

**CITY OF EL PASO, TEXAS**  
**AGENDA ITEM DEPARTMENT HEAD'S SUMMARY FORM**

**DEPARTMENT:** General Services

**AGENDA DATE:** January 22, 2013

**CONTACT PERSON/PHONE:** Stuart Ed, General Services Director, 621-6822  
Bruce D. Collins, Purchasing Manager, 541-4313

**DISTRICT (S) AFFECTED:** ALL

**SUBJECT:**

Amendment #6 to the Energy Services Company (ESCO) Contract with Johnson Controls, Inc.

That the City Manager be authorized to sign Amendment #6 to the Professional Services Contract, dated May 17, 2010, between the City of El Paso and Johnson Controls, Inc., a Wisconsin Corporation, to perform annual expanded measurement and verification (M&V) services, for an amount of \$247,300.00, over a three-year term, which will be funded with General Services Department Operating Funds; and that the City Manager be authorized to sign any contracts or other documents required to effectuate this transaction, subject to final approval by the City Attorney's office of all necessary documents to effectuate the transaction.

**BACKGROUND / DISCUSSION:**

The City is seeking continuation of its City-wide energy and operational efficiency initiatives. This action is the Sixth Amendment of the initial contract award approved by Council to Johnson Controls, Inc. (JCI) on May 17, 2010 to act as the City's Energy Services Company (ESCO) and perform services for monitoring and facilitating a major energy and operational energy savings program which includes implementing mutually-agreed upon improvement measures and services.

The Sixth Amendment authorizes JCI to perform annual expanded measurement and verification (M&V) services of all City energy accounts for a total of \$247,300 over a three-year term paid out of guaranteed savings over the same term.

	<b>Annual Fee</b>	<b>Guaranteed Savings</b>
<b>Year 1</b>	\$80,000	\$80,000
<b>Year 2</b>	\$82,400	\$82,400
<b>Year 3</b>	\$84,900	\$84,900

JCI has agreed to guarantee annual utility savings to pay for the cost of these services each year. Expanded M&V services outsources the Energy Coordinator position, saving the City's General Fund \$90,842 annually, and includes the following services:

1. Assist maintenance managers and staff in evaluating HVAC equipment to ensure equipment design meets SEER/EER (energy efficiency rating) standards for application.
2. Monitor all energy management design as it relates to facilities design and construction activities.
3. Compile utility budgets and energy conservation measure cost estimates based upon documented program needs.
4. Provide reports as to the overall effectiveness of the energy management program.
5. Analyze building utility bills to determine energy usage trends.
6. Monitor the results of energy conservation projects.
7. Conduct annual energy audits of City facilities and make recommendations for appropriate energy conservation measures.
8. Follow up on and resolve utility billing inconsistencies with the building managers and utility companies.
9. Initiate, manage and maintain an information system for City energy consumption.
10. Assist the City with writing and submitting federal and state grant proposals to receive federal/state grant money to implement energy conservation projects.
11. Monitor progress of adopted improvement plans, including auditing and analyzing consumption statistics to detect and recommend corrections for anomalous patterns and trends.
12. Ensure the City is on the proper utility rate schedule and is receiving correct billing.

13. Track energy use and savings in all City facilities adjusted for occupancy totals, hours of operation, severe weather variances and other factors which may have affected the savings for each facility.

**PRIOR COUNCIL ACTION:**

The original Energy Services Company (ESCO) contract with Johnson Controls, Inc. was approved by Council on May 25, 2010 to act as the City's ESCO for the next 5 years. The original award amount totaled \$350,000 under Solicitation Number 2010-085R for Advanced Engineering and grant application support.

The First Amendment to the ESCO contract was approved by City Council on January 6, 2011 in the amount of \$3,626,770 for facility upgrades including lighting improvements, solar photovoltaic (PV) power generation panels, and HVAC equipment and control upgrades at 44 separate City facilities.

The Second Amendment was approved on October 25, 2011 in the amount of in the amount of \$2,824,000 for the conversion of 2,600 streetlights to energy-efficient light-emitting diode standards.

The Third Amendment was approved on October 25, 2011 in the amount of \$5 million for the conversion of 4,700 streetlights to energy-efficient light-emitting diode standards.

The Fourth Amendment was approved on January 10, 2012 in the amount of \$1,080,000 for the installation of solar PV power generation panels at the Municipal Service Center funded through a stimulus grant received from the State Energy Conservation Office (\$900,000 SECO, \$180,000 local cash match).

The Fifth Amendment is being considered on January 22, 2013 in the amount of \$5,649,993 for lighting retrofits and controls, window film, Central Plant and AHU Upgrades, and a Facility Management System at the Terminal Building at 11 El Paso International Airport facilities.

**SELECTION SUMMARY:**

N/A

**AMOUNT AND SOURCE OF FUNDING:**

Department: General Services Department  
Amount \$247,300  
Funds Available: Yes  
Funds Source: General Services Department Operating Funds

**BOARD / COMMISSION ACTION:**

N/A

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\*\*\*\*\*AUTHORIZATION\*\*\*\*\*

**DEPARTMENT HEAD:**



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Stuart Ed, General Services Director

# RESOLUTION

## BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF EL PASO:

That the City Manager be authorized to sign Amendment #6 to the Professional Services Contract, dated May 17, 2010, between the City of El Paso and Johnson Controls, Inc., a Wisconsin Corporation, to perform annual expanded measurement and verification (M&V) services, for an amount of \$247,300.00, over a three-year term, which will be funded with General Services Department Operating Funds; and that the City Manager be authorized to sign any contracts or other documents required to effectuate this transaction, subject to final approval by the City Attorney's office of all necessary documents to effectuate the transaction.

