

ENERGY SAVING GUARANTEE CONTRACT

between

- hereinafter called "the Client" or "CL" -

legally represented by

represented by

and

- hereinafter called "the Contractor" or "CN" -

represented by

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PREAMBLE

1. Based on this Energy Saving Guarantee Contract, the CL sees a possibility for supporting the target projection defined in Council Directive No. 93/76/EEG of 13 September 1993 concerning the reduction of CO₂ emissions.
2. A key obligation of the CN is that, by means of an independent promise to the CL in accordance with this Contract, he undertakes to lower the CL's energy costs for the contractual object by the amount guaranteed by implementing energy saving measures within the contract period and in so far to assume the full risk for the commercial success of the cost-cutting measures.

In that respect, assumption of the commercial risk by the CN means he guarantees that his investments (energy saving measures) will fully be repaid by his contractually agreed share in the saving, and therefore the CL needs not make any investment or raise funds. If the guaranteed reduction of costs is not achieved, the CN will pay the CL a monetary compensation equal to the amount which would have been saved, had the cost reduction actually materialised.¹

3. The CN was given the opportunity to thoroughly examine the contractual object, to acquire or verify the data specified in **Annex 2** concerning all parts of the contractual object and to perform a draft analysis on his own responsibility to get a clear idea of whether or not energy could be saved in the contractual object by implementing technical and other measures, and the CN affirms that this is the case taking account of the technical and commercial risks revealed. On the basis of these preliminary investigations, the CN accepts the obligations stipulated in this Contract.
4. This preamble forms an integral part of the Contract and is an essential basis of the transactions set forth in the individual provisions contractually agreed hereunder.

§ 1 SUBJECT MATTER OF THE CONTRACT AND CONTRACTUAL OBJECTS

§ 1.1. Contractual Objects

This Contract applies to the buildings and real estate listed in **Annex 1**.

§ 1.2. Subject Matter of the Contract

The subject matter of the contract is the installation of energy saving measures in the contractual object to reduce energy consumption and energy costs and the assumption of the economic risk that the target is actually achieved.

The CN represents and warrants that the CL from the commencement of his main obligation to perform (§ 18.2.) until the end of the Contract will reduce the **energy costs** in the contractual object to the extent guaranteed.

Energy costs within the meaning of this contract are the costs of all cost units included in the calculation of the energy costs baseline on the basis of the energy price in the reference year (see § 6.1.). The statutory turnover tax and increases or reductions in the price of energy are not taken into account.

The CN's guarantee is undertaken subject to the reservation that the building data specified in **Annex 2** and determined and/or verified by the CN on its own responsibility will not change.

§ 2 AUTHORISED PROJECT REPRESENTATIVES - POWER OF REPRESENTATION

§ 2.1. Representation of the CL

The CL's authorised project representative with regard to all matters concerning this Contract, and his deputy, are listed in **Annex 3** of this Contract.

The authorised project representative and his deputy are authorised to represent the CL with regard to all legal transactions concerning this Contract, subject to the statutory provisions regarding representation and a written form requirement. The authority includes the right to modify or amend this Contract. The power of attorney may be revoked at any time. In such a case the CL taking account of the relevant regulations of public law shall appoint and authorise another representative by a separate warrant of attorney which is handed over to the CN. **Annex 3** of this Contract will then be replaced by an updated version.

The contacts named in **Annex 2** are not authorised to represent the CL as described above, unless they are the same persons as those specified in **Annex 3**.

§ 2.2. Representation of the CN

The CN's authorised project representative with regard to all matters concerning this Contract, and his deputy, are listed in **Annex 3** of this Contract.

The authorised project representative and his deputy are authorised to represent the CN with regard to all legal transactions concerning this Contract, subject to a written form requirement. The power of attorney may be revoked at any time. In such a case the CN taking account of the relevant regulations of public law shall appoint and authorise another representative by a separate warrant of attorney which is handed over to the CN. **Annex 3** of this Contract will then be replaced by an updated version.

§ 3 DELIVERY

To become effective in law and be served on time, legal statements of any kind may only be delivered to the address of an authorised project representative (§ 2). Delivery to any other address of a partner shall have no legal effect whatsoever, unless the sender can prove that, and, if any time limits are to be complied with, when the document has been received by the authorised project representative of the other party.

§ 4 PREPARATORY SERVICES BY THE CN

The CN shall perform services (**energy saving measures**) in preparation of his main performance for the contractual object which have to be successively arranged with the CL under the terms and conditions stipulated in **Annex 4 / Performance Sheet**. If those services are construction work, VOB/B [Construction Contract Procedures] shall apply to them, taking account of the ranking pursuant to § 1 no. 2 VOB/B. In particular cases, in which energy saving measures are other services within the meaning of § 1 VOL/A [Conditions Concerning Contracts for Supplies and Services Part A], the VOL/B shall apply taking account of the ranking pursuant to § 1 no. 2 VOL/B.²

Upon the signing of each performance sheet the CL agrees to its contents including its appendices. With regard to the performance specifications this also means that the CL consents to the execution of the energy saving measure and finds that the **prices** fixed in the appendices are reasonable, unless an examination from the point of view of the law concerning controlled prices shows something else.

§ 4.1. Definition of Energy Saving Measures

Energy saving measures within the meaning of this Contract are all planning, technical, procedural and other services provided by the CN in connection with the contractual object to fulfil his independent guarantee (§ 6). Thus the term includes preparatory services (§ 4), but also those services which the CN provides subsequently after the commencement of his main performance to optimise or safeguard the savings.

Furthermore, energy saving measures include all maintenance services which the CN needs to provide to ensure functioning, and thus compliance with the targets, of his energy saving measures (§ 6.3.).

§ 4.2. Quality Criteria for the Energy Saving Measures

Energy saving measures installed by the CN are deemed to be performed in conformity with the Contract only if they are conforming to the savings targets³ and apart from that the minimum standards described below are complied with.

Energy saving measures

- a) if they are construction work within the meaning of § 1 VOB/A para 1 or maintenance services relating to such construction work within the meaning of DIN 31 051, must meet the generally accepted engineering standards applicable at the time of performance, in particular the requirements of VOB/C;
- b) must be optimally dimensioned with respect to planning and costs taking account of the actual circumstances of the contractual object and the actual utilisation conditions, in particular they must not cause the CL unreasonable maintenance expenditure after the end of the Contract;
- c) must be interoperable with existing building installations and components (including existing EDP systems);
- d) must not result in an impairment or shortfall of the comfort standards set out in **Annex 2** of this Contract for the specific object;
- e) must with regard to their composition possess the contractually stipulated investment structure (§ 4.5. in conj. with **Annex 6**) and fulfil the availability guarantee with regard to the procurement of replacement parts beyond the end of the Contract (**Annex 6**);
- f) must generally be free from material deficiencies and defects of title and be carried out in such a way that the users of the contractual object are not restricted more than absolutely unavoidable in their possibility to use the contractual object.

§ 4.3. Energy Saving Measures - Transparency Criteria and Price Requirements

The CN shall prepare and present all his energy saving measures in accordance with **Annex 4**. This goes in particular for the drawing up of and the pricing in the performance specifications which the CN has to attach to each performance sheet depending on the kind of service as Appendix 1 or 2.⁴ In detail:

a) Construction Work Within the Meaning of § 1 VOB/A Section 1

The performance specifications to be attached to **Annex 4** as appendix 1 shall be suitably structured and provided with prices. The performance specifications shall show which installations or parts of installations or other measures are installed by the CN with which essential performance features or elements. Prices shall be stated net excluding turnover tax.

b) Other Services Within the Meaning of § 1 VOL/A Section 1

The same principles apply as to those for construction work. However, the performance specifications shall be attached to **Annex 4** as appendix 2.

c) Preparatory Planning Services

Preparatory planning services, i.e. engineering or architectural services provided in addition to or together with the energy saving measures, shall be shown at the end of the respective appendix under a separate item as net total excluding turnover tax. Without detailed specification or reference to the HOAI⁵ [Fee Structure for Architects and Engineers] the distribution of the total to the items in the performance specifications shall be shown. Only when requested by the CL it shall be disclosed which portion of the planning costs relates to a certain item in the performance specifications and how the CN has determined the planning costs.

d) Annex 4 (Performance Sheet)

Apart from that, **Annex 4** shall always be completed fully and correctly. "0" shall be entered in blank lines which are not needed. The prices to be stated in appendices 1 and 2 shall always be such that they stand up to closer examination with regard to the law concerning controlled prices, if applicable in accordance with any provisions in that law effective at the time the performance sheet was drawn up.

