted, or otherwise used by Contractor in the performance of this Agreement. Contractor must ensure that all individuals and entities participating in any way with this Agreement, including but not limited to its officers, employees, agents, subcontractors, subawardees, vendors, and other project partners, comply with this Section. Contractor must flow-down this Section to all subcontracts, subawards, vendor agreements, and all other project partner agreements that will be provided access to Confidential Information or Personal Information before the individual or entity has access to any such information. Contractor must also require all individuals and entities to flow-down this Section to any lower tier subcontractors, subawardees, vendors, project partners, and other individual or entity participating in any way with this Agreement that will be provided access to Confidential Information or Personal Information before the individual or entity has access to any such information.

**B. Definitions:**

- 1) “Confidential Information” means information the Energy Commission has designated as confidential pursuant to Title 20 of the California Code of Regulations, Section 2505 et seq., information the Energy Commission has otherwise deemed or stated to be confidential, and other information exempt from Disclosure under the Public Records Act or any other applicable state or federal laws. Contractor may obtain confidential information from the Energy Commission or third parties on behalf of the Energy Commission for the performance of this Agreement.
- 2) “Disclose” or Disclosure” refers to the release, transfer, provision of, access to, or divulging in any manner of information outside the entity holding the information.
- 3) “Personal Information” means information that meets the definition of “personal information” in California Civil Code Section 1798.3(a) or one of the data elements set forth in California Civil Code Section 1798.29(g)(1) or (g)(2). **Personal information is a type of confidential information and is therefore subject to all requirements for Confidential Information provided in this Agreement and applicable law. However, there are additional requirements specific to personal information, pursuant to subsection K.**
- 4) “Security Incident” means the theft, loss, damage, unauthorized destruction, unauthorized modification, or any intentional, unintentional, negligent, inappropriate or unauthorized release of any Confidential Information, data classified as confidential, sensitive, or personal, including critical infrastructure information.

**C. Labeling.** Confidential Information and Personal Information shared by the Energy Commission will be provided as follows:

- 1) List Describing Confidential Information and Personal Information. A description of Confidential Information and Personal Information that the Energy Commission anticipates it will provide to Contractor is attached as an

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appendix to this Exhibit. If the Energy Commission needs to add items after execution of this Agreement, the Energy Commission will update the list and provide a copy to Contractor; and

- 2) Identification of Confidential Information. Each individual item of Confidential Information and Personal Information will be visibly identifiable, regardless of file type, before the Energy Commission provides access to Contractor. The Confidential Information and Personal Information could be identified as a separate folder, workbook, document, field, electronic tag, etc.

**D. Use and Disclosure Restrictions.** Notwithstanding any other provision in this Agreement, Contractor and all individuals and entities participating in any way with this Agreement must:

- 1) Protect all Confidential Information and Personal Information from unauthorized Disclosure. This includes but is not limited to implementing administrative, physical, and technical safeguards that reasonably and appropriately protect the privacy, confidentiality, security, integrity, and availability of Confidential Information, including electronic or computerized Confidential Information.
- 2) Promptly transmit to the Energy Commission's Commission Agreement Manager all requests for Disclosure of any Confidential Information or Personal Information unless prohibited from doing so by applicable state or federal law.
- 3) Not use any Confidential Information or Personal Information for any purpose other than performing Contractor's work under this Agreement.
- 4) Not Disclose any Confidential Information or Personal Information to anyone other than the Energy Commission without prior written authorization from the Energy Commission's Commission Agreement Manager, except as otherwise specifically permitted by this Agreement, as provided in 20 California Code of Regulations, Sections 2506 and 2507, or when disclosure is required by State or Federal law.

**E. Information Security Program Plan.**

- 1) Attestation and Review. Before Contractor is provided access to Confidential Information or Personal Information, Contractor must attest, using a form provided by the Energy Commission, it has in place an Information Security Program Plan (ISPP) that meets or exceeds the minimum requirements as stated in the California State Administrative Manual Chapter 5300, Information Security (<https://www.dgs.ca.gov/Resources/SAM>), and any other applicable law. Further, the Energy Commission may, at its discretion, also request a copy of Contractor's ISPP for review. After the Energy Commission's review, the Energy Commission may choose whether to direct Contractor to perform work that involves Confidential Information or Personal Information.

## EXHIBIT D

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- 2) Content. Contractor's ISPP can be represented in a single document or a compilation of documents.
  - 3) Implementation. Contractor must implement and maintain appropriate procedural safeguards to secure Confidential Information and Personal Information from Security Incidents and unauthorized use for the term of this Agreement. Contractor is responsible for the security and confidentiality of the Confidential Information and Personal Information under its control and the control of its employees, agents, subcontractors, and other project partners and follow the requirements of its ISPP.
- F. **Encryption.** All Confidential information and Personal Information accessed by Contractor must be encrypted in transit and at rest.
- G. **Computer Security Updates.** Contractor must use computer, software and network systems that are updated with the latest security patches, upgrades, and virus software at all times Contractor has access to Confidential Information or Personal Information.
- H. **Nondisclosure Agreements.**
- 1) Need to Access Confidential Information or Personal Information. Contractor agrees to release Confidential Information and Personal Information only to the individuals who need to access such information to complete work under the Agreement. Contractor must ensure individuals properly handle and secure Confidential Information and Personal Information from unauthorized use or Disclosure, including signed nondisclosure agreements and security awareness training as described in this Section and Section I, Security Awareness Training, below.
  - 2) Maintain Current List of Individual Employees. Contractor must maintain a current list, and keep past versions of it, of all individuals who have access to Confidential Information or Personal Information and the dates each individual has access. Contractor must remove individuals who are no longer employed or no longer have access to Confidential Information or Personal Information and add individuals who are subsequently granted access.
  - 3) Nondisclosure Agreement. Contractor must ensure all individuals who will have access to Confidential Information or Personal Information are provided a copy of, and comply with, these special terms and conditions. Contractor must ensure that individuals sign a nondisclosure agreement provided by the Energy Commission before being provided access to Confidential Information or Personal Information. The nondisclosure agreement includes maintaining the security of Confidential Information and Personal Information; not disclosing Confidential Information or Personal Information to others; using Confidential Information and Personal Information only for the scope of work in support of the Agreement; providing written notification of any unauthorized release of Confidential Information or Personal Information; destruction of Confidential Information and Personal Information; etc.

