

Guaranteed Energy Savings Contract Optional Clauses



DISCLAIMER

This contract (including any optional clauses thereto) is provided by the Regulatory Supervisory Bureau for the Water and Electricity Sector in the Emirate of Dubai (the "**RSB**") for the purposes of general guidance only for the purposes of encouraging and facilitating the growth of the ESCO services market in the Emirate of Dubai. It has not been drafted to reflect a specific transaction or to take into account a specific circumstance or issue. Accordingly it should not be relied upon and independent expert legal advice should always be obtained by those who intend to use it, and particularly before entering into or terminating a contract relating to energy savings.

Without limitation to the paragraph above, it is the responsibility of users to satisfy themselves: (1) as to the applicability of the RSB standard form contracts and documents ("**RSB documents**") to the particulars of their project; and (2) if any user is a Government entity, that the RSB documents comply with any mandatory procurement or other laws, including Law (6) of 1997 *Contracts of the Government of Dubai* and its amendments.

The RSB documents are provided on an as is basis, without warranties of any kind, whether express or implied, including, without limitation, warranties as to merchantability, fitness for purpose and/or non-infringement.

Neither the RSB or their legal advisors or any of their respective affiliated entities, nor any director, partner, officer, employee, consultant or adviser of any of them, shall have any liability to, or accept any responsibility for, any loss, damage, liability, claim or proceedings arising from any reliance placed upon the RSB documents or any part of them (including drafting provisions) or as to any matter concerning them (including as a result of any inadequacy, incompleteness or inaccuracy) whether arising from the negligence of those persons or otherwise.

CONTENT

A.	INTRODUCTION	3
B.	ESCO'S ADDITIONAL PERFORMANCE OBLIGATIONS	4
C.	TIMELY COMPLETION	6
D.	SECURITY	12
E.	PERFORMANCE SECURITY	13
F.	INSURANCE	14
G.	TERMINATION	15
H.	DISPUTE RESOLUTION	17
I.	MISCELLANEOUS	19
J.	LIST OF ADDITIONAL SCHEDULES AND ANNEXURES	22

A. INTRODUCTION

This document contains additional optional clauses that may be inserted in the standard form Guaranteed Energy Savings Contract ("**GESC**") as required by the Parties. Brief guidance notes on when to utilise each clause have been included in the footnotes. These clauses will need to be considered on a case by case basis in light of the key drivers for each project and included accordingly.

B. ESCO'S ADDITIONAL PERFORMANCE OBLIGATIONS

This section sets out additional performance obligations that a Customer may wish to impose on an ESCO during the performance of the Project. These obligations particularly relate to the disposal of obsolete equipment and training for the use of new Equipment installed at a Premises.

10 ESCO'S GENERAL PERFORMANCE OBLIGATIONS

Services Phase¹

- 10.8A In the event that the Customer becomes aware of any defect in the performance of the ESCO's Work, the Customer shall notify the ESCO in writing of such defective performance. Upon receiving such notice, the ESCO shall rectify such defective Work as soon as is reasonably possible, and in any event within ten (10) Business Days and shall notify the Customer in writing of the remedial action it has undertaken. If the ESCO fails to commence rectification works within ten (10) Business Days of receiving written notice from the Customer, the Customer may itself, or engage another third party to, perform such rectification work at the ESCO's expense, which shall be a debt due and payable by the ESCO upon written demand from the Customer.

11 EQUIPMENT²

Obsolete Equipment

- 11.23 The ESCO shall advise the Customer in writing and with supporting particulars if any of the Customer's equipment needs to be replaced or removed from the Premises at any time (such equipment being "**Obsolete Equipment**").
- 11.24 The ESCO shall maintain a register of any Obsolete Equipment removed or replaced at the Premises.
- 11.25 Within ten (10) Business Days of **[CHOICE: (i) [receiving the Construction Completion Certificate from the Customer] or (ii) [the Operations Date]]³**, the ESCO shall provide the Customer with a final register of Obsolete Equipment removed or replaced at the Premises.
- 11.26 The Customer shall within twenty (20) Business Days of receiving the register of such Obsolete Equipment instruct the ESCO in writing to:
- (a) return the Obsolete Equipment to the Customer; or
 - (b) dispose of the Obsolete Equipment and, if in the ESCO's opinion the Obsolete Equipment is able to be sold, remit the proceeds of such disposal to the Customer.
- 11.27 If the Customer fails to provide an instruction in accordance with clause 11.26 to either return or dispose of the Obsolete Equipment, the ESCO shall provide the Customer with a notice reminding the Customer of its failure to do so and drawing the Customer's attention to this clause 11.27. If within ten (10) Business Days of this reminder notice the Customer still has not provided the ESCO with an instruction to either return or dispose of the Obsolete Equipment, the Customer shall be deemed to have instructed the ESCO to dispose of the Obsolete Equipment, in which case the ESCO may do so (including by way of sale, in which case the ESCO shall be entitled to retain all sale proceeds), or, alternatively, may retain such Obsolete Equipment for its own use and the Parties agree that title in such Obsolete Equipment will pass automatically to the ESCO without the

¹ This sub-clause may be inserted where the Customer requires an obligation to be imposed on the ESCO for timely performance in the event that it is notified by the Customer of any defective Work.

