

SEAI EXEED ESCO Contract

SEAI have developed this model contract to support ESCO arrangements under its EXEED Certified Grant scheme, while ensuring SEAI's obligations under State Aid are managed appropriately. Further details can be found in the "Explanatory Note for SEAI EXEED Grant Scheme Approach to ESCOs – April 2022" available on the SEAI website.

In order to facilitate this ESCO arrangement under the EXEED Certified Grant, the following approach must be followed;

- The Client (i.e. the owner of the site where the EXEED supported investment is being made) must be the applicant to the EXEED programme
- The Client and the ESCO must enter into the below form of contract in advance of the Works
- The Client must provide the signed contract as part of their Request for Payment

To facilitate commercial considerations by ESCOs and Clients, and following stakeholder feedback, certain clauses in the contract are amendable. These clauses can be amended to reflect the commercially agreed terms between ESCO and Client but shall not be amended in such a way as to negate, contradict, or override any of the non-amendable clauses within the contract. SEAI are providing this approach to facilitate normal commercial negotiations and minor amendments in the form of contract, not wholesale edits to the form and structure of the model contract. Any wholesale edits to the contract will put any EXEED grant payment at significant risk.

The contract clause numbering system shall be retained to allow SEAI to evaluate the non-amendable clauses at payment evaluation stage. Any clauses that are removed in full should be replaced with the text "*intentionally omitted*"

Non-amendable clauses are as follows:

- Selected definitions
- 2.2
- 9.1, 9.2, 9.3, 9.4
- 14.4.2
- 21.5, 21.6
- 22.1, 22.2, 22.3
- 24.1, 24.2, 24.3, 24.4, 24.5, 24.6
- 35.1.2, 35.2.2, 35.3.2
- 46.2.4
- Schedule 1, Part 2
- Schedule 6
- Schedule 8
- Schedule 9
- Schedule 10

ENERGY PERFORMANCE CONTRACT

TABLE OF CONTENTS

1.	DEFINITIONS & INTERPRETATION.....	5
2.	THE ESCO'S FINANCIAL ARRANGEMENTS	12
•	PART 1 – THE WORKS	13
3.	THE WORKS	13
4.	INTERIM PERIOD SAVINGS.....	14
5.	DELAY AND LIQUIDATED DAMAGES.....	14
6.	ENVIRONMENTAL CONDITIONS.....	15
7.	ENVIRONMENTAL INCENTIVES.....	16
8.	EXISTING EQUIPMENT.....	16
9.	EQUIPMENT OWNERSHIP.....	16
10.	EQUIPMENT WARRANTIES	17
11.	ESCO WARRANTY.....	17
12.	HAZARDOUS MATERIALS	18
13.	TESTING AND COMMISSIONING	19
14.	SUBSTANTIAL COMPLETION AND ACCEPTANCE OF THE WORKS	20
•	PART 2 – THE SERVICES.....	21
15.	THE SERVICES.....	21
16.	TRAINING FOLLOWING SUBSTANTIAL COMPLETION	21
17.	MALFUNCTION, EMERGENCIES & REPAIR OF EQUIPMENT.....	21
18.	MAINTENANCE, REPLACEMENT AND HANDOVER OF EQUIPMENT AND EXISTING EQUIPMENT.....	23
19.	AVAILABILITY OF EQUIPMENT.....	23
•	PART 3 – MEASUREMENT, VERIFICATION & PAYMENT.....	24
20.	ADJUSTMENT OF VALUES FOR THE CONTRACT BASELINE ENERGY CONSUMPTION	24
21.	ENERGY SAVINGS CALCULATION & PAYMENT	24
22.	EXCEED M&V PERIOD AND RETENTION.....	25
23.	TAXES.....	26
•	PART 5 - EXCEED	27
24.	EXCEED GRANT SCHEME.....	27
•	PART 4 - MISCELLANEOUS	29
25.	VARIATIONS.....	29
26.	VALUE ENGINEERING.....	29
27.	OBLIGATIONS OF THE ESCO.....	30
28.	INTELLECTUAL PROPERTY RIGHTS.....	30
29.	LICENCES, PERMITS, APPROVALS & COORDINATION.....	31
30.	INSURANCES.....	31
31.	LIMITATION ON LIABILITY & IDEMNITY.....	32
32.	FORCE MAJEURE.....	33
33.	SUSPENSION.....	33
34.	TERMINATION.....	34
35.	CONSEQUENCES OF TERMINATION.....	35
36.	ESCO AS PRIME CONTRACTOR, PROJECT GOVERNANCE, ASSIGNMENT & SUBCONTRACTING	36
37.	NO AGENCY.....	37
38.	REPRESENTATIONS AND WARRANTIES	37
39.	CHANGE IN LAW	38
40.	TRANSFERRING EMPLOYEES	38
41.	CONFIDENTIALITY.....	38
42.	WAIVER.....	39

43.	NOTICE.....	39
44.	SEVERABILITY.....	40
45.	COOPERATION.....	40
46.	ENTIRE AGREEMENT AND PRIORITY OF DOCUMENTS.....	40
47.	GOVERNING LAW.....	41
48.	DISPUTE RESOLUTION.....	41
49.	EXPERT DETERMINATION.....	41
	SCHEDULE 1	43
	BASELINES AND MEASUREMENT & VERIFICATION OF ENERGY SAVINGS.....	43
	SCHEDULE 2	44
	EQUIPMENT AND EXISTING EQUIPMENT.....	44
	SCHEDULE 3	45
	WORKS SCHEDULE.....	45
	SCHEDULE 4	46
	SERVICES SCHEDULE.....	46
	SCHEDULE 5	47
	CLIENT INFORMATION SCHEDULE.....	47
	SCHEDULE 6	48
	THE EXEED ASSET.....	48
	SCHEDULE 7	49
	TENDER DESIGN DOCUMENTS.....	49
	SCHEDULE 8	50
	ROLES AND RESPONSIBILITIES.....	50
	SCHEDULE 9	51
	EXEED GRANT CONDITIONS.....	51
	SCHEDULE 10	53
	EXEED PRE-INVESTMENT STUDIES.....	53

THIS ENERGY PERFORMANCE CONTRACT made the _____ day of _____ 2021 between:

(1) [] having its registered office at [] (the "Client"); and

(2) [] having registered office at [] (the "ESCO");

each a "Party" and collectively the "Parties".

WHEREAS¹:

- A. The Client is the owner² of the EXEED Asset and wishes to reduce the energy consumption and associated costs at the EXEED Asset and to achieve certification against the EXEED standard for excellence in energy efficient design.
- B. The Client wishes to engage the ESCO to [procure, install, operate and maintain] certain energy-saving equipment and to provide other services described in this Agreement and the attached Schedules for the purpose of achieving reductions in the energy consumed and/or greenhouse gas emissions at the EXEED Asset.

NOW IT IS HEREBY AGREED as follows:

1. DEFINITIONS & INTERPRETATION

1.1. The following words and expressions shall have the following meanings respectively:

"Acceptance Date" means the date on which the Client has accepted Substantial Completion being the date from which the Energy Savings shall be calculated under this Agreement.

"Agreement" means this agreement including all of the schedules attached hereto.

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

"As-Built Documents" means the final "as-built" construction drawings and documentation (including operating instructions) related to the constructed and installed Works [as developed from the Tender Design Documents]³ by the ESCO and provided to the Client under Clause 14.7.

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

"Business Day" means a day (other than Saturday or Sunday) on which banks in Dublin, Ireland are generally open for business.

¹ Recitals to be updated according to nature and background of project

² To be adjusted if Client is not the legal owner of the EXEED Asset.

³ Delete if project not procured through tender process

“Challenge and Analyse” means the challenge and analyse process as defined in the current version of the SEAI EXEED Grant Guidelines at <https://www.seai.ie/business-and-public-sector/business-grants-and-supports/exeed-certified-grant/SEAI-EXEED-Grant-Guidelines.pdf> as completed and attached hereto at Schedule 10.

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

“Construction Regulations” means the Safety, Health and Welfare at Work (Construction) Regulations 2013 to 2019.

“Contract Baseline” is defined in Part 1 of Schedule 1.

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

“Energy Balance Study” means the energy balance study or EBS as defined in the current version of the SEAI EXEED Grant Guidelines at <https://www.seai.ie/business-and-public-sector/business-grants-and-supports/exeed-certified-grant/SEAI-EXEED-Grant-Guidelines.pdf> as completed and attached hereto at Schedule 10.

“Energy Savings” means the reduction in the annual energy consumption at the EXEED Asset saved as a result of the Works determined by comparing the actual energy consumption after the Works for the relevant Reconciliation Period to the previously established Contract Baseline energy consumption calculated in accordance with Clause 21.3 in respect of each energy type.

“Energy Savings Register” means the energy savings register or ESR as defined in the current version of the SEAI EXEED Grant Guidelines at <https://www.seai.ie/business-and-public-sector/business-grants-and-supports/exeed-certified-grant/SEAI-EXEED-Grant-Guidelines.pdf> as completed and attached hereto at Schedule 10.

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

“Equipment” means the goods, materials and equipment to be installed at the EXEED Asset by the ESCO, as set out in Schedule 2 attached hereto, together with any and all additions and modifications made thereto during the Term.

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

“EXEED Asset” means the Client’s building, group of buildings, site or value stream, more particularly described in Schedule 6.

“EXEED Baseline” is defined in Part 2 of Schedule 1.

“EXEED Grant Agreement” means the agreement between the Client and SEAI for the provision of grant funding in respect of the Works being carried out and the Services being performed at the EXEED Asset.

“EXEED Grant Conditions” means the EXEED grant conditions to be satisfied by the ESCO for the purposes of this Agreement as set out in Schedule 9. (For the avoidance of doubt, the Client accepts and acknowledges that it bears the ultimate responsibility vis-à-vis the SEAI for meeting all EXEED grant conditions that the Client has agreed with SEAI for the purposes of procuring the EXEED grant funding pursuant to the EXEED Grant Agreement.)

“EXEED M&V Period” means a period of [18] months from the Acceptance Date.

“EXEED Pre-Investment Studies” means the studies and analysis of the EXEED Asset carried out by or on behalf of the Client [or by the ESCO as part of the tender process (as the case may be)]⁴ which includes inter alia an analysis of the energy usage at EXEED Asset prior to the Works, detailed descriptions of the improvements recommended for the Works, detailed consumption data, calculations for defining the projected Energy Savings to be made by the Client as a result of the Works and Services and which further comprises the Project Execution Plan, the Energy Balance Study, Challenge and Analyse and the Energy Savings Register which is attached hereto at Schedule 10.

“EXEED Project Completion Date” means [] and the Parties acknowledge that such date may only be extended at the absolute discretion of SEAI pursuant to the Grant Agreement. For the avoidance of doubt, such date cannot be extended pursuant to the terms of this Agreement or otherwise by agreement of the Parties.

“EXEED Retention Amount” means [].

“EXEED Standard” means [EXEED “verified”]/[EXEED “managed”]⁵ as per the current SEAI requirements at <https://www.seai.ie/business-and-public-sector/standards/exeed-certified-program/>

“Existing Equipment” means the energy related equipment owned by the Client and installed at the EXEED Asset prior to the execution of this Agreement as set out in Schedule 2.

⁴ Delete if no tender process

⁵ Delete/retain as applicable - Finalised contract should note which one (or both) apply to the project in question.

