

OWNER'S REPRESENTATIVE AGREEMENT

THIS OWNER'S REPRESENTATIVE AGREEMENT ("Agreement" or "Contract") is made as of this ____ day of ____, 2016, by and between the **TOWN OF GUILFORD, CONNECTICUT**, 31 Park Street, Guilford, Connecticut, a municipality organized and existing under the laws of the state of Connecticut ("Owner" or "Town") and _____, a _____ corporation organized and existing under the laws of the State of _____ and having a principal place of business located at _____ ("ESPC CONSULTANT").

W I T N E S S E T H:

WHEREAS, the Town operates and maintains the energy infrastructure for certain municipal and school buildings, as well as municipal street lighting, located in Guilford, Connecticut;

WHEREAS, the Town seeks to enhance the overall energy and cost performance of the Town's energy infrastructure at the facilities and buildings listed in Attachment A to the RFQ;

WHEREAS, the Town intends to identify a scope of services to be performed by an Energy Service Company ("ESCO") pursuant to an Energy Savings Performance Contract ("ESPC") and to solicit an ESPC with an ESCO;

WHEREAS, the Town issued a Request for Qualifications, identified by the Town as RFQ/P #3-1516 ("RFQ") for third party energy savings performance contracting consultant and owner's representative services;

WHEREAS, the RFQ is expressly incorporated herein and made a part hereof as **Exhibit A**;

WHEREAS, ESPC Consultant submitted its Statement of Qualifications on _____ and the same is expressly incorporated herein and made a part hereof as **Exhibit B**;

WHEREAS, ESPC Consultant submitted its Proposal on _____ and the same is expressly incorporated herein and made a part hereof as **Exhibit C**;

WHEREAS, ESPC Consultant submitted its Fee Proposal on _____ and the same is expressly incorporated herein and made a part hereof as **Exhibit D**;

WHEREAS, the Town has accepted ESPC CONSULTANT'S proposal and wishes to retain ESPC CONSULTANT to perform certain owner's representative services in connection with the Town's ESPC, as more particularly set forth herein and in the RFQ; and

WHEREAS, ESPC CONSULTANT is willing to assume and undertake the obligations set forth herein and in Exhibits A through D hereto. The parties further agree to work together to allocate the agreed upon resources of ESPC CONSULTANT in performing the services described hereunder to the maximum benefit of the Town.

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereto hereby agree as follows:

ARTICLE 1: RELATIONSHIP OF THE PARTIES

ESPC CONSULTANT shall act as an independent contractor of the Owner in providing the services required under this Contract.

ESPC CONSULTANT warrants and represents to the Owner that it has fully, completely and truthfully represented its qualifications and skills in the proposal submitted by ESPC CONSULTANT to Owner, in this Contract and in all communications with the Owner relative to this Contract.

Nothing in this Contract shall be construed as an assumption by ESPC CONSULTANT of the responsibilities or duties of the ESCO. ESPC CONSULTANT'S services shall be rendered compatibly and in coordination with the services provided by the ESCO.

ARTICLE 2: RESPONSIBILITIES OF ESPC CONSULTANT

ESPC CONSULTANT and Owner acknowledge that unless otherwise expressly agreed to in writing, ESPC CONSULTANT shall not have the authority to act as, and shall not be, Owner's agent with respect to the execution and delivery of any agreement in connection with the ESPC.

As Owner's Representative, ESPC CONSULTANT will diligently and timely perform the services required of it pursuant to the scope of work set forth in Exhibits A through D hereto. ESPC CONSULTANT shall provide all services required of it in a workmanlike manner and using its best skill and judgment. Services shall continue through Project closeout.

ESPC CONSULTANT shall perform the services required under this Contract in conformance with applicable federal, state, and local laws, ordinances and regulations.

ESPC CONSULTANT shall report to the Owner any act or inaction by any party in connection with the Project which ESPC CONSULTANT believes creates a substantial health or safety risk.

