

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

DEPARTMENT: General Services – Facilities Division

AGENDA DATE: May 25, 2010

CONTACT PERSON/PHONE: Stuart Ed – Director, General Services (915) 621-6822
Carmen Arrieta-Candelaria – Chief Financial Officer (915) 541-4293

DISTRICT(S) AFFECTED: All

SUBJECT:

Approve award of 2010-085R, Energy Operational Savings Program, to Johnson Controls Inc. to act as the City's Energy Services Company ("ESCO"). The ESCO will develop, prepare and submit a Detailed Evaluation Study of City Property that will be used to further facilitate a major energy and operational savings program. After completion of the study the ESCO will partner with the City to submit Performance Contracting Project Agreements (PCPAs) to implement mutually-agreed upon improvement measures as funding opportunities are made available to the City and as approved by City Council.

BACKGROUND / DISCUSSION:

Upon approval of the study by the General Services Department, the ESCO will identify, engineer, design, install, maintain, monitor and facilitate a major energy and operational savings program that has involved Energy Conservation Measure (ECM) retrofits which address the following building components and applications: street lighting, traffic signals, facility lighting, space heating, ventilation, air-conditioning, energy management systems, environmental system controls, motors, domestic water heating, air distribution systems, renewable energy systems and water consumption systems. The City of El Paso anticipates additional major reductions in annual utility and operational costs through the implementation of its comprehensive energy efficiency program. The ESCO will provide a written guarantee of all utility and operational cost reductions, as well as increased revenue opportunities for the project. The estimated payback of the combined project would average a fifteen (15) year period. No project would be recommended for funding without ensuring that the savings (i.e. cash flows) are sufficient to cover the cost of the project over this payback period.

In addition, the ESCO will be responsible for identifying, compiling, preparing and submitting approved grant applications to funding sources. Grant funding would then be matched to those projects identified in the study. This process would be consistently applied during the five year period. Upon available funding, the program is targeted to identify approximately \$13 million in facility energy upgrade improvements over the next five years.

The City of El Paso intends to structure the program's implementation schedule and scope in a manner to minimize the program's financed capital needs and meet the Texas State Energy Conservation Office (SECO) LoanSTAR Program requirements, the federal American Recovery and Reinvestment Act requirements, and the provisions of the Energy Savings Performance Contracts for Local Government (Texas Local Government Code Chapter 302).

As subsequent grant funding is available, these projects will be brought forward to Council for approval. If debt financing through SECO or other financing mechanisms are recommended, these will also be brought forward to Council for authorization.

PRIOR COUNCIL ACTION:

Yes. City Council previously approved funding a similar agreement with Johnson Controls, Inc, RFQ 2007-073, on July 15, 2008 totaling \$14,767,054. The original contract was approved by City Council on August 28, 2007.

AMOUNT AND SOURCE OF FUNDING:

Available federal American Recovery and Reinvestment Act funding includes:

Facility Energy Program	502226-05590-37150067-GEECBG01	\$3,000,000
MSC building Solar System	502226-05590-37150067-GEECBG03	\$100,000

Additionally, future funding will be pursued in partnership with Johnson Controls through the Texas State Energy Conservation Office (SECO) LoanSTAR Program, the federal American Recovery and Reinvestment Act, or any other funding source supporting energy efficiency upgrades and improvements.

BOARD / COMMISSION ACTION:

Enter appropriate comments or N/A

N/A.

*****REQUIRED AUTHORIZATION*****

DEPARTMENT HEAD:

(If Department Head Summary Form is initiated by Purchasing, client department should also sign)

Information copy to appropriate Deputy City Manager

PROJECT FORM

DATE: May 12, 2010

PROJECT: Energy Operational Savings Program
SOLICITATION NO: 2010-085R
DEPARTMENT: General Services - Building Maintenance
FUNDING SOURCE: Facility Energy Program
REPRESENTATIVE DISTRICT(S): All

Handwritten initials

RECOMMENDATION: Vendor: Johnson Controls, Inc.
El Paso, TX
Item: All
Amount: \$350,000.00 total expenditures

The General Services and Financial Services Departments recommend award to the highest qualified Bidder to act as the City's Energy Services Company ("ESCO"). The ESCO will develop, prepare and submit a Detailed Evaluation Study of City Property that will be used to further facilitate a major energy and operational savings program.

Additionally, it is requested that the City Attorney's Office review and that the City Manager be authorized to execute any related contract documents and agreements necessary to effectuate this award.

BIDS SOLICITED: 3 (2 local)
BIDS RECEIVED: 5
"NO BID" RECEIVED: 0

TOTAL RECOMMENDED AWARD: \$350,000.00
Total Expenditures

COUNCIL APPROVED [] REJECTED [] MUNICIPAL CLERK _____

APPROVED: COUNCIL MEETING DATE: May 25, 2010

Carmen Arrieta-Candelaria
Chief Financial Officer
Financial Services Department, Purchasing Division



To: Carmen Arrieta-Candelaria, Chief Financial Officer
From: Stuart C. Ed, General Services Director
Subject: RFQ 2010-085R - Energy Operational Savings Program Evaluation
Committee Recommendation
Date: February 15, 2010

This memorandum summarizes the Energy Operational Savings Program Evaluation Committee's recommendation supporting RFQ 2010-085R received by the City on December 2, 2009.

The Energy Operational Savings Program Evaluation Committee met on January 12, 2010. The Evaluation Committee consisted of the following participants:

1. Stuart C. Ed, General Services Department Director;
2. Larry Nichols, General Services Deputy Director;
3. Marty Howell, City of El Paso Sustainability Program Manager, and;
4. Juan Cruz, City of El Paso Energy Coordinator

The Evaluation Committee evaluated proposals based upon the following criteria and point totals:

1. Business Qualifications – 30 total points – Each company's history in experience and qualification related to energy retrofit programs was evaluated, including its track record of working with local governments. The Committee generally quantified and qualified this criterion against the following point standards for demonstrated historic project and contract capacity:

- a. Performance guarantee contracts -
 - 12 points - \$4 billion or more;
 - 10 points - \$2 - \$3.99 billion;
 - 8 points - \$1 - \$1.99 billion;
 - 6 points - \$500 - \$999 million;
 - 4 points - \$100 - \$499 million;
 - 2 points - Less than \$100 million;
 - 0 points - No contract history.
- b. SECO projects -
 - 6 points - 20 projects or more;
 - 4 points - 10 - 19 projects;
 - 2 points - 5 - 9 projects;
 - 1 point - 1 - 4 projects;
 - 0 points - No SECO project history.

Mayor
John F. Cook

City Council

District 1
Ann Morgan Lilly

District 2
Susannah M. Byrd

District 3
Emma Acosta

District 4
Carl Robinson

District 5
Rachel Quintana

District 6
Eddie Holguin Jr.

District 7
Steve Ortega

District 8
Beto O'Rourke

City Manager
Joyce A. Wilson

General Services
Director
Stuart C. Ed

GENERAL SERVICES DEPARTMENT

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- c. Texas energy rebates -
 - 10 points - \$3 million or more;
 - 8 points - \$2 – 2.99 million;
 - 6 points - \$500,000 - \$1.9 million;
 - 4 points - \$100,000 - \$499,000;
 - 1-3 points - Any non-Texas rebates nationwide;
 - 0 points - No rebates received

- d. Local office for support -
 - 2 points - Local office present;
 - 0 points - No local office.

2. Personnel Qualifications – 20 points – Each company’s team participants (i.e., consultants, contractors, subcontractors, etc.) in the project were evaluated, including their resumes, descriptions of their specific responsibilities, directly-related experiences, and references. Submitted team staff that were internal to the submitting firm were favored by the Committee rather than submittals relying upon sub-contracted companies to perform core scope work functions. The Committee generally quantified and qualified this criterion against the following point standards for personnel qualifications and capacity:

- a. Adequate completely internal staff qualifications - 20 points;
- b. Adequate staffing relying upon sub-contractors - 15 points.

3. Project Experience Summary – 25 points – Each company was evaluated on its project experience with similar size and type of projects for the past five years. Demonstrated experience with energy and operational projects and the ability to identify, engineer, design, install, maintain, monitor, and manage a large-scale, comprehensive energy and operational efficiency program with guaranteed energy savings to the City of El Paso were favorably evaluated. The Committee generally quantified and qualified this criterion by awarding 5 points for each municipal performance guarantee project, up to a maximum of 25 points for 5 or more projects.

4. Project Management Plan – 15 points – Project management plans from previous projects indicating staff hierarchy and level, contractor oversight, procedures, equipment ordering and scheduling were evaluated. The Committee generally quantified and qualified this criterion by awarding 15 points for an adequate plan or 0 points if a plan was not submitted with the proposal.

5. Financial Capability – 10 points – Submitted annual reports or audited financial statements or equivalent for the three (3) most recent complete financial year periods were reviewed by the Committee. The Committee generally quantified and qualified this criterion by awarding 10 points for complete submittals or 0 points if no annual reports or audited financial statements were submitted with the proposal.