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

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

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

“Invitation to Tender⁶” means the invitation to tender issued by the Client on [].

“Key Provisions” means:

- The following definitions in Clause 1.1:
 - Challenge and Analyse
 - Energy Balance Study
 - Energy Savings Register
 - EXEED Asset
 - EXEED Baseline
 - EXEED Grant Agreement
 - EXEED Grant Conditions
 - EXEED M&V Period
 - EXEED Pre-Investment Studies
 - EXEED Project Completion Date
 - EXEED Retention Amount
 - EXEED Standard
 - Project Execution Plan
 - SEAI
 - Shared Savings Amount
 - Shared Savings Ratio
 - Substantial Completion (limb (ii))

- Clause 2.2
- Clauses 9.1, 9.2, 9.3, 9.4
- Clause 14.4.214.4.2
- Clauses 21.5, 21.6

⁶ Delete if project not procured through tender process

- Clauses 22.1, 22.2, 22.3
- Clauses 24.1, 24.2, 24.3, 24.4, 24.5, 24.6
- Clauses 35.1.2, 35.2.2, 35.3.2
- Clause 46.2.4
- Schedule 1, Part 2
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- Schedule 8
- Schedule 9
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“Material Change” shall include any change in or to the EXEED Asset whether structural, operational or otherwise in nature which could reasonably be expected to increase or decrease annual energy consumption at the EXEED Asset by at least [20%]⁷ after adjustments for climatic variations. Actions by the Client which may result in a Material Change include but are not limited to the following:

- (i) manner of use of the EXEED Asset by the Client;
- (ii) hours of operation for the EXEED Asset or for any Equipment or Existing Equipment operating at the EXEED Asset;
- (iii) occupancy of the EXEED Asset;
- (iv) structure of the EXEED Asset;
- (v) modification, renovation or construction at the EXEED Asset;
- (vi) the Client’s failure to provide maintenance of and repairs to the Existing Equipment in accordance with Clause 8.5.

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

“Monthly Payment” means the monthly fee of []⁸ which represents payment by the Client to the ESCO at fair market value under normal market conditions in return for the provision of Services.

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

⁷ Indicative figure only – to be set by Client.

⁸ This figure should equate to on twelfth of the ESCO’s expected share of the monetary savings made from the kWh savings achieved at the EXEED Asset during a reconciliation period

“Project Execution Plan” means the project execution plan or PEP as defined in the current version of the SEAI EXEED Grant Guidelines at <https://www.seai.ie/business-and-public-sector/business-grants-and-supports/exeed-certified-grant/SEAI-EXEED-Grant-Guidelines.pdf> as completed and attached hereto at Schedule 10.

“Reconciliation Period” means:

- (i) the period from the Acceptance Date up to the end of the calendar month in which the Acceptance Date occurs together with the next 3 (three) whole calendar months; and
- (ii) each annual period thereafter

for the measurement and/or calculation of the Energy Savings for the purposes of Clause 21.3.

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

- (i) the ability of either Party to carry out its obligations under this Agreement; or
- (ii) the Energy Savings being achieved by the ESCO.

“SEAI” means the Sustainable Energy Authority of Ireland (which shall include its successors and assigns).

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

- (i) the expiry of the Term; and
- (ii) the date of termination of this Agreement,

as more particularly described in Schedule 4 together with all other necessary activities to ensure the EXEED Asset achieves the EXEED Standard.

“Shared Savings Amount” means:

$$\text{Shared Savings Amount} = \text{Shared Savings Ratio} \times [\text{Energy Savings} \times \text{Unit Price}]^9$$

“Shared Savings Ratio” means [50]¹⁰%.

“Snag List” means minor items of the Works to be completed no later than [1 (one) month]¹¹ after Substantial Completion which do not prevent the Works and the Equipment from being used for the purpose for which they are intended and which will not prevent the issuance of applicable permits or certificates for such use.

⁹ Aggregate figures across each applicable energy type

¹⁰ To reflect commercial agreement

¹¹ Can be set by Client or discussed during dialogue – will vary depending on scale of works

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

“Substantial Completion” means:

- (i) the Works have been completed to the extent that they can be used for their intended purpose notwithstanding those minor Works items noted on the Snag List; and
- (ii) the EXEED Grant Conditions in Part 1 of Schedule 9 have been satisfied in full.

“Target Substantial Completion Date” means [] by which the ESCO shall successfully achieve Substantial Completion which may only be extended in accordance with the provisions of this Agreement;

“Tender Design Documents¹²” means the design documents (including operating instructions) related to the Works forming part of the ESCO’s tender as developed from the EXEED Pre-Investment Studies and as set out in Schedule 7.

“Term” means the period commencing on the date of execution of this Agreement and running until the date of expiry of []¹³ years from the Acceptance Date or such later date as may be agreed in writing between the Parties.

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

“Unit Price” means the unit price applicable to the monetary calculation of Energy Savings for each energy type as set out in Schedule 1.

“Variation Estimate” means the ESCO’s detailed estimate of the impact to this Agreement of a variation to the Works and/or Services and/or an adjustment to the Shared Savings Ratio and/or extension to the Term requested by the Client or the ESCO in accordance with the provisions of Clause 25.1 which shall include:

- (i) its proposal for implementing the variation to the Works and/or Services;
- (ii) a detailed estimate of cost to the ESCO of implementing the proposed variation;
- (iii) any proposed adjustment to the Shared Savings Ratio and/or extension of the Term; and
- (iv) the programme for implementing the proposed variation.

“VAT” means value added tax as provided for in the Value Added Tax Consolidation Act 2010 and the appropriate regulations and any other tax of a similar nature.

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

¹² Delete if project not procured through tender process

¹³ Insert duration

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

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

“Works” means the management, procurement, construction, installation, testing and commissioning works to be carried out by the ESCO during the Interim Period up to the Acceptance Date as more particularly described in Schedule 3 together with all other necessary activities to ensure the EXEED Asset achieves the EXEED Standard.

“Works Schedule” means the schedule for the Works as at the date of this Agreement set out in Schedule 3 which may be amended from time to time and references to the Works Schedule will be deemed to include any amendments made following the date of this Agreement.

- 1.2. Clause headings do not form part of this Agreement and shall not be taken into account in the construction or interpretation of this Agreement.
- 1.3. References to any statute or statutory provision will be construed as a reference to the same as it may have been, or may from time to time be, amended, modified or re-enacted.

2. THE ESCO'S FINANCIAL ARRANGEMENTS

- 2.1. The Client is appointing the ESCO pursuant to [the Invitation to Tender]¹⁴ OR [a process it undertook to identify the ESCO]¹⁵ and the ESCO hereby acknowledges that it is engaged by the Client in line with normal market conditions on terms that a comparative private market operator would consider reasonable.
- 2.2. The ESCO shall be solely responsible for financing all costs¹⁶ in carrying out the Works and the Services under this Agreement including the procurement of any relevant grant funding, with the exclusion of the EXEED grant with SEAL which the Client shall be solely responsible for procuring.
- 2.3. There can be no liens or encumbrances on the Equipment and under no circumstances can the Equipment be used in any way by the ESCO as collateral or security for the repayment of any obligations of the ESCO to any third party.

¹⁴ Delete if project not procured through tender process.

¹⁵ Delete as applicable.

¹⁶ Can be amended to reflect the actual financial arrangement if necessary

• **PART 1 – THE WORKS**

3. THE WORKS

- 3.1. The ESCO shall carry out the Works with all the skill, care, diligence, efficiency and professional conduct reasonably to be expected from a professional with the qualifications and experience suitable for the carrying out of the Works and in the appointment and monitoring of its agents, employees and Subcontractors and shall do so in accordance with the Works Schedule, [the Tender Design Documents]¹⁷, EXEED Pre-Investment Studies, the EXEED Standard and the terms and conditions set out in this Agreement.
- 3.2. The ESCO shall supervise and direct the Works and shall ensure that the completed Works are fit for their intended purpose and shall be responsible for all construction and installation means, methods, techniques, sequences and procedures and for coordinating all elements of the Works under this Agreement.
- 3.3. The ESCO shall procure the Equipment together with all labour, personnel, tools, construction equipment and machinery, transportation and other facilities and services necessary for the proper execution and completion of the Works.
- 3.4. In carrying out the Works the ESCO shall at all times comply with the Client's health and safety protocols as notified to the ESCO.
- 3.5. Save as to the extent that may be required [under the Tender Design Documents or as may be otherwise required]¹⁸ under this Agreement the ESCO shall carry out the Works in such a manner so as not to harm the structural integrity of the EXEED Asset or its operating systems. The ESCO shall without delay and at its own expense repair and restore to its original condition any damage to the EXEED Asset caused by the ESCO or its Subcontractors or agents.
- 3.6. The ESCO shall appoint the ESCO Representative who on the date of execution of this Agreement shall be []¹⁹. The ESCO may replace the ESCO Representative with a person of equivalent experience and expertise with the prior written consent of the Client which shall not be unreasonably withheld or delayed.
- 3.7. Without prejudice to its other obligations under this Agreement and subject to the provisions of Clauses 5.1 and 5.2 the ESCO shall proceed with the Works in accordance with the programme for the Works set out at Schedule 3 (subject to any extension of the Target Substantial Completion Date in accordance with this Agreement) and the Client shall be entitled to rely on the programme when planning its activities.
- 3.8. As soon as possible after it becomes aware either Party shall notify the other of specific probable future events or circumstances which may affect the programme or delay the execution of the Works or that actual progress of the Works is not consistent with the programme for the Works set out in Schedule 3 and the Parties shall work together in good faith to agree a revised programme.

¹⁷ Delete if project not procured through tender process

¹⁸ Delete if project not procured through tender process

¹⁹ Name to be inserted

- 3.9. In carrying out the Works the ESCO shall comply with its obligations under the Construction Regulations.
- 3.10. The ESCO shall complete the Works in accordance with this Agreement and shall comply with all applicable legislation, regulations, guidelines, by-laws, standards and codes of practice including, but not limited to the Construction Regulations and the Building Regulations.
- 3.11. [The Client hereby appoints the ESCO as [project supervisor for the construction stage and project supervisor for the design stage]²⁰ for the Works in accordance with the Construction Regulations and the ESCO hereby accepts the appointment which shall continue as long as the Client is required to have a [project supervisor for the construction stage and project supervisor for the design stage]²¹ in place for the Works.
- 3.12. The ESCO represents and warrants that it is and will continue to be competent to act as [project supervisor for the construction stage and project supervisor for the design stage]²² for the Works and further represents and warrants that it will allocate sufficient resources to enable it to comply with the relevant requirements of the Construction Regulations.
- 3.13. The ESCO acknowledges that it shall not be entitled to any additional costs, fees or expenses in acting as [project supervisor for the construction stage and project supervisor for the design stage]²³ for the Works and that all such costs, fees or expenses are deemed to be included in any payments made to it by the Client under this Agreement.
- 3.14. The ESCO warrants and represents that the insurances required under Clause 30 include cover for its liability in respect of its role as [project supervisor for the construction stage and project supervisor for the design stage]²⁴ for the Works.]²⁵

4. INTERIM PERIOD SAVINGS

- 4.1. For the purposes of Clause 21 where the ESCO achieves Energy Savings during the Interim Period such savings shall be added to the calculation of the Energy Savings for the first year following the Acceptance Date.

