

personnel during the term of the Contract. Such training shall be provided at no charge to the Facility Owner.

## **12. EQUIPMENT SERVICE**

### **12.1 Actions by ESCO**

ESCO shall provide all service, repairs, and adjustments to the Equipment installed under terms of this Contract pursuant to Schedule J (ESCO's Maintenance Responsibilities). The Facility Owner shall incur no cost for Equipment service, repairs, and adjustments, except as set forth in Schedule D (Compensation to ESCO), provided, however, that when there is need for maintenance or repairs due to the negligence or willful misconduct of the Facility Owner or any employee or other agent of the Facility Owner, and ESCO can so demonstrate such negligence or willful misconduct, ESCO may charge the Facility Owner for the actual cost of the maintenance or repair to the extent such cost is not covered by any warranty or insurance proceeds.

### **12.2 Malfunctions and Emergencies**

The Facility Owner shall use its best efforts to notify ESCO or its designee(s) within twenty-four (24) hours after the Facility Owner's actual knowledge and occurrence of: (i) any malfunction in the operation of the Equipment or any pre-existing energy related equipment that might materially impact upon the assured energy savings, (ii) any interruption or alteration to the energy supply to the Premises, or (iii) any alteration or modification in any energy-related equipment or its operation.

Where the Facility Owner exercises due diligence in attempting to assess the existence of a malfunction, interruption, or alteration it shall be deemed not at fault in failing to correctly identify such conditions as having a material impact upon the assured energy savings. The Facility Owner shall notify ESCO within twenty-four (24) hours upon its having actual knowledge of any emergency condition affecting the Equipment. ESCO or its designee shall respond within \_\_\_\_ hours and shall promptly proceed with corrective measures. Any telephonic notice of such conditions by The Facility Owner shall be followed within three (3) business days by written notice to ESCO from the Facility Owner. If the Facility Owner unreasonably delays in notifying ESCO of a malfunction or emergency, and the malfunction

or emergency is not otherwise corrected or remedied, such conditions will be treated as a Material Change and the provisions under Section 14 (Material Changes) shall be applicable.

ESCO shall provide a written record of all service work performed. This record shall indicate the reason for the service, description of the problem and the corrective actions performed.

### **12.3 Actions by the Facility Owner**

The Facility Owner shall not move, remove, modify, alter, or change in any way the Equipment or any part thereof without the prior written approval of ESCO except as set forth in Schedule K (The Facility Owner's Maintenance Responsibilities). Notwithstanding the foregoing, the Facility Owner may take reasonable steps to protect the Equipment if, due to an emergency, it is not possible or reasonable to notify ESCO before taking any such actions. In the event of such an emergency, Facility Owner shall take reasonable steps to protect the Equipment from damage or injury and shall follow instructions for emergency action provided in advance by ESCO. The Facility Owner agrees to maintain the Premises in good repair and to protect and preserve all portions thereof, which may in any way affect the operation or maintenance of the Equipment.

### **13. UPGRADING OR ALTERING THE EQUIPMENT**

ESCO shall at all times have the right, subject to the Facility Owner's prior written approval, which approval shall not be unreasonably withheld, to change the Equipment, revise any procedures for the operation of the equipment or implement other energy saving actions in the Premises, provided that:

- (i) ESCO complies with the standards of comfort and services set forth in Schedule I (**Standards of Comfort**) herein;
- (ii) such modifications or additions to, or replacement of the Equipment, and any operational changes, or new procedures are necessary to enable ESCO to achieve the energy savings at the Premises and;
- (iii) any cost incurred relative to such modifications, additions or replacement of the Equipment, or operational changes or new procedures shall be the responsibility of ESCO.

All modifications, additions or replacements of the Equipment or revisions to operating or other procedures shall be described in a supplemental Schedule(s) to be provided to the Facility Owner for approval, which shall not be unreasonable withheld, provided that any replacement to be installed shall be the New Equipment as set forth in Section 10 and have equal or better potential to reduce energy consumption at the Premises than the Equipment being replaced. ESCO shall update any and all software to be used in connection with the Equipment in accordance with the provisions of Section 18.1 (**Ownership of Certain Proprietary Rights**). All replacements of and alterations or additions to the Equipment shall become part the Equipment described in Schedule A (**Equipment to be Installed by ESCO**) and shall be covered by the provisions and terms of Section 8 (**Construction Schedule and Equipment Installation; Approval**).

## **14. MATERIAL CHANGES**

### **14.1 Material Change Defined**

A Material Change shall include any change in or to the Premises, whether structural, operational or otherwise in nature which reasonably could be expected, in the judgment of the Facility Owner, to increase or decrease annual energy consumption in accordance with the provisions and procedures set forth in Schedule E (Baseline Energy Consumption) and Schedule F (Savings Measurement and Calculation Formulae; Methodology to Adjust Baseline) by at least \_\_\_\_\_ percent (\_\_\_\_%) after adjustments for climatic variations. Actions by the Facility Owner, which may result in, a Material Change include but are not limited to the following:

1. manner of use of the Premises by the Facility Owner; or
2. hours of operation for the Premises or for any equipment or energy using systems operating at the Premises; or
3. permanent changes in the comfort and service parameters set forth in Schedule I (Standards of Comfort); or
4. occupancy of the Premises; or
5. structure of the Premises; or
6. types and quantities of equipment used at the Premises or
7. modification, renovation or construction at the Premises; or

8. The Facility Owner's failure to provide maintenance of and repairs to the Equipment in accordance with Schedule K (The Facility Owner's Maintenance Responsibilities);
9. Any other conditions other than climate affecting energy use at the Premises;
10. "If at any time, during the continuance of this contract, the performance of whole or in part of any obligations under this contract shall be prevented or delayed by reason of war, hostilities, acts of public enemy, civil commotion, sabotage, fires, floods, explosions, epidemics, quarantine restrictions, strikes, lockouts or act of God (herein after referred to events) lying beyond the reasonable control of and unanticipated or unforeseeable by and not brought about at the instance of, the party claiming to be affected by such event provided, notice of the happening of such event is given by either party shall by reason of such event, be neither entitled to terminate this contract nor shall either party have any claim for damages against the other in respect of such non performance or delay in performance and deliveries under the contract shall be resumed as soon as practicable after such event has come to an end or ceased to exist, and the decision of contracting officer as to whether the deliveries have been so resumed or not, shall be final and conclusive.

