

THIS AGREEMENT made as of the ____ day of _____ 2022 between the Owner, the Board of Education of the Mamaroneck Union Free School District, with offices for the transaction of business located at 1000 West Boston Post Road, Mamaroneck, New York 10543 and the Engineer, Energia ("Engineer" or "Energia"), with offices for the transaction of business located at 811 W. Jericho Tpke., Suite 202W, Smithtown, New York 11787.

ARTICLE 1
SCOPE OF ENGINEER'S SERVICES

- A. The Engineer shall provide all architectural and engineering services, including but not limited to structural, mechanical and electrical engineering services, required to complete the following services on behalf of the Owner. To the extent that the following consultants are, in the Engineer's professional judgment, required for proper performance of the Engineer's services, such consultants shall be retained by the Engineer: on-site civil engineering, computer networking, electrical engineering, fire protection/life safety, lighting, mechanical engineering, equipment, roofing, specifications and structural engineering.
- B. The Project is an Energy Performance Project for the facilities owned and operated by the Mamaroneck Union Free School District (the "Project" or "Energy Performance Project").
- C. The Engineer shall designate an individual as the Project Engineer in charge of the Project, subject to the Owner's approval.

ARTICLE 2
ENGINEER'S RESPONSIBILITIES

- A. The Engineer will provide the following engineering/consulting services to assist the Owner with identifying the scope of an Energy Performance Contract ("EPC"), selection of an energy service company ("ESCO"), design of the Energy Performance Project, and performance of the Energy Performance Project in accordance with all applicable laws, rules and regulations:
1. The Engineer shall perform an energy survey of the School District and prepare a written report with their findings.
 2. The Engineer shall meet with the Superintendent of Schools and his/her representatives to discuss the Owner's needs and to review in general the types of projects contemplated to be performed by the Owner in connection with the Energy Performance Project to be performed as outlined in Article 1, paragraph B.
 3. The Engineer shall visit all of the facilities and real property owned and operated by the School District for the purpose of reviewing:
 - a. Information on site, building services and equipment, including an analysis of the building structure, electrical and mechanical systems of the site and buildings to determine their existing

- condition and if they will require upgrading or duplication to support any proposed additions and/or alterations or to determine if any other measures are necessary to maintain existing warranties;
 - b. Review of existing planning documents, facility and site plans, AHERA Reports and ceiling tile surveys for each of said facilities;
 - c. Investigation of existing conditions and to accurately and adequately assess the need for proposed projects;
 - d. Review proposed site use and improvements, selection of materials, building systems and equipment;
 - e. Code Deficiencies/Non-Compliance and Corrective Work;
 - f. Energy Conservation and efficiency; and,
 - g. Building Improvements.
4. The Engineer shall meet with central office administrators and as directed by the Owner the administrators at each of the School District facilities for the purpose of discussing their respective concerns relative to the school facility for which they are responsible.
 5. The Engineer shall consult with the New York State Education Department ("NYSED"), Office of Facilities Planning to ascertain its requirements concerning proposed projects and to ascertain whether any new rules/regulations have been implemented concerning same.
 6. The Engineer shall assist the Owner and its legal counsel in the preparation of a request for proposals ("RFP") to solicit proposals from ESCOs in accordance with Article 3 of this Agreement.
 7. The Engineer shall assist the Owner in obtaining financing through the ESCO or other sources.
 8. The Engineer will require the ESCO to prepare a detailed energy audit and develop the scope of work to be performed, which will produce the most dependable energy savings and energy efficiency for the Owner, incorporating energy conservation/renewable energy measures important to the Owner.
 9. The Engineer will assist the Owner and its legal counsel in the preparation of the EPC with the selected ESCO, if such a contract results from the RFP.
 10. The Engineer will prepare plans, specifications, and applications for approval by NYSED to insure that all code and operational requirements are addressed and that the Project is completed safely and in compliance with the Owner's unique needs.
 11. The Engineer will provide construction administration services to ensure the Project is completed in accordance with approved plans and specifications and the contract with the ESCO in accordance with Article 6 of this Agreement.