5. DELAY AND LIQUIDATED DAMAGES

- 5.1. The Client shall be entitled to recover liquidated damages at the pro-rata daily rate value of []²⁶ for each day Substantial Completion is delayed beyond the Target Substantial Completion Date which shall be due and payable by the ESCO to the Client upon demand.
- 5.2. If the ESCO is delayed in carrying out and completing the Works due to a *force majeure* event set out in Clause 32 or any negligent act or omission of the Client the ESCO shall be entitled to a reasonable extension to the Target Substantial Completion Date as may be

²⁰ Amend text in square brackets as appropriate where ESCO is acting as PSCS and/or PSDP under Construction Regulations

²¹ Amend text in square brackets as appropriate where ESCO is acting as PSCS and/or PSDP under Construction Regulations

²² Amend text in square brackets as appropriate where ESCO is acting as PSCS and/or PSDP under Construction Regulations

²³ Amend text in square brackets as appropriate where ESCO is acting as PSCS and/or PSDP under Construction Regulations

²⁴ Amend text in square brackets as appropriate where ESCO is acting as PSCS and/or PSDP under Construction Regulations

²⁵ Clauses 3.9 to 3.12 inclusive are to be included if the ESCO is carrying out the role of PSCS and/or PSDP under the Construction Regulations.

²⁶ Figure needs to be a genuine pre-estimate of loss – consider linking to expected/projected savings.

agreed in writing between the Parties prior to the resumption of Work by the ESCO following the delay.

- 5.3. Where the Parties cannot agree to an extension of the Target Substantial Completion Date under Clause 5.2 the matter shall be referred to dispute resolution in accordance with Clause 48.
- 5.4. The Parties agree that it would be extremely difficult and impracticable under the presently known and anticipated facts and circumstances to fix with precision the actual damages the Client would incur in the event of any such delay, and that the liquidated damages identified in this Clause 5 are a good faith and reasonable estimate of the damages and loss the Client would suffer.
- 5.5. The Parties acknowledge that any remedies under this Clause 5 shall not act as a sole right of recourse against the other Party and shall be in addition to any other remedies that may be available under this Agreement or otherwise at law.

6. ENVIRONMENTAL CONDITIONS

- 6.1. The ESCO undertakes that the Works shall not under any circumstances compromise the quality of the existing [indoor environment at]/[operating conditions of]²⁷ the EXEED Asset at the date of execution of this Agreement²⁸.
- 6.2. Where existing [indoor environmental]/[operating]²⁹ conditions at the EXEED Asset at the date of execution of this Agreement exceed accepted industry standards [as set out in the current Chartered Institution of Building Services Engineers (CIBSE) guidelines]³⁰ and the Works will lower those conditions the ESCO must advise the Client and obtain the Client's prior written agreement to the lowering of such conditions.
- 6.3. The ESCO undertakes that following Substantial Completion the resulting [indoor environmental conditions]/[operating conditions]³¹ at the EXEED Asset shall not fall below the higher of:
 - 6.3.1. [those specified in the Invitation to Tender (if any)]³²; or
 - 6.3.2. accepted industry standards [as set out in the current standards of the Chartered Institution of Building Services Engineers (CIBSE) guidelines as of the date of execution of this Agreement]³³.
- 6.4. The ESCO shall comply with all reasonable directions of the Client provided always that the Client has no obligation to consent to the lowering of such conditions.

²⁷ Delete/retain as applicable – whether for EXEED Asset relates to a building environment or industrial facility

²⁸ Stipulate range of temperature and lux levels – could be specified in tender docs.

²⁹ Delete/retain as applicable

³⁰ For built environment – delete for industrial facility

³¹ Delete as applicable

³² Delete if project not procured through tender process

³³ Delete for industrial facilities

7. ENVIRONMENTAL INCENTIVES

- 7.1. The Client shall own, and may assign or sell in its sole discretion, all right, title, and interest associated with the Environmental Incentives.
- 7.2. The ESCO shall transfer to the Client at no charge any Environmental Incentives received by it as a result of this Agreement.
- 7.3. For the avoidance of doubt the Environmental Incentives will not be included within any calculation of savings.

8. EXISTING EQUIPMENT

- 8.1. The Existing Equipment shall remain the property of the Client even if it is replaced or its operation made unnecessary as a result of the Works or Services.
- 8.2. The ESCO shall advise the Client in writing where in the ESCO's opinion any of the Existing Equipment needs to be replaced or removed from the EXEED Asset during the Term which it could not have been reasonably expected to identify [during the preparation of its tender submission]³⁴/[prior to entering this Agreement], giving reasons for such replacement or removal, and the Client shall at the earliest opportunity designate in writing to the ESCO which elements of the Existing Equipment (if any) should be replaced by ESCO and/or disposed of off-site from the EXEED Asset. For the avoidance of doubt the replacement or removal of Existing Equipment under this Clause 8.2 shall not be deemed to contribute to any Material Change under this Agreement.
- 8.3. [Any disposal or replacement of the Existing Equipment instructed by the Client under Clause 8.2 shall be carried out by the ESCO [at the ESCO's/Client's cost]³⁵³⁶.
- 8.4. [The Client shall be responsible for the disposal of any Existing Equipment designated by it under Clause 8.2 as disposable off-site.]³⁷
- 8.5. The ESCO confirms it has advised the Client prior to the entry into this Agreement of reasonable operational or maintenance changes it requires the Client to adopt in respect of the Existing Equipment to ensure it operates efficiently in conjunction with the Equipment being installed by the ESCO and the Parties agree to liaise and cooperate to ensure such operational efficiency.
- 8.6. The Client shall designate the location and storage at the EXEED Asset for any Existing Equipment that is to be replaced by the ESCO but is not to be disposed of off-site.

9. EQUIPMENT OWNERSHIP

- 9.1. Title to the Equipment or any part thereof together with any materials, licenses, powers and privileges purchased and installed by the ESCO for the purpose of this Agreement shall remain vested in the ESCO during the Term but the Parties agree that the Client shall purchase the Equipment for the then current fair market value of the equipment (less any

³⁴ Delete if no tender process

³⁵ Consider which party will bear cost of such replacement.

³⁶ Delete 8.3 or 8.4 as appropriate.

³⁷ If client does take responsibility Clause 8.3 can be deleted.

amounts attributable to the Equipment as have been reimbursed to the ESCO through the Monthly Payments up to such date) upon the earlier of the date of:

9.1.1. expiry of this Agreement; or

9.1.2. termination of this Agreement under the provisions of Clause 34.

9.2. The then current fair market value of the Equipment referred to in Clause 9.1 shall be agreed between the Parties acting reasonably or in the absence of such agreement shall be determined by expert determination in accordance with Clause 49 of this Agreement.

9.3. Title to the Equipment shall pass to the Client immediately upon payment to the ESCO of the relevant amount pursuant to Clause 9.1 or Clause 35 as the case may be and shall be free from all liens or encumbrances and under no circumstances shall the Equipment be used in any way by the ESCO as collateral or security for the repayment of any obligations of the ESCO to any third party.

9.4. All additions to, changes, replacements, modifications, upgrades or alterations of the Equipment and/or the Existing Equipment carried out during the Term shall become part of the Equipment and/or the Existing Equipment.

10. EQUIPMENT WARRANTIES

10.1. The ESCO hereby assigns to the Client all available manufacturer warranties relating to the Equipment (including warranties relating to spare parts used and installed when repair is necessitated by malfunction) and the ESCO shall deliver such written warranties to the Client as soon as is practicable.

10.2. Where any defect or fault occurs in the Equipment during the Term the Client hereby grants the ESCO the authority to make all necessary manufacturer warranty claims in relation to the Equipment on behalf of the Client as soon as reasonably possible following the discovery of such defect or fault and provided that the ESCO is providing the Services in respect of the Equipment which is the subject of the warranty claim and that the relevant warranty or warranties are current and valid at the time of making such claim. For the avoidance of doubt the success or failure of any such warranty claim shall not affect the ESCO's obligations under this Agreement.

10.3. The Client may in writing direct the ESCO to rectify and make good any defect or fault in the Equipment and may include a stipulation in respect of a reasonable and proportionate timeframe within which a defect or fault must be rectified and made good by the ESCO and the ESCO shall rectify and make good any such defect or fault within the time stipulated.

10.4. Without restricting any warranty or guarantee implied or imposed by law or contained in this Agreement the ESCO shall at its own expense rectify and make good any defect or fault that appears in the Works or the Equipment.

11. ESCO WARRANTY

11.1. The ESCO warrants and undertakes to the Client that materials and Equipment furnished under this Agreement will be of good and merchantable quality, fit for purpose and new and

that the Works will be free from faults and defects not inherent in the quality required or permitted.

- 11.2. For the avoidance of doubt none of the provisions of the Sales of Goods Acts 1893 and 1980 shall be excluded or limited by the provisions of this Agreement.
- 11.3. The ESCO warrants and undertakes that the Equipment and the Works will conform with the requirements of this Agreement [and the Tender Design Documents]³⁸.
- 11.4. The ESCO's warranty excludes remedy for damage or defect to the extent caused by:
 - 11.4.1. abuse by the Client or any agent or employee of the Client;
 - 11.4.2. modifications made or authorised by the Client and not approved or executed by the ESCO or Subcontractors;
 - 11.4.3. improper or insufficient maintenance or operation by or on behalf of the Client that is not in accordance with this Agreement (save for that carried out on behalf of the Client by the ESCO, its servants, employees, sub-contractors or agents); or
 - 11.4.4. normal wear and tear under normal usage.
- 11.5. If required by the Client the ESCO shall furnish satisfactory evidence as to the kind and quality of materials and Equipment and the recommended maintenance thereto to meet the requirements of this Clause 11 and if necessary shall update the Operations Manual accordingly.

12. HAZARDOUS MATERIALS

- 12.1. In the event that the ESCO discovers Hazardous Materials at the EXEED Asset which it could not reasonably have been expected to discover had it carried out all reasonable and necessary investigations prior to commencing the Works at the EXEED Asset (whether or not it has actually carried out such investigations) it shall immediately notify the Client and may suspend the relevant portion of the Works and/or the Services and remove all ESCO staff or Subcontractors from the affected area of the EXEED Asset.
- 12.2. In the event that the Client discovers Hazardous Materials at the EXEED Asset it shall immediately notify the ESCO and the ESCO may where necessary suspend the relevant portion of the Works and/or the Services and remove all ESCO staff or Subcontractors from the affected area of the EXEED Asset.
- 12.3. The Client shall be responsible for the storage, handling, use, transportation, treatment, disposal, discharge, leakage, detection, removal or containment of any Hazardous Materials at its expense and the ESCO shall undertake no further work on the EXEED Asset until notified by the Client in writing that the Hazardous Materials have been removed from the EXEED Asset and it is safe for the ESCO to proceed with the Works and/or the Services.
- 12.4. In the event of a suspension of the Works due to the discovery of Hazardous Materials in accordance with Clause 12.1 or 12.2 the ESCO shall be entitled to an extension to the

³⁸ Delete if project not procured through tender process

timelines in the Works Schedule and the Target Substantial Completion Date equal to the period of such suspension together with a reasonable period for remobilisation.

