



June 25, 2015

**EnergyCAP<sup>®</sup> Enterprise**

**Software License Agreement**

**Annual License**

**THE GSA CUSTOMER**

Submitted by:

**EnergyCAP, Inc.**

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## EnergyCAP® Enterprise Software Agreement

This Software License Agreement (this “Agreement”) is made by and between the GSA Customer (“Licensee”) and EnergyCAP, Inc. of State College, PA (“ECI”) as of the date of Licensee’s Purchase Order or signing of this agreement for EnergyCAP software and services, whichever is earlier (the “Effective Date”).

Whereas, ECI agrees to provide a License to use EnergyCAP Enterprise Software (the “Software”) and related services to Licensee pursuant to the terms of this Agreement, and

Whereas, Licensee desires to obtain a License to use Software and other related services from ECI.

Now, therefore, in consideration of the mutual covenants and promises contained herein and other good and valuable consideration, the receipt of which is hereby acknowledged, the parties hereto intending to be legally bound do hereby mutually agree as follows:

### ARTICLE 1. SCOPE OF AGREEMENT

This Software License Agreement provides for the following:

1.1. Software License Scope. The fees listed in the GSA Schedule Price List and any applicable GSA Customer Purchase Order (“Order”) are based upon the Licensee’s current approximate facility/account/meter inventory and Licensee’s current software module utilization needs.

1.1.1. The number of facilities, accounts, meters and bills to be tracked are factors used in ECI pricing considerations. ECI has relied upon Licensee’s representations of inventory and scope in the GSA Customer Purchase Order. Licensee is permitted to track the listed number of meters in the Order.

1.1.2. The program modules listed in the Order to be used by Licensee are a factor in ECI pricing considerations. In the event Licensee desires to use additional software modules, whether available today or included in future releases, it will execute a new or modified GSA Customer Purchase Order.

1.2. Software License. Purchase of an EnergyCAP Enterprise software license will be pursuant to the execution of a GSA Customer Purchase Order and the terms of the EnergyCAP Enterprise Annual Software End-User License (the “License” as such term is more particularly described therein) attached hereto as Exhibit A and incorporated herein by reference.

1.3. Software Maintenance. Purchase of Software Maintenance services will be pursuant to the execution of a GSA Customer Purchase Order and the terms of the EnergyCAP Maintenance Agreement (the “Maintenance Agreement”) attached hereto as Exhibit B and incorporated herein by reference.

1.4. Software Implementation Services. Purchase of related implementation services (“Implementation Services”) shall be pursuant to the execution of a GSA Customer Purchase Order and in accordance with the terms of the Software Implementation Services Agreement (“Services Agreement”) attached hereto as Exhibit C and incorporated herein by reference. To the extent Licensee purchases Implementation Services, whether the same is for the initial installation of the Software, or for the installation of additional modules during the term of this Software License Purchase Agreement, the parties agree to execute a Services Agreement in substantially the same form as Exhibit C attached hereto. For the avoidance of doubt, any changes the Parties agree to make to the Project and Invoicing Schedule in the GSA Customer Purchase Order shall be considered non-substantial changes to the Services Agreement.

1.5. Database Hosting Service. ECI offers an optional EnergyCAP database hosting service to EnergyCAP Licensees. The hosting service, if purchased, will be provided pursuant the execution of a GSA Customer Purchase Order and pursuant to the terms of the EnergyCAP Database Hosting Service Agreement attached hereto as Exhibit D and incorporated herein by reference.

### ARTICLE 2. FEES AND TERMS OF PAYMENT

ECI agrees to invoice Licensee and Licensee shall pay for the software and services provided under the License,

Maintenance Agreement and Services Agreement in accordance with the GSA Schedule Price List and any applicable GSA Customer Purchase Orders.

### ARTICLE 3. ECI RESPONSIBILITIES

ECI agrees to perform in accordance with the License, the Maintenance Agreement and the Services Agreement, and perform the Implementation Services in accordance with the delivery dates listed in any applicable GSA Customer Purchase Order(s).

While at any Licensee location, if at all, ECI's employees, agents, consultants, and/or independent contractors (collectively referred to as "personnel," hereinafter) and permitted subcontractors agree to comply with reasonable requests, rules, and regulations of Licensee, including any Government security requirements that have been previously provided to ECI in writing regarding personal and professional conduct (including the wearing of identification badges and adhering to Licensee regulations and safety practices or procedures), and shall otherwise conduct themselves in a businesslike manner.

ECI agrees to provide all necessary tools, office space, equipment, personnel, facilities, telecommunications access, computers and all other resources necessary for ECI to completely and effectively provide the services hereunder. ECI agrees to provide the proper custody and care of any Licensee-supplied property provided to ECI for use in connection with the performance of services.