ADOPTED THIS \_\_\_\_\_ DAY OF \_\_\_\_\_ 2013.

CITY OF EL PASO:

\_\_\_\_\_  
John F. Cook, Mayor

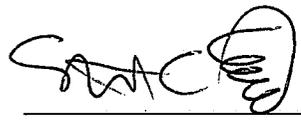
ATTEST:

\_\_\_\_\_  
Richarda Duffy Momsen, City Clerk

APPROVED AS TO FORM:

  
\_\_\_\_\_  
Elizabeth M. Ruhmann  
Assistant City Attorney

APPROVED AS TO CONTENT

  
\_\_\_\_\_  
Stuart C. Ed, Director  
General Services Department

CITY OF EL PASO

AMENDMENT #6 TO  
PROFESSIONAL SERVICES CONTRACT WITH  
JOHNSON CONTROLS INC.

THIS AMENDMENT TO THE PROFESSIONAL SERVICES CONTRACT (the "Amendment #6") is entered into as of the \_\_\_\_ day of \_\_\_\_\_, 2012 by and between Johnson Controls, Inc., a Wisconsin corporation with offices located at 3021 West Bend Drive, Irving, Texas 75063 (hereinafter referred to as "Contractor" or "JCI" or "Consultant") and the City of El Paso (hereinafter referred to as "City" or "Customer" or "Owner").

RECITALS

WHEREAS, the City issued a Request for Qualifications Solicitation No. 2010-085R and Contractor was selected to act as the City's Energy Services Company and perform services for developing a Detailed Evaluation Study (the "Study"), identify, engineer, design, install, maintain, monitor and facilitate a major energy and operational savings program, including Energy Conservation Measures, and to assist the City in obtaining grants for such program (hereinafter the "Services");

WHEREAS, on or about May 17, 2010 the City and Contractor entered into a Professional Services Contract (the "Contract") wherein Contractor was contracted to act as the City's Energy Services Company (ESCO) for a City-wide Energy Operational Savings Program (the "Project");

WHEREAS, on or about February 11, 2011, the City and Contractor entered into Amendment #1 to the Contract wherein Phase II of the Project was initiated, and which was completed in February 2012;

WHEREAS, on or about October 25, 2011, the City and Contractor entered into Amendments #2 and #3 to the Contract wherein Phases III-A and III-B were initiated and are being implemented; and,

WHEREAS, on or about January 10, 2012, the City and Contractor entered into Amendment #4 to the Contract wherein Phase IV was initiated, and which was completed in June 2012; and,

WHEREAS, at or near the same time that this Amendment is being brought forth, the CITY and CONTRACTOR will be seeking to enter into Amendment #5 to the Contract, under which JCI will perform additional facility improvement measures (FIM) at several El Paso International Airport facilities/buildings (Phase V); and

WHEREAS, the CITY and CONTRACTOR have agreed and seek to have Contractor provide annual expanded measurement and verification (M&V) services, as specifically set forth in Schedule R-1 (JCI proposal dated December 21, 2012), attached hereto; and

WHEREAS, the City wishes to enter into this Amendment #6 pursuant to Section 2.4 of the Contract, in order to implement the expanded measurement and verification (M&V) services set forth in Schedule R-1 (Phase VI).

**NOW THEREFORE**, in consideration of the mutual covenants, agreements and conditions herein contained and for other and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, Contractor and the City agree as follows:

#### ARTICLE I. TERMS

1. The attached Energy Savings Performance Contract will be added as Attachment "R" to the Contract and shall be incorporated by reference into this agreement for all purposes as if fully set forth herein.
2. The terms and conditions set forth in Attachment "R" will apply to the measurement & verification services being implemented in Phase VI of the Project, as particularly set forth in Schedule R-1.
3. Schedules M-8, M-9, M-10, M-11, M-12, M-13, M-14, M-15, M-16 and M-17 to Attachment "M" of Amendment #1 to the Contract are incorporated into and shall be deemed an integral part of this Amendment #6. To the extent that Schedules M-8 through M-17 make reference to "Improvement Measures #1," these references are hereby substituted with "Phase VI Improvement Measures."
4. The parties agree that Section 2.2, subsections (A) and (B) only, Section 2.4, Section 3.1, including subsection (A) of the Contract are hereby deleted.
5. Contractor shall submit any requested reports, data, and information on the performance of this Agreement as may be required by the City's lender and/or by the City, if and as applicable.
6. The services and work to be performed by Contractor set forth in Schedule R-1 for Phase VI of the ESPC Project will be for a term that begins on the date that this Amendment is approved by City's governing body and shall terminate on January 31, 2016. The City Manager may, at her sole discretion and without further authorization from City Council, extend this term period for an additional one-year period, but may not exceed three (3) one-year extensions without City Council approval. Exercising the option to extend shall be done by the City providing the Contractor with written notice prior to the termination date of this agreement or any extension thereafter.

#### ARTICLE II. MISCELLANEOUS

1. Except as modified or otherwise provided herein, the existing terms, covenants, agreements, responsibilities and obligations contained in the Contract, and any amendments thereto, shall remain in full force and effect through the term of the Contract and its amendments. In the event of a conflict between the terms and conditions of the Contract and/or any subsequent amendments thereto, and the terms and conditions of this Amendment #6, the terms and conditions of this Amendment #6 shall prevail.