ESPC CONSULTANT acknowledges the importance that the Owner attributes to the abilities and qualifications of the key members of ESPC CONSULTANT'S team, and the continuity of key members' participation in the services to be provided under this Agreement. This Agreement has been entered into by the Owner based on the representation of ESPC CONSULTANT that the individuals, consultants, assignments and responsibilities, as detailed in ESPC Consultant's Proposal dated _____, will be maintained throughout the duration of this engagement. No substitution or replacement of individuals or change in ESPC CONSULTANT's personnel assigned to the Project, as listed in ESPC CONSULTANT's Proposal, shall take place without the prior written approval of the Owner, except when necessitated by termination of the employment of such personnel. If ESPC CONSULTANT proposes to replace one of the key members of ESPC CONSULTANT's team, ESPC CONSULTANT shall propose a person or consultant with qualifications at least equal to the

person ESPC CONSULTANT proposes to replace. The Owner shall have the right to approve any substitution or replacement or change in status for the persons listed in ESPC CONSULTANT's Proposal. At the request of the Owner, ESPC CONSULTANT shall consult with the Owner to resolve any situation in which the Owner determines that a member of ESPC CONSULTANT's team is failing to perform services in an acceptable manner to the Owner. The Owner shall have the right to direct the removal of any such person or consultant. No act or omission of the Owner or the Authority made or permitted under this Section shall relieve ESPC CONSULTANT of its responsibility for the performance of the services specified in this Contract.

ESPC CONSULTANT shall employ, at all times, professional and properly trained support personnel with requisite expertise and adequate experience to assure the complete, timely and high quality performance of the obligations of ESPC CONSULTANT.

ESPC CONSULTANT shall be and shall remain liable to the Owner for all damages incurred by the Owner as a result of the failure of ESPC CONSULTANT's to perform in conformance with the terms and conditions of this Contract.

The scope of the ESPC CONSULTANT's services to be rendered pursuant to this Contract are set forth herein, as well as in more detail in **Exhibits A through D** hereto. This Contract expressly incorporates by reference, as if fully set forth herein, the full contents of **Exhibits A through D**.

TIME IS OF THE ESSENCE IN THE PERFORMANCE OF ESPC CONSULTANT'S OBLIGATIONS HEREUNDER.

ESPC CONSULTANT shall assist the Town in the procurement of an ESCO, as well as in the negotiation, preparation and review of a contract between the selected ESCO and the Town that reflects the scope of work developed and identified by the Town in collaboration with the ESPC Consultant. ESPC CONSULTANT shall ensure that the Town incurs no cost, expense or liability throughout the term of the project.

ESPC CONSULTANT shall provide construction administration services typical for similar public performance contracting projects in Connecticut, to ensure the project is completed in accordance with approved plans, specifications, and the ESCO contract. ESPC CONSULTANT shall inspect and verify substantial completion of the project, identify all punch list items, and review/approve ESCO's invoices. ESPC CONSULTANT shall prepare certificates of payment, RFI logs, status/progress reports and Certificates of Substantial Completion, respectively. ESPC CONSULTANT shall monitor all system commissioning. ESPC CONSULTANT shall ensure that all warranties, guarantees, rebates, training, operation and maintenance materials, equipment manuals, and other contractual requirements are adequate, are provided, are documented and are turned over to the appropriate Town and District personnel.

ESPC CONSULTANT shall maintain a complete Project file and provide the Town and the District, respectively, with a digital copy of same upon Project completion.

ARTICLE 3: COMPLIANCE WITH LAW

ESPC CONSULTANT shall comply with any present or future laws, rules, regulations, ordinances, orders, directions, or other requirements of the federal, state and municipal government; any agencies, departments, subdivisions, bureaus, offices, and/or other authority thereof; and any other governmental, public and/or quasi-public authorities now existing or hereafter created, as and to the extent any of the foregoing have jurisdiction over ESPC CONSULTANT's performance of its obligations hereunder. ESPC CONSULTANT shall work with the Owner, the District, and other governmental entities and officials to provide that the Project is performed in accordance with the requirements of applicable laws and best practices.

ARTICLE 4: TIME AND MANNER OF PERFORMANCE; TERM OF AGREEMENT; DUTIES AND OBLIGATIONS OF THE PARTIES UPON THE EXPIRATION OR EARLIER TERMINATION OF THIS AGREEMENT

The term of this Agreement shall commence on the date hereof and, except as otherwise expressly provided herein, shall continue until the date on which ESPC CONSULTANT completes its obligations hereunder, unless earlier terminated by the parties as set forth below.

