Date: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, Year

|  |
| --- |
| SYSTEM SUPPLY AND MAINTENANCE AGREEMENT |
| **between** |
| THE supplier |
| And |
| THE client |
|  |

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This agreement is dated [DATE]

Parties

|  |  |
| --- | --- |
| (1) | [FULL COMPANY NAME] incorporated and registered in [JURISDICTION] with company number [NUMBER] whose registered office is at [REGISTERED OFFICE ADDRESS] (**Supplier**) |
|  | And |
| (2) | [FULL COMPANY NAME] incorporated and registered in [JURISDICTION] with company number [NUMBER] whose registered office is at [REGISTERED OFFICE ADDRESS] (**Client**) |
|  |  |

Agreed terms

# Recitals

## The Client is desirous of acquiring the equipment described in Schedule I (the **System**) for the [\_\_\_\_\_] facilities located at [\_\_\_\_\_] (the **Facilities**), [for purposes of improving the energy efficiency in the Facilities.]

## The Supplier is desirous of supplying, installing, and setting up the System for the Client, as well as rendering maintenance services in connection therewith, in accordance with the technology solution framework described in the energy efficiency project document dated as of [\_\_\_\_\_], set out in Schedule 1 (the **Project**).

## The Client is interested in acquiring the technology solution proposed by the Supplier, subject to the satisfaction of the terms and conditions of the Project.

## Therefore, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties hereby agree to enter into this Agreement, which shall be governed by the following Clauses, schedules and annexures, appendices as specified and agreed between the Parties in writing from time to time.

# Interpretation

## **Definitions**:

**Achieved Energy Saving** meansthe actual percentage of energy saving achieved by the Client during a certain year.

**Agreement** meansthis System’s Supply and Maintenance Agreement together with all schedules, amendments, variations if any as agreed between the Parties in writing.

**Business Day** means a day other than a Saturday, Sunday or public holiday in [the United Kingdom] when banks in [London] are open for business.

**Cap Insurance Coverage** meansthe maximum amount of money, in the aggregate, that the Insurance Company will pay to the Client for any claims under the insurance described in Clause 4.4(b).

**Certificate of Initial Assessment** means the outcome of the Annual Validation issued by the Independent Expert one year after the issuance of the positive Installation Validation Report as defined in clause 9.3.

**Certificate of Periodic Assessment** means the outcome of the Periodic assessment performed by the Supplier’s Supervisor and the Client’s Supervisor starting one year after the issuance of the Certificate of Initial Assessment. The Certificate of Periodic Assessment is issued by the Client and The Supplier without any involvement of the Independent Expert.

**Client** shall have the meaning provided in the preamble.

**Client’s Supervisor** means the person appointed by the Client to act as its representative in all matters relating to the performance of and compliance with the obligations in this Agreement.

**Committed Energy Saving** meansthe percentage of energy saving, calculated based on the Client’s current consumption in the Facilities, which the Supplier undertakes to deliver to the Client as a result of the supply and installation of the System.

**Conditions Precedent** shall have the meaning provided in Clauses 4.2 and 4.4.

**Data Protection Legislation** shall mean all applicable legislation and regulations relating to privacy or the protection or processing of personal data in any relevant jurisdiction, including Regulation 2016/679 (the General Data Protection Regulation) and Directive 2002/58/EC, and any other legislation which implements any other current or future legal act of the European Union concerning the protection and processing of personal data, including any amendment or re-enactment of the foregoing.

**Energy Saving Warranty** means the period specified in Clause 9.1, which shall commence on the date of issuance of the Installation Validation Report by the Independent Expert, during which the Supplier represents and warrants that the System will allow the Client to achieve the Committed Energy Saving.

**Facilities** shall have the meaning provided in Recital 1.1.

**First Annual Validation** means the assessment by the Independent Expert one year after the issuance of a positive Installation Validation Report as defined in clause 9.3 resulting into the issuance of a Certificate of Initial Assessment.

**Force Majeure Notice** means the notice to be delivered by the Party affected by an event of force majeure informing the other Party of the existence of such event and explaining the reasons why it prevents fulfillment of obligations under this Agreement, how long it expects this event to last (if feasible) and any measures adopted to mitigate damages to the other Party.

**Indemnification for Committed Energy Saving Shortfall** meansthe indemnification to be paid by the Supplier to the Client in case the Committed Energy Saving is not reached, which shall be calculated pursuant to Clause 9.2.

**Independent Expert** means[*Insert name*]or [the independent expert to be joint appointed by the Parties pursuant to Clause 5.1].

**Initial Assessment** shall have the meaning provided in Clause 9.3(a).

**Installation Validation Report** means the report to be issued by the Independent Expert upon completion of the supply, installation and setup of the System by the Supplier. The Installation Validation Report shall include the determination of whether the installation performed by the Supplier conforms to the specifications of the Project, if the data-logger installed by the Supplier is operating properly.

**Insurance Company** shall have the meaning provided in Clause 4.4.

**Party** means either the Supplier or the Client, as the case may be.

**Periodic Assessment** shall have the meaning provided in Clause 9.3(b).

**Project** means the energy efficiency project and offer of supply, installment, setup and maintenance of the System, which shall be prepared by the Supplier for the Client.

**Project Validation Report** means the report to be issued by the Independent Expert determining *inter alia*, the feasibility of the achievement of the Committed Energy Saving indicated upon installation of the System in the Facilities.