GENERAL SERVICES DEPARTMENT

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The committee's cumulative scoring is outlined in the chart below:

	<i>Total Points Per Rater Possible</i>	<i>Total Committee Points Possible</i>	<i>Total Committee Points</i>
<u>Trane</u>			
Business Qualifications	30	120	55
Personnel Qualifications	20	80	80
Project Experience	25	100	20
Project Management Plan	15	60	0
Financial Capability	10	40	40
Total Awarded	100	400	195
<u>Siemens</u>			
Business Qualifications	30	120	60
Personnel Qualifications	20	80	80
Project Experience	25	100	80
Project Management Plan	15	60	60
Financial Capability	10	40	40
Total Awarded	100	400	320
<u>Johnson Controls</u>			
Business Qualifications	30	120	100
Personnel Qualifications	20	80	80
Project Experience	25	100	100
Project Management Plan	15	60	60
Financial Capability	10	40	40
Total Awarded	100	400	380
<u>Chevron</u>			
Business Qualifications	30	120	32
Personnel Qualifications	20	80	80
Project Experience	25	100	60
Project Management Plan	15	60	60
Financial Capability	10	40	40
Total Awarded	100	400	272
<u>Schneider Electric</u>			
Business Qualifications	30	120	56
Personnel Qualifications	20	80	60
Project Experience	25	100	100
Project Management Plan	15	60	60
Financial Capability	10	40	40
Total Awarded	100	400	316

GENERAL SERVICES DEPARTMENT

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Committee scoring, from highest to lowest, is summarized in the table below:

	<i>Total Points Per Rater Possible</i>	<i>Total Committee Points Possible</i>	<i>Total Committee Points (400 point scale)</i>	<i>Total Committee Points (100 point scale)</i>
<u>Johnson Controls</u>				
Total Awarded	100	400	380	95
<u>Siemens</u>				
Total Awarded	100	400	320	80
<u>Schneider Electric</u>				
Total Awarded	100	400	316	79
<u>Chevron</u>				
Total Awarded	100	400	272	68
<u>Trane</u>				
Total Awarded	100	400	195	48.75

Accordingly, the Evaluation Committee recommends award of RFQ 2010-085R to Johnson Controls.

If you have any questions, please contact me at 621-6822.

GENERAL SERVICES DEPARTMENT

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consultant. The CONSULTANT shall perform the Services necessary for the development of the Study as outlined in **Attachment "A."**

2.2 The Services are scheduled to be performed during the period beginning the date of the City's approval, through the completion of the Study, which is estimated to take two hundred seventy (270) days from the date that notice to proceed is given in writing by the CITY (hereinafter "term period"). The City Manager may, at her sole discretion and without further authorization from City Council, approve an extension of the term for an additional thirty (30) days.

(A) Completion of the Study includes the possible submission and presentation of the final Study to CITY staff and to the CITY Council, the governing body of the CITY, and/or its designated reviewing body.

(B) The CONSULTANT shall complete the Services in accordance with the timelines and schedules outlined in **Attachment "B."** Time allotments for review by the CITY and other review committees or entities, if any, are included in the estimated time schedule, and if exceeded will increase the length of the project schedule accordingly.

(C) The CONSULTANT acknowledges that the CITY may apply for and utilize federal funds, including American Recovery and Reinvestment Act (ARRA) funds, for the Improvement Measures. The CONSULTANT represents to the CITY that it is knowledgeable about the requirements imposed by the U.S. Department of Energy (DOE) for ARRA funds, (or, if applicable, ARRA funds administered by other federal agency, as appropriate including, but not limited to, the Department of Transportation). The CONSULTANT has reviewed and understands the federal requirements as set forth in **Attachment C** regarding the ARRA funds (including, but not limited to, the flow through requirements set forth in the section entitled **SPECIAL PROVISIONS RELATING TO WORK FUNDED UNDER AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009**) and will perform the services under this Agreement in compliance thereto.

(D) The CONSULTANT further acknowledges that the CITY may use other federal funds available to it for Improvement Measures. The CONSULTANT agrees that it will further comply with the federal requirements set forth in **Attachment C, Addendum I** and will perform the services under this Agreement in compliance thereto.

(E) The CONSULTANT will comply with all regulations and requirements as may be promulgated by the federal, state or local governmental unit applicable to the services provided under this Agreement or the Improvement Measures. CONSULTANT hereby agrees to provide any and all documentation necessary to fulfill any and all grants (federal, state, or local) requirements pertaining hereto. CONSULTANT shall submit any requested reports, data, and information on the performance of this Agreement as may be required by DOE pursuant to 10 CFR 440.25, state law, or by the CITY.

(F) To the extent required by state or federal law or by the CITY, CONSULTANT shall execute and submit to the CITY the certifications required by federal law and those attached hereto in **Attachment D**, or comply with any such requirements or execute any forms that may be required during the term of this Agreement.

2.3 The CITY shall provide all available information to the CONSULTANT. All aspects of CONSULTANT's services shall be coordinated with the Director of the Department, who shall facilitate the successful completion of CONSULTANT's services.

2.4 Following the completion of the Study, the CONSULTANT shall submit its proposal to the CITY to implement the mutually agreed upon Energy Conservation Measure retrofits which address the following building components and applications: street lighting, traffic signals facility lighting, space heating, ventilation, air-conditioning, energy management systems, environmental system controls, motors, domestic water heating, air distribution systems, renewable energy systems, water consumption systems and any other facility or energy improvement measures and services that the City may designate (the "ECM Projects"). The CITY reserves the right to phase implementation of the ECM Projects. In order to ensure that the terms and conditions of this Agreement and those contained in the CITY's RFQ are consistent, the parties will execute an amendment to this Agreement to add the Services proposed for the implementation of the ECM Projects. Upon agreement between the CITY and the CONSULTANT regarding the ECM Projects to be implemented, the parties will agree to a schedule for the completion of such ECM Projects and the fees and projected budget for such measures.

3.0 CONSULTANT FEES AND PROJECT BUDGET

3.1 Payment to Consultant. The CITY shall pay to the CONSULTANT an amount not to exceed THREE HUNDRED FIFTY THOUSAND AND NO DOLLARS (\$350,000.00) for all professional services performed pursuant to this Contract, as further described in Price and Payment Schedule attached hereto as **Attachment "B."**

(A) Payment to the CONSULTANT shall be made as set forth in the Price and Payment Schedule which is attached hereto as **Attachment "B."** The CITY shall make payments upon presentation of the CONSULTANT's detailed invoice and completion of the Study as well as the CITY's written approval.

3.2 CONSULTANT's Services. The Professional Services to be provided by the CONSULTANT for this Contract are attached hereto as **Attachment "A."** It is understood and agreed by the parties that the CITY will not be obligated to pay for any professional services not contained in **Attachment "A,"** or elsewhere in this Contract and its attachments. Except as specifically set forth in this Contract and its attachments, all costs related to the completion of the professional services requested herein shall be borne by the CONSULTANT and not passed on to the CITY or otherwise paid by the CITY, unless a written amendment to this Contract is executed by both parties allowing for additional costs.

3.4 Payment by the City. CITY agrees to pay invoices for all professional services performed as soon as reasonably possible, but not later than **thirty (30) days** from receipt. Upon dispute, however, the CITY may, upon notice to the CONSULTANT, withhold payment to the CONSULTANT for the amount in dispute only, until such time as the exact amount of the disputed amount due to the CONSULTANT is determined.

4.0 TERMINATION. This Contract may be terminated as provided herein.

4.1 Termination by City. It is mutually understood and agreed by the CONSULTANT and the CITY that the CITY may terminate this Contract, in whole or in part for the convenience of the CITY, upon **thirty (30) consecutive calendar days** written notice.

(A) It is also understood and agreed that upon such notice of termination, the CONSULTANT shall cease the performance of services under this Contract. Upon such termination, the CONSULTANT shall provide one final invoice for all services completed and reimbursable expenses incurred prior to the CITY's notice of termination. In the event the CITY terminates this CONTRACT for cause, CONSULTANT shall be entitled to compensation for services performed and approved expenses incurred, prior to the termination. Nothing contained herein, or elsewhere in this Contract shall require the CITY to pay for any services that are not in compliance with the terms of this Contract and its attachments.

4.2 Termination by Either Party. It is further understood and agreed by the CONSULTANT and CITY that either party may terminate this Agreement in whole or in part. Such a termination may be made for failure of one party to substantially fulfill its contractual obligations, pursuant to this Agreement, and through no fault of the other party. No such termination shall be made, unless the other party being terminated is granted: a) written notice of intent to terminate enumerating the failures for which the termination is being sought; b) a minimum of **seven (7) consecutive calendar days** to cure such failures; and c) an opportunity for consultation with the terminating party prior to such termination. However, the CITY retains the right to immediately terminate this Agreement for default if the CONSULTANT violates any local, state, or federal laws, rules or regulations that relate to the performance of this Agreement. In the event of termination by the CITY pursuant to this subsection, the CITY may withhold payments to the CONSULTANT for the purpose of setoff until such time as the exact amount due the CITY from the CONSULTANT is determined.

