

#### Project Development Agreement

Siemens Industry, Inc., a Delaware corporation, through its Building Technologies Division, with its principal place of business located at 1000 Deerfield Parkway, Buffalo Grove, Illinois 60089 ("Siemens"), and \_\_\_\_\_, with its principal place of business located at \_\_\_\_\_ ("Client") (collectively the "Parties"), enter into this Project Development Agreement this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_ ("PDA") and agree as follows:

#### **RECITALS**

WHEREAS, Siemens has concluded a Feasibility Study/Preliminary Audit pursuant to a Letter of Understanding entered into between the Parties dated \_\_\_\_\_, 20\_\_\_\_;

WHEREAS, the Client has requested that Siemens perform further work for the Client;

WHEREAS, the Parties agree that Siemens will perform work under this PDA with the intention that Siemens will prepare a draft Performance Contracting Agreement ("PCA").

WHEREAS, Siemens' obligations under the PCA will include a guarantee by Siemens of the estimated savings intended to be generated by implementing the scope identified therein;

WHEREAS, Siemens must first perform an in-depth energy audit of Client's facilities to determine a feasible scope of work and estimated savings to be included in the PCA ("Investment Grade Audit" or "IGA"); and,

WHEREAS, the Parties agree that Siemens shall perform the IGA in accordance with the terms herein and that the Client shall pay Siemens in accordance with the same.

**NOW THEREFORE**, as a result of the Recitals, which are specifically incorporated herein and for the mutual consideration contained herein, the Parties agree as follows:

#### **AGREEMENT**

1. Term. Upon the date hereof, or upon such later date as agreed upon by the Parties (the "Effective Date"), Siemens shall commence performing the IGA. The term for performing the IGA shall conclude upon the submission of the draft PCA to the Client by Siemens. Siemens shall use reasonable efforts to complete the IGA no later than one hundred-twenty ( ) days from the Effective Date.
2. Required Information. The Client authorizes Siemens, its employees, agents, consultants and subcontractors, on a need to know basis, to inspect and copy all information and data that Siemens reasonably deems is necessary to sufficiently perform the IGA, whether such information is in the Client's possession or in the possession of a third-party to which the Client shall provide Siemens with sufficient releases in order to obtain such information. The Client shall provide Siemens, its employees, agents and contractors, with reasonably unrestricted access to the Client's buildings that will be addressed in the IGA (the "Facilities"). In addition, Client shall promptly provide Siemens with the Facilities':
  - a. Utility data for the past ( ) year(s), including but not limited to, actual copies of electrical, gas, water invoices, or other utility invoices requested by Siemens ("Utility Data");
  - b. Information on the Facilities' hours of operation and modes of operation ("Operational Data");
  - c. Names and contact information of persons with whom Siemens can confer regarding any of the Utility Data, Operational Data, financial information and general day-to-day issues that may arise during performance of the IGA ("Contact Persons");
  - d. If applicable, an audited financial statement for the fiscal year immediately preceding the Effective Date; and,

- e. Any and all information requested by Siemens reasonably necessary in order for Siemens to perform the IGA.

3. Representations, Warranties and Covenants of the Parties.

- a. Each party represents, warrants and covenants to the other that:
  - i. It has all requisite power and authority, whether statutory or otherwise, to enter into this Agreement, and that its execution hereof has been duly authorized and does not and will not constitute a breach or violation of any of its organizational documents, any applicable laws or regulations, or any agreements with third parties;
  - ii. It has done and will continue to do all things necessary to preserve and keep in full force and effect its existence and the PDA;
  - iii. This PDA is a legal, valid and binding obligation of the party, in accordance with its terms, and all requirements of the party have been met and procedures have been followed by the party to ensure the enforceability of the PDA; and,
  - iv. To the party's best knowledge, there is no pending or threatened suit, action, litigation or proceeding against or affecting the party that impacts the validity or enforceability of this PDA.
- b. Siemens further represents, warrants and covenants to the Client that Siemens is duly authorized to do business in all locations where the work under the PDA is to be performed.
- c. Client further represents, warrants and covenants to the Siemens that 1) any information provided to Siemens, or that is provided to Siemens, by the Client or on behalf of the Client, is accurate and that Siemens is entitled to rely on the accuracy of the same in performing the IGA, and 2) Siemens shall not be held liable to the Client in any manner whatsoever for any error, inaccuracy or omission that is caused solely by Siemens' reliance on the information supplied by the Client or information provided to Siemens on behalf of the Client.

4. Fee. Siemens shall perform the IGA for the fixed fee of \$\_\_\_\_\_ (**spell out amount** dollars and no cents) (the "Fee").

5. Payment of the Fee.

- a. In the event that the IGA demonstrates that the criteria set forth in Exhibit A-Project Criteria ("Project Criteria") will be feasible as scope to be performed under the PCA and Siemens is able to draft a PCA to include the Project Criteria, then the Client shall be liable to Siemens for the Fee.
- b. On the Effective Date and during the period of time that the IGA is being performed, Siemens will direct resources to develop the draft PCA. Where a draft PCA is completed, it will be submitted to the Client within the time period set forth in Section 1 hereof. The draft PCA will include a price that will include the Fee amount. Therefore, if the PCA is executed, the Client will have no obligation to pay the Fee under the terms hereof as the Fee will be paid to Siemens under the terms of the PCA.
- c. In the event that the Client is liable to Siemens for the Fee pursuant to clause 5.a. and Siemens has provided the Client with a draft PCA pursuant to clause 5.b., but the Client does not enter into the PCA with Siemens within thirty (30) days following submission of the draft PCA to the Client, Siemens will submit an invoice to the Client for the Fee. The Client shall pay Siemens in immediately available funds no later than thirty (30) days from the date of invoice.