**Supplier** shall have the meaning provided in the preamble.

**Supplier’s Supervisor** means the person appointed by the Supplier to act as its representative in all matter relating to the performance of and compliance with the obligations hereunder.

**System** shall have the meaning provided in Recital 1.1.

## In this Agreement:

### the words “include” or “including” (or any similar term) are not to be construed as implying any limitation;

### general words shall not be given a restrictive meaning by reason of the fact that they are preceded or followed by words indicating a particular class of acts, matters or things;

### words indicating gender shall be treated as referring to the masculine, feminine or neuter as appropriate;

### a reference to a statute, statutory provision or subordinate legislation (“**legislation**”) refers to such legislation as amended and in force from time to time and to any legislation that (either with or without modification) re-enacts, consolidates or enacts in rewritten form any such legislation.

### any reference to any document other than this Agreement is a reference to that other document as amended, varied, supplemented, or novated (in each case, other than in breach of the provisions of this Agreement) at any time;

### a reference to a document “in the agreed form” means a form of document agreed by each of the Parties and signed by or on behalf of each Party for the purposes of identification;

### references to the time of day are to Central European Time (CET);

### a reference to something being “in writing” or “written” includes any mode of representing or reproducing words in visible form that is capable of reproduction in hard copy form, including words transmitted by email but excluding any other form of electronic or digital communication;

### a reference to a document or communication being “signed” by or on behalf of any person means signature in manuscript by that person or her/his duly authorised agent or attorney (which manuscript signature may be affixed or transmitted by email) and not any other method of signature;

### any reference to a “person” includes any individual, body corporate, trust, partnership, joint venture, unincorporated association or governmental, quasi-governmental, judicial or regulatory entity (or any department, agency or political sub-division of any such entity), in each case whether or not having a separate legal personality, and any reference to a “company” includes any company, corporation or other body corporate, and any limited partnership or limited liability partnership wherever and however incorporated or established;

### any reference to any English legal term for any action, remedy, method of judicial proceeding, legal document, legal status, court, official or any legal concept or thing shall be deemed to include what most nearly approximates in that jurisdiction to the English legal term.

# Purpose

## The Supplier shall (i) supply, install, fully set up the System in the Facilities; and (ii) achieve the Committed Energy Saving, as per the terms of this Agreement and the Project.

## The Supplier shall provide the preventive and corrective maintenance services in connection with the System to the Client as per the terms of this Agreement.

## The Supplier shall provide corrective maintenance services in connection with the System not covered by the warranty, as per the terms of the Project.

# Conditions Precedent

## The obligations under this Agreement shall be subject to the fulfilment of the conditions set forth in Clauses 4.2 and 4.4 (**Conditions Precedent**) no later than [\_\_\_] Business Days from the date of this Agreement. If the Supplier fails to satisfy either of the Conditions Precedent within such time period, this Agreement shall be null and void with no further force or effect.

## Delivery of a positive Project Validation Report issued by the Independent Expert:

## The Supplier is required to deliver to the Client a positive Project Validation Report issued by the Independent Expert (appointed as per Clause 5) taking into account the criteria set out in Clause 4.3.

## For the purposes of preparation of a Project Validation Report, the Supplier shall forthwith [on the date of this Agreement] provide the Independent Expert with an executed copy of this Agreement and the Project for its review. The criteria for issuance of a positive Project Validation Report are *inter alia* as follows:

### the Project expressly includes the minimum content set forth in Schedule 3 hereto and the Independent Expert determines, in accordance with industry standards, that the Project has been developed to the extent necessary to permit the proper validation thereof by the Independent Expert;

### the Independent Expert must expressly represent in the Project Validation Report that it deems the Committed Energy Saving provided in the Project to be feasible if the operational factors indicated therein are duly satisfied and the Independent Expert has received sufficient data to complete such assessment; and

### the Independent Expert determines that the Supplier is capable of implementing the Project, taking into consideration the criteria defined in Schedule 3.

## Delivery by the Supplier to the Client of an Insurance Certificate (as defined below):

## The Supplier shall deliver to the Client, a certificate from a top tier insurance company operating in [\_\_\_] (**Insurance Company**), which shall certify the retention of insurance in favour of the Client and include the following specifications (**Insurance Certificate**):

### the Supplier will act as the policyholder and will appoint the Client as insured;

### the insurance will cover an amount up to [\_\_\_] Euros (the **Cap Insurance Coverage**), in connection with the Supplier’s obligation to pay to the Client the Indemnification for Committed Energy Saving Shortfall, as applicable. The existence of this insurance shall not limit in any way the Supplier’s obligation to make good the entire Committed Energy Saving Shortfall;

### the insurance coverage will be effective upon the issuance by the Independent Expert of a positive Installation Validation Report (as further detailed in Clause 6.1(e) below);

### the policy’s coverage will not exceed the Cap Insurance Coverage and that the Insurance Company is jointly liable with the Supplier upon first request by the Client, with express waiver by the Insurance Company of any [benefit of privilege], excussion and division, or any other rights, interests or exceptions which may delay payment to the Client of the Indemnification for the Committed Energy Saving Shortfall;

### the Insurance Company’s obligation to pay the amount requested by the Client, not exceeding the Cap Insurance Coverage, upon the Client’s first request with no objection or exceptions of any kind, including any exceptions which may apply against the policyholder no later than [10 (ten) Business Days] from the date of receipt of the following documents:

#### copy of the [payment request] made to the Supplier;

#### written declaration issued by the Client confirming that more than [10 (ten) Business Days] have lapsed since the delivery of such payment request and the Supplier’s failure to fulfill such request;

#### written declaration issued by the Client indicating the amount requested to the Insurance Company and the bank account details necessary for the Insurance Company to make the corresponding payment;

#### Certificate of Initial Assessment in the form of Schedule 4, which shall contain the amount of the Indemnification for Committed Energy Saving Shortfall, it being agreed that the amount requested to the Insurance Company shall not, under any circumstance, exceed the Indemnification for Committed Energy Saving Shortfall as provided in the Certificate of Initial Assessment; and

#### written declaration issued by the Client confirming that it has not disassembled or moved the System.

### the Cap Insurance Coverage may be reduced by any partial payments made by the Insurance Company, in which case the insurance policy shall remain effective for the remaining unpaid amount;

### the coverage provided by the insurance policy to the Client shall remain effective until the earlier of:

#### the date on which the sum of all payments made by the Insurance Company to the Client under the Insurance Certificate reaches the Cap Insurance Coverage; and

#### the date of termination of this Agreement for any reason whatsoever.

# Independent Expert

## Simultaneously with the execution of this Agreement, the Parties agree to appoint (\_\_\_\_\_) to act as independent expert, with the following functions (the "Independent Expert"):

### Project validation: to review and where applicable, approve the Project for the fulfilment of the Conditions Precedent set out in Clause 4.2 and Clause 4.3;

### Installation validation: to review and inspect, and if applicable, approve the installation and setup of the System upon completion of the implementation of the Project by the Supplier and issue the Installation Validation Report;

### First Annual Validation: to assess the energy savings based on energy data recorded by the data-logger one year following the confirmation pursuant to Clause 5.1(b) above, to confirm the correct operation of the System, if applicable, as well as the energy saving achieved during such period, issuing the Certificate of Initial Assessment;

### Conflict resolution: to resolve conflicts between the Parties, if pursuant to a Periodic Assessment as per Clause 9.3(b), Parties are unable to agree on any of the following:

#### whether or not the Committed Energy Saving has been achieved;

#### if the Committed Energy Saving has not been achieved, the difference between the Achieved Energy Saving and the Committed Energy Saving;

#### whether the shortfall in the Committed Energy Saving was caused by the Client or not and to the extent such shortfall is not entirely caused by the Client, the amount of the Indemnification for the Energy Saving Shortfall to be paid by the Supplier to the Client.

## [On the date of this Agreement], the Supplier shall enter into a services agreement with the Independent Expert (appointed in accordance with Clause 5.1) (**Expert Services Agreement**). The Parties agree that:

### the [Client shall have the right to be a confirming party to the Expert Services Agreement] and;

### the Independent Expert’s fees shall be borne by the Parties in the following manner and shall be specified accordingly in the Expert Services Agreement:

#### the fees for the services in Clauses 5.1(a), 5.1(b) and 5.1(c) shall be borne solely by the Supplier;

#### the fees for the services in Clause 5.1(d), if required, shall be borne equally by the Parties.

## The Supplier covenants and agrees that the Expert Services Agreement shall provide for the Independent Expert’s obligation to immediately inform the Client in writing if the Supplier fails to pay the Independent Expert’s fees as set forth therein along with an explanation for such default, if any. Upon being notified of any delay or default in payment by the Supplier under the Expert Services Agreement, the Client may, at its discretion, pay these overdue amounts to the Independent Expert on behalf of the Supplier and recover such amounts from the Supplier as per Clause 5.4.

## The Client shall have the right to either offset any payments made to the Independent Expert on behalf of the Supplier against any amounts due by the Client to the Supplier or request the immediate reimbursement by the Supplier of the corresponding amount, together with all accrued interest until the date of recovery [as per the prevailing bank rate].

# Implementation of the Project and Obligation of each of the Parties

## The Supplier agrees and covenants to:

### employ the human and material resources necessary for the most efficient implementation of the Project. Except where expressly provided to the contrary in the Project, the Supplier shall be responsible for the supply of all materials and equipment, supervision, workforce, tools, machinery, services, transportation, connections and other installations, as well as any other elements and services necessary for the fulfillment of this Agreement;

### supply the System in accordance with the quality [standards / levels] provided in the Project. In case any parts of the System supplied by the Supplier fail to meet the specifications described in the Project, the Supplier shall substitute, immediately and free of charge, all such parts of the System and bear all the costs related to such substitution and installation thereof, as well as for the disassembly, removal and, where applicable, disposal of the replaced parts. In case of a defective assembly or installation, pursuant to the Client’s request, the Supplier shall take all actions necessary to cure such defect, immediately and free of charge, as well as bear all related costs;

### deliver to the Client the technical documentation necessary for the adequate operation of the System, particularly those expressly listed in the Project, as well as make available to the Client’s Supervisor any on-site trainings in respect of the maintenance and operation of the System;

### perform the installation and setup of the System in accordance with the timeline provided in the Project. The Parties hereby acknowledge the essential character of such timeline. The Supplier shall report to the Client, on a weekly basis, the status and progress of the Project implementation, as well as immediately notify the Client of any delays or events that may adversely affect such timeline. In case of failure to comply with any due dates stipulated in the timeline caused by an act or omission imputable to the Supplier, the Supplier shall pay non-compensatory damages to the Client in the amount of [\_\_\_\_\_] Euros for each day in arrears, without prejudice to any additional claims for losses and damages caused to the Client as a result of such default;