### ARTICLE 4. MUTUAL REPRESENTATIONS

Each party represents and warrants to the other that (a) it has full power and legal right to execute and deliver this Agreement and to perform its obligations under this Agreement, (b) no authorization or approval from any third party is required in connection with such party's execution, delivery or performance of this Agreement, and (c) this Agreement constitutes its legal, valid and binding obligation, enforceable against it in accordance with its terms.

Further, ECI represents and warrants to Licensee that to the best of its knowledge (i) it has all right, title or interest, or valid license to use, the intellectual property, software copyrights, trademarks or service marks, logos, names, artwork and designs covered by this Agreement, and that its grant or rights associated therewith do not violate any proprietary rights of any third party, and (ii) all services provided hereunder will be performed in a professional and workmanlike manner consistent with the level of care and skill ordinarily exercised by members of ECI' profession currently performing such services under similar conditions.

ECI shall indemnify and hold Licensee and its personnel, successors, and assigns harmless from and against any and all third party claim or liability to the extent arising solely from the acts or omissions of ECI or its personnel in the course of performing the services or from the infringement by ECI of any United States patent, trademark, copyright or proprietary rights.

### ARTICLE 5. DURATION OF AGREEMENT

This Agreement commences on the date executed by Licensee and shall remain in full force and effect for so long as any one or more of the License or Maintenance Agreements are in effect as set forth therein.

### ARTICLE 6. CONFIDENTIAL INFORMATION

"Confidential Information" is any document or other media or tangible items that relates to research, development, trade secrets, clients, business affairs or that contains any other information of a party that was not generally available to the public when received by the other party. "Confidential Information" will also include, but not be limited to, Licensee technology, Licensee utility billing and rate information, ECI technology. "Confidential Information" shall not include information that: (i) is known to the receiving party prior to receipt from the disclosing party directly or indirectly from a source other than one having an obligation of confidentiality to the disclosing party; (ii) becomes known (independently of disclosure by the disclosing party) to the receiving party directly or indirectly from a source other than one having an obligation of confidentiality to the disclosing party; (iii) becomes publicly known or otherwise ceases to be secret or confidential, except through a breach of this Agreement by the receiving party; or (iv) is

independently developed by the receiving party. When the end user is an instrumentality of the U.S. Government, neither this Agreement (including the documents contained in any exhibits), nor the Schedule Price List shall be deemed “confidential information” notwithstanding marking to that effect. Notwithstanding anything in this Agreement to the contrary, the GSA Customer may retain such Confidential Information as required by law, regulation or its bona fide document retention procedures for legal, regulatory or compliance purposes; provided however, that such retained Confidential Information will continue to be subject to the confidentiality obligations of this Agreement.

Each party acknowledges that it will or may have access to Confidential Information of the other party and therefore each party agrees that it will not use Confidential Information of the other party in any way, for its own account or the account of any third party, except as expressly permitted by, or required to achieve the purposes of, this Agreement. The parties agree that they will not disclose Confidential Information to any third party (except as required by law or to that party's attorneys, accountants and other advisors as reasonably necessary and provided that they agree to be bound by obligations of confidentiality at least as strict as those contained herein), nor permit any of its partners, shareholders, directors, officers, personnel, or contracting parties to use or disclose, any of the other party's Confidential Information. The parties agree to take precautions necessary to protect the confidentiality of such Confidential Information using the same degree of care used to protect its own Confidential Information, but in any case using no less than a reasonable degree of care.

The receiving party may disclose Confidential Information pursuant to the requirements of a governmental agency or as required by federal law, provided that it gives the disclosing party reasonable prior written notice sufficient to permit the disclosing party to contest such disclosure. If the disclosing party is not successful in precluding the requesting legal body from requiring disclosure of the Confidential Information, the receiving party shall furnish only that portion of the Confidential Information which is legally required and will exercise all reasonable efforts to obtain reliable assurances the confidential treatment of the Confidential Information.

All of Confidential Information disclosed pursuant to this Agreement (including information in computer software or held in electronic storage media) shall be and remain the property of the disclosing party. All such information in tangible form shall be returned to the disclosing party promptly upon written request or the termination or expiration of this Agreement, and shall not thereafter be retained in any form by the receiving party, its affiliates, or any employees or independent contractors of the receiving party or its affiliates.

This Article VI shall remain in full force and effect for so long as either party retains any Confidential Information of the other party during this Agreement or for a period of five (5) years beyond expiration or termination of this Agreement, whichever is later.

#### ARTICLE 7. INTELLECTUAL PROPERTY

The Software and all documentation, enhancements, modifications, improvements or derivative works thereto, whether or not created or developed in conjunction with Licensee (collectively, the “Enhancements”) shall remain the sole and exclusive property of ECI. ECI retains all copyrights, patents, trade secrets, trademarks, and all other intellectual property interests in the Software and the Enhancements and is licensed for use by Licensee on the terms set forth in Exhibit B.

All underlying methodology utilized by ECI and Licensee respectively which was created and/or developed by either prior to the date of this Agreement and utilized in the course of performance pursuant to this Agreement shall not become the property of the other.

