

MASTER ENERGY SERVICES AGREEMENT PTM MODEL



The model prescribed in this document is based on the energy performance contracting (EPC) approach, which is recognised and applied worldwide.

The MESA is the main reference document for an energy efficiency project. It sets out the obligations of the parties and the relevant procedures. It is advisable to attach the savings calculation and guaranteed savings as well as the monitoring and verification procedures with the MESA so that the project implementation is consistent. However, the MESA PTM Model is only a sample document and it does not attempt to identify or address all circumstances. Parties wishing to use this document are advised to consult with their legal advisers to adapt it to their needs.

This Master Energy Services Agreement ("**MESA**") is made and entered into as of this day (date) of (month), (year), ("Effective Date") by and between (host name) ("**Host**") at (address of host) and (name of ESCO) ("**ESCO**"), at (address of ESCO). Both Host and ESCO shall collectively be referred to as "**Parties**".

ARTICLE 1. RECITALS

- 1.1 **WHEREAS**, Host owns, occupies and operates a manufacturing facility under the (name of sector) sector addressed as stated in Attachment-1 (hereinafter referred to as "**Factory**");
- 1.2 **WHEREAS**, ESCO has agreed to the selection jointly carried out by the Malaysian Industrial Development Finance ("**MIDF**") and Pusat Tenaga Malaysia ("**PTM**") to implement the energy efficiency project (hereinafter referred to as "**Project**") as stated in Attachment-2 under the energy efficiency project lending scheme (hereinafter referred to as "**Scheme**") set up under a Memorandum of Understanding ("**MoU**") between MIDF and PTM. The details of this MoU are as per Attachment-3;
- 1.3 **WHEREAS**, the Parties have jointly carried out an initial investigation grade assessment and found the Project is feasible for implementation under the loan agreement suggested by MIDF as per Attachment-4 and the Terms of Reference ("**ToR**") stated in Attachment-5;
- 1.4 **WHEREAS**, the Parties agree to cooperate in optimising the implementation costs and energy and other operational savings of the Project throughout the term of the MESA;
- 1.5 **WHEREAS**, the Parties have agreed to allocate ten (10) per cent of the Project cost as project management cost for the ESCO;
- 1.6 **WHEREAS**, the Parties have agreed to expense their individual project feasibility study cost of RM 10,000 as Project cost and recover the same in accordance to Article 6.3;

- 1.7 **NOW THEREFORE**, in consideration of these premises and the mutual promises and agreement herein expressed, the Parties intending to be legally bound, hereby agree to the terms and conditions of this MESA.

ARTICLE 2. BASIC UNDERSTANDING OF PARTIES

2.1 **Parties Understanding**

- The Parties shall consult a Project Team (hereinafter referred as "**PT**"), whose ToR is as per Attachment-6, in matters that require a joint decision by the ESCO, Host, MIDF and PTM;
- Disagreements and disputes that cannot be resolved among the Parties shall be referred to the Project Supervisory Committee (hereinafter referred to as "**PSC**"), whose ToR is as per Attachment-7, before proceeding to the invocation of the provisions of the Arbitration Act 1952 (Revised 1972) or any other statutory modification thereof from time to time being in force. The Parties hereby agree to be bound by any award of an arbitrator;
- The Parties shall agree to review the progress of the Project to the PSC as and when requested by the latter;
- The participation of the members in the PT and the PSC shall be treated as "contribution-in-kind" by the organisations they represent.

2.2 **Esco Understanding**

ESCO shall designate an individual (hereinafter referred to as "**Project Manager**") who shall be responsible for supervising and coordinating the implementation of the Project and communicating with the Host on its day-to-day progress. ESCO shall keep the Host and PT informed of the progress of the Project with monthly reports. With regards to any major concern, the ESCO shall meet and discuss with the PT upon reasonable notice. Host and its designated representatives may observe and inspect all Project work performed by ESCO.