- 12.5. If any suspension under this Clause 12 lasts for more than 6 (six) months then either Party shall be entitled to terminate this Agreement with immediate effect upon delivery of written notice to the other subject to the provisions of Clause 35.
- 12.6. Notwithstanding anything to the contrary set forth in this Clause 12 if any Hazardous Materials are introduced to the EXEED Asset by the ESCO its Subcontractors or any party for whom they may be liable as the result of the negligent carrying out of the Works or the Services then the ESCO at its sole cost and expense shall be liable for any response, removal, clean-up, or other remedial action required either under this Agreement or by applicable law.
- 12.7. In respect of any Hazardous Material which is brought into the EXEED Asset by or on behalf of the ESCO, the ESCO shall (and will procure that any ESCO personnel shall) ensure that all Hazardous Material used or stored at the EXEED Asset shall be kept and removed in accordance with applicable legislation, regulations, guidelines and codes of practice and properly and securely labelled and stored, under appropriate supervision and used only by appropriately trained and competent personnel.

13. TESTING AND COMMISSIONING

- 13.1. When the Works are nearing Substantial Completion the ESCO shall notify the Client no less than 5 (five) Business Days in advance in writing of the schedule for commissioning and testing of the relevant part of the Works and/or Equipment and the Client and/or its nominee shall have the right to be present at any or all such tests conducted by the ESCO and/or manufacturers of the Equipment.
- 13.2. The ESCO shall ensure that it supplies all necessary documents, information, suitably qualified and experienced personnel, power, consumables and instruments required to carry out the commissioning and tests. The ESCO shall comply with all and any reasonable and proportionate protocols (having regard to the scale and complexity of the Works and the nature of the Equipment being installed) as to testing and commissioning pre-agreed in writing with the Client from time to time.
- 13.3. The ESCO shall correct any deficiencies in the Works and/or the Equipment that may be observed during the commissioning and testing procedures (including the pursuit of any manufacturer warranty claims as set out in Clause 10.2).
- 13.4. The ESCO shall deliver a written report on the testing and commissioning of the Works and the Equipment to the Client and shall provide the Client with all appropriate testing documentation (including testing and commissioning certificates) along with all operations and maintenance documentation for the Equipment to the Client on or before Substantial Completion.

14. SUBSTANTIAL COMPLETION AND ACCEPTANCE OF THE WORKS

- 14.1. The ESCO will successfully achieve Substantial Completion by the Target Substantial Completion Date which shall only be extended by agreement in writing between the Parties or as otherwise provided herein.
- 14.2. When the ESCO believes that Substantial Completion has been achieved it will submit a certificate of Substantial Completion and a Snag List to the Client in a form pre-agreed by the Client.
- 14.3. If the Client agrees that Substantial Completion has been achieved it will acknowledge the same by signing the certificate of Substantial Completion and Snag List and returning both to the ESCO specifying the Acceptance Date within 10 (ten) Business Days and the ESCO shall promptly proceed to complete all items on the Snag List.
- 14.4. If the Client does not agree that Substantial Completion has been achieved and/or that the Snag List is not complete or correct then the Client shall notify the ESCO in writing of any discrepancies within 10 (ten) Business Days. To the extent the ESCO does not dispute the discrepancies raised by the Client the ESCO shall:
 - 14.4.1. promptly and diligently correct the Works to conform to the description of the Works set forth herein and resubmit the certificate of Substantial Completion to the Client; and/or
 - 14.4.2. promptly and diligently ensure that any of the ESCO's outstanding EXEED Grant Conditions are satisfied and resubmit the Certificate of Substantial Completion to the Client; and/or
 - 14.4.3. promptly complete all items on the Snag List.
- 14.5. If the Client fails to respond to the ESCO within 10 (ten) Business Days of receipt of the certificate of Substantial Completion and Snag List the ESCO shall notify the Client of such failure. If such failure by the Client continues for a further 5 (five) Business Days following such additional notification the Client will be deemed to have agreed to, signed and returned the certificate of Substantial Completion and Snag List. In such circumstances the Acceptance Date shall be deemed to be the day following the expiry of 10 (ten) Business Days from receipt by the Client of the certificate of Substantial Completion and Snag List.
- 14.6. If the ESCO disagrees with any or all of the discrepancies raised by the Client under Clause 14.4 the ESCO shall notify the Client of a dispute which shall be referred to expert determination in accordance with Clause 49.
- 14.7. The ESCO shall furnish hard copies of the As-Built Documents and the Operations Manual to the Client upon Substantial Completion and shall be responsible for keeping such documents up to date during the Term of this Agreement to take account of any additions, changes, replacements, modifications, upgrades or alterations to the Equipment and/or the Existing Equipment including any updated software.

• **PART 2 – THE SERVICES**

15. THE SERVICES

- 15.1. The ESCO shall commence the Services on the day following the Acceptance Date and shall provide the Services until the expiry of the Term.
- 15.2. The ESCO shall perform the Services with all the skill, care, diligence, efficiency and professional conduct reasonably to be expected from a professional with the qualifications and experience suitable for the performance of the Services and in the appointment and monitoring of its agents, employees and Subcontractors and shall do so in accordance with the provisions of this Agreement.
- 15.3. In performing the Services the ESCO shall be obliged to keep updated any and all software to be used in connection with the Equipment and/or Existing Equipment subject to the provisions of Clause 28.
- 15.4. In carrying out the Works the ESCO shall at all times comply with the Client's health and safety protocols as set out in []³⁹.
- 15.5. The ESCO shall comply with all applicable legislation, regulations, guidelines, by-laws, standards and codes of practice including, but not limited to the Construction Regulations and the Building Regulations if applicable in carrying out the Services.

16. TRAINING FOLLOWING SUBSTANTIAL COMPLETION⁴⁰

- 16.1. The ESCO shall no later than 10 (ten) Business Days following Substantial Completion provide training to the Client's staff on the proper operation and maintenance procedures for the Works, the Equipment and/or Existing Equipment including any software replacement or upgrade.
- 16.2. The training referred to in Clause 16.1 shall take place at the EXEED Asset at a time to be agreed by the Parties acting reasonably and the costs of such training shall be borne by the ESCO.
- 16.3. If the ESCO adds to, changes, replaces, modifies, upgrades or alters any of the Equipment and/or the Existing Equipment in accordance with Clause 26 then it shall as soon as possible and at its own expense provide all necessary training to the Client's staff on such addition, change, replacement, modification, upgrade or alteration to the Equipment and/or Existing Equipment including any upgraded software.

17. MALFUNCTION, EMERGENCIES & REPAIR OF EQUIPMENT

- 17.1. The Client shall use reasonable endeavours to notify the ESCO of it becoming aware of the occurrence of any malfunction or emergency condition affecting the operation of the Equipment or Existing Equipment that might materially impact upon the Energy Savings and the ESCO shall respond and proceed with corrective measures within:

³⁹ Refer to any internal client protocols (if any) here.

⁴⁰ Clause may be rendered unnecessary if ESCO is assuming full operational and maintenance responsibility – would be deleted and marked 'not used'.

- 17.1.1. [6 hours]⁴¹ if such notification is received during normal business hours being Mondays to Fridays inclusive from 9.00hrs to 17.00hrs; or
 - 17.1.2. [12 hours]⁴² if such notification is received outside of normal business hours being Mondays to Fridays inclusive from 17.00hrs to 9.00hrs, weekends or public holidays.
- 17.2. When requested in writing by the Client the ESCO shall provide a written record of all service work performed pursuant to this Clause 17 upon written request by Client. This record shall include amongst other things the reason for the service, description of the problem, the corrective action performed and the outcome of the corrective action.
- 17.3. The Client shall take reasonable steps to protect the Equipment and the Existing Equipment from damage, harm, theft or misuse during the Term of this Agreement.
- 17.4. Notwithstanding the foregoing the Client may take reasonable steps to protect the Equipment and the Existing Equipment if due to an emergency it is not practical to notify the ESCO before taking any such actions. In the event of such an emergency the Client may take reasonable steps to protect the Equipment and the Existing Equipment from damage or injury and shall follow reasonable instructions for emergency action provided in advance by the ESCO⁴³.
- 17.5. If it is necessary to effect repairs or replacements as a result of a major malfunction or breakdown of any of the Equipment and/or Existing Equipment caused by any negligent act by the Client or breach of its obligations under this Agreement, the ESCO shall upon prior written approval by the Client:
 - 17.5.1. take any necessary corrective action the cost of which shall be recoverable from the Client upon delivery by the ESCO of all relevant invoices and any other information as may reasonably be requested by the Client; and
 - 17.5.2. subject to the provisions of Clause 20 either adjust the Shared Savings Ratio or extend the Term of this Agreement.
- 17.6. The ESCO shall have no liability to the Client for any interruption to the energy supply to the EXEED Asset where such interruption of supply is due to a *force majeure* event as set out in Clause 32.
- 17.7. The Client shall comply with its obligations under this Clause 17 in accordance with and having regard to the Operations Manual.
- 17.8. During the Term of this Agreement the Client will not without the prior written consent of the ESCO (such consent not to be unreasonably withheld or delayed) add or install any accessory, device or other object on any of the Equipment and/or the Existing Equipment if such addition or installation will or is likely to significantly change or impair the originally intended functions or use of the Equipment and/or the Existing Equipment.

⁴¹ Indicative timeframe only – clients should consider including a more detailed table or schedule of response times if necessary in respect of key equipment at their facilities.

⁴² Indicative timeframe only.

⁴³ Obligation on ESCO to provide emergency action plan.

18. MAINTENANCE⁴⁴, REPLACEMENT AND HANDOVER OF EQUIPMENT AND EXISTING EQUIPMENT

- 18.1. The ESCO shall be responsible for the maintenance and upkeep of the Equipment [and the Existing Equipment] and is obliged to carry out any technical, administrative and management measures during the lifecycle of any item (including but not limited to any part, component, device, sub-system, functional unit, operating equipment or system which can be looked at discretely) of the Equipment [and/or the Existing Equipment] to maintain or restore its operative condition.
- 18.2. The Client shall incur no cost for the maintenance, servicing or adjustment of the Equipment or the Existing Equipment provided however that when such need arises due to the negligence or misconduct of the Client or any employee or other agent of the Client then the Client shall be liable for the cost of such maintenance, servicing or adjustment insofar as such cost is not covered by any warranty or insurance proceeds.
- 18.3. Upon the expiry of the Term of this Agreement the ESCO shall hand over the Equipment and Existing Equipment in a condition which can be regarded as secure and operative taking account of normal wear and tear. [The condition of the Equipment and Existing Equipment shall be comparable to the condition which is generally to be expected in the case of comparable services, comparable service lives and proper maintenance in accordance with []⁴⁵].
- 18.4. In addition to its maintenance obligations under this Agreement the ESCO undertakes to replace any item of Equipment and/or Existing Equipment at its own expense upon expiry of its life cycle during the Term of this Agreement. The ESCO acknowledges that the life cycle of any item of Equipment and/or Existing Equipment may expire prior to the end of the Term of this Agreement and the ESCO shall not be entitled to any uplift in the Monthly Payment or any further remuneration for complying with this obligation.

19. AVAILABILITY OF EQUIPMENT

- 19.1. Where any of the Equipment and/or Existing Equipment is underperforming or unavailable for any reason during the Term of this Agreement any reduction in energy consumption resulting from such underperformance or unavailability shall not be deemed to be an Energy Saving for the purposes of this Agreement and the Contract Baseline shall be adjusted in accordance with Clause 20 to take account of such underperformance or unavailability.