12. The Engineer will review and supervise ESCO's monitoring and verification procedures to ensure that savings will be realized.
13. The Engineer will prepare certificate(s) of substantial completion and assist the Owner in applying for and receiving State Aid for the Project.
14. The Engineer will, for a period of thirty-six (36) months after substantial completion, assist the Owner with the evaluation of actual energy savings realized by the Energy Performance Project. This will include, where needed, discussions and meetings with the ESCO and the review of monitoring and verification procedures, reports and related calculations. If the full amount of energy savings guaranteed by ESCO is not achieved, Energia will assist the Owner with the recoupment of the savings deficit.
15. The Engineer shall certify that all services performed under this agreement will be performed by engineers or architects licensed by the State of New York.
16. The Engineer shall further certify that it is free from financial interest in the ESCO which conflicts with the proper completion of the audit and any design work associated with the EPC and that full disclosure has been made to the Owner detailing all financial compensation received from the ESCO. By signature to this Agreement, the Engineer represents and warrants that it does not have any interest, monetary or otherwise, and/or is not affiliated with any ESCO.
17. The Engineer shall assist the Owner in developing an agenda for the Post-Award conference. The objectives will be to establish roles, responsibilities, expectations, timelines, communication, site access protocols, and the submittal review process. Ensuring the proper arrangements have been made for regular inspections, commissioning, testing, balancing, training, acceptance, criteria, operations, and maintenance requirements; and that measurement and verification guidelines are met.
18. The Engineer shall assist the Owner in the development of the format for construction reports such as progress reports, inspection reports, commissioning, test and balance reports, acceptance reports and punch lists specifically related to performance contracting issues during the construction process.
19. The Engineer shall review the Project scope to determine whether it qualifies as an energy conservation measure ("ECM") under the Energy Law and the Regulations of the Commissioner of Education under the EPC proposed by the ESCO, as well as its eligibility for State Aid.
20. The Engineer shall review the detailed breakdown of the energy savings to ensure compliance with Education Law section 3602(6)(i)(5)(1).
21. The Engineer shall review and analyze the Owner's current operating, utility and water usage costs.

22. The drawings, plans and specifications prepared by the Engineer must be prepared in compliance with all applicable laws, rules, regulations and codes, including, but not limited to the New York Energy Law, Uniform Fire Prevention and Building Code, State Education Department Regulations and Standards and other applicable standards.
23. The Engineer shall provide the Owner with a preliminary schedule of the critical design items to accomplish the work of the Project. Said schedule shall reflect time tables commencing from the Design Development Phase through final closeout of the ESCO's work.
24. The Engineer shall prioritize the projects to be performed pursuant hereto, taking into account the energy efficiency of the facilities, the educational needs of the Owner, as well as the protection and safety of the School District facilities and the occupants thereof, as expressed to the Engineer by the Owner.
25. The Engineer shall prepare status reports of the Energy Performance Project during all phases and submit the same to the Owner.
26. In addition to the responsibilities set forth in this Agreement, the Engineer shall: (1) require the ESCO to provide cashflow statements, as updated periodically, for the District's review and approval prior to commencement of any work; (2) be responsible for review of all cash flow statements prepared in connection with and/or during the course of the Project; (3) review all analysis issued by the New York State Education Department relative to scope and state aid of the Project before commencement of the work; and (4) provide any and all correspondence issued by or between the Engineer, the ESCO or the New York State Education Department regarding the Project.
27. The Engineer shall Assist the Owner in ensuring the ESCO develops the combined O&M manual, training, and the necessary O&M documentation and reports necessary to ensure compliance.
28. The Engineer shall assist the Owner in ensuring the ESCO prepares and presents a series of custom training sessions for the Owner's personnel on the exact technologies that are installed as part of the Project.

ARTICLE 3

REQUESTS FOR PROPOSALS

- A. The Engineer shall assist the Owner and its legal counsel in the preparation of a request for proposals ("RFP") to solicit proposals from ESCOs.
- B. The Engineer will cooperate with the Owner's legal counsel in the preparation of the RFP. The RFP must be reviewed and approved by the Owner's legal counsel prior to issuance of the RFP. The Engineer shall insure that the RFP attracts competitive and qualified proposers and includes quantifiable energy saving measures preferred by the Owner.

C. The Engineer, in cooperation and consultation with the Owner, following the Owner's approval of the RFP, shall assist the Owner in obtaining proposals for the work contemplated by the Project, including the following services:

1. Field any questions during the request for proposal (RFP) process.
2. Attend pre-proposal conference and walk throughs of the facilities with prospective ESCOs.
3. Prepare any addenda required for clarification purposes.
4. Conduct pre-award conferences with successful proposers.
5. Evaluation of proposals in accordance with the RFP.

CI. The Engineer shall review the proposals received including, but not limited to the feasibility of the proposed Energy Performance Project, the ECMs proposed, the guarantee and the qualifications and experience of proposers and assist the Owner in determining the proposal that is in the Owner's best interest. The Engineer will advise the Owner on the acceptability of subcontractors and material suppliers proposed by the ESCOs and will further evaluate materials and equipment proposed by the ESCO.

CII. Upon selection of an ESCO by the Owner, the Engineer will review the investment grade Comprehensive Energy Audit ("CEA") submitted by the ESCO to determine whether a feasible Energy Performance Project exists. The Engineer shall review all ESCO documentation to justify the proposed energy savings contained in the CEA and present this information to the Owner.

CIII. The Engineer shall assist the Owner and its legal counsel in negotiating an EPC with the qualified ESCO selected by the Owner.

CIV. The Engineer will review the EPC with regard to specific products and procedures that will be employed in constructing the various ECMs that were agreed to in the EPC.

CV. The Engineer will conduct the necessary review required by the State Environmental Quality Review Act (SEQRA) prior to award of a contract to the successful ESCO and shall further submit the necessary documents to the Owner evidencing compliance with the SEQRA.

