



Budget Committee Meeting - Final

February 22, 2024

5:00 PM

A. 2024-050 Georgia Power Master Agreement Discussion

CONTRACT

MASTER AGREEMENT FOR ENERGY RELATED SERVICES

BETWEEN

GEORGIA POWER COMPANY

AND

CITY OF SMYRNA

MASTER AGREEMENT FOR SERVICES

THIS MASTER AGREEMENT FOR SERVICES (hereinafter referred to as "the Agreement") is entered into by and between **GEORGIA POWER COMPANY**, with a place of business at 241 Ralph McGill Blvd., Atlanta, Georgia, U.S.A. 30308 (hereinafter referred to as "GPC") and **CITY OF SMYRNA**, with a place of business at 2800 King Street, Smyrna, GA 30080 (hereinafter referred to as "Customer") and is effective on the date it is executed by the latter of GPC and Customer.

W I T N E S S E T H

WHEREAS, Customer desires for GPC to perform and provide Customer with certain energy, energy infrastructure, and energy efficiency related services as requested by Customer and more particularly described herein below; and

WHEREAS, GPC is willing to perform and provide such services;

NOW, THEREFORE, in consideration of the representations and agreements contained herein, the parties hereby agree as follows:

1. **Scope of Services.** This Agreement is applicable to GPC's furnishing of certain materials and performance of certain contract management, engineering, construction and/or consulting services (herein "Services") as more particularly described in the Description of Services which will be attached as Exhibit A to each Work Order issued pursuant to this Agreement. The scope of the Services shall be more particularly described in such written work orders. If additional Services are required, other than those specified on the original work order, GPC shall notify Customer for authorization for such additional Services, prior to the commencement of such additional Services.
2. **Work Orders.** Services shall be provided through a written work order. The term "Work Order" shall mean a written Work Order in the form attached hereto as Attachment 1, which shall reference the Contract Number assigned to this Agreement and shall include the following minimum information:
 - a) The date of the Work Order and the Work Order Number
 - b) A description of the Services to be provided
 - c) the Customer and GPC project coordinators
 - d) The GPC personnel assigned to the project for the Services
 - e) The estimated dates for the commencement and completion of the Services
 - f) The agreed upon compensation, which shall be in the form of either (i) a fixed-price, lump-sum or (ii) an energy savings guarantee amount to be calculated monthly and verified annually, together with the terms of payment (if required)
 - g) The amount of savings estimated, and any amount guaranteed (if required)
 - h) A measurement and verification plan related to the project specific ECMs (if required)
 - i) Designation of the party providing the specifications and drawings required to perform the Services (if required)
 - j) A milestone schedule and/or milestone dates for the performance of the Services, to be attached as Exhibit B to each Work Order
 - k) Responsibilities of the Customer
 - l) Any specific permits that must be obtained by GPC or by Customer
 - m) The requirement of, and amount of, a surety bond to secure the performance of GPC's obligations under the Work Order (if required);
 - n) A Termination Payment Schedule detailing the amount to be paid to GPC by Customer in the event that the Agreement or the Work Order is not renewed for a total of ten (10) years as anticipated by the Parties (Work Order Exhibit G);
 - o) Each of the Exhibits identified herein as specific to a particular Work Order; and
 - p) Any additional term and condition applicable to the Work Order.

Customer will forward the signed Work Order to the GPC Coordinator via email or company address, and within five (5) days after GPC's receipt of a Work Order, GPC shall either accept or reject the Work Order in writing and shall return a copy of the accepted or rejected Work Order to Customer via email or company address. GPC shall have sole discretion for the acceptance or

rejection of any Work Order. If Customer does not receive notice of GPC's acceptance or rejection of a Work Order within ten (10) days after the date of such Work Order, then the Work Order shall be deemed rejected by GPC.

3. **Work Order Severability.** Each Work Order issued under this Agreement shall be deemed to be a separate and independent agreement between Customer and GPC which incorporates by reference all of the terms and conditions of this Agreement.
4. **Term of Agreement and Work Orders.** As required by O.C.G.A. § 36-60-13, the initial one (1) year term of this Agreement will begin upon the Agreement date signature as indicated on the signature page and will expire on December 31, 2024. This Agreement shall (i) terminate without further obligation on the part of the County each and every December 31st unless terminated earlier in accordance with the termination provisions of this Contract; (ii) automatically renew on each January 1st, unless terminated in accordance with the termination provisions of this Contract; and (iii) terminate absolutely, with no further renewals, on December 31, 2034, except with respect to the Parties' obligations in connection with, and the Services necessary to complete, any executed but uncompleted Work Orders.. Each Work Order issued and agreed to by the Parties will be valid and binding on the Parties for the number of years as stated in the Work Order from its effective date, notwithstanding any termination of this Agreement prior to the expiration of the current or renewal term for a particular Work Order. This Agreement shall automatically renew at the end of the original or any renewal term unless either party shall give written notice of its intention not to renew this Agreement no later than sixty (60) days prior to the expiration of the original or then current renewal term. It is the anticipation of the Parties that this Agreement, and each Work Order issued pursuant to this Agreement, will continue for a total of ten (10) years. However, and notwithstanding anything to the contrary herein, the Parties understand and agree that GPC's obligation to enter into any Work Orders pursuant to this Agreement is expressly conditioned on GPC's ability to obtain acceptable financing for the installation materials, equipment and Services to be furnished by GPC.
5. **Compensation and Payment.** For performance of the Services requested pursuant to a Work Order, Customer shall pay GPC the compensation stated in the Work Order based on the project specific Compensation Schedule (Exhibit C to a Work Order). The compensation payable to GPC pursuant to each Work Order issued hereunder shall be invoiced to Customer not later than the month following the month in which the Services were performed. The compensation payable to GPC pursuant to each Work Order issued hereunder, and any Termination payment or Default damages to which GPC may be entitled, shall be invoiced to Customer as part of the Georgia Power monthly power bill and paid monthly by the Customer with its power bill payment. Any other charges or amounts payable to GPC under a Work Order shall be invoiced to Customer not later than the month following the month in which the charges or amounts accrued. All invoices submitted by GPC shall be paid by Customer within thirty (30) days of the date of said invoice. All amounts mentioned in the Work Order Exhibit C's will include all applicable sales, consumer, use and similar taxes (excluding income taxes) for the work provided by GPC as of the execution date of the Work Order.