⁴⁴ ESCO's maintenance responsibilities will be discussed during dialogue and can be specified in Client requirements in tender documents – will vary on project by project basis.

⁴⁵ Insert relevant standard.

- **PART 3 – MEASUREMENT, VERIFICATION & PAYMENT**

20. ADJUSTMENT OF VALUES FOR THE CONTRACT BASELINE ENERGY CONSUMPTION

20.1. In the calculation of Energy Savings the Contract Baseline shall, subject to the provisions of this Agreement, remain constant for the duration of this Agreement, except in circumstances where there is:

20.1.1. a change in the use of all or part of the EXEED Asset;

20.1.2. a change in the occupancy rate of the EXEED Asset;

20.1.3. a modification to or enlargement of the EXEED Asset;

20.1.4. implementation of new standards and/or any kind of regulation governing lighting, temperature, relative humidity or ventilation conditions in the EXEED Asset;

20.1.5. additional enhancements to or reduction of the scope of the Works requested by the Client which differ from those set out in the EXEED Pre-Investment Studies;

20.1.6. replacement or repair of the Equipment and/or Existing Equipment to improve its efficiency or functionality; or

20.1.7. additional work requested in writing by the Client that results in an increase or decrease in the amount of Energy used within the EXEED Asset.

20.2. After consultation with and upon prior written approval by the Client the ESCO may, if it deems it necessary, increase or decrease the Contract Baseline as a result of any of the changes referred to in Clause 20.1.

20.3. If the Contract Baseline is adjusted under Clause 20.2 the ESCO shall provide the Client with a Contract Baseline Adjustment Notice summarising the new values within 15 (fifteen) Business Days.

20.4. If the Client advises the ESCO Representative in accordance with Clause 20.2 that it does not approve the adjusted Contract Baseline all payments to be made by the Client shall continue to be calculated on the basis of the values that existed immediately prior to the Contract Baseline Adjustment Notice and the matter shall be referred to expert determination in accordance with Clause 49.

21. ENERGY SAVINGS CALCULATION & PAYMENT

21.1. The Client will continue to make payments directly to any and all suppliers for energy supplied or received at the EXEED Asset.

21.2. Subject to Clause 24.2, from the Commencement Date the Client shall pay the ESCO the Monthly Payment which shall be payable by the Client within 15 (fifteen) Business Days of the end of the calendar month to which the payment relates.

- 21.3. Energy Savings shall be measured and/or calculated by the ESCO and approved by the Client for each Reconciliation Period as specified in Schedule 1.
- 21.4. Within 5 (five) Business Days after the end of each Reconciliation Period the ESCO will send a measurement and verification report to the Client detailing the Energy Savings for each energy type achieved at the EXEED Asset during that Reconciliation Period together with a valid VAT invoice for payment in accordance with the provisions of this Clause 21.
- 21.5. Where the Shared Savings Amount for a Reconciliation Period is less than the aggregate of the Monthly Payments paid by the Client during that Reconciliation Period then the ESCO shall pay the Client the difference between the two amounts.
- 21.6. Where the Shared Savings Amount for a Reconciliation Period is greater than the aggregate of the Monthly Payments paid by the Client during that Reconciliation Period then subject to Clause 21.7 the Client shall pay the ESCO the difference between the two amounts.
- 21.7. Where the Client approves the contents of the ESCO's report submitted under Clause 21.4 it shall make the relevant payment due under Clause 21.6 within 15 (fifteen) Business Days of the receipt of such report.
- 21.8. Incorrect or incomplete invoices may be returned by the Client to the ESCO for correction with consequential effects on the due date of payment.
- 21.9. Both parties acknowledge that the calculation of Energy Savings is in part dependent upon the weather conditions that apply. In the event of any period of extreme weather events where in a calendar month during following the Acceptance Date a Weather Measurement exceeds the number of days for the same item, the same weather station, and the corresponding month in "Weather Events WE 1.0" published by www.constructionprocurement.gov.ie on the Acceptance Date and as may be updated from time to time the parties agree to review the payment terms with a view to minimising the potential overpayment or underpayment which relates to the effectiveness of the energy efficiency. If agreement is not reached within 5 (five) Business Days of any adjustment, the parties may refer the matter to under Clause 49 for determination.
- 21.10. Wherever any sum of money is recoverable from or payable by the ESCO under this Agreement (including any sum which the ESCO is liable to pay to the Client in respect of any breach of this Agreement), the Client may deduct that sum from any sum then due, or which at any later time may become due to the ESCO under this Agreement or under any other agreement or contract with the Client. Any overpayment by either Party shall be a sum of money recoverable by the Party who made the overpayment from the Party in receipt of the overpayment.
- 21.11. Any disputes in relation to payment under this Clause 21 shall be determined under the dispute resolution procedure in Clause 49.

22. EXEED M&V PERIOD AND RETENTION

- 22.1. The ESCO acknowledges that the EXEED Asset must have achieved the EXEED Standard at the end of the EXEED M&V Period.

- 22.2. No earlier than [] days before the expiry of the EXEED M&V Period the ESCO shall permit the Client and the relevant independent certifying body⁴⁶ to carry out an inspection and audit of the performance of the EXEED Asset. If that inspection and audit shows that the EXEED Asset has met the EXEED Standard to SEAI's satisfaction then the ESCO shall be entitled to be paid the EXEED Retention Amount within [] days.
- 22.3. If the EXEED Asset does not achieve the EXEED Standard to SEAI's reasonable satisfaction then the ESCO acknowledges it shall have no entitlement to the EXEED Retention Amount.

23. TAXES

- 23.1. All fees, rates, prices and charges noted in this Agreement are net prices excluding VAT and furthermore exclude taxes, charges, duties, fees, assessments and tariffs or governmental charges of whatsoever nature that may be imposed on the ESCO with respect to the transactions under this Agreement.
- 23.2. Any payment of VAT to the ESCO shall be subject to the issue of an invoice complying with the provisions of Chapter 2 Part 9 of the Value Added Tax Consolidation Act 2010 and related VAT regulations.
- 23.3. All payments to be made by the Client under this Agreement are stated on a gross basis and are subject to the making of any deduction or withholding on account of Tax as is required by any applicable legislation or the published practice of the Revenue Commissioners (whether such laws or practice are in force at the date of this Agreement or at any time in the future).

⁴⁶ Insert name of the applicable independent certification body here, if known

- PART 5 - EXEED

24. EXEED GRANT SCHEME

24.1. The ESCO shall ensure that the EXEED Grant Conditions are satisfied in full and will provide all required support and assistance to the Client with the EXEED grant scheme, including but not limited to:

24.1.1. the EXEED grant funding payment process;

24.1.2. any scope change applications; and

24.1.3. any extension of time applications.

24.2. The ESCO shall use all reasonable skill, care and diligence in performing its duties and discharging its obligations hereunder so as not, by any act or omission, cause or contribute towards a breach of the Client's duties and obligations under the EXEED Grant Agreement.

24.3. For the purposes of this Agreement (and in particular Clause 24.2) the Client shall make available to the ESCO upon reasonable notice a copy of the final form of the EXEED Grant Agreement (minus any commercially sensitive information) and the ESCO shall not be entitled to contend that it has not had reasonable opportunity to inspect the EXEED Grant Agreement and shall be on notice of the relevant provisions therein

24.4. The ESCO acknowledges that if it fails to achieve Substantial Completion of the Works by the EXEED Project Completion Date the Client will not receive the EXEED grant funding from SEAI. In such circumstances, where the Client elects not to terminate this Agreement pursuant to Clause 34.2.1 the Client shall be entitled to reduce the Monthly Payment by []%.

24.5. If the amount of EXEED grant funding paid to the Client is less than the full amount for any reason, including but not limited to:

24.5.1. any site inspection findings not being to SEAI's satisfaction;

24.5.2. any audit findings not being to SEAI's satisfaction;

24.5.3. the EXEED Standard has not been achieved; and/or

24.5.4. failure to comply with the terms of the EXEED Grant Agreement

when any of the above has been caused or contributed to by the ESCO (whether by act or omission) then the Monthly Payment shall be proportionately reduced until such time as the EXEED Standard may be achieved and the grant funding is paid in full.

24.6. No later than 20 (twenty) Business Days after the date falling 18 (eighteen) months after Acceptance Date the ESCO shall provide the Client with a measurement and verification report of the performance of the EXEED Asset against the EXEED Baseline in such form as may be required by SEAI. Should the ESCO fail to provide such report then the Client shall

be entitled to withhold 10% of each subsequent Monthly Payment until such time as the ESCO provides the report.

- **PART 4 - MISCELLANEOUS**

25. VARIATIONS

- 25.1. Where the Client wishes to implement a Material Change at the EXEED Asset it shall notify the ESCO in writing as soon as practical and in any event no later than 15 (fifteen) Business Days before the Material Change is implemented and the ESCO shall deliver a Variation Estimate to the Client within 5 (five) Business Days of receipt of such notice.
- 25.2. As soon as practicable after receipt by the Client of a Variation Estimate under either Clause 25.1 the Parties will meet to discuss and agree its contents (with or without modification) and in particular whether any costs that will be incurred by the ESCO as a result of such variation shall be recoverable:
 - 25.2.1. by way of an adjustment to the Shared Savings Ratio (either on a temporary basis or for the remainder of the Term);
 - 25.2.2. by an extension to the Term; or
 - 25.2.3. directly from the Client upon delivery by the ESCO of all relevant invoices and any other information as may reasonably be requested by the Client.
- 25.3. Where the Parties agree to the final contents of the Variation Estimate following the discussions under Clause 25.2 they shall confirm their agreement in writing at the earliest opportunity (and in any event no later than 10 (ten) Business Days) and the variation to the Works and/or Services shall have effect from the date of such agreement.
- 25.4. Where the Parties cannot agree to the final contents of the Variation Estimate within 15 (fifteen) Business Days of the commencement of discussions under Clause 25.2 the matter shall be referred to dispute resolution in accordance with Clause 48. Until such matter has been resolved the ESCO shall not be obliged to proceed with any proposed variation to the Works and/or the Services.
- 25.5. The obligations of both Parties under this Agreement shall not be affected where a Variation Estimate is either being considered under this Clause 25 or has been referred to dispute resolution under Clause 48.

26. VALUE ENGINEERING

- 26.1. The ESCO may give the Client a written value engineering proposal that if adopted will either:
 - 26.1.1. adjust the Shared Savings Ratio; and/or
 - 26.1.2. extend the Term.
- 26.2. The ESCO's value engineering proposal shall include any proposed changes to this Agreement and/or the attached Schedules.

- 26.3. The Client shall as soon as practicable notify the ESCO in writing of its acceptance or rejection of the ESCO's value engineering proposal.
- 26.4. Where the Client accepts the ESCO's value engineering proposal this Agreement shall be amended accordingly and the ESCO shall implement the value engineering measures from such date as the Parties agree in writing.

27. OBLIGATIONS OF THE ESCO

- 27.1. The ESCO shall use a selection process for Equipment, installers, and/or Subcontractors that provides the best value to the Client by using a transparent competitive approach which will be subject to audit and review by the Client.
- 27.2. The competitive selection processes referred to in Clause 27.1 may be waived for the following reasons and only after written approval is granted by the Client:
- 27.2.1. it can be clearly demonstrated that only one supplier is capable of providing the service or product that meet the requirements of the Works [or the Tender Design Documents]⁴⁷; or
- 27.2.2. an emergency situation in order to restore building services to the EXEED Asset or mitigate pending interruption of building services to the EXEED Asset.

