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# CONTRACT

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**Master Agreement for**  
**Energy Related Equipment Sale and Installation**  
**between**  
**Georgia Power Company**  
**and**  
**City of Smyrna**

**SCANNED**

BY: \_\_\_\_\_ Date: \_\_\_\_\_

**APPROVED**  
per the City of Smyrna  
Mayor and Council  
Official Meeting Minutes  
Date: \_\_\_\_\_

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# Master Agreement for Energy Related Equipment Sale and Installation

Georgia Power Company (“GPC”), a Georgia corporation, and City of Smyrna (“Customer”) enter into this Master Agreement for Energy Related Equipment Sale and Installation (“Agreement”) as of the Effective Date shown on the signature page. GPC and Customer (the “Parties”) acknowledge:

- Customer desires for GPC to sell and install certain energy-efficiency related equipment as requested by Customer and more particularly described below; and
- GPC is willing to sell and install this equipment on the terms and conditions of this Agreement.

In consideration of the mutual promises described here, and other good and valuable consideration, the receipt, adequacy, and sufficiency of which each Party acknowledges, and intending to be legally bound, the Parties agree:

## PART 1 THE CONTRACT

**1.1 Equipment and Scope of Work.** This Agreement applies to GPC's sale and installation of equipment, along with related services as requested by Customer and agreed by GPC through execution of one or more written Work Orders (defined in Section 1.3). The energy-efficiency “**Equipment**” details and scope of the project will be more particularly described in the *Description of Equipment and Services* attached as Exhibit A to the applicable Work Order (the Equipment, installation, and related Work Order performance, collectively, “**Services**”). If Equipment or Services additional or different to that specified in the original Work Order is required, GPC will contact Customer for authorization for such additional/differing Equipment/Services, before proceeding.

**1.2 Term of Agreement.** This Agreement will be for an initial term of three years, commencing on the date it is executed by the latter of Customer or GPC. Because the term is longer than one year, the Parties agree that this Agreement, as required by O.C.G.A. § 36-60-13, will terminate absolutely and without further obligation on the part of Customer at the close of the calendar year in which it was executed and at the close of each succeeding calendar year for which it is renewed. This Agreement will automatically renew for additional one-year terms, not to exceed 10 years, unless Customer provides written notice (per Agreement Section 7.1.B) to GPC of its decision not to renew the Agreement 60 days prior to the end of a given calendar year.

**1.3 Work Orders.** Equipment and related Services will be provided through a written “**Work Order**” in the form of the sample attached as **Exhibit 1**, which references this Agreement's Contract Number and typically includes the following:

- Work Order Date and Number;
- Description of Equipment to be sold;
- Description of installation and other Services to be provided;
- Customer and GPC project coordinators;
- GPC personnel assigned to the project;
- Estimated dates for commencement and completion of installation;
- Agreed compensation and payment terms;
- Amount of savings estimated, and any amount guaranteed (if required);
- Measurement and verification (“**M&V**”) plan related to the project-specific energy conservation measures (“**ECMs**”) (if required);
- Designation of Party providing specifications and drawings (if required);
- Milestone schedule or dates for performance;
- Responsibilities of Customer;
- Any specific permits that must be obtained by GPC or by Customer (if required);
- Requirement of, and amount of, surety bond to secure performance of GPC's obligations under the Work Order (if required); and
- Any additional term and condition applicable to the Work Order.

**A. Execution.** Customer will forward the signed Work Order to the GPC Coordinator (identified in Section 7.1.A) via email transmission and GPC, within five days after receipt, will either accept or reject the Work Order in writing and return a copy of the accepted or rejected Work Order to Customer via email. GPC will have sole discretion

for acceptance or rejection of any Work Order. If Customer does not receive notice of GPC's acceptance or rejection within 10 days, the Work Order will be deemed rejected by GPC. The Work Order also includes all exhibits and attachments as referenced by its terms.

**B. Term of Work Order.** Each Work Order issued under this Agreement will be a separate and independent agreement between Customer and GPC that incorporates by reference all terms and conditions of this Agreement. If the Work Order term is longer than one year, the Parties agree that the Work Order, as required by O.C.G.A. § 36-60-13, will terminate absolutely and without further obligation on the part of Customer at the close of the calendar year in which it was executed and at the close of each succeeding calendar year for which it is renewed. Each Work Order will automatically renew for additional one-year terms, not to exceed 10 years, unless Customer provides written notice to GPC (per Section 7.1.B) of its decision not to renew the Work Order 60 days prior to the end of a given calendar year.

## **PART 2 PROJECT PERFORMANCE**

**2.1 Work Order Performance.** Following Work Order execution, GPC will provide the Equipment and perform the installation in a prompt and timely manner. Customer acknowledges that any schedule provided by GPC is an estimate only and dependent on a number of variables, including, if applicable, finalization of Customer's financing arrangements. Customer understands and agrees that it must provide GPC with timely and full access to the facilities where GPC will perform installation.

**2.2 Independent Contractor.** GPC will be an independent contractor in its performance under this Agreement and each Work Order and will not be considered or permitted to be an agent, servant, joint ventures, or partner of Customer. All persons furnished, used, retained, or hired by or on behalf of GPC in Work Order performance will be the employees, subcontractors, or suppliers of GPC.

**2.3 Right to Subcontract.** GPC may subcontract all or part of its obligations under any Work Order, including the provision of Equipment, installation, warranty, or maintenance Services, so long as GPC remains responsible to Customer for all obligations subcontracted. Customer agrees that any subcontractor may access and use Customer's Premises (defined in Section 2.12 (*Customer Assistance*)) and facilities for performance of Services. Customer also agrees to provide, to any subcontractor designated in writing by GPC, a copy of any notice required to be given to GPC by Customer under this Agreement or any Work Order.

**2.4 Relationship of Subcontractors.** For purposes of this Agreement or any Work Order, no contractual relationship will exist between Customer and any GPC subcontractor. GPC will be responsible for management of its subcontractors in their performance of any portion of the Work Order.