§ 4.4. Compulsory Measures

Compulsory measures are measures which are not subject to the CN's discretion and which he must perform. Compulsory measures may include

- energy source conversions;
- renovation / exchange of energy or water supply and disposal installations or parts of such installations;
- building renovation;
- disposal of old installations beyond the obligations set out in § 6.5;
- maintenance of installations or parts of installations which are not replaced by the CN and thus become part of the energy saving measures;
- development and implementation of further concepts for user motivation.

The compulsory measures actually to be carried out by the CN result from **Annex 5** of this Contract. **Annex 5** also defines whether or not the costs of compulsory measures are included in the CN's share in the potential savings or how the compulsory measures are financed.⁶

§ 4.5. Amount and Structure of the Total Investment and Products

The CN undertakes to provide at least the investment volume specified in **Annex 6** (Investment Structure and List of Products), to comply with the investment structure specified and to use the products of the respective manufacturers specified therein and offered by the CN. These

prerequisites shall be met upon the commencement of the main obligation to perform (§ 18.2. = reference date). The CN shall furnish proof of this.

§ 4.5.1. Definitions of Terms

Within the meaning of § 4.5. in conj. with **Annex 6** the following terms shall have the meanings set out below.

a) Planning/Engineering

Planning/engineering means all services provided by the CN which are to be regarded as engineering or architectural services, including commissioning services or advisable examinations of defects. Furthermore, mock components within the meaning of § 95 BGB [German Civil Code] are to be listed if they are to be removed at the end of the Contract (e.g. provisional construction devices of any kind).

b) Technical Devices/Installations/Components

This means all physical objects which the CN incorporates into the contractual object as energy saving measures, regardless of whether they are essential parts within the meaning of §§ 93, 94 BGB or accessories within the meaning of § 97 BGB, including EDP programs but excluding mock components within the meaning of § 95 BGB (see Planning/Engineering).

§ 4.5.2. Insufficient Amount of Investments for Technical Devices/Installations/Components

If on the reference date the CN has not reached the amount of investment for the technical devices, installations and components within the meaning of § 4.5.1. letter b) as promised pursuant to **Annex 6** and if he fails to reach such investment within a reasonable extension of time stipulated in writing by the CL, the CL shall be entitled to demand diminution for the time from receipt of a separate enforcement declaration by the CN (§ 4.5.4.) until the end of the Contract (§ 18.3.) in the form of a reduction of the share to which the CN is entitled in accordance with § 10.1. by three quarters of the percentage by which the CN has fallen short of the investment agreed with regard to the technical devices, installations and components.⁷ The CL shall not be entitled to any further claims with regard to this.

§ 4.5.3. Benchmark for Investment Volume and Structure

The only benchmark for settling the question whether or not the CN has reached the contractually stipulated total amount of investments and observed the investment structure shall be the services actually determined in the course of the acceptance inspection in accordance with § 16.1.2. on the basis of the **prices** which the CL has agreed as being adequate by signing the respective performance sheets and their appendices (of **Annex 4**), subject to the legitimacy of the prices as regards the law concerning controlled prices.

§ 4.5.4. Assertion of the Warranty-claims for Reduction in the Contract Price and Adverse Right of the CN

The reduction pursuant to § 4.5.2. shall not automatically become effective upon the expiry of the reasonable extension of time, but only upon receipt of a separate written statement by the CL stating that the warranty-claim for reduction is asserted. The statement shall only be effective if it is received after expiry of the extension of time; otherwise it has to be repeated.

Apart from that, the CN shall be entitled to show and prove that the economic disadvantage or the loss in value incurred by the CN is lower than the value resulting from the calculation of the reduction in accordance with § 4.5.2. If the CN proves this, the CL shall be entitled to a reduction of the amount proved by the CN.

§ 4.6. CL's Right to Demand Performance

Regardless of the scope of discretion granted to the CN (§ 4.7.) the CL shall at any time until the end of the Contract both before and after the commencement of the CN's main obligation to perform be entitled to demand, by unilateral written declaration, execution of such energy saving measures as the CN has specified in the context of his rough analysis (appendix 2 of **Annex 6**).⁸ This shall not apply if the CN for factual reasons has, instead of the energy saving measures specified in the rough analysis, installed energy saving measures which are equal as regards quality, objective and sustainability. If the CN rejects the performance of a legitimately demanded service or if such service is not provided for other reasons attributable to the CN, then the CL shall be entitled to all statutory claims in this respect.

§ 4.7. Discretionary Powers of the CN

As a rule, the CN shall decide, taking account of § 4.5., in its equitable discretion which energy saving measures he installs in each particular case. Therefore, while the CN acts within his powers of discretion, the CL may not reject energy saving measures offered to him on the basis of the performance sheet (**Annex 4**), unless he can refer to general inequity or one of the contractually agreed grounds for a veto (§ 4.9.).⁹

§ 4.8. CN's Duty to Advise

The CN shall explain to the CL's representative any energy saving measures intended for the contractual object in time before their installation. He shall conscientiously review any reservations and change requests or alternative proposals and weigh up the pros and cons. Should the CN see no alternative from the point of view of economic efficiency and conformity with the targets, he shall prior to implementation of the intended energy saving measure communicate his reasons. If the CL still does not agree by signing the object-related performance sheet (see sample **Annex 4**), the CN shall be entitled to execute or initiate the energy saving measure offered without the CL's consent, unless § 4.9. takes effect.

§ 4.9. CL's Right of Veto

Notwithstanding § 4.7. and § 4.8. the overall responsibility for constructional maintenance and modernisation of the contractual object shall remain with the CL to the effect that the CN shall be obliged to refrain from installing his intended energy saving measures upon the written notice of the CL

- a) if the intended measure is incompatible with the law in force or any administrative regulation binding on the CL; or
- b) if contracts the CL has concluded with third parties stand in the way and such third parties following serious endeavours on the part of the CL reject appropriate amendment of the contracts (reference is made to § 4.10.2.); or
- c) if and while the CN despite request by the CL does not prove that the energy saving measure meets the quality requirements of § 4.2.; or
- d) if and while the CN fails to comply with the transparency criteria of § 4.3. with regard to the energy saving measure; or
- e) if and while the CN rejects fulfilment of a demand of performance by the CL in accordance with § 4.6. without being entitled to do so; or
- f) if the exercise of the CN's discretion with regard to any concrete energy saving measure is inequitable, in particular if the CL's reasons for rejection are so significant and, in accordance with the principles of good faith, outweigh the CN's interest to carry out/initiate the measure so considerably that adherence to the CN's measure would be inequitable.

§ 4.10. Legal Consequences in the Case of Justified Exercise of the CL's Veto

§ 4.10.1. Principle

If the CL exercises his right of veto in accordance with the above-mentioned principles, then the respective energy saving measure shall not be executed while the veto is in force. The CN's liability under his guarantee shall not be restricted thereby.

§ 4.10.2. Exception

If the exercise of the right of veto is based exclusively on the ground set forth in § 4.9. letter b), then the regulations of § 4.11. shall be applied to the benefit of the CN if

- a) the CL has failed to point out the concrete obstacle in the context of the award procedure; and
- b) the CN did not know the obstacle and was not obliged to know it.

