



**To: CAEECC and the Program Administrators (PAs)**  
**Re: Comments on the Standard and Modifiable Contract Terms**  
**Date: February 23, 2018**

The California Efficiency + Demand Management Council (the Council) is a statewide trade association of non-utility companies that provide efficiency, demand response and data analytics products and services in California. The mission of the Council is to support energy efficiency and demand management policies and programs for all Californians to create sustainable jobs, long-term economic vitality, stable and reasonably priced energy systems, and environmental improvement.

We are grateful for the opportunity to review and hear from the PAs about their proposed standard and modifiable contract terms, as well as the alternative proposals by parties. We also appreciate the opportunity to provide comments and suggestions on the proposed terms. We offer a set of recommended redline revisions below, and also offer some general comments.

### **COMMENTS**

#### **The Value of Standard Terms**

The Council appreciates the PAs' efforts to meet the expectations and requirements of the CPUC Decision 18-01-004 regarding standard and modifiable terms and contracts. Throughout the discussions at CAEECC and from hearing about the PAs' work to come agree on standard terms, it became clear that standardizing terms is a substantial challenge that may not result in the benefits the CPUC order envisioned "to mitigate risk of program or contract failure" as finding language standard across all contracts, unless made general to a significant extent. The CPUC saw merit in our arguments that it may be reasonable to standardize these terms. While we do not think it is impossible, we support re-evaluation of this assumption. We reserve the right to advocate for reconsideration of the standardization of terms, while providing the comments below.

#### **Consider Type of Work and Nature of Contract**

The Council is concerned that the contractual terms in the Draft Standard Contract Terms inconsistently address primarily direct-install type of work and other general professional services. The Council recommends one of two approaches:

- 1) Restructure terms to generally apply across different contract types, without any specifics to a certain type of contract. For example, certain requirements regarding licensure and certificates may be appropriate for some but not all contracts, and such should be generalized to a level that equally addresses the different types of contracts anticipated in the solicitations. We have taken this approach in our redline suggestions below.
- 2) Differentiate requirements between different types of work anticipated to be contracted. Below, we offer some example definitions that can be used throughout the document to designate applicability.

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Improperly imposing requirements conventional for one type of work onto another is inappropriate, and risks both substantially limiting the pool of potential bidders, or missing certain terms that should be applied to certain types of work.

**Request for Continued Collaboration ahead of the Motion**

The Council recognizes the timelines that the PAs face for meeting approvals and preparing their motion for the May 19, 2018 deadline. Several Parties expressed interest in viewing an updated draft ahead of the Motion. While a second round of revisions is a challenge considering the tight timeline by the Commission, the Council strongly requests that the PAs reach out regarding our comments below for any further dialogue. The Commission order seeks “reasonable and commercially viable” terms, and we are prepared to provide good faith advisement on developing the terms that strike this balance and forge an effective partnership between the PAs and implementers.

The turn-around time between the release of drafts, meetings of CAEECC and comments, essentially came to four business days to establish terms that are to “apply to all bidders and all contracts signed as part of the portfolio.” The draft terms, as described, were a challenge to compile considering the various interests among the PA community. That work notwithstanding, significant revisions are necessary in the standard terms that better anticipate the nuanced nature of the type of contracts in the forthcoming solicitations. We are committed to contributing in this process.

As we enter this “new world,” we imagine new language is necessary to define the new relationship between the market and the PAs. We submit our comments in that spirit for serious consideration and inclusion.

*Please do not hesitate to reach out, request additional information or meetings, or inquiry about our comments. Questions can be directed to Michelle Vigen ([mvigen@cedmc.org](mailto:mvigen@cedmc.org)).*

*Michelle Vigen, Senior Policy Manager  
CA Efficiency + Demand Management Council*

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# ATTACHMENT A

## REDLINE RECOMMENDATIONS BY THE COUNCIL

### Standard Contract Requirements and Process

#### A. Definitions

1. "Business Plans" means the plans filed with the California Public Utilities Commission via the process delineated in R.13-11-005 (Applications 17-01-013 et al.)
2. "Contractor" means the entity with which the Company is offering a contractual agreement; may be an Implementer or Installer.
3. "Company" means the Program Administrator, the role generally delineated in the Business Plans.
4. "Implementer" means the third-party firm that is responsible for the design and delivery of an energy efficiency program under the Business Plans.
5. "Installer" means the firm that is responsible, via contract with the Company or sub-contract with an Implementer, for completing the physical installation to certain specifications.
- 4-6. "Personnel" means representatives and agents of a Contractor or subcontractor assigned for or otherwise completing work on the Contract, having or requiring access to Company's assets, premises, customer property, data or systems