### obtain the approval of the installation and setup of the System by the Independent Expert. To such effect, upon completion of the supply, installation and setup of the System by the Supplier, the Supplier shall send to the Independent Expert, with a copy to the Client, a written request to visit the Facilities, no later than [5 (five) Business Days] from the receipt of such request, and run the appropriate tests, as determined by the Independent Expert in accordance with industry standards, in order to:

#### verify if the installation performed by the Supplier complies with the provisions set forth in the Project;

#### verify if the data-logger installed in the System is operating properly; and/or

#### run a performance test in the System, if applicable;

If the Independent Expert determines that the installation has been completed in accordance with the Project, the data-logger is operating properly and the performance test results indicate that the System is [reasonably likely] to achieve the Committed Energy Saving, it shall issue a positive Installation Validation Report. If any of the foregoing conditions is not satisfied, the Independent Expert will issue a negative Installation Validation Report detailing the reasons for such determination. The determination of the Independent Expert shall be binding on both Parties.

The issuance of a positive Installation Validation Report will have the following consequences: (i) the title to the System, its equipment and parts thereof, as well as the risks associated therewith, will immediately shift from the Supplier to the Client, and (ii) the insurance coverage provided in the Insurance Certificate shall immediately become effective. The Parties hereby covenant and agree to procure that a copy of the positive Installation Validation Report be delivered to the Insurance Company by the Client no later than [3 (three) Business Days] from the issuance thereof.

###  If the Independent Expert issues a negative Installation Validation Report, it shall describe the reasons for such determination and indicate if such issues can be cured, in which case the Supplier shall have a period of [10 (ten) Business Days] from the issuance of such negative Installation Validation Report to take all actions necessary to cure such issues and obtain a positive Installation Validation Report, at its sole expense. Both the failure by the Supplier to cure any issues within the 10 (ten) Business Days’ period set forth herein and the issuance of a negative Installation Validation Report by the Independent Expert for issues that cannot be cured shall be deemed a material breach of this Agreement by the Supplier.

### following the issuance of a positive Installation Validation Report, perform preventive and corrective maintenance services in the System, in a diligent manner and as detailed in the Project, for a period of [\_\_\_\_\_] months;

### retain and maintain, at its sole expense, a liability insurance from a solvent insurance company to cover any losses that may be attributed to it in connection with the implementation of the Project, including the corresponding maintenance services, which shall cover at least [\_\_\_\_\_\_] Euros;

### prior to the commencement of the implementation of the Project, inform the Client of the specific risks associated with the activities to be performed in the Facilities, of all emergency situations that may affect the Client’s workers and of any work-related accident that may result from concurrent activities, adapt its preventive documentation to the peculiarities of the Facilities, communicate to its workers all information and instructions received from the Client regarding labor risk prevention, as well as strictly follow such instructions, including with the adoption of training and monitoring measures of its assigned personnel arising from such information/instructions;

### ensure that the personnel assigned to the implementation of the Project has received the necessary training and information in connection with labor risk prevention, not only in respect of collective protection measures but also relating to the use of the personal protective equipment necessary for the performance of the activities under safe conditions. Additionally, the Supplier shall carry out periodic checks on the labor conditions of the workers performing the activities and ensure the regular monitoring of such workers’ health in light of the inherent risks of their labor activities, pursuant to the terms set forth in the [applicable] regulations on labor risk prevention. All the activities related to the supply, installation, setup and/or maintenance of the System performed by the Supplier shall be conducted in a manner that does not impair the Client’s activities in the Facilities. In turn, the Client shall grant the Supplier access to the Facilities; and

### comply with the applicable regulations and implement the Project in accordance with applicable laws and regulations, including obtaining at its expense, all licenses, permits and governmental approvals necessary for the implementation of the Project, as well as informing the Client of any permits, licenses or approvals that the Client may be required to obtain on its own and assist the Client with all necessary formalities and procedures related thereto. [*Note: any jurisdiction-specific licenses may be specifically referred here*]

## The Client agrees and covenants to the following:

### pay the amounts due in accordance with this Agreement on or before the corresponding due dates and in the manner set forth herein or in the Project;

### grant the Supplier and its personnel and, as applicable, the Independent Expert, the necessary access to the System, on the dates and at the times agreed upon by the Parties, for the correct implementation of the Project and inspection thereof;

### prior to the commencement of the implementation of the Project, provide the Supplier with accurate information and instructions respecting the existing risks in its work site which may affect the activities to be performed by the Supplier, as well as any emergency situations that may affect the Supplier’s workers and any work-related accident resulting from concurrent activities;

### make available to the Supplier the documentation related to the risk assessment in connection with health and safety at work, planning of preventive activities as well as preventive and protective measures to be adopted, such that the Supplier may duly communicate this information to its workers who may be temporarily allocated in the Facilities..

## Each of the Parties agree that:

### each Party shall appoint a representative to act on their behalf on all matters relating to the performance of and compliance with this Agreement (the **Supplier’s Supervisor** or the **Client’s Supervisor**, as the case may be). Each Party shall inform the other Party, the Independent Expert and the Insurance Company by written notice of its appointed representative. Any Party may appoint other individuals to act as its supervisor at any time and any such appointment(s) shall become effective upon receipt of a written notice thereof by the other Party, which notice shall contain the relevant contact information for notice purposes in accordance with Clause 12.7 below. Any substitution of the Supplier’s Supervisor or the Client’s Supervisor, as the case may be, shall be notified in writing by the respective Party to the Independent Expert and the Insurance Company;

### The Supplier and the Client shall determine the means of coordination necessary for the correct application of the protective, preventive and emergency measures in the System considering the implementation of the Project, as well as inform their respective workers of such measures.