² Insert clauses 11.23 – 11.29 where the Project involves the replacement of Existing Equipment at the Premises and where the Parties require certainty in respect of the storage and disposal obligations.

³ Insert option (i) if the more detailed testing and commissioning regime will be utilised or if this will not be included in the Contract then select option (ii).

need for the execution of any further documents at that point in time. The Parties may also agree at any time prior to the **[CHOICE: (i) [issue of the Construction Completion Certificate from the Customer] or (ii) [Operations Date]]**⁴ to dispose of the Obsolete Equipment, subject to such agreement being evidenced in writing and signed by the authorised representatives of each Party.

11.28 The ESCO shall store Obsolete Equipment removed from the Premises at the Customer's cost until it receives, or is deemed to have received, instructions from the Customer to either return or dispose of the Obsolete Equipment.

11.29 The disposal of any Obsolete Equipment shall be at the ESCO's expense.

11A TRAINING⁵

11A.1 The ESCO shall conduct the training programme as set out in Schedule **[insert]** (*Training Programme*). The training shall be completed at least twenty (20) Business Days before the end of the Term.

11A.2 The ESCO shall during the Term provide a reasonable level of on-going training whenever needed or when requested by the Customer in writing with respect to updated or altered Equipment, including upgraded software. Such training shall be provided at no cost to the Customer and shall have no effect on the prior acceptance of installed Equipment.

⁴ Insert option (i) if the more detailed testing and commissioning regime will be utilised or if this will not be included in the Contract then select option (ii).

⁵ Insert this clause where the Customer will require training to use the Equipment.

C. TIMELY COMPLETION

The following clauses may be inserted into the GESC where timely completion of the Project is paramount. This section sets out additional clauses which may be included if more detailed programming obligations are required, which may be necessary when a Customer has obtained external finance to procure the Equipment and consequently requires timely installation of the Equipment and the delivery of Energy Savings to assist it with its finance repayment obligations. This section also includes a delay liquidated damages regime if the ESCO fails to achieve the planned completion date, as well as an extension of time regime if it is prevented from performing the Works.

1 DEFINITIONS

- "**Construction Completion Certificate**"⁶ means the certificate issued (or deemed under clause 15.6 to be issued) by the Customer to the ESCO upon the ESCO passing the testing and commissioning in accordance with Schedule *[insert] (Testing and Commissioning)* and providing the Customer with the documents required under clause 15.5.
- "**Construction Completion Date**"⁷ means *[insert date]*, as such date may be extended in accordance with the terms of this Contract.
- "**Milestone Dates**"⁸ means the dates identified as such in Schedule 5 (*Preliminary Programme*).

6 COORDINATION⁹

- 6.4 The ESCO shall be entitled to an extension of time in accordance with clause 12A if it is prevented or delayed from performing the Works as a result of the acts of the Parties described in clause 6.2 (above), subject to the ESCO taking all reasonable steps to mitigate such delay.

9 PROGRAMME¹⁰

- 9.1 Replace the reference to "**Target Operations Date**" with "**Construction Completion Date**".
- 9.2A The Programme shall address the following at a minimum:
- 9.2A.1 the order in which the ESCO intends to complete the Works *[, including all Milestone Dates]*¹¹;
- 9.2A.2 the major events and activities in the procurement and installation of Equipment at the Premises;
- 9.2A.3 the major events and activities in respect of the maintenance services and replacement of Equipment or Existing Equipment as may be necessary over the lifecycle of such Existing

⁶ The definition of Construction Completion Certificate should be inserted if a liquidated damages regime is to be inserted as the date of the issue of the Construction Completion Certificate will be the trigger for the levy of liquidated damages by a Customer.

⁷ The definition of Construction Completion Date should be inserted if a firm completion date is required and a liquidated damages regime is to be included.

⁸ The definition of Milestone Date should be inserted if milestone dates are to be included in the ESCO's programme and/or if milestone liquidated damages are applicable.

⁹ This clause should be inserted where the Parties intend on using a liquidated damages regime, as a corresponding extension of time entitlement will also need to be included in the Contract so that the liquidated damages are not unfairly levied in circumstances where the ESCO is not responsible for the delay to the Project.

¹⁰ Insert this clause where the Parties seek clarity on how the programming regime will operate under the Contract.

¹¹ Insert these words if the Parties agree to the use of Milestone Dates. If Milestone Dates are not used these words should be omitted.