ARTICLE 4 **DESIGN SERVICES**

A. The Engineer will prepare plans, specifications, and applications for approval by NYSED. These documents will reflect the scope of services and projects negotiated by and between the Owner and the ESCO and will provide all documentation necessary for NYSED approval and the approval of other government authorities having jurisdiction.

B. If NYSED does not approve the plans, or any portion thereof, the Engineer shall promptly revise its Design Documents to comply with NYSED's requirements, unless the requirements violate federal, state and/or local laws governing the Project, and/or the standard of professional care used in the industry governing the Project.

C. The Engineer shall coordinate the information contained on the Drawings.

D. A fixed limit of Construction Cost for the construction work of this Project will be established and financed by the Owner. The fixed limit of Construction Cost includes: contingencies for design, contingencies for construction, price escalation and for the Owner's indirect costs, including soft costs and professional fees.

E. The Engineer shall review the costs submitted by the ESCO to verify the accuracy of said costs. The Engineer shall further review the cash flow analysis for the Project to be certain that the work to be performed by the ESCO will guarantee that the Owner will maintain a positive cash flow during the term of the EPC and guarantee period.

F. The Engineer will work with the Owner and the selected ESCO to prepare a preliminary schedule of the critical items to accomplish the work of the Project. Said schedule shall reflect time tables commencing from the Design Phase through final closeout of the Energy Performance Project.

ARTICLE 5

CONSTRUCTION DOCUMENTS SERVICES

A. The Engineer shall prepare and submit all documents, applications, and other submittals as the same may be required by the New York State Education Department and any other governmental agency, State or Federal, having jurisdiction over the Project(s).

B. The Engineer shall compile and bind the Project Manual and documents for the Project, which shall include technical specifications for the Project and such other material necessary to provide a complete manual for construction purposes.

ARTICLE 6

ENGINEER'S CONSTRUCTION ADMINISTRATION SERVICES

A. The Engineer shall provide administration of the EPC as set forth in this Article 6.

B. The Engineer's responsibility to provide services for the construction phase of this Agreement commences with the appointment of an ESCO and terminates upon the issuance to the Owner of the final certificates of payment from all contractors or sixty (60) days from the date of substantial completion for all of the Work, whichever is later.

C. The Engineer shall have authority to act on behalf of the Owner only to the extent provided in this Agreement, unless the Owner consents to such authority, and/or unless otherwise modified by written instrument.

D. The Engineer shall visit the site once every week while work is in progress, and as often as required to resolve critical design issues in the field, to observe the site and work, to familiarize itself with the general progress and quality of the work, and to determine for the Owner's benefit and protection if the work is proceeding in accordance with the intent of the contract documents.

E. The Engineer shall consult with the Owner as often as necessary concerning design issues arising during construction and the ESCO's compliance with the Contract Documents.

F. On the basis of its on-site observations as an engineer, the Engineer shall keep the Owner informed of the progress and quality of the work and it shall use reasonable care in guarding the Owner against defects and deficiencies in the work and against the ESCO's failure to carry out the work in accordance with the intent of the construction documents.

G. The Engineer shall be present and provide Construction Inspection Reports at bi-weekly Project meetings with the ESCO and the Owner's representatives to discuss issues relative to design, progress of the work, quality of the work and timely completion of the work. Agenda for said meetings shall be developed by the Engineer.

H. The Engineer shall review and approve, reject or take other appropriate action upon the Contractor's submittals (including Shop Drawings, Product Data and Samples, etc.) as necessary to ascertain their conformance with the design's requirements as indicated in the Contract Documents. The Engineer's review shall not be conducted for the purposes of confirming dimensions or quantities except to the extent that the ESCO has requested in writing the assistance of the Engineer to determine certain dimensions because those indicated in the Contract Documents conflict with existing field conditions or because the dimensions in the Contract Documents contain erroneous, inconsistent, or incomplete dimensions for which clarification is needed and can best be supplied by the Engineer.

I. The Engineer shall maintain a record of each submittal received from the ESCO. The record shall include, at a minimum, the subject matter of the submittal, the related specification section number, the provider or supplier of the subject item, material or system, the date received, the action taken, and the date returned to the ESCO.

J. The Engineer's approval of a specific item shall not indicate approval of an assembly of which the item is a component. When professional certification of performance characteristics of materials, systems or equipment is required by the Contract Documents, the Engineer shall be entitled to rely upon such certification to establish that the materials, systems or equipment will meet the performance criteria required by the Contract Documents.

K. The Engineer shall prepare drawings, specifications and other documentation and supporting data in connection with Change Orders and Construction Change Directives for the Owner's approval and execution in accordance with the Contract Documents. The Engineer may authorize minor changes in the Work not involving an adjustment in the Contract Sum and/or an extension of the Contract Time which are consistent with the intent of the Contract Documents.