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- 4) Copy of Nondisclosure Agreement. Contractor must provide a copy of each signed nondisclosure agreement to the Energy Commission's Commission Agreement Manager.
- J. **Security Awareness Training.** Contractor must ensure that all individuals who will have access to Confidential Information or Personal Information take security awareness training before being given access to Confidential Information or Personal Information and then annually thereafter until this Agreement ends for any reason, including termination, or the individual no longer has access, possession, use, or control of Confidential Information or Personal Information. The training must include, at a minimum, the following topics: password protection; malware, social engineering, phishing, social media, privacy awareness, acceptable use, and data protection (data collection, storage, transmission, use, disclosure and destruction). Before Contractor allows any individual access to Confidential Information or Personal Information, Contractor must provide to the Commission Agreement Manager a copy of that individual's training certificate.
- K. **Security Incident.**
- 1) Reporting of Security Incident. If Contractor becomes aware of a potential Security Incident that might affect Confidential Information in this Agreement, Contractor must notify the Commission Agreement Manager in writing immediately, but no later than 48 hours, after the Contractor first learns of the potential Security Incident. Contractor must promptly provide communications to the Commission Agreement Manager in writing as new information becomes available during the Security Incident response process.
  - 2) Prompt Action. Contractor must take prompt corrective action to mitigate any risks or damages involved with the Security Incident and to protect the operating environment, and any action pertaining to a Security Incident required by applicable federal and state laws.
  - 3) Investigation. Contractor must immediately investigate a Security Incident and provide a written report to the Energy Commission as soon as practicable. The report must describe the extent of the Security Incident and Contractor's corrective action to contain the Security Incident and prevent any recurrence. The Energy Commission has the right to participate in any investigation of a Security Incident. In addition, the Energy Commission has the right to conduct its own independent investigation. Contractor must fully cooperate in all investigations related to the Security Incident. Contractor is responsible for its expenses for conducting its own investigation or participating in the investigation by the Energy Commission or other entity selected by the Energy Commission.
  - 4) Notification. If there is a Security Incident that results in the loss of Confidential Information in Contractor's possession, Contractor must comply with any notice requirement under applicable state or federal law. Contractor must, at its sole expense, provide required notices and any other mitigation

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efforts, with the Energy Commission's written approval. The Energy Commission reserves the right to provide the required notices and any other mitigation efforts.

- 5) Costs. In addition to any other rights and remedies available to the Energy Commission, Contractor is responsible for, and must promptly pay to the Energy Commission, all costs, fees, and any other type of expense incurred by the Energy Commission due to a Security Incident resulting from the failure of Contractor to perform, or the intentional, unintentional, negligent, inappropriate or unauthorized acts of Contractor's personnel, that results in an unauthorized Disclosure, release, access, review, or destruction; or loss, theft or misuse of Confidential Information provided to Contractor. These costs include, but are not limited to, staff time, material costs, postage, media announcements, and other identifiable costs associated with the Security Incident causing loss of Confidential Information. Contractor is also responsible for all costs incurred by the Energy Commission due to a Security Incident resulting from the same failure of a subcontractor, lower tier of subcontractor, project partner, match funder or any other entity or person who received Confidential Information under this Agreement.
- 6) Subcontracts and Others with Access to Confidential Information. In order that all subcontractors, subawardees, vendors, project partners, and others with access to Confidential information are liable to the Energy Commission for costs as detailed in subsection J.5, above, Contractor must include a provision indicating the Energy Commission is a third-party beneficiary to all such agreements.

#### L. **Additional Requirements for Personal Information.**

- 1) Possession, Handling, or Use of Personal Information. If Contractor possesses, handles or uses Personal Information during the course of this Agreement, Contractor agrees to comply with the provisions of the Information Practices Act in Civil Code Section 1798 et seq., the California State Administrative Manual chapter 5300 as if Contractor were an "agency" for its work under the Agreement, and any other applicable law. This includes but is not limited to complying with the following:
  - a. Maintaining only Personal Information relevant and necessary for the purposes of this Agreement in accordance with Civil Code Section 1798.14.
  - b. Maintaining the source or sources of Personal Information in accordance with Civil Code Section 1798.16.
  - c. Providing notice on or with any form used to collect personal information from individuals in accordance with Civil Code Section 1798.17.
  - d. Establishing appropriate and reasonable administrative, technical, and physical safeguards to ensure compliance with the Information

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Practices Act, to ensure the security and confidentiality of records, and to protect against anticipated threats or hazards to their security or integrity which could result in any injury in accordance with Civil Code Section 1798.21.