28. INTELLECTUAL PROPERTY RIGHTS

- 28.1. Neither Party shall acquire any interest in the Intellectual Property of the other Party by virtue of this Agreement.
- 28.2. The ESCO warrants that it owns or is licensed to use all Intellectual Property necessary for the completion of the Works and the Services and that such Intellectual Property does not infringe, misappropriate, dilute or otherwise violate the rights of any third party.
- 28.3. The ESCO hereby indemnifies the Client from any and all third-party Intellectual Property claims against the Client relating to the use by the ESCO or the Client of any Intellectual Property necessary for the completion of the Works and/or the Services under this Agreement.
- 28.4. The ESCO hereby grants to the Client a royalty-free non-exclusive licence for any and all software or other Intellectual Property rights (including by way of present assignment of future copyright) necessary for the Client to continue to operate, maintain, and repair the Equipment and/or Existing Equipment.
- 28.5. The Client grants to the ESCO a royalty-free non-exclusive licence (but with no right to grant sub-licences save for with the prior written consent of the Client) to use the Client's pre-existing Intellectual Property rights during the currency of this Agreement to the extent necessary to enable the ESCO to fulfil its obligations under this Agreement.
- 28.6. The ESCO undertakes that all and any necessary consents and/or licences for any software, instrument, modality or methodology are obtained and in place before use for the purposes

⁴⁷ Delete if project not procured through tender process

of this Agreement and shall ensure that the Client shall be vested with all such necessary rights to enable the Client to enjoy the benefit of the Works and/or Services.

- 28.7. The ESCO shall waive or procure a waiver of any moral rights subsisting in copyright produced under or in connection with the performance of this Agreement.
- 28.8. The ESCO hereby acknowledges and confirms that all Intellectual Property rights, title and interest in the Materials (or any part or parts thereof) shall vest in the Client. For the avoidance of doubt the ESCO hereby assigns to the Client all Intellectual Property rights, title and interest it may be deemed by law to have in the Materials (including by way of present assignment of future copyright).
- 28.9. Upon the expiry or termination of this Agreement for whatever reason the ESCO shall immediately deliver up to the Client all Materials prepared up to the date of expiry or termination and the ESCO may retain one paper copy of the Materials in its legal files for the purpose of and only to the extent necessary for ensuring compliance with its obligations under this Agreement.
- 28.10. The terms of this Clause 28 shall survive the expiry or termination (for whatever reason) of this Agreement.

29. LICENCES, PERMITS, APPROVALS & COORDINATION

- 29.1. The Client shall provide reasonable assistance to the ESCO in obtaining all necessary licences, permits and approvals for the carrying out of the Works and the performance of the Services and the ESCO shall bear the cost of obtaining all such permits and approvals.
- 29.2. The Equipment and the operation of the Equipment and the Existing Equipment by the ESCO shall at all times comply with all relevant statutory and legal requirements.
- 29.3. Nothing in Clause 29.1 shall imply or import any financial obligations on or any commitment by the Client of resources or materials or imply or import any obligation on the Client to implement any material change to the Works or Services governed by and/or contemplated by this Agreement.
- 29.4. For the avoidance of doubt the ESCO acknowledges that nothing in this Agreement shall imply or import or be deemed to imply or import any obligation on the Client to introduce or propose any legislative or regulatory reform for the purpose of enabling the ESCO to obtain any necessary licences, permits or approvals as the case may be.
- 29.5. The ESCO shall coordinate the activities of its employees, Subcontractors, equipment installers and service providers with those of the Client, its employees and agents.

30. INSURANCES

- 30.1. From the date of execution of this Agreement and throughout the Term the ESCO shall maintain in full force and effect, and at its expense the following insurances from a reputable insurance company licensed to write business in Ireland:
 - 30.1.1. Professional Indemnity Insurance of €[] million (million euro) for each and every claim for 6 (six) years after the Acceptance Date;

- 30.1.2. Public Liability Insurance of €[] million (million euro) for each and every claim for the Term of this Agreement;
 - 30.1.3. Employer's Liability Insurance of €[] million (million euro) for each and every claim for the Term of this Agreement; and
 - 30.1.4. Contractor's All Risk Insurance to a minimum of the replacement value as new of the Works for the Interim Period and the ESCO acknowledges and agrees that all proceeds paid by insurers under such policy shall be applied to repair, reinstate and replace any parts of the Works, Services and/or Equipment and/or the Existing Equipment in respect of which the proceeds were received.
- 30.2. Upon the Client's request the ESCO shall immediately provide documentary evidence satisfactory to the Client to show that the insurance policies required under this clause are being maintained.
- 30.3. The ESCO shall immediately inform the Client in writing upon any change to its insured status.

31. LIMITATION ON LIABILITY & IDEMNITY

- 31.1. The Client shall not be liable to the ESCO for any loss including but not limited to special, indirect, consequential, remote, punitive or exemplary loss or loss of profit or revenue, loss of use or similar damages suffered by the ESCO arising out of, under or in connection with this Agreement.
- 31.2. The ESCO hereby irrevocably indemnifies and holds harmless the Client from and against any costs, claims, demands, damages, expenses, losses, liabilities, fines, proceedings, actions, charges, penalties directly or indirectly suffered and/or incurred by the Client which arise out of, in connection with, in consequence upon or relate to:
- 31.2.1. the performance and/or non-performance by the ESCO of its obligations under this Agreement; and/or
 - 31.2.2. the acts, errors, omissions, recklessness or negligence of the ESCO or its officers, contractors, Subcontractors, employees, agents or personnel.
- 31.3. The liability of the ESCO arising out of, under or in connection with this Agreement other than in respect of personal injury or death shall not exceed [] for [any one claim]/[each and every claim] in any one calendar year.
- 31.4. Except as otherwise expressly provided by this Agreement, all remedies available to either Party for breach of this Agreement are cumulative and may be exercised concurrently or separately, and the exercise of any one remedy shall not be deemed an election of such remedy to the exclusion of other remedies.

32. FORCE MAJEURE

32.1. Notwithstanding any other provisions of this Agreement, neither Party shall be liable to the other for any non-performance or delay in the performance of this Agreement due to:

32.1.1. war;

32.1.2. revolution;

32.1.3. civil commotion;

32.1.4. labour disputes (save for disputes at the ESCO, its agents or Subcontractors);

32.1.5. floods;

32.1.6. hurricanes, similar storms or other actions of the elements;

32.1.7. acts of God or the public enemy;

32.1.8. restriction or restraints of governmental authorities whether State or local; or

32.1.9. acts of civil or military authorities.

32.2. In the event of any failure, interruption or delay in the performance of either Party's obligations (or of any of them) resulting from any *force majeure* event the affected Party shall promptly notify the other Party in writing specifying:

32.2.1. the nature of the *force majeure* event;

32.2.2. the anticipated delay in the performance of obligations;

32.2.3. the action proposed to minimise the impact of the *force majeure* event; and

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

32.3. If the *force majeure* event continues for 40 (forty) Business Days either Party may terminate at 10 (ten) Business Days' written notice. In circumstances where the ESCO is the affected Party the Client shall be relieved from any obligation to make payments under this Agreement save to the extent that payments are properly due and payable for obligations actually fulfilled by the ESCO in accordance with the terms and conditions of this Agreement.

33. SUSPENSION

33.1. The Client shall be entitled to suspend all or any part of the Works and/or the Services upon written notice to the ESCO.

- 33.2. In the event of a suspension of the Works under Clause 33.1 the ESCO shall be entitled to an extension to the timelines in the Works Schedule and the Target Substantial Completion Date equal to the period of such suspension.
- 33.3. If any suspension under Clause 33.1 lasts for more than 6 (six) months then either Party shall be entitled to terminate this Agreement with immediate effect upon delivery of written notice to the other subject to the provisions of Clause 35.
- 33.4. If the Client fails to pay any amount due to the ESCO under Clause 21.7 the ESCO may submit a written demand for payment to the Client notifying the Client of its intention to suspend the Services if the payment has not been made within 7 (seven) Business Days of the receipt of such written demand.
- 33.5. A notice from the ESCO under Clause 33.4 shall specify:
- 33.5.1. the grounds on which the ESCO intends to suspend the Services; and
- 33.5.2. the date on which the proposed suspension is to begin.
- 33.6. The ESCO shall immediately resume the Services following payment by the Client of the outstanding amount being the subject of the written demand under Clause 33.4.
- 33.7. If any suspension under Clause 33.4 lasts for more than 6 (six) months then either Party shall be entitled to terminate this Agreement with immediate effect upon delivery of written notice to the other subject to the provisions of Clause 35.

34. TERMINATION

- 34.1. The Client shall be entitled to terminate the ESCO's obligations under this Agreement at its election on 20 (twenty) Business Days' notice to the ESCO.
- 34.2. The Client shall be entitled (but not obliged) to terminate this Agreement by written notice to the ESCO during the Term of this Agreement if:
- 34.2.1. the ESCO fails to achieve Substantial Completion by the EXEED Project Completion Date;
- 34.2.2. the ESCO commits any material breach of the terms hereof and fails to remedy same within 10 (ten) Business Days after receipt of written notice of such breach having been served by Client; or
- 34.2.3. either of the ESCO or the Guarantor is declared insolvent or makes a composition or arrangement with creditors or has a winding up order made (except for the purposes of amalgamation or restructuring) or has a liquidator (provisional or otherwise), receiver, manager or examiner of its business or undertaking duly appointed and, in the case of the Guarantor, a replacement has not been appointed within 1 (one) month.
- 34.3. The right of the Client to terminate this Agreement shall be without prejudice to any other rights or remedy either Party may have in respect of the breach concerned or any other breach.

35. CONSEQUENCES OF TERMINATION

35.1. If the Agreement is terminated under Clause 33.3, Clause 33.7 or Clause 34.1 the Client shall pay the ESCO:

35.1.1. an amount equal to the cost of the Works carried out up to the date of termination less any amounts attributable to the Works as have been reimbursed to the ESCO through the Monthly Payments up to such date [together with any reasonable profit thereon] (to the extent not included in any amount in Clause 35.1.2 below);

35.1.2. the then current fair market value of the Equipment less any amounts attributable to the Equipment as have been reimbursed to the ESCO through the Monthly Payments up to such date [together with any reasonable profit thereon];

35.1.3. any outstanding payments due and payable by the Client to the ESCO under this Agreement at the date of such termination; and

35.1.4. any reasonable demobilisation costs upon delivery of all relevant invoices and any other information as may reasonably be requested by the Client.

35.2. Upon termination of this Agreement under Clause 34.2.1, Clause 34.2.2 or Clause 34.2.3 the Client shall pay the ESCO:

35.2.1. an amount equal to the cost of the Works carried out up to the date of termination less any amounts attributable to the Works as have been reimbursed to the ESCO through the Monthly Payments up to such date (to the extent not included in any amount in Clause 35.2.2 below);

35.2.2. the then current fair market value of the Equipment less any amounts attributable to the Equipment as have been reimbursed to the ESCO through the Monthly Payments up to such date; and

35.2.3. any outstanding payments due and payable by the Client to the ESCO under this Agreement at the date of such termination.