#### ARTICLE 8. ASSIGNMENT AND DELEGATION

Licensee shall not assign nor delegate this Agreement or any rights, duties or obligations hereunder to any other person and/or entity without prior express written approval of ECI which approval shall not be unreasonably withheld. Assignment by ECI is subject to FAR 52.232-23 “Assignment of Claims” (Jan. 1986) and FAR Subpart 42.12 “Novation and Change-of-Name Agreements” (Sep. 2013).

**ARTICLE 9. GENERAL PROVISIONS**

9.1. Entire Agreement. This Agreement together with the attachments hereto and all documents incorporated by reference herein, the underlying GSA Schedule Contract, the Schedule Pricelist and any applicable GSA Customer Purchase Orders constitute the entire and sole agreement between the parties with respect to the subject matter hereof and supersede any prior agreements, negotiations, understandings, or other matters, whether oral or written, with respect to the subject matter hereof. This Agreement, however shall not take precedence over the terms of the underlying GSA Schedule Contract or any specific, negotiated terms on the GSA Customer's Purchase Order. This Agreement cannot be modified, changed or amended, except in writing signed by a duly authorized representative of each of the parties.

9.2. Severability. If any provision of this Agreement is declared invalid or unenforceable, the unenforceability or invalidity of any provision shall not affect any other provision of this Agreement, and this Agreement shall continue in full force and effect, and be construed and enforced, as if such provision had not been included.

9.3. Governing Law; Venue. This Agreement shall be governed by, construed in accordance, and subject to the Federal laws of the United States.. This Agreement is subject to any applicable federal laws, rules and regulations. Venue and jurisdiction shall be determined by the applicable federal statute.

9.4 Notice. Any notices required by this Agreement or any attachment hereto shall be in writing and shall be given to the parties by hand, by facsimile, by nationally recognized overnight courier service or by express, registered or certified mail, postage prepaid, return receipt requested. Notices shall be deemed to have been given upon actual receipt thereof.

IN WITNESS WHEREOF, the parties, by their duly authorized representatives, have caused this Agreement to be executed as of the date first written below.

**ENERGYCAP, INC.**

**THE GSA CUSTOMER**

By: \_\_\_\_\_  
(Signature)

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

## **Exhibit A: EnergyCAP® Enterprise Annual Software End-User License**

EnergyCAP, Inc. (“ECI”) owns all rights and copyrights in and to the subject software product (“Software”) called “EnergyCAP Enterprise version.”

The Software is furnished subject to the terms and conditions of this License Agreement,

By this License Agreement, Licensee is granted a license to use the Software subject to the following terms, restrictions, and limitations:

### **ARTICLE 1. INSTALLATION AND USE**

1.1 Licensee may install the software on one or more file servers or multiple microcomputers for simultaneous use by multiple users within Licensee’s organization. Licensee may make copies of the Software for archival and back-up purposes only.

1.2. This license allows Licensee to use the Software for internal use by its personnel (as defined above) for the benefit of the Licensee organization only. Licensee may not use the Software to process the data of third parties or in a service bureau capacity without written authorization from ECI

### **ARTICLE 2. SCOPE**

2.1. License covers those program features, functions and modules purchased by Licensee (as documented in the GSA Customer Purchase Order), as well as any subsequent enhancements to these features furnished to Licensee pursuant to the EnergyCAP Enterprise Maintenance Agreement. Licensee must execute a new or modified GSA Customer Purchase Order to add features, functionality and modules that are outside of the scope of its initial license. Such functionality (1) may have been available to Licensee at time of purchase, but Licensee elected not to purchase it or (2) may be added to the Software’s capabilities and offered to Licensee at a later date.

2.2. Licensee may not alter, modify, or adapt the Software or documentation, or portions thereof, in any way. Licensee may not disassemble, decompile, reverse engineer, translate or create derivative works of the Software, or portions thereof, in any way. Licensee must install and operate the Software in accordance with the documentation

2.3. Use of an external program to alter, edit or append records to the data files is expressly prohibited.

2.3. This License Agreement and ECI’s copyrights also apply to any data that Licensee may have obtained from ECI, including without limitation weather data libraries, bundled type tables (such as the energy type table) and separate data bases. Licensee may use these data files in conjunction with its licensed copy of the Software. Licensee may not provide them to any third parties, nor may Licensee install them on any computer not running Licensee’s licensed copy of the Software.

2.4. This license does not include supporting software and hardware required to be furnished by Licensee, such as operating systems, browsers, database engines, servers and client workstations.

### **ARTICLE 3. TERM**

3.1. This License Agreement and the licenses granted hereunder are effective upon acceptance by Licensee, shall remain in effect for a 12-month period

3.2 When the end user is an instrumentality of the U.S., recourse against the United States for any alleged breach of this Agreement must be made as a dispute under the contract Disputes Clause (Contract Disputes Act). During any dispute under the Disputes Clause, ECI shall proceed diligently with performance of this contract, pending final resolution of any request for relief, claim, appeal, or action arising under the contract, and comply with any decision of the Contracting Officer.