As used in connection with any Work Order in which the basis for payment is based on an energy savings determination, the term "Contract Price" shall refer to the annual energy savings payment owed to GPC plus any other cost or fee as to which GPC is entitled to be paid. The Contract Price does not include the cost of ongoing services to the Customer, if applicable, to be furnished by GPC as Maintenance Services (Exhibit F to a Work Order) or Measurement and Verification Services (Exhibit E to a Work Order) or Energy Savings Guarantee (Exhibit D to a Work Order). If the Term is not renewed before the end of the current term year, in addition to any other payment due, GPC shall be paid the amount reflected in the Termination Payment Schedule attached as an exhibit to the Work Order for the then current term year. This nonrenewal payment will be due in connection with any non-renewal for the ten-year period following the Final Retrofit Acceptance in order to fairly compensate GPC for its investment in the Work Order materials, labor, and equipment. With the payment of all amounts due, including the appropriate amount reflected in the Termination Payment Schedule for the year in which the Agreement is not renewed, the Customer will own, and accept all risks associated with, the Services, materials and equipment provided by GPC, and GPC will have no further responsibility to the Customer in connection with the Agreement or the Services. If the term is continuously renewed for ten years following the Final Retrofit Acceptance in connection with a Work Order, then title to the materials and equipment furnished by GPC in connection with that Work Order will pass to the Customer at the end of the final term with no additional fee payable to GPC.

6. **Energy Savings Guarantee (for Energy Performance Contracts only).** If applicable to a specific Work Order, the energy savings guaranteed under this Agreement shall be determined for each project. The specifics of the saving guarantee will be determined by the actual energy conservation measure (ECM), level of measurement and verification (M&V), the cost of continued measurement and verification methodology, all of which will be negotiated and mutually agreed upon and set forth in the work order as Exhibit D (project specific).
7. **Warranties.** GPC warrants to Customer that all equipment and materials furnished to Customer to this Agreement will be free and clear of liens and encumbrances, provided Customer fully compensates GPC as required herein. GPC warrants that all such equipment and materials will be of good quality and will be free from defects in materials and workmanship, including installation and setup, for a period of one (1) year from the date of beneficial use or substantial completion of the equipment or portion of the Services in question; provided that no repairs, substitutions, modifications, or additions have been made, except by GPC or with GPC's written permission; and provided further that such equipment or materials have not been subjected by non-GPC personnel to accident, neglect, misuse, or use in violation of any instructions supplied by GPC. GPC's sole liability hereunder will be to repair or replace defective equipment or materials, at GPC's option. The limited warranty contained in this Section 7 constitutes the exclusive remedy of Customer and the exclusive liability of GPC for any breach of any warranty related to the equipment, Services and materials furnished by GPC pursuant to this Agreement.
8. **Manufacturer's Warranties.** In addition to the warranty set forth in Section 7 above, and in the event that the Customer elects to purchase and own the materials and equipment furnished pursuant to a Work Order, GPC will, at the Customer's request and following payment of all sums due GPC, assign to Customer any and all manufacturer's or installer's warranties for materials or equipment provided by GPC as part of the Services, to the extent that any such warranties are still in effect and are assignable without additional charge.
9. **Exclusivity of Warranties.** THE WARRANTIES SET FORTH HEREIN ARE EXCLUSIVE, AND GPC EXPRESSLY DISCLAIMS ALL OTHER WARRANTIES, WHETHER WRITTEN OR ORAL, IMPLIED OR STATUTORY, INCLUDING BUT NOT LIMITED TO, ANY WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE, WITH RESPECT TO THE EQUIPMENT AND MATERIALS PROVIDED HEREUNDER. GPC WILL NOT BE LIABLE FOR ANY SPECIAL, INDIRECT, INCIDENTAL, CONSEQUENTIAL OR PUNITIVE DAMAGES ARISING FROM, OR RELATING TO, THIS LIMITED WARRANTY OR ITS BREACH. IN NO EVENT WILL GPC BE LIABLE FOR ANY DAMAGES ARISING FROM, OR RELATING TO, THIS LIMITED WARRANTY OR ITS BREACH IN EXCESS OF THE AMOUNT OF CONSIDERATION CUSTOMER HAS PROVIDED TO GPC AT THE TIME OF ANY BREACH OF THIS WARRANTY. CUSTOMER ASSUMES FULL RESPONSIBILITY FOR THE SELECTION OF THE PARTICULAR SERVICES TO BE PERFORMED HEREUNDER BY GPC TO ACHIEVE CUSTOMER'S PURPOSES.
10. **Ownership.** The parties intend and understand that (i) the materials and equipment provided by GPC will be and at all times will remain separately-identifiable personal property belonging exclusively to GPC or its transferees, and not Customer, and that the materials and equipment provided will not be a fixture to any real property of Customer; and (ii) Customer shall not permit the GPC materials and equipment to be encumbered or otherwise affected in any way by any instrument, security interest or lien on any real or personal property of Customer other than an encumbrance authorized by GPC or its transferees in writing. The parties agree that GPC or its transferees shall be permitted at any time to take all such steps necessary to indicate the ownership of the GPC materials and equipment (e.g., placing signs on the GPC materials and equipment indicating their ownership by GPC).
11. **Final Completion.** Upon Customer's receipt of written notice from GPC that the Services are ready for final inspection and acceptance, both parties will inspect the Services and determine whether the Services have been performed in accordance with this Agreement. If Customer considers the Services complete and performed in accordance with this Agreement, Customer shall issue a Certificate of Final Completion and Acceptance, Exhibit F to be executed by the Authorized Representative of Customer. If, within fourteen (14) calendar days from the date GPC requests the final completion certificate, the Customer fails to sign the certificate or provide written documentation of specific objections, the Date of Final Completion and Acceptance will be the date the Certificate was submitted to Customer. The Customer agrees to deliver an executed original of the Final Completion and Acceptance Certificate to GPC or to provide written justification for withholding the Certificate, identifying the specific parts of the