**2.5 Affiliate Employees and Facilities.** Customer understands that employees of GPC affiliates may perform various activities on behalf of GPC under this Agreement or any Work Order, and Customer consents and agrees to such arrangements. In addition, GPC may use facilities of GPC affiliates for Work Order performance, and Customer also consents and agrees to such arrangements. For purposes of this Agreement and each Work Order, these individuals and facilities will be deemed employees and facilities solely of GPC and GPC will be responsible for the activities of these employees and the use and operation of the facilities. Customer waives and relinquishes any claim or cause of action against GPC's parent or affiliates, it being the Parties' intent that the activities of these employees and use of such facilities will not be attributable to GPC's parent or affiliates.

**2.6 Utilities During Installation.** Customer, at no cost to GPC, will provide water, heat, and utilities consumed by GPC in performing the installation. GPC, at its cost, will install any temporary utility facilities required during installation Services.

**2.7 Compliance with Laws and Ordinances.** GPC will comply with all applicable laws and ordinances in its Work Order performance, except that GPC will not be responsible nor liable for violation of any code, law, or ordinance caused by Customer, or its contractors, subcontractors, representatives, or agents, or existing at Customer's facility prior to commencement of installation or at other property of Customer. If there is a change in any applicable law, regulation, or ordinance, or in the interpretation thereof, after a Work Order has been accepted by GPC, the Work Order will be equitably adjusted to reflect the consequences of the change.

**2.8 Compliance with Health and Safety Laws.** GPC will comply with all applicable federal, state, and local laws and regulations that regulate the health and safety of its workers while performing the installation, and will take such measures as required by those laws and regulations to prevent injury and accidents to other persons on, about, or adjacent to the Premises. It is agreed, however, that GPC will have no responsibility for elimination or abatement of a health or safety hazard created or otherwise resulting from activities at the Premises carried on by

Customer or any person not in a contractual relationship with GPC, including Customer's contractors, subcontractors, representatives, agents, tenants, invitees, or visitors. Customer agrees to cause its contractors, subcontractors, representatives, agents, and tenants to comply fully with all applicable federal, state, and local laws and regulations governing health and safety and to comply with all reasonable requests and directions of GPC for elimination or abatement of any health or safety hazard at the Premises.

**2.9 E-Verify.** Customer is a "public employer" as defined by O.C.G.A. § 3-10-91 and each Work Order is a contract for physical performance of services within the state of Georgia. Compliance with requirements of O.C.G.A. § 13-10-91 is a condition of the Work Order and is mandatory. GPC will provide to Customer a contractor's affidavit as required by O.C.G.A. § 13-10-91. GPC also agrees that, if it employs or contracts with any subcontractor(s) or sub-subcontractor(s) in connection with the Work Order, GPC will secure from each an affidavit attesting to compliance with O.C.G.A. § 13-10-91.

**2.10 Environmental Concerns.** If and to the extent GPC performs any Services in connection with, on, or regarding any real property ("**Property**"), it will comply with all environmental rules, laws, or regulations applicable to its Services; however, GPC disclaims any responsibility for or concerning any present or past disposal of any pollutant, contaminant, industrial or solid waste, dangerous substance, toxic substance, hazardous waste, hazardous material, or hazardous substance (each a "**Hazardous Substance**"), as defined in or pursuant to the Comprehensive Environmental Response Compensation Liability Act, as amended (42 U.S.C. § 9601, *et seq.*) and the Resource Conservation and Recovery Act, as amended (42 U.S.C. § 6901, *et seq.*), or any other environmental law, ordinance, rule, or regulation, on or in the Property, and for or concerning any soil, surface water, ground water, stream settlement, or similar environmental condition (each an "**Environmental Condition**") on or off the Property site, whether arising or resulting from the activity of Customer, the uncertain or unknown activity of Customer's predecessor-in-interest to the Property, or the activity of any other person or entity. It is Customer's sole obligation, at its own cost and expense (and at the request of GPC if GPC discovers any Hazardous Substance on or Environmental Condition at the Property), to comply, or to ensure compliance, with, and for all matters arising out of, all laws, ordinances, rules, regulations, agreements with governmental entities, or court or administrative orders with respect to or regarding any Hazardous Substance, Environmental Condition, or any other circumstance, activity, or incident referenced in this Section 2.10, including performance of any and all necessary or appropriate remedial action. Customer warrants that it has not caused or permitted on the Property any activity that generates, manufactures, refines, transports, treats, stores, handles, disposes, transfers, produces, or processes any Hazardous Substance, except in compliance with all applicable laws, ordinances, rules, and regulations, agreements with governmental agencies, or court or administrative orders, and has not caused or permitted, and has no knowledge of, the releasing, spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, disposing, or dumping of any Hazardous Substance on or off the Property site. Customer agrees that, as between Customer and GPC, GPC is not responsible or liable for any injury, loss, damage, cost, expense, or other liability, including attorneys' fees and expenses of litigation, arising out of, resulting from, or connected with any pre-existing Hazardous Substance, Environmental Condition, or any other circumstance, activity, or incident referenced in this Section 2.10 not resulting from the negligent or intentional act or omission of GPC.

**2.11 Other Contractors and Vendors.** Customer must coordinate the work and activities of its own, and its other separate contractors' or vendors', forces in connection with other aspects of the Services being performed by GPC and must cooperate with GPC as reasonably necessary for GPC to carry out its duties and obligations under this Agreement and the Work Order. If Customer enters into a separate contract directly with any entity other than GPC for the performance of any work related to GPC's Work Order performance, Customer must coordinate that work with GPC's performance in such a way that the separate entity's work does not interfere with, hinder, or delay GPC's performance. If the separate entity's work does interfere with, delay, or make more costly GPC's performance, GPC will be entitled to an equitable adjustment in the Contract Price (defined in Section 3.1) and an extension of time for performance.