#### **14.2 Reported Material Changes; Notice by the Facility Owner**

The Facility Owner shall use its best efforts to deliver to ESCO a written notice describing all actual or proposed Material Changes in the Premises or in the operations of the Premises at least \_\_\_ (\_\_\_) days before any actual or proposed Material Change is implemented or as soon as is practicable after an emergency or other unplanned event. Notice to ESCO of Material Changes arising due to a bona fide emergency or other situation which precludes advance notification shall be deemed sufficient if given by the Facility Owner within \_\_\_\_\_ (\_\_\_) hours after having actual knowledge that the event constituting the Material Change occurred or was discovered by the Facility Owner to have occurred.

#### **14.3 Unreported Material Change.**

In the absence of any Material Changes in the Premises or in their operations, the baseline energy consumption as set forth in Schedule E (Baseline Energy Consumption) should not change more than percent (\_\_\_%) during any month from the projected energy usage for that month, after adjustments for changes in climatic conditions. Therefore, if energy

consumption for any month as set forth in Schedule E (Baseline Energy Consumption) deviates by more than \_\_\_\_percent (%) from the energy consumption for the same month of the preceding contract year after adjustments for changes to climactic conditions, then such deviation shall be timely reviewed by ESCO to ascertain the cause of deviation. ESCO shall report its findings to the Facility Owner in a timely manner and both the parties shall mutually agree to the adjustments to the baseline to be made in accordance with the provisions set forth in Schedule F (Savings Measurement and Calculation Formulae; Methodology to Adjust Baseline) and Schedule E (Baseline Energy Consumption).

## **15. REPRESENTATIONS AND WARRANTIES**

Each party warrants and represents to the other that:

- (i) it has all requisite power, authority, licenses, permits, and franchises, corporate or otherwise, to execute and deliver this Contract and perform its obligations hereunder;
- (ii) its execution, delivery, and performance of this Contract have been duly authorized by, or are in accordance with, its organic instruments, and this Contract has been duly executed and delivered for it by the signatories so authorized, and it constitutes its legal, valid, and binding obligation;
- (iii) its execution, delivery, and performance of this Contract will not breach or violate, or constitute a default under any Contract, lease or instrument to which it is a party or by which it or its properties may be bound or affected;  
or
- (iv) it has not received any notice, nor to the best of its knowledge is there pending or threatened any notice, of any violation of any applicable laws, ordinances, regulations, rules, decrees, awards, permits or orders which would materially and adversely affect its ability to perform hereunder.

## **16. ADDITIONAL REPRESENTATIONS OF THE PARTIES.**

The Facility Owner hereby warrants, represents and promises that it has not entered into any undisclosed leases, or contracts with other persons or entities regarding the leasing of energy efficiency equipment or the provision of energy management services for the Premises or with regard to servicing any of the energy related equipment located in the

Premises. The Facility Owner shall provide ESCO with the copies of any successor or additional leases of energy efficiency equipment and contracts for management or servicing of pre-existing equipment at Premises that may be executed from time to time hereafter within sixty (60) days after execution thereof.

The Facility Owner agrees that it shall adhere to, follow and implement the energy conservation procedures and methods of operation to be set forth on Schedule K (**The Facility Owner's Maintenance Responsibilities**), to be attached hereto and made a part hereof after The Facility Owner's approval.

The Facility Owner agrees that ESCO shall have the right once a month, with prior notice, to inspect Premises to determine if the Facility Owner is complying, and shall have complied with such obligations. For the purpose of determining the Facility Owner's said compliance, the checklist to be set forth at Schedule L (**Facility Maintenance Checklist**) as completed and recorded by ESCO during its monthly inspections, shall be used to measure and record the Facility Owner's said compliance. The Facility Owner shall make the Premises available to ESCO for and during each monthly inspection, and shall have right to witness each inspection and the recordation on the checklist.

ESCO hereby warrants, represents and promises that:

- (i) before commencing performance of this Contract:
  - (a) it shall have become licensed or otherwise permitted to do business.
  - (b) it shall have provided proof and documentation of required insurance pursuant to Section 17 (Insurance Requirements);
  - (c) it shall submit a properly executed Contractor's Affidavit Concerning Taxes.
- (ii) it shall make available, upon reasonable request, all documents relating to its performance under this Contract, including but not limited to all contracts and subcontracts entered into;
- (iii) It is financially solvent, able to pay its debts as they mature and possessed of sufficient working capital to complete and perform its obligations under this Contract.

The parties acknowledge and agree that ESCO has entered into this Contract in reliance upon the prospect of earning compensation based on energy savings assurance in energy used at Premises, as set forth on Schedules C (**Energy Saving Assurance**) and D (**Compensation to ESCO**), attached hereto and made a part hereof. The parties further acknowledge and agree that the said energy savings assurance shall not likely be obtained unless certain procedures and methods of operation designed for energy conservation are implemented, and followed by the Facility Owner on a regular and continuous basis.

## **17. PROPERTY/ CASUALTY/ INSURANCE; INDEMNIFICATION**

Prior to commencement of any work and for the duration of this Agreement, ESCO must provide and maintain insurance as set forth below. ESCO shall require all subcontractors to maintain the same insurance required herein of ESCO. All such insurance shall be written on a Comprehensive Form of Policy. Failure to provide satisfactory evidence of coverage may result in rejection of a submission and/ or contract cancellation. The coverage provided by such policy shall provide that the insurance afforded applies separately to each insured against whom a claim is made, except with respect to the limitation of liability. Any “other insurance” provisions contained in any policy as an additional insured shall not apply. All policies shall contain waivers of subrogation. ESCO shall be responsible for (i) any damage to the Equipment or other property on the Premises and (ii) any personal injury where such damage or injury occurs as a result of ESCO's performance under this Contract.

ESCO shall save and hold harmless the Facility Owner and their officers, agents and employees or any of them from any and all claims, demands, actions or liability of any nature based upon or arising out of any services performed by ESCO, its agents or employees under this Contract.

## **18. OWNERSHIP**

### **18.1 Ownership of Certain Proprietary Property Rights**

The Facility Owner shall not, by virtue of this Contract, acquire any interest in any formulas, patterns, secret inventions or processes, copyrights, patents, or other intellectual or proprietary rights that are or may be used in connection with the Equipment. ESCO shall grant to the Facility Owner a perpetual, irrevocable royalty-free license for any and all

software or other intellectual property rights necessary for the Facility Owner to continue to operate, maintain, and repair the Equipment in a manner that will yield maximal energy consumption reductions.