# Fees

## Supply, installation and setup of the System

## In consideration of the supply, installation and full setup of the System in the Facilities, the Client shall pay to the Supplier a global flat fee of [\_\_\_\_\_\_] Euros. This fee shall be payable by the Client in accordance with the timeline included in the Project. In case of absence of specific provisions in the Project, this fee shall be payable as follows:

### [\_\_\_\_\_\_]% of the fees, plus any taxes imposed thereon, no later than [7 (seven) Business Days] following the satisfaction of the Conditions Precedent; and

### [\_\_\_\_\_\_]% of the fees, plus any taxes imposed thereon, no later than [7 (seven) Business Days] following the issuance of a positive Installation Validation Report by the Independent Expert.

## Maintenance

In consideration of the planning and implementation of the maintenance services, the Client shall pay to the Supplier:

### a [monthly] fee of [\_\_\_\_\_\_] Euros, plus any taxes imposed thereon, for the scheduled maintenance work provided in the Project and

### an [hourly] fee of [\_\_\_\_\_\_] Euros, plus any taxes imposed thereon, for the nonscheduled maintenance work which is not covered by the System warranty;

## The fees for the nonscheduled maintenance work which is not covered by the System warranty shall be payable by the Client in accordance with the timeline included in the Project. In case of absence of specific provisions in the Project, this fee shall be payable no later than [3 (three) Business Days] after the end of the base-month when the relevant maintenance work has been performed.

# Term

## Subject to Clause 11, the term of this Agreement shall be equal to the entire period of the Energy Saving Warranty (as defined in Clause 9 below) [plus 90 (ninety) days].

# Energy Saving

## The Supplier represents and warrants to the Client that, upon installation and setup of the System, the Client shall obtain a Committed Energy Saving of at least [\_\_\_\_\_\_]% of the Client’s current annual energy consumption, equivalent to [\_\_\_\_\_\_][kWh/year] as indicated in the Project, for a period of [\_\_\_\_\_\_] years from the issuance of a positive Installation Validation Report by the Independent Expert (the **Energy Saving Warranty**). The Client is entering into this Agreement placing reliance on the Energy Saving Warranty, which is a fundamental term of this Agreement.

## In order to determine whether or not the Committed Energy Saving has been achieved, the tests described in Clause 9.3 below shall be run on an annual basis following the issuance of a positive Installation Validation Report, for purposes of assessing the percentage of the actual energy efficiency gained during each annual period being assessed (the **Achieved Energy Saving**) and the difference, if any, between the Committed Energy Saving and the Achieved Energy Saving during such period. In order to calculate the Indemnification for Committed Energy Saving Shortfall, the Parties hereby agree that in case of a negative deviation, *i.e.*, if the Energy Saving Achieved is lower than the Committed Energy Saving, the Supplier shall pay to the Client an indemnification of [\_\_\_\_\_\_] Euros for each negative percentage of deviation.

## By way of illustration, if the Committed Energy Saving is 40% and the Achieved Energy Saving in a given assessment period is 10.6% only, there would be a negative deviation of 29.4% (i.e. 40% - 10.6%). If the Parties had agreed to an indemnification of €300.00 (three hundred Euros) for each negative percentage of deviation, the total indemnification would correspond to €8,820.00 (eight thousand, eight hundred and twenty Euros).

### This indemnity obligation shall be immediately terminated in case of disassembly and/or displacement of the System by the Client.

## The Parties shall run, on a regular basis, the following performance tests or performance assessment of the System:

### one year after the issuance of a positive Installation Validation Report, the Independent Expert shall asses the performance of the System, based on the information provided by the Supplier’s Supervisor and on the data of the data-logger and the operational factors provided in the Project, and assess (the **Initial Assessment**):

#### the Achieved Energy Saving during the first year of operation of the System;

#### the difference between the Committed Energy Saving and the Achieved Energy Saving for such period;

#### the Indemnification for Committed Energy Saving Shortfall for such period, if any.

#### Upon completion of the First Annual Validation, the Independent Expert shall sign and deliver to each Party a copy of the Certificate of Initial Assessment, which shall be prepared in the form of Schedule 4 hereto.

### Following the Certificate of Initial Assessment, the Parties hereby agree that the Client’s Supervisor and the Supplier’s Supervisor shall run performance tests or assessments if applicable on an annual basis until the end of the Energy Saving Warranty (each, a **Periodic Assessment**) to assess, for each given year:

#### the Achieved Energy Saving resulting from the operation of the System during such year;

#### the difference between the Committed Energy Saving and the Achieved Energy Saving for such period;

####  the Indemnification for Committed Energy Saving Shortfall for such period, if any.

#### For the Periodic Assessments, the tests or the performance assessments shall be jointly performed by both the Client’s Supervisor and the Supplier’s Supervisor in compliance with the methodology and calculation agreed and used during the First Annual Validation. The Client shall grant the Supplier’s Supervisor access to the Facilities to the extent necessary for the joint performance of the Periodic Assessment with the Client’s Supervisor. Upon completion of such tests, the Supplier’s Supervisor and the Client’s Supervisor shall document the results in a Certificate of Periodic Assessment in the form of Schedule 4 hereto without involvement of the Independent Expert. In case of Committed Energy Saving shortfall or any discrepancies between the assessments of either of the supervisors, a Certificate of Periodic Assessment will not be issued; however, both the Client’s Supervisor and the Supplier’s Supervisor shall provide in writing, a detailed and reasonable explanation for each of their opinions and provide a copy of such document to both the Parties. Upon receipt of such document, any of the Parties may submit this as a conflict to the Independent Expert, who shall settle such conflict in its capacity as an independent expert acting as an arbitrator. The detailed proceeding to be followed in such cases is described in Schedule 5 hereto.