Equipment or Equipment as identified in Schedule 7 (*Equipment and Existing Equipment*);

9.2A.4 the sequence and timing of the performance of the Works;

9.2A.5 [the sequence and timing of testing and commissioning]¹²;

9.2A.6 all other principal activities to be undertaken by the ESCO; and

9.2A.7 a supporting report which includes:

(a) a general description of the methods which the ESCO intends to adopt for the execution of each major stage of the Works; and

(b) the approximate number of each class of the ESCO's personnel or Sub-Contractors required for each major stage of the Works.

9.2B The Customer shall either accept or reject (with comments) a Programme submitted by the ESCO within ten (10) Business Days of receipt of the Programme. If the Programme is rejected by the Customer, the ESCO shall incorporate any comments made by the Customer and re-submit the Programme for the Customer's approval and this process shall continue until the Customer approves the ESCO's Programme. If the Customer does not accept or reject (with comments) the ESCO's Programme within ten (10) Business Days of receipt of the Programme, it shall be deemed to have been accepted by the Customer.

12A EXTENSIONS OF TIME¹³

12A.1 Subject to clause 12A.2, the ESCO shall be entitled to an extension of time to the Construction Completion Date **[and any relevant Milestone Dates]¹⁴** if and to the extent that it is critically delayed in carrying out and completing its obligations under this Contract in the following circumstances:

12A.1.1 a variation has been agreed in accordance with clause 14;

12A.1.2 a cause of delay giving an express entitlement to an extension of time pursuant to:

(a) clause 6.4 (Coordination);

(b) clause 16.4 (Hazardous Materials);

(c) clause 15.8 (Testing and Commissioning and Construction Completion Certificate);

(d) clause 28.1 (Change in Law);

(e) clause 29.3 (Force Majeure);

(f) clause 30.4 (Suspension); or

(g) any delay, impediment or prevention caused by or attributable to the Customer, its agents, representatives or other contractors employed by the Customer.

¹² Insert this sub-clause if the ESCO will be undertaking testing and commissioning of the Equipment.

¹³ Insert this clause where timely completion of the Project is critical and the Parties agree to insert a liquidated damages regime.

¹⁴ Insert these words if the Parties agree to the use of Milestone Dates. If Milestone Dates are not used these words should be omitted.

In the circumstances described above the Construction Completion Date **[and any applicable Milestone Dates]**¹⁵ shall be adjusted equitably by the Parties to take into account the ability of the ESCO to reschedule its activities to minimise the delay and the effect of such delay on the ability of the ESCO to achieve the **[relevant Milestone Date or]**¹⁶ Construction Completion Date by the schedule date therefor. Any dispute regarding the adjustment to the Construction Completion Date **[or any relevant Milestone Date]**¹⁷ that cannot be resolved pursuant to clause 33.2 shall be referred to an independent expert for resolution in accordance with clause 34.

- 12A.2 The ESCO's extension of time entitlement set out in clause 12A.1 shall be subject to the ESCO providing the Customer with notice of the delay event within a reasonable time of becoming aware of the delay event and in any event not later than twenty (20) Business Days after becoming aware of the delay event. The ESCO's notice shall at a minimum specify:
- 12A.2.1 the delay event;
 - 12A.2.2 the reason for the delay or likely delay to the performance of the Works; and
 - 12A.2.3 an estimate of the likely effect of the delay on the Works.
- 12A.3 Upon cessation of the delay event, the ESCO shall promptly provide the Customer with written notice of the following information to enable the Parties to reasonably assess any extension of time claim submitted by the ESCO:
- 12A.3.1 the material circumstances or causes of the delay event which gave rise to the delay;
 - 12A.3.2 the corrective action undertaken by the ESCO to minimise the delay;
 - 12A.3.3 the effect of the delay on its Programme and the extension of time requested; and
 - 12A.3.4 supporting documentation to substantiate the ESCO's claim and such further information as may reasonably be requested by the Customer.
- 12A.4 The ESCO shall take all reasonable steps to mitigate the consequences of any delay which is the subject of a notice pursuant to clause 12A.2, provided however that any mitigation measures the ESCO takes shall not in any way relieve the ESCO of its obligations to continue with the performance of the Works which are unaffected by the delay event or which could reasonably have been performed.
- 12A.5 The Parties agree that the ESCO shall have no right to claim an extension of time in the event that it does not comply with its notice obligations set out in clause 12A.2.
- 12A.6 The ESCO shall not be entitled to claim an extension of time in respect of any event or period of delay:
- 12A.6.1 which does not cause a critical delay to the Construction Completion Date **[or any relevant Milestone Dates]**¹⁸;
 - 12A.6.2 caused or materially contributed to by any negligent act or omission, breach of Contract or other default on the part of the ESCO, its Sub-Contractors or any of their respective employees, agents or representatives; or
 - 12A.6.3 which the ESCO has not taken all reasonable steps to avoid or mitigate without diverging from the requirements of this Contract.

¹⁵ Delete these words if Milestone Dates are not used in the Contract.

¹⁶ Delete these words if Milestone Dates are not used in the Contract.