#### B. Eligibility (Type of Business, License Requirements, Insurance and Bonding Requirements, Etc.)

1. License, Insurance and Bonding Requirements.—At all times during the performance of the Services, an Implementer Contractor represents, warrants and covenants that it has and shall, and shall cause each of its subcontractors for the Services to, obtain and maintain, at its sole cost and expense, (a) all required licenses and registrations required for the operation of its business and the performance of the Services, and including, to the extent applicable, State of California general contractor and electrical contractor licenses, (b) any applicable bonding (direct installers only) or all bonding requirements of the California State License Board and any other payment and/or performance assurances as may be requested by Company, and (c) the insurance coverage requirements specified in [Insert IOU-specific Appendix containing insurance requirements], relevant to the performance of Services.
2. Evidence of Licenses. Copies of such licenses and registrations shall be promptly provided to Company at the request of Company.
3. Good Standing. Contractor represents and warrants that (a) it is a [*corporation/limited liability company/partnership*] duly organized, validly existing and in good standing under the laws of the State of [*Insert State of organization*], and (b) it has full power and authority to execute, deliver and perform its obligations under this Agreement and to engage in the business it presently conducts and contemplates conducting, and is and will be duly licensed or qualified to do business and in good standing under the laws of

**Comment [mv1]:** Bonding is for installation service contractors, in other cases, too, programs rely on customers entering into a contract with their own service or installation contractors vs. directly with the IOU implementer contractor.

**Comment [mv2]:** What will these be? Will these be PA-specific? Consideration should be taken re: the cost of insurance and potential company size of bidders.

the State of California and each other jurisdiction wherein the nature of its business transacted by it makes such licensing or qualification necessary and where the failure to be licensed or qualified would have a material adverse effect on its ability to perform its obligations hereunder.

4. Financial Statements. Contractor shall deliver ~~quarterly and/or~~ annual financial statements or similar financial documentation as may be reasonably requested by Company from time to time. Such financial statements or documents shall be for the most recently available audited or reviewed reports-accounting period and prepared in accordance with generally-accepted accounting principles. Any financial statements provided shall be considered protected or confidential business information.

### C. Safety Requirements

1. Safety. During the term of this Agreement, Contractor represents, warrants and covenants that it shall, and shall require each of its subcontractors performing any Services to:
  - a. abide by all federal and state Occupational Safety and Health Administration requirements and other applicable federal, state, and local rules, regulations, codes and ordinances to safeguard persons and property from injury or ~~damage~~;
  - b. abide by all Company security procedures, rules and regulations and cooperate with Company security personnel whenever on Company's property;
  - c. abide by Company's standard safety program contract requirements as may be provided by Company to Contractor from time to time; and
  - d. provide all necessary training to its employees and subcontractors about the safety and health rules and standards required under this Agreement.
2. Background Checks.
  - a. Contractor hereby represents, warrants and certifies that any personnel of Contractor assigned for or otherwise completing work on the Contract, or subcontractor assigned for or otherwise completing work on the Contract, and their representatives and agents, having or requiring access to Company's assets, premises, customer property, data or systems ("Personnel") shall have successfully passed a pre-employment background screening on each such individual, which screening may include, among other things, a screening of the individual's educational background, employment history, valid driver's license and clean driving record, and court record a period immediately preceding the individual's date of hire, and (b) a drug screen, which may include the Substance Abuse and Mental Health Administration's five categories of drugs, also known as the "SAMHSA 5".
  - b. ~~Notwithstanding the foregoing, in no event shall Contractor permit any Personnel to have one or more convictions for violent or sex offenses, crimes against children, domestic violence, fraud, theft (including but not limited to identity theft), embezzlement, any felonies during the seven (7) year period prior to the Effective Date, or two or more DUI's in the three (3) year period prior to the Effective Date (each a "Serious Offense").~~
  - c. ~~b. Contractor shall maintain documentation related to such background and drug screening for all background checks for Personnel, and require subcontractors to ensure that all their Personnel, -and make it available to Company for audit if required pursuant to the audit provisions of this Agreement.~~
  - d. ~~Contractor shall notify Company if any of its Personnel is charged with or convicted of a Serious Offense during the term of this Agreement.~~

**Comment [mv3]:** Sub bullet (e) has been removed as it is redundant to this sub bullet (a)

**Comment [mv4]:** What are these - we need to review before being able to agree with them.

**Comment [mv5]:** Floating section at the end of the Safety section has been removed as it is redundant and part of this sub bullet (c)

**Comment [mv6]:** specified drug test concern companies employing commercial class drivers.

**Comment [mv7]:** This entire section should be evaluated for compliance and alignment with the most recent human resources and employment laws.

The focus of checks should be on Personnel directly responsible for program and Company assets, etc. and should avoid general terms that could be interpreted as entire implementer-company-wide, as some potential bidders may have extensive employment rosters that are not relevant to the contract work. Further, several of these requirements are more appropriate to consider under the Fitness for Duty requirement.

3. Fitness for Duty. Contractor shall ensure that all Personnel, and require subcontractors ensure that their Personnel, report to work fit for their job. Personnel may not consume alcohol while on duty and/or be under the influence of drugs or controlled substances that impair their ability to perform their work properly and safely. Contractor shall, and shall cause its subcontractors to, have policies in place that requires their employees report to work in a condition that allows them to perform the work safely. For example, employees should not be operating equipment under medication that creates drowsiness.