- 2) Notification. If there is a Security Incident that results in the loss of Personal Information in Contractor's possession, Contractor must comply with the notice requirements in Civil Code Section 1798.29 and California State Administrative Manual chapter 5300. Contractor must, at its sole expense, provide required notices and any other mitigation efforts, with the Energy Commission's written approval. The Energy Commission reserves the right to provide the required notices and any other mitigation efforts.
  - 3) Rights. Contractor has no ownership, license, or other rights in Personal Information or in any form in which it is used (e.g., Products). In this regard, the Personal Information is not treated like Data, Products, Intellectual Property, or other provisions in the Agreement that may indicate Contractor has ownership, license, or other rights.
  - 4) Costs. In addition to any other rights and remedies available to the Energy Commission, Contractor is responsible for, and must promptly pay to the Energy Commission, all costs, fees, and any other type of expense incurred by the Energy Commission due to a Security Incident resulting from the failure of Contractor to perform, or the intentional, unintentional, negligent, inappropriate or unauthorized acts of Contractor's personnel, that results in an unauthorized Disclosure, release, access, review, or destruction; or loss, theft or misuse of Personal Information provided to Contractor. These costs include, but are not limited to, staff time, material costs, postage, media announcements, and other identifiable costs associated with the Security Incident causing loss of Personal Information. Contractor is also responsible for all costs incurred by the Energy Commission due to a Security Incident resulting from the same failure of a subcontractor, lower tier of subcontractor, project partner, match funder or any other entity or person who received Personal Information under this Agreement.
  - 5) Subcontracts and Others with Access to Personal Information. In order that subcontractors, subawardees, vendors, project partners, and others with access to Personal information are liable to the Energy Commission for costs as detailed in subsection K.4, above, Contractor must include a provision indicating the Energy Commission is a third-party beneficiary to all such agreements.
- M. **End of the Agreement**. When this Agreement ends for any reason, including termination, or sooner if Contractor's work with the Confidential Information or Personal Information has concluded, Contractor must securely destroy all Confidential Information and Personal Information and ensure that each entity with individuals that received Confidential Information or Personal Information does the same. Contractor must not attempt to reuse or distribute Confidential Information or Personal Information after destruction. Contractor must provide written verification to

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the Energy Commission that all Confidential Information and Personal Information has been properly destroyed, including the date and method of destruction.

- N. **Audit.** Contractor must maintain books, records, documents, and other evidence, sufficient to reflect that Contractor properly followed all requirements related to these special terms and conditions for a minimum of three years after final payment, unless a longer period of records retention is stipulated. The Energy Commission, other state agencies, and agents designated by the Energy Commission have the right to review, copy and audit Contractor's records related to Confidential Information and Personal Information at all reasonable times, with prior notice by the Energy Commission. Contractor agrees to provide auditors access to such records during normal business hours and to allow interviews of any individual employees who might reasonably have information related to such records.
- O. **Public Records Act Request.** Contractor must work cooperatively with the Energy Commission to respond timely and accurately to Public Records Act requests the Energy Commission receives about Contractor's activities and related Confidential Information or Personal Information under this Agreement.
- P. **Termination.** Contractor understands and agrees that in addition to any other rights and remedies available to the Energy Commission, any unauthorized release of Confidential Information or Personal Information, or disregard for appropriate security protocols that could result in Confidential Information or Personal Information being released may result in the Energy Commission's termination of this Agreement.
- Q. **Amendment.** Contractor and the Energy Commission acknowledge that federal and state laws regarding information security and privacy rapidly evolves and that amendment of these special terms and conditions may be required to provide for procedures to ensure compliance with such laws. Contractor and the Energy Commission specifically agree to take such action as is necessary to implement new standards and requirements imposed by regulations and other applicable laws relating to the security or privacy of Confidential Information and Personal Information.
- R. **List of Confidential Information and Personal Information.** The following is a general description of Confidential Information and Personal Information that the Energy Commission anticipates it will provide to Contractor, or that Contractor will obtain from a third party:

Building owner and stakeholder contact information and some building energy usage information will be accessed for the purposes outlined in the Scope of Work.

#### 10. CONTRACT DATA, OWNERSHIP RIGHTS

- A. "Data" as used in this Agreement means recorded information, regardless of form or characteristic, of a scientific or technical nature. It may, for example, document research or experimental, developmental or engineering work, or be usable or be used to define a design or process, or to support a premise or conclusion asserted in any deliverable document required by this Agreement.



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The data may be graphic or pictorial delineations in media, such as drawings or photographs, data or information, etc. It may be in machine form, such as punched cards, magnetic tape or computer printouts, or may be retained in computer memory.