§ 4.11. Legal Consequences in the Case of Faulty Exercise of the Right of Veto on the Part of the CL

§ 4.11.1. Claim for Compensation by the CN

If the CL in accordance with § 4.9. prohibits an energy saving measure and if the CN after receipt of such prohibition proves that the reasons put forward by the CL are not correct, the CL shall on the CN's request take back his instruction. In such a case the CN shall be entitled to a monetary compensation for the lost energy saving effect. The compensation shall be determined on the basis of the period between receipt of the prohibition and receipt of the taking back of the prohibition by the CN. Any further claims for damages on the part of the CN shall not be affected thereby.

§ 4.11.2. Loss of the Warranty-claim for Reduction

If the preconditions of § 4.11.1. exist and if a veto by the CL thus unjustified results in the amount of investment for the technical devices/installations/components specified by the CN in **Annex 6** being fallen short of, the CL shall not be entitled to the warranty-claim for reduction set out in § 4.5.2. in so far as the deviation is due to the unjustified veto. Unjustified reduction amounts already collected by the CL shall be reimbursed.

§ 5 OFFICIAL PERMITS AND APPROVALS

Unless otherwise provided in this Contract, it shall be the CN's exclusive responsibility to obtain any required official permits and approvals for any energy saving measures he intends to install. With regard to the CL's duties to cooperate see § 12.

§ 6 MAIN PERFORMANCE OF THE CN (SAVING GUARANTEE AND ASSURANCE OF SUCCESS)

§ 6.1. Reference Quantities

§ 6.1.1. Settlement and Reference Periods

The settlement period is one calendar year. Based on the data acquired (**Annex 2**) the parties hereto agree the **reference period** to be the calendar year _____.¹⁰

§ 6.1.2. Energy Costs Baseline

The energy costs baseline has been determined on the basis of the calculation instructions set out in **Annex 8**.

As allocation base and assessment base for the fulfilment of the energy saving guarantee provided by the CN referred to the entire contractual object the parties hereto determine an overall energy cost value expressed in terms of money, net excluding turnover tax, (**energy costs baseline**) based on the calculation regulations and the aforementioned reference period as follows:

	Reference costs net / reference period
Heat:	€0.00
Electricity:	€0.00
Water:	€0.00
Energy costs baseline:	€0.00

§ 6.1.3. Reference Price

The energy costs baseline in the reference period is based on the energy supply prices (net) of the respective energy supplier per consumption unit and part of the contractual object applicable to the relevant period in accordance with **Annex 7**. The CL shall be under an obligation to let the CN look at the calculation documents which form the basis of **Annex 7** and make copies of the documents at the CN's expense at any time upon first request.

§ 6.2. Saving Guarantee

As his main performance the CN represents and warrants that his energy saving measures from the beginning of the main obligation to perform until the end of the Contract will reduce the above-mentioned energy costs baseline per settlement period (§ 6.1.1.) by an **amount** of

€ _____

net excluding turnover tax, in accordance with the calculation principles agreed in § 9.

§ 6.3. Maintenance and Replacement of Energy Saving Measures

In order to ensure functioning in accordance with the guaranteed targets, the CN, during the duration of the Contract, shall take care of maintenance as defined in DIN 31 051 of all energy saving measures provided by him, i.e. construction work or installations, devices, objects and systems integrated in or delivered to the building. Therefore, the CN is obliged to carry out any

technical, administrative and management measures during the life cycle of any item to maintain or restore its operative condition, so that the item is capable of fulfilling its function. Item as used here shall mean any part, component, device, sub-system, functional unit, operating equipment or system which can be looked at discretely.

In addition to the functionality of his energy saving measures as such, the CN shall also guarantee that upon handing over his energy saving measures are in a condition which within the meaning of § 20.1. can be regarded as secure and operative taking account of normal wear. The condition of the energy saving measures shall be comparable to the condition which is generally to be expected in the case of comparable services, comparable service lives and proper maintenance in accordance with DIN 31 051.

During the Contract period, the CN undertakes in addition to his maintenance obligation relating to any item to replace such item by a new one after expiry of the its life cycle. The CN, being aware of the Contract period, shall take into account that any life cycle of any item may end prior to the end of the Contract.

The maintenance strategy chosen by the CN shall comply with the requirements of proper management of the contractual object. Unnecessary early replacement of any unit under review is not admissible. In the event of contravention, the CN shall be liable to pay damages.

§ 6.4. Setting Up of an Energy Management System/Controlling

The CN owes the CL the setting up of a suitable energy management system to monitor the permanent conformity of his energy saving measures with the contractual targets. The system shall as a minimum requirement include an object-specific measuring concept which, by installing appropriate meters, allows the tracing of the flow of energy in any part of the contractual object (**Annex 1**). Individual service requirements result from **Annex 9**.¹¹

The CN shall set up, operate, maintain and implement the energy management system and the CL shall be granted access at any time to the data contained in the system. Analyses contained in or performed in connection with the energy management system, in particular fine analyses of energy engineering matters, shall be provided to the CL at any time. This in particular also applies to the time after Contract termination.

§ 6.5. Disposal of Shut-down and/or Removed Installations, Components of Installations and Objects

Unless the CL expresses an interest in the utilisation of installations, components of installations or other objects and materials of any kind which the CN shuts down or removes in the course of energy saving and/or maintenance measure, the CN shall at his own expense dispose of such installations etc. in accordance with the regulations and the relevant waste disposal provisions.

§ 7 VICARIOUS AGENTS

The CN shall be entitled to instruct any third party to perform individual services as his subcontractor or vicarious agent only with the CL's prior written consent. The CL shall withhold his consent only if serious reasons exist. A serious reason would be, for instance, if the major part of the services to be provided would no longer be performed by the CN's business.¹²

§ 8 SETTLEMENT PERIOD AND PART PERIODS

Any and all settlements and other calculations under this Contract shall as a rule be referred to the settlement period specified in § 6.1.1. Where the beginning or end of any term of this Contract are not identical with a settlement period, the settlement for such part period shall be effected pro rata of the number of contract months attributable to the settlement period. Any month shall only be counted if the 15th day of such month has passed by, otherwise such month shall not be counted.

§ 9 CALCULATION OF THE AMOUNT OF SAVINGS

§ 9.1. Calculation Bases

The CN shall calculate the saved amount per settlement period (§ 6.1.1.) excluding the statutory turnover tax subject to the following provisions. The principles set forth in the following sub-sections of this § 9 are supplemented by the principles and calculation modes set forth in **Annex 8**. Moreover, the CN shall use the **settlement pattern** attached as **Annex 10** and break down in an appendix the individual calculation steps and reference variables/data. Non-observance of this provision shall mean that the settlement cannot be verified and that the CN's claim to remuneration is invalid. In this case, the CL shall be entitled to fix a reasonable period within which the CN shall submit a verifiable settlement and to draw up the settlement himself at the CN's expense after effectual expiry of such period (in accordance with § 14 no. 4 VOB/B).

For the purpose of drawing up the settlement, the CL shall without being asked on an ongoing basis submit to the CN as a basis for assessment all relevant energy supply bills including the energy consumption values recorded by him or a third party.

On this basis, the following calculations shall be made:

§ 9.2. Unadjusted Annual Consumption Value / Annual Cost Value

The **unadjusted annual consumption value** of a settlement period referred to the contractual object results from the calculation documents submitted to the CL.

§ 9.3. Adjustment of the Unadjusted Annual Consumption Value

The following adjustment calculations are made to ensure that only those energy saving effects enter the CN's performance calculation which are directly attributable to energy saving measures implemented by the CN, i.e. to exclude distortion by factors on which the CN has no influence or which he has not directly caused. In this respect, the CN should be put neither at a disadvantage nor an advantage. Therefore, the unadjusted annual consumption value is to be adjusted if the need arises, on the one hand by changes in the technical quality of the type of energy delivered (e.g. changes in calorific value, heating curve) and, on the other, by any changes in the reference prices and other basic data (**Annex 2**) as shown below.