L. The Engineer shall not have control over or charge of and shall not be responsible for construction means, methods, techniques, sequences, procedures, scheduling or for safety precautions and programs in connection with the Work. The Engineer may, with the assistance of the Owner's attorney, include in its specifications and designs, requirements governing the construction means, methods, techniques, sequences, or safety precautions in the Contract Documents. The Engineer shall not have control over, charge of, or responsibility for acts or omissions of the Owner, ESCO, its subcontractors, or their agents or employees, or of any other

persons performing portions of the Work. However, as set forth in subparagraph M hereof, the Engineer shall report to the Owner known material deviations from the Contract Documents as to quality and scope of work, as well as timeliness of the ESCO's performance as ascertained from the most recent construction schedule submitted by the ESCO.

M. The Engineer shall advise the Owner of work which does not conform to the Contract Documents as to quality of the work, scope of the work, or progress of the work. If the Engineer observes or is aware of work which does not conform to the Contract Documents, he shall immediately advise the Owner.

N. Whenever the Engineer considers it necessary or advisable for implementation of the intent of the Contract Documents, the Engineer will have authority to require additional inspection or testing of the Work in accordance with the provisions of the Contract Documents, whether or not such Work is fabricated, installed or completed. Additionally, when the Engineer receives a recommendation that such additional testing or inspection is required, the Engineer shall require such additional inspection or testing. However, neither this authority of the Engineer nor a decision made in good faith either to exercise or not to exercise such authority shall give rise to a duty or responsibility of the Engineer to the ESCO, its subcontractors, material and equipment suppliers, their agents or employees or other persons performing portions of the Work.

O. Based on the Engineer's observations and evaluations of the ESCO's Applications for Payment, the Engineer shall review and certify the amounts due to the ESCO. The Engineer's certification for payment shall constitute a representation to the Owner, based on the Engineer's evaluations of the work and on the data comprising the ESCO's Application for Payment, that the Work has progressed to the point indicated and that, to the best of the Engineer's knowledge, information and belief, the quality of the Work is in accordance with the Contract Documents. The foregoing representations are subject to an evaluation of the Work for conformance with the Contract Documents upon Substantial Completion and measurement and verification for two (2) years thereafter, to results of subsequent tests and inspections, to minor deviations from the Contract Documents correctable prior to completion and to specific qualifications expressed by the Engineer. The issuance of a Certificate for Payment shall further constitute a representation, to the best knowledge of the Engineer, that the Contractor is entitled to payment in the amount certified.

P. The Engineer shall maintain a record of each Contractor's application for payment, copies of which applications shall be sent to the Owner with certification of each such application by the Engineer. Further, the Engineer shall not certify said application for payment if it is not accompanied by the following documentation:

1. A current Sworn Statement from the ESCO setting forth all subcontractors and material suppliers with whom the ESCO has subcontracted, the amount of such subcontract, the amount requested for any subcontractor or material supplier in the application for payment and the amount to be paid to the ESCO from such progress payment, together with a current, duly executed waiver of mechanics' and material supplier's liens from the ESCO establishing receipt of payment or

- satisfaction of the payment requested by the ESCO in the current Application for Payment;
2. Commencing with the second (2nd) Application for Payment submitted by the ESCO, duly executed "after the fact" waivers of mechanics' and material supplier's liens from all subcontractors, material suppliers and, when appropriate, from lower tier subcontractors, establishing receipt of payment or satisfaction of payment of all amounts requested on behalf of such entities and disbursed prior to submittal by the ESCO of the current application for payment, plus sworn statements from all subcontractors, material suppliers and, where appropriate, from lower tier subcontractors, covering all amounts;
 3. Certified payroll for employees and employees of subcontractors performing work on the Project;
 4. Copies of invoices submitted to the ESCO by its subcontractors and/or material suppliers.

The Engineer shall be responsible for ascertaining that the documentation listed in subparagraphs 1 through 4 hereof are annexed to the ESCO's application for payment in the required form. The Engineer shall be required to review said documentation for completeness and accuracy.

ARTICLE 7

ENGINEER'S POST CONSTRUCTION SERVICES

- A. The Engineer shall provide the following services upon completion of the work:
1. Preparation of punch lists for completion of the Work by ESCO.
 2. Review of final close out paperwork submitted by the ESCO, reviewed and collected, and execute such documents which require the Engineer's signature.
 3. The Engineer shall conduct inspections to determine the date or dates of Substantial Completion and the date of final completion, shall receive and review, approve or disapprove as appropriate, and forward to the Owner, and the Owner's attorneys at the Owner's request, for the Owner's review and records written warranties and related documents required by the Contract Documents and assembled by the ESCO, and shall issue a final Certificate for Payment upon compliance with the requirements of the Contract Documents.
- B. The Engineer's responsibility to provide services for post construction phase terminates upon issuance to the Owner of the final certificates for payment from all contractors or sixty (60) days from the date of completion of all of the Work or submission and completion of all required documents to the NYSED, whichever is later, except that Engineer shall provide the Owner with an evaluation of actual energy savings realized during the first, second and third years of the ESCO guarantee period following completion of the Project. All documents submitted to NYSED as part of the Engineer's services shall be simultaneously provided to the Owner. The foregoing evaluation of actual energy savings shall include the necessary discussions and meetings with the ESCO and the Owner and the review of the monitoring and verification procedures and related calculations of the ESCO.