- B. "Deliverable data" is that data which, under the terms of this Agreement, is required to be delivered to the Energy Commission and shall belong to the Energy Commission.
- C. "Proprietary data" is such data as the Contractor has identified in a satisfactory manner as being under Contractor's control prior to commencement of performance of this Agreement, and which Contractor has reasonably demonstrated as being of a proprietary nature either by reason of copyright, patent or trade secret doctrines in full force and effect at the time when performance of this Agreement is commenced. The title to "proprietary data" shall remain with the Contractor throughout the term of this Agreement and thereafter. The extent of the Energy Commission access to and the testimony available regarding, the proprietary data shall be limited to that reasonably necessary to demonstrate, in a scientific manner to the satisfaction of scientific persons, the validity of any premise, postulate or conclusion referred to or expressed in any deliverable for this Agreement.
- D. "Generated data" is that data, which a Contractor has collected, collated, recorded, deduced, read out or postulated for utilization in the performance of this Agreement. Any electronic data processing program, model or software system developed or substantially modified by the Contractor in the performance of this Agreement at the Energy Commission's expense, together with complete documentation thereof, shall be treated in the same manner as "generated data." "Generated data" shall be the property of the Energy Commission, unless and only to the extent that it is specifically provided otherwise in this Agreement.
- E. As to "generated data" which is reserved to Contractor by the express terms hereof, and as to any pre-existing or "proprietary data" which has been utilized to support any premise, postulate or conclusion referred to or expressed in any deliverable hereunder, Contractor shall preserve the same in a form which may be introduced as evidence in a court of law at Contractor's own expense for a period of not less than three years after receipt by the Energy Commission of the Final Report herein.
- F. Before the expiration of the three years and before changing the form of or destroying any data, Contractor shall notify the Energy Commission of any contemplated action and the Energy Commission may, within thirty (30) days after notification, determine whether it desires the data to be preserved. If the Energy Commission so elects, the expense of further preserving data shall be paid for by the Energy Commission. Contractor agrees that the Energy Commission may at its own expense, have reasonable access to data throughout the time during which data is preserved. Contractor agrees to use its best efforts to furnish competent witnesses or to identify competent witnesses to testify in any court of law regarding data.

## EXHIBIT D

### Special Terms and Conditions

- G. Nothing in this Agreement gives the Contractor any rights to “Confidential Information” and “Personal Information” as defined in Section 9, other than using Confidential Information and Personal Information for the limited purpose of performing Contractor’s work under this Agreement in accordance with Section 9.

#### 11. **GENERATIVE ARTIFICIAL INTELLIGENCE**

- A. During the term of the contract, Contractor must notify the State in writing if their services or any work under this contract includes, or makes available, any previously unreported GenAI technology, including GenAI from third parties or subcontractors. Contractor shall immediately complete the GenAI Reporting and Factsheet (STD 1000) to notify the State of any new or previously unreported GenAI technology.
- B. At the direction of the State, Contractor shall discontinue the use of any new or previously undisclosed GenAI technology that materially impacts functionality, risk or contract performance, until use of such GenAI technology has been approved by the State.
- C. Failure to disclose GenAI use to the State and submit the GenAI Reporting and Factsheet (STD 1000) may be considered a breach of the contract by the State at its sole discretion and the State may consider such failure to disclose GenAI and/or failure to submit the GenAI Reporting and Factsheet (STD 1000) as grounds for the immediate termination of the contract. The State is entitled to seek any and all relief to which it may be entitled to as a result of such non-disclosure.
- D. The State reserves the right to amend the contract, without additional cost, to incorporate GenAI Special Provisions into the contract at its sole discretion and/or terminate any contract that presents an unacceptable level of risk to the State.

#### 12. **PUBLIC HEARINGS**

If public hearings on the scope of work are held during the period of the Agreement, Contractor will make available to testify the personnel assigned to this Agreement. The Energy Commission will reimburse Contractor for compensation and travel of the personnel at the Agreement rates for the testimony which the Energy Commission requests.

#### 13. **DISPUTES**

In the event of an Agreement dispute or grievance between Contractor and the Energy Commission, both parties may follow the procedure detailed below. Contractor shall continue with the responsibilities under this Agreement during any dispute.

A. **First Level Dispute Resolution**

The Contractor shall first discuss the problem informally with the CAM. If the problem cannot be resolved at this stage, the Contractor must direct the grievance together with any evidence, in writing, to the CAO. The grievance must state the issues in the dispute, the legal authority or other basis for the

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Contractor's position and the remedy sought. The CAO and the Program Office Manager must make a determination on the problem within ten (10) working days after receipt of the written communication from the Contractor. The CAO shall respond in writing to the Contractor, indicating a decision and explanation for the decision. Should the Contractor disagree with the CAO's decision, the Contractor may appeal to the second level.

**B. Second Level Dispute Resolution**

The Contractor must prepare a letter indicating why CAO's decision is unacceptable, attaching to it the Contractor's original statement of the dispute with supporting documents, along with a copy of the CAO's response. This letter shall be sent to the Energy Commission's Executive Director within ten (10) working days from receipt of the CAO's decision. The Executive Director or designee shall meet with the Contractor to review the issues raised. A written decision signed by the Executive Director or designee shall be returned to the Contractor within twenty (20) working days of receipt of the Contractor's letter. The Executive Director may inform the Energy Commission of the decision at an Energy Commission business meeting. Should the Contractor disagree with the Executive Director's decision, the Contractor may appeal to the Energy Commission at a regularly scheduled business meeting. Contractor will be provided with the current procedures for placing the appeal on an Energy Commission Business Meeting Agenda.

**14. TERMINATION**

The parties agree that because the Energy Commission is a state entity it is necessary for the Energy Commission to be able to terminate, at once, upon the default of Contractors and to proceed with the work required under the Agreement in any manner the Energy Commission deems proper. Contractor specifically acknowledges that the unilateral termination of the Agreement by the Energy Commission under the terms set forth below is an essential term of the Agreement, without which the Energy Commission would not enter into the Agreement. Contractor further agrees that upon any of the events triggering the unilateral termination of the Agreement by the Energy Commission, the Energy Commission has the sole right to terminate the Agreement, and it would constitute bad faith of the Contractor to interfere with the immediate termination of the Agreement by the Energy Commission.