**2.12 Customer Assistance.** Customer agrees to use reasonable efforts to provide assistance and support to GPC as GPC performs its Agreement and Work Order obligations. Any delay, facility unavailability, Force Majeure Event (as defined in Section 3.4), tardiness in response, or Customer fault that impacts or makes more costly GPC's performance will constitute grounds for an equitable adjustment of the Contract Price and an extension of time for performance. Customer agrees to provide, without charge, a mutually satisfactory location or locations for GPC's Work order performance, including sufficient areas for staging, mobilization, and storage (collectively, "**Premises**"). Customer will provide access to the Premises during regular business hours, or such other hours as may be requested by GPC and acceptable to Customer, to perform the Services and to adjust, inspect, or correct the Services. Customer will facilitate, and will not restrict, GPC's access to the Premises to correct any emergency condition.

**2.13 Confidentiality.** The terms and conditions of this Agreement, including the exhibits, Work Orders, pricing, designs, means and methods, and discount terms, must, to the extent possible and permissible under Georgia law, be treated as confidential. To the extent possible and permissible under Georgia law, neither Party will disclose the same to any third party without the prior written consent of the other Party, absent a directive from a governmental or regulatory body or a judicial subpoena or order. In addition, subject to the above, each Party may disclose the terms and conditions of this Agreement, including the exhibits, pricing, and discount terms, only to its employees, representatives, or agents who have a need to know for performance or administration of this Agreement or the Work Order.

**A. Open Records Act Compliance.** Despite anything to the contrary in this Agreement, the Parties acknowledge that Customer is subject to the Georgia Open Records Act (O.C.G.A. § 50-18-70, et seq.) (“**GORA**”) and that any confidential information provided to Customer will be subject to disclosure pursuant to GORA requirements. The previous sentence notwithstanding to the contrary, pursuant to O.C.G.A. §50-18-72(a) (34), an “entity submitting records containing trade secrets that wishes to keep such records confidential under this paragraph shall submit and attach to the records an affidavit affirmatively declaring that specific information in the records constitute trade secrets pursuant to Article 27 of Chapter 1 of Title 10 [O.C.G.A. § 10-1-760, et seq.]” Accordingly, if GPC provides trade secret confidential information to Customer, GPC will attach the specified affidavit to each submission of such trade secret confidential information and each submission of such trade secret confidential information will be deemed provided subject to GPC’s affidavit stating that specific information in the confidential information constitutes trade secrets pursuant to Article 27 of Chapter 1 of Title 10 [O.C.G.A. § 10-1-760, et seq.].

**2.14 Representations and Warranties of Customer.** Customer represents, warrants, or covenants, except as otherwise disclosed in this Agreement or the applicable Work Order, that the Premises where GPC will perform the installation are safe and suitable for the requested performance. Customer must notify GPC of any change or update in conditions at or near the Premises that occurs during the course of performance. If any such material, situation, or condition (“**Condition**”), whether disclosed or not, is discovered by GPC or others and the Condition, in GPC’s reasonable judgment, creates an unsafe condition for Work Order performance, discovery of the Condition will constitute a cause beyond GPC’S reasonable control and GPC may cease or not commence performance until the area has been made safe by or on behalf of Customer, at Customer’s expense. In such event, the Contract Price and time for performance must be equitably adjusted. In addition, by executing this Agreement and each Work Order, Customer represents, warrants, or covenants to GPC that:

- (i) Customer has furnished, or caused others to furnish, accurate and complete data concerning energy usage for and other information pertaining to the Premises, including:
  - Utility records for the 36-month period preceding contract award and throughout the M&V term;
  - Occupancy and usage information for the 36-month period preceding contract award and throughout the M&V term;
  - Written surveys or descriptions of heating, cooling, lighting, or other systems or energy requirements and any changes thereto;
  - Descriptions of all energy-consuming or -saving equipment used on or affecting the Premises;
  - Any energy or environmental audits relating to all or any part of the Premises;
  - Any service or maintenance agreement(s) regarding any heating, cooling, lighting, or other building systems, or part thereof;
  - Construction drawings (“as-builts”) in existence as of the Work Order date or developed during the M&V term; and
  - A description of energy management procedures presently utilized by Customer for the Premises and any revisions to those procedures;
- (ii) To the best of Customer’s knowledge and belief, Customer has provided all records requested by GPC and the information set forth therein is, and all information in other records to be subsequently provided pursuant to this Agreement or the Work Order will be, true and accurate in all material respects, except as disclosed by Customer in writing;
- (iii) Customer has not entered into any contract or agreement with a third-party regarding energy management services or with regard to servicing any energy-related equipment located at the Premises, except as previously disclosed to GPC by Customer in writing;