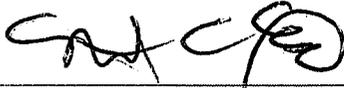
IN WITNESS WHEREOF, the parties have caused this Amendment #6 to be duly executed by their duly authorized representatives on the dates written below:

CITY OF EL PASO	JOHNSON CONTROLS, INC.
By: _____ Joyce Wilson	By: <u>Michael Crowe</u> Name:
Title: <u>City Manager</u>	Title: <u>Regional VP &amp; GM</u>
Date: _____	Date: <u>1/21/2013</u>

APPROVED AS TO FORM:

  
\_\_\_\_\_  
Elizabeth M. Rammann  
Assistant City Attorney

APPROVED AS TO CONTENT:

  
\_\_\_\_\_  
Stuart C. Ed, Director  
General Services Department

## ATTACHMENT "R"

### ENERGY SAVINGS PERFORMANCE CONTRACT

#### TERMS

1. **SCOPE OF THE ATTACHMENT.** Contractor shall perform the expanded measurement & verification services set forth in Schedule R-1.

City shall make payments to CONTRACTOR for the M&V Services in accordance with Schedule R-1.

2. **ATTACHMENT DOCUMENTS:** In addition to the terms and conditions of this Attachment, the following Schedules are incorporated into and shall be deemed an integral part of this Attachment:

Schedule R-1     Scope of Work, Fee for Services and Guaranteed Savings, and City Responsibilities  
(JCI proposal dated December 21, 2012)

3. **M&V SERVICES.** The M&V Services shall continue throughout the Guarantee Term, subject to earlier termination of the Assured Performance Guarantee as provided herein. City acknowledges and agrees that if, for any reason, it (i) cancels or terminates receipt of M&V Services, (ii) fails to pay for M&V Services in accordance with Schedule R-4, (iii) fails to fulfill any of City's responsibilities necessary to enable Contractor to complete the Work and provide the M&V Services, or (iv) otherwise cancels, terminates or materially breaches this Attachment, the Assured Performance Guarantee shall terminate and Contractor shall have no liability thereunder, upon written notice from Contractor as set forth in Section 4.1 of that certain Professional Services Contract dated May 17, 2010 (the "Contract").
4. **DELAYS AND IMPACTS.** If Contractor is delayed in the commencement, performance, or completion of the M&V Services by causes beyond its control and without its fault, including but not limited to inability to access property; concealed or unknown conditions encountered at the project, differing from the conditions represented by City in the bid documents or otherwise disclosed by City to Contractor prior to the commencement of the services; a Force Majeure (as defined below) condition; failure by City to perform its obligations under this Attachment; or failure by City to cooperate with Contractor in the timely completion of the services, Contractor shall provide written notice to City of the existence, extent of, and reason for such delays and impacts. Under such circumstances, an equitable adjustment in the time for performance, price and payment terms shall be made. If an adjustment to price and/or payment is required, the parties shall negotiate additional compensation as provided in Schedule R-1 and an amendment to this Contract shall be mutually executed by the parties.
5. **ACCESS.** City shall provide Contractor, its subcontractors, and its agents reasonable and safe access to all facilities and properties in City's control that are subject to the M&V Services. City further agrees to assist Contractor, its subcontractors, and its agents to gain access to facilities and properties that are not controlled by City but are necessary for Contractor to complete the M&V Services. An equitable adjustment in the time for performance, price and payment terms shall be made as a result of any failure to grant such access. If an adjustment to price and/or payment is required, the parties shall negotiate additional compensation as provided in Schedule R-1 and an amendment to this Contract shall be mutually executed by the parties.
6. **WARRANTY.** Contractor will perform the services in a professional, workman-like manner.
7. **SAFETY; COMPLIANCE WITH LAWS.** Contractor shall be responsible for initiating, maintaining, and supervising all safety precautions and programs in connection with the performance of the M&V Services. Contractor and City shall comply with all applicable laws, ordinances, rules, regulations, and lawful orders of public authorities (collectively, "Laws") in connection with its performance hereunder.
  - 7.1. **Laws to be Observed.** The Contractor shall keep fully informed of all federal, state, and local laws, ordinances, and regulations and all orders and decrees of bodies or tribunals having any jurisdiction or authority, which in any manner affect those engaged or employed on the work, or which any way affect the conduct of the work.

- 7.2. **Provisions Required by Law Deemed Inserted.** Each and every provision of law and clause required by law to be inserted in this contract shall be deemed to be inserted herein and the contract shall be read and enforced as though it were included herein, and if through mistake or otherwise any such provision is not inserted, or is not correctly inserted, then upon the application of either party the contract shall forthwith be physically amended to make such insertion or correction. City affirms that it is responsible for its compliance with all applicable laws, ordinances, regulations, order, and decrees.
- 7.3. **Patented Devices, Materials and Processes.** The Contractor shall indemnify and hold the City and its officers, agents, servants and employees harmless from liability of any nature or kind, including reasonable and direct costs and expenses for, or on account of, any patented or unpatented invention, process, article or appliance manufactured or used in the performance of the contract, including its use by City, unless otherwise specifically stipulated in the contract documents.
- 7.4. **License or Royalty Fees -** License or royalty fees for the use of a process which is authorized by the City for the Project must be reasonable and must be paid to the holder of the patent, or to his/her authorized licensee by the Contractor.
- 7.5. If the Contractor uses any design, device or materials covered by letter, patent or copyright, he/she shall provide for such use by suitable agreement with the holder or City of such patented or copyrighted design, device or materials. It is mutually agreed and understood that without exception, the contract prices shall include all royalties or costs arising from the use of such design, device or materials in any way involved in the work.
- 7.6. **THE CONTRACTOR SHALL INDEMNIFY AND HOLD AND SAVE HARMLESS THE CITY OF THE PROJECT FROM ANY AND ALL CLAIMS FOR INFRINGEMENT UPON OR VIOLATION OF ANY PATENT, COPYRIGHT, TRADE SECRET OR OTHER PROPRIETARY RIGHT AT ANY TIME DURING THE PROSECUTION OF THE WORK OR AFTER COMPLETION OF THE WORK, AND SHALL PAY ANY JUDGMENT (INCLUDING ALL COURT COSTS, EXPERT FEES, AND ATTORNEYS FEES) RENDERED AGAINST THE CITY AS A RESULT OF SUCH CLAIMS.**