4.3 Termination shall not be Construed as Release. Termination by either party shall not be construed as a release of any claims that the terminating party may be lawfully entitled to assert against the terminated party. Further, the terminated party shall not be relieved of any liability for damages sustained by the terminating party by virtue of any breach of this Agreement.

5.0 INDEMNIFICATION

5.1 INDEMNIFICATION. To the fullest extent permitted by law, CONSULTANT shall indemnify and hold harmless CITY, and CITY's officers, directors,

partners, agents, consultants, and employees from and against any claims, costs, losses, and damages (including but not limited to all fees and charges of engineers, architects, attorneys, and other professionals, and all court, arbitration, or other dispute resolution costs) arising out of or relating to the Project, provided that any such claim, cost, loss, or damage is attributable to bodily injury, sickness, disease, or death, or to injury to or destruction of tangible property (other than the Work itself), but only to the extent caused by any negligent act or omission of CONSULTANT or CONSULTANT's officers, directors, partners, agents, consultants or employees in performance of the services. This indemnification provision is subject to and limited by the provisions agreed to by CITY and Consultant, as noted below.

To the extent allowed by state law, the CITY will be responsible for its own actions.

5.2 CONSULTANT'S LIABILITY LIMITED TO AMOUNT OF INSURANCE REQUIREMENTS. CONSULTANT shall procure and maintain insurance as required by and set forth in the terms and conditions of this Agreement. Notwithstanding any other provision of this Agreement, and to the fullest extent permitted by law, the total liability, in the aggregate, of CONSULTANT and CONSULTANT's officers, directors, partners, employees, agents, and consultants (hereafter referred to collectively as "Consultant"), to CITY and anyone claiming by through, or under CITY for any and all claims, losses, costs, or damages, whatsoever arising out of, resulting from or in any way related to the Project or the Agreement from any cause or causes, including but not limited to the negligence, professional errors or omissions, strict liability or breach of contract, or warranty express or implied of CONSULTANT (hereafter "CITY's Claims"), shall not exceed an amount in excess of its primary general comprehensive policy limits. Neither CONSULTANT nor the CITY will be responsible to the other for any special, indirect, or consequential damages arising in any manner from the work or services. If no such insurance coverage is provided with respect to CITY's Claims, then the total liability, in the aggregate, of CONSULTANT to CITY and anyone claiming by, through, or under CITY for any and all such uninsured CITY's claims shall not exceed \$250,000.00 per person or \$500,000.00 per incident with property damage liability limited to \$100,000.00 per incident, \$1,000,000 in the aggregate.

6.0 INSURANCE

6.1 INSURANCE. The CONSULTANT shall not commence work under this Agreement until the CONSULTANT has obtained sufficient insurance as required herein, and such insurance has been approved by the CITY. The CONSULTANT shall maintain the required insurance throughout the term of this Agreement. Failure to maintain said insurance shall be considered a material breach of this Agreement.

6.2 WORKERS' COMPENSATION INSURANCE. The CONSULTANT shall procure and shall maintain during the life of this Agreement, Workers' Compensation Insurance as required by applicable Texas law for all of the CONSULTANT's employees to be engaged in work under this Agreement.

6.3 COMMERCIAL LIABILITY, PROPERTY DAMAGE LIABILITY AND AUTOMOBILE LIABILITY INSURANCE. The CONSULTANT shall procure and shall maintain during the life of this Agreement such Commercial General Liability, Property Damage Liability and Automobile Liability Insurance as shall protect the CONSULTANT and the CONSULTANT's employees performing work covered by this Agreement from claims for damages for personal injury, including accidental death, as well as from claims for property damages, which may arise from operations under this contract, whether such operations be by the CONSULTANT or by anyone directly or indirectly employed by the Consultant. The minimum limits of liability and coverages shall be as follows:

a) **COMMERCIAL GENERAL LIABILITY**

Personal Injury or Death

\$500,000.00 for one person or occurrence

\$1,000,000.00 for two or more persons or occurrences

Property Damage

\$500,000.00 per occurrence

General Aggregate

\$1,000,000.00

b) **AUTOMOBILE LIABILITY**

Combined Single Limit

\$1,000,000.00 per accident

6.4 PROFESSIONAL LIABILITY INSURANCE. The CONSULTANT shall procure and shall maintain, at the CONSULTANT's sole expense, Professional Liability Insurance for the benefit of the CITY to cover the errors and omissions of the Consultant, its principals or officers, agents or employees in the performance of this Agreement with a limit of ONE MILLION AND 00/100 DOLLARS (\$1,000,000.00) on a claims made basis.

6.5 CITY AS ADDITIONAL INSURED. The CITY shall be named as an Additional Named Insured on all of the CONSULTANT's Commercial General Liability and Automobile Liable Insurance Policies with respect to liability arising out of operations performed by or on behalf of CONSULTANT, but only to the extent of damages directly caused by the negligence of CONSULTANT.

6.6 PROOF OF INSURANCE. The CONSULTANT shall furnish the City Engineer with certificates showing the type of insurance coverages, limits on each insurance policy, class of operations covered under each insurance policy, effective dates and expiration dates of policies, insurance companies providing the insurance coverages, name of agent/broker and include confirmation of any endorsement(s) required in this agreement.

6.7 GENERAL INSURANCE PROVISIONS. All certificates required herein shall be attached hereto and incorporated for all purposes as **Attachment "E"**. All certificates shall

also include the name of the project on the corresponding insurance certificate. Further, each certificate shall contain the following statement:

“The insurance covered by this certificate will not be canceled, except after **thirty (30) consecutive calendar days** written notice of intent to cancel said insurance has been provided to the City of El Paso.”

7.0 INDEPENDENT CONTRACTOR

7.1 The CONSULTANT is an independent contractor. Except as may be expressly and unambiguously provided in this Contract, no partnership or joint venture is intended to be created by this Contract, nor any principal-agent or employer-employee relationship between the parties or any of their officers, employees, agents or sub-consultants.

(A) As an independent contractor, the CONSULTANT understands and agrees that it will be responsible for its respective acts or omissions, and the CITY shall in no way be responsible as an employer to the CONSULTANT's officers, employees, agents, representatives or subcontractors who perform any service in connection with this Contract.

7.2 The CONSULTANT shall not receive any compensation or benefits from the CITY, other than as expressly set forth in this Contract.

7.3 The CONSULTANT does not have, and will not attempt to assert, the authority to make commitments for or to bind the CITY to any obligation other than the obligations set forth in this Contract.

8.0 REPRESENTATIONS BY THE PARTIES

8.1 The CONSULTANT represents and agrees to the following:

(A) That CONSULTANT shall comply with all applicable federal, state and local governmental laws, rules, regulations and all provisions of the City of El Paso Charter and Code of Ordinances, now existing or as may be amended, in the performance of its duties under this Contract.

(B) The CONSULTANT shall obtain and pay for all licenses, permits and certificates required by any applicable statute, ordinance, rule or regulation of any regulatory body having jurisdiction over the conduct of its operations that are applicable to the services provided hereunder.

(C) The CONSULTANT warrants that it is duly authorized and licensed to perform its duties hereunder in each jurisdiction in which it will act. The CONSULTANT further warrants that its employees, agents and sub-consultants shall maintain all required profession licenses during the Contract Term. If the CONSULTANT receives notice from a licensing authority of a suspension or revocation of a license of CONSULTANT's employee(s), agent(s) or subcontractor(s), CONSULTANT shall immediately remove such employee, agent or

subcontractor from performing any further services under this Contract until such license is reinstated and in good standing. If the CONSULTANT fails to maintain such licenses or fails to remove any employee, agent or sub-consultant who performs services under this contract whose license has expired or been revoked or suspended, the CITY shall be entitled, in its sole discretion, to immediately terminate this Contract upon notice to CONSULTANT.

(D) The CONSULTANT warrants that the Services, and those of his subcontractor(s) will be performed in a professional manner in accordance with the applicable professional standards. The CONSULTANT gives no warranty, express or implied, as to the results of any recommendations made in any reports provided to the CITY under this Contract. The CONSULTANT will not be liable for any damages that result or are alleged to result from any recommendations or reports provided to the CITY under this Contract.

(E) The CONSULTANT warrants that no person or selling agency has been employed or retained to solicit or secure this contract upon an agreement or understanding for commission, percentage, brokerage, or contingent fee excepting bona fide employees of bona fide established commercial or selling agencies maintained by the CONSULTANT for the purpose of securing business. For breach or violation of this warranty the CITY shall have the right in addition to any other right or rights to cancel this contract without liability and to deduct from the Contract price, or otherwise recover the full amount of such commission, percentage, brokerage or contingent fee.