#### D. Dispute Resolution Process

1. Disputes. Either Party may give the other Party written notice of any dispute which has not been resolved at a working level. Any dispute that cannot be resolved between Contractor's contract representative and Company's contract representative by good faith negotiation efforts shall be referred to a [*Insert IOU-specific level of authority*] of Company and an officer of Contractor for resolution. Within 20 days after delivery of such notice, such persons shall meet at a mutually acceptable time and place, and thereafter as often as they reasonably deem necessary to exchange information and to attempt to resolve the dispute. If Company and Contractor cannot reach an agreement within a reasonable period of time, Company and Contractor shall have the right to pursue all rights and remedies that may be available at law or in equity. All negotiations and any mediation are confidential and shall be treated as compromise and settlement negotiations, to which Section 1119 of the California Evidence Code shall apply, and Section 1119 is incorporated herein by reference.
2. Governing Law. This Agreement shall be governed by the internal laws of the State of California, with reference to its conflict of laws principles.
3. Venue. In the event of any litigation to enforce or interpret any terms of this Agreement, such action shall be brought in a Superior Court of the State of California located in [*Insert IOU-specific County*] (or if the federal courts have exclusive jurisdiction over the subject matter of the dispute, in the U.S. District Court for the [*Northern/Central/Southern*] District of California), and the parties hereby submit to the exclusive jurisdiction of such courts.

#### E. Termination Process

1. Termination/Modification for Convenience Cause. Company shall have the right to terminate or modify this Agreement or all or any portion of the Services at any time, in its sole convenience, exercisable in its sole and absolute discretion and without with documentable cause, upon ten-thirty (1030) business days' written notice to Contractor. Documentable cause may include a California Public Utilities Commission order or directive relating to or affecting any aspect of this Agreement, or an established Event of Default. Upon Company's exercise of such termination/modification rights, the following shall apply:
  - a. Process to Establish Default. An Event of Default shall be established when the Contractor fails to perform or observe a provision of this Agreement, and such failure continues for thirty (30) days after receiving notice from Company with respect thereto (except that such thirty (30)-day limit shall be extended if (i) curing such failure reasonably requires more than thirty (30) days, (ii) Contractor commences such cure within such thirty (30)-day period and diligently

**Comment [mv8]:** The Council recognizes that Termination for Convenience may be considered "standard" due to its existence in past contracts. We strongly recommend these clauses eliminated due to the disproportionate burden it places on future/potential contractors. Alternatively, "Convenience" should be limited or re-named and defined to exclude arbitrary, reckless, or otherwise unconscionable abusive contractual terms. A Termination for Convenience clause represents unbounded risk and does not align with efforts in the solicitations to support a third party market for energy savings.

**Comment [mv9]:** Customers are also impacted by these contractual changes, and sufficient notice is critical to maintain customer service for both the contractors and IOUs.

**Comment [mv10]:** Termination for Cause, or Default has been provided generally here, as this language covers any event in which the Contractor fails to perform or observe the agreement. Specified issues below were either redundant to requirements in the agreement or would obviously result in triggering this definition of default (e.g. Contractor becomes insolvent). The Council proposes a cleaner, more general clause, with a single cure policy.

prosecutes such cure, and (iii) such cure is accomplished within sixty (60) days after receiving such default notice from Company).

b. In the case of an impacting CPUC order or directive, Company will demonstrate and document within any written notice to the Contractor, good faith effort to minimize or ameliorate disadvantageous impacts on this contractual agreement, which may include advocacy for prospective application of policy or reasonable transition/termination periods.

a. Upon receipt of Company's notice for termination, a date of effective termination shall be established such that the Contractor shall immediately stop performing the Services and work to bring the Services to an orderly conclusion as directed by Company. Contractor shall vacate Company's worksite but shall not remove any material, plant or equipment thereon without the approval of Company. Company, at its option, may take possession of any portion of Work Product fully paid for by Company to which it has rights to possess according to Section [ ] on Ownership Requirements.

b-c.

e. Company shall be liable to Contractor only for the compensation earned on Services satisfactorily performed prior to the effective date of termination, plus documented and verifiable costs (such as demobilization costs) reasonably incurred by Contractor in terminating the Services, which include costs associated with pay-for-performance program setup, pay-for-performance losses per the accepted program model, committed and non-retrievable costs incurred in program delivery, and costs due to normal agreements with participating customers necessary to perform the Work under this agreement. Contractor shall mitigate its damages so as to minimize its claim, if any, against Company.

d.

e. Notwithstanding anything contained in this Section [ ], in no event shall Company be liable for lost or anticipated profits or overhead on uncompleted portions of the Services. Contractor shall not enter into any agreement, commitments or subcontracts which would incur significant cancellation or termination costs without prior written approval of Company, and such written approval shall be a condition precedent to the payment of any cancellation or termination charges by Company under this Section [ ]. Also as a condition precedent to the payment of any cancellation or termination charges by Company under this Section [ ], Contractor shall have delivered to Company any and all reports, drawings, documents and deliverables prepared for Company before the effective date of such cancellation or termination.

f.e.

g. The provisions of this Section [ ] shall be Contractor's sole remedy resulting from Company's termination for convenience hereunder.

h.

f. Termination for Cause. Company may terminate this Agreement in the event of an Event of Default of Contractor by providing written notice thereof to Contractor. Company's termination right hereunder shall be without prejudice to and in addition to any other rights and remedies that may be available to Company at law or in equity or in this Agreement as a result of such Event of Default.

