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# PERFORMANCE CONTRACTING AGREEMENT

between

[Insert CLIENT's correct and entire legal name]

and

**Siemens Industry, Inc.**

## TABLE OF ARTICLES

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11. Hazardous Material Provisions
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# PERFORMANCE CONTRACTING AGREEMENT

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Number: SAP JOB NUMBER

## Article 1 AGREEMENT

THIS **PERFORMANCE CONTRACTING AGREEMENT** ("Agreement") is made this       day of       ,       (the "Effective Contract Date", defined below), by and between Siemens Industry, Inc. ("SIEMENS") and the party identified below as the CLIENT.

### The CLIENT:

DESIGNATED REPRESENTATIVE:  
PHONE:       FAX:

**Siemens Industry, Inc.**  
1000 Deerfield Parkway  
Buffalo Grove, Illinois 60089

With offices at: [Insert branch address]

DESIGNATED REPRESENTATIVE:  
PHONE:       FAX:

For Work and Services in connection with the following project (the "Project"):

[Project name and address and any specific building or location that may apply]

The CLIENT considered performing the following FIMs but at this time, has determined to exclude them from the Scope of Work and Services, Exhibit A:

**[List FIMS not part of this project that were considered and may be performed via amendment at a later date]**

# PERFORMANCE CONTRACTING AGREEMENT

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## Articles and Attachments

This Agreement consists of this document, which includes the following articles and exhibits which are acknowledged by the CLIENT and SIEMENS and incorporated into the Agreement by this reference:

### Articles

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

### Exhibits

Exhibit A	Scope of Work and Services
Exhibit B	Payment Schedule(s)
Exhibit C	Performance Assurance
Exhibit D1	Form of Certificate of Substantial Completion
Exhibit D2	Form of Certificate of Final Completion
Exhibit E	Addendum No. 1
Exhibit F	General Conditions for Licensing Access to Software as a Web Based Offering

This Agreement, when executed by an authorized representative of the CLIENT and authorized representatives of SIEMENS, constitutes the entire, complete and exclusive agreement between the Parties relative to the project scope stated in Exhibit A. This Agreement supersedes all prior and contemporaneous negotiations, statements, representations, agreements, letters of intent, awards, or proposals, either written or oral relative to the same, and 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 Exhibit A, and for the Performance Assurance set forth in Exhibit C, the CLIENT shall pay SIEMENS in such manner and amounts as agreed to in Exhibit B.

Agreed for **[Insert CLIENT name]**

(Signature) by: \_\_\_\_\_

Print Name and Title: \_\_\_\_\_

(Signature) by: \_\_\_\_\_

Print Name and Title: \_\_\_\_\_

Agreed for **Siemens Industry, Inc.**

(Signature) by: \_\_\_\_\_

Print Name and Title: \_\_\_\_\_

(Signature) by: \_\_\_\_\_

Print Name and Title: \_\_\_\_\_

# PERFORMANCE CONTRACTING AGREEMENT

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## Article 2

### Glossary

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

**Acceptance** means the CLIENT has signed, or is deemed to have signed, a Certificate of Final Completion.

**Acceptance Date** means the date on which the CLIENT signs or is deemed to have signed a Certificate of Final Completion.

**Annual Performance Assurance Report** means the document prepared by SIEMENS and submitted to the CLIENT as part of the Performance Assurance Service Program, which identifies the Savings achieved for the applicable Annual Period.

**Annual Period** means a twelve (12) month period beginning on the Guarantee Date or on any anniversary date thereof.

**Annual Realized 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.

**Applicable Law** means all applicable laws, including Environmental Laws, treaties, ordinances, rules, regulations and interpretations of any Governmental Authority having jurisdiction over the design, engineering, fabrication, manufacturing, Delivery, assembly, erection, installation, and/or the performance of the Parties' obligations under this Agreement.

**Applicable Permits** means the permits, clearances, licenses, authorizations, consents, filings, exemptions or approvals from or required by any Governmental Authority that are necessary for the performance of the Parties' obligations under this Agreement.

**Baseline** means the measurements of Facility energy usage taken prior to the Effective Contract Date, and the Facility operating practices in effect prior to the Effective Contract Date, as set forth in the Performance Assurance, Exhibit C.

**Baseline Period** means the period of time from which data is provided to SIEMENS to derive the Baseline measurements. The Baseline Period is set forth in the Performance Assurance, Exhibit C.

**BTU** means a British Thermal Unit and is a unit of thermal energy.

**Capital Off-Set Savings** means a sub-category of Operational Savings where Savings will result in a cost-effective upgrade to the Facility to address one or more of the following issues: potential future increased costs, comfort, code non-compliance, usage requirements, user needs and/or expectations.

**Certificate of Final Completion** means a document, in the form attached as Exhibit D2 hereto, indicating that the Work identified in Article 1 of the Scope of Work and Services-Exhibit A has been completed in accordance with the Agreement, including all items in the Outstanding Items List(s).

**Certificate of Substantial Completion** means a document, in the form attached as Exhibit D1 hereto, indicating that the Work, or a designated portion of the Work, is Substantially Complete in accordance with the Agreement. A Certificate of Substantial Completion may be accompanied by an Outstanding Items List.

**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 and the first day of the month following the Acceptance Date.

**Construction Period Savings** means the actual accumulated Measured & Verified Savings plus the Stipulated Savings achieved from the Effective Contract Date until the Guarantee Date.

**Contracted Baseline** means the post-FIM-implementation Facility operating profile based on parameters described in Exhibit C, which the CLIENT shall maintain throughout the Performance Guarantee Period and are relied upon by SIEMENS for the calculation of Guaranteed Savings as provided in the Performance Assurance, Exhibit C. The Contracted Baseline must also include stipulated hours of operation and plug-loads for all Facilities, and must include stipulated blended, or non-blended, utility rates.

**Deferred Maintenance** means a sub-category of Operational Savings where Savings result from a reduction of current or potential future repair and maintenance costs due to certain work being performed hereunder where such work had been previously postponed.

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**Deliverables** shall mean collectively, (a) any Equipment and any Software Product deliverable to CLIENT from SIEMENS under or in connection with the Work, and (b) any Work Product Deliverables.

**Effective Contract Date** is the date appearing at the top of this Agreement, unless specifically indicated otherwise.

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

**Environmental Laws** means applicable national, state/commonwealth, municipal, and local laws as well as all rules, regulations, codes, standards, permits, directives, or ordinances that impose liability or standards of conduct (including disclosure or notification requirements) concerning the protection of human health or the environment, including, without limitation, all laws affecting, controlling, limiting, regulating, pertaining, or relating to the manufacture, possession, presence, use, generation, storage, transportation, detection, monitoring, treatment, Release, disposal, abatement, cleanup, removal, remediation, or handling of Hazardous Materials.

**Equipment** means the installed physical equipment to be provided by SIEMENS as described in the Scope of Work and Services, Exhibit A.

**Escalation Rate** means an annual percentage increase to be applied to the previous Annual Period's energy savings, operational savings and service pricing, beginning and occurring on dates outlined in the Performance Assurance, Exhibit C. A different Escalation Rate may be applied to differing Savings calculations and/or payment schedules depending on the percentage agreed upon by the Parties.

**Facility or Facilities** means the building(s) or structure(s) where Work will be installed or implemented.

**Facility Improvement Measures or FIMs** means the (i) Instruments, know-how and Intellectual Property, including but not limited to methods and techniques for energy conservation, owned or licensed by SIEMENS and employed by SIEMENS to perform the Work and Services under this Agreement; and, (ii) the installation of Equipment and Software Products with the intent of generating net savings or efficiencies at or in connection with the operation of the Facilities. A FIM may include one or multiple ECMs as well as any non-conservation-related activities, means or methods.

**FEMP** means the Federal Energy Management Program managed by the United States Department of Energy.

**FEMP Guidelines** means the FEMP M&V Guidelines v. 3.0 published by FEMP as M&V Guidelines; Measurement and Verification for Federal Energy Management Projects.

**Governmental Authority** means any federal, state/commonwealth, local or other governmental, judicial, public or statutory instrumentality, tribunal, agency, authority, body or entity, or any political subdivision thereof, having legal jurisdiction over the matter or Person in question.

**Guarantee Date** means the first day of the month following the date on which the CLIENT executes, or is deemed to have executed, the Certificate of Final Completion.

**Guaranteed Annual Savings** are the Guaranteed Measured & Verified Savings plus the Stipulated Savings that SIEMENS guarantees will be achieved in an Annual Period of the Performance Guarantee Period.

**Guaranteed Measured & Verified Savings** means the Measured & Verified Savings that SIEMENS guarantees will be achieved, as described in the Performance Assurance, Exhibit C.

**Guaranteed Savings** means the amount of Savings that SIEMENS guarantees will be achieved at the Facility during the Performance Guarantee Period. as identified in the Performance Assurance, Exhibit C as subject to the limitation identified in Section 4.8.

**Hazardous Materials** means any material, substance, or waste, that, by reason of its composition or characteristics, is hazardous to human health and/or the environment, including any "solid waste" or "hazardous waste," as those terms are defined by the Resource Conservation and Recovery Act of 1976, as amended, any "hazardous substance," as that term is defined by the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, and any other hazardous, toxic or radioactive chemical, waste, byproduct, pollutant, contaminant, compound, product, material or substance, including without limitation, Asbestos, Asbestos containing materials ("ACM"), polychlorinated biphenyls, petroleum (including crude oil or any fraction or byproduct thereof), hydrocarbons, radon, urea, urea formaldehyde, and any other material that is prohibited, controlled, limited or regulated in any manner under any Environmental Laws..

**Instruments** means all know-how, tools and related documentation owned or licensed by SIEMENS and used by SIEMENS to install or commission Equipment and Software Products for operation at the Facility, including but not limited to tools for installing any Software Products in Equipment, performing diagnostics on Equipment as installed in the Facility as well as any

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reports, notes, calculations, data, drawings, estimates, specifications, manuals, documents, all computer programs, codes and computerized materials prepared by or for SIEMENS and used by SIEMENS to provide an ECM or a FIM. Instruments excludes Work Product Deliverables.

**Intellectual Property Rights or Intellectual Property** means all trade secrets, patents and patent applications, trademarks (whether registered or unregistered and including any goodwill acquired in such trademarks), services marks, trade names, internet domain names, copyrights (including rights in computer software), moral rights, database rights, design rights, rights in know-how, rights in inventions (whether patentable or not) including, but not limited to, any and all renewals or extensions thereof, and all other proprietary rights (whether registered or unregistered, and any application for the foregoing), and all other equivalent or similar rights which may subsist anywhere in the world, including, but not limited to, any and all renewals or extensions thereof.

**IPMVP** means the International Performance Measurement and Verification Protocol, Volume 1, EVO 10000-1.2007 as prepared by the Efficiency Valuation Organization.

**kW** and **kWh** mean kilowatt and kilowatt hour, respectively.

**Maintenance Services Program or MSP** means the Services performed by SIEMENS to maintain the Equipment in good working order. The MSP may also contain Services unrelated to the maintenance of the Equipment. If applicable, the MSP is more fully described in the Scope of Work and Services, Exhibit A.

**Material Change** means a measurable deviation in the Contracted Baseline such that there is an adverse impact on the Annual Realized Savings which results or will result in a Savings Shortfall.

**Measured & Verified Savings** means those Savings that can be calculated and ascertained by the methodology set forth in the Performance Assurance, Exhibit C.

**Operational Savings** means Savings derived from reduced operational expenses, including but not limited to, Deferred Maintenance, or Capital Off-Set Savings. Operational Savings can only be expressed in monetary value and are Stipulated Savings.