ESPC CONSULTANT acknowledges that expeditious completion of ESPC CONSULTANT's services and the Project is of the utmost importance to the Owner. **TIME IS OF THE ESSENCE with regard to ESPC CONSULTANT's performance and completion of the services required under this Agreement.** ESPC CONSULTANT agrees that no other work in its organization will be permitted to interfere with its timely performance of the work required under this Agreement or any amendment.

ESPC CONSULTANT shall perform its services in a timely manner and shall not delay the work of the ESCO or any contractor. ESPC CONSULTANT shall immediately advise the Owner, in writing, any time the ESPC CONSULTANT determines that any action or inaction of the ESCO or anyone else is jeopardizing the Project schedule.

If at any time all or any portion of ESPC CONSULTANT's responsibilities hereunder are to be terminated or ESPC CONSULTANT otherwise is not to continue to fulfill its role with respect to the Project, then ESPC CONSULTANT agrees that it will fully cooperate with the Owner to ensure a smooth transition of such responsibilities to the Owner or any person(s) or entity (ies) chosen by the Owner to assume those responsibilities. In this regard, and without limiting the generality of the foregoing, ESPC CONSULTANT hereby agrees that:

(a) ESPC CONSULTANT shall continue to fulfill all of its Owner's Representative functions hereunder as if this Agreement were not about to be terminated, and, in this regard, shall continue to provide those services as ESPC CONSULTANT otherwise has, and has been required to do, during the Term hereof; and

(b) ESPC CONSULTANT shall make copies of, and otherwise make available to the Owner, any and all financial records and other documents requested by the Owner and assist the Owner in making a complete inventory of all material, equipment, personal property, fixtures and other goods, accounting for all moneys spent by ESPC CONSULTANT and the Owner to date, and identifying all accounts receivable and payable at that time.

ARTICLE 5: COMPENSATION

ESPC CONSULTANT's Fee. For the satisfactory performance of the all services required by this Agreement, the parties hereby agree that: ESPC CONSULTANT shall be paid a sum not to exceed the fees set forth in **Exhibit D** hereto.

Billing. As of the last day of each month, ESPC CONSULTANT shall submit to the Town monthly invoices for items requiring the Town's payment, in such form and with such supporting documentation as is reasonably required by the Town, which invoices shall be due and payable within thirty (30) days after receipt by the Town. All billing shall be done on an actual percentage of completion basis.

ARTICLE 6: INDEMNIFICATION AND INSURANCE.

A. ESPC CONSULTANT shall indemnify, defend and hold harmless the Owner, its agents, officials, employees, and all of their respective successors and assigns from and against any and all loss or liability (statutory or otherwise), claims, actions, suits, demands, , losses and costs, including reasonable attorneys' fees and disbursements/costs/expenses, but specifically excluding consequential damages, hereinafter, individually and collectively, a "Claim" or "Claims") for or arising from ESPC CONSULTANT's performance or lack thereof under this Agreement including, but not limited to, (i) Claims based upon (a) ESPC CONSULTANT's failure to pay for or provide goods or services as required hereunder, or (b) any negligent act or omission on the part of ESPC CONSULTANT or any of its agents, officers or employees in the acquisition or provision thereof arising from professional services rendered by ESPC CONSULTANT, as well as (ii) Claims for or arising from injury to, or death of, any person or persons, or damage to real or personal property (including the loss of use thereof), which occurs under, in connection with or by reason of ESPC CONSULTANT' s performance or lack thereof under this Agreement during the term hereof. In case any action or proceeding is brought against the Owner by reason of any matter which is the subject of the foregoing indemnity, ESPC CONSULTANT shall pay all costs, reasonable attorneys' fees, out-of-pocket expenses, and liabilities resulting thereof, and shall resist such action or proceeding by attorneys chosen by it and reasonably satisfactory to Owner.

B. The Owner shall indemnify, defend and hold harmless ESPC CONSULTANT, its agents, officials, employees and assigns from and against any Claims for or arising from Owner's performance or lack of performance under this Agreement, including, but not limited to, (i) Claims based upon Owner's failure to pay for goods or services as required hereunder, as well as (ii) Claims for or arising from injury to, or death of, any person or persons, or damage to real or personal property (including the loss of use thereof), which occurs under, in connection with or by reason of the Owner's performance or lack thereof under this Agreement during the term hereof. In case any action or proceeding is brought against ESPC CONSULTANT by reason of any matter which is the subject of the foregoing indemnity, the Owner shall pay all costs, reasonable attorneys' fees, out-of-pocket expenses, and liabilities resulting thereof, and shall resist such action or proceeding by attorneys chosen by it and reasonably satisfactory to ESPC CONSULTANT.