3.3. Upon expiration or termination of the License Agreement, Licensee shall discontinue use of the Software, remove Software from computers, destroy all copies of Software and discontinue use of the EnergyCAP Enterprise SQL Server database. User data contained within the database is owned by the Licensee and may be exported to other databases, but shall not be retained in ECI's proprietary EnergyCAP SQL Server database format.

#### ARTICLE 4. LICENSE VALIDATION

ECI reserves the right to include periodic expiration and validation processes in the Software to hinder software piracy and protect its rights, copyrights and intellectual property. Licensees will be provided with activation keys at no additional charge for the term of this License Agreement.

#### ARTICLE 5. ASSIGNMENT AND DELEGATION

The license hereunder is not assignable by Licensee without ECI's prior written consent. Licensee may not transfer, distribute, rent, sub-license, or lease the Software or the documentation. Assignment by ECI is subject to FAR 52.232-23 "Assignment of Claims" (Jan. 1986) and FAR Subpart 42.12 "Novation and Change-of-Name Agreements" (Sep. 2013).

#### ARTICLE 6. WARRANTY

ECI warrants to Licensee only that, for a period of 180 days beginning on the day following acceptance as defined in the FAR and the underlying GSA Schedule Contract, the media containing the Software shall be free from defects in materials and workmanship. If it is not, ECI will at its option either repair or replace the same if ECI is notified of such defect and the defective media is returned to ECI, together with proof of purchase, within the 180-day period. **THE FOREGOING STATES LICENSEE'S SOLE AND EXCLUSIVE REMEDY, AND ECI'S SOLE AND EXCLUSIVE LIABILITY FOR, ANY DEFECT, FAILURE OR OTHER PROBLEM WITH THE SOFTWARE WHATSOEVER. EXCEPT AS EXPRESSLY SET FORTH IN THIS PARAGRAPH, THE SOFTWARE IS PROVIDED AS IS, WITHOUT WARRANTY OF ANY KIND. ALL WARRANTIES, WHETHER EXPRESS OR IMPLIED, INCLUDING ALL IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, AND NON-INFRINGEMENT, ARE EXPRESSLY DISCLAIMED. ECI DOES NOT WARRANT THAT THE SOFTWARE WILL RUN WITHOUT ERROR OR BE PROBLEM-FREE. IN NO EVENT SHALL ECI BE LIABLE TO LICENSEE FOR ANY LOSS OR DAMAGES, CONSEQUENTIAL (INCLUDING WITHOUT LIMITATION DATA LOSS, LOSS TO BUSINESS, OR OTHERWISE), INDIRECT, SPECIAL, INCIDENTAL, PUNITIVE OR OTHERWISE, ARISING FROM OR RELATED IN ANY WAY TO THE SOFTWARE AND/OR DOCUMENTATION LICENSED BY ECI, WHETHER SUCH DAMAGES OR LOSS SOUND IN CONTRACT, TORT (INCLUDING NEGLIGENCE, STRICT LIABILITY, AND ALL OTHERS), WARRANTY, OR UNDER STATUTE. ECI HAS ABSOLUTELY NO OBLIGATIONS OR LIABILITIES ASSOCIATED WITH OR ARISING OUT OF THE MANNER IN WHICH LICENSEE USES THE SOFTWARE AND OTHER DATA COVERED BY THIS LICENSE AGREEMENT.**

#### ARTICLE 7. GENERAL TERMS

Nothing in this License Agreement constitutes a waiver of ECI's rights under copyright law. This license is non-exclusive. This Agreement is governed by the Federal laws of the United States. This Agreement, the GSA Schedule Contract, the Schedule Price List and any applicable GSA Customer Purchase Orders contain the final and entire agreement of the parties with respect to the subject matter hereof, and supersede all prior and subsequent offers, proposals, negotiations, understandings, and agreements with respect to the subject matter hereof. This Agreement, however shall not take precedence over the terms of the underlying GSA Schedule Contract or any specific, negotiated terms on the GSA Customer's Purchase Order.

## **Exhibit B: EnergyCAP® Enterprise Maintenance Agreement (“ECMA”)**

### **ARTICLE 1. TERM AND FEES**

1.1. Licensee’s ECMA subscription shall be for one year (“Term”). The initial Term shall commence on the date that Licensee first installs EnergyCAP Enterprise on a Licensee-owned or -operated computer (not including any demonstration or trial versions installed prior to placing a GSA Customer Purchase Order with ECI.) Licensee shall promptly provide said date to ECI in writing and certified by Licensee’s IT Manager. This initial software installation date (which normally precedes the operational date of the software and related systems) shall be established as Licensee’s ECMA anniversary date

1.2. Upon execution of a new or modified GSA Customer Purchase Order, ECI will invoice Licensee for the ECMA Fee for the new Term. Taxes are subject to FAR 52.212-4(k) which provides that the contract price shall include all federal, state and local taxes and duties. ECI shall state separately on its invoices, taxes excluded from the fees, and the GSA Customer agrees to either pay the amount of the taxes (based on the current value of the equipment or services) to ECI or provide it evidence necessary to sustain an exemption, in accordance with FAR 52.229-1 and FAR 52.229-3.