ARTICLE 8
ADDITIONAL SERVICES

A. The services described in this Article 8 are not included in the services set forth in Articles 2 through 7 of this Agreement. The services described hereunder shall only be provided if authorized or confirmed in writing by the Owner and following the Engineer's recommendation and advice as to the need for these additional services. If services described in this Article are required due to circumstances beyond the Engineer's control, the Engineer shall notify the Owner prior to commencing such services. If the Owner deems that such additional services are not required, the Owner shall give prompt written notice to the Engineer. If the Owner indicates in writing that all or part of such additional services is not required, the Engineer shall have no obligation to provide those services. It is understood and agreed that all costs for any additional services set forth herein shall be the responsibility of the ESCO and not the Owner.

B. The Engineer's compensation for the services listed in this Article 8, if provided by the Engineer, must be agreed upon by the ESCO for purposes of reimbursement from the ESCO in accordance with Article 11 of this Agreement. All approved additional services shall be invoiced by the Engineer pursuant to the hourly rate schedule annexed hereto as Appendix A.

C. The following services shall be compensated to the Engineer by the ESCO as additional services if so approved by the Owner:

1. Making revisions in Drawings, Specifications or other documents when such revisions are required by the enactment or revision of codes, laws or regulations subsequent to the completion by the Engineer of the construction documents.
2. Providing services required because of significant changes in the Project which are at variance with the Project as designed and approved by the Owner in accordance with this Agreement, including, but not limited to, size, quality, and complexity. However, the Engineer shall not be entitled to additional fees for services related to the modification of documents as required by NYSED. Furthermore, if the changes in the Project will result in an increase in the cost of construction and hence an increase in the basic service fees of the Engineer, the same shall not be compensable as an additional cost.
3. Providing consultation concerning replacement of Work damaged by fire or other cause during construction, and furnishing services required in connection with the replacement of such Work as long as this damage was not the fault of the Engineer.
4. Providing services made necessary by the default of the ESCO.
5. Providing services in connection with an arbitration proceeding or legal proceeding commenced against the Owner by an entity/individual other than the Engineer, or as a witness thereto unless (1) subpoenaed by a party other than the Owner or (2) the Engineer is party to said proceedings.
6. Providing land surveying and topographic services.
7. Preparing a set of reproducible record drawings or drafting analysis showing significant changes in the Work made during construction based on marked-up prints, drawings and other data furnished by the ESCO to the Engineer in the event the ESCO fails to furnish such drawings to the Owner as required by the Contract Documents.

ARTICLE 9
STANDARD OF ENGINEER'S SERVICES

A. The Engineer agrees to provide professional services that reflect the standard of professional care that is customary for engineers. The Engineer shall not deviate to a lesser standard of care.

B. The Engineer will work cooperatively and in conjunction with the Owner's Construction Manager, where one is engaged by the Owner, in performing the work described in this Agreement.

C. All drawings, specifications and other documents prepared by the Engineer shall comply with all applicable laws, statutes, ordinances, codes, orders, rules and regulations in effect at the time said drawings, specifications and other documents are prepared. The Engineer, however, shall not be responsible for additional construction costs incurred due to a change in such laws, statutes, ordinances, codes, orders, rule and/or regulations after the completion by the Engineer of the Construction Documents.

D. Any errors or omissions on drawings, specifications or other documents furnished by the Engineer shall be promptly corrected by the Engineer at no cost to the Owner. Nothing contained herein shall preclude a claim against the Engineer by the Owner for damages arising from errors or omissions drawings, specifications or any other of the Contract Documents furnished by the Engineer. Change orders and/or construction change directives resulting from the Engineer's errors or omissions shall not be subject to any additional Engineer's fees. The Owner's approval, acceptance, use of or payment for all or any part of the Engineer's services or of the Project shall not in any way alter the Engineer's obligations or the Owner's rights hereunder.

E. With regard to the work of this contract the Engineer shall review Owner's AHERA Plan and ceiling asbestos tile surveys to verify scope of work and potential disturbance. The Engineer shall (a) to the best of its abilities, identify asbestos containing materials, (b) to the best of its abilities, notify the Owner of potential impacts of those asbestos containing materials on the Project, the site, and its occupants; and (c) consult with the Owner and the Owner's designated consultant or contractor regarding coordination of the Project with asbestos abatement. The provisions of this paragraph shall not be construed to create an obligation on the part of the Engineer to provide any services concerning hazardous materials other than those materials which contain asbestos and other than the services set forth in this paragraph.

F. The Engineer shall design the Project to be undertaken by the Owner so as to maximize the Owner's receipt of State Aid from New York State.

ARTICLE 10
OWNER'S RESPONSIBILITIES

A. The Owner shall furnish the following documentation, if it possesses same, to the Engineer to assist it in the performance of its obligations under this Agreement:

1. Surveys describing physical characteristics, legal limitations and utility locations for the site or the Project, and a written legal description of the site. The surveys and legal information shall include, as applicable, grades and lines of streets, alleys, pavements and adjoining property and structures; adjacent drainage; rights-of-way, restrictions, easements, encroachments, zoning, deed restrictions, boundaries and contours of the site; locations, dimensions and necessary data pertaining to existing buildings, other improvements and trees; and information concerning available utility services and lines, both public and private, above and below grade, including inverts and depths. All the information on the survey shall be referenced to a Project benchmark.
2. Long Range Planning Studies prepared on behalf of the School District.
3. AHERA Reports on file with the School District.
4. Utility bills and water usage bills of the Owner.