2.3 **Host Understanding**

Host shall provide all information to ESCO in good faith and in a timely manner as required for the implementation of the Project, including, but not limited to:

- Available engineering drawings that are required for the detailed designing and drafting of the specification of the Project;

- All available records and data concerning energy use of the current system, equipment or technology the Project is selected to replace;
- All available records and data that are not directly related to energy use, and which can either have a positive or negative effect on the implementation, testing and commissioning of the Project;
- Any previous energy audit report that can add value to the implementation of the Project;
- Any known special legal or construction requirements relating to the Factory.

From time to time Host shall make available its respective employees for interviews with ESCO to provide information that can assist in the successful implementation of the Project. Host shall designate in writing an individual (hereinafter referred to as "**Host Representative**") who shall have the express authority to bind Host with respect to all Project matters requiring Host's approval or authorisation, including, but not limited to approval of: Design Drawings, Variation Costs, Schedules and Mutually Agreed Modified Drawings and Schedules, and other matters. The Host Representative shall render such decisions promptly and furnish information expeditiously so as to avoid unreasonable delay in the implementation of the Project.

ARTICLE 3. PROJECT MANAGEMENT PROCESS

3.1 Project Management Process

The Project shall be managed in the following manner subject to the terms and conditions of this MESA:

- Arrangement of Project Financing pursuant to Article 4;
- Finalisation of Detail Drawings, Tender Specifications, Tendering and Tender Evaluation pursuant to Article 5;
- Project Cost finalisation and Tender Award pursuant to Article 6;
- Installation, supervision of installation, testing and commissioning of the Project pursuant to Article 7;
- Conversion of the Project Cost to term loan repayable to MIDF pursuant to Article 8.

ARTICLE 4. PROJECT FINANCING

ESCO shall manage the financing of the Project partly through the Scheme set up at MIDF and the remainder through the provision stated in accordance to Article 1.5. In case of the Project cost exceeding RM 2.2 million, ESCO shall seek special arrangements with MIDF for financing the differential. ESCO shall repay MIDF in accordance to the terms and conditions of the Scheme.

ARTICLE 5. PROJECT PROCUREMENT

If a preferred supplier for the Project (hereinafter referred to as "**Supplier**") is agreed upon, the Parties shall negotiate with the Supplier on the price, terms and conditions, implementation schedules, obligations, performances guarantees and progress payment schedules for the award of the Project. ESCO and the Supplier shall formally enter into a Project Award Agreement (hereinafter referred to as "**PAA**") before the commencement of the implementation of the Project by the latter. Otherwise the Project shall be awarded as per the process stated below.

- 5.1 **Detail Drawings and Specifications** Upon execution of this MESA, the ESCO shall work on the detailed drawings and specifications of the Project for facilitating the tender exercise and later, the implementation process. ESCO shall outsource the services to suitably qualified suppliers/consultants with no obligation for the latter to be considered favourably for the award of the tender or to carry out the whole work in-house.
- 5.2 **Tendering** The complete set of tender drawings and specifications shall get the approval of the Host and endorsement from the PT for further action. Tender procedures shall follow the guidelines set forth in Attachment-8.
- 5.3 **Tender Evaluation** The Parties shall appoint a core group consisting of members from the PT or their individuals to evaluate the tender bids. This core group shall, upon completion of the evaluation based on pre-determined criteria, submit the same to the Parties for approval and to the PT for endorsement before the award of the Project.

- 5.4 **Tender Award** The ESCO shall work with the successful Supplier on the terms and conditions, schedule, obligations and performance guarantees and progressive payment schedule for the Project. The ESCO and the Supplier shall formally enter into PAA before commencement of the implementation of the Project by the latter.
- 5.5 **Variation Cost** Any other cost not itemised at the time of the PAA shall be mutually agreed upon by the Parties before proceeding for its expensing. The cost shall be included in the Project cost for repayments as per Article 19.
- 5.6 **Monitoring and Verification (M&V)** The M&V shall be included in the Operation and Maintenance (O&M) provision as per Article 6.