2. An "Event of Default" of Contractor shall mean the occurrence of any one or more of the following:

Comment [mv11]: Deleted the following sentence. Redundant with the preceding section.

~~Contractor becomes insolvent, generally does not pay its debts as they become due, makes a general assignment for the benefit of creditors, or commences any action seeking reorganization or receivership under any bankruptcy, insolvency, reorganization or similar law for the relief of creditors or affecting the rights or remedies of creditors generally;~~

~~Any legal action is made or commenced against Contractor which, in Company's opinion, may interfere with the performance of the Services;~~

~~Contractor commits any material act of dishonesty, fraud, misuse of funds, or misrepresentation of Company's administration of this Agreement;~~

~~Company becomes aware of a public safety issue arising out of or related to Contractor's administration or performance of this Agreement;~~

~~Any representation or warranty made by Contractor herein is materially false or misleading when made;~~

~~Contractor assigns, subcontracts, or transfers this Agreement or any right or interest herein except in accordance with Section [ ];~~

~~Contractor fails to maintain the insurance coverage required of its in accordance with Appendix [ ];~~

~~Contractor fails to make payment to Company as required under this Agreement, and such failure continues for five (5) days;~~

~~Contractor fails to achieve [Insert *Minimum Performance Requirements*]; or~~

~~Contractor fails to perform or observe a provision of this Agreement not otherwise explicitly addressed in this Section [ ], and such failure continues for thirty (30) days after receiving notice from Company with respect thereto (except that such thirty (30)-day limit shall be extended if (i) curing such failure reasonably requires more than thirty (30) days, (ii) Contractor commences such cure within such thirty (30)-day period and diligently prosecutes such cure, and (iii) such cure is accomplished within sixty (60) days after receiving such default notice from Company);~~

~~3. Termination/Modification for CPUC Order. This Agreement shall be subject to changes, modifications, or termination by order or directive of the California Public Utilities Commission. ("CPUC"). The CPUC may from time to time issue an order or directive relating to or affecting any aspect of this Agreement, in which case Company shall have the right to change, modify or terminate this Agreement in any manner so as to be consistent with such CPUC order or directive.~~

**Comment [mv12]:** We would like to see the details of this Section to ensure it allows for the necessary and anticipated subcontracting to meet program goals.

**Comment [mv13]:** To be consistent with the opportunity to cure above

**Comment [mv14]:** Is this referring to the KPIs and the section delineated below? If so, please make that reference explicit.

**Comment [mv15]:** Removed section on Termination/Modification for CPUC Order since it is redundant to the Termination/Modification for Convenience.

**Comment [mv16]:** Moved up above under general Termination section.

**Session 2: Negotiable/Modifiable Contract Terms—Disadvantaged Worker + Diverse and Disadvantaged Business & Employee Terms**

Disadvantaged Worker Definition

An individual who lives in a zip code whose CalEnviroScreen socioeconomic characteristics meet at least one of the following factors:

1. **Educational Attainment:** Percent of the population over age 25 with less than a high school education
2. **Housing Burdened Low Income Households:** Percent of households in a census tract that are both low income (making less than 80% of the HUD Area Median Family Income) and severely burdened by housing costs (paying greater than 50% of their income to housing costs).
3. **Linguistic Isolation:** Percent limited English speaking households
4. **Poverty:** Percent of the population living below two times the federal poverty level
5. **Unemployment:** Percent of the population over the age of 16 that is unemployed and eligible for the labor force.

A disadvantaged worker:

- (1) lives in a high unemployment zip code where unemployment rate is at least 150% of the median unemployment rate for the county or for the state; or
- (2) lives in a low-income zip code where the average household income is 60% below Area Median Income (AMI); or
- (3) lives in a disadvantaged community as designated by the CalEPA CalEnviroScreen; or
- (4) has barriers to employment (e.g., minority, formerly incarcerated, homeless, English-isolated, veterans, those with disabilities, etc.); or
- (5) has a referral from a collaborating community-based organization (CBO), state agency, or workforce investment board.

*Diverse and Disadvantaged Business & Employee Terms*

It is Company's policy that small and diverse businesses shall have the maximum practicable opportunity to participate in providing the goods and services purchased by Company. Small and diverse businesses include Small Business Enterprises ("SBEs"); Women, Minority, and Disabled Veteran Business Enterprises ("WMDVBEs"); and Lesbian, Gay, Bisexual, and Transgender Business Enterprises ("LGBTBEs").

Diverse Business Enterprise (DBE)

Per CPUC General Order 156, Contractor must supply information about their DBE status and subcontracting plans. Contractor agrees to comply, and to require all Subcontractors to comply, with Company's Supply Chain Responsibility Policy as may be provided by Company from time to time, the terms of which shall be incorporated in this Agreement by this reference. Contractor shall provide a copy of such Supply Chain Responsibility Policy to each Subcontractor.

Local Hiring. [To be discussed]

**Comment [mv17]:** Have the PAs considered what goals and targets they are considering? We believe any goals should be portfolio level by each PA and include activities of the PA that support workforce education for disadvantaged workers.

