



# West Virginia University

Contract No:

U07MPCA

Buyer: X

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Institution: West Virginia University

Date

9/8/2006

Fiscal Year:

2007

State Acct No:

## Purchase Order

Telephone No:

412-257-2111

FEIN #

132762488

Ship To:

West Virginia University  
Various Departments  
Morgantown, WV 26506

Vendor Name and Address:

Siemens Building Technologies Inc.  
600 Bursca Dr Ste 606  
Bridgeville, PA 15017-1418

Mail original invoice and 1 copy to:

**West Virginia University**  
**Payment Services**  
**PO Box 6024**  
**Morgantown, WV 26506-6024**

Effective Date: 9/14/2006

Terms: As specified

FOB Destination

Shipping Date: As specified

### Contract Acceptance

This Agreement constitutes the acceptance of contract made by  
and between the **West Virginia University Board of Governors**

and Siemens Building Technologies Inc.

for services in connection with all performance energy projects, phases, building control systems  
integration, and other work pursuant to West Virginia University RFP # 900001100.

Accepted Proposal Signed By: James Platz

Title Account Executive

Service performed under this contract is to be continued in the succeeding fiscal year contingent upon funds being appropriated by the Legislature for this service. In the event funds are not appropriated for these services, this contract becomes of no effect and is null and void after June 30.

Total Amount of this  
Purchase Order

\$ Open End

Jim Bostonia  
Procurement Officer

9/14/2006  
Date

Rep Charmin  
Chief Procurement Officer

14 Sept 2006  
Date

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# **MASTER PERFORMANCE CONTRACTING AGREEMENT**

between

and

**Siemens Building Technologies, Inc.**

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# PERFORMANCE CONTRACTING AGREEMENT

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Number:-\_\_\_\_\_

## Article 1 AGREEMENT

THIS AGREEMENT, is made this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_ by and between Siemens Building Technologies, Inc., ("SIEMENS") and the party identified below as the CLIENT.

### The CLIENT:

The West Virginia University Board of Governors on behalf of West Virginia University

DESIGNATED REPRESENTATIVE:

PHONE: \_\_\_\_\_ FAX: \_\_\_\_\_

### Siemens Building Technologies, Inc. (SIEMENS)

1000 Deerfield Parkway  
Buffalo Grove, Illinois 60018

With offices at: 600 Bursca Drive, Suite 606, Bridgeville, PA 15017

DESIGNATED REPRESENTATIVE: James Platz  
PHONE: 412-257-2111, ext. 612 FAX: 412-257-0220

For services in connection with the following Project which may consist of multiple phases, each to be identified and agreed to by the Parties in a Purchase Order/Work Order. The terms and conditions contained herein will be incorporated by reference into each Purchase Order/Work Order subject to the specific terms of the Purchase Order/Work Order as agreed upon by the Parties.

### Project:

**All performance energy projects, phases, building control systems integration, and other work pursuant to West Virginia University RFP # 90001100, and addendums thereto;**

# MASTER PERFORMANCE CONTRACTING AGREEMENT

## Articles and Attachments

This Agreement shall consist of this document which includes the following articles and indicated Exhibits ("Contract Documents") which are acknowledged by the CLIENT and SIEMENS and incorporated herein by this reference:

### Articles

1. Agreement
2. Glossary
3. General
4. Performance Guarantee
5. Work BY SIEMENS
6. The CLIENT'S Responsibility
7. Changes and Delays
8. Compensation
9. Acceptance
10. Insurance and Allocation of Risk
11. Hazardous Material Provisions
12. Miscellaneous Provisions
13. Maintenance Services Technical Support Program
14. Additional Terms and Conditions

### Exhibits

- Exhibit A Form of Scope of Work and Services  
Exhibit B Form of Payment Schedule(s)  
Exhibit C Form of Performance Assurance  
Exhibit D Form of Purchase Order/Work Order

This Agreement, when accepted in writing by an authorized representative of the CLIENT and by an authorized representative of SIEMENS, constitutes the entire, complete and exclusive agreement between the Parties regarding the subject matter hereof. The above documents and any Purchase Order/Work Order issued pursuant hereto, constitute the entire Agreement between the CLIENT and SIEMENS relative to the project scope as stated in such Purchase Order/Work Order and supersede all prior and contemporaneous negotiations, statements, representations, agreements, letters of intent, awards, or proposals, either written or oral relative to the same. This Agreement may be modified only by a written instrument signed by both Parties.

### COMPENSATION/TERMS OF PAYMENT:

As full consideration for the performance of the Work and Services set forth in an applicable Purchase Order/Work Order, the CLIENT shall pay to SIEMENS the Contract Sum in such manner as agreed in the relevant Purchase Order/Work Order and in accordance with the payment terms and conditions established by the Contract Documents.

Agreed for

(Signature) by:

Philip Charneski

Print Name and Title:

14 Sept 2006 Philip Charneski  
Chief Procurement Officer

Agreed for **Siemens Building Technologies, Inc.**

(Signature) by:

AXEL MEIER

Print Name and Title:

CFO

(Signature) by:

DANIEL W. HISLIP

Print Name and Title:

DANIEL W. HISLIP  
SECRETARY

# MASTER PERFORMANCE CONTRACTING AGREEMENT

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## Article 2

### Glossary

The following terms shall, for all purposes of the Contract Documents comprising this Agreement, have the meanings stated herein, unless the context otherwise specifies or requires, or unless otherwise defined in the Contract Documents:

**“Acceptance”** means the CLIENT has signed the Certificate of Substantial Completion.

**“Acceptance Date”** means the date on which the CLIENT signs the Certificate of Substantial Completion.

**“Accumulated Realized Savings”** means the sum of the actual savings achieved from the Effective Contract Date of a Purchase Order/Work Order through the end of the current Annual Period, derived from the sum of the Measured & Verified Savings plus the Stipulated Savings and includes any and all Savings Shortfall amounts paid by SIEMENS to CLIENT.

**“Accumulated Guaranteed Savings”** means the sum of the Guaranteed Measured & Verified Savings plus the Stipulated Savings from the Guarantee Date of a Purchase Order/Work Order through the end of the current Annual Period.

**“Annual Guaranteed Savings”** are the Measured & Verified Savings and the Stipulated Savings that occur in any Annual Period of the Guarantee Term of the relevant Purchase Order/Work Order.

**“Annual Period”** means a twelve (12) month period beginning on the Guarantee Date of a Purchase Order/Work Order or on any anniversary date thereof.

**“Baseline”** means a period of time or multiple periods of time that have occurred prior to Purchase Order/Work Order commencement, which has been agreed upon and is set forth in the Purchase Order/Work Order’s Exhibit C. The energy usage, operating practices, and facility and equipment in place during such time period represents the basis against which all future energy and operating usage will be compared in order to determine the Accumulated Realized Savings.

**“BTU”** a unit of thermal energy defined as a British Thermal Unit.

**“Certificate of Substantial Completion”** means documentation executed by the CLIENT agreeing that the Work, or a designated portion of the Work, is Substantially Complete in accordance with the Agreement and its relevant Purchase Order/Work Order and such Work is accepted by the CLIENT.