Services the Customer believes have not been completed and providing specific facts in support of this belief within fourteen (14) calendar days from the date of the request. GPC will use reasonably diligent efforts to correct all such material deficiencies and will give written notice to Customer when all such items have been corrected. A final Completion and Acceptance Certificate will be executed for the Services as soon as all of the Services are installed and operating. Execution and delivery by Customer of such Final Completion and Acceptance Certificate with respect to the Services will constitute "Final Retrofit Acceptance" of such Services completed by GPC pursuant to the Installation Schedule.

12. **Limitation of Liability.** GPC's, its affiliates' and their respective agents', representatives', employees', successors' and assigns', liability to Customer, its respective successors or assigns, for damages or alleged damages whether arising from breach of this Agreement, breach of warranty, tort or otherwise with respect to the Services furnished pursuant to any Work Order issued hereunder, is limited to and shall not exceed the total compensation paid by Customer to GPC for the Services rendered pursuant to the particular Work Order out of which the liability arises. In no event shall GPC, its affiliates and parent and their respective agents, representatives, employees or successors and assigns be liable to Customer or any individual or entity for any indirect, incidental, consequential or special damages of any kind whatsoever, including without limitation, any loss of revenues or loss of profits, loss of goodwill, cost of any substitute equipment, facilities or services, downtime cost of capital, loss of qualification, loss of tax credits or rebates, increased costs of operation, cost of replacement power or fuel or claims of Customer or other third parties, by reason of anything done or omitted to be done by GPC, its employees, agents or its subcontractors in connection with any Work Order issued under this Agreement.
13. **Independent Contractor.** GPC shall be deemed to be an independent contractor in the performance of this Agreement and shall not be considered or permitted to be an agent, servant, joint venture or partner of Customer. All persons furnished, used, retained, or hired by or on behalf of GPC shall be considered to be the employees, subcontractors or suppliers of GPC.
14. **Excusable Delays.** Neither party shall be deemed to be in default of any provision of this Agreement or liable for failures in performance resulting from acts or events beyond the reasonable control of such party. Such acts shall include but not be limited to acts of God, civil or military authority, civil disturbance, war, strikes, fires, other catastrophes, or other events beyond a party's reasonable control.
15. **Utilities During Construction.** Customer agrees to provide and pay for water, heat, and utilities consumed by GPC during performance of the Services at no cost to GPC. GPC will install and pay the cost of any temporary facilities not already in existence that will be required during construction for accessing such water, heat, and utilities.
16. **Compliance with Laws and Ordinances.** GPC will comply with all applicable laws and ordinances in its performance of the Services; provided, however, that GPC will not be responsible nor liable for the violation of any code, law or ordinance caused by Customer (or its contractors, subcontractors, or agents) or existing at a Facility prior to the commencement of the Project or at other property of Customer. If there is a change in any applicable law, regulation, or ordinance (or in the interpretation thereof) after the Work Order has been accepted by GPC, then the terms of the Work Order will be equitably adjusted to reflect the consequences of any such change.
17. **Compliance with Health and Safety Laws.** GPC will comply with all applicable federal, state, and municipal laws and regulations that regulate the health and safety of its workers while performing the Project and will take such measures as required by those laws and regulations to prevent injury and accidents to other persons on, about or adjacent to the site of the Services. It is understood and agreed, however, that GPC will have no responsibility for elimination or abatement of health or safety hazards created or otherwise resulting from activities at the site of the Services carried on by Customer or persons not in a contractual relationship with GPC, including Customer's contractors, subcontractors, agents, tenants, or visitors. Customer agrees to cause its contractors, subcontractors, agents, and tenants to comply fully with all applicable federal, state and municipal laws and regulations governing health and safety and to comply with all reasonable requests and directions of GPC for the elimination or abatement of any such health or safety hazards at the site of the Services.
18. **Agreement Coordinator.** The Agreement Coordinators designated below shall be responsible for administering this Agreement each respective party and for coordinating all activities relating to the

performance of Services hereunder. Each party may change its Agreement Coordinator by giving ten (10) days prior written notice of its new Agreement coordinator to the other party.

Customer Coordinator:

Joseph Bennett, City Administrator

Phone: (678) 631-5304

Email: jbennett@smyrnaga.gov

GPC Coordinator:

Randy Dix, Project Manager

Phone: (770) 500-9451

Email: rdix@southernco.com

19. Incorporation of Exhibits. The Exhibits referenced in and attached to this Agreement shall be deemed an integral part hereof to the same extent as if written at length herein.

20. Notices. All notices and Work Orders permitted or required to be given under this Agreement shall be in writing and shall be deemed duly given upon personal delivery via email or company address as set forth below. All notices shall be delivered or sent to the other party at the address or email shown below or to any other email as the party may designate by ten (10) days prior written notice given in accordance with this provision.