The Engineer shall be entitled to rely on the accuracy of the information provided to it by the Owner.

B. With the Engineer's assistance and upon the Engineer's advice that such services are necessary, the Owner shall engage appropriate entities for structural, mechanical, chemical, air and water pollution tests, tests for hazardous materials, and other laboratory and environmental tests, inspections and reports required by law or the Contract Documents. The Engineer shall request of the Owner such soil, foundation, hazardous material, and other tests, inspections, surveys and reports (collectively 'tests' in this subparagraph) as may, in the Engineer's professional judgment, be appropriate in the circumstances. To the extent qualified to do so as an engineer, and as necessary, the Engineer shall cooperate in the formulation of such tests. The Engineer shall take into account the results of such tests in performing the Engineer's services.

C. The Owner shall furnish all legal and insurance services as may be necessary at any time for the Project, except where such services are necessitated due to a claim or suit brought against the Engineer.

D. When the Engineer determines such services are necessary as a result of existing site conditions, the Owner shall engage the services of a geotechnical engineer. Such services may include but are not limited to test borings, test pits, determinations of soil bearing values, percolation tests, evaluations of hazardous materials, ground corrosion and resistancy tests, including necessary operations for anticipating subsoil conditions, with reports and appropriate professional recommendations.

E. Upon performance of all of the Owner's obligations under this Agreement, the Owner shall have the right to use the latest original drawings and specifications and the latest electronic data prepared by the Engineer for the Project in accordance with its regular course of business in maintaining and using its facilities. All drawings, specifications, and all electronic data and electronic versions of such documents, are the property of the Engineer and its consultants, and they shall retain all rights thereto, including copyrights. The Engineer shall not be deprived of

the right to retain electronic data or other reproducible copies of the drawings and specifications or the right to reuse information contained in them in the normal course of the Engineer's professional activities. The Engineer shall be deemed the author of such electronic data or documents, shall retain all rights not specifically conveyed, and shall be given appropriate credit in any public display of such drawings and specifications. There shall be no use by the Owner of the Engineer's drawings, specifications and electronic data retained by the Owner in connection with future projects, unless such use either (a) is required by law, (b) required by Court Order, or (c) authorized by the Engineer. As used in this Agreement, the word "documents" includes computer disks or other methods of storing electronic data. Any unauthorized use of the drawings and specifications, or any use of them for any further additions to the Project shall be at the Owner's sole risk and without liability to the Engineer and the Engineer's consultants.

ARTICLE 11

PAYMENTS TO THE ENGINEER

A. All payments to the Engineer shall be the responsibility of the ESCO selected by the Owner. Payment for the services under this Agreement shall be fully realized from the guaranteed savings realized by the EPC, if any. The Owner shall not be responsible to the Engineer for any direct payments for services performed under this Agreement, except as expressly set forth in Article 11(D) hereof. The Engineer acknowledges that the Owner has engaged the Engineer in connection with an EPC and that payment for the Engineer's services is subject to the approval of the EPC by the Owner and NYSED. The EPC is further subject to the receipt of the necessary financing for the energy Project.

B. In the event that the Owner enters into an EPC, the Engineer's compensation for the services outlined in Article 2 through 7 from the selected ESCO shall be five percent (5%) of construction costs as approved by NYSED and financed by the Owner for the energy Project. Notwithstanding the foregoing, the initial percentage of payment to the Engineer set forth in paragraphs 11(D)(i)(a) and 11(D)(i)(b) shall be based on the proposed Project cost prior to NYSED approval. If the projected Project cost is revised as a result of NYSED approval, the subsequent payments to the Engineer shall be adjusted to account for any over or underpayment.

C. The term "Construction Cost" is defined as follows:

- i. Construction cost shall include the cost at the current market rates of labor and materials as evidenced by the proposal submitted and financed by the Owner in connection with the Project. In the event that a proposal is not awarded, approved by NYSED and/or the Owner does not receive financing for the Project, the Owner shall not be liable for any costs incurred by the Engineer.

D. The Engineer shall prepare and submit invoices for its statement of services rendered to the Owner for the Owner's review and approval. If authorized by the Owner, the Owner will transmit the invoices to the ESCO for payment to the Engineer. The Owner shall not be responsible for any delays associated with payment to the Engineer by the ESCO.