- (iv) During the term of this Agreement or the Work Order, Customer will not enter into any agreement with a third-party regarding energy management services or with regard to servicing any energy-related Equipment at the Premises furnished or modified by GPC, without prior written consent by GPC;
- (v) Customer presently intends to continue to use the Premises in a manner similar to its present use, except as has been disclosed to GPC by Customer in writing;
- (vi) No part of the Equipment systems modified or installed by GPC will be placed in a permanent “on” operating mode or manually controlled. During the term of this Agreement and of each Work Order, Customer will permit only GPC personnel or other qualified providers to repair, adjust, or program the Equipment, systems, or controls, except in the event of an emergency, in which case Customer may remedy the emergency and must then notify GPC as soon as possible of the existence of the emergency and measures taken by Customer;
- (vii) Customer has disclosed in writing to GPC the existence and location of all known or suspected asbestos or any other Hazardous Substance on the Premises and there are no:
  - (a) Materials or substances classified as toxic or hazardous: (a) on or within the walls, floors, ceilings, or other structural components; or (b) otherwise located on the Premises, including asbestos or presumed asbestos-containing materials, formaldehyde, containers or pipelines containing petroleum products or Hazardous Substances;
  - (b) Materials, situations, or conditions subject to special precautions or equipment required by federal, state, or local health or safety regulations, or unsafe working conditions;
- (viii) Customer, within 10 days after execution, will provide GPC with copies of any successor or additional contract for management or servicing of preexisting equipment that it executes during the term of this Agreement or a Work Order and will promptly provide related information or services under Customer’s control;
- (ix) Customer’s execution, delivery, and performance of this Agreement or the Work Order do not: (a) violate any law; (b) conflict with or result in a breach of any order, writ, injunction, or decree of any court or governmental authority, domestic or foreign, or Customer’s charter or bylaws; or (c) create a default under any agreement, bond, note, or indenture to which Customer is a party or by which Customer is bound or to which any of Customer’s Premises is subject;
- (x) Customer has no knowledge of any fact or circumstance that, but for the passage of time, would materially, adversely affect either Party’s ability to perform its Agreement or Work Order obligations and Customer has complied with all laws and regulations relative to bidding, procurement, or authorization of the Services;
- (xi) This Agreement or the Work Order has been duly authorized, executed, and delivered by Customer, and constitutes the valid and legally binding obligation of Customer, enforceable according to its terms, except as may be limited by bankruptcy, insolvency, reorganization, or other laws or equitable principles of general application relating to or affecting the enforcement of creditor’s rights and remedies; and
- (xii) Customer will use its best efforts to notify GPC Pursuant to both Section 7.1.A and Section 7.1.B within 24 hours after Customer’s receipt of notice of any: (a) material malfunction in operation of the Equipment installed or affected by GPC’s Services; or (b) interruption or alteration of the energy supply to the Premises.

### **PART 3 PAYMENT AND CHANGES**

**3.1 Compensation and Payment.** For the Equipment, installation, and related Services requested in each Work Order, Customer will pay the compensation stated in the Work Order and its Exhibit C (*Compensation Schedule*) (“**Contract Price**”). The amount, timing, and all other aspects of Customer’s payment obligations will be set out in detail in the applicable Work Order Exhibit C. Unless expressly stated otherwise in the applicable Work Order Exhibit C, GPC is selling the requested Equipment to Customer, a governmental entity that is exempt from state of Georgia sales tax, along with related Equipment installation labor. If Customer, in good faith, disputes an invoice, Customer is not in default (per Section 5.1) if Customer: (i) makes and continues to make all payments not in dispute; (ii) engages in good faith discussions with GPC regarding the issue; and (iii) if applicable, makes timely payment of the agreed amount due at conclusion of the Parties’ discussions.

**3.2 Changes.** The Parties will execute a “**Change Order**” under the following scenarios:

**A. Proposals for Changes.** Customer may request that GPC submit a proposal for a change in the Work Order, including the retrofit of additional facilities owned by Customer. Unless both Parties specifically agree otherwise in writing, if GPC submits a proposal pursuant to such request, and Customer chooses not to proceed with the

proposed change, Customer will reimburse GPC for all costs incurred in preparing the proposal. If Customer does desire to proceed with the proposal, Customer will request a Change Order detailing the change it desires. Nothing in this Section 3.2 (*Changes*) may be construed to require GPC to prepare or submit any such proposal, or to execute any such Change Order, or to proceed with a change for which Customer has not provided a signed, authorized, and mutually acceptable Change Order.

**B. Events Entitling GPC to a Change Order.** GPC will be entitled to a Change Order extending the time for performance or increasing the Contract Price if: (i) a Force Majeure Event causes a delay or an increase in cost with respect to any aspect of Work Order performance; (ii) a Change in Law prevents or delays the performance of, or increases the cost of, any aspect of Work Order performance; or (iii) GPC is delayed at any time in performing its Agreement or Work Order obligations by an act of Customer or any contractor employed by Customer. A “**Change in Law**” is a change in any applicable law or regulation or any court action that would prevent, make more costly, or delay performance, including an injunction causing GPC to cease work on any portion of Work Order performance.

**C. Concealed Conditions.** If a condition is encountered at any Premises where Services are to be performed that is: (a) subsurface or otherwise concealed physical condition that differs from those indicated in the Work Order; or (b) unknown physical condition of an unusual nature that differs from those ordinarily found to exist and generally recognized as inherent in construction activities of the character provided for in the Work Order, then the Party observing such condition will notify the other Party promptly, before the condition is disturbed, and in no event later than 21 days after first observance of the condition. GPC will be entitled to a Change Order for equitable adjustment to the Contract Price and performance time caused by the changed condition.

**D. Emergencies.** In any emergency affecting the safety of persons or property, GPC, at its discretion, will act to prevent threatened damage, injury, or loss, except that GPC will not be liable for any damage, injury, or loss for failing to so act. GPC will be entitled to a Change Order for an increase in the Contract Price or an extension of time for performance as a result of such emergency.

**3.3 Excusable Delay.** Neither Party will be deemed in default of any Agreement or Work Order provision or liable for failure in performance resulting from an act or event beyond the Party’s reasonable control (e.g., act of God, act of civil or military authority, civil disturbance, war, strike, fire, or other catastrophe).

**3.4 Force Majeure Events.** If GPC is rendered wholly or partially unable to perform its Agreement or Work Order obligations as a result of a Force Majeure Event, GPC will be excused from the affected performance to the extent so affected. A “**Force Majeure Event**” is an act or event, whether foreseeable or not, that is beyond the reasonable control of GPC and that prevents or delays performance of an Agreement/Work Order obligation or compliance with an Agreement/Work Order condition. A Force Majeure Event includes an act of God, hurricane, earthquake, tornado, rain, lightning, flood, sink hole, wind, hail, snow, ice, extreme high or low temperature, water or gas main break, fire, explosion, riot, terrorist act, military action, act or failure to act on the part of a governmental authority, strike, lockout or other labor problem, transportation delay, unavailability of supplies, Equipment, or materials, or change in, or in the interpretation of, any law or regulation.