### **18.2 Ownership of Existing Equipment**

The equipment and materials at the Premises at the time of execution of this Contract shall remain the property of the Facility Owner even if it is replaced or its operation made unnecessary by work performed by ESCO pursuant to this Contract. If applicable, ESCO shall advise the Facility Owner in writing of all equipment and materials to be replaced at the Premises and The Facility Owner shall within thirty (30) days designate in writing to ESCO which equipment and materials should not be disposed of off-site by ESCO. It is understood and agreed to by both Parties that the Facility Owner shall be responsible for and designate the storage location for any equipment and materials that should not be disposed of off-site. ESCO shall be responsible for the disposal of all equipment and materials designated by the Facility Owner as disposable off-site in accordance with all applicable laws and regulations regarding such disposal.

### **18.3 Ownership of Drawings**

All drawings, reports and materials prepared by ESCO specifically in performance of this Contract shall become the property of the Facility Owner and will be delivered to the Facility Owner no later than forty-five (45) days after completion.

## **19. TRUST AND RETENTION ACCOUNT**

### **19.1 Trust and Retention Account**

The ESCO shall, within 30 (thirty) days from the date of Trust and Retention Agreement, and in any case prior to the date of signing of Trust and Retention Agreement, open and establish a Trust and Retention Account with a Bank (the "Trust and Retention Bank") in accordance with this Agreement read with the Trust and Retention Agreement.

The nature and scope of the Trust and Retention Account are fully described in the agreement (the "Trust and Retention Agreement") to be entered into amongst the ESCO, the Facility Owner, the Trust and Retention Bank and the Participating Financial Institutions, which shall be substantially in the form set forth in Schedule-S.

The provisions of this Clause 19 and the instructions contained in the Trust and Retention Agreement shall remain in full force and effect until the obligations set forth under this Agreement have been discharged.

## **20. EVENTS OF DEFAULT**

### **20.1 Events of Default by the Facility Owner**

Each of the following events or conditions shall constitute an "Event of Default" by the Facility Owner:

- (i) any failure by the Facility Owner to pay ESCO any sum due for a service and maintenance period of more than sixty (60) days after written notification by ESCO that the Facility Owner is delinquent in making payment and provided that ESCO is not in default in its performance under the terms of this Contract;
- (ii) any other material failure by the Facility Owner to perform or comply with the terms and conditions of this Contract, including breach of any covenant contained herein, provided that such failure continues for sixty (60) days after notice to the Facility Owner demanding that such failures to perform be cured or if such cure cannot be effected in sixty (60) days, the Facility Owner shall be deemed to have cured default upon the commencement of a cure within sixty (60) days and diligent subsequent completion thereof; or

- (iii) any representation or warranty furnished by the Facility Owner in this Contract, which was false, or misleading in any material respect when made.

## **20.2 Events of Default by ESCO**

Each of the following events or conditions shall constitute an "Event of Default" by ESCO:

- (i) the standards of comfort and service set forth in Schedule I (Standards of Comfort) are not provided due to failure of ESCO to properly design, install, maintain, repair or adjust the Equipment except that such failure, if corrected or cured within thirty (30) days after written notice by the Facility Owner to ESCO demanding that such failure be cured, shall be deemed cured for purposes of this Contract;
- (ii) any representation or warranty furnished by ESCO in this Contract is false or misleading in any material respect when made;
- (iii) failure to furnish and install the Equipment and make it ready for use within the time specified by this Contract as set forth in Schedules A (Equipment to be Installed by ESCO) and G (Construction and Installation Schedule);
- (iv) provided that the operation of the facility is not adversely affected and provided that the standards of comfort in Schedule I (Standards of Comfort) are maintained, any failure by ESCO to perform or comply with the terms and conditions of this Contract, including breach of any covenant contained herein except that such failure, if corrected or cured within thirty (30) days after written notice by the Facility Owner to ESCO demanding that such failure to perform be cured, shall be deemed cured for purposes of this Contract;
- (v) any lien or encumbrance is placed upon the Equipment by any subcontractor, laborer, supplier or lender of ESCO;
- (vi) the filing of a bankruptcy petition whether by ESCO or its creditors against ESCO which proceeding shall not have been dismissed within ninety (90) days of its filing, or an involuntary assignment for the benefit of all creditors or the liquidation of ESCO;
- (vii) any change in ownership or control of ESCO without the prior approval of the Facility Owner, which shall not be unreasonably withheld; or

- (viii) Failure by ESCO to pay any amount due to the Facility Owner or perform any obligation under the terms of this Contract or the Energy Savings Assurance as set forth in Schedule C (Energy Savings Assurance).

## **21. REMEDIES UPON DEFAULT**

### **21.1 Remedies upon Default by the Facility Owner**

If an Event of Default by the Facility Owner occurs, ESCO may exercise all remedies available at law or in equity or other appropriate proceedings including bringing an action or actions from time to time for recovery of amounts due and unpaid by the Facility Owner, and/or for damages which shall include all costs and expenses reasonably incurred in exercise of its remedy. Election of one (1) remedy is not a waiver of other available remedies.

### **21.2 Remedies upon Default by ESCO**

In the Event of Default by ESCO, the Facility Owner may exercise and any all remedies at law or equity, or institute other proceedings, including, without limitation, bringing an action or actions from time to time for specific performance, and/or for the recovery of amounts due and unpaid and/or for damages, which shall include all costs and expenses reasonably incurred, including attorney's fees. Election of one (1) remedy is not a waiver of other available remedies.

## **22. CONDITIONS BEYOND CONTROL OF THE PARTIES**

If a party ("performing party") shall be unable to reasonably perform any of its obligations under this Contract due to acts of God, insurrections or riots, or other event beyond its control, this Contract shall at the other party's option (i) remain in effect but said performing party's obligations shall be suspended until the said events shall have ended; or, (ii) be terminated upon ten (10) days' notice to the performing party, in which event neither party shall have any further liability to the other.

## **23. Termination of Contract**

### **23.1 The contract shall be terminated in following events:**

Save as otherwise provided in this contract, in the event that any of the defaults specified below shall have occurred, and respective Party fails to cure the default within the period set forth below, or where no period is specified, then within a period of 60 (sixty) days, a Party shall be deemed to be in default of this contract and in that event the contract is terminated The defaults referred to herein shall include:

- (i) Any time after the first anniversary of Contract, the Facility Owner may exercise an option to terminate this contract by giving ninety (90) days notice and paying the Termination Value as mentioned in Table No.4-4 :**Payment Schedule and Termination Value**
- (ii) If at any time conditions beyond control of the parties as mentioned under clause 14.1 (10) and clause 22
- (iii) On completion of five-year contract period, the Facility Owner might avail at its sole options an additional two-year contract for maintenance of energy savings at the same terms and conditions of payments without any enhancements.