1.3. The annual ECMA fee as stated in any applicable GSA Customer Purchase Order(s) based on the GSA Schedule Pricelist reflects the software and services proposed for purchase.

### **ARTICLE 2. SCOPE OF SERVICES**

2.1. The licensed software covered under these Terms (the “Software”) is EnergyCAP Enterprise versions 6.x and later and is subject to the terms and conditions of ECI’S standard EnergyCAP Enterprise Software License Agreement.

2.2. During the Term, ECI will use commercially reasonable efforts to correct or replace Software and/or provide support services to remedy material programming errors that are attributable to the Software, and which significantly affect use of the Software (“Software Defects”). **SUCH CORRECTION, REPLACEMENT, OR SUPPORT SERVICES SHALL BE LICENSEE’S SOLE AND EXCLUSIVE REMEDY, AND ECI SHALL HAVE NO OTHER LIABILITY, FOR SOFTWARE DEFECTS.**

2.3. ECI agrees to only provide the support services described above in Section 2.2 if Licensee (a) promptly provides ECI with reports, screen prints and all other relevant diagnostic information and assistance required by ECI; and (b) ECI is able to duplicate the problem as reported by Licensee. Licensee further agrees, subject to Government security requirements, to provide all necessary IT support and test time on Licensee’s computer system to demonstrate to ECI’S reasonable satisfaction the existence of a Software Defect.

2.4. Licensee shall inform ECI in writing of any modifications made by Licensee to the Software. **NOTWITHSTANDING ANYTHING TO THE CONTRARY HEREIN, IN NO EVENT SHALL ECI BE RESPONSIBLE FOR SUPPORTING, MAINTAINING OR PROVIDING ANY SERVICES WITH RESPECT TO SOFTWARE MODIFIED BY LICENSEE.**

2.5. In the event any problems, difficulties or defects are determined by ECI to be traceable to Licensee’s software, hardware, modifications or system changes, ECI shall execute a new or modified GSA Customer Purchase Order for any maintenance services it requires.

2.6. During the term of this ECMA, ECI will provide to Licensee:

- a. Updates or discounts to the Software, as they are commercially and generally released by ECI.
- b. Toll-Free Support Hotline – 877.327.3702, manned 8:00 AM-5:00 PM ET on standard business days.
- c. Program activation codes as may be required by the EnergyCAP piracy protection scheme to Operate authorized modules of the program.

- d. Tech Support via Internet e-mail and website, <http://support.energycap.com>. ECI shall retain absolute discretion as to the timing, scope, and content of updates, upgrades, new releases and/or new versions of the Software.
- e. Subscription services for the ENERGY STAR interface, access to EPA eGrid Greenhouse Gas factors, and mean daily temperature weather data are provided by AccuWeather®.

2.7. The services provided hereunder do not include: (a) any services relating to software or hardware not provided by ECI, including, without limitation, any programming performed by Licensee; (b) training; (c) correction of user errors and database errors; (d) installation of updates, new versions, or new releases; or (e) data conversion.

2.8. ECI will use reasonable efforts to respond to all support requests submitted during standard business hours within four hours of submission. Support requests are prioritized by Licensee at time of submission into one of three categories, and ECI will make a reasonable effort to resolve the request within the specified time: (a) Routine – 5-day resolution; (b) Urgent – 2-day resolution; (c) Emergency – 1-day resolution.

### ARTICLE 3. LICENSEE’S RESPONSIBILITIES

3.1. Licensee shall thoroughly research all software or system problems before reporting a problem to the ECI support staff.

3.2. Licensee shall promptly install software provided by ECI, including all updates, patch disks, diagnostic programs, database scripts and new system releases..

3.3. Licensee acknowledges that it is Licensee’s sole responsibility, at all times, including specifically during service functions performed by ECI, to protect the computer system database, files and software from all possible losses, including power failures, hardware failures, software problems, external influences, and inadvertent mistakes, such as operator errors, or any other cause by maintaining copies, through the use of verified daily file saves, stored on and off the premises, and such other additional methods of protection as may be available for the computer system database, files and software.

### ARTICLE 4. PROPRIETARY RIGHTS

The Software and all documentation, enhancements, modifications, improvements (collectively, the “Enhancements”) shall remain the sole and exclusive property of ECI. ECI retains all copyrights, patents, trade secrets, trademarks, and all other intellectual property interests in the Software.