8.2 Force Majeure. If, by reason of Force Majeure, either party hereto will be rendered unable wholly or in part to carry out its obligations under this Contract then such party will give notice and full particulars of such Force Majeure in writing to the other party within a reasonable time after occurrence of the event or cause relied upon, and the obligation of the party giving notice, so far as it is affected by such Force Majeure, will be suspended for only thirty (30) days during the continuance of the inability then claimed, except as hereinafter provided, but for no longer period, and such party will try to remove or overcome such inability with all reasonable dispatch.

The term Force Majeure as employed herein, will mean acts of God, strikes, lockouts, or other industrial disturbances, acts of public enemies, orders of any kind of the government of the United States or the State of Texas or any civil or military authority, insurrections, riots, epidemics, landslides, lightning, earthquake, fires, hurricanes, storms, floods, washouts, droughts, arrests, restraint of government and people, civil disturbances, explosions, breakage or accidents to machinery, pipelines or canals. It is understood and agreed that the settlement of strikes and lockouts will be entirely within the discretion of the party having the difficulty, and that the above requirement that any Force Majeure will be remedied with all reasonable dispatch will not require the settlement of strikes and lockouts by acceding to the demands of the opposing party or parties when such settlement is unfavorable in the judgement of the party having the difficulty. If a party is unable to comply with the provisions of this contract by reason of Force Majeure for a period beyond thirty (30) days, the affected party shall be excused by further performance under this contract.

8.3 Cooperation Of City. The CITY will cooperate with the CONSULTANT in providing information relating to the CONSULTANT's scope of services and access to facilities.

CITY is responsible to provide CONSULTANT, its subcontractors and/or its agents reasonable and safe access to all facilities and properties that are in the CITY's control which are subject to the work and Services contained in this Agreement. CITY further agrees to assist CONSULTANT, its subcontractors and/or its agents to gain access to facilities and properties that are not controlled by the CITY which are subject to the work and services contained in this Contract.

If CONSULTANT is delayed in the commencement or completion of the work and/or services by failure by the CITY to cooperate with CONSULTANT in the timely completion of the work, then CONSULTANT shall provide written notice to the CITY of the existence, extent of, and reason for such delays. An equitable adjustment in the performance schedule shall be made as a result.

8.4 Taxes, Permits, And Fees. CONSULTANT shall be responsible for obtaining all permits and related permit fees associated with the work and services. CONSULTANT shall pay sales, consumer, use, and other similar taxes and shall secure and pay for the building permit and other permits and governmental fees, licenses, and inspections necessary for proper execution of its services under this Contract. The CITY shall be responsible for securing any necessary approvals, easements, assessments, where applicable. The parties acknowledge that the CITY is tax-exempt and not subject to real estate and personal property taxes. CONSULTANT makes no representations regarding the tax implications or the CITY's accounting treatment of this CONTRACT.

9.0 GENERAL PROVISIONS

9.1 CONSULTANT's Quality of Work. The CITY's review of any documents prepared by the CONSULTANT is only general in nature and its option to approve and accept the work in no way relieves the CONSULTANT of responsibility for any specific deficiencies in its professional services. The CONSULTANT's professional services shall be performed as expeditiously as is consistent with professional skill and care as well as the orderly progress of the Study and in accordance with the time periods established in **Attachment "B,"** and shall be adjusted, if necessary, as the Study proceeds. The identified time limits shall not, except for reasonable cause, be exceeded by the CONSULTANT. The professional services provided by the CONSULTANT under this Contract shall be performed in a manner consistent with that level of care and skill ordinarily exercised by members of the profession currently practicing under similar circumstances.

These warranties are in lieu of all warranties, express or implied.

9.2 Confidential Work. The CONSULTANT recognizes that all materials to be prepared and all data received in connection with this Contract by the CONSULTANT shall be kept in strictest confidence. The CONSULTANT shall not divulge such confidential information except as approved in writing by the CITY or as otherwise required by law until publication of the Study. The CONSULTANT shall establish a method to secure the confidentiality of records or information that the CONSULTANT may have access to in accordance with

the applicable federal, state, and local laws and regulations. This provision shall not be construed as limiting the CITY's or its authorized representatives', right of access to records or other information under this Contract. If the CONSULTANT receives inquiries regarding documents within its possession pursuant to this Contract, the CONSULTANT shall immediately forward such request to the City Attorney's office for disposition.

9.3 Discrimination Prohibited.

(A) No person in the United States shall, on the grounds of race, creed, color, national origin, (including immigration status where an alien holds proper work authorization), religion, sex, age, or disability be excluded from participation in, be denied the benefits of, or be otherwise subjected to segregation or discrimination in any way, shape or form in employment or under projects or activities funded in whole or in part with funds made available to CONSULTANT pursuant to this Contract, as set forth in Title VI of the Civil Rights Act of 1964 (42 U.S.C. Section 2000d) and implementing regulations at Title 24 CFR Part 1; Age Discrimination Act of 1975 (42 U.S.C. Sections 6101-07) and implementing regulations at Title 24 CFR Part 146; Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. Section 794); implementing regulations at Title 24 CFR Part 8 and Title 1 of the Americans with Disabilities Act of 1990 (ADA) and implementing regulations at Title 28 CFR Part 35.

(B) Furthermore, CONSULTANT shall comply with all the equal opportunity requirements in Title 24 CFR Section 5.105; the requirements of Executive Order 11246 (Equal Opportunity) and the implementing regulations at Title 41 CFR Chapter 60; and the requirements attached to this Agreement and incorporated by reference as **Attachment C**.

(C) CONSULTANT must file the Assurance required under City Ordinance 9779, prohibiting discrimination against disabled persons. Failure to do so in any manner which impairs the quality of performance hereunder, or affects the administration of the funds provided hereunder, shall constitute a breach of this Agreement.

9.3 Inspections. The CITY shall have the right to perform, or cause to be performed, (1) inspections of the books and records of the CONSULTANT related to the performance in creation of the Study, and (2) inspections of all places where work is undertaken in connection with this Contract. The CONSULTANT shall be required to keep such books and records available for such purpose for **at least five (5) years** after its performance under this Contract ceases. Nothing in this provision shall affect the time for bringing a cause of action nor the applicable statute of limitations.

9.4 Ownership. The Study generated by CONSULTANT as a result of its activity under this Contract shall remain at all times the property of the CITY. The data stored in the computer database shall also remain the property of the CITY. The CONSULTANT may use the Study prepared as an example of work produced.

9.5 Assignment. Neither party may assign its rights or obligations under this Contract, including but not limited to (a) any interest in the proceeds of the contract, (b) any proceeds of

claims arising from the contract or (c) any claims or causes of action arising out of the project, without the prior written consent of the other party hereto. Any attempted assignment or delegation by either party shall be wholly void and totally ineffective for all purposes unless made in conformity with this paragraph.

9.6 Subcontractors. The CONSULTANT may subcontract with other competent entities to provide services required to be performed under this Contract. Any work or services approved for subcontracting hereunder, however shall be contracted only by written contract and agreement, and unless specific waiver is granted in writing by the City, shall be subject by its terms to each and every provision of this Contract. Compliance by subcontracts with this Contract shall be CONSULTANT's responsibility. CONSULTANT shall submit a list, identifying the subcontractors who will perform services under this Contract, at least ten (10) business days prior to the date that the subcontractors render any services under this Contract. However, all subcontractors must be accepted and approved by the City in writing, and such consent shall not be unreasonably withheld.

Despite City approval of a subcontract or subcontractor, the City shall in no event be obligated to any third party, including any subcontract of the CONSULTANT, for performance of work or services, nor shall City funds ever be used for payment of work or services performed prior to the date of Contract execution or extending beyond the expiration date of this Contract.

9.7 Right of Assurance. Whenever one party to this Contract in good faith has reason to question the other party's intent to perform, it may demand that the other party give written assurance of its intent to perform. In the event that a demand is made and no assurance is given within five (5) calendar days, the demanding party may treat this failure as an anticipatory repudiation of the Contract.

9.8 Survival. Each party shall remain obligated to the other under all clauses of this Contract that expressly or by their nature extend beyond the expiration or termination of this Contract, including but not limited to the Indemnification provisions hereof.

9.8 Amendment and Waiver. The parties may amend this Contract at any time by mutual consent. Unless otherwise provided herein, this Contract may be amended only by written instrument duly executed on behalf of the CITY (by authority by the City Council) and CONSULTANT. No claim or right arising out of a breach of this contract can be discharged in whole or in part by a waiver or renunciation of the claim or right unless the waiver or renunciation is supported by consideration and is in writing signed by the aggrieved party.

9.9 Complete Agreement. This Contract, together with the Attachment(s) attached hereto, constitutes the entire agreement between the parties relating to the terms and conditions of the Contract. The parties expressly acknowledge and warrant that there exists no other written or oral understanding, agreements or assurances with respect to such matters except as are set forth herein. Unless expressly stated, this Contract confers no rights on any person(s) or business entity(s) that is not a party hereto. This Contract shall not be construed against or unfavorably to any party because of such party's involvement in the preparation or drafting of this Contract.