## **24. ASSIGNMENT**

### **24.1 Assignment by ESCO.**

ESCO acknowledges that the Facility Owner is induced to enter into this Contract by, among other things, the professional qualifications of ESCO. ESCO agrees that neither this Contract nor any right or obligations hereunder shall be assigned in whole or in part to another firm, without the prior written approval of the Facility Owner. Notwithstanding the provisions of this paragraph, ESCO shall remain jointly and severally liable with its assignees(s), or transferee(s) for all of its obligations under this Contract.

### **24.2 Assignment by the Facility Owner**

The Facility Owner may transfer or assign this Contract and its rights and obligations herein to a successor or purchaser of the facility (ies) subject to this Contract or an interest therein.

## **25. DISPUTE RESOLUTION**

25.1 If any dispute or difference or claims of any kind arises between the Parties in

connection with interpretation or application of any terms and conditions or any matter or thing in any way connected with or in connection with or arising out of this Agreement, or the rights, duties or liabilities of any Party under this Agreement and so notified in writing by either Party to the other Party (the “Dispute”), whether before or after the termination of this Agreement, then the Parties shall meet together promptly, at the request of any Party, in an effort to resolve such dispute, difference or claim by discussion between them. The Parties may, in appropriate cases agree to refer the matter to an Expert appointed by them with mutual consent. The Parties agree to abide by the decision/opinion of the Expert. The cost of obtaining the service of the Expert shall be shared equally.

## **25.2 Arbitrators**

In the event the dispute or difference or claim, as the case may be, is not resolved, as evidenced by the signing of the written terms of settlement by the Parties, within 30 (thirty) days of reference for amicable settlement and/or settlement with the assistance of Expert, as the case may be, the same shall be finally settled by binding arbitration under the Arbitration and Conciliation Act, 1996. The arbitration shall be by a panel of three arbitrators, one each to be appointed by the ESCO and the Facility Owner and the third to be appointed by the two arbitrators so appointed, who shall act as chairperson of the arbitral tribunal.

## **25.3 Place of Arbitration**

The place of arbitration shall be New Delhi.

## **25.4 English Language**

The request for arbitration, the answer to the request, the terms of reference, any written submissions, any orders and rulings shall be in English and, if oral hearings take place, English shall be the language to be used in the hearings.

## **25.5 Enforcement of Award**

Any decision or award resulting from arbitration shall be final and binding upon the Parties. The Parties hereto hereby waive, to the extent permitted by law, any rights to appeal or to review of such award by any court or tribunal. The Parties hereto agree that the arbitral award may be enforced against the Parties to the arbitration proceeding or their assets wherever they may be found and that a judgment upon the arbitral award

may be entered in any court having jurisdiction thereof.

#### **25.6 Fees and Expenses**

The fees and expenses of the arbitrators and all other expenses of the arbitration shall be initially borne and paid by respective Parties subject to determination by the arbitrators. The arbitrators may provide in the arbitral award for the reimbursement to the prevailing Party of its costs and expenses in bringing or defending the arbitration claim, including legal fees and expenses incurred by such Party.

#### **25.7 Performance during Arbitration**

Pending the submission of and/or decision on a dispute, difference or claim or until the arbitral award is published; the Parties shall continue to perform all of their obligations under this Agreement without prejudice to a final adjustment in accordance with such award.

### **26. MISCELLANEOUS PROVISIONS**

#### **26.1 Waiver of Claims/Liens**

ESCO shall obtain and furnish to the Facility Owner a Waiver of Claims or Liens from each vendor, material manufacturer and laborer in the supply, installation and servicing of each piece of Equipment.

#### **26.2 Compliance with Law and Standard Practices**

ESCO shall perform its obligations hereunder in compliance with any and all applicable federal, state, and local laws, rules, and regulations, in accordance with sound engineering and safety practices and in compliance with any and all reasonable rules of relative to the Premises. ESCO shall be responsible for obtaining all governmental permits, consents, and authorizations as may be required to perform its obligations hereunder. Failure in this Contract to specifically identify any applicable law does not affect its applicability.

#### **26.3 Independent Capacity of the Contractor**

It is distinctly and particularly understood and agreed between the parties hereto that the Facility Owner is in no way associated or otherwise connected with the performance of any service under this Contract on the part of ESCO or with the employment of labor or the incurring of expenses by ESCO. Said ESCO is an independent contractor in the performance of each and every part of this Contract, and solely and personally liable for

all labor, taxes, insurance, required bonding and other expenses, and for any and all damages in connection with the operation of this Contract, whether it may be for personal injuries or damages of any other kind.

#### **26.4 Severability**

In the event that any clause or provision of this Contract or any part thereof shall be declared invalid, void, or unenforceable by any court having jurisdiction, such invalidity shall not affect the validity or enforceability of the remaining portions of this Contract unless the result would be manifestly inequitable or unconscionable.

#### **26.5 Complete Contract**

This Contract, when executed, together with all Schedules attached hereto or to be attached hereto, as provided for by this Contract shall constitute the entire Contract between both parties and this Contract may not be amended, modified, or terminated except by a written amendment signed by the parties hereto.

#### **26.6 Further Documents**

The parties shall execute and deliver all documents and perform all further acts that may be reasonably necessary to effectuate the provisions of this Contract.

#### **26.7 Applicable Law**

This Agreement shall be construed in accordance with, and governed by the laws of the Government of India. Any action to enforce the provisions of this Agreement shall be brought in the court of \_\_\_\_\_. In the event any term of this Agreement is held to be invalid or unenforceable by a court, the remaining terms of this Agreement will remain in force.

#### **26.8 Notice**

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

TO ESCO:                   <**ESCO Name, Attention:, Mailing address.**>

TO THE FACILITY OWNER: <**The Facility Owner Name, Attention:, Mailing address.**>

#### **26.9 Headings**

Headings and subtitles used throughout this Contract are for the purpose of convenience

only, and no heading or subtitle shall modify or be used to interpret the text of any section.

#### **26.10 Handling of Hazardous Materials**

All work completed under this Contract must be in compliance with all applicable laws of Government of India, any applicable State laws, local laws, rules and regulations regarding waste disposal and treatment/disposal of any hazardous materials that could result from this project, including any clearances and licenses that may be required to be taken for the purpose of implementation and the operations of the Facility.

#### **26.11 Licenses as per Law**

ESCO and its subcontractors and contractors of subcontractors, if any shall comply with existing laws for getting necessary Licenses, permits and approvals.

#### **26.12 Architects**

If applicable, construction work done under this Contract shall have plans and specifications approved by the local authority.