This Agreement may be terminated for any reason set forth below.

**A. With Cause**

In the event of any breach by the Contractor of the conditions set forth in this Agreement, the Energy Commission may, without prejudice to any of its legal remedies, terminate this Agreement for cause upon five (5) days written notice to the Contractor. In such event, the Energy Commission shall pay Contractor only the reasonable value of the services theretofore rendered by Contractor, as may be agreed upon by the parties or determined by a court of law, but not in excess of the Agreement maximum payable. "Cause" includes without limitation:

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- 1) Failure to perform or breach of any of the terms or covenants at the time and in the manner provided in this Agreement; or
- 2) Contractor is not able to pay its debts as they become due and/or Contractor is in default of an obligation that impacts his ability to perform under this Agreement; or
- 3) It is determined after notice and hearing by the Energy Commission or the Executive Director that gratuities were offered or given by the Contractor or any agent or representative of the Contractor, to any officer or employee of the Energy Commission, with a view toward securing an Agreement or securing favorable treatment with respect to awarding or amending or making a determination with respect to performance of the Agreement; or
- 4) Significant change in Energy Commission policy such that the work or product being funded would not be supported by the Energy Commission; or
- 5) Reorganization to a business entity unsatisfactory to the Energy Commission; or
- 6) The retention or hiring of subcontractors, or the replacement or addition of personnel that fail to perform to the standards and requirements of this Agreement.

#### B. Without Cause

The Energy Commission may, at its option, terminate this Agreement without cause in whole or in part, upon giving thirty (30) days advance notice in writing to the Contractor. In such event, the Contractor agrees to use all reasonable efforts to mitigate the Contractor's expenses and obligations hereunder. Also, in such event, the Energy Commission shall pay the Contractor for all satisfactory services rendered and expenses incurred within 30 days after notice of termination which could not by reasonable efforts of the Contractor have been avoided, but not in excess of the maximum payable under this Agreement.

#### 15. WAIVER

No waiver of any breach of this Agreement shall be held to be a waiver of any other or subsequent breach. All remedies afforded in this Agreement shall be taken and construed as cumulative, that is, in addition to every other remedy provided therein or by law. The failure of the Energy Commission to enforce at any time any of the provisions of this Agreement, or to require at any time performance by Contractor of any of the provisions, shall in no way be construed to be a waiver of those provisions, nor in any way affect the validity of this Agreement or any part of it or the right of the Energy Commission to thereafter enforce each and every such provision.

## EXHIBIT D

### Special Terms and Conditions

16. **CAPTIONS**

The clause headings appearing in this Agreement have been inserted for the purpose of convenience and ready reference and do not define, limit, or extend the scope or intent of the clauses.

17. **PRIOR DEALINGS, CUSTOM OR TRADE USAGE**

In no event shall any prior course of dealing, custom or trade usage modify, alter, or supplement any of these terms.

18. **NOTICE**

Legal notice must be given using any of the following delivery methods: U.S. Mail, overnight mail, or personal delivery, providing evidence of receipt to the person identified in Exhibit F of this Agreement for legal notices. Delivery by fax or e-mail is not considered legal notice for the purpose of this clause. This clause is not intended to apply to normal, daily communication between the parties related to progress of the work. This clause applies to situations where notice is required to be given by this Agreement or the parties are asserting their legal rights and remedies.

Notice shall be effective when received, unless a legal holiday for the State commences on the date of the attempted delivery. In which case, the effective date shall be postponed until the next business day.

19. **STOP WORK**

The CAO may, at any time, by written notice to Contractor, require Contractor to stop all or any part of the work tasks in this Agreement. Stop Work Orders may be issued for reasons such as a project exceeding budget, standard of performance, out of scope work, delay in project schedule, misrepresentations and the like.

- A. **Compliance.** Upon receipt of such stop work order, Contractor shall immediately take all necessary steps to comply therewith and to minimize the incurrence of costs allocable to work stopped.
- B. **Equitable Adjustment.** An equitable adjustment shall be made by the Energy Commission based upon a written request by Contractor for an equitable adjustment. Such adjustment request must be made by Contractor within thirty (30) days from the date of receipt of the stop work notice.
- C. **Revoking a Stop Work Order.** Contractor shall resume the stopped work only upon receipt of written instructions from the CAO canceling the stop work order.

20. **INTERPRETATION OF TERMS**

This Agreement shall be conducted in accordance with the terms and conditions of the solicitation, if applicable. The Contractor's proposal is not attached, but is expressly incorporated by reference into this Agreement. In the event of conflict or inconsistency between the terms of this Agreement and the solicitation or proposal, this Agreement shall be considered controlling.

## **EXHIBIT D**

### **Special Terms and Conditions**

#### **21. AMENDMENTS**

This Agreement may be amended through a formal amendment process to make changes, including without limitation;

- Increases in total Agreement amount,
- Extending the Agreement end date,
- Modifying tasks,
- Adding or modifying terms and conditions.

Amendments may be made without competitively bidding, so long as the amendment is exempt from competitive bidding pursuant to Public Contract Code section 10335, Government Code section 11010.5 and the State Contract Manual.

