



ENGIE Services Project #: \_\_\_\_\_  
ENGIE Services Contract # R \_\_\_\_\_

## PROGRAM DEVELOPMENT AGREEMENT

This PROGRAM DEVELOPMENT AGREEMENT (this "Agreement") is made and entered into as of \_\_\_\_\_, 2019, between ENGIE Services U.S. Inc. ("ENGIE Services U.S."), having its principal offices at 500 Twelfth Street, Suite 300, Oakland, CA 94607, and City of Hercules, with offices located at 111 Civic Drive, Hercules, CA 94547 ("Hercules") and together with ENGIE Services U.S. the "Parties" and each of Hercules and ENGIE Services U.S. a "Party").

WHEREAS, ENGIE Services U.S. is an energy services and solutions company with the technical and management capabilities and experience to perform an integrated energy assessment (an "Assessment") and to identify supply-side and/or demand-side energy conservation measures ("ECMs");

WHEREAS, Hercules desires to enter into an agreement to have ENGIE Services U.S. perform an Assessment in accordance with the scope of work set forth in Attachment A (the "Scope of Work") for the sites listed on Part I of Attachment B (the "Sites"), and to deliver recommendations, described in the Scope of Work, identifying energy improvements and operational changes to be installed or implemented at the Sites (the "Recommendations"); and

WHEREAS, the primary purpose of the Assessment and the Recommendations is to provide an engineering and economic basis for the implementation of the ECMs identified in the Recommendations, in furtherance of which the Parties intend to negotiate and execute a contract providing for, among other things, engineering, procurement, installation, construction and training services (an "Energy Services Contract");

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties agree as follows:

### 1. ASSESSMENT AND RECOMMENDATIONS

ENGIE Services U.S. agrees to complete the Assessment and to present Recommendations to Hercules within ninety (90) calendar days after the date on which ENGIE Services U.S. receives the information listed in Part I of Attachment A (the "Required Information"). Hercules agrees to deliver the Required Information to ENGIE Services U.S. no later than thirty (30) calendar days after the date hereof.

Hercules agrees to assist ENGIE Services U.S. in performing the Assessment by (i) providing ENGIE Services U.S. with access to key decision makers and stakeholders of the City of Hercules, (ii) providing ENGIE Services U.S. its employees and agents, such access to the Sites and other relevant facilities of Hercules as ENGIE Services U.S. deems necessary and (iii) providing, or causing Hercules's energy suppliers to provide, complete and accurate data concerning energy usage and costs related to the Sites and other relevant facilities. ENGIE Services U.S. will be entitled to rely upon the accuracy and completeness of all information provided to ENGIE Services U.S. by Hercules and Hercules's energy suppliers. ENGIE Services U.S. will promptly provide written notice to Hercules if ENGIE Services U.S. determines there is any incorrect data included in the information provided by Hercules or Hercules's energy suppliers, but ENGIE Services U.S. will have no obligation to correct or confirm any such information unless otherwise specified in the Scope of Work. Any change(s) in the Scope of Work will be set forth in a writing executed by the Parties.

### 2. COMPENSATION TO ENGIE SERVICES U.S.

Hercules will compensate ENGIE Services U.S. for the Assessment and the Recommendations by payment to ENGIE Services U.S. of a fee (the "Assessment Fee") in the amount of twelve thousand, eight hundred Dollars (\$12,800).

The Assessment Fee will be due and payable thirty (30) calendar days after ENGIE Services U.S.'s submission of the Recommendations; *provided* that if on such thirtieth (30<sup>th</sup>) calendar day ENGIE Services U.S. and Hercules are negotiating an Energy Services Contract in good faith, the Assessment Fee will be due ninety (90) calendar days after ENGIE Services U.S.'s submission of the Recommendations; *provided further*, that if ENGIE Services U.S. and Hercules execute an Energy Services Contract within ninety (90) calendar days after ENGIE Services U.S.'s submission of the Recommendations, the Assessment Fee, and other fees, costs, expenses, disbursements and overhead of ENGIE Services U.S. incurred during the Assessment, will be incorporated into the total contract amount payable under such Energy Services Contract.