**8. CHANGE ORDERS.** The parties, without invalidating this Attachment, may request changes in the Work to be performed under this Attachment ("Change Orders"), consisting of additions, deletions, or other revisions to the services. The price and payment terms, and time for performance shall be equitably adjusted in accordance with the Change Order. Such adjustments shall be determined by mutual agreement of the parties. Contractor may delay performance until adjustments arising out of the Change Order are clarified and agreed upon. Any Change Order must be signed by an authorized representative of each party. If concealed or unknown conditions are encountered at the project, differing from the conditions represented by City in the bid documents or otherwise disclosed by City to Contractor prior to the commencement of the Work, price and payment terms, time for performance and, if necessary, the Assured Performance Guarantee shall be equitably adjusted. Claims for equitable adjustment may be asserted in writing within a reasonable time from the date a party becomes aware of a change to the Work by written notification. Failure to promptly assert a request for equitable adjustment, however, shall not constitute a waiver of any rights to seek any equitable adjustment with respect to such change.

- 8.1 Without invalidating the Contract, the City may, in accordance with applicable state law, order extra work or make changes by altering, adding to or deducting from the work, the contract sum being adjusted accordingly. Any changes in the services ordered and approved by the City shall become a part of the Contract. All the work of the kind bid upon shall be paid for at the price stipulated in the proposal and no claims for any extra work or materials shall be allowed unless the work is ordered in writing by the City or City's designated representative, acting officially for the City, in accordance with applicable state law, and the price is stated in such order. Additional time for change orders or delays, which affect the Contractor, shall be considered estimates upon their granting.

8.2 NO CHANGES IN THE SERVICES COVERED BY THE APPROVED CONTRACT AMENDMENT SHALL BE MADE WITHOUT HAVING PRIOR WRITTEN APPROVAL OF THE CITY OR CITY'S DESIGNATED REPRESENTATIVE AS AFORESAID.

8.3 No claim for extra work or cost shall be allowed unless the same was done in pursuance of a written order of the City's designated representative, approved by the City, as aforesaid. Upon receipt of a change order cost proposal from the Contractor, the City shall have fourteen (14) calendar days in which to respond to the proposal, provided that the additional cost does not have to be approved by the City's governing body; if the increased cost of the contract requires a written amendment approved by the governing body, the City shall have thirty (30) days to respond to the proposal.

9. **CITY FINANCING; TREATMENT; TAXES.** The parties acknowledge and agree that Contractor is not making any representation or warranty to City with respect to matters not expressly addressed in this Attachment, including, but not limited to:

- (a) City's ability to obtain or make payments on any financing associated with paying for the measurement and verification services, related services, or otherwise;
- (b) City's proper legal, tax, accounting, or credit rating agency treatment relating to this Attachment; and
- (c) the necessity of City to raise taxes or seek additional funding for any purpose.

City is solely responsible for its obligations and determinations with respect to the foregoing matters. In addition, the parties acknowledge and agree that City shall be responsible for complying, at its cost and expense, with all Laws that may be applicable to it relating to performance contracting, including, without limitation, any requirements relating to the procurement of goods and/or services and any legal, accounting, or engineering opinions or reviews required or obtained in connection with this Attachment.

**10. INSURANCE AND CONTRACT SECURITY.**

10.1 Contractor shall maintain insurance in amounts no less than those set forth below in full force and effect at all times until the Work has been completed, and shall provide a certificate evidencing such coverage promptly following City's request there for.

COVERAGES	LIMITS OF LIABILITY
Workmen's Compensation Insurance or self insurance, including Employer's Liability	Statutory
Commercial General Liability Insurance	\$5,000,000 Per Occurrence \$5,000,000 Aggregate
Comprehensive Automobile Liability Insurance	\$5,000,000 Combined Single Limit
Builder's Risk (as applicable)	100% of Value of Attachment C
Professional Liability/Errors and Omissions	

The above limits may be obtained through primary and excess policies, and may be subject to self-insured retentions.

City shall also maintain insurance coverage, of the types and in the amounts customary for the conduct of its business, throughout the term of this Attachment.

10.1.1 The City shall be named as an Additional Insured, but only with respect to liability arising out of this contract regarding operations performed for them by or on behalf of Contractor, on all of the Contractor's Insurance policies, with the exception of Workers' Compensation Insurance, required by this Contract. All of the Contractor's Insurance Policies shall remain

in effect until final payment and at all times thereafter when the Contractor may be correcting, removing or replacing defective work in accordance with Section 7.