**“CLIENT Representative”** means the person identified to SIEMENS by the CLIENT as the person authorized to make decisions on behalf of the CLIENT as set forth in Section 6.1(a) hereof.

**“Construction Period”** means the period between the Effective Contract Date of the Purchase Order/Work Order and the first day of the month following the Substantial Completion Date.

**“Construction Period Savings”** means the actual accumulated Measured & Verified Savings plus the Stipulated Savings achieved from the Effective Contract Date of a Purchase Order/Work Order until the Purchase Order/Work Order’s Guarantee Date.

**“Contracted Baseline”** means the future annual period or multiple annual periods post-FIM implementation agreed upon and stated in a Purchase Order/Work Order’s Exhibit C that define the energy usage, operating practices, and facility and equipment in place post-FIM implementation and represents the basis on which the Guaranteed Savings are calculated.

**“Deliverable”** means a report or drawing specifically prepared for and deliverable to the CLIENT pursuant to the terms hereof.

**“Effective Contract Date”** is the date appearing at the top of this contract for purposes of this Master Performance Contracting Agreement and, pertaining to a Purchase Order/Work Order, is the date appearing at the top of the Purchase Order/Work Order.

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## MASTER PERFORMANCE CONTRACTING AGREEMENT

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**“Energy Conservation Measure” or “ECM”** means the equipment, devices, materials and/or software as installed by SIEMENS at the Facilities, or as repaired or replaced by the CLIENT hereunder, for the purpose of improving the efficiency of utility consumption.

**“Equipment”** means the installed products to be provided by SIEMENS as described in a Purchase Order/Work Order’s Scope of Work and Services, Exhibit A.

**“Escalation Factor”** means an annual escalation percentage to be applied to the previous year’s Energy Savings, Operational Savings and Technical Support Program, beginning and occurring on dates outlined in a Purchase Order/Work Order’s Performance Assurance, Exhibit C.

**“Facility” or “Facilities”** means the building(s) or structure(s) where Work will be installed or implemented. It shall have the same meaning as the term “Site”.

**“Facility Improvement Measures” or “FIMs”** means the methods, techniques, application of know-how, installation of devices or otherwise, described in a Purchase Order/Work Order’s Scope of Work and Services, Exhibit A, that are undertaken by SIEMENS as a result of such Purchase Order/Work Order with the intent of generating net savings or efficiencies at or in connection with the operation of the Facilities, including without limitation the ECMs, OIMs, TIMs, USMs, WCMs, SCMs and any other, non-conservation-related activities, means or methods.

**“Guarantee Date”** means the date on which the CLIENT executes the final Certificate of Substantial Completion, thus indicating that the Construction Period is complete.

**“Guaranteed Measured & Verified Savings”** means the Measured & Verified Savings guaranteed to be achieved as described in the Purchase Order/Work Order’s Performance Assurance, Exhibit C.

**“Guaranteed Savings”** means the amount of savings that the Purchase Order/Work Order sets forth will be achieved at the Facilities defined in the Purchase Order/Work Order, calculated as the aggregate of the Measured & Verified Savings and the Stipulated Savings amounts identified in the Purchase Order/Work Order’s Performance Assurance, Exhibit C, but shall not exceed the aggregate of the Purchase Order/Work Order’s Contract Sum; the Purchase Order/Work Order’s Performance Assurance TSP Payments; and the CLIENT’S cost of financing the Work performed under the Purchase Order/Work Order.

**“Instruments”** means all reports, notes, calculations, data, drawings, estimates, specifications, manuals, documents, excluding Deliverables, all computer programs, codes and computerized materials prepared by or for SIEMENS are instruments of SIEMENS’ work.

**“kW” and “kWh”** means kilowatt and kilowatt hour, respectively.

**“Maintenance Services TSP”** means the Services performed under a Technical Support Program as stated in the Purchase Order/Work Order’s Scope of Work and Services, Exhibit A.

**“Material Change”** means an event, or a combination of events, causing a deviation from the Contracted Baseline, equal to, or in excess of, that set forth in the applicable Purchase Order/Work Order.

**“Measured and Verified Savings”** means those savings that can be measured and verified by the methodology as set forth in the Purchase Order/Work Order’s Performance Assurance, Exhibit C.

**“Operational Improvement Measure” or “OIM”** means the programs, practices, methodologies, devices, materials and/or software as installed or instituted by SIEMENS at the Facilities, or as instituted by the CLIENT hereunder, for the purpose of improving the efficiency of operations activities, operational costs and/or operational results as described in the Purchase Order/Work Order’s Scope of Work and Services, Exhibit A.

**“Parties”** means the CLIENT and SIEMENS.

# MASTER PERFORMANCE CONTRACTING AGREEMENT

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**“Performance Assurance”** is the process of ascertaining that the FIMs defined in the Purchase Order/Work Order’s Scope of Work and Services, Exhibit A, are performing at the guaranteed values that are defined in the Purchase Order/Work Order’s Performance Assurance, Exhibit C.

**“Performance Assurance TSP”** means the Services performed to monitor and report the performance relative to the guarantees defined in the Purchase Order/Work Order’s Performance Assurance, Exhibit C.

**“Performance Guarantee”** means the result of the Performance Assurance process as set forth in Exhibit C of the Purchase Order/Work Order.

**“Performance Guarantee Period”** means the entire period from the Guarantee Date of the Purchase Order/Work Order until the termination or expiration of this Agreement or the Purchase Order/Work Order, which ever occurs first, as set forth herein.

**“Permitted Users”** means the CLIENT, its employees and agents.

**“Realized Annual Savings”** means the actual savings achieved by the CLIENT during an Annual Period, calculated as the sum of the Measured & Verified Savings plus the Stipulated Savings.

**“Savings Excess”** means the Realized Annual Savings less the Annual Guaranteed Savings for the Annual Period. If the amount is zero or greater, the Guarantee Savings in the Purchase Order/Work Order’s Performance Assurance, Exhibit C, has been fulfilled.

**“Savings Shortfall”** means the Realized Annual Savings less the Annual Guaranteed Savings for the Annual Period. If the amount is less than zero the Guarantee Savings in the Purchase Order/Work Order’s Performance Assurance, Exhibit C, has not been fulfilled.

**“Services”** means those services to be provided by SIEMENS as described in the Purchase Order/Work Order’s Scope of Work and Services, Exhibit A and as described in the Purchase Order/Work Order’s Performance Assurance, Exhibit C.

**“Site”** shall have the same meaning as Facilities.

**“Stipulated Savings”** are the savings that have been mutually agreed upon and are stipulated to by SIEMENS and the CLIENT prior to or upon implementation of the FIMs. The Stipulated Savings cannot be changed unless agreed upon by the Parties or as set forth herein. The Stipulated Savings for each Annual Period, with the corresponding Escalation Factor if applicable, are set forth in the Purchase Order/Work Order’s Performance Assurance, Exhibit C.