**Outstanding Items List** means a list of items in need of completion or correction that relates to the Work, or a designated portion thereof that is Substantially Complete. The absence of such items does not deprive the CLIENT of the ability to put such Work, or a designated portion thereof to beneficial use. An Outstanding Items List may be attached to a Certificate of Substantial Completion.

**Parties** means the CLIENT and SIEMENS.

**Performance Assurance** is the process of ascertaining whether the FIMs are performing at the level necessary to achieve the Guaranteed Savings.

**Performance Assurance Services Program or PASP** means the Services required to monitor the operation of the FIMs so that SIEMENS can provide the Annual Performance Assurance Report detailing the Annual Realized Savings and comparing the same to the Annual Guaranteed Savings based upon the calculations agreed to by the Parties in the Performance Assurance, Exhibit C. The Services provided under the PASP are described in the Scope of Work and Services, Exhibit A.

**Performance Guarantee** means the guarantee that SIEMENS makes to the CLIENT which is reconciled and confirmed through the Performance Assurance process set forth in the Performance Assurance, Exhibit C.

**Performance Guarantee Period** means the timeframe from the Guarantee Date to the last day of the final Annual Period as described in Table 1.1 of the Performance Assurance, Exhibit C, or the period from the Guarantee Date until the termination of this Agreement, whichever occurs earlier.

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

**Person or Persons** means any individual, corporation, partnership, limited liability company, association, joint stock company, trust, unincorporated organization, joint venture, government or political subdivision or agency thereof.

**Release** means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing of any Hazardous Materials into the environment, including the abandonment or discard of barrels, containers, and other closed receptacles containing any Hazardous Materials.

**Savings** means the Parties' intended result from implementing all FIMs. Savings can be derived from reductions in energy or utility consumption, reductions in operating expenses, a changed utility rate classification or a combination thereof. The Savings that are achieved from reduced energy or utility consumption are converted to a dollar figure based upon the calculation in Article 4.1.1 and as detailed in the Performance Assurance, Exhibit C. When converted to a dollar figure, these Savings become energy cost savings. Operational Savings are only expressed in a dollar figure.



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**Savings Shortfall** means the Annual Realized Savings less the Guaranteed Annual Savings for the Annual Period resulting in an amount less than zero.

**Services** means those services to be provided by SIEMENS as described in the Scope of Work and Services, Exhibit A.

**SIEMENS Permits** means the Applicable Permits that SIEMENS is required to obtain in SIEMENS's name in order to perform the Work under Applicable Law (as it exists on the Effective Date).

**SIEMENS Pre-existing Intellectual Property** means any Intellectual Property: (i) that has been conceived or developed by an employee or subcontractor of SIEMENS before SIEMENS performs any Work or Services under this Agreement; (ii) that is conceived or developed by such employee or subcontractor at any time wholly independently of SIEMENS performing the Work under this Agreement; or, (iii) if developed while performing the Work under this Agreement, where the development of Intellectual Property for the benefit of the CLIENT is not expressly identified as a FIM or part of a FIM. SIEMENS Pre-existing Property is included in all reports, notes, calculations, data, drawings, estimates, specifications, manuals, documents, all computer programs, codes and computerized materials prepared by or for SIEMENS.

**SIEMENS Product** means a product, including Software Product and/or Equipment, offered for sale or license by SIEMENS or its affiliates or subsidiaries and developed prior to performing the Work or SIEMENS rendering services in connection with this Agreement. A SIEMENS Product also includes improvements or modifications to any Equipment and any Software Product developed by SIEMENS or developed as part of the Work, including any SIEMENS Product that is configured or modified for operation at a site specified by the CLIENT. Any information that is provided by the CLIENT and incorporated into a SIEMENS Product is not, by itself, a SIEMENS Product. A compilation of such information and the product of such compilation, however, is a SIEMENS Product.

**Software Product** means any software that is owned or licensed by SIEMENS or its affiliates and that is either separately deliverable for use in the Equipment or for use in a computer system owned by the CLIENT or delivered as firmware embedded in the Equipment.

**Stipulated Savings** are a sub-category of Guaranteed Savings that do not require post-FIM implementation measurement and verification because they are agreed upon by the Parties based upon representations made to SIEMENS by the CLIENT and through the application of generally accepted analytical formulae. As such, Stipulated Savings are agreed upon in advance by the Parties and cannot be changed. When used as a methodology for representing a FIM's energy savings, such methodology is not recognized as a measurement and verification methodology under IPMVP. Therefore, where the IPMVP measurement methodologies are required, a methodology other than Stipulated Savings must be used to calculate energy savings.

**Substantial Completion or Substantially Complete** means the Work, or any identifiable portion thereof, which is sufficiently complete, in accordance with the provisions of this Agreement relating to the Scope of the Work and Services, Exhibit A, such that the CLIENT will be able to realize from such Work substantially all of the practical benefits intended to be gained therefrom, or otherwise employ the Work or the FIMs for their intended purposes.

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

**Total Guaranteed Savings** means the sum of the Savings that are guaranteed for all Annual Periods during the Performance Guarantee Period (inclusive of the Construction Period, if applicable). The Total Guaranteed Savings are reflected in Tables 1.1 and 1.2 in the Performance Assurance, Exhibit C.

**Work** means collective labor, Equipment and services comprising the FIMs to be performed by SIEMENS, as described in the Scope of Work and Services, Exhibit A.

**Work Product Deliverable** means the tangible form of a report or drawing specifically developed for, commissioned by and deliverable to the CLIENT in connection with the Work to be performed by SIEMENS under this Agreement.

### Article 3

#### General

- 3.1 The Parties hereto acknowledge and agree that this Agreement has been negotiated at arm's length and among the Parties equally sophisticated and knowledgeable as to the subject matter of this Agreement. Each party has conferred, or has had the opportunity to confer, with their respective legal counsel. Accordingly, in the event any claim is made relating to any conflict, omission, or ambiguity in this Agreement, no presumption, burden of proof, or persuasion shall be implied by virtue of the fact that this Agreement was drafted by or at the request of a particular party or its legal counsel.
- 3.2 The CLIENT hereby retains SIEMENS as an independent contractor, not an agent or employee of the CLIENT, to perform and provide, or cause to be performed and provided, and SIEMENS hereby agrees to perform and provide, or cause to be performed or provided, the Work and Services set forth in Exhibit A all in accordance with the terms and conditions of

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this Agreement. No employee or agent of SIEMENS shall be, or shall be deemed to be, an employee or agent of the CLIENT.

- 3.3 SIEMENS shall have exclusive control of the manner and means of performing the Work in accordance with the requirements of the Agreement. SIEMENS, however, has no authority to act or make any agreements or representations on behalf of the CLIENT.
- 3.4 SIEMENS represents, warrants and covenants to the CLIENT that:
- (a) It has all requisite corporate power 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 Law, 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 Services are to be performed.
- 3.5 The CLIENT represents, warrants and covenants to SIEMENS that:
- (a) It has all requisite corporate power and/or 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 Law, 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 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;
  - (d) To the CLIENT's best 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; and,
  - (e) The CLIENT has consulted with its legal counsel and is relying on the advice of its counsel concerning all legal issues related to this Agreement, and is not relying on SIEMENS in this regard.

### Article 4

#### Performance Guarantee

- 4.1 The Annual Realized Savings generated during each Annual Period will be no less than the Guaranteed Annual Savings as shown in Tables 1.1 and 1.2 of the Performance Assurance, Exhibit C, subject to the limits in Section 4.8. The measurement and verification calculation methodology for determining the Savings is set forth in the Performance Assurance, Exhibit C.
- 4.1.1 General. Except as otherwise provided, energy savings will be calculated for each month of each Annual 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 calculated by 1) assuming the Contracted Baseline has been maintained per Section 4.3 below, and 2) subtracting the then current period measured units of energy consumed from the Baseline units of energy defined in Article 5 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 Rates to be applied to utility, energy or other costs are set forth in Exhibit C. SIEMENS and the CLIENT agree that the Baseline data 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 the Annual Realized Savings.
- 4.3 SIEMENS and the CLIENT agree that the Contracted Baseline fully described 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



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Baseline parameters, as may be adjusted in accordance with the terms herein, during the entire term of the Performance Guarantee Period.

- 4.4 The CLIENT agrees to notify SIEMENS prior to or within thirty (30) days of CLIENT's knowledge of any Material Change.
- 4.5 Within thirty (30) days of notice of a Material Change, SIEMENS' discovery of a Material Change and with prompt notice to CLIENT, SIEMENS will either:
- (a) Require an adjustment to the Performance Assurance and the Performance Guarantee as a result of the Material Change; or,
  - (b) Where a commercially reasonable adjustment to the Performance Guarantee is unavailable, terminate both the Performance Assurance and the Performance Guarantee.
- 4.6 A Performance Guarantee Period savings reconciliation as identified in Section 4.1 will be performed at the end of each Annual Period as follows:
- (a) Within ninety (90) days of the Guarantee Date, the Construction Period Savings shall be reconciled and applied to the calculation of the first Annual Period's Annual Realized Savings.
  - (b) At the conclusion of each Annual Period, SIEMENS will calculate the Annual Realized Savings and compare the calculated amount to the applicable Guaranteed Annual Savings amount.
  - (c) Where the Annual Realized Savings are less than the Guaranteed Annual Savings, a Savings Shortfall shall be recorded for the applicable Annual Period.
  - (d) A Savings Shortfall shall be paid by SIEMENS within sixty (60) days following the CLIENT's acceptance of the reconciliation and once paid SIEMENS shall have fulfilled its obligations under the Performance Guarantee for the applicable Annual Period.
- 4.6.1 As the mutual goal of the Parties is to maximize Savings, if SIEMENS can correct a Savings Shortfall through an operational improvement at no expense or material inconvenience to the CLIENT and without future operational expenses, and the CLIENT declines to allow such operational improvement, then any future Savings Shortfall that the improvement would have corrected will be negated by deeming the value of the Savings Shortfall as Savings achieved and adding the amount of same to the Annual Realized Savings calculations for each Annual Period thereafter.
- 4.7 The Performance Guarantee is dependent upon and is subject to the express condition that the CLIENT maintains the PASP during the entire Performance Guarantee Period. If the CLIENT fails to maintain, breaches, cancels or otherwise causes the termination of the PASP then; (a) The Performance Guarantee shall terminate immediately and be void and of no force or effect; or, (b) Where termination of the Performance Guarantee acts to render the Agreement in violation of Applicable Law, all Guaranteed Savings thereafter shall be determined to have been achieved and SIEMENS shall have been deemed to have met its Performance Guarantee obligations under this Agreement for each and every Annual Period thereafter without the obligation to provide the CLIENT, or any third-party as the case may be, with any further Annual Performance Assurance Reports.
- 4.8 The payments and credits based on Savings Shortfalls, if any, are the sole remedy of the CLIENT under 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 EITHER SIEMENS AND/OR A THIRD-PARTY (IN THE EVENT THAT THE CLIENT HAS FINANCED THE TRANSACTION) FOR THE AGGREGATE OF: THE PRICE, AS DEFINED IN EXHIBIT B, ARTICLE 1.1; THE PASP PAYMENTS; THE MSP PAYMENTS, IF ANY; AND, IF APPLICABLE, THE CLIENT'S COST OF FINANCING THE WORK. The CLIENT's cost of financing the Work is the cost of financing calculated either: (a) On the date that the escrow account is funded in accordance with Exhibit B, Article 1.2; or, (b) On the Effective Contract Date if the escrow requirement is expressly waived by SIEMENS.
- 4.9 The CLIENT represents that all existing equipment that is not installed by SIEMENS under this Agreement but is deemed necessary to achieve the Performance Guarantee, is in satisfactory working condition. Prior to the beginning of the Performance Guarantee Period, SIEMENS will have inspected all such existing equipment and reported any deficiencies to the CLIENT. To the extent that the deficiencies are not remedied by the CLIENT prior to the Guarantee Date, the adverse effect on the ability of the Project to attain the necessary Guaranteed Savings shall be factored into the Annual Performance Assurance Report and, if necessary, the Performance Guarantee shall be adjusted accordingly.