In accordance with the above, the Owner agrees to insert the following payment schedule into the RFP and resulting EPC, if any:

- i. The Engineer selected by the Owner shall be entitled to receive five percent (5%) of Construction Costs as approved by NYSED and financed by the Owner for the Energy Performance Project in accordance with the following schedule:
 - a. 30% upon District signing contract with ESCO;
 - b. 25% upon submittal of plans and specifications to NYSED;
 - c. 25% upon approval of plans and specifications by NYSED; and
 - d. 20% upon substantial completion of post-construction services.
 - e. At the completion of post-construction services, the Owner shall withhold the amount of \$15,000 from the Engineer's final payment identified above. In accordance therewith, the Owner will direct the ESCO to deduct \$15,000 from the last invoice submitted by the Engineer. The Owner will further require the ESCO to issue payment for the remaining \$15,000 directly to the Owner. This amount shall be paid to the Engineer by the Owner upon completion of its evaluation of the actual energy savings realized at the conclusion of the first, second and third years of the ESCO guarantee period. The Engineer will receive three (3) annual payments of \$5,000 in connection with these services. Such payments shall be issued by the Owner within thirty (30) days of the Owner's receipt of Energia's evaluation report.
- ii. The Owner agrees to include language in its agreement with the ESCO that provides for a late payment penalty of 1% per month by the ESCO to Energia in the event the ESCO does not make payment within 45 days of receipt of an invoice from Energia. Notwithstanding the foregoing, the Owner shall not be liable to Energia or the ESCO for a late payment penalty under any circumstances.

E. All fees identified in this Agreement shall be the sole responsibility of the ESCO selected by the Owner for this Project. The Owner will require the ESCO in connection with the execution of an energy performance contract to provide the appropriate funds necessary to permit the ESCO to pay the Engineer in accordance with the schedule of fees identified in paragraph 11(D)(1) above. The Owner shall not be responsible for any Engineer fees.

F. In the event that the Owner decides not to pursue an EPC for any reason whatsoever, the Owner shall be under no obligation to pay for any services provided by the Engineer.

G. Any additional compensation provided for in this Agreement will also be funded by the selected ESCO and said obligation must be included in the ESCO contract with the Owner. To that end, Owner agrees to append a copy of this Agreement to the ESCO contract with Owner, if any.

H. All invoices submitted pursuant to this Article 11 shall contain a detailed articulation of the services provided including the date thereof, who performed the service and the nature of the service.

I. Reimbursable Expenses – The Owner shall not be responsible for any reimbursement expenses claimed by the Engineer.

ARTICLE 12
TERMINATION, SUSPENSION OR ABANDONMENT

A. The Owner may terminate this agreement for any reason upon fourteen (14) days' notice to the Engineer. Under no circumstance, shall the Owner be responsible for any costs associated with termination of the Engineer.

B. This Agreement may be terminated by either party upon not less than seven (7) days' written notice should the other party fail substantially to perform in accordance with the terms of this Agreement through no fault of the party initiating the termination. The breaching party shall have fourteen (14) days from notice of its breach to cure said breach.

C. In the event this Agreement is terminated pursuant to any of the provisions of Article 12, the Owner shall not be obligated to Energia for any claims of whatever nature, including any claim for payment.

ARTICLE 13
MISCELLANEOUS PROVISIONS

A. This Agreement shall be governed by, and interpreted and enforced in accordance with, the laws of the State of New York without regard to conflicts or choice of law provisions that would defer to the substantive laws of another jurisdiction. Each of the parties hereto consents to the jurisdiction of any state court located within the County of Westchester, State of New York, or federal court located in the County of Westchester, State of New York, and irrevocably agrees that all actions or proceedings relating to this Agreement must be litigated in such courts, and each of the parties waives any objection which it may have based on improper venue or *forum non conveniens* to the conduct of and proceeding in any such court.

B. The Engineer shall not assign this Agreement without the written consent of the Owner, which consent shall not be unreasonably withheld.

C. This Agreement represents the entire and integrated agreement between the Owner and Engineer and supersedes all prior negotiations, representations or agreements, either written or oral. This Agreement may be amended only by written instrument signed by both Owner and Engineer.

D. This Agreement has been arrived at mutually and is not to be construed against any party hereto as being the drafter hereof or causing the same to be drafted.

E. Nothing contained in this Agreement shall create a contractual relationship with or a cause of action in favor of a third party against either the Owner or Engineer.

F. The Engineer shall have the right to include representations of the design of the Project, including photographs of the exterior and interior, among the Engineer's promotional and professional materials. The Engineer's materials shall not include the Owner's confidential or proprietary information if the Owner has previously advised the Engineer in writing of the specific information considered by the Owner to be confidential or proprietary. The Owner shall Provide Professional credit for the Engineer on the construction sign and in the promotional materials for the Project.