**“Substantial Completion”** or **“Substantially Complete”** means the first to occur of the following: (i) the Work is sufficiently complete, in accordance with the provisions of this Agreement and the Purchase Order/Work Order relating to the Purchase Order/Work Order’s Scope of the Work and Services, Exhibit A, that the CLIENT will be able to realize from such Work substantially all of the practical benefits intended to be gained therefrom, or otherwise to employ the Work or the FIMs associated therewith for their intended purposes; or (ii) temporary, qualified or final certificates of occupancy, if required, have been issued with respect to such portions of the Work by the appropriate public authority.

**“Technical Support Program”** or **“TSP”** is a plan detailing the tasks, material, and responsibilities provided by SIEMENS to the CLIENT during a specified time period defined in the Purchase Order/Work Order’s Scope of Work and Services, Exhibit A, and/or described in the Purchase Order/Work Order’s Performance Assurance, Exhibit C.

**“Term”** is a stipulated period of time starting on the Effective Contract Date of this Agreement or of a Purchase Order/Work Order and ending at the termination or expiration of this Agreement or Purchase Order/Work Order, as applicable.

**“Technology Improvement Measure”** or **“TIM”** means the application of new technology methods, devices, materials and/or software as installed or instituted by SIEMENS at the Facilities for the purpose of improving the efficiency of operations activities, operational costs and/or utility costs as described in the Purchase Order/Work Order’s Scope of Work and Services, Exhibit A.

**“Therm”** is a measure of energy equal to 100,000 BTUs.

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**Total Guaranteed Savings**” are the amount of savings identified to be achievable based on calculations and adjustments as set forth in the Purchase Order/Work Order’s Performance Assurance, Exhibit C. Total Guaranteed Savings includes all savings that SIEMENS has guaranteed for each Annual Period of the Term and may also include Construction Period Savings if specified in the Purchase Order/Work Order’s Performance Assurance, Exhibit C.

**“Utility Services Measure”** or **“USM”** means the application of utility services methods and technology as described in the Purchase Order/Work Order’s Scope of Work and Services, Exhibit A.

**“Work”** means collective labor, equipment and services comprising the FIMs to be performed by SIEMENS as described in the Purchase Order/Work Order’s Scope of Work and Services, Exhibit A.

**“Water Conservation Measure”** or **“WCM”** means the equipment, devices, materials, programs, practices, methodologies and/or software as installed or coordinated by SIEMENS at the Facility for the purpose of improving the efficiency of the Facility’s water consumption, as described in the Purchase Order/Work Order’s Scope of Work and Services, Exhibit A.

**“Waste Conservation Measure”** or **“SCM”** means the equipment, devices, materials, programs, practices, methodologies and/or software as installed or coordinated by SIEMENS at the Facility for the purpose of improving the efficiency of operations, activities, operational costs and/or operations results, as described in the Purchase Order/Work Order’s Scope of Work and Services, Exhibit A.

## Article 3

### General

- 3.1 The CLIENT hereby engages SIEMENS and SIEMENS hereby accepts the engagement to perform and provide the Work and Services as set forth in Exhibit A of a properly executed Purchase Order/Work Order and in accordance with the terms and conditions of this Agreement and such Purchase Order/Work Order.
- 3.2 SIEMENS shall perform the Work and Services as an independent contractor with exclusive control of the manner and means of performing the Work and Services in accordance with the requirements of this Agreement and the applicable Purchase Order/Work Order. SIEMENS has no authority to act or make any agreements or representations on behalf of the CLIENT. This Agreement is not intended, and shall not be construed to create, between the CLIENT and SIEMENS, the relationship of principal and agent, joint venturers, co-partners or any other such relationship, the existence of which is hereby expressly denied. No employee or agent of SIEMENS shall be, or shall be deemed to be, an employee or agent of the CLIENT.
- 3.3 SIEMENS represents, warrants and covenants to the CLIENT that:
- (a) It has all requisite corporate power and statutory authority 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 SIEMENS’ organizational documents, any applicable laws or regulations, or any agreements with third parties;
  - (b) It has done and will continue to do all things necessary to preserve and keep in full force and effect its existence and the Agreement;
  - (c) This Agreement is the legal, valid and binding obligation of SIEMENS, in accordance with its terms, and all requirements have been met and procedures have been followed by SIEMENS to ensure the enforceability of the Agreement;
  - (d) To SIEMENS’ best knowledge, there is no pending or threatened, suit, action, litigation or proceeding against or affecting SIEMENS that affects the validity or enforceability of this Agreement; and,
  - (e) It is duly authorized to do business in all locations where the Work and Service are to be performed.
- 3.4 The CLIENT represents, warrants and covenants to SIEMENS that:
- (a) It has all requisite corporate power and statutory authority 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 the CLIENT’S organizational documents, any applicable laws or regulations, or, to the best of CLIENT’S knowledge, any agreements with third parties;
  - (b) It has done and will continue to do all things necessary to preserve and keep in full force and effect its existence and the Agreement;

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- (c) This Agreement is the legal, valid and binding obligation of the CLIENT, in accordance with its terms, and all requirements have been met and procedures have been followed by the CLIENT to ensure the enforceability of the Agreement; and
- (d) To the best of CLIENT'S knowledge, there is no pending or threatened, suit, action, litigation or proceeding against or affecting the CLIENT that affects the validity or enforceability of this Agreement.

## Article 4

### Performance Guarantee

- 4.1 SIEMENS guarantees that the Guaranteed Savings generated from the Guarantee Date to the last date of the Performance Guarantee Period will be no less than the Total Guaranteed Savings shown in the Purchase Order/Work Order's Performance Assurance, Exhibit C. The measurement and verification calculation methodology for determining the Measured & Verified Savings is set forth in the Purchase Order/Work Order's Performance Assurance, Exhibit C.
  - 4.1.1 General. Except as otherwise provided, energy savings will be calculated for each month of each Annual Savings Period as the product of (a) "units of energy saved" (kWh, Therms, GJ, etc.) multiplied by (b) "cost of energy."
    - (a) Units of energy saved are computed by a software application which is specified in Exhibit C. Units of energy saved are calculated by subtracting current period measured units of energy consumed from the adjusted Baseline units of energy defined in Article 5 of Exhibit C. Adjustments to the Baseline energy units are based on factors such as weather, occupancy, operating hours, etc., and changes to the Contracted Baseline conditions and operating practices as defined in Article 7 of Exhibit C.
    - (b) Costs of energy are defined in Article 6 of Exhibit C, Utility Rate Structures and Escalation Rates.
- 4.2 Any future escalation factors applied to utility, energy or other costs which are to be applied are set forth in Exhibit C. SIEMENS and the CLIENT agree that the Baseline data which is set forth in Exhibit C is a full and accurate reflection of the existing Facility, equipment, operation, business use and energy usage, and that such Baseline data will be the basis on which all future energy use will be compared in order to determine both the Annual Realized Savings and the Accumulated Realized Savings.
- 4.3 SIEMENS and the CLIENT agree that the Contracted Baseline defined in Exhibit C will represent the new operating and/or equipment profile of the Facility resulting from the FIM implementation. The Performance Guarantee is dependent upon and is subject to the express condition that the CLIENT operates and maintains its Facilities within the Contracted Baseline parameters during the entire term of the Performance Guarantee Period.
- 4.4 The CLIENT agrees to notify SIEMENS prior to or within 30 days of its knowledge of any:
  - (a) Material Change to operating schedules, strategies, equipment and conditions in the Facility from those described in the Contracted Baseline data.
  - (b) Any other Material Changes in or at the Facility that may increase or decrease energy usage, including without limitation: changes in operations, business conducted, occupancy, hours of operation, and energy consuming equipment and malfunctions, failures and related changes in energy consuming equipment; and
  - (c) Any damage to, or destruction of, the FIM Work that may result in a Material Change.
- 4.5 SIEMENS agrees to respond and advise the CLIENT within 30 days of the receipt of a notice of a Material Change that SIEMENS will:
  - (a) Continue the Performance Assurance without adjustments; or
  - (b) Require an adjustment to the Performance Assurance as a result of the Material Change.
- 4.6 **[Reserved]**
- 4.7 Performance Guarantee Period savings reconciliation as identified in Section 4.1 will be performed at the end of each annual period as follows unless otherwise agreed to in the Purchase Order/Work Order:
  - (a) Within thirty (30) days of the Purchase Order/Work Order's Guarantee Date, the Construction Period Savings shall be reconciled and added to the Accumulated Realized Savings, unless otherwise agreed to in the Purchase Order/Work Order;