ARTICLE 6. PROJECT INSTALLATION MANAGEMENT

- 6.1 **Project Installation** The Project Manager shall be responsible for managing the supervision and coordination of the implementation of the Project in accordance to the terms and conditions set forth in the PAA. Any work requiring site modification shall get the approval of the Parties before implementation. The Project Manager shall update the PT on the progress of the Project implementation on a regular basis as decided by the PT.
- 6.2 **Testing and Commissioning** The Project Manager shall assure the Host and the PT that the Project is tested and commissioned according to the PAA.
- 6.3 **Progressive Payment** The Project Manager shall prepare the request for progressive payments as per the schedule stated in the PAA and submit it for PT's approval. PT shall approve all undisputed portion of the request for progressive payment within ten (10) working days and forward the same to MIDF to execute payment. MIDF shall make the relevant payment within seven (7) working days. The disputed portion shall be pursued as per Clause 9.4 of Article 9.
- 6.4 **ESCO Obligations** During the Project implementation period, ESCO shall:

- Promptly inform PT and Host of matters which may affect the obligations of ESCO or Host under this MESA;
- Promptly inform the PT and Host of matters which may impact the safe operation of the Factory;
- Assist the Host in obtaining all applicable licenses, permits and approvals required under governmental regulations for the implementation of the Project;
- Accept delivery of equipment and materials at the premises and provide safe and secure storage;
- Be solely responsible for the satisfactory performances of its Supplier and subcontractors;
- Provide reasonable instruction and training to person(s) designated by Host in the proper operation and maintenance of the implemented Project; and
- Provide to Host all necessary documentation reasonably required by the Host regarding “as built” drawings and the proper operation and maintenance of the Project.

6.5 **Host Obligations** During the Project implementation period, Host shall:

- Provide daily access to the Project site for ESCO or its authorised personnel, subcontractors, suppliers and agents and the PT to perform any functions related to this MESA during regular business hours, or such other hours as may be reasonably requested by ESCO;
- Obtain all applicable licenses, permits and approvals required under governmental regulations for the implementation of the Project;
- Accept certain temporary inconveniences necessary for the implementation of the Project;
- Provide electric power, water, elevating (if available at site) and other services reasonably required for the implementation of the Project;
- Provide sufficient rent free space in the Factory for the implementation of the project; and
- Exercise reasonable due diligence and insurance to protect the implemented Project.

6.6 **Operation and Maintenance (O&M)** Parties shall jointly carry out the O&M of the Project as specified in Attachment–9.

ARTICLE 7. PROJECT ENERGY PERFORMANCE COST SAVINGS

- 7.1 **Saving Calculation Method** The ESCO with the assistance of the Supplier shall formulate and agree on the method for calculating the energy cost saving of the Project as Attachment-10. The savings arrived from this analysis shall be used to decide on the various payments that have to be executed as per Article 19.
- 7.2 **Guaranteed Saving** Using the saving calculation method and agreed basic assumptions, the Parties shall agree on the amount that shall be considered as guaranteed saving by the ESCO.
- 7.3 **Guaranteed Period** Based on the terms and conditions of the Scheme and the guaranteed saving amount, the Parties shall decide the guaranteed period.
- 7.4 **Monitoring and Verification (M&V)** The ESCO shall determine the actual monthly savings resulting from the performance of the Project and request for the execution of the various payments in accordance to Article 19.
- 7.5 **Non-Performance of the Project** The management of the non-performance of the Project shall be dealt with in accordance to terms and conditions stated in Article 19.

ARTICLE 8. HOST PROJECT OPERATION RESPONSIBILITIES

- 8.1 **Reporting Planned Changes and Emergencies** Host shall notify ESCO before thirty (30) days of any changes planned in the Factory's operation that shall affect the intended performance of the Project. In case of bona fide emergency situation or other occurrence not within the control of Host, the Host shall notify ESCO within forty-eight (48) hours after the occurrence happened or was discovered to have happened.
- 8.2 **Notifying Project Malfunction** Host shall notify ESCO within twenty-four (24) hours of any malfunction or breakdown of the Project. If Host shall negligently

delay in notifying ESCO, Host shall be responsible for any direct loss, or damage, including loss of savings, incurred from such negligence.