9.10 Notices. All notices required or permitted hereunder shall be in writing and shall be deemed delivered when actually received via United States Postal Service post office or certified mail, return receipt requested addressed to the respective other party at the address prescribed in the preamble of this Contract or at such other address as the receiving party may have theretofore prescribed by written notice to the sending party.

The initial addresses of the parties, which one party may change by giving written notice of its changed address to the other party, are as follows:

CITY: City of El Paso
Attention: Mayor's Office
Two Civic Center Plaza, 10th Floor
El Paso, Texas 79901-1196

COPY TO: General Services Department
Two Civic Center Plaza, 6th Floor
El Paso, Texas 79901-1196

CONSULTANT: Johnson Controls, Inc.
3021 W Bend Drive
Irving, TX 75063

COPY TO: Johnson Controls, Inc.
507 E. Michigan Street
Milwaukee, Wisconsin 53202

9.11 Governing Law. This Contract shall be construed and interpreted in accordance with the laws of the State of Texas, along with any applicable provisions of the federal law, the City Charter and/or any ordinance of the City of El Paso.

9.12 Severability. All agreements and covenants contained in this Contract are severable. Should any term or provision of this agreement be declared invalid by a court of competent jurisdiction, the parties intend that all other terms and provisions of this agreement should be valid and binding and have full force and effect as if the invalid portion had not been included

9.13 Venue. For the purpose of determining place of this Contract and the law governing the same, this Contract is entered into in the City and County of El Paso, the State of Texas, and shall be governed by the laws of the State of Texas. Venue shall be in the County of El Paso, State of Texas.

Each person signing below represents that he or she has read this Contract in its entirety (including any and all Exhibits); understands its terms; and agrees on behalf of such party that such party will be bound by those terms.

(Signatures On Following Page)

STATE OF TEXAS)
)
)
COUNTY OF EL PASO)

**PROFESSIONAL SERVICES CONTRACT
BETWEEN CITY OF EL PASO AND
JOHNSON CONTROLS, INC.**

Signature Page

Executed this _____ day of _____, 2010.

CITY OF EL PASO

Joyce Wilson
City Manager

JOHNSON CONTROLS, INC.

By: Michael Crowe
Name Printed: Michael Crowe
Title: Regional VP & GM Solutions Mgr

APPROVED AS TO FORM:

Bertha A. Ontiveros
Bertha A. Ontiveros
Assistant City Attorney

APPROVED AS TO CONTENT:

Stuart Ed
Stuart Ed, Director
General Services Department

ATTACHMENT "A" PROJECT SCOPE

City of El Paso
2 Civic Center Plaza
El Paso, Texas 79901

AND

Johnson Controls, Inc.
1320 Goodyear, 2nd Floor
El Paso, TX 79936

1. Detailed Evaluation Study

CONSULTANT agrees to perform a Detailed Evaluation Study (Study) of City Property. CONSULTANT will analyze the operational expenditures and characteristics of the existing and new City Property and identify improvement measures and operating and maintenance services that can be provided by CONSULTANT to improve the infrastructure, reduce operating costs and increase revenues. CITY agrees to provide its complete cooperation in the conduct and completion of the Study. CONSULTANT will provide to the CITY written documentation, which will include:

- a) A summary/description of improvement measures that CONSULTANT proposes to install;
- b) A summary/description of the reduced operating costs, cost avoidance and increased revenues as a result of installing and/or implementing the recommended improvement measures and services; and
- c) An investment grade detailed audit report

CONSULTANT will investigate the improvement measures and services identified in Table 1 for all City Property as part of the Study. CITY may decide to implement the Project in multiple phases which may require the CONSULTANT to refine the Study in multiple phases. Negotiation may be required for major changes in the initial Study regarding costs associated with the investigation of additional measures and services for improvements.

2. Records and Data

During the Study, CITY will furnish to CONSULTANT upon its request, accurate and complete data concerning CITY budgets, operational expenditures, revenues, facility operating requirements, facility master plans, construction documents and equipment inventories, including but not limited to the following:

- Occupancy and usage information;
- Actual utility bills supplied by the utility and other relevant utility records (3 years);
- Annual expenditures for operating the facilities (3 years);
- Descriptions of relevant operational or maintenance procedures utilized at the facility;
- Existing facility construction documents and specifications;
- Existing equipment inventories, such as, street lights, traffic lights and HVAC equipment;
- Information for any future scheduled changes in a building structure or its heating, cooling, lighting, or other systems;
- Copies of representative current tenant leases, if any; and
- Prior efficiency audits or studies of any facilities, if any.

3. Preparation of Performance Contracting Project Agreement

After the completion of the Study described under Paragraph 1 of this Agreement, CONSULTANT will partner with the CITY to refine the Study as required to submit the necessary documents responsive to Notice of Funding Availability or other funding announcements from various funding sources as they are made available to CITY. CONSULTANT will prepare and submit to the CITY Performance Contracting Project Agreements (PCPAs) to implement the mutually-agreed upon improvement measures and services on a project-by-project basis as successfully-awarded funding opportunities are made available to the CITY. PCPAs shall be prepared on standard CONSULTANT contract forms, copies of which will be made available to CITY upon request.

4. Preparation of Performance Contracting Project Agreement

CONSULTANT will investigate the following potential Improvement Measures listed in Table 1 for all City Property during the Study outlined in this Agreement.

Table 1 – Improvement Measures

Facility Improvement Measures
HVAC Improvements
Lighting Improvements
Building Envelope Improvements
Water Conservation
Street & Traffic Light Improvements
Utility Rate Improvements
Renewable Energy Opportunities
O&M Improvements

ATTACHMENT "B"
Price and Payment Schedule

CITY agrees to pay to Consultant the not to exceed sum of \$350,000 within 60 days after the delivery to the CITY of the documentation described under paragraph 1 of this Agreement. However, CITY will have no obligation to pay this amount if:

1. Consultant and the CITY enter into an initial PCPA within 60 days after the delivery to the CITY of the documentation described under paragraph 1 of this Agreement totaling no less than \$3 million. Total costs for the Study will be transferred to the cost of subsequent PCPA's incrementally over the next 5 years and be subject to the payment terms outlined in each subsequent PCPA.
2. Project benefits may not offset the cost of the Project with a payback period of 15 years or less. If Project is fully or partially funded through grant funds (no cost to CITY), CITY has the option to extend the payback period to 20 years or less as allowed by Texas Local Government Code 302. Project benefits shall include, but not be limited to, utility cost avoidance, negotiated utility rate reductions, operating and maintenance cost avoidance, capital cost avoidance and utility revenue increases.

COMMITTEE SCORE SHEET

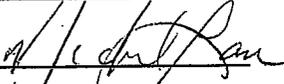
SOLICITATION NO: 2010-085R

SOLICITATION TITLE: ENERGY OPERATIONAL SAVINGS PROGRAM
 GENERAL SERVICES DEPARTMENT - BUILDING MAINTENANCE DIVISION

	Chevron Energy Solutions Company Irving, TX	Johnson Controls, Inc. El Paso, TX	Schneider Electric Buildings Americas Inc. Location	Siemens Industry, Inc. Location	Trane US, Inc. Location
BUSINESS QUALIFICATIONS 30 points	8	25	14	15	13.75
PERSONNEL QUALIFICATIONS 20 points	20	20	15	20	20
PROJECT EXPERIENCE SUMMARY 25 points	15	25	25	20	5
PROJECT MANAGEMENT PLAN 15 points	15	15	15	15	0
FINANCIAL CAPABILITY 10 points	10	10	10	10	10
GRAND TOTAL 100 points (100 points/percent max)	68	95	79	80	48.75

CITY OF EL PASO REQUEST FOR PROPOSALS (RFQ)

TITLE: ENERGY OPERATIONAL SAVINGS PROGRAM DATE: DECEMBER 2, 2009	RFQ: 2010-085R DEPARTMENT: GENERAL SERVICES - BUILDING MAINTENANCE
CHEVRON ENERGY SOLUTIONS COMPANY, A DIVISION OF CHEVRON U.S.A., INC.	IRVING, TX
JOHNSON CONTROLS, INC.	EL PASO, TX
SCHNEIDER ELECTRIC BUILDINGS AMERICAS INC.	CARROLLTON, TX
SIEMENS INDUSTRY, INC. - BUILDING TECHNOLOGIES DIVISION	HOUSTON, TX
TRANE US INC.	EL PASO, TX
RFQs SOLICITED: 3	RFQs RECEIVED: 5
RFQs LOCAL: 2	NO RFQs: 0

APPROVED: 

DATE: 12/13/09

CONTROL AND EQUIPMENT CO
2001 E YANDELL
EL PASO, TX 79903

JOHNSTON CONTROLS
1320 GOODYEAR DRIVE
EL PASO, TX 799

SIEMANS BUILDING TECHNOLOGIES
ATTN: CHAD NOBLES
8850 FALLBROOK
HOUSTON, TX 77064

consultant. The CONSULTANT shall perform the Services necessary for the development of the Study as outlined in **Attachment “A.”**

2.2 The Services are scheduled to be performed during the period beginning the date of the City’s approval , through the completion of the Study, which is estimated to take two hundred seventy (270) days from the date that notice to proceed is given in writing by the CITY (hereinafter “term period”). The City Manager may, at her sole discretion and without further authorization from City Council, approve an extension of the term for an additional thirty (30) days.