#### **26.13 As-Built Drawings**

Where applicable, ESCO must provide durable, reproducible record drawings (and such CADD documents as may be agreed to by the Facility Owner) from the “as-built drawings” of all existing and modified conditions associated with the project, conforming to typical engineering standards. These should include architectural, mechanical, electrical, structural, and control drawings and operating manuals and will be delivered prior to acceptance. Drawing format should be in an electronic format and shall be as per the relevant IS codes.

#### **26.14 Follow-up Monitoring/ Measurement and Maintenance Services**

Following the installation and implementation of improvements, ESCO shall be responsible for maintaining and measuring to ensure optimal performance, however, the Facility Owner shall have rights to decline these services or negotiate for a reduced term of services. All maintenance and measurement fees shall be paid through assured savings.

### **26.15 Operation and Maintenance Manuals**

At least three (3) maintenance manuals for each site shall be provided for all equipment replacements and/or upgrades at each location. Manuals shall be subject to approval of the Facility Owner.

### **26.16 Continuing Activities**

The Facility Owner reserves the right to make energy and water improvements to the work sites and to monitor the performance of the installations independently of ESCO. Additionally, the Facility Owner may wish to integrate other identified capital needs with ESCO projects, which may or may not contain energy and water savings opportunities.

### **26.17 Taxes**

ESCO agrees:

- (i) To pay promptly when due all taxes, duties and license fees due to the State, its sub-divisions, and municipal and quasi-municipal corporations;

### **26.18 Contract Re-Negotiation**

Both the parties shall have right to renegotiate the terms of the Contract due to changes in the regulatory or utility climates or the Facility Owner's non-discretionary use of energy, or if the Facility Owner desires to change the Scope.

### **26.19 Preventive Maintenance Schedule**

Upon completion of measurement and verification by ESCO, ESCO shall provide to the Facility Owner a single comprehensive schedule of necessary preventive maintenance for all installations for the five (5) years following Contract expiration or termination.

### **26.20 Minimum Wage Law**

It will be the responsibility of ESCO to fully comply with laws of land, regarding the minimum wage law for employees hired on the project.

### **26.21 Officials, Agents and Employees of the Facility Owner Not Personally Liable**

It is agreed by and between the parties hereto that in no event shall any official, officer,

employee or agent of the Facility Owner be in any way personally liable or responsible for any covenant or agreement contained in this Contract whether express or implied, nor for any statement, representation or warranty made herein or in any way connected with this Contract.

**26.22 Drafting Not to be Construed against any Party**

All parties acknowledge and agree that each has had a full opportunity to review and have input into this Contract and that any ambiguity found shall not be construed against any party as drafter. Reference to “year” shall mean calendar year unless a fiscal year is specified. If a fiscal year is specified that year is April 1 through March 30.

IN WITNESS WHEREOF, and intending to be legally bound, the parties hereto subscribe their names to this Contract by their duly authorized officers on the date first above written.

\_\_\_\_\_  
**<Name of ESCO>**

\_\_\_\_\_  
**<Name of the Facility Owner>**

By: \_\_\_\_\_  
(Signature)

By: \_\_\_\_\_  
(Signature)

\_\_\_\_\_  
(Name and Title)

\_\_\_\_\_  
(Name and Title)

## **ATTACHMENT I: Schedules, Exhibits, Appendices**

### **SCHEDULE A. EQUIPMENT TO BE INSTALLED BY ESCO**

*<Note: Schedule A: This schedule will be furnished by ESCO based on the final Audit Report. It should specify all of the newly installed equipment including manufacturer, quantity, location and warranties (you can also have a separate schedule for warranties). This schedule should also describe any modifications that may have been made to existing equipment, if applicable.>*

### **SCHEDULE B. DESCRIPTION OF PREMISES; PRE-EXISTING EQUIPMENT INVENTORY**

*<Note: Schedule B: This schedule is based on the final Audit Report. It contains basic information about the condition of the premises at the time of contract execution. Such information would include facility square footage, building construction, use, occupancy, hours of operation etc., and any special conditions that may exist.*

*The inventory is important to include for the purpose of identifying what equipment was in place and how it was configured at the time of contract execution. This schedule is important to the accurate establishment of baseline, savings measurement and may need to be referred to in the later years of the contract.>*

### **SCHEDULE C: ENERGY SAVINGS ASSURANCE**

*<Note: Schedule C: This schedule should fully describe all provisions and conditions of the energy saving assurance provided by ESCO. The assurance should be defined in units of energy to be saved for the duration of the contract term and provide a mechanism to calculate dollar savings. Reference to the annual reconciliation of achieved vs. assured savings should be included (there is also language in the body of the contract regarding annual reconciliation See Section 4.2).>*

*<Note: Actual savings of energy costs attributable to all measures for each year of the contract should be more than the calculated savings for that year.>*

*<Note: This schedule should contain the projected energy savings in units for each year of the contract. Often these projections are broken down on a measure by measure basis, although some measures may be aggregated into general categories such as lighting or HVAC. If there are several buildings involved in the project, this schedule should contain projections for each facility, even though they may all be covered under a single assurance.>*

#### **SCHEDULE D: COMPENSATION TO ESCO**

*<Note: Schedule D: This should contain the amount and frequency of any payments that may be made to ESCO for maintenance, measurement and verification or other services negotiated as part of the contract. It should contain information about how the compensation is calculated (e.g. a percentage of savings above and beyond the assurance, flat fee etc.), and if an annual inflation index is to be used to escalate fees over the duration of the contract term. An hourly fee structure can also be included to cover ESCO costs for any services provided beyond the scope agreed to at the time of contract execution. If ESCO is not the financing arm and will be paid for audit services previously performed, that could be included here.>*

#### **SCHEDULE E: BASELINE ENERGY CONSUMPTION**

*<Note: Schedule E: The baseline energy consumption is the "yardstick" by which all savings achieved by the installed project will be measured. The methodology and all supporting documentation used to calculate the baseline should be in this schedule including unit consumption and current utility rates for each fuel type. This schedule may also include baseline documentation regarding other cost savings such as material savings (e.g. bulbs, ballast, filters, chemicals etc.), and cost savings associated with the elimination of outside maintenance contracts. >*

*<For each site or project, the baseline and post-installation energy use will usually be defined using metering, billing analysis and/or engineering calculations (including computer simulations) either individually or in combination. In addition, values for certain factors that affect energy use and savings that are beyond ESCO's control may be stipulated using historical data, analyses and/or results of spot or short-term metering. The Facility Owner or ESCO can define baseline conditions. If The Facility Owner defines the baseline, ESCO will*

have the opportunity to verify it. If the baseline is defined by ESCO, The Facility Owner will have the opportunity to verify.