**3.5 Substantial Completion.** Prior to final completion, GPC may provide written notice to Customer that all or substantial portions of the installation is substantially complete and request that Customer issue a *Certificate of Substantial Completion and Acceptance*, in the form of Work Order Exhibit D. Substantial Completion is the date when the specified Equipment has been installed and is operating as required by this Agreement and the Work Order, with only minor work remaining (as may be specified on a punch list agreed to by both Parties). If Customer does not consider the specified Equipment installation substantially complete, it will notify GPC in writing, stating the reasons for denial. If Customer considers any or all of the specified installation substantially complete, Customer will issue a Certificate of Substantial Completion and Acceptance for the specified Equipment, executed by an authorized Customer representative. Issuance of a Certificate of Substantial Completion and Acceptance will not be unreasonably withheld or delayed by Customer. The executed Work Order Exhibit D will set the date(s) of “**Substantial Completion**” and the date(s) for commencement of warranties for the accepted Equipment; Exhibit D may contain a list of items to be completed or corrected.

**3.6 Final Completion.** Upon Customer’s receipt of written notice from GPC that the Equipment installation is ready for final inspection and acceptance, both Parties will inspect the Equipment and determine whether the installation has been performed in accordance with this Agreement and the applicable Work Order. If Customer considers the Equipment installation complete and performed in accordance with this Agreement and the Work Order, Customer will issue a *Certificate of Final Completion and Acceptance*, in the form of Work Order Exhibit F, executed by an authorized Customer representative. Within 14 calendar days after GPC’s request, Customer



agrees to either: (i) deliver to GPC an executed original of the Final Completion and Acceptance Certificate; or (ii) provide written justification for withholding the Certificate, identifying the specific portion of the Work Order Customer believes has not been completed and providing specific supporting facts. GPC will use reasonably diligent efforts to correct all such material deficiencies and will give written notice to Customer when all such items have been corrected; upon approval by Customer, a final Completion and Acceptance Certificate will be executed as soon as all Equipment is installed and operating. If Customer fails to sign the certificate or to provide written documentation of specific objections within 14 calendar days after GPC requests the final completion certificate, the Date of Final Completion and Acceptance will be the date the Certificate was requested by GPC. Execution and delivery by Customer of the Final Completion and Acceptance Certificate will constitute **"Final Retrofit Acceptance"** of the Equipment.

## **PART 4 RISK AND CLAIMS**

**4.1 GPC Insurance and Bonding.** GPC is self-insured but will provide a copy of its coverage letter (workers' compensation, general liability, automobile, etc.) to Customer. If this coverage is not acceptable, GPC will negotiate project-specific coverage and will include the cost of such coverage in the cost of the overall Services. Such coverage must be requested and negotiated prior to finalizing the Work Order for a particular project. GPC will provide to Customer a payment bond and a performance bond (if required), each in an amount equal to 100% of the Contract Price as shown in Work Order Exhibit C. The payment and performance bonds will cover construction or supply and installation of improvements through the date of the signed certificate of substantial completion and acceptance. The payment and performance bonds will warrant that all improvements will be free from defects in materials and workmanship for a period of 12 months from the date of substantial completion and acceptance. Both bonds will be issued by a corporate surety authorized to do business in Georgia. The AIA A312 Performance Bond and the AIA A312 Payment Bond forms will be used.

**4.2 Commercial General Liability Insurance.** Customer will be responsible for purchasing, at its expense, and maintaining commercial general liability insurance and any other insurance coverages Customer may deem necessary, to protect it against claims that may arise from operations under this Agreement or any Work Order.

**4.3 All Risk Property Insurance.** Customer will purchase and maintain all risk property insurance, including boiler and machinery coverage if applicable, covering the full replacement cost of the project property, including any property or Equipment that is the subject of GPC's Services, in a form acceptable to GPC. This insurance will include as additional insureds, GPC and GPC's subcontractors of any tier, as their interests may appear, and will include, at a minimum, coverage for fire, windstorm, flood, earthquake, theft, vandalism, malicious mischief, transit, collapse, testing, and damage resulting from defective design, workmanship, or material. Customer will increase limits of coverage, if necessary, to reflect estimated replacement costs. Customer will be responsible for any applicable coinsurance penalties or deductibles. If the Services include an addition to, or are adjacent to, an existing building, GPC and all subcontractors of any tier will be named as additional insureds under Customer's property insurance covering such building and its contents.

**4.4 Loss of Use of Property.** GPC's obligation to meet its energy savings guarantee during the initial term, and any renewal term, of this Agreement or a Work Order is expressly conditioned on Customer's continuous maintenance of both the physical conditions at Customer's facilities and the completed GPC installations. Any loss or damage to the facilities or the completed GPC installations must be promptly restored by Customer and will be cause for an equitable adjustment of the GPC energy savings guarantee. Customer will purchase and maintain such insurance as will protect Customer and GPC against loss of use of Customer's property due to those perils insured pursuant to this Agreement. Such a policy will provide coverage for expenses of expediting materials, continuing overhead of Customer and GPC, necessary labor expenses including overtime, loss of income by Customer, and other determined exposures. Exposures of Customer and GPC will be determined by mutual agreement and separate limits of coverage fixed for each item.

**4.5 Allocation of Risks.** This Agreement allocates fairly between GPC and Customer the risk of non-conformities in the Services. This allocation is the result of negotiations between the Parties, is accepted by both Parties, and is reflected in the pricing for the Services, other amounts payable, the limited warranties and remedies provided, the disclaimer of liability for certain damages (including indirect, special, incidental, and consequential damages), and the limitation of liability. The Parties stipulate, in any proceeding or dispute under this Agreement, that all such provisions should be recognized and enforced.

**4.6 No Indemnity.** Nothing in this Agreement may be construed to provide for GPC's indemnification of any Customer action, inaction, work, service, obligation, or property. Similarly, nothing in this Agreement may be

construed to provide for Customer's indemnification of any GPC action, inaction, work, Services, obligation, or property.