(A) Completion of the Study includes the possible submission and presentation of the final Study to CITY staff and to the CITY Council, the governing body of the CITY, and/or its designated reviewing body.

(B) The CONSULTANT shall complete the Services in accordance with the timelines and schedules outlined in **Attachment “B.”** Time allotments for review by the CITY and other review committees or entities, if any, are included in the estimated time schedule, and if exceeded will increase the length of the project schedule accordingly.

(C) The CONSULTANT acknowledges that the CITY may apply for and utilize federal funds, including American Recovery and Reinvestment Act (ARRA) funds, for the Improvement Measures. The CONSULTANT represents to the CITY that it is knowledgeable about the requirements imposed by the U.S. Department of Energy (DOE) for ARRA funds, (or, if applicable, ARRA funds administered by other federal agency, as appropriate including, but not limited to, the Department of Transportation). The CONSULTANT has reviewed and understands the federal requirements as set forth in **Attachment C** regarding the ARRA funds (including, but not limited to, the flow through requirements set forth in the section entitled SPECIAL PROVISIONS RELATING TO WORK FUNDED UNDER AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009) and will perform the services under this Agreement in compliance thereto.

(D) The CONSULTANT further acknowledges that the CITY may use other federal funds available to it for Improvement Measures. The CONSULTANT agrees that it will further comply with the federal requirements set forth in **Attachment C, Addendum I** and will perform the services under this Agreement in compliance thereto.

(E) The CONSULTANT will comply with all regulations and requirements as may be promulgated by the federal, state or local governmental unit applicable to the services provided under this Agreement or the Improvement Measures. CONSULTANT hereby agrees to provide any and all documentation necessary to fulfill any and all grants (federal, state, or local) requirements pertaining hereto. CONSULTANT shall submit any requested reports, data, and information on the performance of this Agreement as may be required by DOE pursuant to 10 CFR 440.25, state law, or by the CITY.

(F) To the extent required by state or federal law or by the CITY, CONSULTANT shall execute and submit to the CITY the certifications required by federal law and those attached hereto in **Attachment D**, or comply with any such requirements or execute any forms that may be required during the term of this Agreement.

2.3 The CITY shall provide all available information to the CONSULTANT. All aspects of CONSULTANT's services shall be coordinated with the Director of the Department, who shall facilitate the successful completion of CONSULTANT's services.

2.4 Following the completion of the Study, the CONSULTANT shall submit its proposal to the CITY to implement the mutually agreed upon Energy Conservation Measure retrofits which address the following building components and applications: street lighting, traffic signals facility lighting, space heating, ventilation, air-conditioning, energy management systems, environmental system controls, motors, domestic water heating, air distribution systems, renewable energy systems, water consumption systems and any other facility or energy improvement measures and services that the City may designate (the "ECM Projects"). The CITY reserves the right to phase implementation of the ECM Projects. In order to ensure that the terms and conditions of this Agreement and those contained in the CITY's RFQ are consistent, the parties will execute an amendment to this Agreement to add the Services proposed for the implementation of the ECM Projects. Upon agreement between the CITY and the CONSULTANT regarding the ECM Projects to be implemented, the parties will agree to a schedule for the completion of such ECM Projects and the fees and projected budget for such measures.

3.0 CONSULTANT FEES AND PROJECT BUDGET

3.1 Payment to Consultant. The CITY shall pay to the CONSULTANT an amount not to exceed THREE HUNDRED FIFTY THOUSAND AND NO DOLLARS (\$350,000.00) for all professional services performed pursuant to this Contract, as further described in Price and Payment Schedule attached hereto as **Attachment "B."**

(A) Payment to the CONSULTANT shall be made as set forth in the Price and Payment Schedule which is attached hereto as **Attachment "B."** The CITY shall make payments upon presentation of the CONSULTANT's detailed invoice and completion of the Study as well as the CITY's written approval.

3.2 CONSULTANT's Services. The Professional Services to be provided by the CONSULTANT for this Contract are attached hereto as **Attachment "A."** It is understood and agreed by the parties that the CITY will not be obligated to pay for any professional services not contained in **Attachment "A,"** or elsewhere in this Contract and its attachments. Except as specifically set forth in this Contract and its attachments, all costs related to the completion of the professional services requested herein shall be borne by the CONSULTANT and not passed on to the CITY or otherwise paid by the CITY, unless a written amendment to this Contract is executed by both parties allowing for additional costs.

3.4 Payment by the City. CITY agrees to pay invoices for all professional services performed as soon as reasonably possible, but not later than **thirty (30) days** from receipt. Upon dispute, however, the CITY may, upon notice to the CONSULTANT, withhold payment to the CONSULTANT for the amount in dispute only, until such time as the exact amount of the disputed amount due to the CONSULTANT is determined.

4.0 TERMINATION. This Contract may be terminated as provided herein.

4.1 Termination by City. It is mutually understood and agreed by the CONSULTANT and the CITY that the CITY may terminate this Contract, in whole or in part for the convenience of the CITY, upon **thirty (30) consecutive calendar days** written notice.

(A) It is also understood and agreed that upon such notice of termination, the CONSULTANT shall cease the performance of services under this Contract. Upon such termination, the CONSULTANT shall provide one final invoice for all services completed and reimbursable expenses incurred prior to the CITY's notice of termination. In the event the CITY terminates this CONTRACT for cause, CONSULTANT shall be entitled to compensation for services performed and approved expenses incurred, prior to the termination. Nothing contained herein, or elsewhere in this Contract shall require the CITY to pay for any services that are not in compliance with the terms of this Contract and its attachments.

4.2 Termination by Either Party. It is further understood and agreed by the CONSULTANT and CITY that either party may terminate this Agreement in whole or in part. Such a termination may be made for failure of one party to substantially fulfill its contractual obligations, pursuant to this Agreement, and through no fault of the other party. No such termination shall be made, unless the other party being terminated is granted: a) written notice of intent to terminate enumerating the failures for which the termination is being sought; b) a minimum of **seven (7) consecutive calendar days** to cure such failures; and c) an opportunity for consultation with the terminating party prior to such termination. However, the CITY retains the right to immediately terminate this Agreement for default if the CONSULTANT violates any local, state, or federal laws, rules or regulations that relate to the performance of this Agreement. In the event of termination by the CITY pursuant to this subsection, the CITY may withhold payments to the CONSULTANT for the purpose of setoff until such time as the exact amount due the CITY from the CONSULTANT is determined.

4.3 Termination shall not be Construed as Release. Termination by either party shall not be construed as a release of any claims that the terminating party may be lawfully entitled to assert against the terminated party. Further, the terminated party shall not be relieved of any liability for damages sustained by the terminating party by virtue of any breach of this Agreement.

5.0 INDEMNIFICATION

5.1 INDEMNIFICATION. To the fullest extent permitted by law, CONSULTANT shall indemnify and hold harmless CITY, and CITY's officers, directors,

partners, agents, consultants, and employees from and against any claims, costs, losses, and damages (including but not limited to all fees and charges of engineers, architects, attorneys, and other professionals, and all court, arbitration, or other dispute resolution costs) arising out of or relating to the Project, provided that any such claim, cost, loss, or damage is attributable to bodily injury, sickness, disease, or death, or to injury to or destruction of tangible property (other than the Work itself), but only to the extent caused by any negligent act or omission of CONSULTANT or CONSULTANT's officers, directors, partners, agents, consultants or employees in performance of the services. This indemnification provision is subject to and limited by the provisions agreed to by CITY and Consultant, as noted below.

To the extent allowed by state law, the CITY will be responsible for its own actions.

5.2 CONSULTANT'S LIABILITY LIMITED TO AMOUNT OF INSURANCE REQUIREMENTS. CONSULTANT shall procure and maintain insurance as required by and set forth in the terms and conditions of this Agreement. Notwithstanding any other provision of this Agreement, and to the fullest extent permitted by law, the total liability, in the aggregate, of CONSULTANT and CONSULTANT's officers, directors, partners, employees, agents, and consultants (hereafter referred to collectively as "Consultant"), to CITY and anyone claiming by through, or under CITY for any and all claims, losses, costs, or damages, whatsoever arising out of, resulting from or in any way related to the Project or the Agreement from any cause or causes, including but not limited to the negligence, professional errors or omissions, strict liability or breach of contract, or warranty express or implied of CONSULTANT (hereafter "CITY's Claims"), shall not exceed an amount in excess of its primary general comprehensive policy limits. Neither CONSULTANT nor the CITY will be responsible to the other for any special, indirect, or consequential damages arising in any manner from the work or services. If no such insurance coverage is provided with respect to CITY's Claims, then the total liability, in the aggregate, of CONSULTANT to CITY and anyone claiming by, through, or under CITY for any and all such uninsured CITY's claims shall not exceed \$250,000.00 per person or \$500,000.00 per incident with property damage liability limited to \$100,000.00 per incident, \$1,000,000 in the aggregate.