35.3. Upon termination of this Agreement under Clause 12.5 or Clause 32.3 the Client shall pay the ESCO:

35.3.1. an amount equal to the cost of the Works carried out up to the date of termination less any amounts attributable to the Works as have been reimbursed to the ESCO through the Monthly Payments up to such date (to the extent not included in any amount in Clause 35.3.2 below);

35.3.2. the then current fair market value of the Equipment less any amounts attributable to the Equipment as have been reimbursed to the ESCO through the Monthly Payments up to such date;

35.3.3. any outstanding payments due and payable by the Client to the ESCO under this Agreement at the date of such termination; and

- 35.3.4. any reasonable demobilisation costs upon delivery of all relevant invoices and any other information as may reasonably be requested by the Client.
- 35.4. The then current fair market value of the Equipment referred to in Clauses 35.1.2, 35.2.2 and 35.3.2 shall be agreed between the Parties acting reasonably or in the absence of such agreement shall be determined by expert determination in accordance with Clause 49 of this Agreement.
- 35.5. Any payments under this Clause 35 will be made within 60 (sixty) Business Days of the date of such termination of the Agreement.
- 35.6. The ESCO shall remove all employees, staff, Subcontractors and other persons for whom the ESCO is responsible under this Agreement together with any plant, equipment, machinery, tools and other property of the ESCO from the EXEED Asset in an orderly manner as soon as reasonably possible following termination or expiry of this Agreement and shall ensure that those parts of the EXEED Asset from which the ESCO removes its plant, equipment, machinery, tools and other property are left in a clean and tidy condition.
- 35.7. If requested, the ESCO shall, upon the termination of this Agreement for any reason or prior to the expiry of the Agreement, promptly furnish such anonymised information relating to the terms and conditions of the employment of all persons providing the Services as may be required by the Client. The ESCO agrees to the Client releasing any such anonymised information to third party tenderers for the purposes of any procurement competition for the provision of the Services upon expiry of the Agreement or earlier termination of this Agreement for whatever cause.

36. ESCO AS PRIME CONTRACTOR, PROJECT GOVERNANCE, ASSIGNMENT & SUBCONTRACTING

- 36.1. The ESCO is deemed to be the prime contractor under this Agreement and the ESCO assumes full responsibility for the delivery of the Works and/or the Services and shall assume all the duties, responsibilities and obligations associated with the position of prime contractor.
- 36.2. The ESCO as prime contractor hereby assumes liability for its employees, agents and Subcontractors and undertakes that its employees, agents and Subcontractors shall comply in all respects with the relevant terms of this Agreement to the extent that they are retained by the ESCO.

- 36.3. The ESCO agrees to keep the Client advised of any matter which may materially impact on the ESCO's obligations under this Agreement and to comply with the reporting arrangements and governance protocols required by the Client from time to time. The roles and responsibilities of the parties are detailed in Schedule 8. The ESCO shall advise the Client in writing of any material alterations to its governance, Works and Services delivery and business continuity processes and procedures.
- 36.4. The ESCO shall not assign and/or subcontract the benefit and/or burden of this Agreement in whole or in part to any third party without the prior written approval of the Client (such approval not to be unreasonably withheld or delayed and subject to the Client's obligations at law) provided always that the ESCO shall remain primarily liable to the Client for the due performance of all of its obligations under this Agreement.
- 36.5. The ESCO shall require its employees, agents and Subcontractors to exercise due skill, care, diligence, efficiency and professional conduct in the carrying out of any obligations allocated, assigned or subcontracted by the ESCO to its employees, agents and Subcontractors pursuant to its obligations under this Agreement.

37. NO AGENCY

- 37.1. The ESCO will at all times be an independent contractor and nothing in this Agreement will be construed (and the ESCO will not hold out its relationship) as constituting a partnership, joint venture, representation, agency or employer and employee relationship between the Client and the ESCO or any of the ESCO's or its Subcontractors' employees.

38. REPRESENTATIONS AND WARRANTIES

- 38.1. The ESCO warrants, represents and undertakes to the Client that:
- 38.1.1. before commencing performance of this Agreement it shall have provided proof and documentation of required insurance pursuant to this Agreement;
 - 38.1.2. it shall make available, upon reasonable request by the Client, all documents relating to its performance under this Agreement, including all contracts and subcontracts entered into;
 - 38.1.3. the Works will meet or exceed the provisions set out in the Works Schedule; and
 - 38.1.4. the Equipment is or will be compatible with all other mechanical and electrical systems, subsystems, or components with which the Equipment interacts, and that, as installed, neither the Equipment nor such other systems, subsystems, or components will materially adversely affect each other as a direct or indirect result of Equipment installation or operation.
- 38.2. The Client warrants, represents and undertakes to the ESCO that it shall provide all access to the EXEED Asset reasonably required by the ESCO to carry out its obligations under this Agreement. The ESCO shall be granted immediate access to the EXEED Asset to make emergency repairs or corrections as it may in its discretion determine are needed.
- 38.3. Notwithstanding the provisions of Clause 38.2 the Client shall not be obliged to provide access to the EXEED Asset or any part thereof in circumstances where the ESCO has

accelerated its programme or where a revision of such programme is due to the delay, act or omission of the ESCO although the Client shall at all times use reasonable endeavours to provide access in such circumstances.

39. CHANGE IN LAW⁴⁸

39.1. Where a change in Relevant Legislation which is not foreseeable on the date of execution of this Agreement occurs or is about to occur either Party may give the other written notice of its opinion as to any:

39.1.1. change to the Works and/or the Services, and/or

39.1.2. adjustment of the Shared Savings Ratio, and/or

39.1.3. change to the terms of this Agreement

necessitated by the change in Relevant Legislation.

39.2. The Parties shall meet within 5 (five) Business Days of the written notice referred to in Clause 39.1 to discuss and agree any of the proposed changes set out in the notice and in the absence of such agreement the Parties shall refer the matter to dispute resolution in accordance with Clause 48.

40. TRANSFERRING EMPLOYEES⁴⁹

40.1. The ESCO shall comply with all applicable obligations arising pursuant to the Transfer Regulations and failure to so comply shall constitute a material breach of this Agreement.

40.2. The ESCO shall indemnify, hold harmless and keep the Client indemnified from and against all liabilities (including the cost of wages, salaries and other remuneration or benefits, expenses, taxation, PRSI payments, health contributions, levies, losses, claims, demands, actions, fines, penalties, awards, (including legal expenses on an indemnity basis)) from, or incurred by reason of any claims made against the Client under the Transfer Regulations by any Affected Employees.

41. CONFIDENTIALITY

41.1. This Agreement creates a confidential relationship between the ESCO and the Client and both Parties acknowledge that in carrying out their duties and obligations under this Agreement each will have access to Confidential Information of the other.

41.2. Each of the Parties to this Agreement agrees to hold confidential all information, documentation and other material received, provided or obtained arising from their participation in this Agreement and shall not disclose same to any third party unless authorised in writing by the other Party except:

41.2.1. to its professional advisers subject to the provisions of this Clause 41;

41.2.2. as may be required by law;

⁴⁸ Provision to be inserted.

⁴⁹ Optional clause – if not applicable delete text and mark as 'Not Used'.

- 41.2.3. as may be necessary to give effect to the terms of this Agreement subject to the provisions of this Clause 42; or
- 41.2.4. in the case of the Client by request of any person or body or authority whose request the Client or persons associated with the Client (including but not limited to the Legislature and/or the Executive and/or the Civil Service) considers it necessary or appropriate to so comply.
- 41.3. Neither Party shall disclose any Confidential Information to any third party unless authorised in writing by the other Party. The ESCO may only make copies of Confidential Information where necessary for the performance of the Services.
- 41.4. Upon cessation of the Works and/or Services, upon termination or expiration of this Agreement or upon either Party's written request, each Party shall return or destroy to the other Party all Confidential Information in their control and the ESCO shall erase any Confidential Information held by it in electronic form. The ESCO shall furnish a certificate to that effect as soon as possible if requested by the Client in writing.
- 41.5. The obligations in this Clause 41 will not apply to any Confidential Information:
 - 41.5.1. in the ESCO's possession (with full right to disclose) before receiving it from the Client;
 - 41.5.2. which is or becomes public knowledge other than by breach of this clause;
 - 41.5.3. is independently developed by the ESCO without access to or use of the Confidential Information; or
 - 41.5.4. is lawfully received from a third party (with full right to disclose).
- 41.6. The terms of this Clause 41 shall survive expiry, completion or termination for whatever reason of this Agreement.

42. WAIVER

- 42.1. Failure of either Party to enforce or exercise at any time or for any period any term of this Agreement does not constitute and shall not be construed as a waiver of such term and shall not affect that Party's right to enforce such term or any other term contained in this Agreement at a later date.

43. NOTICE

- 43.1. Any notice required or permitted hereunder shall be deemed sufficient if given in writing and delivered personally or sent by registered or certified mail to the address shown below or to such other persons or addresses as are specified by similar notice.

To the ESCO: Attention: []
Include copy to: []

To the Client: Attention: []

Include Copy to: []

44. SEVERABILITY

44.1. The invalidity or unenforceability of any term of or any right arising pursuant to this Agreement shall not adversely affect the validity or enforceability of the remaining terms and rights.

45. COOPERATION

45.1. Each Party will cooperate with and assist the other Party, its advisors, consultants, legal advisors, employees, agents, and representatives at all times during the Term of this Agreement.

46. ENTIRE AGREEMENT AND PRIORITY OF DOCUMENTS

46.1. This Agreement when executed together with all Schedules attached hereto or to be attached hereto as provided for by this Agreement [together with the Invitation to Tender]⁵⁰ shall constitute the entire contract between both Parties and supersedes and replaces any previous agreements, arrangements or understandings between the Parties in respect of the subject matter hereof.

46.2. In the event of any conflict, ambiguity or discrepancy between the provisions of this Agreement and/or the Schedules attached hereto or to be attached hereto [and/or the Invitation to Tender]⁵¹ the following priority of documents shall apply (in descending order):

46.2.1. this Agreement

46.2.2. the Schedules

46.2.3. [the Invitation to Tender]⁵²

46.2.4. the EXEED Pre-Investment Studies

46.2.5. [the ESCO's tender]⁵³

[unless the ESCO's tender offers a higher standard of work and/or services in which case the ESCO's tender shall prevail]⁵⁴.

46.3. In the event of any conflict, ambiguity or discrepancy between the Key Provisions and the rest of the provisions of this Agreement, the Key Provisions shall prevail.

46.4. This Agreement may not be amended or modified except by a written agreement signed by both Parties. For the avoidance of doubt, the Parties acknowledge that any amendment, deletion or other modification of the Key Provisions or any part of them may result in the SEAI withholding or refusing EXEED grant funding.

⁵⁰ Delete if project not procured through tender process

⁵¹ Delete if project not procured through tender process

⁵² Delete if project not procured through tender process

⁵³ Delete if project not procured through tender process

⁵⁴ Delete if project not procured through tender process

47. GOVERNING LAW

- 47.1. This Agreement shall be governed by and confirmed in all respects in accordance with the laws of Ireland.