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- 4.10 If the Equipment or the existing 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 reacceptance test on, or if necessary a re-commissioning of, the system at the CLIENT's expense in order to determine if a Material Change has occurred.
- 4.11 SIEMENS will have no liability or obligation to continue providing PASP Services or any Guaranteed Savings under the Performance Guarantee in the event that the CLIENT fails to:
- Authorize a re-acceptance test or re-commissioning that SIEMENS reasonably deems necessary in order to determine if a Material Change has occurred;
  - Provide access to any Facility where Work is to be performed;
  - Service and maintain all Equipment in accordance with the manufacturers' recommendations in order to prevent a Savings Shortfall; or,
  - Provide SIEMENS with accurate Facility operating information as soon as such information becomes reasonably available to the CLIENT, including energy usage and cost, executed preventive maintenance and repair records, building or equipment additions, and occupancy levels during each Annual Period.
- 4.12 Unless expressly contrary to Applicable Law, should the CLIENT decide to discontinue the PASP before the end of the Performance Guarantee Period, the CLIENT will give SIEMENS thirty (30) days prior written notice and in such notice indicate that the CLIENT has selected one of the following:
- The CLIENT will re-invest the avoided cost of cancellation of the PASP into Facility improvements and services that improve the overall Facility's performance and which improvements and services are implemented by SIEMENS; or,
  - The CLIENT will pay to SIEMENS % of the remaining value left in the PASP Annual Period, as a liquidated damage and not as a penalty, to compensate SIEMENS for SIEMENS' up-front costs and expenses in preparing to perform the PASP as contracted for the Annual Period.
- 4.13 Unless expressly contrary to Applicable Law, any disputes concerning the calculation of the Annual Realized Savings or changes to the Contracted Baseline that are not resolved by negotiation between the Parties within thirty (30) days of the notice of the dispute, will be resolved by a third-party professional engineering firm which is reasonably acceptable to both SIEMENS and the CLIENT. The determination of such firm will be final and binding upon CLIENT and SIEMENS. SIEMENS and the CLIENT will each be responsible for half of the fees of such firm.

### Article 5

#### Work by SIEMENS

- 5.1 SIEMENS will perform the Work expressly described in this Agreement and in any work release documents or change orders that are issued under this Agreement and signed by both Parties. The Work performed by SIEMENS shall be conducted in a workmanlike manner.
- 5.2 SIEMENS shall perform the Work during its normal hours, Monday through Friday inclusive, excluding holidays, unless otherwise agreed herein. The CLIENT shall make the Facility available so Work may proceed in an efficient manner.
- 5.3 SIEMENS is not required to conduct safety, reacceptance or other tests, install new devices or equipment or make modifications to any Equipment unless expressly made a part of the Work identified in the Scope of Work and Services, Exhibit A. Any CLIENT request to change the scope or the nature of the Work or Services must be in the form of a mutually agreed change order, effective only when executed by the Parties.
- 5.4 All Work Product Deliverables shall become the CLIENT's property upon receipt by CLIENT. SIEMENS may retain file copies of such Work Product Deliverables. If any Instruments are provided to the CLIENT under this Agreement, any such Instruments shall remain SIEMENS' property, including the Intellectual Property conceived or developed by SIEMENS in the Instruments. All SIEMENS' Pre-existing Intellectual Property that may be included in the Deliverables provided to the CLIENT under this Agreement shall also remain SIEMENS property including the SIEMENS Pre-existing Intellectual Property included in the Work Product Deliverables. All Work Product Deliverables and any Instruments provided to the CLIENT are for Permitted Users' use and only for the purposes disclosed to SIEMENS. SIEMENS hereby grants the CLIENT a royalty-free (once payments due under this Agreement are paid to SIEMENS), non-transferable, perpetual, nonexclusive license to use any SIEMENS Pre-existing Intellectual Property solely as incorporated into the Deliverables and SIEMENS' Intellectual Property as incorporated into any Instruments provided to the CLIENT under this

## PERFORMANCE CONTRACTING AGREEMENT

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Agreement. Under such license, and following agreement to be bound to such separate confidentiality provisions that may exist between the Parties, Permitted Users shall have a non-exclusive, non-transferable, limited license right to:

- (a) Use, in object code form only, the Software Products included in the Deliverables (“Software Deliverables”);
- (b) Make and retain archival and emergency copies of such Software Deliverables (subject to any confidentiality provisions) except if the Software Deliverable is embedded in the Equipment; and,
- (c) Use all such Deliverables and such Instruments, provided however, the Deliverables and Instruments shall not be used or relied upon by any parties other than Permitted Users, and such use shall be limited to the particular project and location for which the Deliverables are provided. All Deliverables provided to the CLIENT are for Permitted Users’ use only for the purposes disclosed to SIEMENS, and the CLIENT shall not transfer them to others or use them or permit them to be used for any extension of the Work or any other project or purpose, without SIEMENS’ express written consent.

5.4.1 Any reuse of such Deliverables or such Instruments for other projects or locations without the written consent of SIEMENS, or use by any party other than Permitted Users will be at Permitted Users’ risk and without liability to SIEMENS; and, the CLIENT shall indemnify, defend and hold SIEMENS harmless from any claims, losses or damages arising therefrom.

5.4.2 In consideration of such license, CLIENT agrees not to reverse engineer any Equipment or Software Product to reconstruct or discover any source code, object code, firmware, underlying ideas, or algorithms of such Equipment or Software Product even to the extent such restriction is allowable under Applicable Law.

5.4.3 Nothing contained in this Agreement shall be interpreted or construed to convey to the CLIENT the pre-existing Intellectual Property rights of any third party incorporated into the Deliverables. CLIENT agrees to take delivery of any Software Deliverables subject to any applicable SIEMENS or third party end-user license agreement (EULA) accompanying such Software Deliverable, or if no EULA or third party license accompanies such SIEMENS software, the EULA posted at [www.usa.siemens.com/btcpseula](http://www.usa.siemens.com/btcpseula) (SIEMENS’ EULA web site) for such SIEMENS software. Notwithstanding the foregoing, in the event of any inconsistency between the terms of the Agreement and the EULA for such SIEMENS software, the terms of the Agreement shall govern over the EULA except for the use and metric restrictions set forth in the EULA for such SIEMENS software shall take precedence and supersede the terms of the Agreement.

5.5 SIEMENS shall obtain and maintain the SIEMENS Permits. If any SIEMENS Permit (or application therefor) requires action by the CLIENT, the CLIENT shall, upon the request of SIEMENS, take such action as is reasonably appropriate.

5.6 SIEMENS shall be responsible for any portion of the Work performed by 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 Facility shall not relieve others of their responsibility to the CLIENT or to others.

5.7 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 PASP or MSP Services, is warranted to be free from defects in workmanship for one year after the Work is performed. PASP Services and MSP Services are warranted to be free from defects in workmanship for ninety (90) days after the Services are performed.

5.8 Warranty Limitation:

- (a) The limited warranties set forth in Section 5.7 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) which the CLIENT or a third party subjects to unreasonable or improper use or storage, uses beyond rated conditions, operates other than per SIEMENS or the manufacturer’s instructions, or otherwise subjects to improper maintenance, negligence or accident; (iii) damaged because of any use of the Equipment after the CLIENT has, or should have 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.

## PERFORMANCE CONTRACTING AGREEMENT

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- (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. The CLIENT's sole and exclusive remedy for any Equipment or Services not conforming with this limited warranty is limited to, at SIEMENS' option: (i) repair or replacement of defective components of covered Equipment; (ii) re-performance of the defective portion of the Services; or (iii) to the extent previously paid and itemized, the issuance of a credit or refund for the original purchase price of such defective component or portion of the Equipment or Services.
  - (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.
- 5.9 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.
- 5.10 SIEMENS will not be responsible for the maintenance, repair or replacement of, or Services necessitated 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 covered by the warranty provisions herein or otherwise specifically stated herein; or
  - (b) The CLIENT's 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 THAT PERFORMED BY SIEMENS OR ITS AGENTS.
- 5.11 SIEMENS may suspend its performance of the Work at the Facility, if, in the reasonable opinion of SIEMENS, based upon industry standards and SIEMENS' applicable safety programs, conditions at the Facility for which SIEMENS is not responsible become unsafe for the continued performance of the Work and such conditions are not rectified by CLIENT immediately. SIEMENS shall resume its performance of the Work promptly after the unsafe conditions are rectified by CLIENT.

### Article 6

#### CLIENT 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 so as not to 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 Facility 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 Facility where the Work is to be performed as may be reasonably requested by SIEMENS. Such plans and blueprints, along with an executed copy of this Agreement, with its



## PERFORMANCE CONTRACTING AGREEMENT

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Exhibits, shall be kept and maintained in CLIENT's files for a period of fifteen (15) years from the Effective Contract Date;

- (f) Furnish SIEMENS with all approvals, permits and consents from Governmental Authorities and others as may be required for performance of the Work, except for SIEMENS Permits;
  - (g) In accordance with Article 11 hereof, promptly notify SIEMENS of all known or suspected Hazardous Materials at the Facility, of any contamination of the Facility by Hazardous Material, and of any other 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) Comply with Applicable Law and provide any notices required to be given to any Governmental Authority in connection with the Work, except such notices SIEMENS has expressly agreed in writing to give;
  - (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 Facility where the Work is to be performed;
  - (j) Furnish SIEMENS with any contingency plans, safety programs and other policies, plans or programs related to any Facility where the Work is to be performed;
  - (k) Operate, service and maintain all Equipment according to the manufacturer's recommendations including those set forth in the manufacturer's operating manuals or instructions, as well as all requirements of Applicable Law or of authorities having jurisdiction. The CLIENT shall furnish all needed servicing and parts for said FIMs, which parts shall become part of the FIMs. Such Equipment shall be operated only in the specified operating environment, which shall be supplied by the CLIENT, including without limitation: (1) suitable electrical service, including clean, stable, properly conditioned power, to all Equipment; (2) telephone lines, capacity and connectivity as required by such Equipment; and (3) heat, light, air conditioning or other environmental controls, and other utilities in accordance with the specifications for the Equipment;
  - (l) Promptly notify SIEMENS of any unusual operating conditions, hours of usage, system malfunctions, installed equipment or building alterations that may affect the Equipment or energy usage or any Services; 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. All on-line service Equipment (excluding the phone line) will remain the property of SIEMENS unless otherwise stated herein.
- 6.2 Unless contrary to Applicable 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 Facility. Except as expressly provided herein, SIEMENS shall not be responsible for the adequacy of the health or safety programs or precautions related to the CLIENT's activities or operations, the CLIENT's other contractor(s), the work of any other person or entity, or Facility conditions. SIEMENS shall not be responsible for inspecting, observing, reporting or correcting health or safety conditions or deficiencies of the CLIENT or others at the Facility. So as not to discourage SIEMENS from voluntarily addressing health or safety issues while at the Facility, 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 As the Work is performed, Applicable Law or conditions (as they exist on the Effective Date) may change, or circumstances outside SIEMENS' reasonable control may develop, which would require SIEMENS to expend additional costs, effort or time to complete the Work, in which case SIEMENS will notify the CLIENT and an equitable adjustment will be made to SIEMENS' compensation and the time for performance. In the event such changes require the Work to be suspended or terminated, SIEMENS shall be compensated for Work previously performed and for costs reasonably incurred in connection with the suspension or termination.
- 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.