ARTICLE 9. PAYMENT PROCEDURES

- 9.1 **Payment Process** For payment, ESCO shall submit the invoice to the PT. Upon verification and certification by the PT, the invoice shall be forwarded to MIDF by ESCO for the facilitation of the respective payment. MIDF shall disburse the payment to ESCO within ten (10) working days from the time it received the certified invoice from the latter.
- 9.2 **Payment to Parties** Upon signing of this MESA, the PT shall approve the payment of Ringgit Malaysia Ten Thousand only (RM 10,000) for each Party for its project feasibility study cost as per provisions stated in Article 1.6.
- 9.3 **Progress Payment** The progress payment to ESCO shall be executed as per terms and conditions stated in the PAA.
- 9.4 **Payment Disputes** The Host with the advise of the PT shall approve the undisputed part of any invoice or progress payment. If the Parties are unable to resolve any problems related to payment within thirty (30) days, the matter shall be resolved pursuant to Article 2.1 of this MESA.

ARTICLE 10. OWNERSHIP

- 10.1 **Project** The ownership of the completed Project shall be treated as per the terms and conditions of the loan agreement between MIDF and ESCO.
- 10.2 **Ownership of Propriety Property Rights** Drawings, specifications, formulae, patents, devices, secret inventions or processes, or similar items of property which are or may be used in connection with the Project shall be governed by the terms and conditions stipulated in the memorandum of understanding (MoU) among ESCO, Host and PTM.

ARTICLE 11. CONDITIONS BEYOND CONTROL OF THE PARTIES

In addition to the Parties' rights and remedies under Article 21, if ESCO or Host shall be unable to reasonably perform any of its obligations under this MESA due to act of God, insurrections or riots, fire, flood, earthquake, explosion, war, sabotage, governmental decrees, changes in the law or regulations related to the work, labour strikes, slow downs or disruptions, subsurface or latent or concealed conditions at the Factory, and casualty loss or damage, or other conditions not specifically contemplated by this MESA which, by the exercise of reasonable diligence, could not be prevented, then the Parties may prolong the terms of this MESA by the period of actual existence of such conditions. If such conditions exist for more than 60 days, the performing Party may choose to terminate the impacted portion of this MESA by written notice to the non-performing Party.

ARTICLE 12. INSURANCE

- 12.1 **Host's Insurance** Host shall arrange comprehensive "all risk" property insurance coverage on the successfully tested and commissioned Project to repair or replace it in total if destroyed, stolen or damaged until the expiration of the guaranteed period. ESCO shall be named as an additional insured on such "all risk" insurance. All cost incurred to arrange Host's insurance shall be an integral part of the Project cost.
- 12.2 **ESCO's Insurance** From the date of signing the MESA, ESCO shall provide full comprehensive policies including "builder's risk" insurance coverage sufficient to cover actual repair costs and general liability damages caused in the Factory by ESCO employees or their suppliers. General liability insurance shall include such things as bodily injury, death, and property damage. All cost incurred to arrange ESCO's insurance shall be an integral part of the Project cost.

ARTICLE 13. ESCO'S DEFAULT

- 13.1 **Events** Events which shall be deemed irrefutably to be a default by ESCO, can be any or all of the following:

- ESCO is declared bankrupt and is not a debtor in possession; makes a voluntary assignment for the benefits of creditors; becomes insolvent; proceeds to voluntary liquidation, or is dissolved; (save and except if such liquidation or dissolution is pursuant to any scheme of amalgamation or reconstruction);
- Any material failure by ESCO to perform or comply with the terms and conditions of this MESA; provided that such failure shall not be a default if it corrected or covered by ESCO within thirty (30) days after written notice has been given to ESCO demanding that such failure to perform be cured, or if cure cannot be effected within thirty (30) days, if ESCO is diligently pursuing a cure;
- ESCO has knowingly furnished a material false or materially misleading representation or warranty to the Host.

13.2 **Remedies** In the event of default by the ESCO, the remedies shall be executed pursuant to Article 15.1.

ARTICLE 14. HOST'S DEFAULT

14.1 **Events** Events which shall be deemed irrefutably to be default by Host, can be any or all of the following:

- Host is declared bankrupt and is not a debtor in possession; makes a voluntary assignment for the benefit of creditors; becomes insolvent; proceeds to voluntary liquidation, or is dissolved; (save and except if such liquidation or dissolution is pursuant to any scheme of amalgamation or reconstruction);
- Host has knowingly furnished wrong information related to current system that is to be replaced by the Project or any other information related to the Project;
- Any failure to pay the amount due by the Host as stipulated in Article 19;
- Termination of the Project by Host during the implementation or M&V period;
- Any other material failure by the Host or to comply with the terms and conditions of this MESA, provided that such failure shall not be a default if it

is corrected or cured by Host within thirty (30) days after written notice has been given to Host demanding such failure to perform be cured.