48. DISPUTE RESOLUTION

- 48.1. Subject to the provisions of Clause 49 if a dispute or difference arises between the Parties with regard to or in connection with this Agreement, such dispute shall be referred in writing to senior members of each of the Client and the ESCO who will use good faith efforts to resolve such dispute within 15 (fifteen) Business Days of such referral.
- 48.2. If the Parties are unable to resolve the matter within the thirty (30) day period in Clause 48.1 the Client and the ESCO will attempt to resolve the dispute in question by mediation. Any such mediation will be conducted by a mediator to be mutually agreed upon between the Parties or in the absence of such agreement upon the request of either Party to be appointed by the President for the time being of Engineers Ireland. If a settlement of the dispute is not achieved through the mediation process within three months either Party may refer the dispute to arbitration in accordance with Clause 48.3.
- 48.3. Where the Parties are unable to resolve any dispute which may arise under or in connection with this Agreement either through good faith efforts or mediation as set out in Clauses 48.1 and 48.2 either Party may by provision of notice in writing refer the matter to arbitration. The final decision of who will act as arbitrator will be mutually agreed upon between the Parties or in the absence of such agreement the decision as to who to appoint as arbitrator will be referred upon the request of either Party to the President for the time being of Engineers Ireland. Every such reference shall be deemed to be a submission to arbitration within the meaning of the Arbitration Act 2010 or any statutory amendment therefore for the time being in force.

49. EXPERT DETERMINATION

- 49.1. Where a dispute arises under or in connection with this Agreement in relation to:
- 49.1.1. Substantial Completion;
 - 49.1.2. the Snag List;
 - 49.1.3. the calculation of Energy Savings;
 - 49.1.4. the method of measurement and verification;
 - 49.1.5. the adjustment of the Contract Baseline; or
 - 49.1.6. the calculation of the current market value of the Equipment under Clause 9 or Clause 35,

the Parties agree in the first instance to use good faith efforts to resolve the dispute within 10 (ten) Business Days as set out in Clause 48.1. If the dispute is not resolved in that time then either Party may submit the matter to an independent expert for determination.

- 49.2. Where a matter is to be referred to an independent expert under this Agreement for determination, the independent expert shall be an independent engineer (or other person with relevant expertise) agreed upon by the Parties, or, if agreement is not reached within 5 (five) Business Days of either Party giving notice to the other that it wishes to refer a matter to an independent expert, such independent engineer or other person with relevant expertise will be nominated by the President for the time being of Engineers' Ireland upon the request of either Party.
- 49.3. The Parties are entitled to make submissions to the independent expert (including oral submissions) and will provide (or procure that others provide) the independent expert with all such assistance and documents as the independent expert may reasonably require for the purpose of reaching a decision. Each Party shall with reasonable promptness supply each other with all information and give each other access to all documentation and personnel as the other Party reasonably requires to make a submission under this clause.
- 49.4. The Parties agree that the independent expert may in its reasonable discretion determine such other procedures to assist with the conduct of the determination as it considers appropriate.
- 49.5. The independent expert shall act as an expert and not as an arbitrator. The independent expert's decision shall be final and binding on the Parties in the absence of fraud or manifest error.
- 49.6. Each Party shall bear its own costs in relation to the reference to the independent expert. The independent expert's fees and any costs it properly incurs in arriving at its determination (including any fees and costs of any advisers appointed by the independent expert) shall be borne by the Parties in equal shares or in such proportions as the independent expert shall direct.
- 49.7. Pending final resolution of any dispute under this Agreement the ESCO will proceed diligently with the performance of its duties and obligations under this Agreement and the Client will continue to make payments of all undisputed amounts in accordance with this Agreement. Any disputed calculation will not take effect until final determination of the dispute in accordance with Clause 48 or 49 (as appropriate).

SCHEDULE 1⁵⁵

BASELINES AND MEASUREMENT & VERIFICATION⁵⁶ OF ENERGY SAVINGS

Part 1 – Contract Baseline

	Electricity Use (kWh/year)	Electricity Cost (€/year)	Gas Use (kWh/year)	Gas Cost (€/year)	Other Use (kWh/year)	Other Cost (€/year)
Contract Baseline						

Unit Prices⁵⁷

Electricity: []€/kWh
Gas: []€/kWh
Other: []€/kWh

Part 2 – EXEED Baseline⁵⁸

[]

Part 3 – Measurement & Verification methodology and report structure

⁵⁵ This schedule clearly sets out how measurement and verification of savings will be performed during the contract. Again this may be populated from the ESCO's tender and/or EXEED Pre-Investment Studies. The contract baseline will be set out here again for clarification purposes and the method for adjusting it will be clearly recorded here.

⁵⁶ The Parties should adopt the International Performance Measurement & Verification Protocol as their basis for M&V.

⁵⁷ Will be same as per defined term – set by Client in tender docs.

⁵⁸ The EXEED Baseline differs from the Contract Baseline and only the latter is used for the purposes of calculating energy savings under the payment provisions of Part 3 of this contract. The EXEED Baseline is produced by reference to the Building Regulations (Part L) (where they apply) and measurements against this are required for reporting purposes to SEAI. Where the Building Regulations do not apply to a project a bespoke EXEED Baseline will be developed.

SCHEDULE 2⁵⁹

EQUIPMENT AND EXISTING EQUIPMENT

(a) Equipment

(b) Existing Equipment

⁵⁹ In the interests of clarity the information under the headings set out above should be extracted and clearly set out – these headings are defined terms within the contract and they must be followed by the parties when preparing the contract.

SCHEDULE 3⁶⁰

WORKS SCHEDULE

⁶⁰ The Works being carried out by the ESCO during the Interim Period must be clearly set out in this schedule. The ESCO's programme for the Works will also be set out here.

SCHEDULE 4⁶¹
SERVICES SCHEDULE

⁶¹ The Services being performed by the ESCO during the Interim Period must be clearly set out in this schedule.

SCHEDULE 5

CLIENT INFORMATION SCHEDULE⁶²

⁶² Extracted information from Technical File and Contract Baseline Data which Client will retain responsibility for – e.g. historical occupancy rates. May delete if project not procured through tender process

SCHEDULE 6

THE EXEED ASSET⁶³

ASSET NAME	
ASSET BOUNDARY	
ASSET ADDRESS	
ASSET DESCRIPTION	

⁶³ Set out description of Client's EXEED Asset here.

SCHEDULE 7⁶⁴

TENDER DESIGN DOCUMENTS

⁶⁴ The finalised design documents against which the ESCO will carry out the Works will be set out here – this could be done by either attaching all documents, or, if this is overly burdensome, an agreed design document register clearly identifying the relevant documents may be attached here. Delete and mark as 'not used' if project not procured through tender process.

SCHEDULE 8⁶⁵

ROLES AND RESPONSIBILITIES

Role	Responsibility and authority	Name / Job Title / Email
Top Management Representative	Applying the EXEED Standard to this project	
EED Owner	Fulfilling the responsibilities set out in the EXEED Standard for the EED Owner in relation to this project	
EED Expert⁶⁶	Fulfilling the responsibilities set out in the EXEED Standard for the EED Expert in relation to this project	
Lead Applicant⁶⁷	Management of the EXEED grant application process and first point of contact for SEAI queries. Responsible for ensuring compliance with the terms and conditions of the EXEED grant scheme	
Certification Lead⁶⁸	Management of the process for obtaining certification against the EXEED standard	
ESCO EXEED Lead⁶⁹	ESCO representative leading on EXEED-related activities	
EEOS Obligated Party⁷⁰	Providing support to the project to drive additionality in terms of energy savings achieved. [Specific details of support to be explained here]	

⁶⁵ The parties shall discuss and agree their respective roles and responsibilities which shall be incorporated into a RACI matrix to be set out at this Schedule.

⁶⁶ The EED Expert will generally be independent from both the Client and the ESCO. Their details should be recorded here in all cases for reference.

⁶⁷ The EED Owner usually also fulfils the role of Lead Applicant. Alternatively, it may be another representative from the Client organisation.

⁶⁸ The EED Owner usually also fulfils this role. Alternatively, it may be another representative from the Client organisation.

⁶⁹ Will likely be (but does not have to be) the same as the ESCO Representative

⁷⁰ It is not mandatory to have support from an EEOS OP. However, if such support is received, it must be agreed in advance of project implementation and the OP must be material to the energy savings achieved. Once EXEED Verified or EXEED Managed certification is achieved, the verified energy savings can be attributed towards their target without the need for a separate EEOS application.

SCHEDULE 9⁷¹

EXEED GRANT CONDITIONS

Part 1 – Conditions to be Satisfied prior to Substantial Completion

The ESCO acknowledges that subject to all terms and conditions attached to the EXEED Grant Agreement being satisfied, the EXEED grant funding will be paid to the Client following completion of the Works. The ESCO is required to facilitate this grant payment by:

- (a) Ensuring that Works and Services are carried out in accordance with the terms and conditions of the EXEED Grant scheme and in accordance with the EXEED Standard;
- (b) Providing all relevant project documentation by the EXEED Project Completion Date, including:
 - (i) Invoices for all itemised eligible costs as determined by SEAI. These must contain adequate description and detail of the eligible costs being claimed.
 - (ii) Proof of payment in the form of the ESCO's bank statement, clearly showing the full invoice payment. All unrelated transactions may be obscured. Where the payment is for multiple invoices or is included in a larger payment, a breakdown of these payments is required to allow verification of payment.
 - (iii) Current VAT status confirmation if the ESCO is unable to reclaim VAT on the eligible costs.
 - (iv) All technical documentation required by SEAI to facilitate a site inspection and/or audit of the Works. This will depend on the specific nature of the Works but typically includes photographs, commissioning certificate, product datasheet, RECI certificate, Operations Manual and declaration of conformity for each opportunity included in the EXEED Grant Agreement.
- (c) Supporting the Client and Lead Applicant to complete the inspection spreadsheet for the project;
- (d) Providing all relevant project documentation (including the documentation at (b) above) required by SEAI in support of any planned milestone payments⁷² for works completed prior to Substantial Completion.

Part 2 – Other Conditions

- (a) Supporting the Client and Lead Applicant to respond to any technical queries from SEAI as part of the site inspection and/or audit process;
- (b) Facilitating access for site inspection by SEAI and accompanying the site inspector during the inspection, if applicable;
- (c) Carrying out any physical re-works required by SEAI following site inspection and/or audit;
- (d) Supporting the Client and Lead Applicant to provide any documentation or information requested as part of the inspection re-works process;

⁷¹ Relevant conditions of EXEED Grant to be set out here

⁷² Delete if no milestone payments to be made in advance of completion of the Works.

- (e) Facilitating access for any EXEED certification audit(s) and accompanying the site inspector during the inspection, if applicable;
- (f) Supporting the Client and Certification Lead to facilitate achievement of the EXEED Standard. The ESCO acknowledges that it shall not be entitled to the EXEED Retention Amount until the EXEED Asset has achieved the EXEED Standard.

SCHEDULE 10⁷³

EXEED PRE-INVESTMENT STUDIES

- (a) Project Execution Plan
- (b) Energy Balance Study
- (c) Challenge and Analyse
- (d) Energy Savings Register

⁷³ Relevant conditions of EXEED Grant to be set out here

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

GIVEN under the common seal of
the Client

Director/Company Secretary

Print name

Director

Print name

GIVEN under the common seal of
the ESCO

Director/Company Secretary

Print name

Director

Print name