§ 9.3.1. Changes in Energy Supply Prices

As a first step, the CN expresses the unadjusted annual consumption value in terms of money on the basis of the reference prices (§ 6.1.3.). This is to exclude negative or positive effects of increases as well as reductions in the price of energy on the CN's performance calculation. The same goes for changes in the tax portions relating to energy consumption if they are included in the reference prices.

§ 9.3.2. Changes in Climate

For the reference period (§ 6.1.) the partners have agreed an annual cumulative value adjusted by heating degree days in accordance with VDI 3807 Blatt 1 [Characteristic Values of Energy Consumption in Buildings] based on data measured by *Deutscher Wetterdienst* in Offenbach/Main or the location of the meteorological station closest to the place of performance for the area

as a reference value as follows:

$G_t =$ _____

If the annual cumulative value changes during a calculation period, then the following applies:

The annual cumulative value for the calculation period officially determined by *Deutscher Wetterdienst* in accordance with VDI 3807 Blatt 1 for the above area is to be used as comparative value for the above-mentioned reference value and to be adjusted to the reference value. This must be done based on the characteristic values with regard to the heat and/or refrigeration requirements in accordance with VDI 3807 including the relevant guidelines and standards referred to there (in particular VDI guideline 2067 in conj. with DIN 4710).

§ 9.3.3. Changes in Utilisation of the Contractual Object

The starting point are the conditions (base data) described in **Annex 2**). If these utilisation conditions on which the CN's calculations are based change in the contractual object at the CL's instigation or with his permission, then this must not have a negative or positive effect on the CN. Therefore, the change in utilisation has to be assessed from a cost point of view and to be adjusted to the base data. Changes in utilisation within this meaning include:

- extension or reduction of the occupancy times specified in **Annex 2**;
- subsequent installation or removal of plants, appliances or other facilities resulting in an increase or a reduction of energy consumption;
- changes of the building utilisation type.

Any necessary adaptation on the basis of the reference prices (§ 6.1.3.) is made

- a) with regard to possible **changes in the heat and/or refrigeration requirements** in accordance with **VDI guideline 3808** [Energy Economical Criteria for Estimation of Heating Plants], in particular item 15, "Influence of Measures on the Alteration of Useful Heat and Thus on Fuel Consumption"] including the relevant guidelines and standards referred to there, in particular **VDI guideline 2067** [Economy Calculation of Heat Consuming Installations] **in conj. with DIN 4710** [Meteorological Data for Calculating the Energy Requirements for Heating and Air Conditioning Equipment];
- b) with regard to possible **changes in the current requirements** due to additionally installed consumers the partners, taking account of the occupancy times of the contractual object, jointly estimate the expected operating time of the appliance and, on the basis of the appliance-specific nominal power and the reference price for electric current, calculate the additional consumption by which the unadjusted annual consumption value is to be adjusted.

If the change in utilisation is permanent, the parties may for future calculations jointly redefine the energy costs baseline (§ 6.1.2.) in accordance with the above-mentioned principles. Usage restrictions as specified above mean partial decommissioning within the meaning of § 14.3. and may, under the preconditions of § 14.3.1. result in a compensation claim on the part of the CN.

§ 9.3.4. Performance or Non-performance of Building Maintenance Measures / Modernisation

Effects relevant to energy costs of any **building maintenance measures** carried out by the CL contrary to the Contract (§ 13) must not burden the CN. Therefore, the unadjusted annual consumption value is to be adjusted in accordance with § 9.3.3. in such cases. However, if the CN has not exercised his right of intervention although he could have done so (§ 13.2.), then adjustment shall be made exclusively for the benefit of the CL. The saving effect of the building maintenance measurement must in such a case not be taken into account for the benefit of the CN. For modernisation measures see § 13.3.2.

§ 9.4. Adjusted Annual Consumption Value of a Settlement Period

Taking account of the adjustments specified in § 9.3., the CN shall determine the adjusted annual consumption value from the unadjusted value and thus the adjusted annual cost value in terms of money excluding the turnover tax. This value inclusive of the settlement documents shall be provided to the CL no later than three months after the expiry of the relevant settlement period.

§ 9.5. Result of the Calculations

§ 9.5.1. Determination Basis

The fulfilment of the guarantee and thus the assessment of the question whether the CL is entitled to a compensation claim or the CN is entitled to a payment shall be determined on the basis of the settlement documents as shown below:

$$\begin{array}{rcl} & & \text{energy costs baseline in € (§ 6.1.2.)} \\ \text{less} & ./ & \text{adjusted annual consumption value in € (§ 9.4.)} \\ & & = \text{actual saving in €} \\ \text{less} & ./ & \text{guaranteed savings in € (§ 6.2.)} \\ & & = \text{balance of the settlement period in €} \end{array}$$

§ 9.5.2. Fulfilment of the Guarantee

If the balance (§ 9.5.1.) equals €0.00, then the CN has fulfilled his guarantee for the respective settlement period and is entitled to the agreed basic remuneration (§ 10.1.) for the respective settlement period.

§ 9.5.3. Non-fulfilment of the Guarantee

If the balance (§ 9.5.1.) is less than €0.00, then the CN has missed his guaranteed targets for the respective settlement period by the amount of the negative balance and is obliged to pay the CL the negative balance as compensation for non-fulfilment of the guarantee. The compensation amount shall be set off against the relevant basic remuneration (§ 10.1.). If the negative balance exceeds the basic remuneration, then the CN shall pay the further amount to the CL.

§ 9.5.4. Bonus For Extra Performance

If the balance (§ 9.5.1.) is more than €0.00, then the CN shall as a further incentive receive in addition to the basic remuneration (§ 10.1.) _____ %¹³ of the extra amount plus the applicable statutory turnover tax.

§ 10 REMUNERATION OF THE CN

The CN's claim to remuneration shall commence upon the creation of the main obligation to perform (§ 18.2.) and be composed of a basic remuneration and an additional bonus for exceeding the saving guarantee.

§ 10.1. Basic Remuneration

As a lump-sum final basic remuneration for all his services, i.e. in particular

- energy saving measures altogether including maintenance and additional services of any kind such as training and instruction of CL personnel, debt service etc. (§ 4.1.);
- risk assumption through liability under the guarantee (§ 6.2., § 9.5.);
- energy management system (§ 6.4. in conj. with **Annex 9**);
- replacement of energy saving measures (§ 6.3.);
- disposal of objects (§ 6.5.);
- investment structure guarantee (§ 4.5.);
- availability guarantee with regard to replacement parts (§ 4.2. letter e) in conj. with **Annex 6**); and
- obtainment of public permits and approvals (§ 5);

the CN shall per settlement period during the duration of the Contract receive a share of

_____ per cent¹⁴

of the amount resulting from the saving guarantee § 6.2.) plus the applicable statutory turnover tax if the targets are achieved (§ 9.5.2.) or exceeded (§ 9.5.4.).¹⁵ If the guarantee is fulfilled exactly, this corresponds to a net amount of

€ _____

plus the applicable statutory turnover tax which is final and conclusive and (except for the bonus (§ 9.5.4.)) rules out any subsequent claim.

§ 10.2. Falling Short of and Exceeding of the Saving Guarantee

If the guaranteed savings are exceeded, the CN shall be allocated part of the extra amount saved and receive the agreed bonus (§ 9.5.4.) in addition to the basic remuneration. If the guaranteed savings are not achieved, the CN's basic remuneration shall be reduced to a portion or to zero in accordance with (§ 9.5.3.).

§ 11 TERMS OF PAYMENT

§ 11.1. CN's Claims for Payment

As soon as the CN has submitted a complete and verifiable settlement in accordance with § 9.1. which shows a pecuniary claim in favour of the CN, the procedure pursuant to the verification and due-date regulations of § 16 no. 3 para 1 VOB/B shall be applied.

Upon the commencement of his main obligation to perform, the CN shall receive a monthly part payment on his expected claims for payment of € _____ plus statutory turnover tax. Should the monthly part payments effected by the CL during a settlement period exceed the actual claim for payment of the CN for such period (excess payment period), the CL shall be entitled to unilaterally redetermine the amount of part payments for the current settlement period on the basis of the excess payment period. Apart from that § 11.2. shall apply.