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- 7.3 SIEMENS may, in its sole discretion, 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 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 or omissions by the CLIENT or its employees, agents or contractors, 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 time for performance shall be extended by a period equal to the time lost plus a reasonable recovery period and the compensation shall be equitably adjusted to compensate for additional costs SIEMENS incurs due to such delay. If any such delay exceeds sixty (60) days, SIEMENS may terminate this Agreement upon three (3) days' notice to the CLIENT and the CLIENT shall promptly pay SIEMENS for the allocable portion of the Work completed, for any costs and expenses of termination, and for any loss or damage incurred with respect to materials, equipment, tools and machinery, including reasonable overhead and profit.

### Article 8

#### Compensation

- 8.1 The aggregate amount paid by CLIENT provides for and is solely in consideration of the Scope of Work and Services described in Exhibit A, and is detailed in Exhibit B.
- 8.2 SIEMENS will invoice the CLIENT in accordance with the schedules set forth in Exhibit B. Unless otherwise agreed in writing, invoices are due and payable upon receipt by the CLIENT. If the CLIENT disagrees with any portion of an invoice, it shall notify SIEMENS in writing of the amount in dispute and the reason for its disagreement within 21 days of receipt of the invoice, and shall pay the portion not in dispute.
- 8.3 SIEMENS may suspend or terminate the Work or Services at any time if payment is not received when due. In such event, SIEMENS shall be entitled to compensation for the Work or Services previously performed and for costs reasonably incurred in connection with the suspension or termination.
- 8.4 On amounts not paid within thirty (30) days of invoice date, the CLIENT shall pay interest from invoice date until payment is received at the lesser of 12% per annum or the maximum rate allowed by law. The CLIENT shall reimburse SIEMENS for SIEMENS' costs and expenses (including reasonable attorney and witness fees) incurred for collection under this Agreement.
- 8.5 Except to the extent expressly agreed herein, SIEMENS' fees do not include any taxes, excises, fees, duties or other government charges related to the Work or Services. The CLIENT shall pay such amounts or reimburse SIEMENS for any such amounts SIEMENS pays to the extent such charges are lawfully due and payable by CLIENT and have been paid or incurred by SIEMENS in furtherance thereof. If the CLIENT claims that the 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.
- 8.6 All other work or services requested by the CLIENT, including but not limited to the following, shall be separately billed or surcharged on a time and materials basis:
- (a) Emergency services, if inspection does not reveal any deficiency covered by the Scope of Work and Services, Exhibit A;
  - (b) Work and/or services performed at times other than during SIEMENS' normal working hours, unless otherwise agreed to in Exhibit A; or
  - (c) Work and/or services performed on equipment not covered by the Scope of Work and Services, Exhibit A.

### Article 9

#### Acceptance

- 9.1 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 Completion to the CLIENT which shall be subject to the following:
- (a) If the CLIENT concurs that the described portion of the Work as performed is Substantially Complete, the CLIENT will sign the Certificate of Substantial Completion and return it to SIEMENS;



## PERFORMANCE CONTRACTING AGREEMENT

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- (b) A Certificate of Substantial Completion may include, as an attachment to it, an Outstanding Items List prepared by SIEMENS;
  - (c) If the CLIENT does not concur that the Work is Substantially Complete, then, within five (5) business days of receiving the Certificate of Substantial Completion, the CLIENT shall notify SIEMENS in writing of the reasons it believes the Work is not Substantially Complete;
  - (d) If SIEMENS disagrees with the CLIENT as to whether the Work is Substantially Complete, SIEMENS shall notify the CLIENT of a dispute and such dispute shall be resolved in accordance with Section 9.3 herein;
  - (e) If, within five (5) business days of receiving the Certificate of Substantial Completion the CLIENT fails to sign the Certificate, and within the same period the CLIENT's Representative does not deliver to SIEMENS a written notice of the reasons the CLIENT believes that the Work is not Substantially Complete, then in the mutual interests of the Project proceeding in a timely manner, the CLIENT will be deemed to have agreed to, signed and returned the Certificate of Substantial Completion.
- 9.2 After the CLIENT signs and returns, or is deemed to have signed and returned to SIEMENS all of the Certificates of Substantial Completion relating to the Work, and after SIEMENS corrects and completes all of the items on all of the Outstanding Items Lists, if any, SIEMENS will submit to the CLIENT a Certificate of Final Completion which shall be subject to the following:
- (a) If the CLIENT concurs that all of the items on all of the Outstanding Items Lists have been completed or corrected, the CLIENT will indicate its final acceptance of the Work by signing the Certificate of Final Completion and returning it to SIEMENS;
  - (b) If the CLIENT does not concur that all of the items on all of the Outstanding Items Lists have been completed or corrected, then the CLIENT shall, within five (5) business days of receiving the Certificate of Final Completion, identify the items that, it believes, were not completed or corrected;
  - (c) If SIEMENS disagrees that the items identified by the CLIENT have not been completed or corrected, SIEMENS shall notify the CLIENT of a dispute and such dispute shall be resolved in accordance with section 9.3 herein;
  - (d) If, within five (5) business days of receiving a Certificate of Final Completion, the CLIENT fails to sign that Certificate, and, within the same period the CLIENT's Representative does not deliver to SIEMENS a written notice identifying the items on the Outstanding Items List(s) that, the CLIENT believes, were not completed or corrected, then the CLIENT will be deemed to have agreed to and signed and returned the Certificate of Final Completion.
- 9.3 Any disputes concerning the Substantial Completion or the Final Completion of the Work will be resolved by submitting the issue to a third party professional engineering firm and which is reasonably acceptable to both SIEMENS and the CLIENT. The determination of this firm with respect to Final Completion or Substantial Completion will be final and binding upon the Parties. SIEMENS and the CLIENT shall share equally the costs or fees for such firm in connection with such dispute resolution process.

### Article 10

#### Insurance and Allocation of Risk

- 10.1 SIEMENS shall maintain in full force and effect the following insurance coverage and limits specified below commencing ten (10) days after the Effective Contract Date or, where applicable, the date that the CLIENT closes its financing, whichever is later, and continuing until the date of the Certificate of Final Completion. The required limits of insurance may be satisfied with any combination of primary and excess coverage. SIEMENS or SIEMENS' insurance carrier shall endeavor to provide the CLIENT with thirty (30) days' prior notice of cancellation, termination or material alteration of any insurance coverage set forth in this Article 10.1. In addition, SIEMENS' insurance shall be maintained with insurance companies having an A.M. Best rating of "A-" or better and a financial size category of "VII" or higher (or a comparable rating by any other rating entity reasonably acceptable to the CLIENT and evidenced by the CLIENT's written confirmation, which acceptance shall not be unreasonably withheld). SIEMENS shall provide the CLIENT applicable insurance certificates of such coverage prior to SIEMENS' commencement of any Work at the Facility.
- 10.1.1 SIEMENS has the responsibility and obligation to procure and maintain the following insurance policies:
- (a) Workers' Compensation Insurance in accordance with Applicable Law;
  - (b) Employer's Liability Insurance with a limit of One Million Dollars (\$1,000,000) per accident, per employee for occupational disease, and in the aggregate for occupational disease;

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- (c) Commercial General Liability Insurance with coverage written for bodily injury and broad form property damage on an “occurrence” basis with a limit of Five Million Dollars (\$5,000,000) per occurrence and Five Million Dollars (\$5,000,000) aggregate. This policy shall include blanket contractual coverage, railroad protective liability coverage, and coverage for premises, operations, explosion, collapse and underground (XCU) hazards, and products/completed operations;
  - (d) Contractual Liability insuring the obligations assumed by SIEMENS in this Agreement; and,
  - (e) Broad Form Property Damage (including Completed Operations).
- 10.1.2 SIEMENS shall name the CLIENT as an additional insured to the extent bodily injury (including death) or third party property damage results from the negligent acts or omissions of SIEMENS and require that this policy contain a “separation of insureds” clause.
- 10.1.3 SIEMENS shall require its subcontractors performing Work at the Facility to maintain the types, coverage and limits of insurance which are reasonable in accordance with prudent industry practice and commensurate with the Work to be performed by such subcontractor.
- 10.2 The CLIENT shall maintain in full force and effect the insurance coverage and limits specified below from the date of SIEMENS’ commencement of Work at the Facility and continuing until the end of the warranty period set forth in Section 5.7(a). The CLIENT or the CLIENT’s insurance carrier shall endeavor to provide SIEMENS with thirty (30) Days’ prior notice of cancellation, termination or material alteration of any insurance coverage set forth in this Section 10.2. In addition, the CLIENT’s insurance shall be maintained with insurance companies having an A.M. Best rating of “A- “ or better and a financial size category of “VII” or higher (or a comparable rating by any other rating entity reasonably acceptable to SIEMENS and evidenced by SIEMENS’ written confirmation, which acceptance shall not be unreasonably withheld). The CLIENT shall provide SIEMENS applicable insurance certificates of such coverage prior to SIEMENS’ commencement of any Work at the Facility. The required limits of insurance may be satisfied with any combination of primary and excess coverage.
- (a) Workers’ Compensation Insurance in accordance with Applicable Law applicable to the jurisdiction in which the Work is performed.
  - (b) Employer’s Liability Insurance with a limit of One Million Dollars (\$1,000,000) per accident, per employee for occupational disease, and in the aggregate for occupational disease;
  - (c) Commercial General Liability Insurance with a limit of Five Million Dollars (\$5,000,000) per occurrence and Five Million Dollars (\$5,000,000) annual aggregate. This policy shall include blanket contractual coverage, railroad protective liability coverage, and coverage for premises, operations, explosion, collapse and underground (XCU) hazards, and products/completed operations. The CLIENT shall name SIEMENS and its subcontractors as additional insureds to the extent bodily injury (including death) or third party property damage results from the negligent acts or omissions of CLIENT or CLIENT’s other contractors, if any. This policy shall contain a “separation of insureds” clause.
- 10.3 In regard to insurance maintained by either Party, including any property insurance, each such Party hereby waives, for itself and its insurers, all rights of recovery and subrogation which may arise against the other Party and its Affiliates as a result of a payment made by an insurer.
- 10.4 Title to the Equipment shall pass to the CLIENT on delivery of the Equipment to the Facility. SIEMENS warrants that legal title to and ownership of the Equipment (excluding, however, the Intellectual Property Rights) shall upon such delivery be free and clear of any and all liens, claims, security interests or other encumbrances, subject to any lien of SIEMENS that may arise under Applicable Law that is not otherwise prohibited hereunder.
- 10.5 Irrespective of the passage of title as provided in Section 10.4, and except for loss or damage due to uninsurable events for which the CLIENT shall be responsible, SIEMENS shall bear the risk of loss and damage with respect to the Work to be supplied by SIEMENS, or Equipment that is within the care, custody and control of SIEMENS, wherever located, that have been or will be incorporated into the Work, until Substantial Completion of such Work. Upon Substantial Completion of such Work, risk of loss and damage shall transfer to the CLIENT and the CLIENT shall assume full and exclusive custody and control of such components of the Work other materials, Equipment and components supplied by SIEMENS, and of all such Work; *provided that*, CLIENT’s assumption of risk of loss and damage shall not obviate SIEMENS’ obligations to correct any warranty non-conformances in accordance with Article 5.
- 10.6 SIEMENS shall indemnify the CLIENT from and against all third party claims alleging bodily injury, death or damage to a third party’s tangible property, but only to the extent caused by SIEMENS’ negligent acts or omissions. If the injury or

## PERFORMANCE CONTRACTING AGREEMENT

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damage is caused by the parties' joint or contributory negligence, the loss and/or expenses shall be borne by each party in proportion to its degree of fault. No part of the Equipment(s) or the Facility is considered third party property. The CLIENT shall provide SIEMENS with prompt written notice of and shall not acknowledge any third party claims covered by this Section 10.6. SIEMENS has the unrestricted right to select and hire counsel and the exclusive right to conduct the legal defense and/or settle the claim on the CLIENT's behalf. The CLIENT shall not make any admission(s) which might be prejudicial to SIEMENS and shall not enter into a settlement without the express permission of SIEMENS.