*<Baseline physical conditions (equipment inventory and conditions, occupancy, nameplate data, energy consumption rate, control strategies, etc.) are typically determined through well-documented audits, surveys, inspections and/or spot or short-term metering. This documentation will define the baseline for calculating savings and document baseline conditions in case future changes require baseline energy use adjustments.>*

**SCHEDULE F: SAVINGS CALCULATION FORMULAE; METHODOLOGY TO ADJUST BASELINE**

*<Note: Schedule F: This schedule contains a description of the energy savings measurement, monitoring and calculation procedures used to verify and compute the savings performance of the installed equipment. This calculation will include a method to compare the level of energy that would have been consumed without the project (referred to as the "Baseline") with what amount of energy actually consumed during a specific time period (monthly, quarterly, etc.). All methods of measuring savings including engineered calculations, metering, equipment run times, pre- and post-installation measurements, etc. should be explicitly described for all equipment that is installed.*

*Periodically (typically on an annual basis), the baseline will be adjusted to account for the prevailing conditions (e.g., weather, billing days, occupancy, etc.) during the measurement period. All methodologies used to account for any adjustments to the baseline needs to be clearly defined in this schedule.*

*Use FEMP Measurement and Verification Guidelines. You will need to incorporate these by reference. Be sure to identify by current year, edition or version.>*

*Examples of baseline adjustments include: change in the amount of space being air conditioned, changes in auxiliary systems (towers, pumps, etc.), and changes in occupancy or schedule. For example, if a chiller retrofit was completed in a building with 100,000 square feet of conditioned space and during the contract term the conditioned space is reduced to*

75,000 square feet, post-installation energy use would be lower making savings higher. If there are no records of the amount of originally conditioned space, the baseline could not be adjusted. Baseline adjustments for issues such as changes in production shifts, facility closures, adding new wings or loads (such as computer labs) require a conceptual approach versus a method to cover each eventuality. Clearly predictable annual variations are usually handled through established procedures for each identified factor in the savings formulas. Permanent changes, such as changes in square footage, are handled through agreement clauses that allow predictable or expected changes and/or through a “re-open” clause that allows either party to renegotiate the baseline.>

<A Facility Changes Checklist or other method may be provided by ESCO for The Facility Owner to notify ESCO of any changes in the facility that could have an impact on energy use (occupancy, new equipment, hours of use, etc.). This checklist is generally submitted on a monthly or quarterly basis.>

#### **SCHEDULE G: CONSTRUCTION AND INSTALLATION SCHEDULE**

<Schedule G: The timetables and milestones for project construction and installation should be contained in this schedule. If so desired, documentation of required insurance, and subcontractor lists may be included in this schedule or broken out into a separate schedule. NOTE: It is important that the construction/installation phase of the project (for example bonds and insurance) be treated in compliance with individual institutional requirements and the appropriate governing statutes. Since construction is just one component of the overall project, a separate construction contract may be desirable and in some cases necessary. The construction contract would then be referred to in the body of the contract and attached as an exhibit, appendix or other type of attachment. Another approach would be to consolidate the appropriate construction language for inclusion in the body of the final contract. This will need to be decided as appropriate on a case-by-case basis.>

**SCHEDULE H: SYSTEMS START-UP AND COMMISSIONING; OPERATING PARAMETERS OF INSTALLED EQUIPMENT**

*<Note: Schedule H: This section should specify the performance testing procedures that will be used to start-up and commission the installed equipment and total system. The schedule also provides for The Facility Owner to be notified of and have the right to be present during all commissioning procedures. This schedule should contain a provision for the documentation of The Facility Owner's attendance at the various tests and acceptance of ESCO's certification that the tests followed the specified procedures and met or exceed the expected results. Use of manufacturer's start up and performance sheets are required.*

*<The operating parameters should contain any specified parameters for the operation of the installed equipment such as temperature setbacks, equipment run times, load controlling specifications and other conditions for the operation of the equipment.>*

**SCHEDULE I: STANDARDS OF COMFORT**

*<Note: Schedule I: The standards of comfort to be maintained for heating, cooling, lighting levels, hot water temperatures, humidity levels and/or any special conditions for occupied and unoccupied areas of the facility should be explicitly described in this schedule. >*

**SCHEDULE J: ESCO'S MAINTENANCE RESPONSIBILITIES**

*<Note: Schedule J: A complete description of ESCO's specific operations and maintenance responsibilities should be included in this schedule along with the time intervals for their performance of the stated O&M activities.>*

**SCHEDULE K: THE FACILITY OWNER'S MAINTENANCE RESPONSIBILITIES**

*<Note: Schedule K: This schedule describes the operations and maintenance responsibilities that may be assigned to facility staff as agreed to by both parties. In some instances it will contain no more than a description of routine O&M currently being performed on existing energy consuming equipment in the facility. In other cases, facility staff may be used to provide some maintenance on the new equipment installed under the performance contract, with ESCO providing any specialized services as needed.>*

#### **SCHEDULE L: FACILITY MAINTENANCE CHECKLIST**

*<Note: Schedule L: This checklist is a method by which ESCO may record and track compliance with operations and maintenance procedures performed by facility personnel. The checklist typically specifies simple list of tasks and the corresponding schedule for the performance of the prescribed procedures. Facility staff will complete the checklist and forward it to ESCO, usually on a monthly basis. (This checklist is a very useful tool for both ESCO and The Facility Owner to verify that the required maintenance activities are being performed at the scheduled intervals).*

#### **SCHEDULE M: ESCO'S TRAINING RESPONSIBILITIES**

*<Note: Schedule M: The description of ESCO's training program or sessions for facility personnel should be contained in this schedule. The duration and frequency of the specified training should also be included. Any provisions for on-going training, commitments to train newly hired facility personnel, and training with respect to possible future equipment or software upgrades should also be described. Any fees associated with requests for training beyond what ESCO is contractually bound to provide should also be specified.>*

#### **SCHEDULE N: GENERAL CONDITIONS**

*<Note: Schedule N: Where applicable, insert standard GENERAL CONDITIONS. Where referenced in Section 1.2, describe which of the paragraphs of the general conditions apply to this contract.>*

#### **SCHEDULE O: ANNUAL INSTALLMENT PAYMENT SCHEDULE**

*<Schedule O: This schedule contains the amortized financing payments to be made to the financing institution for the total, itemized capitalized costs (principal and interest) of the project. This schedule will indicate the frequency (monthly, quarterly semi-annually) of payment, the specific amount due. The actual lease agreement and associated documents are located in Appendix D. This Schedule may identify the costs of the audit that the ESCO will expect to recover, if ESCO is the financing institution. If ESCO is not the financing institution, be sure to identify in some schedule the costs of the audit that ESCO will be paid for.>*