10.1.2 Subcontractor's Commercial General Liability and Vehicle Liability Insurance. The Contractor shall require each of his/her subcontractors to procure and to maintain during the life of his/her subcontract, Subcontractor's Commercial General Liability and Vehicle Liability Insurance in the amounts specified above.

10.1.2 Proof of Insurance. The Contractor shall furnish the City with copies of policies and/or certificates showing the type, amount, class of operations covered, effective dates and dates of expiration of policies.

10.1.3 ENDORSEMENTS The Contractor shall provide endorsements to the commercial general liability and vehicle liability insurance policies naming the city as an additional insured and naming the city as entitled to notice substantially as follows: "The insurance covered by this certificate will not be cancelled, except after thirty (30) consecutive calendar days written notice of the intent to cancel said insurance has been provided to the City and ten (10) days written notice for nonpayment of insurance policy premiums."

10.1.4. Failure by the Contractor to provide timely proof of insurance coverage for itself will delay release of pending payments.

10.2 Texas Workers' Compensation Requirements. The Contractor shall furnish the a copy of all required insurance policies and endorsements to the City that complies with the provisions set forth in Schedule M-13 to Amendment #1.

**11. INDEMNIFICATION. CONTRACTOR WILL INDEMNIFY AND HOLD HARMLESS THE CITY, ITS OFFICERS, AGENTS AND EMPLOYEES, FOR AND AGAINST ANY AND ALL CLAIMS, CAUSES OF ACTION, LIABILITY, DAMAGES OR EXPENSE, (INCLUDING BUT NOT LIMITED TO ATTORNEY FEES AND COSTS) FOR ANY DAMAGE TO OR LOSS OF ANY PROPERTY, OR ANY ILLNESS, INJURY, PHYSICAL OR MENTAL IMPAIRMENT, LOSS OF SERVICES, OR DEATH TO ANY PERSON TO THE EXTENT ARISING OUT OF THE NEGLIGENT ACTS OR OMISSIONS OF CONTRACTOR, EVEN WHERE SUCH DAMAGE, INJURY, LOSS, ILLNESS, PHYSICAL OR MENTAL IMPAIRMENT, LOSS OF SERVICES, OR DEATH RESULTS FROM OR INVOLVES NEGLIGENCE OR ALLEGATIONS OF NEGLIGENCE ON THE PART OF THE CITY, ITS OFFICERS, AGENTS, OR EMPLOYEES.**

**12. LIMITATION OF LIABILITY. NEITHER CONTRACTOR NOR CITY WILL BE RESPONSIBLE TO THE OTHER FOR ANY SPECIAL, INDIRECT, CONSEQUENTIAL, REMOTE, PUNITIVE, EXEMPLARY, LOSS OF PROFITS OR REVENUE, LOSS OF USE, OR SIMILAR DAMAGES, REGARDLESS OF HOW CHARACTERIZED AND REGARDLESS OF A PARTY HAVING BEEN ADVISED OF THE POSSIBILITY OF SUCH POTENTIAL LOSSES OR RELIEF, ARISING IN ANY MANNER FROM THIS ATTACHMENT, THE WORK, THE IMPROVEMENT MEASURES, THE PREMISES, THE M&V SERVICES, OR OTHERWISE. WITHOUT LIMITING CONTRACTOR'S EXPRESS OBLIGATIONS UNDER THE ASSURED PERFORMANCE GUARANTEE, CONTRACTOR'S LIABILITY UNDER THIS ATTACHMENT, REGARDLESS OF THE FORM OF ACTION, SHALL IN NO EVENT EXCEED THE AMOUNT OF THE PAYMENTS ACTUALLY RECEIVED BY CONTRACTOR UNDER SCHEDULE R-4. If this Attachment covers fire safety or security equipment, City understands that Contractor is not an insurer regarding those services, and that Contractor shall not be responsible for any damage or loss that may result from fire safety or security equipment that fails to prevent a casualty loss. The foregoing waivers and limitations are fundamental elements of the basis for this Attachment between Contractor and City, and each party acknowledges that Contractor would not be able to provide the work and services contemplated by this Attachment on an economic basis in the absence of such waivers and limitations, and would not have entered into this Attachment without such waivers and limitations.**

**13. FORCE MAJEURE.** Neither party will be responsible to the other for damages, loss, injury, or delay caused by conditions that are beyond the reasonable control, and without the intentional misconduct or negligence of that party. Such conditions (each, a "Force Majeure") include, but are not limited to: acts of God; acts of government agencies; strikes; labor disputes; fires; explosions or other casualties; thefts; vandalism; riots or war; acts of terrorism; electrical power outages; interruptions or degradations in telecommunications, computer, or electronic communications systems; changes in Laws; or unavailability of parts, materials or supplies.

**14. CONTRACTOR'S PROPERTY.** All materials furnished or used by Contractor personnel and/or Contractor subcontractors or agents at the installation site, including documentation, schematics, test equipment, software and associated media remain the exclusive property of Contractor or such other third party. City agrees not to use such materials for any purpose at any time without the express authorization of Contractor. City agrees to allow Contractor personnel and/or Contractor subcontractors or agents to retrieve and to remove all such materials remaining after installation or maintenance operations have been completed. City acknowledges that any software furnished in connection with the Work and/or M&V Services is proprietary and subject to the provisions of any software license agreement associated with such software.