Each of Hercules and ENGIE Services U.S. reserves the right to terminate this Agreement at any time during the course of the Assessment, by delivery of written notice to the other. If this Agreement is terminated by Hercules, the Assessment Fee will be payable by Hercules to ENGIE Services U.S. within thirty (30) calendar days of termination. If this Agreement is terminated by ENGIE Services U.S., Hercules will have no obligation to pay any portion of the Assessment Fee to ENGIE Services U.S. If ENGIE Services U.S. determines that the projected savings from implementation of the ECMs identified during the Assessment cannot result in a paid-from-savings project which complies with California Government Code Sections 4217.10 through 4217.18, the Assessment and this Agreement will be terminated by ENGIE Services U.S.

Any amount not paid when due will, from and after the due date, bear interest at a fluctuating rate equal to the sum of (a) The United States Prime Rate as listed from time to time in the Eastern print edition of the Wall Street Journal® *plus* (b) 2% per annum. Accrued and unpaid interest on past due amounts (including interest on past due interest) will be due and payable upon demand.

### 3. INSURANCE

ENGIE Services U.S. will maintain, or cause to be maintained, for the duration of this Agreement, the insurance coverage outlined in (A) through (F) below, and all such other insurance as required by applicable law. Evidence of coverage will be provided to Hercules via an insurance certificate.

A. Workers' Compensation/Employers Liability for states in which ENGIE Services U.S. is not a qualified self-insured. Limits as follows:

- \* Workers' Compensation: Statutory
- \* Employers Liability: Bodily Injury by accident \$1,000,000 each accident  
Bodily Injury by disease \$1,000,000 each employee  
Bodily Injury by disease \$1,000,000 policy limit

B. Commercial General Liability insurance with limits of:

- \* \$2,000,000 each occurrence for Bodily Injury and Property Damage
- \* \$4,000,000 General Aggregate - other than Products/Completed Operations
- \* \$2,000,000 Products/Completed Operations Aggregate
- \* \$2,000,000 Personal & Advertising Injury
- \* \$ 100,000 Damage to premises rented to ENGIE Services U.S.

Coverage to be written on an occurrence form. Coverage to be at least as broad as ISO form CG 0001 (04/13) or its equivalent forms, without endorsements that limit the policy terms with respect to: (1) provisions for severability of interest or (2) explosion, collapse, underground hazard.

C. Auto Liability insurance for owned, hired and non-owned vehicles with limits of \$1,000,000 per accident. Coverage to be written on an occurrence form.

D. Professional Liability insurance with limits of:

- \* \$1,000,000 per occurrence
- \* \$1,000,000 aggregate

Coverage to be written on a claims-made form.

E. Umbrella/Excess Liability Insurance. Limits as follows:

- \* \$1,000,000 each occurrence
- \* \$1,000,000 aggregate

Coverage terms and limits to apply excess of the per occurrence and/or aggregate limits provided for Commercial General Liability and Professional Liability written on a claims made form. Coverage terms and limits also to apply in excess of those required for Employers Liability and Auto Liability written on an occurrence form.

F. Policy Endorsements.

- \* The insurance provided for Workers Compensation and Employers Liability above will contain waivers of subrogation rights against Hercules, but only to the extent of the indemnity obligations contained in this Agreement.
- \* The insurance provided for Commercial General Liability and Auto Liability above will:

- (1) include Hercules as an additional insured with respect to Work performed under this Agreement, but only to the extent of the indemnity obligations contained in this Agreement, and
- (2) provide that the insurance is primary coverage with respect to all insureds, but only to the extent of the indemnity obligations contained in this Agreement.

#### **4. INDEPENDENT CONTRACTOR**

ENGIE Services U.S., and the agents and employees of ENGIE Services U.S., its subcontractors and/or consultants, are acting in an independent capacity in the performance of this Agreement, and not as public officials, officers, employees, consultants, or agents of Hercules for purposes of conflict of interest laws or any other applicable law. This Agreement may not be construed to represent the creation of an employer/employee or principal/agent relationship. ENGIE Services U.S. will act in an independent capacity and retain sole discretion in the manner and means of carrying out its activities under this Agreement. ENGIE Services U.S. is free to work for other entities while under contract with Hercules.

#### **5. ENERGY SERVICES CONTRACT**

As it is the intent of Hercules and ENGIE Services U.S. to pursue cost effective energy retrofits and ECMs at the Sites pursuant to an Energy Services Contract, both Parties agree to enter into good faith negotiations of an Energy Services Contract immediately following completion of the Assessment.