**SCHEDULE P: PRE-EXISTING SERVICE AGREEMENTS**

*<Note: Schedule P: Include information on the scope and cost of pre-existing equipment service contracts. This gives The Facility Owner and ESCO information about how and when existing equipment is being serviced. If ESCO is credited with any maintenance savings or is taking over any existing service contracts, the scopes and costs of these agreements will be useful in tracking the performance of ESCO in providing required services and documenting attributable cost savings.>*

**SCHEDULE Q: CURRENT AND KNOWN CAPITAL PROJECTS AT FACILITY**

*<Note: Schedule Q: Include a description or discussion of any current or planned capital projects to be implemented. This information could prove useful in the out-years of the contract to avoid potential disputes over long-term energy savings performance. An installment payment/amortization schedule may need to be included depending on the type of financing used.>*

**SCHEDULE R: PROJECTED FINANCIAL PERFORMANCE**

*<Note: Schedule R: This schedule should include a spreadsheet depiction of expected financial performance of the project for the entire contract term. It should clearly identify all financial components of the project including interest rates, current fuel prices, any escalation rates to be applied, assured savings, ESCO compensation figures, cash-flow projections and projected Net Present Value of any cumulative positive cash flow benefits to the building owner.>*

**SCHEDULE S: TRUST AND RETENTION AGREEMENT**

**TRUST AND RETENTION AGREEMENT**

This TRUST AND RETENTION AGREEMENT made this [insert date] .....at by and between:

1. \_\_\_\_\_<name of Energy Service Company> having its office at \_\_\_\_\_(hereinafter referred to as the “**ESCO**” which expression shall unless repugnant to the context or meaning there of include its administrators, successors and assigns);
  
2. ....<name of Participating Financial Institution (PFI)> and having its office at ..... (hereinafter referred to as the “**PFI**” which expression shall, unless repugnant to the context or meaning thereof, include its successors and substitutes);
  
3. ....<name of the Trust and Retention Bank> and having its office at .....(hereinafter referred to as the “**Trust and Retention Bank**” which expression shall, unless repugnant to the context or meaning thereof, include its successors and substitutes); and
  
4. \_\_\_\_\_<name of Facility Owner entity> having its office at \_\_\_\_\_ (hereinafter referred to as the “**Facility Owner**” which expression shall unless repugnant to the context or meaning there of include its administrators, successors and assigns) of other Part;

**WHEREAS:**

- A. The Facility Owner had entered into Energy Performance Contract dated ..... with ESCO (the “**Energy Performance Contract**”) for \_\_\_\_\_<Name of the Project>, and a copy of which is annexed hereto and marked as Annex-A to form part of this Agreement.
  
- B. Participating Financial Institution (PFI) has agreed to finance the Project in accordance with the terms and conditions set forth in the Financing Agreements.

- C. The ESCO Agreement requires the ESCO to establish the Trust and Retention Account, inter alia, on the terms and conditions stated therein.

NOW, THEREFORE, in consideration of the foregoing and the respective covenants and agreements set forth in this Agreement, the receipt and sufficiency of which is hereby acknowledged, and intending to be legally bound hereby, the Parties agree as follows:

## **1. DEFINITIONS AND INTERPRETATION**

### **1.1. Definitions**

In this Agreement, the following words and expressions shall, unless repugnant to the context or meaning thereof, have the meaning hereinafter respectively assigned to them

**“Agreement”** means this Trust and Retention Agreement and any amendment thereto made in accordance with the provisions contained herein;

**“Energy Performance Contract”** means the Energy Performance Contract referred to in Recital (A) above and annexed hereto as Annex-A, and shall include all of its Recitals and Schedules and any amendments made thereto in accordance with the provisions contained in this behalf therein;

**“Cure Period”** means the period specified in this Agreement for curing any breach or default of any provision of this Agreement by the ESCO, and shall commence from the date on which a notice is delivered by the Facility Owner or the Participating Financial Institution as the case may be, to the ESCO asking the latter to cure the breach or default specified in such notice;

**“Trust and Retention Account”** means trust and retention account established in terms of and under this Agreement, and shall include the Sub-Accounts;

**“Trust and Retention Default”** shall have the meaning ascribed thereto in Clause 8.1;

**“Participating Financial Institution”** means the financial institution referred to as the Participating Financial Institution in the foregoing Recitals;

**“Parties”** means the parties to this Agreement collectively and “Party” shall mean any of the Parties to this Agreement individually;

**“Payment Date”** means, in relation to any payment specified in Clause 5.1, the date(s) specified for such payment; and

**“Sub-Accounts”** means the respective Sub-Accounts of the Trust and Retention Account,

into which the monies specified in Clause 5.1, would be credited every month and paid out if due, and if not due in a month then appropriated proportionately in such month and retained in the respective Sub Accounts and paid out therefrom on the Payment Date(s).

## **1.2. Interpretation**

1.2.1. The words and expressions beginning with capital letters and defined in this Agreement shall have the meaning ascribed thereto herein, and the words and expressions used in this Agreement and not defined herein but defined in the Energy Performance Contract shall, unless repugnant to the context, have the meaning ascribed thereto in the Energy Performance Contract.

1.2.2. References to Clauses are, unless stated otherwise, references to Clauses of this Agreement.

## **2. TRUST AND RETENTION ACCOUNT**

### **2.1. Trust and Retention Bank to act as trustee**

2.1.1. The ESCO hereby appoints the Trust and Retention Bank to act as trustee for the Facility Owner, the PFI and the ESCO in connection herewith and authorizes the Trust and Retention Bank to exercise such rights, powers, authorities and discretion as are specifically delegated to the Trust and Retention Bank by the terms hereof together with all such rights, powers, authorities and discretion as are reasonably incidental hereto, and the Trust and Retention Bank accepts such appointment pursuant to the terms hereof.

2.1.2. The ESCO hereby declares that all rights, title and interest in and to the Trust and Retention Account shall be vested in the Trust and Retention Bank and held in trust for the Facility Owner, the PFI and the ESCO, and applied in accordance with the terms of this Agreement. No person other than the Facility Owner, the PFI and the ESCO shall have any rights hereunder as the beneficiaries of or as third party beneficiaries under this Agreement.