C. Each party's obligations to indemnify, defend and hold harmless the other

and its officials, agents and employees shall survive the expiration or earlier termination of this agreement.

D. The indemnification obligation in this Article shall be in addition to, and not a limitation of, any other rights and remedies available to the Owner under this Agreement or at law.

E. ESPC CONSULTANT shall purchase and maintain such insurance as will protect the Owner from the claims set forth below which may arise out of or result from ESPC CONSULTANT's services under this agreement and for which ESPC CONSULTANT or the Owner may be legally liable:

1. ESPC CONSULTANT shall be responsible for maintaining insurance coverage in force for the duration of the Contract of the kinds and amounts listed below, with an insurance company with an AM Best Rating of A-, VIII or better licensed to write such insurance in the State of Connecticut and acceptable to the Town.

2. The insurer shall provide the Town and the District with Certificates of Insurance signed by an authorized representative of the insurance company prior to the performance of this contract describing the coverage and providing that the insurer shall give the Town and the District written notice of at least thirty (30) days in advance of any termination, expiration, or any and all changes in coverage.

3. All insurance or renewals or replacements thereof shall remain in force during the ESPC CONSULTANT's responsibility under this contract.

4. ESPC CONSULTANT, at its own cost and expense, shall procure and maintain all insurances required and shall include the Town and the Guilford Board of Education as Additional Insureds on all such insurance, except Workers' Compensation coverage. The Certificate of Insurance shall evidence all required insurances, including Additional Insured and Waiver of Subrogation.

5. *SPECIFIC REQUIREMENTS*

ESPC CONSULTANT shall provide such insurances at such limits as are set forth in and described in the RFQ/P attached hereto as **Exhibit A**.

ARTICLE 7: OWNER'S TERMINATION RIGHTS

This Agreement is subject to the limitation that whenever ESPC CONSULTANT shall do, or permit anything to be done, whether by action or inaction, contrary to any covenant or agreement on the part of ESPC CONSULTANT contained in this Agreement, and ESPC CONSULTANT shall fail to remedy the same within fourteen (14) days after the Owner shall have given to ESPC CONSULTANT a written notice specifying the same, the Owner may give to ESPC CONSULTANT a notice of its intention to terminate this Agreement specifying a day not less than five (5) days thereafter ("second notice") as being the termination date hereof, and, upon the giving of the second notice, this Agreement shall expire and terminate upon the day so specified in the second notice as fully and completely and with the same force and effect as if the

day so specified were the date hereinbefore fixed for the expiration of this Agreement and, except as otherwise specifically provided to the contrary, all rights of ESPC CONSULTANT under this Agreement shall thereupon expire and terminate. Notwithstanding any termination, (i) the Owner shall remain liable to reimburse ESPC CONSULTANT for any fees due hereunder based on work actually performed by the ESPC CONSULTANT as of the date of termination, and for work performed with respect to transition in Section 4(a) computed using ESPC CONSULTANT's standard hourly rates, and (ii) ESPC CONSULTANT shall comply with the provisions of this Agreement which survive termination.

The Owner may, upon thirty (30) days advance written notice, terminate this Agreement for the Owner's convenience, without cause. In the event that the Owner exercises its right to terminate this Agreement for Owner's convenience, Owner shall remit to ESPC CONSULTANT, within thirty (30) days of the effective date of such termination, any sums due to ESPC CONSULTANT for services actually rendered hereunder, billed in accordance with the terms hereof. Other than payment for work performed as of the date of termination, no sums of any nature, including lost profits for work not performed, shall be due to ESPC Consultant upon Owner's termination for convenience of this Agreement.