#### **6. WORK PRODUCT**

Hercules will not, by virtue of this Agreement, acquire any interest in any formulas, patterns, devices, secret inventions or processes, copyrights, patents, other intellectual or proprietary rights, or similar items of property which are or may be used in connection with the Assessment or the Recommendations. The Recommendations, and all data, proposals, plans, specifications, flow sheets, drawings, and other work product prepared or produced by ENGIE Services U.S. hereunder ("Work Product") and furnished directly or indirectly, in writing or otherwise, to Hercules under this Agreement will remain ENGIE Services U.S.' property and will be used only in connection with work performed by ENGIE Services U.S. ENGIE Services U.S. will be deemed the author and owner of such Work Product and will retain all common law, statutory and other reserved rights, including copyrights. The Work Product may not be used by Hercules as a basis for facility construction or implementation of ECMs developed herein by any entity other than ENGIE Services U.S., without the prior written agreement of ENGIE Services U.S. If ENGIE Services U.S. determines that Hercules has violated this prohibition, ENGIE Services U.S. may, in its sole discretion, and in addition to injunctive relief or any other legal or equitable remedies ENGIE Services U.S. may have, require that Hercules pay, in addition to the Assessment Fee, liquidated damages in an amount equal to five (5) times the Assessment Fee. This liquidated damages amount is not a penalty but a reasonable estimate of the amount of losses ENGIE Services U.S. will suffer, and will survive the termination of this Agreement. Any unauthorized use of the Work Product will be at Hercules's sole risk and without liability to ENGIE Services U.S., and Hercules agrees to defend, indemnify and hold harmless, ENGIE Services U.S., its subcontractors, and their directors, employees, subcontractors, and agents from any and all actions, claims, demands, damages, disabilities, fines, penalties, losses, costs, expenses (including consultants' and attorneys' fees and other defense expenses) and liabilities of any nature (collectively, "Losses") associated with or resulting from such use.

#### **7. LIMITATION OF LIABILITY**

The liability of a defaulting Party, in connection with this Agreement or any analysis, report, recommendations, or other deliverables provided hereunder, will be limited to direct, actual damages. Neither Party shall be liable to the other Party for any special, indirect, incidental or consequential damages whatsoever, whether in contract, tort (including negligence) or strict liability, including, but not limited to, operational losses in the performance of business such as lost profits or revenues or any increase in operating expense. Additionally, each Party waives any claims for negligence against the other Party to the greatest extent permitted by law. In no event will ENGIE Services U.S. be liable to Hercules for any Losses which collectively exceed the amount of the Assessment Fee, regardless of whether such amounts arise out of breach of contract, guarantee or warranty, tort, product liability, contribution, strict liability or any other legal theory.

#### **8. NONDISCRIMINATION; COMPLIANCE WITH LAWS**

ENGIE Services U.S. will comply with all applicable laws, rules, regulations and policies, including, but not limited to, those relating to nondiscrimination, accessibility and civil rights.

The Parties acknowledge and agree that ENGIE Services U.S. is not a municipal advisor and cannot give advice to Hercules with respect to municipal securities or municipal financial products absent Hercules being represented by, and relying upon the advice of, an independent registered municipal advisor. ENGIE Services U.S. is not subject to a fiduciary duty with regard to Hercules or the provision of information to Hercules. Hercules will consult with an independent registered municipal advisor about the financing option(s) appropriate for Hercules's situation.

ENGIE Services U.S. cannot guarantee that Hercules will receive funding from any energy efficiency rebate, incentive, and/or loan program(s) (collectively, "Incentive Funds"); ENGIE Services U.S. expressly disclaims any liability for Hercules's failure to receive any portion of the Incentive Funds, and Hercules acknowledges and agrees that ENGIE Services U.S. will have no liability for any failure to receive all or any portion of the Incentive Funds.

## **9. FORCE MAJEURE**

Neither Party will be considered to be in default in the performance of any material obligation under this Agreement (other than the obligation to make payments) when a failure of performance will be due to an event of Force Majeure. The term "Force Majeure" will mean any cause beyond the control of the affected Party and which by the exercise of due diligence such Party could not reasonably have been expected to avoid and which, despite using commercially reasonable efforts, it has been unable to overcome. Neither Party will be relieved of its obligation to perform if such failure is due to causes arising out of its own negligence or due to removable or remediable causes which it fails to remove or remedy within a reasonable time period. Either Party rendered unable to fulfill any of its obligations under this Agreement by reason of an event of Force Majeure will give prompt written notice of such fact to the other Party.