- d. If during the performance of the IGA, Siemens believes that the Project Criteria cannot be reasonably achieved and, therefore, a draft PCA cannot be provided to the Client, then the Client shall not have any obligation to pay the Fee.
6. Termination. The Client may terminate this Agreement at any time with fifteen (15) days prior written notice to Siemens. The Client shall then pay to Siemens a termination fee equal to Siemens' reasonable costs and expenses incurred up to the date of termination.
7. Insurance. Both Parties shall maintain fully adequate, comprehensive insurance on their respective goods, services, and operations, as applicable.
8. Indemnity. Siemens and the Client shall indemnify and hold each other harmless from and against all damages, losses and expenses suffered or paid as a result of any and all claims, demands, suits, causes of action, proceedings, judgments and liabilities, fines, penalties and costs, including reasonable attorney's fees and disbursements, incurred in litigation or otherwise assessed, incurred or sustained by or against the indemnified party arising out of or in connection with this PDA to the extent that such damages, losses and expenses result from the negligence or willful misconduct of the indemnifying party.
9. Limitation of Liability. ANYTHING HEREIN NOTWITHSTANDING, IN NO EVENT SHALL EITHER THE CLIENT OR SIEMENS BE LIABLE TO THE OTHER PARTY FOR SPECIAL, INDIRECT, INCIDENTAL OR CONSEQUENTIAL DAMAGES, INCLUDING COMMERCIAL LOSS, LOSS OF USE, OR LOST PROFITS, EVEN IF EITHER PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES AND, IN ANY EVENT, SIEMENS' AGGREGATE LIABILITY FOR ANY AND ALL CLAIMS, LOSSES OR EXPENSES ARISING OUT OF THIS PDA, OR OUT OF ANY DELIVERABLES FURNISHED UNDER THIS PDA, WHETHER BASED IN CONTRACT, NEGLIGENCE, STRICT LIABILITY, AGENCY, WARRANTY, TRESPASS, INDEMNITY OR ANY OTHER THEORY OF LIABILITY, SHALL BE LIMITED TO THE LESSER OF \$1,000,000 OR THE TOTAL COMPENSATION RECEIVED BY SIEMENS FROM THE CLIENT UNDER THIS PDA.
10. Exclusivity. During the term of this PDA, the Client shall not negotiate with any third-party for the same or a substantially similar project as that which is the subject of this PDA.
11. Deliverables. All non-proprietary notes and reports that are specifically prepared by Siemens under this PDA (the "Deliverables") shall become the Client's personal property upon the Client's execution of the PCA or upon the Client's payment of the Fee, whichever is earlier. Any reuse of the Deliverables for other projects or locations without the written consent of Siemens, or use other than by the Client, will be at such other user's sole risk and without liability to Siemens; and, unless expressly prohibited by law, the Client and the other users, jointly and severally shall indemnify, defend and hold Siemens harmless from any claims, losses or damages arising from such unauthorized use.
12. Intellectual Property. Notwithstanding the foregoing, the Client shall not, by virtue of this PDA, acquire any ownership interest in any formulas, patterns, devices, secret inventions or processes, copyrights, patents, other intellectual proprietary rights, or similar items of property which are owned by Siemens, any of Siemens' subcontractors, or by any of Siemens' consultants, whether or not they are used in connection with the work provided under this PDA.
13. Confidentiality. Any information concerning Siemens or the Client that is designated as proprietary and disclosed in confidence to the other party during the term of this PDA is disclosed in confidence. The party that receives such confidential information shall not publish or disclose the same to any other entity or person without the prior written approval of the disclosing party. To the extent that the Parties have entered into a confidentiality agreement or will enter into such an agreement during the term of this PDA, then the terms contained in the confidentiality agreement shall be incorporated by reference herein.

14. Choice of Law, Jurisdiction and Venue. THIS PDA SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF ILLINOIS, WITHOUT REGARD TO CHOICE OF LAW PROVISIONS. JURISDICTION AND VENUE SHALL LIE WITH THE STATE OR FEDERAL COURTS IN THE COUNTY IN WHICH THE SUBJECT PROJECT WILL BE PERFORMED. THE PARTIES EACH WAIVE ANY RIGHTS THAT EACH OF THEM MAY HAVE TO A TRIAL BY JURY. FURTHERMORE, EACH PARTY WAIVES ANY OBJECTION THAT IT MAY HAVE BASED ON IMPROPER VENUE OR FORUM NON CONVENIENS.
15. Merger Clause. Upon execution and delivery, this PDA: (a) constitutes the entire agreement and understanding between the Parties relating to the subject matter hereof; (b) supersedes any and all prior agreements and understandings of the Parties, oral or written, relating to the subject matter hereof; and, (c) shall not be amended, supplemented, contradicted or otherwise modified by evidence of prior, contemporaneous or subsequent oral agreements of the Parties.

**IN WITNESS WHEREOF**, the Parties hereto have caused this Project Development Agreement to be duly executed by their respective authorized signatories as of the date first above written.

Agreed for **Insert Client's correct legal name**  
(Signature) by: \_\_\_\_\_  
Print Name and Title: \_\_\_\_\_

Agreed for **Siemens Industry, Inc.**  
(Signature) by: \_\_\_\_\_  
Print Name and Title: \_\_\_\_\_