ARTICLE 8: CUMULATIVE RIGHTS AND REMEDIES

The mention herein of any particular remedy shall not preclude the moving party from any other remedy it might have, either at law or in equity. The failure of either party to insist upon the strict performance of any one of the covenants, agreements, terms, provisions or conditions of this Agreement or to exercise any right, remedy or election herein contained or permitted by law, shall not constitute or be construed as a waiver or relinquishment for the future of such covenant, agreement, term, provision, condition, right, remedy or election, but the same shall continue and remain in full force and effect. Any right or remedy that either party may have at law, in equity or otherwise upon breach of any covenant, agreement, term, provision or condition in this Agreement contained upon the part of the defaulting party to be performed, shall be distinct, separate and cumulative and no right or remedy, whether exercised by the moving party or not, shall be deemed to be in exclusion of any other. No covenant, agreement, term, provision or condition of this Agreement shall be deemed to have been waived by either party unless such waiver shall be in writing, signed by either party or either party's agent duly authorized in writing. Consent of either party to any act or matter must be in writing and shall apply only with respect to the particular act or matter to which such consent is given and shall not relieve the defaulting party from the obligation wherever required under this Agreement to obtain the consent of the moving party to any other act of matter. This Agreement may not be changed orally, but only by an agreement in writing signed by the party against whom enforcement of any waiver, change, modification or discharge is sought.

ARTICLE 9: GOVERNING LAW; NOTICE; DISPUTE RESOLUTION; VENUE

This Agreement shall be governed by and construed in accordance with the laws of the State of Connecticut.

Notices. All notices, claims, or demands hereunder shall be in writing and shall be delivered personally, or sent by certified or first class mail, postage prepaid, addressed to the party at the following address:

If to the Owner:

Town of Guilford

Town Hall
31 Park Street
Guilford, CT 06437

With a copy to:

If to ESPC CONSULTANT:

With a copy to:

If a notice is hand-delivered, delivery shall be conclusively deemed effected at such time. If delivered by certified or first-class mail, delivery shall be conclusively deemed effective upon mailing.

Dispute Resolution and Venue: If a dispute arises between the parties hereto, the parties agree to use the following procedures to resolve the dispute: (a) Negotiation. A meeting shall be held between representatives of the parties with decision-making authority regarding the dispute to attempt in good faith to negotiate a resolution of the dispute; such meeting shall be held within fourteen calendar days of a party's written request for such a meeting; (b) Mediation. If the parties fail to negotiate a resolution of the dispute, they shall submit the dispute to mediation as a condition precedent to litigation and shall bear equally the costs of the mediation. The parties shall jointly appoint a mutually acceptable mediator; if they are unable to agree upon a mediator within fourteen (14) days of a demand for mediation by either party, then the mediation shall be administered by the American Arbitration Association in accordance with the Construction Industry Rules or the ADR Center, Inc.; and (c) Litigation. If the parties fail to resolve their dispute through mediation, or are unable to convene mediation within 60 days of first attempting to do so, then either party may file suit in Connecticut Superior Court in and for the Judicial District of New Haven at New Haven.

ARTICLE 10: MISCELLANEOUS

Severability. If any term or provision of this Agreement or the application thereof to any person or circumstances shall, to any extent, be invalid or unenforceable, the remainder of this Agreement, or the application of such term or provision to persons or circumstances other than those as to which it is held invalid or unenforceable, shall not be affected thereby, and each term

and provision of this Agreement shall be valid and be enforced to the fullest extent permitted by law.

Successors and Assigns; Joint and Several. This Agreement shall be binding upon and shall inure to the benefit of the parties hereto and their successors. Neither party, however, shall have any right to assign this Agreement or their interests herein without the approval of the other, which approval may be withheld in said party's absolute discretion. Any assignment or attempted assignment of this Agreement in violation of this provision shall be null and void *ab initio*.

Amendments. This Agreement may be amended by written instrument executed by the parties hereto, acting therein by their duly authorized representatives.

Non-Waiver. Any failure by the Owner or ESPC CONSULTANT to insist upon the strict performance by the other of any of the terms and provisions hereof shall not be a waiver, and each party hereto, notwithstanding any such failure, shall have the right thereafter to insist upon the strict performance by the other, of any and all of the terms and provisions of the Agreement, and neither party hereto shall be relieved of such obligation by reason of the failure of the other to comply with or otherwise enforce any of the provisions of this Agreement.

Entire Agreement. This Agreement contains the entire understanding between the parties hereto and supersedes any and all prior understandings, negotiations, and agreements whether written or oral, between them respecting the subject matter hereof.

By: **TOWN OF GUILFORD**

By: _____

Its _____

By: _____

By: _____

Its President