The CN shall not be entitled to demand higher part payments.

§ 11.2. Compensation Claims and Other Claims for Payment on the Part of the CL

If the CL is entitled to amounts based on the CN's settlement, such amounts shall be set off against subsequent part payments.

§ 11.3. Legal Consequences of Accepted Payments

Acceptance of a payment by either party hereto shall not be deemed to be an acknowledgement or waiver by such party and also have no exclusion effect with regard to justified subsequent claims or other corrections.

§ 11.4. Construction Withholding Tax (German "Bauabzugssteuer")

The CN undertakes to submit the original of a final certificate of exemption from the withholding tax for construction work in accordance with § 48b para 1 clause 1 EStG (introduced by the law regarding the containment of illegal employment in the building industry dated 30 August 2001, Federal Gazette I, p. 2267), forthwith upon conclusion of the Contract, but no later than two weeks prior to the due-date of the first payment, which exempts the CL from his duty to withhold the said tax in accordance with § 48 EStG in connection with the performance of this Contract. Until presentation of the certificate, the CL may withhold payments due to the CN, unless the CN proves that he is not responsible for the delay.

§ 12 CL'S DUTIES TO COOPERATE

The CL, in so far as necessary also with regard to the users of the contractual object, shall ensure in particular

- a) that the requirements of the CN made on the operation of the contractual object and the technical installations, provided they are in conformity with the Contract, will be observed or implemented;
- b) that the settings and adjustments made by the CN to installations having a function relevant to energy, provided they are in conformity with the Contract, will not be changed;
- c) that the CN will be provided with all information and documents required to perform his services and that he will be granted access to the contractual object at any time during his normal working hours; the right of access shall also apply to third parties within the meaning of § 7;
- d) that the CN will be informed in writing of any change in the utilisation preconditions of the contractual object (§ 1.1.) no later than two months prior to their implementation;
- e) that installations of the CN are kept in locked rooms and that third parties not authorised by the CN in writing will not be granted access to such installations.
- f) However, the CN shall not be entitled to demand that the CL change, terminate or otherwise cancel, in the interest of the CN, any existing contracts with third parties relating to the contractual object.
- g) The CL will moreover use his best efforts to support the CN with regard to obtaining any necessary public permits or approvals.

§ 13 BUILDING MAINTENANCE MEASURES

§ 13.1. Principle

The CL shall arrange for and undertake **building maintenance measures**. The parties hereto assume that the CN takes over the contractual object with its installations relevant to energy as it is as evidenced by the data entry forms (**Annex 2**) (**as-is condition**). The CL shall preserve the as-is condition from the beginning of the Contract (§ 18.1.) until its end (§ 18.3.) by effecting the necessary dispositions within the meaning of § 994 para 1 clause 1 BGB. The term building maintenance measures as used here therefore means all construction and other measures which the CL is obliged to take at his own account and expense in the above-mentioned period to preserve the as-is condition. Exempted from the CL's building maintenance obligation shall be those objects which are subject to the CN's maintenance obligation.¹⁶

§ 13.2. CN's Right of Intervention

If building maintenance measures intended to be installed by the CL have energy-saving effects, the CN may by unilateral declaration

- a) completely acquire the right to finance the building maintenance measure; or, alternatively,
- b) undertake the financing of those components of any building maintenance measure which from a technical point of view are the cause of the energy-saving effects and can be separated from the overall service; or, alternatively,
- c) request the CL to supplement building maintenance measures by energy-saving effects, with the CN then bearing the extra cost.

The right of intervention shall be limited to the taking over of the financing. In contrast to this, the CN, for reasons of contract awarding, shall not be entitled to demand that building maintenance measures be transferred to him directly for execution.¹⁷ However, the CN shall be free to bid in any invitation to tender with regard to this. If the CN exercises his right of intervention, such building maintenance measures are deemed to be energy saving measures, with the consequence that the energy-saving effects created will have to be taken into account for the benefit of the CN.

To safeguard this right of intervention, the CL shall inform the CN about intended building maintenance measures in good time to enable the CN to make his decision, unless there is increased danger in any delay.

§ 13.3. Other Modernisation Measures Taken by the CL

The CL shall be free to implement modernisation measures on the contractual object going beyond building maintenance within the meaning of § 13.1. However, the CN's interests must be taken into consideration.

§ 13.3.1. CN's Right of Intervention

If modernisation measures taken by the CL result in additional energy-saving effects, § 13.2. shall firstly be applied by analogy.

§ 13.3.2. CN's Claim for Adjustment

If the CN with regard to a concrete modernisation measure explains that from a commercial/business point of view the right of intervention to which he in so far is entitled does not allow amortisation out of the agreed share of the CN in the potential savings, and thus the Contract is no longer sufficient, he shall at his option be entitled to

- a) either demand that the energy costs baseline (§ 6.1.2.) in effect be adapted in accordance with the principles of a change in utilisation (§ 9.3.3.); or,
- b) in the event the CN in whole or in part takes over the cost of modernisation, his share in the savings (§ 10.1. and/or § 10.2.) be adequately increased.

If by means of the above-mentioned adjustment measures or otherwise, maybe by supplementing agreements which are reasonable for the CN, adequate compensation cannot be provided to the CN, then the modernisation measure must not be implemented.

§ 14 DISPOSAL AND SHUT-DOWN OF THE CONTRACTUAL OBJECT

§ 14.1. No Restrictions on the Right of Disposal

The CL shall be free to dispose of the contractual object in whole or in part to one or several third parties and to convey it to them. The CL's obligations under this Contract shall not be affected thereby.

In so far as the CL in the process also transfers rights of the CN protected by the Copyright Act, the Patent Act or the Trademark Act, he shall in a suitable manner ensure in the contract of sale that the respective acquirer will observe such property rights in the same way. In the event of disposal the CN shall notify the CL of the individual relevant property rights.

§ 14.2. Taking-over of the Contract

The parties hereto may agree that the acquirer of the contractual object shall in accordance with §§ 414 ff. BGB enter into the contractual rights and obligations of the CL with discharging effect for the CL. The CN shall if possible comply with the CL's wish if this is equitable and can reasonably be expected of the CN, in particular if

- the credit standing of the prospective acquirer is adequate or the CL with regard to the CN's pecuniary claims under this Contract stands an unconditional, unlimited and irrevocable surety for the acquirer, and
- cooperative behaviour on the part of the acquirer can be expected, and
- no significant reasons on the part of the CN, his shareholders/partners and affiliated companies stand in the way.

The latter is to be assumed if the acquirer or any of his affiliated companies are competitors of the CN, his shareholders/partners or one of his affiliated companies. The CN shall not have a legal obligation to participate in or approve of any assumption of debt by the third party.

§ 14.3. Shut-down of the Contractual Object, Shut-down and/or Disposal of Parts of the Contractual Object

The CL shall be free at any time to shut down the contractual object in whole or in part or to dispose of parts of it if and in so far as this does not have an economically detrimental effect on the CN.

§ 14.3.1. Compensation for Detrimental Effects by Mutual Consent

In such a case the parties hereto shall at first negotiate about an adequate adjustment of the Contract which would compensate the CN for economically detrimental effects – if and when required by application of the principles of frustration of contract – by, among other things,

- a) reasonable adjustment of the energy costs baseline (§ 6.1.2.); or
- b) reasonable adjustment of the remuneration provisions (§ 10.1. and/or § 10.2.); or
- c) a compensatory extension of the contractual object (§ 1.1.).

§ 14.3.2. Indemnification of the CN

Should agreement by mutual consent in accordance with § 14.3.1. not be achieved, then the energy-saving effects generated as a consequence of the shut-down or disposal shall be left to the CN in the context of his performance calculation (§ 9) as follows:

- a) If the CN has not yet installed energy saving measures in the part of the contractual object shut down or disposed of, he shall be put in a position as if the saving effects forecast for the respective part in his rough analysis had actually materialised. Saved expenses shall be allocated to the CN.
- b) If the CN has already installed all or part of his energy saving measures in the part of the contractual object shut down or disposed of, he shall be put in a position as if the energy saving measures had been installed completely and the saving effects forecast on their basis had actually materialised.