6.0 INSURANCE

6.1 INSURANCE. The CONSULTANT shall not commence work under this Agreement until the CONSULTANT has obtained sufficient insurance as required herein, and such insurance has been approved by the CITY. The CONSULTANT shall maintain the required insurance throughout the term of this Agreement. Failure to maintain said insurance shall be considered a material breach of this Agreement.

6.2 WORKERS' COMPENSATION INSURANCE. The CONSULTANT shall procure and shall maintain during the life of this Agreement, Workers' Compensation Insurance as required by applicable Texas law for all of the CONSULTANT's employees to be engaged in work under this Agreement.

6.3 COMMERCIAL LIABILITY, PROPERTY DAMAGE LIABILITY AND AUTOMOBILE LIABILITY INSURANCE. The CONSULTANT shall procure and shall maintain during the life of this Agreement such Commercial General Liability, Property Damage Liability and Automobile Liability Insurance as shall protect the CONSULTANT and the CONSULTANT's employees performing work covered by this Agreement from claims for damages for personal injury, including accidental death, as well as from claims for property damages, which may arise from operations under this contract, whether such operations be by the CONSULTANT or by anyone directly or indirectly employed by the Consultant. The minimum limits of liability and coverages shall be as follows:

- a) **COMMERCIAL GENERAL LIABILITY**
 - Personal Injury or Death**
 - \$500,000.00 for one person or occurrence
 - \$1,000,000.00 for two or more persons or occurrences
 - Property Damage**
 - \$500,000.00 per occurrence
 - General Aggregate**
 - \$1,000,000.00
- b) **AUTOMOBILE LIABILITY**
 - Combined Single Limit**
 - \$1,000,000.00 per accident

6.4 PROFESSIONAL LIABILITY INSURANCE. The CONSULTANT shall procure and shall maintain, at the CONSULTANT's sole expense, Professional Liability Insurance for the benefit of the CITY to cover the errors and omissions of the Consultant, its principals or officers, agents or employees in the performance of this Agreement with a limit of ONE MILLION AND 00/100 DOLLARS (\$1,000,000.00) on a claims made basis.

6.5 CITY AS ADDITIONAL INSURED. The CITY shall be named as an Additional Named Insured on all of the CONSULTANT's Commercial General Liability and Automobile Liable Insurance Policies with respect to liability arising out of operations performed by or on behalf of CONSULTANT, but only to the extent of damages directly caused by the negligence of CONSULTANT.

6.6 PROOF OF INSURANCE. The CONSULTANT shall furnish the City Engineer with certificates showing the type of insurance coverages, limits on each insurance policy, class of operations covered under each insurance policy, effective dates and expiration dates of policies, insurance companies providing the insurance coverages, name of agent/broker and include confirmation of any endorsement(s) required in this agreement.

6.7 GENERAL INSURANCE PROVISIONS. All certificates required herein shall be attached hereto and incorporated for all purposes as **Attachment "E"**. All certificates shall

also include the name of the project on the corresponding insurance certificate. Further, each certificate shall contain the following statement:

“The insurance covered by this certificate will not be canceled, except after **thirty (30) consecutive calendar days** written notice of intent to cancel said insurance has been provided to the City of El Paso.”

7.0 INDEPENDENT CONTRACTOR

7.1 The CONSULTANT is an independent contractor. Except as may be expressly and unambiguously provided in this Contract, no partnership or joint venture is intended to be created by this Contract, nor any principal-agent or employer-employee relationship between the parties or any of their officers, employees, agents or sub-consultants.

(A) As an independent contractor, the CONSULTANT understands and agrees that it will be responsible for its respective acts or omissions, and the CITY shall in no way be responsible as an employer to the CONSULTANT’s officers, employees, agents, representatives or subcontractors who perform any service in connection with this Contract.

7.2 The CONSULTANT shall not receive any compensation or benefits from the CITY, other than as expressly set forth in this Contract.

7.3 The CONSULTANT does not have, and will not attempt to assert, the authority to make commitments for or to bind the CITY to any obligation other than the obligations set forth in this Contract.

8.0 REPRESENTATIONS BY THE PARTIES

8.1 The CONSULTANT represents and agrees to the following:

(A) That CONSULTANT shall comply with all applicable federal, state and local governmental laws, rules, regulations and all provisions of the City of El Paso Charter and Code of Ordinances, now existing or as may be amended, in the performance of its duties under this Contract.

(B) The CONSULTANT shall obtain and pay for all licenses, permits and certificates required by any applicable statute, ordinance, rule or regulation of any regulatory body having jurisdiction over the conduct of its operations that are applicable to the services provided hereunder.

(C) The CONSULTANT warrants that it is duly authorized and licensed to perform its duties hereunder in each jurisdiction in which it will act. The CONSULTANT further warrants that its employees, agents and sub-consultants shall maintain all required profession licenses during the Contract Term. If the CONSULTANT receives notice from a licensing authority of a suspension or revocation of a license of CONSULTANT’s employee(s), agent(s) or subcontractor(s), CONSULTANT shall immediately remove such employee, agent or

subcontractor from performing any further services under this Contract until such license is reinstated and in good standing. If the CONSULTANT fails to maintain such licenses or fails to remove any employee, agent or sub-consultant who performs services under this contract whose license has expired or been revoked or suspended, the CITY shall be entitled, in its sole discretion, to immediately terminate this Contract upon notice to CONSULTANT.

(D) The CONSULTANT warrants that the Services, and those of his subcontractor(s) will be performed in a professional manner in accordance with the applicable professional standards. The CONSULTANT gives no warranty, express or implied, as to the results of any recommendations made in any reports provided to the CITY under this Contract. The CONSULTANT will not be liable for any damages that result or are alleged to result from any recommendations or reports provided to the CITY under this Contract.

(E) The CONSULTANT warrants that no person or selling agency has been employed or retained to solicit or secure this contract upon an agreement or understanding for commission, percentage, brokerage, or contingent fee excepting bona fide employees of bona fide established commercial or selling agencies maintained by the CONSULTANT for the purpose of securing business. For breach or violation of this warranty the CITY shall have the right in addition to any other right or rights to cancel this contract without liability and to deduct from the Contract price, or otherwise recover the full amount of such commission, percentage, brokerage or contingent fee.

8.2 Force Majeure. If, by reason of Force Majeure, either party hereto will be rendered unable wholly or in part to carry out its obligations under this Contract then such party will give notice and full particulars of such Force Majeure in writing to the other party within a reasonable time after occurrence of the event or cause relied upon, and the obligation of the party giving notice, so far as it is affected by such Force Majeure, will be suspended for only thirty (30) days during the continuance of the inability then claimed, except as hereinafter provided, but for no longer period, and such party will try to remove or overcome such inability with all reasonable dispatch.

The term Force Majeure as employed herein, will mean acts of God, strikes, lockouts, or other industrial disturbances, acts of public enemies, orders of any kind of the government of the United States or the State of Texas or any civil or military authority, insurrections, riots, epidemics, landslides, lightning, earthquake, fires, hurricanes, storms, floods, washouts, droughts, arrests, restraint of government and people, civil disturbances, explosions, breakage or accidents to machinery, pipelines or canals. It is understood and agreed that the settlement of strikes and lockouts will be entirely within the discretion of the party having the difficulty, and that the above requirement that any Force Majeure will be remedied with all reasonable dispatch will not require the settlement of strikes and lockouts by acceding to the demands of the opposing party or parties when such settlement is unfavorable in the judgement of the party having the difficulty. If a party is unable to comply with the provisions of this contract by reason of Force Majeure for a period beyond thirty (30) days, the affected party shall be excused by further performance under this contract.

8.3 Cooperation Of City. The CITY will cooperate with the CONSULTANT in providing information relating to the CONSULTANT's scope of services and access to facilities.

CITY is responsible to provide CONSULTANT, its subcontractors and/or its agents reasonable and safe access to all facilities and properties that are in the CITY's control which are subject to the work and Services contained in this Agreement. CITY further agrees to assist CONSULTANT, its subcontractors and/or its agents to gain access to facilities and properties that are not controlled by the CITY which are subject to the work and services contained in this Contract.

If CONSULTANT is delayed in the commencement or completion of the work and/or services by failure by the CITY to cooperate with CONSULTANT in the timely completion of the work, then CONSULTANT shall provide written notice to the CITY of the existence, extent of, and reason for such delays. An equitable adjustment in the performance schedule shall be made as a result.

8.4 Taxes, Permits, And Fees. CONSULTANT shall be responsible for obtaining all permits and related permit fees associated with the work and services. CONSULTANT shall pay sales, consumer, use, and other similar taxes and shall secure and pay for the building permit and other permits and governmental fees, licenses, and inspections necessary for proper execution of its services under this Contract. The CITY shall be responsible for securing any necessary approvals, easements, assessments, where applicable. The parties acknowledge that the CITY is tax-exempt and not subject to real estate and personal property taxes. CONSULTANT makes no representations regarding the tax implications or the CITY's accounting treatment of this CONTRACT.