- 10.7 UNLESS CONTRARY TO APPLICABLE LAW, IN NO EVENT SHALL THE CLIENT OR SIEMENS BE LIABLE UNDER THIS INDEMNITY OR OTHERWISE UNDER THIS AGREEMENT FOR SPECIAL, INDIRECT, INCIDENTAL, PUNITIVE, EXEMPLARY OR CONSEQUENTIAL DAMAGES, INCLUDING COMMERCIAL LOSS, LOSS OF USE, OR LOST PROFITS, HOWEVER CAUSED.
- 10.8 IN ANY EVENT, UNLESS CONTRARY TO APPLICABLE LAW, SIEMENS' MAXIMUM LIABILITY FOR ANY AND ALL CLAIMS, LOSSES OR EXPENSES ARISING OUT OF THIS AGREEMENT, OR OUT OF ANY GOODS OR SERVICES FURNISHED UNDER THIS AGREEMENT, WHETHER BASED IN CONTRACT, NEGLIGENCE, STRICT LIABILITY, AGENCY, WARRANTY, TRESPASS, INDEMNITY OR ANY OTHER THEORY OF LIABILITY, SHALL BE LIMITED TO THE TOTAL COMPENSATION RECEIVED BY SIEMENS FROM THE CLIENT UNDER THIS AGREEMENT. The preceding limit shall not apply to the CLIENT's remedy under the Performance Guarantee as such is limited by Section 4.8.
- 10.9 THE CLIENT AGREES THAT THE EXCLUSIONS AND LIMITATIONS IN SECTIONS 10.7 AND 10.8 WILL PREVAIL OVER ANY CONFLICTING TERMS AND CONDITIONS IN THIS AGREEMENT AND MUST BE GIVEN FULL FORCE AND EFFECT, WHETHER OR NOT ANY OR ALL SUCH REMEDIES ARE DETERMINED TO HAVE FAILED OF THEIR ESSENTIAL PURPOSE. THESE LIMITATIONS OF LIABILITY ARE EFFECTIVE EVEN IF SIEMENS HAS BEEN ADVISED BY THE CLIENT OF THE POSSIBILITY OF SUCH DAMAGES. THE WAIVERS AND DISCLAIMERS OF LIABILITY, RELEASES FROM LIABILITY AND LIMITATIONS ON LIABILITY EXPRESSED IN SECTION 10.7 AND 10.8 EXTEND TO SIEMENS' AFFILIATES (AND THEIR EMPLOYEES), PARTNERS, PRINCIPALS, SHAREHOLDERS, DIRECTORS, OFFICERS, EMPLOYEES, SUPPLIERS OF ANY TIER (AND THEIR EMPLOYEES), AGENTS, AND SUCCESSORS AND ASSIGNS.
- 10.10 As to Patents and Copyrights:
- (a) SIEMENS will, at its option and expense, defend or settle any suit or proceeding brought against the CLIENT based on an allegation that any Work or use thereof for its intended purpose constitutes an infringement of any Patent Cooperation Treaty country member's patent or misappropriation of a third party's trade secret or copyright in the country where the Work is delivered by SIEMENS. The CLIENT will promptly give SIEMENS written notice of the suit or proceeding and the authority, information, and assistance needed to defend the claims. The CLIENT shall not acknowledge any such third party proceedings defined under this Section 10.10. SIEMENS shall have the full and exclusive authority to defend and settle such claim(s) and will pay the damages and costs awarded in any suit or proceeding so defended. The CLIENT shall not make any admission(s) which might be prejudicial to SIEMENS and shall not enter into a settlement without SIEMENS' consent. SIEMENS is not responsible for any settlement made without its prior written consent. If the Work, 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 expense, either: (i) procure for the CLIENT the right to continue using said Work; (ii) replace it with substantially equivalent non-infringing Work; or (iii) modify the Work so it is non-infringing.
  - (b) SIEMENS will have no duty or obligation under 10.10(a) if the Work is: (i) supplied according to the CLIENT's design or instructions and compliance therewith has caused SIEMENS to deviate from its normal course of performance; (ii) modified by the CLIENT or its contractors after delivery; or (iii) combined by the CLIENT or its contractors with devices, methods, systems or processes not furnished hereunder and by reason of said design, instruction, modification, or combination a suit is brought against the CLIENT. In addition, if by reason of such design, instruction, modification or combination, a suit or proceeding is brought against SIEMENS, the CLIENT must protect SIEMENS in the same manner and to the same extent that SIEMENS has agreed to protect the CLIENT under Section 10.10(a).
  - (c) THIS SECTION 10.10 IS AN EXCLUSIVE STATEMENT OF SIEMENS' DUTIES AND THE CLIENT'S REMEDIES RELATING TO PATENTS, TRADE SECRETS AND COPYRIGHTS, AND DIRECT OR CONTRIBUTORY INFRINGEMENT THEREOF.

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10.11 The Parties acknowledge that the price for which SIEMENS has agreed to perform the Work and obligations under this Agreement was calculated based upon the foregoing allocations of risk, and that each Party has expressly relied on and would not have entered into this Agreement but for such allocations of risk.

### Article 11

#### Hazardous Materials Provisions

- 11.1 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 Facility at which Work is performed and any soil or groundwater at the Facility by 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 following due inquiry, there are no Hazardous Materials present where the Work is to be performed. SIEMENS will notify the CLIENT immediately if it discovers or reasonably suspects the presence of any previously undisclosed Hazardous Material. All Work and Services have been priced and agreed to by SIEMENS in reliance on the CLIENT's representations as set forth in this Article. The discovery or reasonable suspicion of Hazardous Materials or hazardous conditions at a Facility where SIEMENS is to perform Work, or of contamination of the Facility by Hazardous Materials 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, or to terminate the Work and to be paid for Work previously performed.
- 11.2 The CLIENT warrants that, prior to the execution of the Agreement, it notified SIEMENS in writing of any and all Hazardous Materials, to the best of its knowledge following due inquiry, known to be present, potentially present or likely to become present at the Facility and provided a copy of any Facility 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 Applicable Law.
- 11.3 Regardless of whether Hazardous Material was disclosed pursuant to Section 11.2, the CLIENT shall be solely responsible for properly testing, abating, encapsulating, removing, disposing, remedying or neutralizing such Hazardous Materials, and for the costs thereof. Even if an appropriate change order has been entered into pursuant to Section 11.1, SIEMENS shall have the right to stop the Work until the Facility is free from Hazardous Materials. In such event, SIEMENS will receive an equitable extension of time to complete the Work, and compensation for delays caused by Hazardous Materials remediation. In no event shall SIEMENS be required or construed to take title, ownership or responsibility for such 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 Applicable Law, for separate consideration of \$10 and other good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, 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 Hazardous Materials or from the CLIENT's breach of, or failure to perform its obligations under this Article.
- 11.5 For purposes of this Article 11, in the context of the phrase "to the best of its knowledge following due inquiry"; "knowledge" means actual awareness of the facts by the CLIENT's directors, officers, employees or agents, or the presence of relevant information contained in the CLIENT's books or records; and, "due inquiry" means inquiry of those Persons under the CLIENT's control who should have knowledge of the subject matter of such inquiry.

### 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 five (5) 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 or Services. 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.



## PERFORMANCE CONTRACTING AGREEMENT

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- 12.3 This Agreement is governed by and construed in accordance with the laws of the State or Commonwealth in which the Facility is located, without regard to its conflict of laws principles. The application of the United Nations Convention on Contracts for the International Sale of Goods is excluded. BOTH SIEMENS AND THE CLIENT KNOWINGLY, VOLUNTARILY AND IRREVOCABLY WAIVE ALL RIGHTS TO A JURY TRIAL IN ANY ACTION OR PROCEEDING RELATED IN ANY WAY TO THIS AGREEMENT. Each Party agrees that claims and disputes arising out of this Agreement, with the exception of disputes arising under Article 4 or Article 9, must be decided exclusively in a federal or state court of competent jurisdiction located in the State or Commonwealth in which the Facility is located. Each Party submits to the personal jurisdiction of such courts for the purpose of litigating any claims or disputes.
- 12.4 The following Sections of this Agreement shall survive the termination, expiration or cancellation of this Agreement: 5.4, 5.7, 5.8, 5.9, 5.10, 8.1, 8.4, 10.3, 10.6, 10.7, 10.8, 10.9, 10.10, 11.4, 12.5, 12.7 and 12.8.
- 12.5 SIEMENS' performance of the Work and Services is expressly conditioned on the Parties assenting to all of the terms of this Agreement, notwithstanding any different or additional terms contained in any writing at any time submitted or to be submitted by a Party to the other Party relating to the Work or Services, even if signed by the Parties, unless the written statement expressly indicates that such terms supersede the terms of this Agreement
- 12.6 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.
- 12.7 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.
- 12.8 In the event that Applicable 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 performance and payment bond will solely apply to the Work performed during the Construction Period and to the required statutory lien filing period thereafter. The performance and payment bond will not apply to any of the obligations included in the Performance Assurance, Exhibit C. Furthermore, the CLIENT's funding source may be named as "Co-Obligee" on the performance bond if so requested by the CLIENT.

### Article 13

#### Maintenance Services Program

- 13.1 If applicable, the scope of Services provided by SIEMENS for the Maintenance Services Program is stated in Exhibit A.
- 13.2 The CLIENT represents that all equipment not installed by SIEMENS under this Agreement and subject to a MSP is in satisfactory working condition. SIEMENS will have inspected all such equipment within the first thirty (30) days of MSP 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.
- 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 reacceptance test on, or if necessary, a re-commissioning of, the system at the CLIENT's expense.
- 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 MSP and adjust the MSP 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. The CLIENT's failure to execute such statement within ten (10) days will void the MSP and release SIEMENS from any further obligations with respect to the MSP.

## PERFORMANCE CONTRACTING AGREEMENT

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13.6 If the MSP scope of Services 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 under all circumstances remain the property and responsibility of the CLIENT.

Sample PCA



**Article 1: Scope of Work**

1.1 *Description:* Except as otherwise expressly provided herein, SIEMENS shall provide each and every item of cost and expense necessary for:

1.2 *Specific Elements:* The Work shall include the following:

1.2.1

1.2.2

1.2.3

1.2.4

1.3 *Technical Specifications, Drawings, and Exhibits:* The Work shall be performed in accordance with the following specifications, drawings and other attachments hereto, which are specifically incorporated herein and made part hereof:

1.3.1

1.3.2

1.4 CLIENT'S Responsibilities (in addition to those in Article 6 of the Agreement):

1.4.1

1.5

**Article 2: Work Implementation Period**

2.1 Commencement of Work (select **one**):

2.1.1  SIEMENS shall commence the Work on \_\_\_\_\_, 20\_\_, and shall perform the Work diligently and shall complete the Work no later than \_\_\_\_\_, 20\_\_;

or,

2.1.1  SIEMENS shall commence the Work \_\_\_\_\_ calendar days from the Effective Contract Date, and shall perform the Work diligently and shall complete the Work no later than \_\_\_\_\_ calendar days from the day of commencement.