## MASTER PERFORMANCE CONTRACTING AGREEMENT

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- (b) At each annual reconciliation the Realized Annual Savings shall be applied to the Accumulated Realized Savings.
    - 1) Should the Accumulated Realized Savings be greater than the Accumulated Guaranteed Savings, a Savings Excess shall be recorded.
    - 2) Should the Accumulated Realized Savings be less than the Accumulated Guaranteed Savings, a Savings Shortfall shall be recorded.
  - (c) Reconciliation shall occur on a year to year basis, with no Savings Excess or Savings Shortfall being transferred to subsequent years.
  - (d) A Savings Excess shall inure to the benefit of the CLIENT. A Savings Shortfall shall be paid by SIEMENS within thirty (30) days following the CLIENT'S acceptance of the reconciliation and the amount paid shall be then added to calculate the Accumulated Realized Savings..
  - (e) If SIEMENS can correct a shortfall through a reasonable operational improvement at no material expense or material inconvenience to the CLIENT and with no future operational expenses, and the CLIENT declines to allow such reasonable operational improvement, then any future Savings Shortfall that the improvement would have corrected will be negated.
- 4.8 The Performance Guarantee is dependent upon and is subject to the express condition that the CLIENT enter into and maintain, as specified in the Purchase Order/Work Order, a Performance Assurance TSP. If the CLIENT fails to enter into, breaches, cancels or otherwise causes the termination of the Performance Assurance TSP, the Performance Guarantee solely of the affected Purchase Order/Work Order shall be terminated. The services to be provided under the Performance Assurance TSP are defined in Exhibit A.
- 4.9 The payments and credits based on Savings Shortfalls, if any, are the sole remedy of the CLIENT for this Performance Guarantee. Any payments made or to be made to the CLIENT under the terms of this Performance Guarantee shall not exceed the payments actually made by CLIENT to SIEMENS for the aggregate of the Contract Sum; the Performance Assurance TSP Payments; and, the CLIENT'S cost of financing the Work.
- 4.10 The Performance Assurance TSP is the technical service to be provided by SIEMENS to the CLIENT during the Performance Guarantee Period, commencing on the Guarantee Date. Performance Assurance TSP is defined in the Glossary and described more fully in Exhibit A.
- (a) At least thirty (30) days prior to the beginning of the Performance Guarantee Period, SIEMENS will have made a final inspection of all existing equipment deemed necessary to achieve the Performance Guarantee, and report any deficiencies to the CLIENT. Any deficiencies that materially affect the equipment's operation so as to have an adverse affect to SIEMENS in the calculation of the Realized Annual Savings shall cause such savings attributable to such equipment deemed achieved until such time that the deficiency is remedied so as not to have a materially adverse affect on the calculation of the Realized Annual Savings. Except as specifically set forth in this Section 4.10(a), the foregoing shall not be construed to limit, or otherwise affect, in any way, any of SIEMENS' obligations under the applicable Purchase Order/Work Order.
  - (b) If the existing equipment or Equipment installed by SIEMENS is altered or moved by any person, including the CLIENT, other than SIEMENS or a person authorized by SIEMENS, the CLIENT shall immediately notify SIEMENS in writing, and SIEMENS reserves the right to perform a reasonable reacceptance test on, or if necessary a reasonable re-commissioning of, the system at the CLIENT'S expense.
- 4.11 SIEMENS will have no liability or obligation to continue providing Performance Assurance TSP Services or any Guaranteed Savings under the Performance Guarantee, solely as they relate to the affected FIMS, in the event that the CLIENT fails to:
- (a) Provide access to any Site where Work is to be performed as required by the Contract Documents;
  - (b) Service and maintain all equipment involved with the FIMS defined in the Scope of Work and Services, Exhibit A in accordance with the Purchase Order/Work Order Maintenance Requirements
  - (c) Upon SIEMENS' written request, provide SIEMENS with accurate Facility operating information, including energy usage and cost, executed preventive maintenance and repair records, building or equipment additions, and occupancy levels during each Annual Period, as soon as such information becomes reasonably available to the CLIENT.
- 4.12 **[INTENTIONALLY DELETED]**
- 4.13 **[INTENTIONALLY DELETED]**