If to GPC:

GEORGIA POWER COMPANY

241 Ralph McGill Blvd.

Atlanta, Georgia 30308

Attn: Randy Dix, Project Manager

Email: rdix@southernco.com

Phone: 770-500-9451

If to Customer:

City of Smyrna

2800 King Street

Smyrna, Georgia 31201

Attn: Joseph Bennett

Email: jbennett@smyrnaga.gov

Phone: 678-631-5301

21. Affiliate Employees and Facilities. Notwithstanding anything to the contrary in this Agreement, Customer understands that GPC has made arrangements whereby employees of the affiliates of GPC will perform various activities on behalf of GPC pursuant to this Agreement, and Customer hereby consents and agrees to such arrangements. In addition, GPC has decided whereby facilities of the affiliates of GPC will be utilized for the performance of Services under this Agreement, and Customer hereby consents and agrees to such arrangements. Such individuals and facilities shall be deemed employees and facilities solely of GPC. GPC shall be responsible for the activities of such employees and the use and operation of the facilities for purposes of this Agreement and Customer hereby waives and relinquishes all claims or causes of action against GPC's parent and affiliates, it being the intent of this Agreement that the activities of such employees and use of such facilities shall not be attributable to such parent and affiliates.

22. Default. If an Event of Default occurs in the performance of a party's obligations under this Agreement and such default is not promptly cured, as provide below, after the defaulting party receives written notice of the default from the non-defaulting party, then the non-defaulting party may terminate this Agreement and/or exercise any right or remedy provided by law or equity.

An "Event of Default" of a party will be deemed to have occurred if any of the following events occurs and is continuing:

- a) Said party fails to pay any sum required to be paid or reimbursed pursuant to the Agreement Termination Fee Schedule or Compensation Schedule – Exhibit C Work Order, and such failure continues for fifteen (15) days after receipt by such party of a notice of non-payment;
- b) Said party fails to observe or perform any term, covenant or agreement contained in this Agreement and such failure continues for sixty (60) days after receipt by such party of a notice of the breach; provided that such sixty (60) day period will be extended to such longer period as may reasonably be required in order to cure if such party has commenced to cure and is pursuing such cure;
- c) Customer fails to comply with Exhibit F of a Work Order, or the maintenance instructions or guidelines provided by GPC or any material or equipment manufacturer or distributor, or otherwise acts so as to void any equipment or material warranty provided by any manufacturer or distributor of equipment or material furnished by GPC as part of its Services; or

- d) Said party does not pay its debts as they become due or makes a general assignment for the benefit of its creditors, or any proceeding is instituted by or against such party seeking to adjudicate it as bankrupt or insolvent, or seeking liquidation, reorganization, adjustment or other relief under any law relating to bankruptcy or reorganization, or seeking an order for relief or the appointment of a receiver, trustee, or other similar official for a substantial part of its property and, with respect to any such proceedings instituted against such party, such proceeding has not been dismissed within sixty (60) days.

23. Early Termination. This Agreement may be terminated upon delivery of a notice of termination --

- a) by either party at any time during the term of this Agreement upon the occurrence of an Event of Default by the other party, or
- b) by GPC if performance of its material obligations hereunder is prevented for six (6) months or more by a Force Majeure Event.

24. Rights Upon Termination for Default Prior to Final Retrofit Acceptance.

- a) **Rights of Customer.** If Customer terminates this Agreement prior to Final Retrofit Acceptance due to an Event of Default on behalf of GPC, Customer may take possession of the site together with all materials thereon and move to complete the Project itself expediently. If the unpaid balance of the Contract Price exceeds the actual expense of finishing the Services, Customer will pay the excess to GPC, but if the actual expense of completing the Services exceeds the unpaid balance of the Contract Price, GPC will pay the difference to Customer.
- b) **Rights of GPC.** With each Work Order, GPC shall share with Customer its Installation Budget for the Services to be performed. If GPC terminates this Agreement prior to Final Retrofit Acceptance due to an Event of Default on behalf of Customer or based on the terms of Section 23(b) above, GPC may recover from Customer the prorata value of the GPC Installation Budget established by GPC for the Services completed by GPC prior to the Event of Default (less amounts previously paid by Customer), plus (i) all costs of material and equipment for open Work Orders which have been delivered to the work site and which Customer shall take title to upon the making of such payment, (ii) the cost of terminating subcontractor and vendor agreements (including restocking fees), (iii) the cost of materials and equipment which has been ordered but not yet delivered, and which cannot be returned (less any salvage value), provided Customer shall be entitled to take possession and title of any materials and equipment upon the making of such payment, (iv) a profit markup of ten (10%) percent and an overhead markup of ten (10%) percent on the Installation Budget value of all Services not completed. Customer shall have no additional liability to GPC for any work not actually performed by GPC prior to the termination date.

25. Rights Upon Termination After Final Retrofit Acceptance. If either party terminates this Agreement after Final Retrofit Acceptance due to an Event of Default by the other party, then such terminating party may pursue all remedies available to it at law or in equity.

26. Force Majeure Events. If GPC is rendered wholly or partly unable to perform its obligations under this Agreement as a result of a Force Majeure Event (as hereinafter defined), GPC will be excused from whatever performance is affected by the Force Majeure Event to the extent so affected. A "Force Majeure Event" is defined as any act or event, whether foreseeable or not, that prevents or delays GPC from performing its obligations under this Agreement or complying with any conditions required by GPC under this Agreement, if such act or event is beyond the reasonable control of GPC. Force Majeure Events will include, without limitation, any act of God, hurricane, earthquake, tornado, rain, lightning, flood, sink hole, wind, hail, snow or ice, extreme high or low temperatures, water or gas main break, fire, explosion, riot, terrorist act, military action, act or failure to act on the part of a governmental authority, strike, lockout or other labor problem, transportation delay, unavailability of supplies, equipment or materials, or change in or in the interpretation of any law or regulation.