# Independence of the Parties, absence of employment relationship

## [Nothing contained in this Agreement shall be construed as establishing an employer-employee, partnership or independent contractor relationship between the Parties. The Supplier agrees to comply with its employment and social security obligations and to indemnify the Client from and against any losses arising out of a breach thereof.][*This clause may be retained/omitted/modified depending upon the domestic contract laws of the jurisdictions involved.*]

# Termination

## This Agreement shall automatically terminate upon expiration of its term as per Clause 8.

## This Agreement may be terminated by:

### mutual agreement between the Parties communicated in writing;

### at the election of the non-breaching Party, in case of a material breach of any obligations hereunder by the other Party, except if such breach can be cured and is in fact cured no later than [10 (ten) Business Days] from the receipt by the breaching Party of a written notice from the non-breaching Party requesting such cure. The breaching Party’s failure to cure a breach within the period set forth herein shall give the non-breaching Party the right to terminate this Agreement by written notice to the breaching Party, without prejudice to any additional claims for losses and damages resulting therefrom;

### in case of a force majeure that prevents a Party from fulfilling its obligations hereunder, such Party may notify the other Party in writing explaining the relevant events of force majeure preventing such performance, how long it expects these events to last (if feasible) and any measures adopted to mitigate damages to the other Party (the **Force Majeure Notice**), in which case the compliance with obligations affected by the event of force majeure shall be suspended. For the avoidance of doubt, a Party’s own strike or voluntary non-performance of the terms of this Agreement in the absence of any events preventing the performance of this Agreement shall not be deemed an event of force majeure. Notwithstanding the foregoing, no later than [\_\_\_\_\_\_] following the receipt of a Force Majeure Notice, any of the Parties may terminate this Agreement, it being agreed that any mutual performance shall be restituted, reversed or reimbursed as the case may be, but no losses and damages shall be due by one Party to another. ;

## Except where expressly specified to the contrary, termination of this Agreement shall not affect any of the Parties’ rights and remedies that have accrued as at termination, including the right to claim damages in respect of any breach of this Agreement which existed at or before the date of termination.]

## Any provision of this Agreement that expressly or by implication is intended to come into or continue in force on or after termination shall remain in full force and effect.

# General

## **Confidentiality**.

### Each Party undertakes that it shall not at any time during this Agreement, and for a period of [five **OR** [NUMBER]] years after termination of this Agreement, without the written consent of the other Party, disclose to any person any confidential information concerning this Agreement, the terms of this Agreement, the business, affairs, customers, clients or suppliers of the other Party [or of any member of the group to which the other Party belongs], except as permitted by Clause 12.1(b). [For the purposes of this Clause, **group** means, in relation to a Party, that Party, any subsidiary or holding company from time to time of that Party, and any subsidiary from time to time of a holding company of that Party.]

### Each Party may disclose the other Party’s confidential information:

#### to its employees, officers, representatives or advisers who need to know such information for the purposes of exercising the Party’s rights or carrying out its obligations under or in connection with this Agreement. Each Party shall ensure that its employees, officers, representatives or advisers to whom it discloses the other Party’s confidential information comply with this Clause 12.2;

#### as may be required by law, a court of competent jurisdiction or any governmental or regulatory authority;

#### if the information is or becomes publicly available (other than by breach of this Agreement);

### No Party shall use any other party’s confidential information for any purpose other than to perform its obligations under this Agreement.

## **Entire agreement**.

## [This Agreement constitutes the whole agreement between the Parties relating to the Project to the exclusion of any terms implied in law that may be excluded by contract. They supersede and extinguish any and all prior discussions, correspondence, negotiations, drafts, arrangements, understandings or agreements relating to the Project. *Provided*, however that this Clause does not limit or exclude any liability for fraud.][*Note: this clause may need to be modified in different jurisdictions, depending upon applicable domestic contract law.*]

## **Variation**

## No variation of this Agreement shall be effective unless it is in writing and signed by or on behalf of each Party.

## **Waiver**

## No failure or delay by a party to exercise any right or remedy provided under this Agreement or by law shall constitute a waiver of that or any other right or remedy, nor shall it prevent or restrict the further exercise of that or any other right or remedy. No single or partial exercise of such right or remedy shall prevent or restrict the further exercise of that or any other right or remedy.

## **Severance**.

### If any provision of this Agreement is held to be invalid or unenforceable by any judicial or other competent authority, all other provisions of this Agreement will remain in full force and effect and will not in any way be impaired.

### If any provision of this Agreement is held to be invalid or unenforceable but would be valid or enforceable if some part of the provision were deleted or amended, the provision in question will apply with the minimum modifications necessary to make it valid and enforceable.

### If any provision or part-provision of this Agreement is deemed deleted under this Clause, the Parties shall negotiate in good faith to agree a replacement provision that, to the greatest extent possible, achieves the intended commercial result of the original provision.