2.2 *Milestones:* Specific scheduling milestones and coordination requirements are as follows:

2.3

2.4

**Article 3: Scope of Services-Performance Assurance Services Program**

3.1

3.2

**Article 4: Scope of Services-Maintenance Services Program**

(Please check one box only)

CLIENT has elected to self-implement maintenance. Therefore, SIEMENS shall not perform any on-going maintenance services, although the Parties may negotiate a separate agreement for such services at a later date. CLIENT agrees that it will maintain the equipment per manufacturer specifications and that it will operate the Equipment in accordance with the Contracted Baseline described in Article 7 of Exhibit C. If CLIENT fails to properly maintain or operate the Equipment, SIEMENS shall have the right to modify the Performance Guarantee pursuant to Article 4 of the Agreement.

The follow consists of the Services to be performed by SIEMENS:

4.1

4.2

Sample PDF

Exhibit A - Scope of Work and Services

---

By signing below, this Exhibit is attached to and made a part of the Agreement between SIEMENS and the CLIENT.

**CLIENT:**            **[Insert CLIENT name]**  
Signature: \_\_\_\_\_  
Printed Name: \_\_\_\_\_  
          Title: \_\_\_\_\_  
          Date: \_\_\_\_\_

**SIEMENS:**        **Siemens Industry, Inc.**  
Signature: \_\_\_\_\_  
Printed Name: \_\_\_\_\_  
          Title: \_\_\_\_\_  
          Date: \_\_\_\_\_

Signature: \_\_\_\_\_  
Printed Name: \_\_\_\_\_  
          Title: \_\_\_\_\_  
          Date: \_\_\_\_\_

Sample PCA

**Article 1: Payment for Scope of Work**

- 1.1 **Price:** As full consideration of the Work as described in Exhibit A, Article 1: Scope of Work, the CLIENT shall pay to SIEMENS \$[Insert installation/construction price here] (plus taxes, if applicable).
- 1.2 **Escrow:** The CLIENT has agreed to deposit the Price into an Escrow Account at a financial institution satisfactory to both the CLIENT and SIEMENS. All expenses to establish the Escrow Account shall be the complete responsibility of the CLIENT and the CLIENT will receive all interest earnings from the Escrow Account. SIEMENS will submit periodic invoices to the CLIENT based on the Payment Schedule in Table B.1 below. The CLIENT shall be responsible for submitting the necessary documents to the Escrow Agent to allow for timely disbursements from the Escrow Account. The funding of the Escrow Account in an amount equal to or greater than the Price stated in Article 1.1 above shall be a condition precedent to SIEMENS obligation to perform or to continue the performance of the Work. If the Escrow Account is not funded within thirty (30) days of the execution of this Agreement, this Agreement shall be null and void. This thirty (30) day funding period may be extended as mutually agreed in writing by the Parties. In the event that the Agreement becomes null and void as described in this paragraph and CLIENT has previously authorized SIEMENS to proceed with the Work, the CLIENT shall be obligated to reimburse SIEMENS either: (i) for the Work performed to date; or (ii) for the Work specifically authorized by the CLIENT.
- 1.3 **Timely Payments:** The CLIENT agrees to pay SIEMENS per Table B.1 below. CLIENT agrees to pay all invoices submitted by SIEMENS per Article 8 of the Agreement.

**Table B.1 – FIM Work Payment Schedule**

Project Phase	Payments (\$)	Payments (%)	Schedule
<b>PROJECT TOTAL:</b>			

Article 1 of Exhibit B is attached to and made a part of the Agreement between SIEMENS and the CLIENT.

**CLIENT:** [Insert CLIENT name]  
 Signature: \_\_\_\_\_  
 Printed Name: \_\_\_\_\_  
 Title: \_\_\_\_\_  
 Date: \_\_\_\_\_

**SIEMENS: Siemens Industry, Inc.**  
 Signature: \_\_\_\_\_  
 Printed Name: \_\_\_\_\_  
 Title: \_\_\_\_\_  
 Date: \_\_\_\_\_

Signature: \_\_\_\_\_  
 Printed Name: \_\_\_\_\_  
 Title: \_\_\_\_\_  
 Date: \_\_\_\_\_

**Article 2: Payment for Performance Assurance Services Program (PASP)**

- 2.1 **Price:** As full consideration of the Services as described in Exhibit A, Article 3, the CLIENT shall pay to SIEMENS the amounts identified in Table B.2 plus taxes, if applicable, on the dates identified therein.
- 2.2 **Performance Assurance Services Program Term:** The term of the PASP shall commence on the Guarantee Date and shall extend for either: (a) the term of the Performance Guarantee Period where multi-year obligations are allowed; or (b) for twelve (12) month periods corresponding to the term of each Annual Period.
- 2.3 **Automatic Renewal:** Where the PASP term is limited to an Annual Period, the PASP shall automatically renew for successive Annual Periods beginning on the anniversary date of Guarantee Date. Either party may request to amend the PASP at the end of an Annual Period by giving the other party at least sixty (60) days prior written notice of such amendments and such amendment shall be mutually negotiated by the Parties and effective upon a written amendment signed by both Parties prior to commencement of the next Annual Period. Each automatic renewal shall be and remain subject to the terms and conditions of this Agreement. SIEMENS obligations under the Performance Guarantee are dependent upon and subject to the express condition that the CLIENT maintains the PASP during the entire Performance Guarantee Period.
- 2.4 **Termination:** See Section 4.7 of the Agreement.

**Table B.2 – Performance Assurance Program Payment Schedule**

Date	Semi - Annual Payments (\$)	Notes

Article 2 of Exhibit B is attached to and made a part of the Agreement between SIEMENS and the CLIENT.

**CLIENT:** [Insert CLIENT name]  
Signature: \_\_\_\_\_  
Printed Name: \_\_\_\_\_  
Title: \_\_\_\_\_  
Date: \_\_\_\_\_

**SIEMENS: Siemens Industry, Inc.**  
Signature: \_\_\_\_\_  
Printed Name: \_\_\_\_\_  
Title: \_\_\_\_\_  
Date: \_\_\_\_\_  
  
Signature: \_\_\_\_\_  
Printed Name: \_\_\_\_\_  
Title: \_\_\_\_\_  
Date: \_\_\_\_\_

**Article 3: Payment for Maintenance Services Program (MSP)**

- 3.1 **Price:** As full consideration of the Services as described in Exhibit A, Article 4, the CLIENT shall pay to SIEMENS the amounts identified in Table B.3 plus taxes, if applicable, on the dates identified therein.
  
- 3.2 **Maintenance Services Program Term:** The initial or first term of the MSP shall commence on the Guarantee Date and shall have duration of [Insert number of months] months and shall extend thereafter for the term as identified in Table B.3 and in accordance with Section 3.3 below.
  
- 3.3 **Automatic Renewal:** Where multi-year obligations are disallowed, the Maintenance Services Program shall automatically renew for successive twelve (12) month periods beginning on the ending anniversary date of the initial or first term as set forth in Article 3.2 above, and each twelve (12) month period thereafter as identified in Table B.3. Either party may request not to renew or to amend the Maintenance Services Program at the end of the initial term or at the end of a renewal term by giving the other party at least sixty (60) days prior written notice of such amendments or intent not to renew. Each renewal shall be and remain subject to the terms and conditions of this Agreement.

**Table B.3 – Maintenance Services Program Payment Schedule**

Date	Annual Payments (\$)	Notes

Article 3 of Exhibit B is attached to and made a part of the Agreement between SIEMENS and the CLIENT.

**CLIENT:**            [Insert CLIENT name]  
Signature: \_\_\_\_\_  
Printed Name: \_\_\_\_\_  
Title: \_\_\_\_\_  
Date: \_\_\_\_\_

**SIEMENS:**        **Siemens Industry, Inc.**  
Signature: \_\_\_\_\_  
Printed Name: \_\_\_\_\_  
Title: \_\_\_\_\_  
Date: \_\_\_\_\_  
  
Signature: \_\_\_\_\_  
Printed Name: \_\_\_\_\_  
Title: \_\_\_\_\_  
Date: \_\_\_\_\_



**Articles and Tables**

The following Articles and Tables are hereby included and made part of this Exhibit C:

- Article 1 Total Guaranteed Savings
- Article 2 Measurement and Verification Options
- Article 3 Performance Guarantee Period Responsibilities of CLIENT
- Article 4 Measurement and Verification Plan
- Article 5 Baseline Data
- Article 6 Utility Rate Structures and Escalation Rates
- Article 7 Contracted Baseline Data
- Appendix 1-
- Appendix 2-

This Exhibit C provides the methodology to be used to determine the Annual Realized Savings and the reconciliation of these calculated Savings with the Guaranteed Annual Savings for each Annual Period of the Performance Guarantee Period. The Scope of Services for the Performance Assurance Service Program is provided in Article 3 of Exhibit A.

**Article 1: Total Guaranteed Savings**

**Table 1.1 – Total Guaranteed Savings (Units)**

Performance Period	Electric Energy Saved (kWh)	Electric Power Saved (kW)	Natural Gas Saved (Therms)	No. 2 Fuel Oil Saved (Gallons)	Water Saved (Gallons)
Construction					
Annual Period 1					

- 1.1 Only Annual Period 1 is shown as the energy/utility unit Savings will remain constant for each Annual Period of the Performance Guarantee Period as the CLIENT will operate the Facility in accordance with the Contracted Baseline identified in Article 7.

**Table 1.2 – Total Guaranteed Savings (Cost)**

Performance Period	Energy/Utility Savings	Operational Savings	Total Savings
Construction			
Annual Period 1			
Annual Period 2			
Annual Period 3			
Annual Period 4			
Annual Period 5			
Annual Period 6			
Annual Period 7			
Annual Period 8			
Annual Period 9			
Annual Period 10			

<b>TOTALS</b>			

- 1.2 Table 1.2 shows the CLIENT'S guaranteed cost Savings for each Annual Period that are extrapolated from the guaranteed energy/utility unit Savings shown in Table 1.1 by multiplying the energy/utility Savings by the Baseline energy/utility rates including the stipulated Escalation Rates found in Article 6.
- 1.3 SIEMENS cannot and does not predict fluctuations in utility rates or the cost of energy. Therefore, the CLIENT and SIEMENS agree that the energy/utility cost Savings for each Annual Period will be calculated by multiplying the verified units of energy/utility Savings by the Annual Period's stipulated energy/utility rate and Escalation Rates and not the Annual Period's actual utility rate.
- 1.4 The determination of energy/utility Savings will follow current best practice, as defined in the IPMVP, or the FEMP Guidelines where required, unless otherwise agreed to by the Parties.
- 1.5 The Performance Guarantee does not operate to guarantee the Savings per-FIM. Rather, the calculation of Savings is based on aggregate performance of all of the FIMs contained in the Project. The projected value of such aggregate performance is contained in Table 1.2 above representing the Total Guaranteed Savings as monetized.

This Exhibit C, comprising Enter TOTAL number of pages including appendices pages, is attached to and made a part of the Agreement between SIEMENS and the CLIENT.