That is, the unadjusted annual consumption value (§ 9.2.) is to be adjusted for the benefit of the CN in cases a) and b).

§ 15 LIABILITY

§ 15.1. Limitations of the CN's Contractually Agreed Liability Under the Guarantee

The CN's liability under his contractual saving guarantee (§ 6.2.) shall be limited to the securing of the guaranteed saving with regard to its economic effect and thus to the amount refunded in accordance with § 9.5.3. Therefore, the CN's maximal liability under his guarantee shall be that in the case of complete non-achievement of the targets he will neither receive the basic remuneration nor the bonus (§ 9.5.2. and § 9.5.4.) and additionally will be under an obligation to refund the CL in accordance with § 9.5.3. the amount of the negative balance of the basic remuneration over the entire period of his main obligation to perform (§ 18.2.).

§ 15.2. Other Liability Claims on the Part of the CL

Apart from that there shall be no limitations as to the claims for damages and warranty claims specified in VOB/B. The CL's rights of retention or set-off shall not be restricted.

§ 15.3. Non-observance of Duties to Cooperate

If the CL culpably fails to meet his contractual (§ 12) or statutory duties to cooperate, he shall pay the CN damages for any loss resulting thereof. If such loss is a development of the annual consumption (§ 9.2.) which is detrimental to the CN, the CN shall be entitled to demand a compensatory adjustment of the unadjusted annual consumption value in accordance with the principles set out in § 9.3. for his benefit. The assertion of further damages shall not be affected thereby.

§ 15.4. Damages in the Case of Anticompetitive Collusion in the Contract Award Process

If the CN has participated in illegal anticompetitive collusion in the course of the contract award process, the CL shall be entitled to a lump-sum claim for damages as follows:

$$MG \times ML \times 0.03$$

MG = monthly value of guaranteed amount (§ 6.2.)

ML = period of liability in months (§ 18.2. to § 18.3.)

The CL reserves the right to prove and assert a higher amount of damages. The CN shall be free to prove that the CL has incurred a smaller loss. Any month shall only be counted if the 15th day of such month has passed by, otherwise such month shall not be counted.

§ 16 ACCEPTANCE PROCEDURES, PASSING OF RISK, WARRANTY CLAIMS, CLAIMS FOR DAMAGES, STATUTE OF LIMITATIONS

§ 16.1. Acceptance Procedures

§ 16.1.1. Principle

All energy saving measures of the CN regardless of whether they are construction work, work performance or other services shall require the CL's technical approval in a formal acceptance inspection in which usually adherence (including by analogy) to the principles of DIN 18 386 no. 3.5. [Automation Installations in Buildings; Acceptance Inspection] is deemed sufficient.

§ 16.1.2. Acceptance of Preparatory Services (§ 4)

Preparatory services by the CN shall as a rule be inspected for acceptance by the CL only after complete and free-of-defects performance, however, no earlier than upon the commencement of the main obligation to perform (§ 18.2.). The performance contents defined in the respective Performance Sheets and their appendices (**Annex 4**) are relevant with regard to the scope of supplies and services. Prior partial acceptance is excluded in this respect.

§ 16.1.3. Acceptance of Other Energy Saving Measures

Other energy saving measures which the CN provides in addition to preparatory services shall be inspected for acceptance by the CL one month after complete and free-of-defects delivery. The performance contents defined in the respective Performance Sheets and their appendices (**Annex 4**) are relevant with regard to the scope of supplies and services.

§ 16.2. Passing of Risk

With regard to energy saving measures installed by the CN the risk shall pass to the CL upon performance of the acceptance inspection set out in § 16.1.

§ 16.3. Warranty Claims and Periods

The CL shall be entitled to the statutory warranty claims without abatement. The statutory periods shall as a rule commence upon the acceptance of the respective energy saving measure even if such measure is not a work performance.

§ 16.4. Establishing Readiness for Delivery After Termination of the Contract – Statutory Period of Limitation

The period of limitation for the CN's obligations to establish readiness for delivery after termination of the Contract (§ 20.2.) shall be six months from the time the Contract is terminated.

§ 16.5. Availability of Replacement Parts

The CN shall vouch beyond termination of the Contract that replacement parts will be available for the period guaranteed by him (**Annex 6**).

§ 16.6. Claims for Damages and Statute of Limitations

With regard to claims for damages of any kind the statutory provisions shall apply, including the statute of limitations. Where pursuant to the law either delivery or acceptance apply to the

commencement of the period of limitation for claims for damages, the time of acceptance (§ 16.1.) shall apply.

§ 16.7. Limitation of Actions for Debts

The statutory provisions shall apply.

§ 17 PASSAGE OF TITLE

The title to technical installations, devices and components which the CN in the course of the installation of energy saving measures either supplies or otherwise incorporates into the contractual object shall pass to the CL at the latest upon acceptance of the service (§ 16.1.), unless something else results from § 946 BGB.

§ 18 COMMENCEMENT AND TERMINATION OF THE CONTRACTUAL RELATIONSHIP, COMMENCEMENT OF THE MAIN OBLIGATION TO PERFORM

§ 18.1. Commencement of the Contractual Relationship

With the exception of the special regulation concerning the main obligation to perform in § 18.2., this Contract and all its Annexes shall come into force on _____.

§ 18.2. Commencement of the Main Obligation to Perform

With regard to the main obligation to perform (§ 6.2. = saving guarantee) this Contract shall come into force upon the completion and commissioning of the preparatory services of the CN (§ 4.). In this respect, the time of acceptance (§ 16.1.) shall not be relevant. The partners will determine the time of completion by mutual agreement. Notwithstanding the aforesaid, the Contract shall come into force also with regard to the main obligation to perform no later than on _____.

§ 18.3. Termination of the Contractual Relationship

This Contract shall end on _____. If the commencement of the main obligation to perform in accordance with § 6 VOB/B has been delayed and if the circumstances to which such delay can be attributed are not part of the CL's scope of risk within the meaning of § 6 no. 2. a) VOB/B, then the above-mentioned termination date shall be postponed by the period by which the commencement of the main obligation to perform has been delayed. Furthermore, the Contract

shall continue to be in force with regard to settlements which the CN has not yet completed until such settlements are completed.

§ 19 PROVISION OF SECURITY BY THE CN (§ 17 VOB/B), ASSIGNMENT OF CLAIMS

§ 19.1. Purpose and Amount of the Collateral Security

To secure the performance of the preparatory services and the fulfilment of the guarantee (§ 6.) and the CN's duties to compensate (§ 15.1.) possibly resulting thereof, the CN shall provide a security amounting to 5% of the total value of the guarantee, subject, however, to the special provisions set out in § 19.3. The total value of the guarantee shall be calculated as:

$$MG \times ML$$

MG = monthly value of guaranteed amount (§ 6.)

ML = period of liability in months (§ 10.1. to § 10.2.)

Any month shall only be counted if the 15th day of such month has passed by, otherwise such month shall not be counted.

The CN shall provide the security no later than 30 days after the signing of the Contract.

§ 19.2. Provision of Collateral Security by the CN

The CN shall provide a security in the form of a security note by a bank or a credit insurance company. The bank or credit insurance company must be accredited in the European Community or in a member state of the Agreement on the European Economic Area or in a member state of the WTO Agreement on Government Procurement. The original of the suretyship instrument to be handed over to the CL must be in the CL's name, be unconditional and be valid for an indefinite period, and include a waiver of the benefit of discussion (§ 771 BGB) and of the right to deposit the suretyship amount, and include an agreement to the effect that the exclusive place of jurisdiction for disputes arising out of the suretyship relationship shall be the venue of the authority competent with regard to the CL's legal representation in court. If the suretyship is provided by a foreign bank, then additionally application of German law and exclusion of the UN Convention on Contracts for the International Sale of Goods and German as the contract and legal language must be stipulated and the suretyship instrument must be drawn up in German.