## **10. INTEGRATION; AMENDMENT; COUNTERPARTS**

This Agreement constitutes the entire contract among the Parties relating to the subject matter hereof and supersedes any and all previous agreements and understandings, oral or written, relating to the subject matter hereof. This Agreement may not be amended except by a writing executed by both Parties. No oral amendment shall be enforceable, even if supported by new consideration. Except as otherwise provided herein, the terms and provisions of this Agreement will apply to, be binding upon, and inure to the benefit of the Parties hereto and their respective heirs, legal representatives, successors, and permitted assigns.

This Agreement may be executed in counterparts (and by different parties hereto in different counterparts), each of which shall constitute an original, but all of which when taken together shall constitute a single contract. Delivery of an executed counterpart of a signature page of this Agreement by email shall be effective as delivery of a manually executed counterpart of this Agreement.

## **11. DISPUTE RESOLUTION; APPLICABLE LAW; VENUE; SEVERABILITY**

If a dispute arises out of or relates to this Agreement, or the transaction contemplated by this Agreement (a "Dispute"), either Party may initiate the dispute resolution process set forth in this Section 11 by giving notice to the other Party. Senior executives for the Parties will meet, within thirty (30) calendar days after notice of the Dispute, in an attempt to resolve the Dispute and any other identified disputes or any unresolved issues that may lead to a dispute. If the senior executives are unable to resolve a Dispute or if a senior management conference is not held within the time provided herein, either Party may submit the Dispute to mediation.

If the Dispute is not settled by senior management conference, the Parties will endeavor to settle the Dispute by mediation under the Commercial Mediation Procedures of the American Arbitration Association ("AAA"). Mediation is a condition precedent to arbitration or the institution of legal or equitable proceedings by either Party. Once one Party files a request for mediation with the other Party and with the American Arbitration Association, the Parties agree to conclude the mediation within sixty (60) calendar days after filing the request. Either Party may terminate the mediation at any time after the first session, but the decision to terminate must be delivered in person by the Party's representative to the other Party's representative and the mediator.

If the Dispute is not resolved by mediation within sixty (60) calendar days after the date of filing of the request for mediation, then the exclusive means to resolve the Dispute is final and binding arbitration. Either Party may initiate arbitration proceedings by notice to the other Party and the American Arbitration Association. The following provisions apply to all arbitration proceedings pursuant to this Article: (i) The place of arbitration will be the American Arbitration Association office closest to where the Assessment was performed; (ii) one arbitrator will conduct the arbitral proceedings in accordance with the Commercial Arbitration Rules and Mediation Procedures (excluding the Procedures for Large, Complex Commercial Disputes) of the American Arbitration Association currently in effect ("Arbitration Rules") (to the extent of any conflicts between the Arbitration Rules and the provisions of this Agreement,

the provisions of this Agreement prevail); (iii) the Parties will submit true copies of all documents considered relevant with their respective statement of claim or defense, and any counterclaim or reply (in the discretion of the arbitrator, the production of additional documents that are relevant and material to the determination of the Dispute may be required); (iv) the arbitrator does not have the power to award, and may not award, any punitive, indirect or consequential damages (however denominated); all arbitration fees and costs are to be shared equally by the parties, regardless of which Party prevails, and each Party will pay its own costs of legal representation and witness expenses; (v) the award must be in the form of a reasoned award; (vi) the Dispute will be resolved as quickly as possible, and the arbitrator will endeavor to issue the arbitration award within six (6) months after the date on which the arbitration proceedings were commenced; and (vii) the award will be final and binding and subject to confirmation and enforcement proceedings in any court of competent jurisdiction.

If any term of this Agreement is declared by a court to be illegal, invalid or unenforceable, the legality, validity and enforceability of the other terms of this Agreement will not be affected or impaired thereby, and the rights and obligations of the Parties will be enforced as if the illegal, invalid or unenforceable term were revised to the minimum extent necessary to make such term legal, valid and enforceable.

*[the Parties' signatures appear on the following page]*

IN WITNESS WHEREOF, and intending to be legally bound, the Parties hereto subscribe their names to this Agreement.