**14.1 Contractor's Title of Materials.** No materials or supplies for the work shall be purchased by the Contractor or by any subcontractor subject to any chattel mortgage or under a conditional sale contract or other agreement by which an interest is retained by the seller. The Contractor warrants that he/she has good title to all materials and supplies used by him/her in the work, free from all liens, claims, or encumbrances. **PROVIDED, HOWEVER, NOTHING IN THIS PARAGRAPH SHALL PREVENT THE CITY FROM EXERCISING ALL LIEN RIGHTS THE CITY MAY HAVE IN GOODS PURCHASED BY THE CONTRACTOR WHICH ARE IDENTIFIED TO THE CONTRACT.**

**14.2** The Contractor may be required to pay state sales tax for the purchase, rental or lease of tools, machinery and equipment used in the performance of the awarded contract and for materials purchased which are not incorporated into the completed project. It is the obligation of the Contractor to ascertain the amount of state sales tax to be paid under Chapter 151 of the Texas Tax Code and to include this amount in his/her bid submitted to the City. For further information, the Contractor may want to contact the office of the Texas Comptroller of Public Accounts at 1-800-252-5555. The Contractor shall execute and provide to the City prior to the City's issuance of the Notice to Proceed a Statement of Incorporated Materials in the form attached as Schedule M-14 to Attachment #1.

**15. DISPUTES.** Contractor and City will attempt to settle any controversy, dispute, difference, or claim between them concerning the performance, enforcement, or interpretation of this Attachment (collectively, "Dispute") through direct discussion in good faith, but if unsuccessful, will submit any Dispute to non-binding mediation in El Paso County, Texas. If the parties are unable to agree on a mediator or a date for mediation, either party may request JAMS, Inc. to appoint a mediator and designate the time and procedure for mediation. Such mediator shall be knowledgeable, to each party's reasonable satisfaction, with respect to matters concerning construction law and municipal law. The parties shall have all rights available to it by law or equity. Neither Contractor nor City will file a lawsuit against the other until not less than sixty (60) days after the mediation referred to herein has occurred, unless one or both parties is genuinely and reasonably concerned that any applicable statute of limitations is on the verge of expiring.

**16. GOVERNING LAW.** This Attachment and the construction and enforceability thereof shall be interpreted in accordance with the laws of the state where the Work is conducted.

**17. CONSENTS; APPROVALS; COOPERATION.** Whenever City's consent, approval, satisfaction or determination shall be required or permitted under this Attachment, and this Attachment does not expressly state that City may act in its sole discretion, such consent, approval, satisfaction or determination shall not be unreasonably withheld, qualified, conditioned or delayed, whether or not such a "reasonableness" standard is expressly stated in this Attachment. Whenever City's cooperation is required by Contractor in order to carry out Contractor's obligations hereunder, City agrees that it shall act in good faith and reasonably in so cooperating with Contractor and/or Contractor's designated representatives or assignees or subcontractors. City shall furnish decisions, information, and approvals required by this Attachment in a timely manner so as not to delay the performance of the M&V Services.

18. **FURTHER ASSURANCES.** The parties shall execute and deliver all documents and perform all further acts that may be reasonably necessary to effectuate the provisions of this Attachment.
19. **INDEPENDENT CONTRACTOR.** The relationship of the parties hereunder shall be that of independent contractors. Nothing in this Attachment shall be deemed to create a partnership, joint venture, fiduciary, or similar relationship between the parties.
20. **POWER AND AUTHORITY.** Each party represents and warrants to the other that (i) it has all requisite power and authority to execute and deliver this Attachment and perform its obligations hereunder, (ii) all corporate, board, body politic, or other approvals necessary for its execution, delivery, and performance of this Attachment have been or will be obtained, and (iii) this Attachment constitutes its legal, valid, and binding obligation.
21. **SEVERABILITY.** In the event that any clause, provision, or portion of this Attachment 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 Agreement unless the result would be manifestly inequitable or materially impair the benefits intended to inure to either party under this Attachment.
22. **HEADINGS.** The captions and titles in this Attachment are for convenience only and shall not affect the interpretation or meaning of this Attachment.
23. **COUNTERPARTS.** This Attachment may be executed in any number of counterparts, all of which when taken together shall constitute one single agreement between the parties.
24. **NOTICES.** All notices or communications related to this Attachment shall be in writing and shall be deemed served if and when sent by facsimile or mailed by certified or registered mail: to Johnson Controls, Inc. at the address listed on the first page of this Attachment, ATTN: Regional Solutions Manager, with a copy to Johnson Controls, Inc., ATTN: General Counsel – Building Efficiency Americas, 507 East Michigan Street, Milwaukee, Wisconsin, 53202; and to City at the address listed in Section 9.9 of the original Contract.
25. **REPORTS, RECORDS, DATA.** The Contractor shall submit to the City or City's designated representative such progress schedules, payrolls, reports, estimates, records and other data as the City or City's designated representative may request concerning work performed or to be performed under this contract.
26. **INSPECTION AND AUDIT.**

- 26.1 The authorized representative and agents of the City, State or Federal agencies, if applicable, shall be permitted to inspect all work, materials, payrolls, records of personnel, invoices of materials and other relevant data and records. Additionally, authorized representatives and agents of the City, State or Federal agencies, if applicable, shall be permitted to interview any personnel performing work on behalf of or in relation to the project, including but not limited to, workers on the job site.
- 26.2 The City of El Paso, its authorized representative, and/or the appropriate State or Federal agency reserve the right to audit the Contractor's records pertaining to this project to verify the accuracy and appropriateness of all pricing data, including data used to negotiate any Change Orders. The City of El Paso reserves the right to decrease the contract amount and/or payments made on this contract, if upon audit of the project's records, the audit discloses that false, misleading or inaccurate cost and/or pricing data has been provided.
- 26.3 Additionally, authorized representatives and agents of the City, State or Federal agencies, if applicable, shall be permitted to interview any personnel performing work on behalf of or in relation to the project, including but not limited to, field and office personnel.