#### **22. SURVIVAL OF TERMS**

Certain provisions will survive the completion or termination date of this Agreement for any reason. The provisions include but are not limited to:

- General Terms and Conditions (Exhibit C)
- Audits Rights (included in Section 3, "Subcontracts," paragraph D)
- Legal Notice on Products (included in Section 7, "Reports")
- Receipt of Confidential Information and Personal Information (Section 9)
- Contract Data, Ownership Rights (Section 10)
- Termination (Section 14)
- Waiver (Section 15)
- Notice (Section 18)
- Venue (Section 23)
- CEC as Third-Party Beneficiary (Section 24)
- Purchase of Equipment (Section 27)

#### **23. VENUE**

The venue for any court action to enforce any part of this Agreement must be Sacramento County.

#### **24. THE ENERGY COMMISSION AS THIRD-PARTY BENEFICIARY**

Contractor ensure that in all of its agreements with all subcontracts and all lower-tier subcontracts that the Energy Commission is specifically named as a third-party beneficiary to the agreement. In addition, the term shall state the entity agrees that if the Energy Commission brings a court action, the entity agrees to venue in Sacramento County.

## EXHIBIT D

### Special Terms and Conditions

**25. DISCRIMINATION AND HARASSMENT TRAINING**

All employees of Contractor and any subcontractor who provide service under this Agreement and maintain work space at the Energy Commission shall take annual training on the prevention of discrimination and harassment. The Energy Commission shall provide the online training course at no charge to Contractor or subcontractors. However, Contractor and subcontractors shall not invoice for the time spent taking the course. Contractor shall ensure that all employees of Contractor and any subcontractor who provide service under this Agreement and represent the Energy Commission in public hearings and workshops, but do not maintain office space at the Energy Commission, receive training on prevention of discrimination and harassment.

**26. EXECUTIVE ORDER N-6-22 – RUSSIA SANCTIONS**

On March 4, 2022, Governor Gavin Newsom issued Executive Order N-6-22 (the EO) regarding Economic Sanctions against Russia and Russian entities and individuals. "Economic Sanctions" refers to sanctions imposed by the U.S. government in response to Russia's actions in Ukraine, as well as any sanctions imposed under state law. The EO directs state agencies to terminate contracts with, and to refrain from entering any new contracts with, individuals or entities that are determined to be a target of Economic Sanctions. Accordingly, should the State determine Contractor is a target of Economic Sanctions or is conducting prohibited transactions with sanctioned individuals or entities, that shall be grounds for termination of this agreement. The State shall provide Contractor advance written notice of such termination, allowing Contractor at least 30 calendar days to provide a written response. Termination shall be at the sole discretion of the State.

**27. PURCHASE OF EQUIPMENT**

- A. Only equipment identified in this Agreement is approved for purchase. Equipment not identified in this Agreement shall be subject to prior written approval from the CAM.
- B. All equipment purchased with Energy Commission funds shall be made subject to the following terms and conditions:
  - 1) The CAO will complete a Uniform Commercial Code (UCC.1) Financing Statement and submit it to the Contractor for signature. The CAO will file the signed UCC.1 with the Secretary of State's Office. Invoices for equipment purchases associated with a UCC.1 will not be processed until the UCC.1 has been filed with the Secretary of State's Office.
  - 2) Title to all non-expendable equipment purchased in part or in whole with Commission funds shall remain with the Energy Commission.
  - 3) Contractor shall assume all risk for maintenance, repair, destruction and damage to equipment while in the possession or subject to the control of Contractor. Contractor is not expected to repair or replace equipment that is intended to undergo significant modification or testing to the point of damage/destruction as part of the work described in Exhibit A, Scope of Work.

## **EXHIBIT D**

### **Special Terms and Conditions**

- C. Upon termination or completion of this Agreement, or Work Authorization, if applicable, the Executive Director of the Energy Commission may:
  - 1) Authorize the continued use of such equipment.
  - 2) Request equipment is delivered to the Energy Commission with any costs incurred for such return to be borne by the Energy Commission.

#### **28. RIGHTS OF PARTIES IN COPYRIGHTS, PHYSICAL WORKS OF ART AND FINE ART**

- A. The Contractor; by signing this Agreement, expressly grants to the Energy Commission for all copyrightable material, work of art and original work of authorship first produced, composed or authored in the performance of this Agreement a royalty-free, paid-up, non-exclusive, irrevocable, nontransferable, worldwide license to produce, translate, publish, use, dispose of, reproduce, prepare derivative works based on, distribute copies of, publicly perform, or publicly display a work of art or fine art, and to authorize others to produce, translate, publish, use, dispose of, reproduce, prepare derivative works based on, distribute copies of, publicly perform, or publicly display a work of art or fine art.
- B. Contractor, by signing this Agreement, expressly conveys to the Energy Commission all ownership of the physical works of art and fine art produced under this Agreement. Contractor agrees it does not reserve any rights to the physical works of art and fine art produced under this Agreement.
- C. Contractor shall obtain these same rights for the Energy Commission from all subcontractors and others who produce copyrightable material, works of art, or works of fine art under this Agreement. Contractor shall incorporate these paragraphs, modified appropriately, into its agreements with subcontractors. No subcontract shall be entered into without these rights being assured to the Energy Commission from the subcontractor.