**CLIENT:** [Insert CLIENT name]  
 Signature: \_\_\_\_\_  
 Printed Name: \_\_\_\_\_  
 Title: \_\_\_\_\_  
 Date: \_\_\_\_\_

**SIEMENS:** Siemens Industry, Inc.  
 Signature: \_\_\_\_\_  
 Printed Name: \_\_\_\_\_  
 Title: \_\_\_\_\_  
 Date: \_\_\_\_\_

Signature: \_\_\_\_\_  
 Printed Name: \_\_\_\_\_  
 Title: \_\_\_\_\_  
 Date: \_\_\_\_\_

## Article 2: Measurement and Verification Options

2.1 Measurement and Verification Options: There are five measurement and verification options to measure and verify energy/utility Savings: Option A - Retrofit Isolation: Key Parameter Measurement; Option B - Retrofit Isolation: All Parameter Measurement; Option C - Whole Facility; and, Option D – Calibrated Simulation. Options A through and including D are part of the IPMVP. Option E-Stipulated is based on industry accepted engineering standards and is the Option used for purposes of calculating Operational Savings.

**Option A - Retrofit Isolation:** Key Parameter Measurement. Savings are determined by field measurement of the key performance parameter(s) which define the energy use of the FIM's affected system(s) and/or the success of the Project. Measurement frequency ranges from short-term to continuous, depending on the expected variations in the measured parameter and the length of the reporting period. Parameters not selected for field measurement are estimated. Estimates can be based on historical data, manufacturer's specifications, or engineering judgment. Documentation of the source or justification of the estimated parameter is required. The plausible savings error arising from estimation rather than measurement is evaluated. If applicable, the predetermined schedule for data collection, evaluation, and reporting is defined in Exhibit A, Article 3-Performance Assurance Services Program.

**Option B – Retrofit Isolation:** All Parameter Measurement. Savings are determined by field measurement of the energy use of the FIM-affected system. Measurement frequency ranges from short-term to continuous, depending on the expected variations in the savings and the length of the reporting period. If applicable, the predetermined schedule for data collection, evaluation, and reporting is defined in Exhibit A, Article 3-Performance Assurance Services Program.

**Option C - Whole Facility:** Savings are determined by measuring energy use at the whole Facility or sub-Facility level. Continuous measurements of the entire Facility's energy use are taken throughout the reporting period. If applicable, the predetermined schedule for data collection, evaluation, and reporting is defined in Exhibit A, Article 3-Performance Assurance Services Program.

**Option D - Calibrated Simulation:** Savings are determined through simulation of the energy use of the whole Facility, or of a sub-Facility. Simulation routines are demonstrated to adequately model actual energy performance measured in the Facility. This Option usually requires considerable skill in calibrated simulation. If applicable, the predetermined schedule for data collection, evaluation, and reporting is defined in Exhibit A, Article 3-Performance Assurance Services Program.

**Option E – Stipulated:** This Option is the method of measurement and verification applicable to FIMS consisting either of Operational Savings or where the end use capacity or operational efficiency; demand, energy consumption or power level; or manufacturer's measurements, industry standard efficiencies or operating hours are known in advance, and used in a calculation or analysis method that will stipulate the outcome. Both CLIENT and SIEMENS agree to the stipulated inputs and outcome(s) of the analysis methodology. Based on the established analytical methodology the Savings stipulated will be achieved upon completion of the FIM and no further measurements or calculations will be performed

during the Performance Guarantee Period. If applicable, the methodology and calculations to establish Savings value will be defined in Section 4.6 of this Exhibit C.

2.2 Table 2.1 below summarizes the first Annual Period’s Guaranteed Savings (See Article 1, Tables 1.1 and 1.2) utilizing the applicable Measurement and Verification Options as applied to the referenced FIMs valued pursuant to the agreed upon amounts identified in Article 6 hereof.

**Table 2.1 – Savings for First Annual Period by Option**

FIM	Energy/Utility Savings \$						Operational Savings \$	Total Savings \$
	Measurement and Verification Options						E Stipulated	
	A Retrofit Isolation: Key Parameter Measurement	B Retrofit Isolation: All Parameter Measurement	C Whole Facility	D Calibrated Simulation	E Stipulated	Total Energy/Utility Savings		
Lighting								
Motors								
Boiler								
HVAC								
TOTALS								

2.3 Table 2.2 identifies the source of Operational Savings defined and quantified by the Parties. The Parties affirm that such amounts are Stipulated Savings for purposes of calculating Annual Realized Savings and acknowledge that the Guaranteed Savings identified herein have been based on CLIENT’S affirmation. **OPERATIONAL SAVINGS SHALL NOT BE MEASURED OR MONITORED DURING THE PERFORMANCE GUARANTEE PERIOD.**

**Table 2.2 - Source of Operational Savings**

Account/Vendor	Description	Annual Cost \$	# of Annual Periods Savings Are Applied	Annual Period Savings Begin

- 2.4 SIEMENS has explained to the CLIENT and the CLIENT has satisfied itself as to how Operational Savings are incorporated into the Annual Realized Savings.
- 2.5 The Escalation Rate applicable to the Operational Savings is \_\_\_\_\_.

BY SIGNING BELOW, THE PARTIES CONFIRM THAT THEY HAVE REVIEWED THE INCLUDED MEASUREMENT AND VERIFICATION OPTIONS AND THEIR APPLICATION TO BE USED IN CALCULATING SAVINGS UNDER THE AGREEMENT.

**CLIENT:** [Insert CLIENT name]  
Signature: \_\_\_\_\_  
Printed Name: \_\_\_\_\_  
Title: \_\_\_\_\_  
Date: \_\_\_\_\_

**SIEMENS:** Siemens Industry, Inc.  
Signature: \_\_\_\_\_  
Printed Name: \_\_\_\_\_  
Title: \_\_\_\_\_  
Date: \_\_\_\_\_  
  
Signature: \_\_\_\_\_  
Printed Name: \_\_\_\_\_  
Title: \_\_\_\_\_  
Date: \_\_\_\_\_

Sample PQA

**Article 3: Performance Guarantee Period Responsibilities of the CLIENT**

In addition to the CLIENT'S responsibilities under Article 6 of the Agreement, this Article details the responsibilities of the CLIENT in connection with the management and administration of the Performance Guarantee.

- 3.1 The CLIENT will provide a representative at each Facility to coordinate work and provide required data described below.
- 3.2 The CLIENT will provide SIEMENS with accurate Facility operating information as defined below and in the Contracted Baseline article of this Exhibit C during each Annual Period, within thirty (30) days of any Material Change that may increase or decrease energy usage.
- 3.3 If applicable, the CLIENT will provide SIEMENS with copies of utility bills within thirty (30) days of receipt by the CLIENT or provide access to utility vendor information to allow SIEMENS to include a utility bill analysis in the Annual Performance Assurance Report. The utility bill analysis does not take the place of the Measurement and Verification Plan identified in Article 4 of this Exhibit C and is not used to measure the Project's performance.
- 3.4 If required for the Work, CLIENT will provide telephone/data remote access, through SIEMENS Insight® software package or otherwise, as SIEMENS reasonably requests. All charges related to telephone/data line installation, activation and communication services are the responsibility of the CLIENT.
- 3.5 If required for the Work, CLIENT will provide and coordinate utility meter upgrade for interface with SIEMENS metering and data collection. All charges related for these upgrades are the responsibility of the CLIENT.
- 3.6



## Article 4: Measurement and Verification Plan

The following information is applicable to this Agreement:

- Article 4.1 General Overview
- Article 4.2 Option A - Retrofit Isolation: Key Parameter Measurement
- Article 4.3 Option B - Retrofit Isolation: All Parameter Measurement
- Article 4.4 Option C - Whole Facility
- Article 4.5 Option D - Calibrated Simulation
- Article 4.6 Option E – Stipulated-Energy/Utility Savings

### 4.1 General Overview –

The purpose of the Measurement and Verification (M&V) Plan is to identify the methods, measurements, procedures and tools that will be used to verify the Savings for each FIM which has energy/utility Savings. Savings are determined by comparing prior usage, consumption or efficiencies (defined as the “Baseline”) against the post-FIM implementation usage, consumption or efficiencies. The Baseline usage, consumption or efficiencies are described in this Exhibit C, Article 5. The post-FIM implementation usage, consumption or efficiencies is defined as the Contracted Baseline and are described in this Exhibit C, Article 7.

### 4.2 Option A - Retrofit Isolation: Key Parameter Measurement

#### 4.2.1 [FIM Name or Type]

**Location(s):** List of all applicable locations

**Overview:**

1. What: *FIM Description and key parameter(s)*
2. How: *Explanation of measurement protocol*
3. When: *Frequency of measurement*
4. *Outline customer responsibilities for facility or equipment changes if necessary by referencing Article 3, 5, or 7.*

**Pre-Retrofit Measurement/Calculations:**

1. List key parameter
2. Calculation for pre-retrofit energy consumption for all energy types
3. Definition of each parameter in calculation
4. Include specification for measurement tools

**Post-Retrofit Measurement/Calculations:**

1. List key parameter
2. Calculation for post-retrofit energy consumption for all energy types
3. Definition of each parameter in calculation
4. Include specification for measurement tools

5. Detail frequency of measurement

**Savings Calculations:**

**Energy Savings (Units/yr): Pre-Retrofit Consumption – Post-Retrofit Consumption** for each applicable energy type. Define all parameters in calculation if not already defined

**Cost Savings (\$/yr): (Pre-Retrofit Consumption X Pre-Retrofit \$/Unit) - (Post-Retrofit Consumption X Post-Retrofit \$/Unit)** for each applicable energy type. Define all parameters in calculation if not already defined and define utility rates explicitly, with reference to Exhibit C, Article 6.

**Total Cost Savings (\$/yr):** Include formula to show how cost savings by energy type will be totalized.

**Responsibility for SIEMENS and CLIENT (listed in M&V Library for each FIM but to be included only in Articles 3, 5, and/or 7 as applicable)**

1. Article 3
  - a. List of specific customer responsibilities (Remote Connection, Utility Bills, etc.)
2. Article 5
  - a. Detail baseline adjustments
  - b. Include all assumed parameters (schedule, set point, etc.)
3. Article 7
  - a. Include expected post-retrofit operating parameters (schedule, set point, etc.)

**4.3 Option B - Retrofit Isolation: All Parameter Measurement**

4.3.1 [FIM Name or Type]

See sample outline under Section 4.2.1

**4.4 Option C - Whole Facility**

4.4.1 [FIM Name or Type]

See sample outline under Section 4.2.1 above AND National M&V Library for HUD & Option C Approaches

**4.5 Option D – Calibrated Simulation**

4.5.1 [FIM Name or Type]

See sample outline under Section 4.2.1

4.6 **Option E - Stipulated-Energy/Utility Savings**

4.6.1 [FIM Name or Type]

See sample outline under Section 4.2.1

Sample PCA

**Article 5: Baseline Data**

5.1 The year(s) selected as the Baseline Period starts on \_\_\_\_\_ and ends on \_\_\_\_\_. Table 5.1 outlines the utility consumption that occurred during this Baseline Period. This Baseline Period’s Facility utility consumption will be used as the reference for comparing the Facility’s utility consumption during the Performance Guarantee Period in order to determine the Annual Realized Savings.

**Table 5.1 – Baseline Utility Consumption**

	Units	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
Electric	kWh												
Electric	kW												
N. Gas	Therm												
Oil	Gal												
Water	kGal												
Sewer	kGal												
Other													

5.2 The operating practices during the Baseline Period determine the utility consumption shown in Table 5.1. This data indicates the operating characteristics that were in effect during the Baseline Period. The Guaranteed Savings provided under this Agreement are based on the efficiencies gained by implementing the Work and implementing the Contracted Baseline in Article 7 of this Exhibit C.