**27. PROTECTION OF WORK AND PROPERTY**

- 27.1 In the event of temporary suspension of work, or during inclement weather, or whenever the City or City's designated representative shall direct, the Contractor will, and will cause his/her subcontractors, to protect carefully his/her and their work and materials against damage or injury from the weather or any other cause.
- 27.2 If, in the opinion of the City or City's designated representative, any work or materials shall have been damaged or injured by reason of failure on the part of the Contractor or any of his/her subcontractors to so protect his work or materials, all such work or materials shall be removed or replaced at the expense of the Contractor.

**28. PROTECTION OF WORK AND PROPERTY - EMERGENCY**

- 28.1 The Contractor shall at all times safely guard the City's property from injury or loss in connection with this contract. The Contractor shall at all times safely guard and protect his/her own work and that of adjacent property from damage.
- 28.2 In case of an emergency which threatens loss or injury of property and/or safety of life, the Contractor will be allowed to act, without previous instructions from the City or City's designated representative, in a diligent manner. However, the Contractor shall notify the City or City's designated representative immediately thereafter. Any claim for compensation by the Contractor due to such extra work shall be promptly submitted to the City or City's designated representative for approval.
- 28.3 Inclusion of this paragraph in the Attachment, as well as any notice which may be given by the City or the City's designated representative concerning omissions under this paragraph as the work progresses, are intended as reminders to the Contractor of his duty and shall not be construed as any assumption of duty to supervise safety precautions by the Contractor or any of his subcontractors.

**29: MUTUAL RESPONSIBILITY OF CONTRACTOR.** If, through acts of negligence on the part of the Contractor, any other Contractor or any subcontractor shall suffer loss or damage on the work, the Contractor agrees to settle with such other Contractor or subcontractor by agreement or arbitration if such other Contractor or subcontractor will so settle. If such other Contractor or subcontractor shall assert any claim against the City on account of any damage alleged to have been sustained, the City shall notify the Contractor, who shall indemnify and save harmless the City against any such claim.

**30. RIGHT OF CITY TO TERMINATE CONTRACT**

- 30.1 In the event that any of the provisions of this contract are violated by the Contractor, or by any of his/her subcontractors, the City may serve written notice to contain the reasons for such intention to terminate the contract, and unless within ten (10) work days after the serving of such notice upon the Contractor, such violation or delay shall cease and satisfactory arrangement of correction be made, the contract shall, upon the expiration of said ten (10) work days, cease and terminate. The City shall have the right to immediately terminate the Contract for default if the Contractor violates any local, state, or federal laws, rules or regulations that relate to the performance of this Attachment.
- 30.2 All direct and reasonable costs and charges incurred by the City, to complete the work under the contract, will be deducted from any monies due the Contractor or remaining on the contract. If such expenses exceed the sum which would have been payable under the contract, the Contractor shall be liable to the City for said amount.
- 30.3 The City may, at any time, at will and without cause, terminate any part of the work to be performed or all remaining work for any reason whatsoever by giving seven (7) days prior written notice to the Contractor. The City shall incur no liability to the Contractor by reason of such termination, except

that the Contractor shall be entitled to payment for work properly completed, and materials ordered in accordance with this contract prior to the effective date of the termination. In the event that only part of the work is terminated, the Contractor shall continue in full force and effect as to all remaining work to be completed.

**30.4 Default of Contract.** The following reasons shall constitute default of this contract:

30.4.1 If the Contractor fails to begin the work under the contract within the time specified herein, or

30.4.2 If the Contractor fails to perform the work with sufficient workmen and/or equipment and/or with insufficient materials to assure the prompt completion of said work, or

30.4.3 If the Contractor fails to perform the work in accordance with the contract requirements and/or refuses to remove and replace rejected materials or unacceptable work, or

30.4.3 If the Contractor discontinues the prosecution of the work without cause, or

30.4.4 If the Contractor fails to resume work that has been discontinued within a reasonable time after notice to do so, or

30.4.5 If the Contractor becomes insolvent or is declared bankrupt, or commits any act of bankruptcy or insolvency, or

30.4.6 If the Contractor allows any final judgment to remain unsatisfied for a period of 10 days, or

30.4.7 If the Contractor makes an assignment for the benefit of creditors, without obtaining the written consent of the City, or

30.4.8 If the Contractor fails to comply with contract requirements regarding minimum wage payments or EEO requirements, or

30.4.9 If the Contractor, for any other cause whatsoever, fails to carry on the work in an acceptable manner.

30.4.10 If the Contractor violates any local, state, or federal laws, rules or regulations that relate to the performance of this Attachment.

30.5 The City's representative will give notice in writing to the Contractor of such delay, neglect, or default.

30.6 If the Contractor, within a period of 10 days after such notice, does not proceed in accordance therewith, then the City will have full power and authority without violating the contract, to take the prosecution of the work out of the hands of the Contractor. The City may enter into an agreement for the completion of said contract according to the terms and provisions thereof, or use such other methods as in the opinion of the City will be required for the completion of said contract in an acceptable manner.