### ARTICLE 5. LIMITATIONS OF LIABILITY

ECI’S LIABILITY HEREUNDER SHALL BE LIMITED IN THE AGGREGATE TO AN AMOUNT EQUAL TO ALL ECMA FEES PAID BY LICENSEE TO ECI FOR SUPPORT AND MAINTENANCE SERVICES FOR THE 12-MONTH PERIOD PRECEDING ANY CLAIM OR DEMAND BY LICENSEE. IN NO EVENT SHALL ECI BE LIABLE TO LICENSEE OR TO ANY OTHER PARTY FOR ANY CONSEQUENTIAL (INCLUDING WITHOUT LIMITATION DATA LOSS, LOSS TO BUSINESS, OR OTHERWISE), INDIRECT, SPECIAL, INCIDENTAL, EXEMPLARY OR PUNITIVE LOSS OR DAMAGE, ARISING FROM OR RELATED IN ANY WAY TO THE SERVICES HEREUNDER, OR THE SOFTWARE AND/OR DOCUMENTATION LICENSED BY ECI, WHETHER SUCH DAMAGES OR LOSS SOUND IN CONTRACT, TORT (INCLUDING NEGLIGENCE, STRICT LIABILITY, AND ALL OTHERS), WARRANTY, OR UNDER STATUTE. THE FOREGOING EXCLUSION/LIMITATION OF LIABILITY SHALL NOT APPLY (1) TO PERSONAL INJURY OR DEATH CAUSED BY ECI’S NEGLIGENCE; (2) FOR FRAUD; (3) FOR EXPRESS REMEDIES UNDER THE LAW OR CONTRACT; OR (4) FOR ANY OTHER MATTER FOR WHICH LIABILITY CANNOT BE EXCLUDED BY LAW.

### ARTICLE 6. GENERAL TERMS

These Terms shall be governed and construed under the Federal laws of the United States, ECI is an independent contractor. These Terms shall not be construed to create a partnership or joint venture between the Parties. Nothing in

these Terms shall provide any benefit to any third party or entitle any third party to any claim, cause of action, remedy or right of any kind. These ECMA Terms shall not be construed as a third party beneficiary contract.

#### ARTICLE 7. SUBSCRIPTION SERVICES TERMS & CONDITIONS OF USE

Before using EnergyCAP, Inc. subscription-based products, Licensee should carefully read the following terms and conditions. Licensee has read and accepts the following terms and conditions:

7.1. In no event will ECI be liable for any damages including, but not limited to, direct, indirect, special, incidental or consequential damages or losses arising out of or inability to use ECI Products. The foregoing exclusion/limitation of liability shall not apply (1) to personal injury or death caused by ECI's negligence; (2) for fraud; (3) for express remedies under the law or contract; or (4) for any other matter for which liability cannot be excluded by law.

7.2. ECI's Subscription Products are intended for Licensee's own use. Licensee may not place any of ECI's Subscription Products, including imported third party content and/or data, modified or unmodified, on a diskette, CD, DVD, flash drive or any other medium and offer them for redistribution, re-broadcast, or resale of any kind.

7.3. Licensee may not claim intellectual or ownership rights to any of ECI's Subscription Products.. All Subscription Products and contents therein are property of ECI or independent third party providers. Third party content and/or data may be imported or may be accessible via links from our Products. Licensee acknowledges and agrees that ECI is not responsible for and assumes no liability for any loss or damages which may be incurred as a result of any mistakes, omissions, or incorrect data or representations or any other form of content provided by ECI.

7.4. **ECI's SUBSCRIPTION PRODUCTS ARE PROVIDED "AS IS" WITHOUT WARRANTY OF ANY KIND.** ECI, makes no warranty whatsoever as to the accuracy or completeness of the content or the results to be obtained from using the information contained therein, and ECI shall not be responsible for any claims attributable to errors, omissions, or other inaccuracies in the information contained in the content or results thereof. The entire risk for the results and performance of the Subscription Products is assumed by Licensee.

## **Exhibit C: EnergyCAP® Enterprise Implementation Services Agreement**

This Agreement provides the terms and conditions by which EnergyCAP, Inc. (“ECI”) agrees to furnish Software Implementation Services (“Services”) to Licensee in order to assist Licensee in making EnergyCAP Enterprise software (“Software”) operational, as required by Licensee, in a timely manner.

### **ARTICLE 1. SCOPE**

ECI shall, as an independent contractor, provide certain consulting, software development, implementation, training, and other services as described in the GSA Customer Purchase Order which lists the specific implementation tasks and functional requirements for the Services. Any Services not listed in the Order are not included in this Agreement. All software delivered under this Software Implementation Services Agreement shall be included in the definition of “Software” set forth in the EnergyCAP Enterprise Software End-User License and referred to in the Software Agreement as Software End-User License. Accordingly, ECI shall support all software delivered under this Software Implementation Services Agreement under the terms of any in-force EnergyCAP Maintenance Agreement.

### **ARTICLE 2. DILIGENCE**

ECI shall appoint sufficient staff of suitable training and skills to provide the services called for by this Agreement. ECI shall endeavor to complete tasks per the delivery dates shown in the Order. Completion dates may be extended at no fault to ECI due to uncontrollable factors as stated in FAR 52.212-4(f).