## **Further assurance**. Each Party shall, and shall use all reasonable endeavours to procure that any necessary third party shall, promptly execute and deliver such documents and perform such acts as may [reasonably] be required for the purpose of giving full effect to this Agreement.

## **Notices**.

### Any notice to be given under this Agreement must be in [English] and in writing, and may be served by hand, by first class post or airmail (pre-paid and signed for in each case) or by email to the address, or email address (as applicable) given below, or to such other address or email address as may have been notified by any Party to the other Parties for this purpose (which shall supersede the previous address, or email address (as applicable) from the date on which notice of the new address is deemed to be served under

### All notices shall be in writing and delivered (i) by hand with receipt confirmation by the other Party, (ii) through a notary, (iii) by certified facsimile (iv) by regular mail or e-mail or any other means with return receipt and duly addressed to the Client’s Supervisor or the Supplier’s Supervisor, as the case may be, whose contact information may be found below:

|  |  |  |
| --- | --- | --- |
|  | Supplier’s Supervisor | Client’s Supervisor |
| Name |  |  |
| Address |  |  |
| E-mail |  |  |
| Facsimile |  |  |

### .

(b) A notice or other communication shall be deemed to have been received: if delivered personally, when left at the address referred to hereinabove; if sent by pre-paid first class post or other next working day delivery service, at [9.00 am **OR** [TIME]] on the [second **OR** [NUMBER]] Business Day after posting; if delivered by commercial courier, on the date and at the time that the courier’s delivery receipt is signed; or, if sent by [fax or] email, one Business Day after transmission.

### The provisions of this Clause do not apply to the service of any proceedings or other documents in any legal action.

## **Third party rights**. No one other than a Party to this agreement shall have any right to enforce any of its terms.

## **Governing law**. This Agreement, and any dispute or claim (including non-contractual disputes or claims) arising out of or in connection with it or its subject matter or formation, shall be governed by, and construed in accordance with the law of [England and Wales].

## **Jurisdiction**. Each party irrevocably agrees that the courts of [England and Wales] shall have exclusive jurisdiction to settle any dispute or claim (including non-contractual disputes or claims) arising out of or in connection with this agreement or its subject matter or formation.

## **Data Privacy**.The data privacy obligations in connection with this Agreement are set out in Schedule 6.

This agreement has been entered into on the date stated at the beginning of it.

[SIGNATURE PAGE]

##### Project

[To be provided by the Supplier]

##### Formula for calculation of the Committed Energy Saving

The Committed Energy Saving will be calculated based on the actual conditions of the installation of the System and the estimated usage data, in accordance with the following formula



Where:

* Ibr means the index prior to the installation of the System, obtained by the operation of preexisting installations. This index will be based upon:
1. On-site measurements of pre-existing installations (kW, kWh…)
2. Operational factors (number of units, operating hours, [charges // load])
* Iar means the index after the installation of the System for the validation of the proposal. This index will be based upon:
1. Datasheet of the Manufacturer for the new equipment (kW, kWh, rpm, etc.)
2. Operational factors (number of units, operating hours, [charges // load])

Commited Energy saving will be calculated based on the actual conditions of the installation of the System and the estimated usage data, in accordance with the formula in the methodology handbook per technology.

##### Minimum Project Content

|  |  |
| --- | --- |
| **Regarding the Supplier** | * Experience and ability of the Supplier and training of the workers assigned to the Project.
 |
| **Regarding the System** | * Technical documentation necessary for the proper operation of the System.
* Warranty by the Supplier for the products, installation, setup and operation, with express provision of scope and duration.
* Detailed description of the parts to be supplied, including quantity, quality standards and sufficient description of their technical specifications.
 |
| **Regarding the Committed Energy Saving** | * Current energy consumption of the Client and parameters employed in its measurement.
* Calculation of the Committed Energy Saving in accordance with the formula indicated in Schedule 2, expressly indicating the concepts upon which the Ibr (index prior to the installation of the System) and the Iar (index after the installation of the System) were based.
* Identification details of the data-logger to be installed in the System on a permanent basis, indicating the key parameters to be monitored by it.
* The ESI technique employed for the measurement, reporting and verification (MRV) will be based on [Option A - CMVP Protocol Method][*BASE team to review and confirm this, as it was not very clear from the translations*].
* The confirmation that the validations followed ESI Methodology Handbook per technology.
* The confirmation that all of the measurements must be reported using the ESI measurement reporting template.
* Actual conditions and data that have been estimated for the calculation of the Committed Energy Saving.
* Operational factors that define the use of technology, such as operating hours [Signed hours (h)], energy consumption based on 12 latest invoices, airflow, engine load, etc.
* Instructions on the operation of the System after installation by the Client for the obtainment of the Committed Energy Saving.
* Resources to be employed to assess if the Client has properly followed such instructions.
* The confirmation that the methodology employed for the measurement of the Achieved Energy Saving follows the Methodology Handbook per technology
* Minimum maintenance measures which are based on country regulations or on maintenance operations established by the Supplier to be taken by the Client for the survival of the Supplier’s obligation to guarantee the Committed Energy Saving.
 |
| **Installation of the System** | * Timeline for the performance of the activities.
* Installation procedure.
* Resources to be employed by the Supplier (materials, tools, estimated workforce).
* Demarcation of premises in the Establishment where the Supplier and its workers may operate or occupy for the implementation of the Project.
 |
| **Implementation of the System** | * Implementation timeline.
* Procedure.
* Resources to be employed by the Supplier (materials, tools, estimated workforce).
* Training of the Client’s personnel in respect of the operation and maintenance of the System (including agenda and dates)
 |
| **Permits, Licenses and Approvals** | * Details of the permits, licenses and governmental approvals to be obtained by each Party for the performance of the activities related to the Project.
 |
| **Fees** | * Total fees for the supply, installation and setup of the System, as well as for the agreed maintenance, if any, including a breakdown of the total fees for each concept.
 |