**Table 5.2.x Summer/Winter Operating Hours**

Day of Week	Occupied Run Hours	Unoccupied Run Hours		
Monday				
Tuesday				
Wednesday				
Thursday				
Friday				
Saturday				
Sunday				
Holiday				

**Table 5.2.x Summer/Winter Operating Temperatures**

Day of Week	Occupied Minimum DEG	Occupied Maximum DEG	Unoccupied Minimum DEG	Unoccupied Maximum DEG
Monday				
Tuesday				
Wednesday				
Thursday				
Friday				
Saturday				
Sunday				
Holiday				

**Table 5.2.x** Equipment Summer/Winter Operating Parameters

Day of Week	Occupied	Occupied	Unoccupied	Unoccupied
Monday				
Tuesday				
Wednesday				
Thursday				
Friday				
Saturday				
Sunday				
Holiday				

**Table 5.2.x** Occupancy Summer/Winter

Day of Week	Day	Afternoon	Night	
Monday				
Tuesday				
Wednesday				
Thursday				
Friday				
Saturday				
Sunday				
Holiday				

5.3 Applicable codes - Federal, State, County or Municipal codes or regulations are applicable to the use and operation of the Facility. SIEMENS will maintain the current level of Facility compliance relative to applicable codes unless specifically outlined to the contrary below. Unless specifically set forth in the Scope of Work and Services, Exhibit A, nothing herein should be construed as to require SIEMENS to provide additional work or services in the event that the current applicable code or regulation is modified.

5.3.1 Current code compliance (identify the applicable code citation):

- a.
- b.

5.3.2 Code changes:

5.4 Building Inventory - The following information summarizes the equipment inventory that existed in the Facility during the Baseline Period.

5.5

5.6

**Article 6: Utility Rate Structures and Escalation Rates**

6.1 Utility costs used for Savings calculations will be based on the utility rates and Escalation Rates, as provided in the table(s) below. Each Escalation Rate will be applied annually to the utility rate.

**Table 6.1.1** Electricity  
Tariff Number or Designation:  
Utility Name:  
Rate Structure: \$ per kWh  
\$ per kW  
Escalation Rate: % per Annual Period

**Table 6.1.2** Natural gas  
Tariff Number or Designation:  
Utility Name:  
Rate Structure: \$ per Therm  
Escalation Rate: % per Annual Period

**Table 6.1.3** Water  
Tariff Number or Designation:  
Utility Name:  
Rate Structure: \$ per kgallon  
Escalation Rate: % per Annual Period

**Table 6.1.4** Sewer  
Tariff Number or Designation:  
Utility Name:  
Rate Structure: \$ per kgallon  
Escalation Rate: % per Annual Period

6.2

6.3



**Article 7: Contracted Baseline Data**

7.1 The following tables detail the Facility operating parameters that are required to be implemented on the Guarantee Date or on such time as agreed upon by the Parties. This specific configuration of Facility operating parameters is the Contracted Baseline and failure of the CLIENT to maintain the Contracted Baseline may result in a Material Change which may require a modification of the Performance Guarantee pursuant to Article 4 of the Agreement.

**Table 7.1.x** Summer/Winter Operating Hours

Day of Week	Occupied Run Hours	Unoccupied Run Hours		
Monday				
Tuesday				
Wednesday				
Thursday				
Friday				
Saturday				
Sunday				
Holiday				

**Table 7.1.x** Summer/Winter Operating Temperatures

Day of Week	Occupied Minimum DEG	Occupied Maximum DEG	Unoccupied Minimum DEG	Unoccupied Maximum DEG
Monday				
Tuesday				
Wednesday				
Thursday				
Friday				
Saturday				
Sunday				
Holiday				

**Table 7.1.x** Equipment Summer/Winter (from month to month) Operating Parameters

Day of Week	Occupied Minimum CFM/BTU/GPM (L/s/MJ/L/s)	Occupied Maximum CFM/BTU/GPM (L/s/MJ/L/s)	Unoccupied Minimum CFM/BTU/GPM (L/s/MJ/L/s)	Unoccupied Maximum CFM/BTU/GPM (L/s/MJ/L/s)
Monday				
Tuesday				
Wednesday				
Thursday				
Friday				
Saturday				
Sunday				
Holiday				

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**Table 7.2.x**      Occupancy Summer/Winter

Day of Week	Day	Afternoon	Night	
Monday				
Tuesday				
Wednesday				
Thursday				
Friday				
Saturday				
Sunday				
Holiday				

7.2

7.3

7.4

Sample PCA



### Certificate of Substantial Completion

<b>PROJECT NAME:</b>	
<b>CLIENT:</b>	
<b>CERTIFICATE DATE (mm/dd/yyyy):</b>	
<b>CERTIFICATE NUMBER:</b>	
<b>PROJECT NUMBER:</b>	

The following portions of the Work are at Substantial Completion in accordance with the Agreement. (Insert unique Work item such as Facility Improvement Measure title, system name, building, etc.)

<b>Work Item:</b>	
<b>Warranty Start Date (mm/dd/yyyy):</b>	
<b>Work Item:</b>	
<b>Warranty Start Date (mm/dd/yyyy):</b>	
<b>Work Item:</b>	
<b>Warranty Start Date (mm/dd/yyyy):</b>	

Siemens Industry, Inc. guarantees the workmanship and materials of the above Substantially Complete Work in accordance with the Agreement.

The Work indicated above has been reviewed by the CLIENT and has been found, to the best of the CLIENT’s knowledge, to be Substantially Complete. Substantial Completion is the milestone in the progress of the Work at which time the Work is sufficiently complete and available for the CLIENT to have beneficial use of the Work for its intended purpose. A list of items to be completed and corrected (if any) shall be identified as the Outstanding Items List, attached to this form, and indicated by checking the appropriate box below:

**Outstanding Items List Attached:**       **No Outstanding Items Noted:**

The failure of the CLIENT to note items requiring completion or correction does not relieve the contractual responsibility of Siemens Industry, Inc. to complete or correct the Work. Work found to

require completion or correction after the Certificate Date of this Certificate, but within the warranty period shall be corrected in accordance with the Agreement's warranty provisions.

Siemens Industry, Inc. agrees to complete or correct all items indicated on the Outstanding Items in a timely manner.

Siemens Industry, Inc. Representative: \_\_\_\_\_

Signature: \_\_\_\_\_ Date: \_\_\_\_\_

The CLIENT accepts the Work indicated above as Substantially Complete and assumes possession and beneficial use of the Work on the Warranty Start Date indicated above.

CLIENT: \_\_\_\_\_

CLIENT Representative: \_\_\_\_\_

Signature: \_\_\_\_\_ Date: \_\_\_\_\_

**Note:** The CLIENT shall, upon execution of this Certificate of Substantial Completion, assume all contractual responsibilities for maintenance, insurance, operation, and protection of the Substantially Complete Work in accordance with the Agreement.



### Certificate of Final Completion

<b>PROJECT NAME:</b>	
<b>CLIENT:</b>	
<b>CERTIFICATE DATE (mm/dd/yyyy):</b>	
<b>PROJECT NUMBER:</b>	

All elements of the project Work have been reviewed by the CLIENT and have been found, to the best of the CLIENT's knowledge, to be at Final Completion. All items noted in the Outstanding Items Lists associated with Certificate(s) of Substantial Completion have been resolved, and all Work as defined in Exhibit A of the Agreement is complete.

The failure of the CLIENT to note items requiring completion or correction does not relieve the contractual responsibility of Siemens Industry, Inc. to complete or correct the Work. Work found to require completion or correction after the date of this Certificate, but within the warranty period shall be promptly corrected in accordance with the Agreement's warranty provisions.

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Siemens Industry, Inc. has reviewed the project Work, as well as all contractual requirements, and the requirements for Final Completion have been met.

Siemens Industry, Inc. Representative: \_\_\_\_\_

Signature: \_\_\_\_\_ Date: \_\_\_\_\_

The CLIENT accepts the project Work as meeting the requirements for Final Completion.

CLIENT: \_\_\_\_\_

CLIENT Representative: \_\_\_\_\_

Signature: \_\_\_\_\_ Date: \_\_\_\_\_

**Addendum No. 1 to the Performance Contracting Agreement between  
Siemens Industry, Inc. (“SIEMENS”) and  
Insert CLIENT's name here (“CLIENT”)  
Dated Insert Date of PCA that appears on Page 2 of the PCA  
No. Enter SAP Job Number**

The Parties agree to modify and to supplement the Performance Contracting Agreement (“Agreement”) as follows:

1. To the extent that any terms and conditions contained in the Agreement conflict with any terms and conditions contained in this Addendum No. 1, then the terms contained in this Addendum No. 1 shall control.
2. Defined terms that are not specifically defined herein shall be as defined in the Agreement.
3. The following is added and made part of the Agreement:  
The CLIENT acknowledges and agrees that in reading any of the information provided herein or by SIEMENS (i) the proposed transaction described in this Agreement is an arm’s-length commercial transaction between the CLIENT and SIEMENS, (ii) in connection therewith and with the discussions, undertakings, and procedures leading up to the consummation of this transaction, SIEMENS is and has been acting solely as a principal and is not acting as the agent or fiduciary of the CLIENT, (iii) SIEMENS is not an advisor to or fiduciary of the CLIENT with respect to the transaction contemplated hereby or the discussions, undertakings, and procedures leading thereto (regardless of whether SIEMENS has provided other services or is currently providing other services to the CLIENT on other matters), and (iv) the CLIENT has consulted its own legal, financial, and other advisors to the extent it has deemed appropriate.
4. The following is added and made part of the Agreement:  
THE CLIENT ACKNOWLEDGES THAT ANY GRANTS, REBATES, AND INCENTIVES THAT MAY BE AVAILABLE TO THE CLIENT WILL BE GRANTED BY A THIRD PARTY OUTSIDE THE CONTROL OF SIEMENS. THE CLIENT FURTHER ACKNOWLEDGES THAT WHILE SIEMENS WILL ASSIST THE CLIENT TO OBTAIN SUCH GRANTS, REBATES, AND INCENTIVES, SIEMENS DOES NOT GUARANTEE THAT ALL GRANTS, REBATES, AND INCENTIVES THAT MAY BE AVAILABLE TO THE CLIENT WILL BE SECURED. FURTHER, THE CLIENT HEREBY RELEASES SIEMENS FROM ANY AND ALL LIABILITY TO THE CLIENT ARISING FROM SIEMENS’, THE CLIENT’S, OR ANY THIRD PARTY’S FAILURE, TO OBTAIN OR APPLY FOR ANY GRANTS, REBATES, OR INCENTIVES THAT COULD BE AVAILABLE TO THE CLIENT.

The Parties agree that this Exhibit E – Addendum No. 1 modifies the Agreement between the Parties, dated \_\_\_\_\_, 2023 and is attached to and made a part of the Agreement.

**CLIENT:** [Insert CLIENT name]  
Signature: \_\_\_\_\_  
Printed Name: \_\_\_\_\_  
Title: \_\_\_\_\_  
Date: \_\_\_\_\_

**SIEMENS:** Siemens Industry, Inc.  
Signature: \_\_\_\_\_  
Printed Name: \_\_\_\_\_  
Title: \_\_\_\_\_  
Date: \_\_\_\_\_  
  
Signature: \_\_\_\_\_  
Printed Name: \_\_\_\_\_



Title: \_\_\_\_\_  
Date: \_\_\_\_\_

Sample PCA