**Article 5**

**Work and Services by SIEMENS**

- 5.1 SIEMENS will perform the Work and Services expressly described in the Purchase Order/Work Order and in any work release documents or change orders that are issued under the Purchase Order/Work Order and signed by both Parties. The Work and Services performed by SIEMENS shall be conducted in a workmanlike manner.
- 5.2 SIEMENS shall perform the Work and Services during its normal working hours, Monday through Friday inclusive, excluding holidays, unless otherwise agreed herein or in a Purchase Order/Work Order. The CLIENT shall make the Site available in order for Work to proceed in an efficient manner. Siemens will be required to work within the confines of a working University. Disruptions to the CLIENT'S operations are to be kept at a minimum.
- 5.3 SIEMENS is not required to conduct safety, reacceptance or other tests, install new devices or equipment or make modifications to any Equipment beyond the Scope and Services set forth in the applicable Purchase Order/Work Order. Any CLIENT request to change the Scope or the nature of the Work must be in the form of a mutually agreed upon change order, effective only when executed by the Parties.
- 5.4 All Deliverables shall become the CLIENT'S property upon delivery by SIEMENS. SIEMENS may retain file copies of such Deliverables. All Instruments shall remain SIEMENS' property. To the extent specified in Exhibit A, Permitted Users shall have a right to make and retain copies of Instruments except uncompiled code, and to use all Instruments, provided, however, that the Instruments shall not be used or relied upon by any parties other than Permitted Users, and such use shall be limited to any Work and/or Services contemplated under this Agreement, or any Purchase Order/Work Order resulting therefrom. The CLIENT shall not transfer any copies of Instruments to other parties or use them or permit them to be used for anything other than any Work and/or Services contemplated under this Agreement, or any Purchase Order/Work Order resulting therefrom, without SIEMENS' express written consent, or as otherwise required by law or court order.
- 5.5 SIEMENS shall be responsible for any portion of the Work and Services performed by, as well as the acts and omissions of, any subcontractor of SIEMENS. SIEMENS shall not have any responsibility, duty or authority to direct, supervise or oversee any contractor of the CLIENT or their work or to provide the means, methods or sequence of their work or to stop their work. SIEMENS' work and/or presence at the Site shall not relieve others of their responsibility to the CLIENT or to others.
- 5.6 SIEMENS warrants that:
- (a) Unless otherwise agreed, all Equipment shall be new and of good quality. Until one year from the date the Equipment is installed all Equipment manufactured by SIEMENS or bearing its nameplate will be free from defects in material and workmanship arising from normal use and service.
  - (b) Labor for all Work, excluding TSP Services, is warranted to be free from defects in workmanship for one year after the Works are performed. TSP services are warranted to be free from defects in workmanship for ninety (90) days after the Services are performed.
- 5.7 Warranty Limitation:
- (a) The limited warranties set forth in Section 5.6 will be void as to, and shall not apply to, any Equipment (i) repaired, altered or improperly installed by any person other than SIEMENS or its authorized representative; (ii) operated other than per SIEMENS' or the manufacturer's instructions; (iii) damaged because of any use of the Equipment after the CLIENT had knowledge of any defect in the Equipment; or, (iv) not manufactured, fabricated and assembled by SIEMENS or not bearing SIEMENS' nameplate. However, SIEMENS assigns to the CLIENT, without recourse, any and all assignable warranties available from any manufacturer, supplier, or subcontractor of such Equipment.
  - (b) Any claim under the limited warranty granted above must be made in writing to SIEMENS within thirty (30) days after discovery of the claimed defect unless discovered directly by SIEMENS. Such limited warranty only extends to the CLIENT and not to any subsequent owner of the Equipment.
  - (c) SIEMENS shall not be required to repair or replace more than the component(s) of the Equipment or the portion of the Work and Services actually found to be defective. SIEMENS' warranty liability shall not exceed the purchase price of such item. Repaired or replaced Equipment or Services will be warranted hereunder only for the remaining portion of the original warranty period. Notwithstanding the foregoing, nothing in this Section 5.7 shall

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be construed to limit, or otherwise affect, in any way, the general liability provisions set forth in this Agreement, including, but not limited to, those in Article 10 hereof.

- 5.8 THE EXPRESS LIMITED WARRANTIES PROVIDED ABOVE ARE IN LIEU OF AND EXCLUDE ALL OTHER WARRANTIES, STATUTORY, EXPRESS, OR IMPLIED, INCLUDING WITHOUT LIMITATION ANY WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, WHICH ARE HEREBY EXPRESSLY DISCLAIMED. THE LIMITED EXPRESS WARRANTIES AND REPRESENTATIONS SET FORTH IN THIS AGREEMENT MAY ONLY BE MODIFIED OR SUPPLEMENTED IN A WRITING EXECUTED BY A DULY AUTHORIZED SIGNATORY OF EACH PARTY.
- 5.9 SIEMENS will not be responsible for the maintenance, repair or replacement of, or Services necessitated solely by reason of:
- (a) Non-maintainable, non-replaceable or obsolete parts of the Equipment, including but not limited to: ductwork, shell and tubes, heat exchangers, coils, unit cabinets, casings, refractory material, electrical wiring, water and pneumatic piping, structural supports, cooling tower fill, slats and basins, etc. unless otherwise specifically stated herein or in a Purchase Order/Work Order; or
  - (b) CLIENT, or a third-party's, negligence, abuse, misuse, improper or inadequate repairs or modifications, improper operation, lack of operator maintenance or skill, corrosion, erosion, improper or inadequate water treatment, electrolytic action, chemical action, failure to comply with manufacturer's operating and environmental requirements, Acts of God, or other reasons beyond SIEMENS' control. Unless expressly agreed in writing, SIEMENS is not responsible for the removal or reinstallation of replacement valves, dampers, or waterflow and tamper switches with respect to pipes and ductwork, including vent or drain system. SIEMENS ASSUMES NO RESPONSIBILITY FOR ANY SERVICE PERFORMED ON ANY EQUIPMENT OTHER THAN FOR THAT PERFORMED BY SIEMENS OR ITS AGENTS.

### Article 6

#### The CLIENT'S Responsibilities

- 6.1 The CLIENT, without cost to SIEMENS, shall:
- (a) Designate a contact person with authority to make decisions for the CLIENT regarding the Work and provide SIEMENS with information sufficient to contact such person in an emergency;
  - (b) Coordinate the work of contractors under CLIENT'S sole control with the Work and Services so as not to substantially disrupt the Work and Services proceeding in an efficient manner;
  - (c) Provide or arrange for 24 hour, 7 day per week access and make all reasonable provisions for SIEMENS to enter any Site where Work is to be performed so that Work may proceed in an efficient manner;
  - (d) Permit SIEMENS to control and/or operate all building controls, systems, apparatus, equipment and machinery necessary to perform the Work;
  - (e) Furnish SIEMENS with blueprints, surveys, legal descriptions, waste management plans and all other available information pertinent to the Work and any Site where the Work is to be performed as may be reasonably requested by SIEMENS;
  - (f) To the best of CLIENT'S ability, assist SIEMENS in obtaining all approvals, permits and consents from government authorities and others as may be required for performance of the Work;
  - (g) In accordance with Article 11 hereof, notify SIEMENS promptly of all known or suspected Hazardous Materials at the Site, of any known or suspected contamination of the Site by Oil or Hazardous Material, and of any other known conditions requiring special care or which may reasonably be expected to affect the Work, and provide SIEMENS with any available documents describing the quantity, nature, location and extent of such materials, contamination or conditions;
  - (h) Reasonably assist SIEMENS in providing any notices required to be given to any government authorities in connection with the Work,;
  - (i) Provide SIEMENS with legally required materials and information (including but not limited to Material Safety Data Sheets) related to all Hazardous Materials located at any Site where the Work is to be performed;
  - (j) Furnish to SIEMENS any contingency plans, safety programs and other policies, plans or programs related to any Site where the Work is to be performed;

# MASTER PERFORMANCE CONTRACTING AGREEMENT

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- (k) Operate, service and maintain all Equipment according to the maintenance plan as outlined in the applicable Purchase Order/Work Order, as well as all requirements of applicable law or of authorities having jurisdiction
  - (l) Promptly notify SIEMENS of any unusual or materially changed operating conditions, hours of usage, system malfunctions, installed equipment or building alterations that may affect the Equipment or energy usage or any Services and that are known, or become known, to CLIENT; and
  - (m) If applicable, provide and pay for a dedicated voice grade dial-up phone line, or a mutually agreed communication method, and install a terminal block, or an equivalent communication mechanism, in a mutually agreed upon location.
- 6.2 Unless contrary to law, the CLIENT acknowledges that the technical and pricing information contained in this Agreement is confidential and proprietary to SIEMENS and agrees not to disclose it or otherwise make it available to others without SIEMENS, express written consent.
- 6.3 The CLIENT acknowledges that it is now and shall at all times remain in control of the project Site. Except as expressly provided herein or in a Purchase Order/Work Order, SIEMENS shall not be responsible for the adequacy of the health or safety programs or precautions related to the CLIENT'S activities or operations, or the CLIENT'S other contractors. SIEMENS shall not be responsible for inspecting, observing, reporting or correcting health or safety conditions or deficiencies of the CLIENT or CLIENT'S other contractors at the Site. So as not to discourage SIEMENS from voluntarily addressing such health or safety issues while at the Site, in the event SIEMENS does address such issues by making observations, reports, suggestions or otherwise, the CLIENT shall not hold, or attempt to hold, SIEMENS liable or responsible on account thereof.