¹⁷ Delete these words if Milestone Dates are not used in the Contract.

¹⁸ Delete these words if Milestone Dates are not used in the Contract.

12B DELAY DAMAGES¹⁹

- 12B.1 If the ESCO fails to attain a Construction Completion Certificate by the Construction Completion Date, the ESCO shall be liable to pay the Customer the sum specified in Schedule *[insert]*²⁰ (*Delay Damages*) for each Day of delay. The Parties agree that the delay damages identified in Schedule [22] (*Delay Damages*) are not a penalty but are a fair and reasonable pre-estimate of the amount of actual damages and loss the Customer would suffer as a result of the ESCO failing to attain the Construction Completion Certificate by the Construction Completion Date.
- 12B.2 The total amount of delay damages payable by the ESCO to the Customer under this Contract shall not exceed *[insert]*% of the Contract Price.
- 12B.3 The delay damages payable by the ESCO pursuant to this clause 12B shall be the only damages due from the ESCO for such delay, other than in the event of termination of this Contract by the Customer in accordance with the terms of this Contract.
- 12B.4 The Customer may either:
- 12B.4.1 deduct any delay damages payable by the ESCO to the Customer under this Contract from any payments due or to become due to the ESCO under this Contract; or
 - 12B.4.2 issue a demand in writing requesting payment of the delay damages payable within twenty (20) Business Days of the date of such demand.
- 12B.5 If the ESCO disputes any delay damages levied by the Customer under this clause 12B, the dispute shall be referred to an independent expert for resolution in accordance with clause 34.
- 12B.6 Any delay damages levied by the Customer on the ESCO shall not relieve the ESCO from the continued performance of its obligations under this Contract.

15 TESTING AND COMMISSIONING AND CONSTRUCTION COMPLETION CERTIFICATE²¹

- 15.1 The ESCO shall conduct a thorough and systematic performance test of each element and the **[CHOICE: (i) [total system of the installed Equipment] or (ii) [Systems]]**²² in accordance with the procedures set out in Schedule *[insert]* (*Testing and Commissioning*). The testing shall be designed to determine if the Equipment is functioning in accordance with both its published specifications and the Schedules to this Contract, and to determine if the **[CHOICE: (i) [modified Premises systems, sub-systems or components] or (ii) [Systems]]**²³ are functioning properly within the new integrated environment.
- 15.2 The ESCO shall notify the Customer in writing at least five (5) Business Days prior to commencing any testing and commissioning in accordance with this clause 15 and the Customer shall have the right to be present during such tests.
- 15.3 Unless notified otherwise, the ESCO shall perform the testing and commissioning within ten (10) Business Days of the notice provided to the Customer under clause 15.2, unless agreed otherwise with the Customer in writing.

¹⁹ Insert this clause when timely completion and Project delivery is critical and where a liquidated damages regime is required.

²⁰ The Schedule numbering may need to be amended depending on the number of schedules that are to be included in the Contract.

²¹ Insert this clause in place of clause 15 of the Contract (Operations Date) if the Parties wish to include a comprehensive testing and commissioning regime. Such a clause will be useful where complex Project delivery is involved.

²² Select option (i) if the ESCO is performing energy saving services in respect of the entire Premises, or if the services are limited to a System, use option (ii).

²³ Select option (i) if the ESCO is performing energy saving services in respect of the entire Premises, or if the services are limited to a System, use option (ii).

- 15.4 The ESCO shall be responsible for performing any remedial or rectification works if the Equipment fails to meet the minimum performance requirements set out in Schedule **[insert]** (*Testing and Commissioning*) at its own cost.
- 15.5 Upon successfully passing the testing and commissioning requirements in Schedule **[insert]** (*Testing and Commissioning*) the ESCO shall provide the Customer with:
- 15.5.1 a written report on the testing and commissioning of the Equipment and all testing documentation (including testing and commissioning certificates);
- 15.5.2 reasonably satisfactory documentary evidence that the Equipment installed is the Equipment specified in Schedule 8 (*Equipment and Existing Equipment*); and
- 15.5.3 the operations manuals for the Equipment installed.
- 15.6 The Customer shall provide the ESCO with a Construction Completion Certificate within ten (10) Business Days of the ESCO successfully passing the testing and commissioning requirements in Schedule **[insert]** (*Testing and Commissioning*) and providing the information required under clause 15.5. If the Customer fails to do so without providing the ESCO with written reasons, the Construction Completion Certificate shall be deemed to have been issued on the tenth (10th) Business Day after the ESCO provided the information under clause 15.5.
- 15.7 If any dispute arises between the Parties in respect of the issue of the Construction Completion Certificate, the matter shall be referred to an independent expert for resolution in accordance with clause 34.
- 15.8 If for any reason the testing and commissioning to be performed by the ESCO under this clause 15 is delayed by the Customer or Tenants, the ESCO shall be entitled to an extension of time in accordance with clause 12A.²⁴

16 HAZARDOUS MATERIALS²⁵

- 16.4 In the event that the Works are suspended due to the discovery of Hazardous Materials at the Premises in accordance with this clause 16, the ESCO shall be entitled to an extension of time in accordance with clause 12A.