9.0 GENERAL PROVISIONS

9.1 CONSULTANT's Quality of Work. The CITY's review of any documents prepared by the CONSULTANT is only general in nature and its option to approve and accept the work in no way relieves the CONSULTANT of responsibility for any specific deficiencies in its professional services. The CONSULTANT's professional services shall be performed as expeditiously as is consistent with professional skill and care as well as the orderly progress of the Study and in accordance with the time periods established in **Attachment "B,"** and shall be adjusted, if necessary, as the Study proceeds. The identified time limits shall not, except for reasonable cause, be exceeded by the CONSULTANT. The professional services provided by the CONSULTANT under this Contract shall be performed in a manner consistent with that level of care and skill ordinarily exercised by members of the profession currently practicing under similar circumstances.

These warranties are in lieu of all warranties, express or implied.

9.2 Confidential Work. The CONSULTANT recognizes that all materials to be prepared and all data received in connection with this Contract by the CONSULTANT shall be kept in strictest confidence. The CONSULTANT shall not divulge such confidential information except as approved in writing by the CITY or as otherwise required by law until publication of the Study. The CONSULTANT shall establish a method to secure the confidentiality of records or information that the CONSULTANT may have access to in accordance with

the applicable federal, state, and local laws and regulations. This provision shall not be construed as limiting the CITY's or its authorized representatives', right of access to records or other information under this Contract. If the CONSULTANT receives inquiries regarding documents within its possession pursuant to this Contract, the CONSULTANT shall immediately forward such request to the City Attorney's office for disposition.

9.3 Discrimination Prohibited.

(A) No person in the United States shall, on the grounds of race, creed, color, national origin, (including immigration status where an alien holds proper work authorization), religion, sex, age, or disability be excluded from participation in, be denied the benefits of, or be otherwise subjected to segregation or discrimination in any way, shape or form in employment or under projects or activities funded in whole or in part with funds made available to CONSULTANT pursuant to this Contract, as set forth in Title VI of the Civil Rights Act of 1964 (42 U.S.C. Section 2000d) and implementing regulations at Title 24 CFR Part 1; Age Discrimination Act of 1975 (42 U.S.C. Sections 6101-07) and implementing regulations at Title 24 CFR Part 146; Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. Section 794); implementing regulations at Title 24 CFR Part 8 and Title 1 of the Americans with Disabilities Act of 1990 (ADA) and implementing regulations at Title 28 CFR Part 35.

(B) Furthermore, CONSULTANT shall comply with all the equal opportunity requirements in Title 24 CFR Section 5.105; the requirements of Executive Order 11246 (Equal Opportunity) and the implementing regulations at Title 41 CFR Chapter 60; and the requirements attached to this Agreement and incorporated by reference as **Attachment C**.

(C) CONSULTANT must file the Assurance required under City Ordinance 9779, prohibiting discrimination against disabled persons. Failure to do so in any manner which impairs the quality of performance hereunder, or affects the administration of the funds provided hereunder, shall constitute a breach of this Agreement.

9.3 Inspections. The CITY shall have the right to perform, or cause to be performed, (1) inspections of the books and records of the CONSULTANT related to the performance in creation of the Study, and (2) inspections of all places where work is undertaken in connection with this Contract. The CONSULTANT shall be required to keep such books and records available for such purpose for **at least five (5) years** after its performance under this Contract ceases. Nothing in this provision shall affect the time for bringing a cause of action nor the applicable statute of limitations.

9.4 Ownership. The Study generated by CONSULTANT as a result of its activity under this Contract shall remain at all times the property of the CITY. The data stored in the computer database shall also remain the property of the CITY. The CONSULTANT may use the Study prepared as an example of work produced.

9.5 Assignment. Neither party may assign its rights or obligations under this Contract, including but not limited to (a) any interest in the proceeds of the contract, (b) any proceeds of

claims arising from the contract or (c) any claims or causes of action arising out of the project, without the prior written consent of the other party hereto. Any attempted assignment or delegation by either party shall be wholly void and totally ineffective for all purposes unless made in conformity with this paragraph.

9.6 Subcontractors. The CONSULTANT may subcontract with other competent entities to provide services required to be performed under this Contract. Any work or services approved for subcontracting hereunder, however shall be contracted only by written contract and agreement, and unless specific waiver is granted in writing by the City, shall be subject by its terms to each and every provision of this Contract. Compliance by subcontracts with this Contract shall be CONSULTANT's responsibility. CONSULTANT shall submit a list, identifying the subcontractors who will perform services under this Contract, at least ten (10) business days prior to the date that the subcontractors render any services under this Contract. However, all subcontractors must be accepted and approved by the City in writing, and such consent shall not be unreasonably withheld.

Despite City approval of a subcontract or subcontractor, the City shall in no event be obligated to any third party, including any subcontract of the CONSULTANT, for performance of work or services, nor shall City funds ever be used for payment of work or services performed prior to the date of Contract execution or extending beyond the expiration date of this Contract.

9.7 Right of Assurance. Whenever one party to this Contract in good faith has reason to question the other party's intent to perform, it may demand that the other party give written assurance of its intent to perform. In the event that a demand is made and no assurance is given within five (5) calendar days, the demanding party may treat this failure as an anticipatory repudiation of the Contract.

9.8 Survival. Each party shall remain obligated to the other under all clauses of this Contract that expressly or by their nature extend beyond the expiration or termination of this Contract, including but not limited to the Indemnification provisions hereof.

9.8 Amendment and Waiver. The parties may amend this Contract at any time by mutual consent. Unless otherwise provided herein, this Contract may be amended only by written instrument duly executed on behalf of the CITY (by authority by the City Council) and CONSULTANT. No claim or right arising out of a breach of this contract can be discharged in whole or in part by a waiver or renunciation of the claim or right unless the waiver or renunciation is supported by consideration and is in writing signed by the aggrieved party.

9.9 Complete Agreement. This Contract, together with the Attachment(s) attached hereto, constitutes the entire agreement between the parties relating to the terms and conditions of the Contract. The parties expressly acknowledge and warrant that there exists no other written or oral understanding, agreements or assurances with respect to such matters except as are set forth herein. Unless expressly stated, this Contract confers no rights on any person(s) or business entity(s) that is not a party hereto. This Contract shall not be construed against or unfavorably to any party because of such party's involvement in the preparation or drafting of this Contract.

9.10 Notices. All notices required or permitted hereunder shall be in writing and shall be deemed delivered when actually received via United States Postal Service post office or certified mail, return receipt requested addressed to the respective other party at the address prescribed in the preamble of this Contract or at such other address as the receiving party may have theretofore prescribed by written notice to the sending party.

The initial addresses of the parties, which one party may change by giving written notice of its changed address to the other party, are as follows:

CITY: City of El Paso
Attention: Mayor's Office
Two Civic Center Plaza, 10th Floor
El Paso, Texas 79901-1196

COPY TO: General Services Department
Two Civic Center Plaza, 6th Floor
El Paso, Texas 79901-1196

CONSULTANT: Johnson Controls, Inc.
3021 W Bend Drive
Irving, TX 75063

COPY TO: Johnson Controls, Inc.
507 E. Michigan Street
Milwaukee, Wisconsin 53202

9.11 Governing Law. This Contract shall be construed and interpreted in accordance with the laws of the State of Texas, along with any applicable provisions of the federal law, the City Charter and/or any ordinance of the City of El Paso.

9.12 Severability. All agreements and covenants contained in this Contract are severable. Should any term or provision of this agreement be declared invalid by a court of competent jurisdiction, the parties intend that all other terms and provisions of this agreement should be valid and binding and have full force and effect as if the invalid portion had not been included

9.13 Venue. For the purpose of determining place of this Contract and the law governing the same, this Contract is entered into in the City and County of El Paso, the State of Texas, and shall be governed by the laws of the State of Texas. Venue shall be in the County of El Paso, State of Texas.

Each person signing below represents that he or she has read this Contract in its entirety (including any and all Exhibits); understands its terms; and agrees on behalf of such party that such party will be bound by those terms.

(Signatures On Following Page)

STATE OF TEXAS)
)
)
COUNTY OF EL PASO)

**PROFESSIONAL SERVICES CONTRACT
BETWEEN CITY OF EL PASO AND
JOHNSON CONTROLS, INC.**

Signature Page

Executed this 17 day of May, 2010.

CITY OF EL PASO

Joyce Wilson
City Manager

JOHNSON CONTROLS, INC.

By: 
Name Printed: Michael Crowe
Title: Regional VP & GM Solutions Mgr

APPROVED AS TO FORM:

APPROVED AS TO CONTENT:

Bertha A. Ontiveros
Assistant City Attorney

Stuart Ed, Director
General Services Department