27. Purchase Options and Rights Upon Orderly Termination. Sixty (60) days prior to the end of the initial Term or any renewal Term for this Agreement, and sixty (60) days prior to the end of the initial Term or any renewal Term of any Work Order (the "Option Date") and provided the Customer is in compliance with all material provisions of this Agreement and any Work Order, Customer may elect one of the following:

- a) Take no action, in which case the Agreement and any outstanding Work Order will be deemed renewed for an additional one (1) year Term; or

b) Notify GPC of its intention not to renew a particular Work Order, but accept the automatic renewal of the Agreement for another one (1) year Term; or

c) Notify GPC of its intention not to renew the Agreement, in which case any outstanding Work Order will continue in effect for another one (1) year Term for the Work Order, and such outstanding Work Order shall continue to be subject to automatic annual renewal until the final payment is made as required by the Compensation Payment Schedule of such Work Order, or the Work Order is earlier terminated; or

d) Notify GPC of its intention not to renew the Agreement and a particular Work Order, in which case the Agreement and any designated Work Orders will terminate with the payment by Customer of one of the following –

(1) If the Customer wishes to retain and own the equipment and materials provided by GPC pursuant to a terminated Work Order, then the Customer may do so upon the payment to GPC of the Termination Fee reflected in the Termination Fee Schedule for the year in which the Work Order is terminated: or

(2) If the Customer elects to have GPC remove the materials and equipment furnished pursuant to a Work Order, then GPC will do so, and the Customer will be obligated to pay the greater of (i) the Termination Fee payable for the year in which the Work Order is terminated, or (ii) the price paid by GPC to an electrical subcontractor charged with the removal of the materials and equipment, plus a construction management overhead and profit markup of twenty-five (25%) percent.

If a Work Order is not renewed, the Customer will be liable to GPC for the prompt payment of any earned Energy Savings Fee, plus the amount payable under either subparagraph (d)(1) or (d)(2) above, consistent with the Customer's election to either keep and own the materials and equipment furnished or to have GPC remove the equipment and materials. With respect to any Work Order which is renewed for a total of ten (10) consecutive years, title to and full responsibility for the materials and equipment furnished pursuant to the Work Order will automatically pass to the Customer at the end of the final Term with no Termination Fee payable.

Except as expressly provided otherwise herein, upon termination of this Agreement, each party shall forthwith return to the other all papers, materials, and property of the other held by such party in connection herewith. Each party shall also assist the other in orderly termination of this Agreement and the transfer of all aspects hereof, tangible and intangible, as may be necessary for the orderly, non-disrupted business continuation of each party.

28. Allocation of Risks. This Agreement allocates fairly between GPC and Customer the risk of non-conformities in the Services. This allocation is the result of negotiations between the parties, is accepted by both parties, and is reflected in the pricing for the Services, other fees payable, the limited warranties and remedies provided, the disclaimer of liability for certain damages including without limitation, indirect, special, incidental, and consequential damages, and the limitation of liability. The parties stipulate that, in any proceeding regarding any dispute under this Agreement, all such provisions should be recognized and enforced. This Agreement and the language herein shall not be construed against one party of the ground that such party is the author of this Agreement or any part hereof.

29. Liability Waiver and Release. Absent a formal assignment of the Agreement to a GPC affiliate or to GPC's parent, and notwithstanding anything in this Agreement to the contrary, it is understood and agreed that GPC shall be solely responsible and liable for its obligations and liabilities under this Agreement. Further, nothing contained in this Agreement shall be construed as making its parent or any of its affiliates, liable for any of the obligations or liabilities of GPC hereunder. Customer hereby waives and relinquishes all claims or causes of action against GPC's parent and its present and future affiliated companies, because of any matter or thing arising out of or related or on account of, or resulting from the obligations of GPC under this Agreement, it being the intent of this Agreement that activities of GPC shall in no way be attributable its parent and its affiliates. Nothing in this Agreement or in any Work Order issued pursuant to this Agreement is intended to create any legal or equitable right for the benefit of any non-party to this Agreement.

30. **Remedies Exclusive.** The remedies set-forth in this Agreement for Customer are intended to be exclusive to any other remedies provided by law or equity.
31. **Subsequent Changes in Agreement.** This Agreement may be modified only by an amendment executed in writing by a duly authorized representative for each party.
32. **Assignment.** Customer shall not assign this Agreement without the prior written consent of GPC. It is understood and agreed that GPC shall have the right to assign this Agreement and all rights and obligations therein to a successor in interest or any present or future affiliate of GPC. Upon assignment of this Agreement by GPC, Customer releases GPC from any liability or obligation under this Agreement. Any attempted assignment in violation of this Section shall be null and void.
33. **Confidentiality.** GPC acknowledges and agrees that this Agreement, the terms and conditions hereof, and any documents, communications or other information or materials exchanged hereunder are to some extent subject to the Georgia Open Records Act, O.C.G.A. § 50-18-70 *et seq.* Provided that GPC has complied with the requirements of O.C.G.A. § 50-18-72(a)(34), Customer will provide GPC with written notice prior to disclosing any of GPC's Trade Secrets as permitted by such Code Section. All information and Trade Secrets disclosed to Customer pursuant to this Agreement shall remain the property of GPC and shall be returned to GPC, or promptly destroyed at its request, immediately upon the termination of this Agreement or any Work Order, to the extent permitted by law.
34. **Customer Assistance.** Customer understands and agrees that it will use reasonable efforts in performing assistance and support for GPC as GPC performs its obligations under this Agreement. Any delays, facilities unavailability, Force Majeure event, tardiness in response or Customer fault which impacts or makes more costly GPC's performance will constitute grounds for an equitable adjustment in GPC's compensation and extension of performance periods. GPC shall provide written notice of Customer of any such delays, facilities unavailability, Force Majeure event, tardiness in response or other Customer fault which impacts GPC's performance within ten (10) business days of GPC's becoming aware of any such event, and any failure to give such required notice in a timely manner shall result in a waiver of any claim for equitable adjustment or otherwise. Customer agrees to provide, without charge, a mutually satisfactory location, or locations (herein "the Premises") for the installation and operation of the equipment and the performance of the installation work, including sufficient areas for staging, mobilization, and storage. Customer shall provide access to the Premises during regular business hours, or such other hours as may be requested by GPC and acceptable to Customer, to install, adjust, inspect, and correct the installation work. GPC's access to correct any emergency condition will be facilitated by and will not be restricted by Customer.
35. **Representations and Warranties of Customer.** Customer represents and warrants that, except as otherwise disclosed in this Agreement, that the areas where GPC will perform the Services are safe and suitable for the performance of the requested Services. Customer shall notify GPC of any changes or updates in conditions at or near the Premises that occur during the course of the Agreement. If any such materials, situations or conditions (collectively, the "Conditions"), whether disclosed or not, are in fact discovered by GPC or others and such Conditions create, in GPC's reasonable judgment, an unsafe condition for the performance of the Project or services, the discovery of the Conditions will constitute a cause beyond GPC'S reasonable control and GPC will have the right to cease or not commence the Project until the area has been made safe by Customer or Customer's representative, at Customer's expense. In such event, the Contract Price and Installation Schedule shall be equitably adjusted. In addition, Customer represents the following:
- a) Customer will, at its expense, take all actions necessary to ensure that GPC and its agents, employees, affiliates and contractors have full and unencumbered access to the sites at which the Services will be performed.
 - b) Customer has furnished, or caused others to furnish, accurate and complete data concerning energy usage for and other information pertaining to the Premises, including but not limited to the following:
 - utility records for the 36-month period preceding the award and throughout the M&V term;
 - occupancy and usage information for the 36-month period preceding the award and throughout the M&V term;
 - written surveys or descriptions of heating, cooling, lighting or other systems or energy requirements and any changes thereto;