28 CHANGE IN LAW²⁶

- 28.1 In the event that there is a change in Law after the Effective Date, the ESCO shall be entitled to submit a written request to the Customer for:
- 28.1.1 an extension of time in accordance with clause 12A; and/or
- 28.1.2 an adjustment to the Contract Price and, if applicable, Maintenance Fee,
- to take into account any delays or increase in costs resulting from a change in Laws, including the introduction of new Laws and the repeal or modification of existing Laws.
- 28.2 The Customer shall make a reasonable determination in respect of the ESCO's request and either accept or reject the ESCO's extension of time claim and/or request for an adjustment to the Contract Price and, if applicable, Maintenance Fee.

²⁴ Only insert this clause if the optional extension of time clause has been included in the Contract.

²⁵ Only insert this clause if the optional extension of time clause has been included in the Contract.

²⁶ Replace clause 28 with this clause if the optional extension of time clause has been included in the Contract.

28.3 If the ESCO disagrees with the Customer's determination, the Parties shall resolve the matter in accordance with the dispute resolution regime set out in clause 33.

29 FORCE MAJEURE²⁷

29.1A If the ESCO is prevented from performing all or substantially all of its obligations as a result of a Force Majeure Event, it shall be entitled to an extension of time in accordance with clause 12A.

29.3 The Parties agree that if the ESCO fails to notify the Customer in accordance with clause 29.1 the ESCO shall have no right to claim an extension of time.

30 SUSPENSION²⁸

30.4 In the event that the Works are suspended in accordance with clause 30.2 the ESCO shall be entitled to:

30.4.1 where such suspension is during the Construction Period, an extension of time for the duration of such suspension; and

30.4.2 an adjustment to the Contract Price in respect of the reasonable costs the ESCO may incur during the suspension period, including (but not limited to) demobilisation and remobilisation costs and storage of Equipment and (if applicable) Existing Equipment costs.

²⁷ Insert these clauses if the optional extension of time clause has been included in the Contract.

²⁸ Replace clause 30.4 with this clause if the optional extension of time clause has been included in the Contract.

D. SECURITY

This section sets out a clause which may be included in the GESC if the Customer is obtaining external financing to procure the Project and there is a requirement for the ESCO to execute a consent deed with the party providing the finance.

13A SECURITY²⁹

13A.1 Notwithstanding any other provision of this Contract, the Customer may without the consent of the ESCO for the purposes of securing financial accommodation from a bank, Islamic financial institution or other recognised financial institution, mortgage, pledge or assign by way of security its rights under this Contract provided that:

13A.1.1 the person taking the benefit of that security (a "**Permitted Security Taker**") and any person claiming through a Permitted Security Taker shall be, or shall be made, expressly subject to the provisions of this Contract; and

13A.1.2 the Permitted Security Taker shall not be a competitor of the ESCO.

13A.2 Upon request by the Customer, the ESCO shall enter into a consent deed with the Permitted Security Taker in a form reasonably required by the Permitted Security Taker.

²⁹ Insert this clause when the Customer is funding the Contract through bank financing and the bank requires security to be provided in respect of the financing provided.

E. PERFORMANCE SECURITY

This section sets out clauses which may be included in the GESC if a Customer requires an ESCO to submit a form of performance security, in the form of either a parent company guarantee or a performance bond issued by an approved financial institution.

22A [CHOICE: (I) [PARENT COMPANY GUARANTEE] OR (II) [PERFORMANCE BOND]]³⁰

22A.1 Within ten (10) Business Days of the Effective Date, the ESCO shall provide the Customer with a parent company guarantee in the form set out in Schedule ***[insert]*** (*Parent Company Guarantee*).

22A.2 The Customer shall not be obliged to make any payments to the ESCO under this Contract until the ESCO has provided the Customer with a properly executed parent company guarantee in accordance with requirements of clause 22A.1.

or

22A.1 Within ten (10) Business Days of the Effective Date, the ESCO shall, at its own expense, provide the Customer with an on demand, irrevocable performance bond from a bank acceptable by the Customer in the form set out in Schedule ***[insert]*** (*Performance Bond*).

22A.2 The Customer shall not be obliged to make any payments to the ESCO under this Contract until the ESCO has provided the Customer with a properly executed performance bond in accordance with requirements of clause 22A.1.

³⁰ Insert option (i) if a parent company guarantee is desirable, or option (ii) where a performance bond is preferable.

F. INSURANCE

This section sets out additional insurance obligations on the ESCO in respect of the provision of insurances. These clauses may be included for high value projects where having the appropriate insurances in places at all times will be critical. One of the key clauses included in this section is the Customer's right to procure insurance at the ESCO's expense if the ESCO has failed to maintain appropriate insurance during the Term.