### **ARTICLE 3. ACCEPTANCE OF DELIVERABLES**

Each deliverable shall be subject to review by Licensee to verify that the deliverable is acceptable to Licensee pursuant to the FAR and the GSA Schedule Contract.

### **ARTICLE 4. LIMITATION OF LIABILITY**

IN NO EVENT SHALL EITHER PARTY BE LIABLE TO THE OTHER PARTY FOR ANY INCIDENTAL OR CONSEQUENTIAL, OR ANY INDIRECT LOSS OR DAMAGE, INCLUDING WITHOUT LIMITATION LOST PROFITS, ARISING OUT OF THIS AGREEMENT OR ANY OBLIGATION RESULTING THEREFROM, WHETHER IN AN ACTION FOR OR ARISING OUT OF ANY CAUSE WHATSOEVER, REGARDLESS OF THE FORM OF ACTION, WHETHER IN CONTRACT, TORT INCLUDING NEGLIGENCE, STRICT LIABILITY OR OTHERWISE. THE ENTIRE LIABILITY OF EITHER PARTY FOR ANY CLAIM, LOSS, DAMAGE OR EXPENSE ARISING IN CONNECTION WITH THE PERFORMANCE OF THIS AGREEMENT, REGARDLESS OF THE FORM OF ACTION, WHETHER IN CONTRACT, TORT INCLUDING NEGLIGENCE, STRICT LIABILITY OR OTHERWISE, SHALL BE LIMITED TO DIRECT DAMAGES.

### **ARTICLE 5. REMEDIES**

EXCEPT FOR OTHER REMEDIES SET FORTH IN THIS SOFTWARE IMPLEMENTATION SERVICES AGREEMENT, THE SOLE AND EXCLUSIVE REMEDY FOR FAILURE OF ECI TO PROVIDE THE SERVICES OR FOR ANY BREACH OF THIS SOFTWARE IMPLEMENTATION SERVICES AGREEMENT BY ECI SHALL BE TERMINATION OF THE SERVICES BY Licensee IN EXCHANGE FOR A FULL REFUND OF ALL AMOUNTS PAID UNDER THE SOFTWARE IMPLEMENTATION SERVICES AGREEMENT THE FOREGOING EXCLUSION/LIMITATION OF LIABILITY SHALL NOT APPLY (1) TO PERSONAL INJURY OR DEATH CAUSED BY ECI’S NEGLIGENCE; (2) FOR FRAUD; (3) FOR EXPRESS REMEDIES UNDER LAW OR THE CONTRACT; OR (4) FOR ANY OTHER MATTER FOR WHICH LIABILITY CANNOT BE EXCLUDED BY LAW.

## ARTICLE 6. LIMITED WARRANTY REGARDING SERVICES

ECI warrants that (a) it shall make its best effort to provide the Services substantially free of defects and malfunctions, (b) each deliverable will have all of the functions and features and perform as agreed by the parties in the GSA Customer Purchase Order, (c) the deliverables do not and shall not infringe any patents, copyrights, trade secrets, or other intellectual property, proprietary or contractual rights of any third party, and (d) Licensee shall have the full right to use and exploit such materials in accordance with the terms and conditions of this Software Implementation Services Agreement without claims from any third party, including, without limitation, any personnel or subcontractor of ECI. ECI shall remedy any failure to comply with the foregoing warranties at no cost to Licensee, including, without limitation, by repairing or replacing any non-conforming deliverables and/or working with the Government to obtain any necessary rights.

## ARTICLE 7. DISCLAIMER

EXCEPT AS PROVIDED EXPRESSLY IN THIS SOFTWARE IMPLEMENTATION SERVICES AGREEMENT, LICENSEE'S SOFTWARE PURCHASE AGREEMENT AND ANY OTHER ATTACHMENT THERETO, ECI HEREBY DISCLAIMS ALL IMPLIED AND EXPRESS WARRANTIES, INCLUDING WITHOUT LIMITATION IMPLIED WARRANTIES FOR MERCHANTABILITY, ACCURACY, INTEGRATION, OR FITNESS FOR PARTICULAR PURPOSE, RELATING TO THE SERVICES, INCLUDING WITHOUT LIMITATION ANY SOFTWARE, HARDWARE, TECHNOLOGY, OR TANGIBLE OR INTANGIBLE PROPERTY THEREIN.

## ARTICLE 8. TERM AND TERMINATION

This Agreement shall remain in full force and effect until Services have been completed by ECI, accepted by Licensee, and paid in full. When the end user is an instrumentality of the U.S., recourse against the United States for any alleged breach of this Agreement must be made as a dispute under the contract Disputes Clause (Contract Disputes Act). During any dispute under the Disputes Clause, ECI shall proceed diligently with performance of this contract pending final resolution of any request for relief, claim, appeal, or action arising under the contract, and comply with any decision of the Contracting Officer.