- descriptions of all energy consuming or saving equipment used on or affecting the Premises;
 - any energy or environmental audits relating to all or any part of the Premises;
 - any service or maintenance agreement(s) regarding any heating, cooling, lighting or other building systems, or part thereof;
 - construction drawings (“as-builts”) in existence as of the date hereof or developed during the M&V term; and
 - a description of energy management procedures presently utilized by Customer for the Premises and any revisions to those procedures.
- c) Customer has provided all records requested by GPC and the information set forth therein is, and all information in other records to be subsequently provided pursuant to this Agreement will be, true and accurate in all material respects except as disclosed by Customer in writing; and
- d) Customer has not entered into any contracts or agreements with other persons or entities regarding the provision of energy management services or with regard to any servicing of any of the energy related equipment located on the Premises, except as previously disclosed to GPC in writing by Customer; and
- e) During the term of this Agreement or any renewal term, Customer will not (i) enter into any agreements with other persons or entities regarding the provision of energy management services with respect to the GPC-furnished facilities which are the subject of an outstanding Work Order; or (ii) act in a manner inconsistent with any applicable manufacturer or GPC recommendations with respect to the installed materials or equipment; or (iii) otherwise take any action which will impact the energy savings calculation or guarantee set out in any pending Work Order, without GPC’s prior written consent; and
- f) Customer presently intends to continue to use the Premises in a manner similar to its present use, except as may have been disclosed to GPC by Customer in writing; and
- g) No part of the systems modified or installed by GPC will be placed in a permanent “on” operating mode or manually controlled. During the Term of this Agreement, Customer shall permit only GPC personnel or other qualified providers to repair, adjust or program equipment, systems, and/or controls, except in the event of an emergency, in which event Customer may remedy the emergency and shall notify GPC as soon as possible of the existence of the emergency and measures taken by Customer; and
- h) Customer has disclosed in writing to GPC the existence and location of all known or suspected asbestos and other Hazardous Materials on the Premises; there are no:
- i. materials or substances classified as toxic or hazardous either (i) on or within the walls, floors, ceilings, or other structural components, or (ii) otherwise located in the Project area, including, without limitation, asbestos or presumed asbestos-containing materials, formaldehyde, containers, or pipelines containing petroleum products or hazardous substances;
 - ii. materials, situations, or conditions subject to special precautions or equipment required by federal, state, or local health or safety regulations; or unsafe working conditions.
- i) Customer will provide GPC with copies of any successor or additional contracts for management or servicing of preexisting equipment that may be executed from time-to-time hereafter within ten (10) days after execution thereof, and information or services under Customer’s control shall be furnished promptly by Customer; and
- j) the execution, delivery and performance by Customer of this Agreement does not violate any provision of law and does not conflict with or result in a breach of any order, writ, injunction or decree of any court or governmental instrumentality, domestic or foreign, or Customer’s respective charter or by-laws or create a default under any agreement, bond, note or indenture to which Customer is a party or by which Customer is bound or to which any of Customer’s property is subject; and Customer has no knowledge of any facts or circumstances that, but for the passage of time, would materially, adversely affect either party’s ability to perform its respective obligations hereunder and, if Customer is a governmental entity or instrumentality thereof, Customer has

complied with all laws and regulations relative to bidding or procurement or authorization of the Services hereunder; and

- k) the Agreement has been duly authorized, executed and delivered by Customer, and constitutes the valid and legally binding obligation of Customer, enforceable in accordance with its terms, except as may be limited by bankruptcy, insolvency, reorganization or other laws or equitable principles of general application relating to or affecting the enforcement of creditor's rights and remedies;
- l) Customer shall notify GPC within twenty-four (24) hours of Customer's receipt of actual or constructive notice of (1) any material malfunction in the operation of the equipment installed or equipment affected by the Services provided pursuant to this Agreement and/or (2) any interruption or alteration of the energy supply to the Premise.

36. Severability. If any provision of this Agreement shall be held by a court of competent jurisdiction to be contrary to law, the remaining provisions of this Agreement shall remain in full force and effect.

37. Governing Law and Jurisdiction. This Agreement shall be governed by, subject to, and construed in all respects in accordance with the laws of the State of Georgia, U.S.A. In the event of any dispute or claim arising out of this Agreement, but subject to the Disputes Resolution requirements of Section 45 below, the parties hereby agree that any lawsuit or other legal claim or action shall be filed in either the Superior Court of Cobb County, Atlanta, Georgia, U.S.A. or in the Federal District Court, Northern District of Georgia, U.S.A.