26 INSURANCE³¹

- 26.4 The ESCO shall provide certificates of currency or other documentary evidence satisfactory to the Customer upon the Customer's request to demonstrate that it has adequately discharged its obligations under this clause 26.
- 26.5 The ESCO shall not amend or make any material alterations to the terms of any insurance policy without the Customer's prior written approval.
- 26.6 If the ESCO fails to effect and keep in force any of the insurances it is required to effect and maintain under this Contract, or fails to provide satisfactory evidence that it has effected and maintained insurances, the Customer may effect the necessary insurances at the ESCO's expense, which shall be a debt due and payable by the ESCO to the Customer within ten (10) Business Days of receiving a written demand from the Customer.

³¹ Insert these clauses if a more robust insurance regime is required.

G. TERMINATION

This section sets out clauses which may be included within the termination clause in the GESC in the event that the parties would like to agree a more robust and clear process to evaluate payments upon the early termination of the Contract.

1 DEFINITIONS

"**Cost of Completion**"³² has the meaning given to it in clause 31.6A.

31 TERMINATION

Customer's Termination Rights

31.2.3 if the ESCO has reached the limit of its liability for delay damages pursuant to clause 12B or the overall cap on liability under clause 28.1;³³

31.2.3A if the ESCO fails to achieve the Construction Completion Certificate by the date that is twelve (12) months after the Construction Completion Date;³⁴

Consequences of Termination³⁵

31.6 If this Contract is terminated by the Customer in accordance with clauses 31.2.1, 31.2.2, 31.2.3 or 31.2.5 the Customer shall be entitled to complete the Works itself or employ another energy savings company to do so. The Customer shall thereafter promptly fix and determine:

31.6.1 all outstanding undisputed sums payable to the ESCO less any amounts payable by the ESCO to the Customer under this Contract (including any amounts arising out of a default that led to the termination of this Contract); and

31.6.2 the costs of any Equipment which is properly installed at the Premises or has been delivered to the Premises and has not been paid for by the Customer

(the amount certified by the Customer under this clause being the "**Termination Value**").

31.6A The Customer shall not be liable to make any further payments to the ESCO until the costs of completing or taking over the Works and all other expenses that will be incurred by the Customer in connection therewith have been ascertained (the "**Cost of Completion**"). The Cost of Completion shall include all costs and fees charged by a replacement energy services company for providing a financial guarantee to the Customer equivalent (in value and duration) to each undischarged Energy Savings Guarantee in respect of both:

31.6A.1 the Equipment installed by the ESCO prior to the termination date; and

31.6A.2 (if applicable) the Equipment that would have been installed by the ESCO during the Term but for the termination of this Contract and which will now be provided to the Customer by the replacement energy services company.

³² The definition of Cost of Completion should be inserted if the cost of completion regime is included in the termination clause (see clause 31.6A.)

³³ Replace clause 31.2.3 with this clause if the optional delay damages clause has been included in the Contract.

³⁴ Insert this clause if the delay liquidated damages regime and optional testing and commissioning clause has been included in the Contract. Please note that this will also require an amendment to clause 31.6 to also include a reference to clause 31.2.3A.

³⁵ Delete clause 31.6 and replace it with the clause 31.6 included herein and insert the additional two clauses 31.6A and 31.6B where a more robust and certain payment regime is desired in the event that the Contract is terminated for the ESCO's default prior to the completion of the Term.

If the Cost of Completion when added to the amounts then already paid to the ESCO as at the date of termination exceeds the total amount which would have been payable to the ESCO for the execution of the Works assuming this Contract was not terminated, the Customer shall certify the excess and the ESCO shall pay the Customer the amount of (that is the then Contract Price) such excess within thirty (30) Business Days of a written demand from the Customer. Any such excess shall be taken to be a debt due by the ESCO to the Customer and shall be recoverable accordingly. If there is no such excess the ESCO shall be entitled to be paid the Termination Value and the Customer shall pay the Termination Value to the ESCO not later than sixty (60) Days after determining the Cost of Completion.

31.6B Notwithstanding anything else in this Contract, payment by the ESCO of the excess in accordance with this clause 31.6 and 31.6A shall be in full and final satisfaction of the Customer's claims and rights against the ESCO and is the Customer's sole remedy for the termination or the events or circumstances which gave rise to the termination.

H. DISPUTE RESOLUTION

This section sets out an alternative dispute resolution forum to the courts of the Emirate of Dubai, which may be particularly relevant to private sector participants or where either of the Parties is a foreign participant in the market. Furthermore, an alternative dispute resolution process has been set out below if the Parties do not wish to refer a matter to a court for final resolution, as provided for in the GESC, but would prefer the final dispute forum to be arbitration.

1. **DEFINITIONS**³⁶

"**DIFC Courts**" means the courts of the Dubai International Financial Centre.