**4.7 Limitation of Liability.** Excepting and excluding a grossly negligent act or omission or willful or intentional misconduct, the liability of GPC, its owner or affiliates, and the employees, representatives, agents, successors, or assigns of each (each a "GPC-Related Party") to Customer or its successor or assign, for damages or alleged damages, whether arising from breach of this Agreement or any Work Order, breach of warranty, tort, or otherwise with respect to Services furnished pursuant to any Work Order under this Agreement, is limited to and will not exceed the total compensation paid by Customer to GPC for the Services rendered pursuant to the particular Work Order out of which the liability arises. In no event will GPC or any GPC-Related Party be liable to Customer or any individual or entity for any indirect, incidental, consequential, or special damages of any kind whatsoever, including any loss of revenue, profit, or goodwill; cost of any substitute equipment, facilities or services; downtime; cost of capital; loss of qualification, tax credit, or rebate; increased cost of operation; cost of replacement power or fuel; or claims of Customer or any third party, by reason of any act or omission by GPC, or its employees, representatives, agents, or subcontractors, in connection with performance of any Work Order under this Agreement. Further, GPC agrees that Customer will not be liable to GPC for any indirect, incidental, consequential, or special damages of any kind whatsoever in connection with any Work Order issued under this Agreement.

**4.8 Affiliate Waiver and Release.** Absent a formal assignment of this Agreement to a GPC affiliate, and despite anything in this Agreement to the contrary, Customer agrees that GPC is solely liable and responsible for its obligations and liabilities under this Agreement and each Work Order. Further, nothing in this Agreement may be construed as making GPC's parent or any affiliate liable for any GPC obligation or liability under this Agreement or any Work Order. Customer expressly waives any claim or cause of action against GPC's parent and its present or future affiliates because of any matter arising out of or related to or on account of, or resulting from the obligations of GPC under, this Agreement or any Work Order, it being the Parties' intent that no activity of GPC is in any way attributable to its parent or its affiliates. Nothing in this Agreement or in any Work Order creates any legal or equitable right for the benefit of any non-party to this Agreement.

#### **4.9 Dispute Resolution.**

**A. Resolution by Senior Management.** Except for disputes regarding adjustment of Base Year Energy Usage (which, if applicable, will be resolved in accordance with the applicable Work Order Exhibit E), disputes arising out of or in connection with this Agreement or any Work Order, including the negotiation, execution, interpretation, performance, or nonperformance of this Agreement or a Work Order will, prior to institution of any mediation, arbitration, or legal proceeding, be submitted to the senior management of each Party. Either Party, upon written notice to the other Party in accordance with Section 7.1.B, may request that the dispute be referred to senior management for resolution. Within five working days after such notice, each Party will designate a senior management representative, who must have authority to make a binding decision. Within three working days after both Parties have made their appointments, the senior managers will meet, either in person or via telephone, to discuss the dispute and will attempt in good faith to resolve the issue.

**B. Mediation.** If, within 10 working days following the first meeting of the Parties' senior management representatives, they have failed to reach agreement on the dispute(s) presented, or if the meeting does not occur within the prescribed timeframe, either Party may request that the dispute(s) be submitted to mediation. Submission of a dispute to mediation is a condition precedent to initiation of legal proceedings by either Party. Any mediation will be in accordance with the then-current Construction Industry Mediation Rules of the American Arbitration Association. Either Party may request mediation by filing a request with the other Party and with the American Arbitration Association. The request may be made concurrently with the filing of a legal or equitable proceeding, but, in such event, mediation will proceed in advance of legal or equitable proceedings, which will be stayed pending mediation for a period of 60 days from the date of filing, unless stayed for a longer period by agreement of the Parties or court order.

**C. Fees.** The Parties will share the mediator's fee and any filing fees equally. The mediation will be held in the county where Customer maintains its principal place of business, unless the Parties mutually agree on another location. An agreement reached in mediation will be enforceable as a settlement agreement in any court having jurisdiction.

**D. Litigation.** Claims not resolved by mediation will be decided by litigation in accordance with *Governing Law and Jurisdiction* (Section 7.2.A).

**E. Limitations on Consolidation or Joinder.** No litigation arising out of or relating to this Agreement or any Work Order will include, by consolidation or joinder or in any other manner, any party other than Customer and GPC, except that GPC, at GPC's election and by consolidation or joinder, may add its subcontractor(s) or supplier(s) to any litigation with Customer if the dispute involves the performance, act, or omission of a GPC subcontractor or supplier.

**F. Injunctive Relief.** Despite anything in this Section 4.9 to the contrary, either Party may seek injunctive relief in a court of competent jurisdiction prior to submission of any dispute to senior management or mediation.

## **PART 5 TERMINATION AND DEFAULT**

**5.1 Default.** If an Event of Default occurs in the performance of a Party's Agreement or Work Order obligations and the default is not promptly cured, as provided below, after the defaulting Party receives written notice of the default from the non-defaulting Party in accordance with Section 7.1.B, the non-defaulting Party may terminate this Agreement or the applicable Work Order or may exercise any right or remedy provided by law or equity. An **"Event of Default"** of a Party will be deemed to have occurred if any of the following occurs and is continuing:

- (i) The Party fails to pay any sum required to be paid or reimbursed pursuant to this Agreement or Work Order Exhibit C (*Compensation Schedule*) and the failure continues for 15 days after receipt of notice of non-payment;
- (ii) The Party fails to observe or perform any Agreement or Work Order term, covenant, or obligation and the failure continues for 60 days after receipt of a notice of breach, except that the 60-day period will be extended to such longer period as reasonably required in order to cure if the Party has commenced cure and is pursuing such cure;
- (iii) Customer fails to comply with the Energy Savings Guarantee and Verification Plan (Work Order Exhibit E) or in accordance with manufacturer requirements; or
- (iv) The Party does not pay its debts as they become due or makes a general assignment for the benefit of creditors, or any proceeding is instituted by or against the Party seeking to adjudicate it as bankrupt or insolvent, or seeking liquidation, reorganization, adjustment, or other relief under any law relating to bankruptcy or reorganization, or seeking an order for relief or appointment of a receiver, trustee, or other similar official for a substantial part of its property and, with respect to any such proceeding instituted against the Party, the proceeding has not been dismissed within 60 days.