## ARTICLE 9. INDEPENDENT CONTRACTOR STATUS

ECI will render the services hereunder as an independent contractor (and not as an employee or agent of, or joint venturer with, Licensee) and, accordingly, neither ECI nor Licensee will (a) participate in any of the other parties' employee benefits plans nor receive any other compensation beyond that stated in the GSA Customer Purchase Order, (b) have the power or authority to bind the other party or to assume or create any obligation or responsibility, express or implied, on the other party's part or in the other party's name, or (c) represent to any person or entity that Licensee or ECI or any employee of Licensee or ECI has such power or authority. Each party shall be solely responsible for determining the manner and means by which it performs the duties and responsibilities assigned to it, and shall be solely responsible and liable for its personnel and their acts and omissions within the scope of their employment. Taxes are subject to FAR 52.212-4(k) which provides that the contract price shall include all federal, state and local taxes and duties. ECI shall state separately on its invoices, taxes excluded from the fees, and the GSA Customer agrees to either pay the amount of the taxes (based on the current value of the equipment or services) to ECI or provide it evidence necessary to sustain an exemption, in accordance with FAR 52.229-1 and FAR 52.229-3.

## **Exhibit D: EnergyCAP® Database Hosting Service Agreement**

### **ARTICLE 1. HOSTING SERVICE**

ECI may, at Licensee's option, act as the Licensee's Hosting Agent and host Licensee's EnergyCAP database(s) on hardware owned and maintained by ECI.

1.1. Hosting hardware is located in Pittsburgh, PA in a commercial co-location facility that has secure access, redundant high-speed Internet access, redundant power, and redundant cooling.

1.2. Hardware will include a multi-processor database server with RAID and mirrored drives, Microsoft Server 2003 OS, Microsoft SQL Server, and separate web server.

1.3. Databases will be backed-up nightly to on-site and off-site locations. Additionally, databases are backed up to a secondary database server in near real-time.

1.4. Guaranteed system availability if 98% during customary Eastern Time Zone business office hours. Licensee shall be entitled to a credit of \$500 if system availability in any calendar quarter falls below 98% for that quarter.

1.5. Licensee may elect, at an additional fee, to have ECI host a separate EnergyCAP database for testing purposes. The test database will be in addition to Licensee's production database(s), and the following terms will apply to the test database:

- a. The test database will be set up initially as a restored copy of Licensee's production database.
- b. ECI will, up to two times per 12-month period and upon Licensee's request, delete the test database and replace it with a new backup of Licensee's then-current production database.
- c. The test database will be upgraded by ECI as part of the normal production environment upgrade process.
- d. Test databases are not considered to be critical databases and, therefore, are not subject to ECI's standard service level agreement (SLA) terms.
- e. Test databases are backed-up nightly; however, a hot-swappable backup is not created. In the event of a server failure the most recent backup copy of the test database (up to 24 hours old) will be restored for Licensee access.
- f. All standard ECI hosting service terms and conditions apply to test databases, unless stated otherwise in this Paragraph 1.5.
- g. A fee of \$1,200 per year will be added to Licensee's annual hosting service fee for each Licensee test database hosted by ECI.

1.6. Licensee may elect to store electronic bill images on a server owned and maintained by ECI at an annual Bill Image Hosting Fee of \$0.05 per bill image. The Bill Image Hosting Fee will be invoiced by ECI annually and included on Licensee's annual Database Hosting Fee invoice.

1.7. ECI will upgrade the database and web client when updates are released by ECI for Licensee access. ECI will notify Licensee two weeks in advance of all upgrades. It is the responsibility of Licensee to upgrade the Installed Windows Client on all personal computers on which the Windows Client is installed on or after the database upgrade date specified by ECI.

### **ARTICLE 2. DATA OWNERSHIP & CONFIDENTIALITY**

2.1. Ownership of proprietary EnergyCAP SQL database schema resides with ECI. Database schema includes database design elements, to include: table and field design; indexes and triggers; stored procedures, scripts and views.

2.2. Data ownership resides with the Licensee. ECI shall treat Licensee databases as confidential information and shall not release, divulge, or provide access to data by any third parties without the prior consent of Licensee:

- a. The EnergyCAP application does not store or process any personal information aside from Username.
- b. EnergyCAP utilizes secure Web and FTP traffic as needed for implementation and other client projects.

- c. EnergyCAP does not encrypt database files. Communication between the installed workstation or Web application can use SSL encryption (128-bit) for all data transfer on a site-to-site basis.

### ARTICLE 3. HOSTING SERVICE TERMINATION

3.1. ECI reserves the right to terminate Hosting Agent services upon 180 days written notice to Licensee and shall transfer Licensee data to Licensee upon termination.

3.2. The Hosting Agent Service is separate and independent of the EnergyCAP Software License and Maintenance (ECMA) agreements; therefore, termination of the Hosting Agent Service does not automatically terminate the License or ECMA agreements.