## Article 7

### Changes and Delays

- 7.1 Changes to a Purchase Order/Work Order's Scope of Work and Services, and all matters related thereto, shall be addressed under, and processed through, CLIENT'S change order procedures.
- 7.2 Either party may request additions, deletions, modifications or changes to the Work. Any such requests shall only become effective upon execution of a written agreement by authorized representatives of both parties.
- 7.3 SIEMENS may, with CLIENT's prior written consent, substitute alternative parts, goods or equipment in the performance of the Work, provided that any such substitution shall be of an equal or better quality.
- 7.4 SIEMENS or CLIENT shall not be responsible for loss, delay, injury, damage or failure of performance that may be caused by circumstances beyond its control, including but not restricted to Acts of God, war, civil commotion, acts or omissions of government authorities, fire, theft, corrosion, flood, water damage, lightning, freeze-ups, strikes, lockouts, differences with workmen, riots, explosions, quarantine restrictions, delays in transportation, or shortage of vehicles, fuel, labor or materials. In the event of such delay or failure, the Parties will mutually agree on a change order extending the time to complete the Work relevant to the affected Purchase Order/Work Order. If any such delay exceeds ninety (90) days, either party may terminate the affected Purchase Order/Work Order upon three (3) days notice to the other party and, where the CLIENT is terminating the affected Purchase Order/Work Order, the CLIENT shall promptly pay SIEMENS for the allocable portion of the Work completed under the affected Purchase Order/Work Order.

## Article 8

### Compensation

- 8.1 SIEMENS shall be compensated for any extra work requested by the CLIENT, as mutually agreed in writing by the Parties. The Contract Sum provides for, and is in consideration of, only the Work and Services specifically included under the Purchase Order/Work Order's Scope of Work and Services, Exhibit A.
- 8.2 Unless otherwise agreed in writing, SIEMENS may invoice the CLIENT on a monthly or other progress-billing basis. Unless otherwise agreed in writing, valid invoices are due and payable upon receipt by the CLIENT.
- 8.3 SIEMENS may suspend or terminate the Work or Services at any time if payment is not received when due and shall be entitled to compensation for the Work or Services previously performed and for costs reasonably incurred in connection with the suspension or termination.

# MASTER PERFORMANCE CONTRACTING AGREEMENT

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- 3.4 Subject to the provisions of the West Virginia Prompt Payment Act, the CLIENT shall pay interest from the date that is thirty (30) days after the date of valid invoice until payment is received at the lesser of 12% per annum or the maximum rate allowed by law.
- 8.5 Except to the extent expressly agreed in writing, SIEMENS' fees do not include any taxes, excises, fees, duties or other government charge related to the Work or Services, and the CLIENT shall pay such amounts or reimburse SIEMENS for any amounts it pays. If the CLIENT claims that Work or Services is subject to a tax exemption or direct payment permit, it shall provide SIEMENS with a valid exemption certificate or permit and, unless specifically prohibited by law, shall indemnify, defend and hold SIEMENS harmless from any taxes, costs and penalties arising out of the use or acceptance of same.

## Article 9

### Acceptance

When SIEMENS believes that all, or an independent, definable phase or portion, of the Work is Substantially Complete, SIEMENS will submit a Certificate of Substantial or Final Completion to the CLIENT. If the described portion of the Work as performed is Substantially Complete as defined herein, the CLIENT may accept that Work by signing the Certificate of Substantial or Final Completion and returning it to SIEMENS. If the Work is not Substantially Complete, then the CLIENT Representative shall notify SIEMENS within twenty (20) business days of any discrepancies and SIEMENS shall correct the Work to conform to the description of the Work set forth herein and resubmit the Certificate of Substantial or Final Completion to the CLIENT if SIEMENS agrees with the notice of discrepancies or, if SIEMENS disagrees with the notice, notify the CLIENT of its disagreement and such disagreement shall be resolved under the terms of this Agreement. If the CLIENT Representative does not deliver written notice to SIEMENS within twenty (20) business days of receiving the Certificate of Substantial or Final Completion, the CLIENT will be deemed to have agreed to, signed and returned the Certificate of Substantial or Final Completion.

## Article 10

### Insurance and Allocation of Risk

- 10.1 SIEMENS shall maintain, at SIEMENS' expense, the following insurances while performing the Work and Services and shall add the CLIENT as an "Additional Insured" to each policy that is referenced in subsections (c) through and including (e) hereof:
- (a) Workers' Compensation at the statutory amounts and limits as prescribed by applicable law.
  - (b) Employer's Liability insurance (and, where applicable, Stop Gap extended protection endorsement) limits of liability shall be:
    - \$1,000,000 per occurrence
    - \$1,000,000 Disease Policy
    - \$1,000,000 Each Employee
  - (c) SIEMENS shall carry, in the Occurrence Coverage Form, Comprehensive General Liability or Commercial General Liability, insurance covering SIEMENS' operations and providing insurance for bodily injury and property damage with limits of liability stated below and including coverage for:
    - Products and Completed Operations
    - Contractual Liability insuring the obligations assumed by SIEMENS in this Agreement
    - Broad Form Property Damage (including Completed Operations)
    - Explosion, Collapse and Underground Hazards
    - Personal Injury Liability:
      - Limits of liability shall be \$1,000,000 per occurrence
  - (d) SIEMENS shall carry Automobile Liability Insurance in the Occurrence Coverage Form covering all owned, hired and non-owned automobiles and trucks used by or on behalf of SIEMENS providing insurance for bodily injury liability and property damage liability for the limits of:
    - \$1,000,000 per occurrence
  - (e) SIEMENS shall carry Excess Liability Insurance in the Occurrence Coverage Form with limits of:
    - \$5,000,000 per occurrence
- 0.2 The CLIENT shall carry, at its expense and during the term of this Agreement, Comprehensive General Liability Insurance in an amount of \$1,000,000.00 per occurrence for bodily injury and property damage. The policy will name

# MASTER PERFORMANCE CONTRACTING AGREEMENT

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SIEMENS as additional insured. Prior to commencement of Work, CLIENT shall furnish to SIEMENS a certificate of insurance showing that the insurance is in effect pursuant to the terms of this Agreement.