**Comment [mv18]:** The Council offers general comments that a Definition and Target should consider again the nature of the contractor's work, and the context of the contractor's assigned/relevant team vs. the entire company. For example, a target to reach a certain % of assigned personnel under a contract or sector may be limited if the implementer or installing contractor team is relatively small.

**Comment [mv19]:** The Council prefers NRDC's definition due to the flexibility beyond location-based designation. Residence-based requirements can result in an added layer of complexity as workforce is (hopefully) geographically mobile, particularly in metropolitan areas such as LA and the Bay Area.

**Comment [mv20]:** Any verification should be able to be self-provided or otherwise easily verifiable and only in the case of an audit.

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**Comment [mv21]:** We would like to have discussion on this on the follow-up meeting regarding Disadvantaged Worker definition, etc.



## Negotiable Terms (Workforce Qualifications and Quality Installation Requirements)

1. Workforce Qualifications and Quality Installation Requirements. At all times during the performance of the Work, Contractor shall be in compliance with, and shall cause its employees, agents, representatives, and subcontractors and all other persons performing the Work on behalf of the Contractor ("Contractor Party") to be in compliance with, the following workforce qualifications, certifications, standards and requirements:

~~To be discussed~~—As part of its bid, each Contractor bidder will be required to propose applicable workforce standards for each sector and/or program that would reduce the risk of lost energy savings from poor installation of energy efficiency measures. This includes identifying all applicable workforce installer ~~standards~~qualifications, including any specific experience, knowledge, skills—certifications—~~requirements~~—and/or broader—occupational training ~~and experience requirements~~.

The following table outlines examples of ~~potential skills~~—certifications ~~and experience requirements~~that might be proposed by the Contract bidder. These examples are illustrative only and are based on current Company Program requirements and market research and do not denote an endorsement, preference, nor requirement.—Third parties may propose additional skills certifications and experience requirements to address the risk of lost energy savings from poor installation of energy efficiency measures in their program proposals.

Area of Work	Organization	Skills Certification or Experience Requirement
Commissioning*	AABC	Certified Commissioning Authority
	ASHRAE	Certified Building Commissioning Professional
	BCxA	Certified Building Professionals
Energy Management*	AEE	Certified Energy Manager
HVAC	N/A	Experienced journeymen
	N/A	Apprentices currently enrolled in or having completed a federal of California state apprenticeship program
	ACCA	Quality Standards Training
	BPI	AC and Heat Pump, Heating Professional
Industrial Refrigeration	RETA	Certified Refrigeration Energy Specialist
Lighting	CALCTP	Certified Installer Contractor, Acceptance Technician
	NALMCO	Certified Lighting Management Consultant, Certified Lighting Controls Professional, Certified Apprentice Lighting Technician, Certified Senior Lighting Technician
	NCQLP	Lighting Certified
Non-Residential Audits*	ASHRAE	Building Energy Assessment Professional
	AEE	Certified Energy Auditor
Residential	BPI	Air Leakage Controller Installer
		Building Analyst
		Crew Leader
		Energy Auditor Certification
		Envelope Professional
		Infiltration and Duct Leakage
		Manufactured Housing
		Multifamily Building Analyst
		Multifamily Building Operator
		Quality Control Inspector
Retrofit Installer Technician		
*These skills certifications are recognized by the Department of Energy as aligned with the Better Buildings Workforce Guidelines, and have received qualified accreditation by the American National Standards Institute, International Accreditation Service, or other qualified accreditation bodies who are in compliance with ISO/IEC 17024:2012.		

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Prior to the commencement of Work, ~~and periodically once per [month/quarter/year]~~, and at any other time as may be requested by Company, ~~but not more than once per year~~, Contractor shall provide ~~all~~ written documentation necessary to demonstrate its compliance with this Section [ ] .

2. Quality Assurance. Contractor shall follow the following quality assurance procedures:

~~[To be discussed]~~ As part of its bid, each Contractor bidder will be required to develop quality assurance procedures that ensure projects and measures installed under the

Program perform to minimum qualifications. The quality assurance procedures should ensure the Program is in compliance with all regulatory and legal requirements. Industry best practices should be leveraged when appropriate with a focus on measure functionality, customer satisfaction and ensuring that energy savings are realized. The quality assurance procedures shall ensure compliance and include detective controls.}

3. Audit Rights and Inspection. Upon demand, Contractor shall, and shall cause the Contractor Parties to, make available to Company and/or the CPUC copies of all records and supporting documentation pertaining to the performance of the Agreement or the Work, during normal business hours and upon reasonable advance notice; and to allow reasonable access, with advance notice, in order to interview Personnel any employee, agent or representative thereof who reasonably have information related to such records. All Work performed at a customer facility by or on behalf of Contractor or any Contactor Party shall be subject to inspection of Company and/or the CPUC at all times with advance notice, but such right of inspection of the Work shall not relieve Contractor of responsibility for the proper performance of the Work, nor shall such inspection waive Company's right to reject the Work at a later date.