[CHOICE: (I)]

[33 DISPUTE RESOLUTION³⁷

33.3 Subject to the terms of clause 34, if the Parties are unable to resolve the dispute within the twenty (20) Business Day period referred to in clause 33.2, the Parties hereby agree that the dispute shall be subject to the exclusive jurisdiction of the DIFC Courts.^{38]}

OR (II)

[33 DISPUTE RESOLUTION³⁹

33.3 If the Parties are unable to resolve the dispute within the twenty (20) Business Day period referred to in clause 33.2, then either Party may refer the matter to arbitration as set out in clause 33.4.

33.4 Where a Party wishes to refer a matter to arbitration in accordance with this Contract, it shall serve a written notice on the other Party to that effect. The arbitration shall be governed by the arbitration rules of the Dubai International Arbitration Centre (the "**DIAC Rules**")⁴⁰ and shall be:

33.4.1 heard by three (3) arbitrators appointed in accordance with the DIAC Rules;

33.4.2 in the English language, including all arbitral proceedings, correspondence and hearings; and

33.4.3 heard in, and the seat of the arbitration shall be the Emirate of Dubai, UAE.

33.5 The award in any arbitration proceeding shall be final and binding upon the Parties and shall be enforceable in, and judgments upon any award may be entered in, any court having jurisdiction over one or more of the Parties.

33.6 The arbitral tribunal shall have the power and authority to make an award in respect of the costs incurred by the Parties (including legal fees) arising out of or in connection with an arbitration commenced by the Parties in accordance with this clause 33.

³⁶ Insert the definition of "DIFC Courts" if the preferred forum for resolving disputes is the DIFC Courts rather than the courts of the Emirate of Dubai.

³⁷ Replace clause 33.3 in the GESC with this sub-clause if the Parties would prefer the DIFC as the dispute resolution forum.

³⁸ If this option is selected, references to "courts of the Emirate of Dubai" will need to be replaced with "DIFC Courts" throughout the Contract.

³⁹ Replace clause 33.3 and 33.4 in the Contract with the following clauses if the Parties decide to use arbitration as their dispute resolution forum. Clause 34.7 will also need to be amended to make reference to the resolution by way of arbitration proceedings rather than the Courts of the Emirate of Dubai.

⁴⁰ The Parties are free to nominate any arbitral body they wish to oversee the arbitral proceedings such as the arbitration rules of the Dubai International Financial Centre – London Court of International Arbitration or the arbitration rules of the International Chamber of Commerce. If so, consequential changes to this clause will be required.

33.7 Subject to the terms of this Contract, the Parties shall continue to discharge their duties and obligations under this Contract notwithstanding the commencement of any arbitral proceedings.]]

I. MISCELLANEOUS

This section sets out additional clauses that the Parties may wish to include in the GESC, which will need to be assessed on a case by case basis.

1 DEFINITIONS

"ESCO'S Proposal"⁴¹ means the ESCO's proposal set out in Annexure B (*ESCO's Proposal*).

"RFP for ESCO Services"⁴² means the request for proposal issued by the Customer for ESCO services as provided for in Annexure A (*RFP for ESCO Services*).

4 CONTRACT DOCUMENTS⁴³

4.1 The following documents shall form part of and comprise this Contract:

4.1.1 Clauses 1 - 48;

4.1.2 Schedules 1 – *[insert as applicable]*;

4.1.3 Annexure A (ESCO's Proposal); and

4.1.4 Annexure B (RFP for ESCO Services).

17 NOTICE OF MATERIAL CHANGES AND NEW SUB-METERS FOR EXTENSIONS⁴⁴

17.1 The Customer shall use its best endeavours to provide the ESCO with written notice identifying all actual or proposed Material Changes at least ten (10) Business Days before any actual or proposed Material Change is implemented or occurs. Notice to the ESCO of Material Changes which result because of a bona fide emergency or other situation which prevents advanced notification shall be deemed to be sufficient if the Customer provides such notice within twenty four (24) hours after having actual knowledge that the event constituting the Material Change occurred or was discovered by the Customer to have occurred.

17.2 The Customer shall provide and install utility sub-meters on all new construction and/or additions to the Premises during the Operations Period as recommended by the ESCO or, alternatively, pay the ESCO the applicable fee notified by the ESCO in writing for the cost incurred by the ESCO in calculating the necessary adjustments to the Energy Savings as a result of the new construction and/or addition to the Premises.

⁴¹ The definition of ESCO Proposal should be included where the ESCO has submitted a proposal to perform the Works and the Parties require this document to form a 'Contract Document'.

⁴² The definition of RFP for the ESCO Services should be included where the Customer has issued a request for proposal for the performance of the Works and the Parties require this document to form a 'Contract Document'.

⁴³ When the Parties require the ESCO's Proposal and the RFP to form part of the Contract Documents, then insert the above replacement clause 4.1 and insert as new Appendices after the Schedules.

⁴⁴ Insert this clause where the Energy Savings measures relate to the Premises and not merely discrete Systems.