- 10.3 Risk of loss of materials and Equipment furnished by SIEMENS shall pass to the CLIENT upon their installation at the Site, and the CLIENT shall, after such installation, be responsible for protecting and insuring them against theft and damage. However, until SIEMENS is paid in full, SIEMENS shall retain title for security purposes only and the right to repossess the materials and Equipment in the event, and to the extent, CLIENT fails to fulfill its payment obligations as set forth in the applicable Purchase Order/Work Order.
- 10.4 SIEMENS will indemnify the CLIENT from and against losses, claims, expenses and damages (including reasonable attorney's fees) for personal injury or physical damage to property (collectively "Damages"). Such indemnification shall be solely to the extent the Damages are caused by or arise from SIEMENS or its employees', consultants' or agents' negligence or willful misconduct in connection with SIEMENS' performance of the Work. SIEMENS' obligations under this indemnity shall not apply to the proportional extent any such Damages arise out of, or are attributable to, the negligence of the CLIENT or its agents, contractors or employees. SIEMENS reserves the right to control the defense and settlement of any claim for which SIEMENS has an obligation to indemnify hereunder.
- 10.5 As to Patents and Copyrights:
- (a) SIEMENS will, at its own expense, defend or at its option settle any suit or proceeding brought against the CLIENT in so far as it is based on an allegation that any Work or Services (including parts thereof), or use thereof for its intended purpose, constitutes an infringement of any United States patent or copyright, if SIEMENS is promptly provided Notice and given authority, information, and assistance in a timely manner for the defense of said suit or proceeding. SIEMENS will pay the damages and costs awarded in any suit or proceeding so defended. SIEMENS will not be responsible for any settlement of such suit or proceeding made without its prior written consent. In case the Work or Services, or any part thereof, as a result of any suit or proceeding so defended is held to constitute infringement or its use by the CLIENT is enjoined, SIEMENS will, at its option and its own expense, either: (i) procure for the CLIENT the right to continue using said Work or Services; (ii) replace it with substantially equivalent non-infringing Work or Services; or (iii) modify the Work or Services, without thereby affecting performance, so it becomes non-infringing.
  - (b) SIEMENS will have no duty or obligation to the CLIENT under Section 10.5(a) to the extent that the Work is: (i) modified by the CLIENT or its contractors after delivery; or, (ii) combined by the CLIENT or its contractors with items not furnished hereunder and by reason of said modification or combination a suit is brought against the CLIENT. In addition, if by reason of such modification or combination, a suit or proceeding is brought against SIEMENS, unless expressly prohibited by law, the CLIENT shall protect SIEMENS in the same manner and to the same extent that SIEMENS has agreed to protect the CLIENT under the provisions of Section 10.5(a) above.
  - (c) THIS SECTION 10.5 IS AN EXCLUSIVE STATEMENT OF ALL THE DUTIES OF THE PARTIES RELATING TO INFRINGEMENT OF PATENTS AND COPYRIGHTS IN CONNECTION WITH THE WORK OR SERVICES, AND OF ALL THE REMEDIES OF THE CLIENT RELATING TO ANY CLAIMS, SUITS, OR PROCEEDINGS INVOLVING INFRINGEMENT OF PATENTS AND COPYRIGHTS IN CONNECTION WITH THE WORK OR SERVICES. Compliance with Section 10.5 as provided herein shall constitute fulfillment of all liabilities of the Parties under the Agreement with respect to the indemnification set forth therein.

## 10.6 *[INTENTIONALLY DELETED]*

### Article 11

#### Hazardous Materials Provisions

- 11.1 Except as otherwise provided for in a Purchase Order/Work Order, the Work does not include directly or indirectly performing or arranging for the detection, testing, handling, storage, removal, treatment, transportation, disposal, monitoring, abatement or remediation of any contamination of any Site at which Work is performed and any soil or groundwater at the Site by petroleum or petroleum products (collectively called "Oil"), asbestos, PCBs or hazardous, toxic, radioactive or infectious substances, including any substances regulated under RCRA, CERCLA or any other federal, state or local environmental laws, regulations, statutes, rules, standards or ordinances (collectively called "Hazardous Materials"), including without limitation: ionization smoke detectors, ballasts, mercury bulb thermostats, used oil, contaminated filters, contaminated absorbents, and refrigerant. Except as expressly disclosed pursuant to Section 11.2, the CLIENT represents and warrants that, to the best of its knowledge, there are no Hazardous Materials or Oil, present at the CLIENT'S locations where the Work is to

# MASTER PERFORMANCE CONTRACTING AGREEMENT

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be performed. SIEMENS will notify the CLIENT immediately if it discovers or reasonably suspects the presence of any previously undisclosed Oil or Hazardous Material. All Services have been priced and agreed to by SIEMENS in reliance on the CLIENT'S representations as set forth in this Article. The discovery of Hazardous Materials at a Site where SIEMENS is to perform Work not previously disclosed pursuant to Section 11.2 shall entitle SIEMENS to suspend the Work immediately, subject to mutual agreement of terms and conditions applicable to any further Work.

- 11.2 The CLIENT warrants that, prior to the execution of the Agreement, it notified SIEMENS in writing of any and all Oil and Hazardous Materials known to it to be present at the Site and provided a copy of any Site safety policies and information, including but not limited to lock-out and tag procedures, chemical hygiene plan, material safety data sheets, and other items covered or required to be disclosed or maintained by federal, state or local laws, regulations or ordinances.
- 11.3 With the exception of Oil or Hazardous Materials brought to the Site by SIEMENS, the CLIENT shall be solely responsible for properly testing, abating, encapsulating, removing, disposing, remediating or neutralizing such Oil or Hazardous Materials, and for the costs thereof. SIEMENS shall have the right to stop the Work until the Site is free from Oil or Hazardous Materials other than those brought to the Site by SIEMENS. In such event, the Parties will mutually agree to an equitable extension of time to complete the Work, and for delays caused by Oil or Hazardous Materials remediation in a change order issued by the CLIENT. Except for Hazardous Materials brought to the Site and discharged at the Site by SIEMENS thus requiring remediation, in no event, shall SIEMENS be required or construed to take title, ownership or responsibility for such Oil or Hazardous Materials. The CLIENT shall sign any required waste manifests in conformance with all government regulations, listing the CLIENT as the generator of the waste. If someone other than the CLIENT is the generator of the waste, the CLIENT shall arrange for such other person to sign such manifests.
- 11.4 Except where expressly prohibited by law, the CLIENT shall indemnify, defend and hold SIEMENS harmless from and against any damages, losses, costs, liabilities or expenses (including attorneys' fees) arising out of any Oil or Hazardous Materials or from the CLIENT'S breach of, or failure to perform its obligations under this Article.