**Negotiable Terms (Other Negotiable Topics)**

**A. Progress and Evaluation Metrics**

1. Implementation Plan. Contractor shall perform the Work in accordance and consistent with the Implementation Plan. The Parties shall use good faith efforts to finalize an Implementation Plan within 60 days following the Effective Date of this Agreement. Such final Implementation Plan shall only be effective upon the written approval of both Parties. ~~Work under this agreement with all of its terms may commence ahead of final Implementation Plan approval with the written agreement of the Company. Contractor shall not be permitted to, nor shall Contractor permit or allow a Contractor Party to, commence Work prior to the Parties agreement upon such final Implementation Plan, and Company shall not be obligated to make any payment to Contractor under this Agreement prior to the Parties agreement upon such final Implementation Plan.~~

~~[To be discussed.]~~ As part of its bid, each Contractor shall propose and develop an Implementation Plan and include key program implementation milestones and deliverables.]

2. Key Performance Indicators (KPIs). -The Key Performance Indicators (KPIs) for the Program are attached hereto as Schedule [\_\_\_\_]. -Company shall from time to time, but no less frequently than once per [month/quarter/year], review the Contractor's performance in achieving each KPI. ~~Contractor agrees that failure to achieve one or more KPIs shall be an Event of Default of Contractor under this Agreement and that Company shall have all rights and remedies available to Company in law and in equity, and as may be provided in this Agreement, including without limitation the termination rights set forth in Section [\_\_\_\_] and modification or reduction of Program funding as set forth in Section [\_\_\_\_].~~

~~[To be discussed.]~~ KPIs will be the primary means of assessing the Program's performance on an ongoing basis. Contractor shall provide KPIs as metrics to measure performance management. KPIs may be tracked on a monthly or quarterly basis. The Company and Contractor will agree on multipliers or weights for each KPI category. A KPI score (multiplier \* score) will be developed on a quarterly basis. KPI categories may include the following categories, among others:

**Comment [mv22]:** This is overly restrictive – there should be an option for flexibility on the part of the Company and Contractor when there is work agreed upon that should commence in a more timely fashion than the approval of the IP.

**Comment [mv23]:** Event of Default language is general and inclusive above. KPIs, my understanding, are for monitoring and are related to certain payment terms, but are not singular thresholds for Contractor default.

Example KPIs Matrix to be Proposed by Bidder and Negotiated in the Contracting Phase

<b>KPI Category</b>	<b>Description Example Components</b>	<b>Metric Definition</b>	<b>Metric Range</b>	<b>Weight/Multiplier</b>	<b>Tracking Frequency</b>
Program Performance	Energy Savings, Schedule Adherence, Cost Management and Engineering Quality	TBD	TBD		[monthly / quarterly]
Implementer Administrative Performance	Invoicing and Billing Accuracy, Communication and Engagement with IOU, Program Data Quality	TBD	TBD		[monthly / quarterly]
Marketing Performance	Email Marketing Performance, Web Experience Performance, Social Media Performance	TBD	TBD		[monthly / quarterly]
Customer Satisfaction	Customer Satisfaction Feedback Survey Results, Compliant Rate	TBD	TBD		[monthly / quarterly]
Safety Performance	Completeness of Health & Safety Policies, OSHA Reporting Timeliness, Total Safety Incident Rate	TBD	TBD		[monthly / quarterly]
Diversity	Highlights financial performance with diverse businesses	TBD	TBD		[monthly / quarterly]
Sustainability	Examines the Contractor against environmental and sustainability practices and metrics.	TBD	TBD		[monthly / quarterly]

**B. Contract Term/Length.**

The Agreement shall commence as of the Effective Date and shall be in full force and effect through <insert date>, unless terminated earlier or extended in accordance with the terms of this Agreement. Notwithstanding the expiration or termination of the Agreement, the provisions of this Agreement which by their nature are intended to survive such expiration or termination, including without limitation Sections [ ], shall continue as a valid and enforceable obligation of the applicable party.

**C. Payment Schedule and Terms**

1. Payment Terms. ~~{To be discussed}~~—The following table outlines major contract component categories with associated payment schedules and payment terms, if applicable. Contractor shall specify as part of their program proposal their proposed allocation of the percentage of the total contract amount among the contract payment categories. The following is a list of some potential contract payment categories. Note that the list is not intended to be exhaustive, and other or different payment categories may be proposed in the filing and/or in specific agreements, as negotiated by the parties thereto.
  - a. Program Launch and Administration: This contract payment category is available as an upfront payment upon contract execution for program launch and administration activities (limited to 25% max of total contract amount)
  - b. Deemed: This contract payment category is defined by the applicable ruleset for Deemed energy savings with payments based upon successful completion of program implementation milestones tied to completed and verified project installations.
  - c. Custom: This contract payment category is defined by the applicable ruleset for Custom energy savings with payments split between Pre-installation customer commitments and Post-installation Measurement and Verification (M&V).
  - d. Meter-Based: This contract payment category is defined by the Meter-Based energy savings platform with all payments tied to post-installation meter verification at predetermined measurement intervals.
  - e. True-Up and Security: The contract may include true-up and security deposit requirements to ensure performance by the Contractor.