**5.2 Early Termination.** This Agreement may be terminated upon delivery of a notice of termination in accordance with Section 7.1.B by: (i) either Party, at any time during the term of this Agreement or of any Work Order, upon the occurrence of an Event of Default by the other Party; or (ii) GPC, if a Force Majeure Event prevents performance of GPC's material Agreement or Work Order obligations for six months or more.

### **5.3 Rights Upon Termination for Default Prior to Final Retrofit Acceptance.**

**A. Rights of Customer.** If Customer terminates this Agreement or any Work Order prior to Final Retrofit Acceptance due to an Event of Default by GPC, Customer may take possession of the Premises, together with all materials thereon, and move to complete the Services itself. If the unpaid balance of the Contract Price exceeds the reasonable and necessary expense of finishing the Services, Customer will pay the excess to GPC, but if the reasonable and necessary expense of completing the Services exceeds the unpaid balance of the Contract Price, GPC will pay the difference to Customer.

**B. Rights of GPC.** If GPC terminates this Agreement or any Work Order prior to Final Retrofit Acceptance due to an Event of Default by Customer, or under the terms of Section 5.2 (ii), GPC may recover from Customer the pro rata portion of the Contract Price for Services completed, less amounts previously paid, plus all costs and losses sustained for Services in progress and materials/Equipment ordered.

**5.4 Rights upon Termination after Final Retrofit Acceptance.** If either Party terminates this Agreement or a Work Order after Final Retrofit Acceptance due to an Event of Default by the other Party, the terminating Party may pursue all remedies available at law or in equity.

**5.5 Rights upon Termination.** Except as expressly provided otherwise in this Agreement or the Work Order, upon any termination of this Agreement or a Work Order, each Party must return to the other all papers, materials, and property of the other held in connection with this Agreement or the Work Order. The Parties will cooperate to effect an orderly termination and to protect and transfer property (tangible or intangible).

## PART 6 WARRANTIES

**6.1 Energy Savings Guarantee.** The energy savings guaranteed under this Agreement will be agreed for each project. The specifics of the savings guarantee will be determined by energy conservation measure, level of measurement and verification, the cost of continued measurement, and verification methodology, all of which will be negotiated and mutually agreed upon and set forth in the applicable Work Order as Exhibit E.

**6.2 Warranties.** GPC warrants to Customer good and clear title to all Equipment and materials furnished to Customer pursuant to this Agreement and each Work Order free and clear of liens and encumbrances, so long as Customer fully compensates GPC as required by the Work Order. GPC warrants that all Equipment and materials will be of good quality and will be free from defects in materials and workmanship, including installation and setup, for a period of one year from the date of beneficial use or substantial completion of the Equipment installation or portion of the Equipment installation in question, so long as: (i) no repair, substitution, modification, or addition has been made, except by GPC or with GPC's written permission; and (ii) the Equipment or material has not been subjected to accident, neglect, misuse, or use by non-GPC personnel in violation of any instruction supplied by GPC. GPC's sole liability under this Agreement or any Work Order will be to repair or replace defective Equipment or materials, at GPC's option. The limited warranty contained in this Section 6.2 constitutes the exclusive remedy of Customer and the exclusive liability of GPC for any breach of any warranty related to the Equipment, Services, or materials furnished by GPC pursuant to this Agreement or any Work Order.

**6.3 Manufacturer's Warranties.** In addition to the warranty set forth in Section 6.2 (*Warranties*), GPC, at Customer's request, will assign to Customer any and all manufacturer's or installer's warranties for Equipment or materials provided by GPC, to the extent that such third-party warranties are assignable without additional charge and extend beyond the one year limited warranty set forth in Section 6.2.

**6.4 Exclusivity of Warranties.** THE WARRANTIES SET FORTH IN THIS AGREEMENT ARE EXCLUSIVE, AND GPC EXPRESSLY DISCLAIMS ALL OTHER WARRANTIES, WHETHER WRITTEN OR ORAL, IMPLIED OR STATUTORY, INCLUDING ANY WARRANTY OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, OR NON-INFRINGEMENT WITH RESPECT TO THE EQUIPMENT OR MATERIALS PROVIDED UNDER THIS AGREEMENT OR ANY WORK ORDER. GPC WILL NOT BE LIABLE FOR ANY SPECIAL, INDIRECT, CONSEQUENTIAL, INCIDENTAL, OR PUNITIVE DAMAGES ARISING FROM, OR RELATING TO, THIS LIMITED WARRANTY OR ITS BREACH. IN NO EVENT WILL GPC BE LIABLE FOR ANY DAMAGES ARISING FROM, OR RELATING TO, THIS LIMITED WARRANTY OR ITS BREACH IN EXCESS OF THE AMOUNT OF CONSIDERATION CUSTOMER HAS PROVIDED TO GPC AT THE TIME OF THE BREACH. CUSTOMER ASSUMES FULL RESPONSIBILITY IN EACH WORK ORDER FOR SELECTION OF THE PARTICULAR EQUIPMENT TO BE PROVIDED BY GPC AS APPROPRIATE TO ACHIEVE CUSTOMER'S PURPOSE.

**6.5 Remedies Exclusive.** The remedies set forth in this Agreement for the Parties are intended to be exclusive to any other remedies provided by law or equity.

## PART 7 MISCELLANEOUS

### 7.1 Administration and Notice.

**A. Agreement Coordinators.** Unless expressly stated otherwise in the applicable Work Order, the Agreement Coordinators designated below will be responsible for administering this Agreement for each respective Party and for coordinating all activities relating to Agreement performance. Each Party may change its Agreement Coordinator by giving 10 days' prior written notice to the other Party.