40A PROHIBITED ACTS⁴⁵

40A.1 Each Party represents and warrants to the other that at the time of entering into this Contract it has not done any of the following:

40A.1.1 offered, given or agreed to give any officer or employee of any entity (without limitation, whether it be a Party to this Contract, another commercial entity or a Government Instrumentality) any gift or consideration of any kind as an inducement or reward for doing or not doing or for having done or not having done any act in relation to the obtaining or performance of this or any other contract with the Party, or for showing or not showing favour or disfavour to any person in relation to this or any other contract with the Party; and

40A.1.2 in connection with this Contract paid or agreed to pay any commission, other than payment particulars of which (including the terms and conditions of the agreement for its payment) have been disclosed in writing to the Party

("Prohibited Acts").

40A.2 If any of the Parties, its employees or agents (or anyone acting on its or their behalf) has on or before the Effective Date done any of the Prohibited Acts (the "Defaulting Party") with or without the knowledge of the other Party (the "Innocent Party") in relation to this or any other contract with the Defaulting Party, the Innocent Party shall be entitled to:

40A.2.1 terminate this Contract and recover from the Defaulting Party the amount of any loss resulting from the termination;

40A.2.2 recover from the Defaulting Party the amount or value or any gift, consideration or commission concerned; and

40A.2.3 recover from the Defaulting Party any other loss or expense sustained in consequence of the carrying out of the Prohibited Act or the commission of the offence.

41A SOVEREIGN IMMUNITY⁴⁶

41A.1 The Parties unconditionally and irrevocably agree not to claim, invoke or permit to be invoked on its behalf or for its benefit any right it may have under the Laws, or of any other state or jurisdiction, to prevent, delay, hinder, nullify or in any other way obstruct the submission of any dispute to **[CHOICE: (i) [CHOICE: [(i) the courts of the Emirate of Dubai] or (ii) [DIFC Courts]]⁴⁷ or (ii)[arbitration]]⁴⁸** in accordance with clause 41A. The Parties unconditionally and irrevocably agree **[CHOICE: (i) [to accept any award rendered by the arbitral tribunal as set out in clause 33 and any judgement entered thereon by a court of competent jurisdiction as final and binding, and,] or (ii) [to any [CHOICE: (i) [the courts of the Emirate of Dubai] or (ii) [DIFC Courts]]⁴⁹ judgment]]⁵⁰** not to claim, invoke or permit to be invoked on its behalf or for its benefit any right it may have under the Laws, or of any other state or jurisdiction, to prevent, delay, hinder, nullify or in any other way obstruct the enforcement or execution of any **[CHOICE: (i) [judgment of the [CHOICE: (i) the courts of the Emirate of Dubai] or (ii) [DIFC Courts]]⁵¹ or (ii) [award**

⁴⁵ Insert this clause if the Parties wish to include anti-bribery terms.

⁴⁶ Insert this clause where the Customer is the government or a government agency, statutory corporation or any other entity that may be afforded sovereign immunity under the relevant Laws.

⁴⁷ The Parties may select either dispute resolution forum as they see fit.

⁴⁸ Insert (i) if the dispute resolution forum selected by the Parties is the DIFC Court, otherwise select option (ii) if arbitration is the preferred dispute resolution forum.

⁴⁹ The Parties may select either dispute resolution forum as they see fit.

⁵⁰ Insert these words if the preferred dispute resolution form is arbitration rather than the DIFC Court.

⁵¹ The Parties may select either dispute resolution forum as they see fit.

given by an arbitral tribunal]]⁵² in accordance with clause 41A and any judgement entered thereon by a court of competent jurisdiction.

- 41A.2 To the extent that the Customer or any of its properties may in any state or jurisdiction claim or benefit from any immunity (whether characterised as state immunity, sovereign immunity, act of state or otherwise) from jurisdiction, suit, action, service, execution, attachment, set off, provisional measures or orders, or other legal process (whether in aid of execution, before award or judgement or otherwise), or to the extent that there may be attributed to the Customer or any of its properties any such immunity (whether or not claimed), the Customer hereby expressly, unconditionally and irrevocably agrees not to claim, invoke, or permit to be invoked on its or its properties' behalf or for its or its properties benefit, and hereby expressly, unconditionally and irrevocably waives, any such immunity.
- 41A.3 The Customer acknowledges that all of the transactions and actions contemplated and effected by this Contract are commercial transactions.

⁵² Insert (i) if the dispute resolution forum selected by the Parties is the DIFC Court, otherwise select option (ii) if arbitration is the preferred dispute resolution forum.

J. LIST OF ADDITIONAL SCHEDULES AND ANNEXURES

1. DELAY DAMAGES
2. TRAINING PROGRAMME
3. TESTING AND COMMISSIONING
4. PARENT COMPANY GUARANTEE/PERFORMANCE BOND
5. RFP FOR ESCO SERVICES
6. ESCO'S PROPOSAL