#### **29. CONFLICT OF INTEREST**

See Exhibit E for conflict-of-interest provisions.



## EXHIBIT E

### Conflict of Interest

These Special Terms and Conditions prevail over any conflicting terms in this Agreement number 400-24-001, Building Energy Performance Strategy Report & Benchmarking Support, (Agreement) between ADM Associates Incorporated (Contractor) and the California Energy Commission (Energy Commission), of which this Exhibit is a part, including the General Terms and Conditions.

1. Applicability of Laws and Definitions.

- a. Contractor agrees that California conflict of interest laws, including but not limited to Government Code sections 81000 *et seq.* and 1090 *et seq.*, apply to Contractor, its subcontractors and project partners, and their employees under this Agreement.
- b. The term “subcontractor” in this Exhibit E means not only the direct subcontractors to Contractor but also any lower tier level of subcontractor (e.g., sub-subcontractors, sub-sub-subcontractors, etc.).
- c. Unless specifically otherwise provided, the term “employees” or “their employees” as used in this Exhibit E, means the employees of the Contractor, subcontractors, and project partners.
- d. The phrase “working under this Agreement” and similar phrases in this Exhibit E include work by Contractor, subcontractors, project partners, and their employees.

2. Contractor’s Responsibility for Compliance. Contractor shall avoid, and shall ensure all subcontractors, project partners, and their employees avoid, all conflicts of interest in the performance of this Agreement. Contractor, subcontractors, project partners, and their employees are responsible for compliance with California conflict of interest laws, including but not limited to Government Code sections 81000 *et seq.* (Political Reform Act) and 1090 *et seq.*, as well as all other applicable laws, ordinances, regulations, and standards.

- a. Contractor shall make subcontractors, project partners, and their employees aware of the provisions in the Political Reform Act and in this Exhibit and shall enforce them. Contractor shall ensure that these provisions are included in all subcontracts and agreements with project partners and shall enforce them.
- b. Contractor understands and agrees that every individual qualifying as a “consultant” under the Political Reform Act has an ongoing duty to avoid conflicts of interest and is personally liable for penalties.
- c. Individuals Designated as Consultants. All employees working on Tasks 2-7 are “consultants” assigned to Disclosure Category 1. A description of the disclosure categories in Title 20 California Code of Regulations sections 2401 and 2402 is located at:  
<https://govt.westlaw.com/calregs/Browse/Home/California/CaliforniaCodeofRegulations?guid=IC23FEB00D44E11DEA95CA4428EC25FA0>. Consultants are subject to the requirements and restrictions of the Political Reform Act and shall file an original Form 700 with the Energy Commission (See Government Code sections 82019 and 87302), except those employees working in strictly administrative job classifications. Contractor and the Commission Agreement Manager may work together to narrow the list of consultants as job duties are

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more specifically defined. The following job classifications are strictly administrative:

- i. Administrative Specialist
- ii. Administrative Assistant

Employees working only on strictly administrative tasks, including Task 1, are not consultants and do not need to file a Form 700 unless directed to do so by the Energy Commission.

- d. Contractor is responsible for having consultants complete Form 700s and Contractor is responsible for reviewing each Form 700 at multiple points: 1) within 30 business days from the date a consultant begins work under the Agreement; 2) at least every twelve months until the Agreement end date; and 3) within 30 days of the end date of the Agreement or after the consultant ends their work under the Agreement. These points of review will ensure that each employee, subcontractor, and project partner has considered their relationship with the Contractor and other project entities, as such entities are subject to change over the life of the project.
  - e. Contractor is responsible for ensuring that consultants complete the online ethics training within six months of beginning work under this Agreement, and at least once every two years thereafter, as required by Government Code section 11146 *et seq.* The training is provided by the Fair Political Practices Commission and the California Office of the Attorney General and is available at <https://oag.ca.gov/ethics/course>. Contractor shall provide records to the Energy Commission Filing Officer indicating each consultant's name, job classification, and date of completion of the course.
  - f. **Failure to file a Form 700, or failure to meet training requirements of Government Code 11146 *et seq.*, can result in automatic daily fines and other consequences.**
3. Reservation of Right to Require Form 700 from Any Employee. The Energy Commission reserves the right to require any individual working under this Agreement to file Form 700s.
4. Form 700. Each individual designated as a consultant under this Agreement (see section 2.c. of this exhibit), or other individual required by the Energy Commission to do so, shall file a Form 700.
- a. Form 700s shall be (i) submitted electronically at <https://CEC.southtechhosting.com/eDisclosure/>, or (ii) filed in person at, or mailed to, the following address (e-mails and faxes are not acceptable):  
  
Energy Commission Filing Officer – Form 700 Filing  
Selection & Equal Employment Opportunity Office  
715 P St., MS 52  
Sacramento, CA 95814
  - b. A Form 700 must be filed at the times required under the Political Reform Act, which include the following:

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- i. Assuming Office Statement. Must be filed within 30 days of beginning work under the Agreement. Beginning work means when the employee actually performs work under the Agreement; it does not mean the start date of the Agreement unless the employee starts work on the start date.
    - ii. Annual Statement. Must be filed annually, no later than April 1.
    - iii. Leaving Office Statement. Must be filed within 30 days of ceasing to perform work under the Agreement (e.g., removed as a subcontractor, completion of assigned tasks) or within 30 days after the Agreement ends.
  - c. **Failure to file the Form 700 when required can result in automatic daily fines and other consequences.**
  - d. When completing the Form 700, each consultant must disclose financial interests that fit within the disclosure categories assigned to them (see section 2.c. of this exhibit). A description of the disclosure categories is set forth in the Energy Commission's Conflict of Interest Code at Cal. Code Regs., tit. 20, § 2402.
5. Form 805. Contractor shall:
- a. Provide the CAM with a Fair Political Practices Commission Form 805, Agency Report of Consultant, within 5 days of the Agreement start date. Form 805 is available at: <http://www.fppc.ca.gov/content/dam/fppc/NS-Documents/TAD/Agency%20Reports/805.pdf>.
    - i. The Contractor shall complete Section 2, Firm Information.
    - ii. Under Section 3, Consultant Information, the Contractor shall write the name, job classification and email address for every employee working on Tasks 2-7, along with the date that individual began work on the Agreement.
    - iii. The Contractor shall leave the remaining parts of the Form 805 blank.
  - b. Within 30 days of the Contractor's submittal of the Form 805, the CAM may return the completed Form 805 to the Contractor for use in completing the Form 700(s). In the event the Form 805 is not returned by the CAM to the Contractor before an individual's Assuming Office Form 700 is due, the individual shall report under the broadest disclosure of the Energy Commission's Conflict of Interest Code at Cal. Code Regs., tit. 20, § 2402 which is Category 1.
  - c. Submit to the CAM an amended Form 805 whenever a new consultant begins work under the Agreement, or whenever a consultant ceases to perform work under the Agreement, within 5 days after the consultant begins or ceases work.
6. Restrictions on Outside Work.
- a. Prohibition on Participating in or Sharing Information about Energy Commission Funding Opportunities.

Under this Agreement, if the Contractor, subcontractors, or project partners assist the Energy Commission to develop agreements, develop competitive solicitations or score applications, then the Contractor, subcontractors, project partners, and their employees are prohibited from participating and agree not to

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participate (e.g., through development of an application, as an applicant, subcontractor, or match-fund partner), in any Energy Commission solicitation or other funding opportunity that solicits or includes work that is related to work done under this Agreement. Except with prior written permission of the CAM, the Contractor, subcontractors, project partners, and their employees shall not share any non-public information about applicants, applications, solicitations, other funding mechanisms, or any other non-public information related to Energy Commission funding opportunities with any other person or entity.

b. Contractor, Subcontractor and Project Partner Financial Interests.

The Contractor, subcontractors, project partners and their employees shall not negotiate, make arrangements, or enter into any other agreement or working relationship with an individual or entity who is interested in or is likely to be interested in CEC Benchmarking Program and implementation of SB48 (2023) under this Agreement.

If such an agreement or working relationship began prior to and exists at the start of this Agreement, the Contractor, subcontractor, project partner, or their employees shall complete the agreement or working relationship as soon as possible. And during the pendency of the pre-existing relationship or working relationship, the Contractor, subcontractor, project partner, or their employees shall not provide advice or guidance to the individual or entity regarding \_ CEC Benchmarking Program and implementation of SB48 (2023) under this Agreement.

c. Restrictions Following Agreement Term.

All individuals identified as consultants are subject to restrictions of the Political Reform Act on post-governmental activity. Contractor shall ensure that all consultants are aware of these restrictions. Guidance published by the Fair Political Practices Commission on these restrictions can be found at: [http://www.fppc.ca.gov/content/dam/fppc/NS-Documents/TAD/Public%20Officials%20and%20Employees/Leaving\\_State\\_Employment.pdf](http://www.fppc.ca.gov/content/dam/fppc/NS-Documents/TAD/Public%20Officials%20and%20Employees/Leaving_State_Employment.pdf).

d. Exceptional Method Applicant. In limited circumstances, it may be appropriate to permit Contractor to enter into a service agreement with an individual or business who has an exceptional design method approved by the Energy Commission pursuant to California Code of Regulations, Title 24, Part 1, section 10-109 (exceptional method applicant). Contractor may do so subject to the Energy Commission making each of the following findings:

- i. That the service agreement is in the public interest beyond the marketing interests of the exceptional method applicant, and
- ii. The Contractor's proposed scope of work is entirely objective and ministerial.

Such service agreement shall provide that the Energy Commission is the beneficiary of the work, and that the Contractor's work will be subject to approval by the Executive Director of the Energy Commission. The Executive Director of the Energy Commission shall set a reasonable maximum amount the Contractor may charge under the service agreement.

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7. **Avoidance of Appearance of Conflict.** Contractor acknowledges that in governmental contracting even the appearance- or perception- of a conflict of interest can be harmful to the interests of the State. Thus, Contractor agrees to refrain from, and shall ensure subcontractors, project partners, and their employees refrain from, any practices, activities, or relationships that appear to conflict with obligations under this Agreement. In the event Contractor is uncertain whether the appearance of a conflict of interest may exist, Contractor shall submit to the CAM a written description of the relevant details and shall avoid the activity in question until receiving written approval from the Energy Commission to carry out that activity.
8. **Notification of Potential Problems.** Contractor shall immediately inform the CAM of any potential problems in compliance with this Exhibit.
9. **Flow-Down.** Contractor shall flow-down the terms in this Exhibit to its subcontractors and project partners.
10. **Section 8, Notification of Potential Problems, and to the extent applicable, all other terms in this Exhibit E survive the end of this Agreement.**