Any other kind of providing security is not permissible.

§ 19.3. Assignment of Receivables

The CN shall not be entitled to assign receivables under this Contract, § 399 BGB.

This prohibition shall not apply to the assignment of receivables to financial or credit institutions which the CN employs to prefinance his energy saving measures. If in the process the CL is required to waive any of his rights to a plea with regard to the receivables assigned, assignment shall only be permitted under the precondition that

- the amount of the receivables sold does not exceed 70% of the total of receivables which would become due over the term of this Contract on achieving the targets; and
- the CN consents to an increase of the security in accordance with § 19.1 to _____ % of the total value of the guarantee.

§ 19.4. Return of the Security

Upon acceptance of the preparatory services, the amount of the security shall be reduced to 40% of the original amount in accordance with § 19.1., if applicable in conj. with § 19.3. In the time between acceptance of the preparatory services and expiry of the second but last settlement period the amount of the security shall be reduced by another 30% of the original amount in accordance with § 19.1., if applicable in conj. with § 19.3., linearly distributed over the number of settlement periods.

The CN shall in each case replace the suretyship by another of the appropriate amount. The suretyship of 10% of the original amount of the security shall be returned to the CN once the last settlement period has been settled, to the extent it has not been made use of or cannot be made use of, provided that the CN has fulfilled all his obligations to pay and any and all defects which have been detected have been properly remedied (§ 20).

§ 20 HANDING OVER AND FINAL AUDIT

§ 20.1. Handing Over of the Energy Saving Measures

Upon termination of the Contract, the CN shall hand over all energy saving measures for further use by the CL in the CL's own responsibility. The CN shall warrant that on handing over the energy saving measures are in the general condition as owed under his maintenance obligation (§ 6.3.) **(readiness for delivery)**.

§ 20.2. Final Audit – Examination of Readiness for Delivery

Forthwith upon termination of the Contract the partners shall perform a joint audit of all the energy saving measures installed by the CN as shown in the Performance Sheets (**Annex 4**) to verify readiness for delivery of the same, and draw up and sign an audit certificate in order to be able to furnish proof of the audit results.

If the energy saving measures are not in a condition to allow handing over, the CN shall at his expense establish the proper condition by rectifying the defects without prejudice to any other existing statutory warranty claims which the CL may be entitled to.

§ 21 CRISIS MANAGEMENT

§ 21.1. Consideration

Both partners are aware that this Contract can only be successful if the other partner's interests and concerns are taken into consideration in an appropriate manner. This includes that disputes shall be settled amicably if possible.

§ 21.2. Crisis Management

To avoid legal disputes, all possibilities of settling a dispute out of court shall first be exhausted. If agreement cannot be reached, and if the disagreement primarily relates to matters of fact, technical issues or calculation procedures under this Contract, then the partners shall first employ a publicly appointed and sworn expert as arbitrator to settle the dispute. The expert must be proved to have expertise in the field of determining the heat and energy requirements of buildings. Should the parties hereto be unable to agree on an expert, then each of them shall be entitled to ask the competent chamber of industry and commerce to appoint an expert taking account of the qualification criteria set forth herein. The expert's decision shall be final. Both partners already now submit to the expert's decision and acknowledge the decision as being binding also in any legal action which may be brought. The defeated party shall bear the cost of the expert opinion. Additionally, § 18 no. 3 VOB/B shall apply.

§ 22 NOTICE TO TERMINATE AND TERMINATION OF THE CONTRACT

§ 22.1. Contractual Notice to Terminate

Neither party shall be entitled to give notice to terminate the Contract prior to its expiration (§ 18.3.). The same goes for the CL's right of termination in accordance with § 649 BGB and the CN's

right of termination in accordance with § 643 BGB. In particular, § 643 para 1 clause 2 BGB is excluded.

§ 22.2. Termination Without Notice for an Important Reason

Either partner's right of termination without notice for an important reason shall not be affected. § 314 BGB applies, i.e. in particular if the important reason is the breach of a contractual duty, the Contract may only be terminated after an extension of time for remedy has been fixed and expired without remedy having been effected or after giving an unsuccessful warning notice. Important reasons for the CL include any case in which the CN persistently fails to meet the defined and agreed quality criteria (§ 4.2.) or refuses to meet the transparency criteria (§ 4.3.).

§ 22.3. Written Form

Any notice to terminate, warning notice and fixing of extensions of time shall only be valid if provided in writing.

§ 22.4. Damages

If the reason justifying termination without notice at the same time is a behaviour on the part of the other partner which is contrary to the Contract, the partner terminating the Contract shall be entitled to damages.

§ 23 PLACE OF JURISDICTION, LEGAL STATUTE AND CONTRACT LANGUAGE

The exclusive place of jurisdiction for any disputes arising out of this Contract and its Annexes, for any resulting consequential claims and for any independent taking of evidence shall be the venue of the authority competent with regard to the CL's legal representation in court which shall be disclosed to the CN on first demand. The same goes for any disputes concerning the legal validity of this place of jurisdiction clause.

This Contract shall exclusively be governed by the laws of the Federal Republic of Germany. Application of the UN Convention on Contracts for the International Sale of Goods in accordance with Article 6 Clause 1 of the CISG is excluded.

The contract and legal language is German.

§ 24 FINAL PROVISIONS

§ 24.1. Severability Clause

Should any of the provisions of this Contract be or become invalid, the validity of the remaining provisions of this Contract and its Annexes shall not be affected thereby.

§ 24.2. Publication

The CN shall be entitled within the bounds of applicable laws to publish this project as a reference project and for that purpose use photographs of the contractual object and/or his services provided to the contractual object, provided that no concerns of the CL or third parties which are legally protected or merit protection stand in the way of such publication.

§ 24.3. Subsidiary Agreements and Other General Terms and Conditions of Business

Additional or deviating agreements to this Contract and its Annexes do not exist. Furthermore, any General Terms and Conditions of Business of the CN not expressly included in this Contract and its Annexes are not applicable. The CL expressly rejects such General Terms and Conditions of Business of the CN for the time being and for the future.

§ 25 ANNEXES

All Annexes plus their appendices attached to this Contract form an essential part of this Contract. The Annexes are:

- Annex 1 (Contractual Object)
- Annex 2 (Data Entry Forms)
- Annex 3 (Authorised Project Representatives)
- Annex 4 (Performance Sheet)
- Annex 5 (Compulsory Measures)
- Annex 6 (Investment Structure)
- Annex 7 (Energy Consumption and Prices)
- Annex 8 (Calculation Instructions for Energy Costs Baseline and Amount of Savings)
- Annex 9 (Energy Management)
- Annex 10 (Sample Settlement)

Attention – Restriction of the Power of Attorney!

The signing representatives of the CL and the CN and their authorised project representatives named in **Annex 3** as well as their deputies are not authorised to deviate from this Contract and its Annexes by making additional oral agreements. Only written agreements are legally binding to the CL and the CN. Apart from that § 2.1. and § 2.2. apply.

_____, this ____ day of _____

_____, this ____ day of _____

For the CL:

For the CN:

(Official seal and legally binding signature)

(Official seal and legally binding signature)

(Official seal and legally binding signature)

(Official seal and legally binding signature)

¹ This clarification in the preamble, on the one hand, points out the philosophy of the Contract's underlying model of performance-related remuneration of the Contractor. On the other, however, it describes the model's essential distinguishing criterion from the conventional types of credit-like external financing in the field of public contract awarding such as leasing or payment plan agreements. The latter establishes a permanent payment obligation on the part of the Client which is just distributed to instalments over a longer period of time. From an economic point of view, this means an additional demand for liquidity and thus funds for the Client.