Contract Payment Category		Contract %	Customer Incentive %	Payment Terms		
Program Launch and Administration	Upfront Payment (A)	0% - 25%	N/A	N/A		
Deemed	Milestone Payments tied to Installations (B)	0% - 100%	% of (B)	(B) x 50%	for 50% of completed and verified installs	
				(B) x 25%	for 75% of completed and verified installs	
				(B) x 25%	for 100% of completed and verified installs	
Custom	Milestone Payments tied to Post-Install M&V (C)	0% - 100%	% of (C)	(C) x 35%	payable upon pre-install customer commitment	
				(C) x 65%	payable upon successful post-install M&V	
Meter-based	Post Installation M&V (D)	0% - 100%	% of (D)	(D) x 50%	for measurement interval 1	(X) months post installation
				(D) x 50%	for measurement interval 2	(Y) months post installation
<b>Contract Total (T) = A + B + C + D</b>		<b>100%</b>				

2. Modification of Funding. To the maximum extent permitted by applicable law, Company shall have the right to modify, reduce or increase any or all of, or any portion of, the funding allocated and unencumbered for payment to the Program under this Agreement at any time providing no less than a thirty (30) day notice, at its sole reasonable discretion, which reasonable discretion shall include (a) reductions due to excess expenditures incurred during previous Program periods, (b) carrying over unused Program funds during a Program period to the funding of the following Program period, (c) shifting Program funds among budget categories, or (d) shifting Program funds to or

from another program, (e) reductions due to either the unavailability of funds or Contractor obtaining a different funding source for all or any portion of the Program, or (f) reductions due to any breach or default of Contractor under this Agreement or any termination of all or any portion of this Agreement. Good faith effort will be made by the Company to provide notice of no less than thirty (30 days) prior to modification of funding.

**Comment [mv24]:** Sub-bullet (e) is irrelevant to these contracts. Sub-bullet (f) is covered above in Termination and is redundant here.

3. Rate Adjustments. Contractor will submit payment terms and budgets with anticipated annual rate adjustments effective for the duration of the contract. Any contract renewals or extensions, will require submission of new labor rates by the Contractor to allow for normal and reasonable rate increase due to increased cost of labor, inflation, and other market factors.

2-4. On-Time Payments. The Company will pay the Contractor on a 0% net 30 basis. No discount will be applied for normal and on-time payment.

**Comment [mv25]:** Alternatively, if a discount is applied to an on-time payment, such discounts should be equal in the reverse (% fee on late payments). Terms to reward normal contracting and invoicing fulfillment is arbitrary and biased and unreasonable.



**D. Measurement and Verification Requirements, including Guidelines about Normalized Metered Energy Consumption (NMEC) Design Requirements.**

1. Contractor shall only enroll customers that qualify for program services. Contractor shall report customer participation information to Company in an agreed-upon format and on an agreed-upon schedule.
2. Contractor shall comply with current policies, procedures, and other required documentation as required by Company.
3. During the course of Work being performed, Company may identify new energy savings estimates, net-to-gross ratios, effective useful lives, or other values that may alter Program Energy Savings. The Company will provide written explanation for such changes and date of applicability not to be less than 30 days from notice given. ~~Implementer-Contractor~~ shall use modified values upon Company's request, provided Company modifies ~~Implementer's-Contractor's~~ Program budget and/or overall Program Energy Savings consistent with the requested change. ~~Company will determine any budget-increases in its sole discretion. Any budget changes in response to modifications of energy savings estimates or other relevant values will be mutually agreed upon by Company and Contractor.~~ Any and all compliance obligations relating to emissions of greenhouse gases or avoidance of emissions of greenhouse gases relating to the implementation shall remain with the entity or entities responsible for such compliance.
4. Contractor shall work with Company's evaluation team to define program-specific data collection and evaluability requirements, and in the case of normalized metered energy consumption (NMEC), which independent variables shall be normalized.
5. For programs claiming to-code savings, Contractor shall work with Company to address elements in their program designs, such as:
  - a. Identifying where to-code savings potential resides;
  - b. Specifying which equipment types, building types, geographical locations, and/or customer segments promise cost-effective to-code savings;
  - c. Describing the barriers that prevent code-compliant equipment replacements;
  - d. Explaining why natural turnover is not occurring within certain markets or for certain technologies; and
  - e. Detailing the program interventions that would effectively accelerate equipment turnover.

**Comment [mv26]:** These are more general than just NMEC and should be reserved for any sections that more broadly apply to programs.

**E. Coordination with Other Program Administrators**

As part of its bid, each bidding Contractor will propose how they will coordinate with all applicable energy efficiency program administrators when implementing the Program in areas where there is geographic overlap among program administrators.

**F. Data Collection and Ownership Requirements**

1. Requirements for Data Collection.
  - a. Company Data shall mean: All data or information provided by or on behalf of Company, including but not limited to, personally identifiable information relating to, of, or concerning, or provided by or on behalf of any customers; all data or information input, transferred, uploaded, migrated, or otherwise sent by or on behalf of Company to Contractor as Company may approve of in advance and in

writing (in each instance); account numbers, forecasts, and other similar information disclosed to or otherwise made available to ~~Implementer-Contractor~~ by or on behalf of Company and Customers; and all data provided by Company's licensors, including any and all survey responses, feedback, and reports, as well as information entered by ~~OUCompany~~, Contractor or Subcontractor, and Participating Customers through the Program.