38. Environmental Concerns. If and to the extent that any Services are performed in connection with, on, or regarding any real property, GPC disclaims any and all responsibility for or concerning any present or past disposal of pollutants, contaminants, industrial or solid waste, dangerous substances, toxic substances, hazardous wastes, hazardous materials or hazardous substances (collectively "Hazardous Substances"), as defined in or pursuant to the Comprehensive Environmental Response Compensation Liability Act, as amended (42 U.S.C. § 9601 et. seq.), and the Resource Conservation and Recovery Act, as amended (42 U.S.C. § 6901 et. seq.), or any other environmental law, ordinance, rule or regulation, on or in such real property, and for or concerning any conditions with respect to soil, surface waters, ground waters, stream settlements and similar environmental conditions (collectively, "Environmental Conditions") on or off site of such real property, whether any or all of the above arises or results from the activities of Customer or the uncertain or unknown activities of Customer's predecessors in interest to such real property or any other person or entity. It is Customer's sole obligation, as its own cost and expense (and at the request of GPC should GPC discover any Hazardous Substances on or Environmental Conditions at such real property), to comply or to ensure compliance with, and for all matters arising out of all laws, ordinances, rules and regulations, agreements with governmental entities and court and administrative orders with respect to or regarding any Hazardous Substances, Environmental Conditions and/or any other circumstances, activity and/or incident referenced above, including without limitation the performance of any and all necessary or appropriate remedial action. Customer warrants that it has not caused or permitted any activity on such real property that generates, manufactures, refines, transports, treats, stores, handles, disposes, transfers, produces or processes Hazardous Substances, except in compliance with all applicable laws, ordinances, rules and regulations, agreements with governmental agencies and court and administrative orders, and has not caused or permitted and has no knowledge of the release, spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, disposing or dumping of any Hazardous Substances on or off the site of such real property. To the extent permitted by law, Customer agrees to indemnify GPC, its affiliates and their respective employees, officers, agents and directors from and against all injuries, losses, damages, costs, expenses and other liabilities, including without limitation, attorneys' fees and expenses of litigation, which may arise out of, result from or be connected with any Hazardous Substances, Environmental Conditions and/or any other circumstances, activity and/or incident referenced above.

39. Other Contractors and Vendors. Customer shall coordinate the work and activities of its own, its other separate contractors' and its vendors' forces in connection with other aspects of the Services being performed by GPC and Customer shall cooperate with GPC as reasonably necessary for GPC to carry out its duties and obligations under this Agreement and any Work Order. If Customer enters into separate contracts directly with any entity other than GPC, for the performance of any work related to GPC' Services, Customer shall coordinate the work of each such other entity with GPC' Services in such a way that the separate entity's work does not interfere with, hinder, or delay GPC' Services. If the separate

entity's work does interfere with, delay, or make more costly GPC' Services, GPC shall be entitled to an equitable adjustment in its performance schedule and compensation.

40. Changes. Change orders may occur under the following scenarios:

Proposals for Changes. Customer may request that GPC submit proposals for changes in the Services, including, but not limited to, the retrofit of additional facilities owned by Customer. If Customer does desire to proceed with the proposal, Customer will request a Change Order detailing the changes it desires in the Services. Nothing in this Section 40 will be construed to require GPC to prepare or submit any such proposals, or to execute any such Change Orders, or to proceed with a change for which Customer has not provided a signed, authorized and mutually-acceptable Change Order.

Events Entitling GPC to a Change Order. For delays to the Services caused solely by Customer, a Force Majeure Event, a Change in Law (as hereinafter defined) or any unforeseen site conditions, GPC's sole remedy against Customer shall be an extension of time and a recovery of its direct field costs and approved job-related material and equipment costs which GPC could not reasonably avoid, incurred on account of such delay. Under no circumstances shall GPC be entitled to any indirect field or home office costs, including home office overhead; provided, however, that no extension or field costs shall be granted if such delay could reasonably have been anticipated and avoided by GPC. For delays within its control or which reasonably could have been anticipated and avoided by GPC, GPC shall not be entitled to an extension of time, or any costs incurred on account of such delay. For purposes of this Section 40, the term "Change in Law" shall mean a change in any applicable law or regulation or any court action which would prevent, make more costly or delay GPC's performance of the Services or any portion thereof. A Change in Law includes, without limitation, an injunction causing GPC to suspend or terminate the Services or any portion thereof.

Concealed Conditions. If conditions are encountered at any site where any part of the Services is to be performed that are (a) subsurface or otherwise concealed physical conditions which differ from those indicated in this Agreement, or (b) unknown physical conditions of an unusual nature, which differ from those ordinarily found to exist and generally recognized as inherent in construction activities of the character provided for in this Agreement, then the party observing such conditions will notify the other party promptly, before conditions are disturbed, and in no event later than twenty-one (21) days after first observance of the conditions, and GPC will be entitled to a Change Order for the equitable adjustment to the Contract Price and Installation Schedule caused by the changed condition.

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

41. Right to Subcontract. It is understood and agreed that GPC shall have the right to subcontract all of its performance obligations under any Work Order, including, but not limited to, the provision of equipment, installation, warranty, and maintenance services set forth herein; provided however, that GPC shall remain responsible to Customer for all obligations so subcontracted. Customer agrees that any such subcontractor shall be entitled to access and use the Customer's facility for the performance of Services subcontracted by GPC. Customer agrees to provide any subcontractor designated in writing by GPC to perform its obligations hereunder, with a copy of any notice required to be given to GPC by Customer hereunder.

42. Relationship of Subcontractors. For purposes of this Agreement, no contractual relationship will exist between Customer and any GPC Subcontractor. GPC will be responsible for the management of its Subcontractors in their performance of any portion of the Services.