**ENGIE SERVICES U.S.:**

**HERCULES:**

**ENGIE Services U.S. Inc.**

**City of Hercules**

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

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

**Print Name:** \_\_\_\_\_

**Print Name:** \_\_\_\_\_

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

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

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## ATTACHMENT A

### SCOPE OF WORK

#### I. Required Documents (Needed to Proceed).

- A. Hercules will provide the following detailed documentation:
1. Most recent two (2) years of audited financial statements.
  2. Actual utility company invoices for all utilities serving the Sites, for a minimum of three (3) years, and preferably five (5) years, immediately prior to the date hereof, with, beginning with the most recently completed month.
  3. Permission to obtain utility company demand interval recordings of 15/30-minute electrical demand for characteristic months of the year, where available.
  4. Any available record drawings (AutoCAD or hard copy) for the Sites:
    - a. mechanical
    - b. plumbing
    - c. electrical
    - d. building automation and temperature controls
    - e. structural
    - f. architectural
    - g. modifications and remodels
    - h. site landscaping
  5. Any available hard copy (8 ½" x 11" or 11" x 17") floor and roof plans of all Sites, as well as information on the age, type and condition of buildings and roofs. It is understood the City has no AutoCAD drawings.
  6. A list of key contacts at each Site, including Hercules personnel knowledgeable of the electrical, HVAC, lighting and controls systems.
  7. Energy management system and HVAC equipment operating schedules, point lists and sequences of operation.
  8. Original construction submittals and factory data (specifications, pump curves, etc.), where available.
  9. Test and balance reports for water and air systems, where available.

#### II. Scope of Work.

The Integrated Energy Assessment (the "Assessment") will be performed as described below:

- A. Perform detailed review of documents delivered above.
- B. Perform an inspection survey to:
1. Identify potential energy conservation measures ("ECMs") and opportunities for distributed and renewable generation technologies.
  2. Identify the potential locations and type of application for solar photovoltaics (PV) and other ECM installations.
  3. Interview the facility manager, chief engineer, or others as needed.
  4. Identify comfort or system-function problems which may impact the performance of the recommended measures.
  5. Obtain the hours of operation for building systems and equipment, and expected occupancy and use.

6. Survey major energy using equipment, and record (to extent available) the pertinent information for the following:
  - a. Lighting
  - b. City Hall Boiler
  - c. City Hall Cooling Tower and approx. 17 package units
  - d. Approx. 500 Street Lights, many of which are decorative
7. Perform Site survey, consisting of:
  - a. Site walk
  - b. Shading analysis
- C. Perform Utility Analysis and Solar Photovoltaic Production Analysis:
  1. Identify current rate schedule, analyze electrical usage and model load profile for each Site
  2. Determine historical Site-specific rate escalation
  3. Determine expected solar photovoltaic production curve for proposed Sites
  4. Overlay electrical load profile with expected solar photovoltaic production curve, to right-size the solar photovoltaic system(s) and identify rate restructuring opportunities
- D. ENGIE Services U.S. will provide to Hercules Recommendations which will include:
  1. A draft Energy Services Contract which will include the contract amount, scope of work, and payment schedule
  2. A scope of work for each ECM per Site which is compatible with Hercules' investment and infrastructure improvement goals
  3. Presentation material, documentation, and pro forma for Public Works and City Council.

### **III. Technologies to be Considered:**

- A. The technologies listed below will be considered during the performance of assessments:
  1. Interior/Exterior Lighting
    - a. Lighting fixture retrofit
    - b. Lighting controls
    - c. LED parking lot lighting
  2. LED retrofit of approximately 500 streetlights, as well as decorative pathway lights at Refugio Valley Park
  3. Plant/equipment modifications:
    - a. Boiler upgrade
  4. Solar photovoltaic electric generation



## ATTACHMENT B

### SITE INVENTORY

#### PART I: SITES INCLUDED IN ASSESSMENT

Site	Address	Approx. Building Sq. Ft.
City Hall	111 Civic Drive, Hercules, CA 94547	22,960
Public Library	109 Civic Drive, Hercules, CA 94547	21,500
Community Center	2001 Refugio Valley Road, Hercules, CA 94547	22,300
Hercules Teen Center	2007 Refugio Valley Road, Hercules, CA 94547	3,000
Refugio Valley Park	1360 Refugio Valley Road, Hercules, CA 94547 (note: park address is approximate)	n/a
City streetlights	Various	n/a

#### PART II: SITES NOT INCLUDED IN ASSESSMENT

Any site not included above.