- b. Before receiving any Company Data, Contractor shall complete ~~Company's~~ Vendor Security Review process. Contractor may receive Company data if Contractor receives a satisfactory risk rating from Company at the conclusion of Company's Vendor Security Review process. If Contractor receives an unsatisfactory risk rating from Company, Contractor may not receive Company Data until such time Implementer receives a satisfactory risk rating.
- c. Contractor shall take "Security Measures" with the handling of Confidential Information to ensure that the Confidential Information will not be compromised and shall be kept secure. Security Measures shall mean ~~industry standards and techniques, physical and logical, that may include~~ing but ~~are~~ not limited to: written policies regarding information security, disaster recovery, third-party assurance auditing, penetration testing; password protected workstations at Contractor's premises, any premises where Work or services are being performed and any premises of any person who has access to such Confidential Information; encryption of Confidential Information, and measures to safeguard against the unauthorized access, destruction, use, alteration or disclosure of any such Confidential Information including, but not limited to, restriction of physical access to such data and information, implementation of logical access controls, sanitization or destruction of media, including hard drives, and establishment of an information security program that at all times is in compliance with the industry requirements of ISO 27001.
- d. Contractor shall comply with ~~security policies~~ relating to the handling of Confidential Information. Prior to Company's first transfer of Confidential Information to Contractor, Contractor shall provide Contractor with documentation satisfactory to Contractor that it has undertaken Security Measures. Contractor and Company agree to meet periodically, if requested by Company, to evaluate Contractor's Security Measures and to discuss, in good faith, means by which the Parties can enhance such protection, if necessary.
- e. Contractor shall update its Security Measures, including procedures, practices, policies and controls so as to keep current with industry standards, including but not limited to NIST and NERC/CIP, as applicable.
- f. At least annually, Contractor shall assist Company in obtaining a copy of any report that documents Contractor's Security Measures. Company reserves the right to perform onsite security assessments to verify the implementation and ongoing operation and maintenance of security controls, given reasonable advance notice and justification to conduct an onsite assessment.
- g. In the event Company determines Contractor has not complied with Security Measures, Company shall provide written notice to Contractor describing the deficiencies. Contractor shall then have sixty (60) calendar days to cure. If

Comment [mv27]: Need to check with members on anticipated security measures, whether this entire list is reasonable, or whether they expect additional specificity about necessary security measures.

Comment [mv28]: What will these be?

Contractor has not cured the deficiencies within sixty (60) calendar days, Company may cancel this Contract for cause in accordance with the Terms and Conditions of the Contract.

h. Contractor shall immediately notify ~~IOU Company~~ in writing of any unauthorized access or disclosure of Confidential Information and/or ~~IOU Company~~ Data. Contractor shall take reasonable measures within its control to immediately stop the unauthorized access or disclosure of Confidential Information and/or ~~IOU Company~~ Data to prevent recurrence and to return to ~~IOU Company~~ any copies.

2. Ownership of Work Product. ~~Any and all m~~Material and information prepared, accumulated or developed by Contractor or any Contractor Party, and provided by the Contractor to the Company for the purposes of fulfilling obligations in this agreement, including EM&V and contract management and new intellectual property developed exclusively with public funds, and excluding generally applicable modifications to existing Contractor intellectual property ("Work Product"), ~~including, without limitation, documents, drawings, computer programs, designs, calculations, maps, plans, workplans, text, filings, estimates, manifests, certificates, books, specifications, sketches, notes, reports, summaries, analyses, data models and samples, including summaries, extracts, analyses and preliminary or draft materials developed in connection therewith,~~ shall be jointly owned by the Company and Utility Participants, if any, on behalf of their respective customers. Contractor hereby grants Company and the Utility Participants an irrevocable, assignable, non-exclusive, perpetual, worldwide, royalty-free, unrestricted license to use and sublicense others to use, any intellectual or proprietary property right of Contractor or any Contractor Party for the sole purpose of using such Work Product for the conduct of Company's business related thereto.

All such Work Product shall be used by Contractor and Contractor Parties only for Work performed pursuant to this Agreement and shall not be used in Contractor's general course of business, nor disclosed nor revealed in any way to a third party without the prior written consent of Company.

3. Billing, Energy Use, and Program Tracking Data. Contractor shall comply with and timely cooperate with all CPUC directives, activities and requests regarding the Program and Project evaluation, measurement and verification (EM&V). Company shall not pay incremental costs associated with such CPUC requests.

Contractor shall make available to Company upon demand, full program descriptions, and detailed descriptions of data tracking systems, baseline conditions, and detailed participant data including program-related financial assistance amounts.

Contractor shall also make available to Company any revisions to Contractor's program theory and logic model (PTLM), the results of its Quality Assurance Plan, and comply with all data reporting requirements, including progress and evaluation metrics.

4. Access to Customer Sites. Contractor shall be responsible for obtaining any and all access rights from customers and other third parties to the extent necessary to perform the Work. Contractor shall also procure any and all access rights from

**Comment [mv29]:** Need to check with members. Section is aligned with work product contracts, but does not seem to fully consider the nature of the program design and delivery activities. Consider striking.

**Comment [mv30]:** Can the PAs provide examples of what these incremental costs might represent?

Contractor Parties, customers and other third parties in order for Company and CPUC to inspect the Work as provided in this Agreement.