The matter is different if a commercial overall view is applied to the Energy Saving Guarantee Contract: Although money flows to the Contractor through his participation in the savings, the "source of capital" already exists in the form of the potential energy savings hitherto unused in the Client's "negative assets" (energy costs), quasi as "secret liquidity reserves" included in the public building. It is thus exactly the Contractor's job to disclose these liquidity reserves (potential savings) by implementing appropriate energy saving measures and to feed them into the money circuit. Only if the Contractor succeeds in doing this will he participate in the liquid funds thus released and be able to amortise his investments. If the Contractor fails to achieve the target, then not only will he have to defray his expenses, but also the monetary equivalent of the failure to achieve the target. This is the meaning of the guarantee the Contractor assumes by concluding the Energy Saving Contract.

From a commercial point of view, this is actually not external financing. In fact, the Contractor only prefinances the tapping of potential savings, i.e. liquidity reserves which are already existing in the Client's assets. Only after these reserves have been activated will the Contractor receive a portion of this "additional money". Therefore, the Client finally finances the measures himself out of already existing assets which, however, require tapping. In contrast to conventional credit-like external financing, the payment obligation is not created if the Contractor fails to make the liquidity reserves available. In this case, the Contractor will even be obliged to add liquidity to the Client's assets, namely the monetary equivalent of the failure to achieve the target.

Therefore, the effect is the following:

Leasing and other payment plan agreements actually mean an obligation by the public Client to provide additional liquidity potentials, while, in contrast to this, energy saving contracting only obligates the Client to share with the Contractor during the term of the Contract a liquidity reserve not used but existing. Were such reserves not tapped, then there would be no amount of money to be distributed, and in contrast to leasing and payment plan agreements there is no payment obligation towards the Contractor. Even more: beyond the fact that there is no payment obligation towards the Contractor, the Contractor may even be obliged to pay a certain amount. Exactly this is the significance of the Contractor's assuming the full economic risk.

2 The ranking order and general order are expressly pointed out by the clarifying reference to §§ 1 no. 2 VOB/B or VOL/B. Therefore, the provisions of this framework agreement have priority, i.e. the provisions taking account of the peculiarities of the Energy Saving Contract override the corresponding regulations of the VOB/B.

3 Thus, in particular energy saving measures not leading to a reduction of, or even resulting in an increase in, the energy costs are defective within the meaning of the statutory provisions and entitle the Client to warranty claims up to a claim to have such measures removed.

4 The objective of these regulations is not so much the determination of the Contractor's selective claims to a remuneration, because he amortises his investment in an all-inclusive manner and exclusively via his share in the savings potential which he must guarantee and therefore earn. The transparency criteria are the basis on which two questions are answered: on the one hand, whether the Contractor implements the investment quality owed in accordance with § 4.5., and, on the other, whether the share in the potential savings achieved by the Contractor in proportion to the value of his services taking account of the business risk increased by the liability under his guarantee stands up to an examination from the point of view of the law concerning controlled prices.

5 HOAI is not applicable to engineering or architectural services which the Contractor provides in addition to or together with the services. Therefore, the Contractor must not apply the HOAI fees schematically and the stipulated consolidation into a lump-sum is legal.

6 The passage with the help of an annex allows the contractual specification of concrete wishes of the CL. Of course, standard requirements for Annex 5 cannot be defined, as the installation will have to be designed specifically to a certain project.

However, in an individual case it will have to be checked to what extent the specification of compulsory measures influences the selection of the award procedure.

7 This means that the share proportion in the potential savings is reduced by three quarters of the percentage by which the Contractor has fallen short of the investment volume promised for technical installations, devices and components. Example:

Share proportion in the savings potential: 50%

Shortfall of investment by: 10%

Three quarters of share proportion shortfall = 7.5%

7.5% of 50% = 3.75% > reduced share proportion: 50% - 3.75% = 46.25%

8 The regulation is based on the considerations to be made already in the award process that bidders are to be treated equally. It would be incompatible with this principle if a bidder were able to gain a

competitive edge in the award process by offering a generous bundle of measures without having to reckon with having to implement the measures after conclusion of the contract because of the Contractor's powers of discretion in the context of the Energy Saving Guarantee Contract. This would lead to inappropriate discrimination of serious bidders who submit feasible bids and, moreover, to distorted tender evaluation and vetting. For this reason, the Contract entitles the Client to demand and enforce implementation of those or equivalent measures on which the Contractor's tender lump-sum was focused.

9 In compliance with the idea of the Contract and the functional nature of the contract award process it is necessary to grant the Contractor powers of discretion with regard to the kind and dimensioning of his energy saving measures in order that he may use his technical and business know-how to the full and provide the Client with optimal results. However, the Contractor cannot arbitrarily use his powers of discretion, but they are legally restricted by § 315 para 3 BGB. The Contractor's contractual behaviour must satisfy the requirements of equitableness weighing up the interests of both sides. Contractual limits are the veto rights regulated in § 4.9 which put the equity principle into specific terms and in this way allow the Contractor to be controlled in conformity with the Contract without essentially restricting his scope of discretion.

10 The Client should define the reference period prior to the handing over of the contract documents.

11 Annex 9 serves to supplement the minimum requirements directly set out in the wording of the Contract. The Annex includes possible performance components which may be agreed cumulatively or alternatively. Annex 9 may also be supplemented by performance features not mentioned there. The Client may either define the performance features from the outset and hand over Annex 9 together with the Contract as binding, but he may also configure Annex 9 as some kind of checklist and leave it up to competition which of the individual performance features will be offered as binding.

12 This passage takes account of the fact that the Contractor, following the approach of the Contract, will provide at least the majority of the services to be provided in his own business. Although it is not ruled out that the Contractor, as is common in business, subcontracts individual services, the provision shows that there are limits to the extent of subcontracting.

13 The bonus for the Contractor's performance exceeding what is necessary should be determined in competition, i.e. the Client should not define it upon handing out of the contract documents. The fundamental idea is to create an attractive incentive for the Contractor to optimise the potential savings over and beyond the guaranteed target.

14 The quota and the resulting share of the Contractor are determined in competition.

15 This is actually the stipulation of an all-inclusive price for all services. The agreement of a lump-sum at a time when the contract is awarded and the scope of services to be supplied is only rudimentarily defined, is admissible. The functional invitation to tender as such is an admissible form of contract. At the time of bidding, the Contractor knows the risks associated with this and as an expert entrepreneur cannot claim later that he had failed to recognise the relocation of risk. It is also insignificant whether or not the Contractor at the time the contract is awarded knows or can reliably determine the extent of the services he promises to provide. Taking the market situation into account it can be assumed that many companies are active in the so-called "contracting" business, know the risks associated with guarantee contracts and, based on their technical skills, are able to provide adequate binding tenders even on the basis of rough analyses and to provide in an appropriate manner for the relevant economic risks.

16 This takes account of the principle that the condition of the buildings at the time the contract is concluded, which is partly established in the data entry forms, forms an essential basis of the Contractor's calculation. Therefore, this provision obligates the Client only to maintain the actual condition. If the condition was poor already, the duty to maintain the building is limited to the preservation of the "poor" condition. This takes account of the aspect that this Contract is to save the Client money, and not to cause additional costs in other areas.

Independent of this, the Contractor cannot demand or enforce the execution of a certain maintenance measure. Under the Contract he is only entitled to adjustment for his benefit of his performance calculation per settlement period if the Client omits a maintenance measure which he is

obliged to carry out and as a consequence the saving result is impaired. In such a case the Contractor with regard to his performance calculation is put in a position as if the maintenance measure had been carried out and the detrimental effect to the energy costs balance had not occurred. Thus, the Contractor will not incur an economic disadvantage and his interests will be adequately looked after.

- 17 In view of the fundamental consideration that building maintenance beyond the contractual target of energy costs reduction will as a rule remain the Client's responsibility, a public Client will have to advertise for bids for such services as provided for by statutory or budget law regulations. This principle is not be violated by the Energy Saving Contract. Therefore, the Contractor's right to intervene must be restricted to the full or partial financing of the building maintenance measures announced and awarded in accordance with the regulations. However, nothing stands in the way of the Contractor participating in the invitation to tender and being awarded the contract for the measure.