##### Form of Certificate of Initial Assessment and Certificate of Periodic Assessment

***CERTIFICATE OF ASSESSMENT IN CONNECTION WITH THE SYSTEM’S SUPPLY, AND MAINTENANCE OF AGREEMENT ENTERED INTO BY AND BETWEEN [CLIENT’S NAME] AND [SUPPLIER’S NAME] AS OF [DATE]***

***Date of Assessment:****…………………………………………………………………………………..*

*…. Initial Assessment*

*….Periodic Assessment*

***Operating Period of the System subject to Assessment:***

*From ……………………………………… through …………………………………………………*

***Party Responsible for Assessment:***

*………………………………………………………………………………………………………………………………………………………………………………….………………………………………………………………………………………………………………………………………………………………………………….………………………………………………………………………………………………………………………………………………………………………………….………………………………………………………………………………………………………………………………………………………………………………………*

***Achieved Energy Saving:*** *.................. %*

***Difference from Committed Energy Saving:*** *……………………..%*

***Indemnification for Committed Energy Saving Shortfall:*** *………………… Euros.*

*[Location], [date]*

*[Signatures]*

##### Proceeding before Independent Expert for disputes relating to a periodic assessment

##### Data Protection Obligations

## For the purpose of this Schedule the terms “Controller”, “Processor”, “Data Subject”, “Personal Data”, “Supervisory Authority” and “Processing” will be as defined in applicable Data Protection Legislation, and “Process” and “Processed” will be construed accordingly.

## The Parties undertake that they will comply, and take all reasonable steps to cause their employees, agents and subcontractors to comply with, all applicable Data Protection Legislation in connection with the performance of their obligations under this Agreement.

## The Parties acknowledge and agree that, for the purposes of applicable Data Protection Legislation, the applicable Recipient is the controller, and the applicable Provider is the processor, of any Personal Data provided by such Recipient to enable the provision of the Services.

## In processing Personal Data on behalf of the applicable Recipient during the provision of the Services, the applicable Provider (acting as processor) shall:

#### only act on the instructions of the Recipient, as set out in this Agreement or as otherwise documented by the Recipient, unless any applicable laws require otherwise, in which case, the Provider shall promptly notify the Recipient of such legislative requirement before processing such Personal Data (unless the Provider is barred from notifying the Recipient under any applicable laws);

#### implement and maintain at all times during the term of this Agreement appropriate technical and organisational measures to protect such Personal Data against accidental or unlawful destruction or accidental loss, alteration, unauthorised disclosure or access, taking into account the state of the art, the costs of implementation and the nature, scope, context and purposes of the processing;

#### ensure the reliability of any person that the Provider discloses such Personal Data to, including by ensuring such persons have committed themselves to confidentiality or are under an appropriate statutory obligation of confidentiality in respect of such Personal Data;

#### only transfer Personal Data outside the European Economic Area in accordance with applicable Data Protection Legislation. If the Provider is required by applicable law to transfer such Personal Data outside of the European Economic Area, the Provider shall inform the Recipient of such requirement before making the transfer (unless the Provider is barred from making such notification under applicable law);

#### provide reasonable cooperation as requested by the Recipient to assist the Recipient with responding to any request from a Data Subject, and in ensuring compliance with its obligations under the Data Protection Legislation with respect to security, breach notifications, data protection impact assessments and consultations with Supervisory Authorities;

#### notify the Recipient without undue delay on becoming aware of a Personal Data breach and reasonably assist the Recipient, at the Recipient’s request and cost, in ensuring compliance with the Recipient’s obligations under applicable Data Protection Legislation with respect to Personal Data breach notifications;

#### upon the termination or expiry of the Agreement for any reason, promptly (at the Recipient’s election) delete, or return to the Recipient, all such Personal Data, unless it is necessary for the Provider to retain certain copies of such Personal Data to comply with any applicable laws; and

#### maintain and make available to the Recipient, on the Recipient’s request, complete and accurate records to demonstrate its compliance with this Clause 13 and allow for audits and inspections by the Recipient or the Recipient’s designated auditor on reasonable written notice

## The Recipient hereby generally authorises the Provider to engage sub-processors of the Personal Data, including any member of the Provider’s Group, for the provision of the Services. The Provider shall notify the Recipient of any intended new sub-processor of such Personal Data and provide the Recipient with a reasonable period to object to such new sub-processor’s engagement. The Provider shall ensure that any sub-processor of the Personal Data is under an obligations with respect to the Personal Data that are no less protective than the provisions of this Schedule. The Provider shall remain fully liable for performance of any sub-processor's obligations under this Agreement.

## Each Party shall promptly, and without undue delay, notify the other Party and provide reasonable assistance as requested, where it becomes aware of any Data Subject complaint in relation to the other party’s Personal Data, or, unless and to the extent required by applicable law, any communication by a relevant data protection authority in relation to the Personal Data of the other party Processed pursuant to this Agreement.