G. Required Insurance:

1. Notwithstanding any terms, conditions or provisions, in any other writing between the parties, the Engineer hereby agrees to effectuate the naming of the Owner as an unrestricted additional insured on the Engineer's insurance policies, with the exception of workers' compensation and N.Y. State Disability insurance. If the policy is written on a claims-made basis, the retroactive date must precede the date of the contract.
2. The policy(ies) naming the Owner as an additional insured shall:
 - Purchase an insurance policy from an A.M. Best A- rated or better insurer, licensed to conduct business in the State of New York.
 - Contain a 30-day notice of cancellation.
 - State that the Engineer's coverage shall be primary and non-contributory coverage for the Owner, its Board, employees and volunteers with a waiver of subrogation in favor of the Owner.
 - The Owner shall be listed as an additional insured. Additional insured status shall be provided by standard or other endorsements that extend coverage to the Owner (CG 20 26) or equivalent. The certificate must state that this endorsement is being used. A completed copy of the endorsements must be attached to the Certificate of Insurance.
 - The certificates of insurance must describe the services provided by the Engineer that are covered by the liability policies.
 - At the Owner's request, the Engineer shall provide a copy of the declaration page of the liability and umbrella/excess policies with a list of endorsements and forms. If requested, the Engineer will provide a copy of the policy endorsements and forms.
3. The Engineer agrees to indemnify the Owner for any applicable deductibles and self-insured retentions.
4. Required Policy Limits:
 - **Commercial General Liability Insurance**
\$1,000,000 per occurrence/\$2,000,000 aggregate.

- **Automobile Liability**
\$1,000,000 combined single limit for owned, hired, borrowed and non-owned motor vehicles.
- **Workers' Compensation and N.Y.S. Disability**
Statutory Workers' Compensation (C-105.2 or U-26.3); and NYS Disability Insurance (DB- 120.1) for all employees. Proof of coverage must be on the approved specific form, as required by the New York State Workers' Compensation Board. ACORD certificates are not acceptable.
- **Professional Errors and Omissions Insurance**
\$5,000,000 per occurrence/\$5,000,000 aggregate for the professional acts of the Engineer performed under the contract for the Owner. If written on a "claims-made" basis, the retroactive date must pre-date the inception of the contract or agreement. Coverage shall remain in effect for three years following the completion of the work. If the Engineer is providing environmental services, the errors & omissions policy must contain an endorsement to include coverage for these services. The Engineer shall provide an excess insurance policy of at least \$3,000,000 that applies as excess insurance above the Errors and Omissions Insurance policy.
- **Excess Insurance**
\$3 million each Occurrence and Aggregate. Umbrella/Excess coverage shall be on a follow-form basis over the required Auto Liability, General Liability and Professional Liability coverages.

5. The Engineer acknowledges that failure to obtain such insurance on behalf of the Owner constitutes a material breach of contract. The Engineer is to provide the Owner with a certificate of insurance, evidencing the above requirements have been met, prior to the commencement of work or use of facilities. The failure of the Owner to object to the contents of the certificate or the absence of same shall not be deemed a waiver of any and all rights held by the Owner.

H. To the fullest extent permitted by law, the Engineer shall indemnify and hold harmless the Owner, its board, officers, consultants and agents and employees of any of them from and against all claims, damages, losses and expenses resulting in bodily injury and/or property damage, including, but not limited to, attorneys' fees to the extent arising out of or resulting from any negligent act or omission of Engineer, or any subcontractor of Engineer, excluding any claims, damages, losses and expenses arising from and limited to the extent of the Owner's own negligence.

I. The Owner agrees to deliver Certificate(s) of Insurance evidencing the insurance coverages required in this Agreement to the Engineer prior to the commencement of construction activities. The insurance coverages shall contain a provision that they shall not be cancelled or not renewed except upon a thirty (30) day prior written notice. All insurance certificates and coverage provided by the Engineer shall be subject to the review and approval of the Owner's insurance carrier.

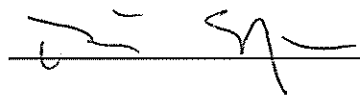
J. This Agreement may be executed in counterparts, each of which when executed shall be deemed to be an original and all of which together shall constitute a single instrument binding upon the Parties, and facsimile or electronic signatures shall have the same force and effect as an original. Further, this Agreement may be delivered by facsimile or electronic transmission. The facsimile or electronic transmission of any signed original document or any retransmission of any signed facsimile or electronic transmission will be deemed the same as delivery of an original.

ARTICLE 14
TERM OF AGREEMENT

The term of the within Agreement commences from the date of execution of this Agreement and terminates upon completion of the Project. Notwithstanding the foregoing, the Engineer will assist the Owner with the evaluation of actual energy savings realized during the first, second and third year after Project completion at no cost to the Owner as set forth in Article 11(D) hereof.

**BOARD OF EDUCATION OF THE
MAMARONECK UNION FREE
SCHOOL DISTRICT**

Dated: 12/12/2022

By: 

ENERGIA

Dated: 12/12/2022

By: David Newman, PE

Appendix A
Hourly Rate Schedule

Principal Engineer	\$275.00 per hour
Senior Project Manager	\$215.00 per hour
Principal Architect	\$275.00 per hour
Junior Architect	\$125.00 per hour
Energy Engineer- CEM	\$125.00 per hour
Civil Engineers	\$245.00 per hour
Structural Engineers	\$245.00 per hour
Mechanical Engineers	\$245.00 per hour
Electrical Engineers	\$245.00 per hour
Junior Engineer	\$125.00 per hour
CAD Operator	\$100.00 per hour