43. DISPUTE RESOLUTION

a) Resolution by Senior Management. Except for disputes regarding adjustments to the Base Year Energy Usage, which if applicable will be resolved in accordance with the provisions of Exhibit D, disputes arising out of or in connection with the Agreement or any Work Order, including but not limited to the negotiation, execution, interpretation, performance or nonperformance of this Agreement or a Work Order will, prior to the institution of any mediation, arbitration or legal proceedings, be submitted to the senior management of each party. Either party may request, upon written notice to the other party, that the dispute be referred to senior management for resolution. Within five (5) days of such notice, each party will designate a representative of its senior

management who must have the authority to make a binding decision. Within three (3) days after both parties have appointed a senior management representative, the senior managers so designated will meet, either in person or via telephone, to discuss the disputes and will attempt in good faith to resolve the issue.

- b) **Mediation.** If, within ten (10) days following the first meeting of the parties' senior management representatives, the representatives have failed to reach an agreement on the disputes presented to them, or if the meeting does not occur within the timeframe provided for above, either party may request that such disputes be submitted to mediation. Submission of any dispute to mediation is a condition precedent to arbitration or the initiation of legal proceedings by either party. Any such mediation will be in accordance with the Construction Industry Mediation Rules of the American Arbitration Association currently in effect. Either party may make a request for mediation by filing the request with the other party and with the American Arbitration Association. The request may be made concurrently with the filing of a demand for arbitration but, in such event, mediation will proceed in advance of arbitration or legal or equitable proceedings, which will be stayed pending mediation for a period of sixty (60) days from the date of filing, unless stayed for a longer period by agreement of the parties or court order.
- c) **Fees.** The parties will share the mediator's fee and any filing fees equally. The mediation will be held in Atlanta, Georgia, unless another location is mutually agreed upon by the parties. Agreements reached in mediation will be enforceable as settlement agreements in any court having jurisdiction thereof.
- d) **Injunctive Relief.** Notwithstanding anything in this Article 43 to the contrary, either party may seek injunctive relief in a court of competent jurisdiction prior to the submission of any dispute to senior management, mediation, or arbitration.
- e) If the dispute resolution procedures outlined in Subsections (a) through (c) above do not resolve the dispute, the then parties agree to resolve such dispute by litigation as more particularly set forth in Section 37. For the avoidance of doubt, no litigation shall be filed with respect to any Work Order unless and until the complaining party has provided ten (10) days written notice to the other party and an opportunity for the non-complaining party to take corrective action.

44. GPC Insurance.

- a) GPC shall, as a minimum, be required to maintain workers compensation with state statutory minimums, comprehensive general liability insurance with limits of at least \$1,000,000 per occurrence, commercial auto liability insurance with limits of at least \$1,000,000 per occurrence, and umbrella liability insurance with annual aggregate limits of at least \$5,000,000.
- b) Certificates of insurance listing Customer as an additional insured on all such policies (other than workers' compensation) acceptable to Customer shall be filed with Customer prior to commencement of the Services. These certificates and the insurance policies required hereunder shall contain a provision that coverages afforded under the policies will not be reduced, canceled, or allowed to expire until at least 30 days prior written notice has been given to Customer.

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

46. Duplicate Originals. Two (2) duplicate originals of this Agreement and all Work Orders shall be executed, each of which shall be deemed an original but both of which together shall constitute one and the same instrument.

47. Entire Agreement. This Agreement contains the entire agreement of the parties and supersedes all prior and contemporaneous negotiations, discussions, promises, representations, and agreements.

There are no oral or written representations, understandings or agreements between the parties respecting the subject matter of this Agreement which are not fully expressed herein.

- 48. Performance and Payment Bonds.** Prior to commencement of any Services under any Work Order, GPC shall provide to Customer performance and payments bonds in the amount of one hundred percent (100%) of the estimated cost of the materials and services to be provided hereunder for the initial Term of the Work Order as reflected in Exhibit "D" to the Work Order. The Surety shall be licensed in the State of Georgia and have a minimum A.M. Best's rating of "A-" and a financial size of (VII) or better. The bonds will remain in effect until the Final Retrofit Acceptance of the Services provided pursuant to the Work Order, and the premium costs of each such bond shall be added to the Contract Price and payable with the Energy Savings Fee at the end of the initial Term.
- 49. Immigration Compliance.** GPC shall, at all times, comply with the Georgia Security and Immigration Compliance Act, O.C.G.A. § 13-10-90 *et seq.* Prior to performing any Services under this Agreement, GPC shall deliver to Customer the appropriate Georgia Security & Immigration Compliance Act affidavits in a form complying with the applicable law.
- 50. Pre-Existing Hazardous Waste.** Customer represents and warrants that there is no pre-existing hazardous waste of any kind within or upon the existing buildings, materials, equipment, or lighting fixtures in those areas where GPC will be requested to perform any work under this Agreement. Customer agrees that in the event any pre-existing hazardous waste is discovered or in the event the presence of any pre-existing hazardous waste is suspected, GPC will immediately cease further work and notify Customer of such discovery or suspicion, and Customer shall thereafter be solely responsible for the investigation, remediation, and removal of any and all pre-existing hazardous waste. Customer is not legally authorized to indemnify GPC against any costs or damages incurred as a result of encountering any pre-existing hazardous waste; however, Customer agrees that GPC shall not be responsible for the release or contamination from pre-existing hazardous waste attributable to the performance of any work under this Agreement. This section shall apply to any and all pre-existing hazardous waste encountered by GPC while performing work under this Agreement.
- 51.** Except as specifically amended and modified herein, all other terms and conditions contained in the Agreement shall remain in full force and effect.

IN WITNESS WHEREOF, each of the parties have caused this Agreement to be executed in duplicate originals by its duly authorized representative on the respective dates entered below.

GPC:
GEORGIA POWER COMPANY

By: _____

Name: _____

Title: _____

Date: _____

CUSTOMER:
CITY OF SMYRNA

By: _____

Name: **Derek Norton**

Title: **Mayor**

Date: _____