30.7 All direct and reasonable costs and charges incurred by the City to complete the work under the contract will be deducted from any monies due or remaining on the contract. If such expense exceeds the sum which would have been payable under the contract, then the Contractor shall be liable to the City for said amount.

**31. ASSIGNMENT.** The Contractor shall not assign the whole or any part of the contract, or any monies due or to become due hereunder without written consent of the City. In case the Contractor assigns all or any part of any monies due or to become due under this contract, the instrument of assignments shall contain a clause substantially to the effect that it is agreed that the right of the assignee in and to any monies due or

to become due to the Contractor shall be subject to prior claims of all persons, firms and corporations of services rendered or materials supplied for the performance of the work called for in this contract.

32. **ACCEPTANCE OF FINAL PAYMENT CONSTITUTES RELEASE.** The acceptance by the Contractor of final payment shall be, and shall operate as a release to the City of all claims and all liability to the Contractor for all things done or furnished in connection with this work and for every act and neglect of the City and others relating to or arising out of this work with the exceptions of outstanding claims or disputes for which the Contractor has provided the City prior notice. No payment, however, final or otherwise, shall operate to release the Contractor from any obligations under this contract.

*(Signature Page to follow)*

Attachment R: ENERGY SAVINGS PERFORMANCE CONTRACT

(Signature Page)

Johnson Controls, Inc.

Signature: Michael J. Crowe  
Printed Name: Michael J. Crowe  
Title: Regional V.P. + GM  
Date: 1/2/2013

City of El Paso

Signature: \_\_\_\_\_  
Printed Name: Joyce Wilson  
Title: City Manager  
Date: \_\_\_\_\_

Approved as to Content:

City of El Paso

Signature: Stuart Ed  
Printed Name: Stuart Ed  
Title: Director, General Services Department  
Date: \_\_\_\_\_

Approved as to Form:

City of El Paso

Signature: Elizabeth M. Ruhmann  
Printed Name: Elizabeth M. Ruhmann  
Title: Assistant City Attorney  
Date: \_\_\_\_\_

# Schedule R-1

JCI's Proposal for Expanded Measurement & Verification Services  
(consisting of 3 pages) follows on the next page



Johnson Controls, Inc.  
Systems and Services Division  
1320 Goodyear Drive  
Second Floor  
El Paso, Texas 79936  
Tel.: (915) 629-6090 (Office)  
(915) 629-6099 (Fax)

December 21, 2012

Mr. Stuart Ed  
City of El Paso  
Director – General Services Department  
1059 Lafayette Drive  
El Paso, TX 79907

Ref: Expanded Measurement & Verification Services  
Amendment to ESCO Professional Services Contract

Dear Stuart,

JCI is pleased to submit this proposal to the City of El Paso for annual expanded measurement & verification (M&V) services. These services would be executed as an amendment to the ESCO Professional Services Contract with Johnson Controls, Inc.

JCI has agreed to guarantee annual savings to pay for the cost of these services each year.

Services fee and guaranteed savings for the 3-year term

Year	Annual Fee	Guar. Savings
1	\$80,000	\$80,000
2	\$82,400	\$82,400
3	\$84,900	\$84,900

Expanded M&V services will include the following:

- Assist maintenance managers and staff in evaluating HVAC equipment to ensure equipment design meets SEER/EER (energy efficiency rating) standards for application.
- Monitor all energy management design as it relates to facilities design and construction activities.
- Compile utility budgets and energy conservation measure cost estimates based upon documented program needs.
- Provide reports as to the overall effectiveness of the energy management program.
- Analyze building utility bills to determine energy usage trends.

- Monitor the results of energy conservation projects.
- Conduct annual energy audits of City facilities and make recommendations for appropriate energy conservation measures.
- Follow up on and resolve utility billing inconsistencies with the building managers and utility companies.
- Initiate, manage and maintain an information system for City energy consumption.
- Assist the City with writing and submitting federal and state grant proposals to receive federal/state grant money to implement energy conservation projects.
- Monitor progress of adopted improvement plans, including auditing and analyzing consumption statistics to detect and recommend corrections for anomalous patterns and trends.
- Ensure the City is on the proper utility rate schedule and is receiving correct billing.
- Track energy use and savings in all City facilities adjusted for occupancy totals, hours of operation, severe weather variances and other factors which may have affected the savings for each facility.

Additional conditions associated with this proposal:

- City must continue to pay existing annual M&V service agreements.
- If requested by the energy consultant, City will furnish accurate and complete data concerning City budgets, operational expenditures, revenues, facility operating requirements, facility master plans, construction documents and equipment inventories.
- Energy Consultant will conduct services from a City facility office (provided by the City) or the JCI office.
- If City wants to continue the use of Utility Bill Tracking Software after Year 1, City will be required to pay an additional annual subscription fee beginning in 2014.
- City and JCI has the option to extend these services after Year 3.

Guaranteed annual savings associated with these services will be derived from any of the following:

- Any savings that exceed the guaranteed savings associated with other JCI ESPC installation contracts.
- Any savings or revenues identified by the energy consultant which impact the General Services annual budget.

We have enjoyed working with you and your staff and will continue to work diligently to identify energy conservation and renewable energy projects.

Regards,

A handwritten signature in black ink, appearing to read "Harry Romine". The signature is fluid and cursive, with the first name "Harry" and the last name "Romine" clearly distinguishable.

Harry Romine  
Account Manager  
Municipal Solutions Group