**Customer Coordinator:**  
Joe Bennett  
City Administrator  
Phone: (678) 631-5304  
Email: [jbennett@smyrnaga.gov](mailto:jbennett@smyrnaga.gov)

**GPC Coordinator:**  
Randy Dix  
Project Manager  
Phone: (770) 500-9451  
Email: [rdix@southernco.com](mailto:rdix@southernco.com)

**B. Notices.** A Party giving notice under this Section 7.1.B must provide the notice in writing to the other Party as shown below and deliver by: (i) personal delivery (effective that date); (ii) if the Party has provided an email address for official notice purposes, email delivery (effective that date if sent by 5:00 p.m. (recipient's time); otherwise, the next business day); or (iii) prepaid nationally- or internationally-recognized commercial overnight courier (effective the next business day). Unless the Agreement or Work Order expressly requires notice in accordance with this Section 7.1.B, a Party may provide notice according to the Work Order or as otherwise

reasonable in the circumstance. Either Party may update its Section 7.1 contact information by 10 days' prior written notice given in accordance with this Section 7.1.B.

**If to Customer:**

City of Smyrna  
Attn: Joe Bennett  
2800 King Street  
Smyrna, GA 30080  
Phone: (678) 631-5304  
Email: jbenett@smyrnaga.gov

**If to GPC:**

Georgia Power Company  
Attn: Randy Dix, Project Manager  
241 Ralph McGill Blvd  
Atlanta, GA 30308  
Phone: 770-500-9451  
Email: crdix@southernco.com

**7.2 Contract Interpretation.** In this Agreement and in each Work Order, and in all attached or incorporated documents: (i) **"including"** means "including, but not limited to" or "including, without limitation"; (ii) **"or"** means "either or both" ("A or B" means "A or B or both A and B"); (iii) **"e.g."** means "for example, including, without limitation"; and (iv) if the Party has provided email contact information, **"written"** or **"in writing"** includes email communication, absent express statement otherwise. Reference to: (a) a Party or entity includes any allowed successor or assign; (b) a regulatory authority includes an authority succeeding to the same function; and (c) an applicable law, document, or provision is to the law, document, or provision as modified or amended, and then-effective or current. Defined terms may be singular or plural, as the context requires and, absent express statement otherwise, have the same meaning in all Agreement or Work Order documents. Captions are for convenience only and do not affect Agreement or Work Order interpretation. Reference to an Agreement part or section by caption or number includes all separate clauses and provisions within that part or section. Both Parties were actively involved in negotiating this Agreement; no rule allowing construction in favor of, or against, a Party according to authorship will apply.

**A. Governing Law and Jurisdiction.** Georgia law governs all matters, including torts, arising under, or relating to execution, interpretation, performance, or enforcement of, this Agreement and each Work Order under this Agreement, without regard to choice of law principles. In the event of any dispute or claim arising out of this Agreement or any Work Order, subject to the *Dispute Resolution* requirements of Section 4.9, the Parties agree that any lawsuit or other legal claim or action will be filed in either the Superior Court of Cherokee County, Georgia, or in the Federal District Court, Northern District of Georgia.

**B. Entire Agreement.** This Agreement, or, as applicable, each Work Order contains the entire agreement of the Parties about the subject matter and supersedes any prior or contemporaneous negotiation, discussion, promise, representation, or agreement. There are no oral or written representations, understandings or agreements between the Parties respecting the subject matter of this Agreement or, as applicable, the Work Order that are not fully expressed in the document. Each exhibit, attachment, appendix, schedule, or other document attached to or referenced in this Agreement or a Work Order is part of, and integral to, the document as if included in the main body. Neither this Agreement nor any Work Order creates a contractual relationship with, or cause of action for, a third party.

**C. Duplicate Originals.** Two duplicate originals of this Agreement and each Work Order may be executed, each of which will be deemed an original, but both of which together constitute one and the same instrument.

**D. Survival.** Agreement provisions that by nature or context logically should apply beyond Agreement expiration, completion, cancellation, or termination, or after transfer, assignment, novation, merger, or other entity change, will survive per applicable law or Agreement terms, including *Affiliate Employees and Facilities* (Section 2.5); *Payment and Changes* (Part 3); *Risk and Claims* (Part 4) or other Agreement/Work Order indemnity obligation; *Termination and Default* (Part 8); *Rights upon Termination after Final Retrofit Acceptance* (Section 5.4); *Rights upon Termination* (Section 5.5); and *Miscellaneous* (Part 7).

**7.3 Agreement Modification.** This Agreement may be modified only by an amendment executed in writing by an authorized representative of each Party.

**A. No Waiver.** If GPC fails to enforce a Customer obligation, waives a Customer breach, elects a remedy, or waives a right in one instance, GPC does not waive a similar, or any other, breach or the right to enforce that, or any other, right, remedy, or obligation, in another instance. Acquiescence to or acceptance of late performance, with or without reservation, does not waive a future right to require timely performance.

**B. Assignment.** Customer may not assign this Agreement or any Work Order without the prior written consent of GPC. The Parties agree that GPC may assign this Agreement or any Work Order and all rights and obligations herein to a successor in interest or any present or future affiliate of GPC. Upon assignment of this Agreement or

a Work Order by GPC, Customer releases GPC from any liability or obligation under this Agreement or the Work Order. A purported assignment in violation of this *Assignment* clause is void.

**C. Severability.** If any provision of this Agreement or any Work Order is held by a court of competent jurisdiction to be contrary to law, the remaining provisions of this Agreement or the Work Order will remain in full force and effect.

**Each Party** agrees to all terms and conditions of this Agreement. The Parties may exchange counterparts of this Agreement as a scanned image (e.g., .pdf or .tiff file extension) as an attachment to email; a scanned signature is an original signature for all purposes. The “**Effective Date**” is the date on which the last Party signs, as shown below.

**Georgia Power Company**

**City of Smyrna**

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_  
Date: \_\_\_\_\_

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_  
Date: \_\_\_\_\_

2018-12-09



ATTEST:

\_\_\_\_\_  
Heather K. Peacon-Corn, City Clerk