### **2.2. Acceptance of Trust and Retention Bank**

The Trust and Retention Bank hereby agrees to act as such and to accept all payments and other amounts to be delivered to and held by the Trust and Retention Bank pursuant to the provisions of this Agreement. The Trust and Retention Bank shall hold and safeguard the Trust and Retention Account during the term of this Agreement and shall treat the amount in the Trust and Retention Account as monies deposited by the Facility Owner with the Trust and Retention Bank. In performing its functions and duties

under this Agreement, the Trust and Retention Bank shall act in trust for the benefit of, and as agent for, the Facility Owner, the PFI and the ESCO or their nominees, successors or assigns, in accordance with the provisions of this Agreement.

### **2.3. Establishment and operation of Trust and Retention Account**

2.3.1. Within 30 (thirty) days from the date of this Agreement, and in any case prior to the date of signing of this agreement, the ESCO shall open and establish the Trust and Retention Account with the ..... (name of Branch) Branch of the Trust and Retention Bank. The Trust and Retention Account shall be denominated in Rupees.

2.3.2. The Trust and Retention Bank shall maintain the Trust and Retention Account in accordance with the terms of this Agreement and its usual practices and applicable regulations, and pay the maximum rate of interest payable to similar customers on the balance in the said account from time to time.

2.3.3. The Trust and Retention Bank and the ESCO shall, after consultation with the PFI, agree on the detailed mandates, terms and conditions, and operating procedures for the Trust and Retention, but in the event of any conflict or inconsistency between this Agreement and such mandates, terms and conditions, or procedures, this Agreement shall prevail.

### **2.4. Trust and Retention Bank's fee**

The Trust and Retention Bank shall be entitled to receive its fee and expenses in an amount, and at such times, as may be agreed between the Trust and Retention Bank and the ESCO. For the avoidance of doubt, such fee and expenses shall form part of the O&M Expenses and shall be appropriated from the Trust and Retention Account in accordance with Clause 5.1.

### **2.5. Rights of the parties**

The rights of the Facility Owner in the monies held in the Trust and Retention Account are set forth in this Agreement and the Facility Owner, the PFI and the ESCO shall have no other rights against or to the monies in the Trust and Retention Account.

### **2.6. Substitution of the ESCO**

The Parties hereto acknowledge and agree that upon substitution of the ESCO with the nominated company, pursuant to the substitution agreement, it shall be deemed for the purposes of this Agreement that the Nominated Company is a Party hereto and the

Nominated Company shall accordingly be deemed to have succeeded to the rights and obligations of the ESCO under this Agreement on and with effect from the date of substitution of the ESCO with the nominated company.

### **3. Deposits into Trust and Retention Account**

#### **3.1. Deposits by the Facility Owner**

3.1.1. The Facility Owner agrees and undertakes that it shall deposit into and/or credit the Trust and Retention Account with all periodic proceeds from the actual energy savings by Facility Owner, resulting from the implementation of Energy Efficiency project as per Energy Saving Performance Contract and as mutually agreed between the ESCO and the Facility Owner for following two separate durations:

- Till the end of the Moratorium Period of Energy Efficiency Loan
- The Energy Efficiency repayment period - from end of the Moratorium Period till the end of Energy Efficiency Loan tenure

3.1.2. The Facility Owner agrees and undertakes that the following shall be deposited into and/or credited to the Trust and Retention Account:

(a) All periodic proceeds as per the Energy Saving Performance Contract will be deposited in to the Trust and Retention Account.

(b) In case periodic proceeds from the implementation of Energy Efficiency project as per Energy Saving Performance Contract are more than the periodic proceeds as mutually agreed between the ESCO and the Facility Owner then \_\_\_\_\_ % ( \_\_\_\_\_ percent) of the particular periodic proceeds from Energy Saving Performance Contract will be deposited in the Trust and Retention Account.

(c) In case periodic proceeds from the implementation of Energy Efficiency project as per Energy Saving Performance Contract are less than the periodic proceeds as mutually agreed between the ESCO and the Facility Owner then the particular proceeds will be deposited in the Trust and Retention Account and deficit from the level defined in Energy Performance Contract and the particular proceed will be replenished from the Reserve Account

3.1.3. Each of the above-mentioned proceeds, mutually agreed upon and signed by both the Facility Owner and the ESCO will be deposited by the Facility Owner within 10 (ten) days from the end of the respective period.

#### **3.2. Interest on deposits**

The Trust and Retention Bank agrees and undertakes that all interest accruing on the balances of the Trust and Retention Account shall be credited to the Trust and Retention Account; provided that the Trust and Retention Bank shall be entitled to

appropriate therefrom the fee and expenses due to it from the ESCO in relation to the Trust and Retention Account and credit the balance remaining to the Trust and Retention Account.

#### **4. DEPOSITS INTO RESERVE ACCOUNT**

##### **4.1. Deposits by the Facility Owner**

- 4.1.1. The Facility Owner agrees and undertakes that all periodic proceeds from ~~the of~~ the project will be deposited in Reserve Account to act as a buffer against any potential future fluctuations in energy saving during loan repayment period.
- 4.1.2. The Facility Owner agrees and undertakes that the following shall be deposited into and/or credited to the Reserve Account:
  - (a) In case periodic proceeds from the implementation of Energy Efficiency project as per Energy Saving Performance Contract are more than the periodic proceeds as mutually agreed between the ESCO and the Facility Owner then excess proceeds above \_\_\_\_\_ % ( \_\_\_\_\_ percent) as mentioned in Clause 3.1.2 (b) will be deposited in the Reserve Account.
- 4.1.3. Each of the above-mentioned proceeds, mutually agreed upon and signed by both the Facility Owner and the ESCO will be deposited by the Facility Owner within 10 days from the end of the respective period.

#### **5. WITHDRAWALS FROM TRUST AND RETENTION ACCOUNT**

##### **5.1. Withdrawals during Agreement Period**

- 5.1.1. At the beginning of every month, or at such shorter intervals as the PFI and the Facility Owner and the ESCO may by written instructions determine, the Trust and Retention Bank shall withdraw amounts from the Trust and Retention Account and appropriate them in the following order by depositing such amounts in the relevant Sub-Accounts for making due payments, and if such payments are not due in any month, then retain such monies in such Sub-Accounts and pay out therefrom on the Payment Date(s):
  - a. Loan Installments due to PFI (Principal amount + Interest due)
  - b. all taxes due and payable by the ESCO for and in respect of the Project;
  - c. all payments relating to construction of the Project, subject to and in accordance with the conditions, if any, set forth in the Financing Agreements;
  - d. O&M Expenses, subject to the ceiling, if any, set forth in the Financing