## Article 12

### Miscellaneous Provisions

- 12.1 Notices between the parties shall be in writing and shall be hand-delivered or sent by certified mail, express courier, or acknowledged telefax properly addressed to the appropriate party. Any such notice shall be deemed to have been received when delivered in-person or when sent by telefax, or ten (10) business days subsequent to deposit in the U.S. mails, or one (1) day after deposit with express courier.
- 12.2 Neither the CLIENT nor SIEMENS shall assign or transfer any rights or obligations under this Agreement, except that either party may assign this Agreement to its affiliates and SIEMENS may use subcontractors in the performance of the Work. Nothing contained in this Agreement shall be construed to give any rights or benefits to anyone other than the CLIENT and SIEMENS without the express written consent of both parties.
- 12.3 This Agreement shall be governed by and construed in accordance with the laws of the state or commonwealth within which the Facilities are located.
- 12.4 All disputes and claims hereunder shall be submitted to, and heard by, the West Virginia Court of Claims.
- 12.5 All provisions of this Agreement allocating responsibility or liability between the Parties shall survive the completion of the Work and the termination of this Agreement.
- 12.6 All amendments and modifications to this Agreement shall be in writing and signed by both parties hereto.
- 12.7 Any provision of this Agreement found to be invalid, unlawful or unenforceable by a court of law shall be ineffective to the extent of such invalidity, and deemed severed herefrom, without invalidating the remainder of this Agreement. All other provisions hereof shall remain in full force and effect.
- 12.8 The waiver by a party of any breach by the other party of any term, covenant or condition hereof shall not operate as a waiver of any subsequent breach hereof. No waiver shall operate or be effective unless made in writing and executed by the party to be bound thereby.
- 12.9 In the event that the law or the CLIENT requires that SIEMENS procure a performance bond and/or a payment bond, SIEMENS shall provide a performance and payment bond in the amount of the Purchase Order/Work Order. The performance and payment bond will solely apply to the Work performed during the Construction Period and to the

# MASTER PERFORMANCE CONTRACTING AGREEMENT

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required statutory lien filing period thereafter. The performance and payment bond will not apply to any of the obligations included in Performance Assurance, Exhibit C.

12.10 As a State entity, the CLIENT is exempt from Federal and State taxes and will not pay or reimburse such taxes.

## Article 13

### Maintenance Services Technical Support Program

- 13.1 The scope of services provided by SIEMENS for the Maintenance Services Technical Support Program (MSTSP) is stated in Exhibit A.
- 13.2 SIEMENS will have inspected all equipment associated with the Work or Services within the first thirty (30) days of MSTSP commencement or no later than the first scheduled inspection. Testing and inspection will not be deemed to be complete until all such equipment has been so tested and inspected. However, SIEMENS may extend the testing and inspection period for portions of equipment relating to any fire alarm or life safety system ("FLS"), provided that during the course of the year following execution of this Agreement, the entire FLS will be tested and inspected as set forth in National Fire Protection Association ("NFPA") guidelines (hereby incorporated by reference), or as otherwise may be required pursuant to the law of the applicable jurisdiction.
- 13.3 If the equipment is altered or moved by any person, including the CLIENT, other than SIEMENS or a person authorized by SIEMENS, the CLIENT shall immediately notify SIEMENS in writing, and SIEMENS reserves the right to perform a reasonable reacceptance test on, or if necessary a reasonable re-commissioning of, the system at the CLIENT'S expense. If, in performing Services, SIEMENS makes a change to any FLS that, pursuant to NFPA or applicable law, requires a reacceptance test, SIEMENS will have the right to perform such reacceptance test at the CLIENT'S expense, provided that the CLIENT Representative is notified thereof. Reacceptance tests will be performed in accordance with applicable NFPA requirements, and charged on a time and materials basis.
- 13.4 If SIEMENS reasonably determines as a result of such inspection and/or testing that any equipment requires repair or replacement, the CLIENT will be so notified and shall take corrective action within thirty (30) days, or such equipment shall be removed from coverage hereunder without further action by the parties. SIEMENS is not liable or responsible for the continued testing, maintenance, repair, replacement or operating capabilities of any portion of the equipment until it has been inspected and/or tested and has been, if necessary, restored to an acceptable initial condition at the CLIENT'S sole expense. Any services provided by SIEMENS in the course of such restoration will be separately charged, on a time and materials basis, and not included in fees paid hereunder. If individual items of equipment cannot, in SIEMENS' sole determination, be properly repaired or replaced due to age, obsolescence, lack of availability of refrigerant gas, halon gas, necessary parts, materials, compatibility or otherwise, or as a result of excessive wear or deterioration, SIEMENS may, within ten (10) days of such inspection, give written notice that it is withdrawing such items from coverage under the MSTSP and adjust the MSTSP Payments due hereunder accordingly.
- 13.5 If the removal of equipment from coverage would compromise or impair the integrity of the Work, Services or compliance with law of any system, then SIEMENS will provide a written statement thereof for execution by the CLIENT.
- 13.6 If the MSTSP scope of Services defined in this Agreement provides for equipment maintenance, repairs and/or replacements of equipment by SIEMENS, those Services are limited to restoring the proper working condition of such equipment. SIEMENS will not be obligated to provide replacement equipment that represents significant capital improvement compared to the original. Exchanged components become the property of SIEMENS, except Hazardous Materials, which except as otherwise set forth herein remain the property and responsibility of the CLIENT.
- 13.7 All testing of any Fire Alarm and Life Safety Equipment provided for in the Contract Documents will be performed at the time and place and in the manner deemed appropriate by SIEMENS AND THE CLIENT, in accordance with applicable law and the requirements of NFPA and other relevant standards at least once per year.

## Article 14

### Additional Terms and Conditions

- 14.1 Contractor's License. West Virginia Code § 21-11-2 requires that all persons desiring to perform contractual work in West Virginia must be duly licensed. The West Virginia Contractors Licensing Board is empowered to issue the contractor's license. Application for a contractor's license may be made by contacting the West Virginia Division of Labor, Building 3, Room 319 1900 Kanawha Blvd., E., Charleston, West Virginia, 25305-0570. Telephone (304) 558-7890.

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SIEMENS will be required to furnish a copy of its contractor's license concurrently with execution of this Agreement.

It shall be SIEMENS' responsibility to ensure that all sub-contractors are duly licensed to perform work within the State of West Virginia.

4.2 Prevailing Wage Rates. SIEMENS and all subcontractors must pay the higher of the U. S. Department of Labor Minimum Wage Rates or the West Virginia Department of Labor Wage Rates as established for Monongalia County, pursuant to West Virginia Code § 21-5A-1, et seq. or the Federal Project Wage Rates (Davis Bacon Wages), whichever is higher.

Copies of current wage rates may be located at the following web sites:

State of WV Wage Rates

<http://www.labor.state.wv.us/wage/links.html>

Federal Wage Rates

<http://www.access.gpo.gov/davisbacon/>

Browse Determinations by State) (WV – Morgantown is Monongalia County)

4.3 Workers' Compensation Requirements. SIEMENS shall be in compliance with all rules and regulations of the State of West Virginia Workers' Compensation Fund and have all premiums paid and reports filed currently. SIEMENS will be required to furnish a copy of their proof of coverage concurrently with execution of this Agreement.

4.4 Wage Bond. If SIEMENS has been engaged in construction work in West Virginia for less than five (5) years proceeding the date of this Agreement, it shall post a wage bond with the West Virginia Department of Labor.

4.5 West Virginia Jobs Act. SIEMENS, when applicable, shall comply with the provisions of the West Virginia Jobs Act, West Virginia Code § 21-1C-1 et seq.

SIEMENS will be required to provide certified payrolls. One set of certified payrolls shall be sent directly to the WV Division of Labor. A second set of certified payrolls shall be sent to WVU Procurement Services; attn: Tim Bostonia. SIEMENS must also provide WVU Procurement with a copy of the transmittal letter to the WVDOL.