14.2 **Remedies** In the event of default by the Host, the remedies shall be executed pursuant to Article 15.2.

ARTICLE 15. TERMINATION

15.1 **General** If the Project is deemed non-available at any time after signing of this MESA for reasons beyond the control of the Parties, the relevant technical issues and commercial ramifications shall be identified for discussion and agreement. In case of disagreement, the matter shall be settled as per Clause 2.2 of Article 2.

15.2 **By ESCO:**

- **After signing of the MESA and before start of work on Project:** ESCO shall pay Host a compensation of Malaysian Ringgit of Ten Thousand Only;
- **After starting and before testing and commissioning of the Project:** ESCO shall install back the original system on its own cost or allow Host to complete the Project using the financial facilities from the Scheme. ESCO shall not absolve itself from its original obligations to MIDF in serving the loan. ESCO shall use its best of abilities to see that the financing from the Scheme is facilitated in the most efficient manner. In either case, the Host shall have the right to choose the option;
- **After testing and commissioning and before the guaranteed period:** ESCO shall allow the Host to operate the Project and assist ESCO in whatever way possible to manage the payment to MIDF or allow the Host to operate the Project without any obligation to service the loan to MIDF. In the latter case ESCO shall buy off the Project from MIDF and transfer its assets to the Host. In either case the Host shall have the right to choose the option.

15.3 **By HOST:**

- **After signing of the MESA and before start of work on Project:** Host shall pay ESCO a compensation of Malaysian Ringgit of Ten Thousand Only and any other Project cancellation charges incurred by the ESCO;

- ***After starting and before testing and commissioning of the Project:***
Host shall pay all outstanding amount owed by ESCO to MIDF in addition to the ESCO's outstanding management fees incurred until the time of termination. Host shall also be liable to any cancellation charges resulting from the termination.
- ***After testing and commissioning and before the guaranteed period:***
Host shall pay all outstanding amount to MIDF, capitalised management fees and the guaranteed amount to ESCO as stated in Article 19.

ARTICLE 16. FACTORY PRODUCTION SHUTDOWN PROCEDURES

Project Manager shall give sufficient notice for the Factory production shutdown to facilitate special project implementation requirements. The duration of such requests shall have the prior approval of the Host Representative before proceeding to prepare for the shutdown. Project Manager shall work with the Host Representative in coming up with a mutually agreed checklist for the execution of a systematic production shutdown to avoid any production loss or damage to the assets of the Factory. Both Project Manager and Factory Representative shall be responsible for ensuring the adherence of the stated shutdown procedures.

ARTICLE 17. FACTORY PRODUCTION START-UP PROCEDURES

In addition to Article 16, the Project Manager shall also work with the Factory Representative in coming up with a checklist for the start-up of the Factory production. Both Project Manager and Factory Representative shall be responsible for ensuring the adherence of the stated start-up procedures.

ARTICLE 18. DURATION OF MESA

This MESA shall be in force and effect upon its Effective Date and shall terminate when the Guaranteed Period ends, or as otherwise terminated in the MESA.

ARTICLE 19. SHARING OF PROJECT ENERGY COST SAVING

19.1 **Parties Agreement** Parties shall agree to use the energy cost saving to execute the various payments stated in Articles 19.4, 19.5 and 19.6. Any

balance amount shall be deposited into a joint account managed by the Parties in accordance to Article 19.2. The amount accumulated in the joint account shall be used to manage the repair and maintenance cost of the Project once the warranty expires. Any remaining funds in the joint account at the end of the duration of this MESA shall be shared equally among the Parties.

- 19.2 **Non-Performance of the Project** During periods when the energy savings are insufficient to execute the various payments, the Parties shall use the accumulated amount in the joint account to compensate for the differentials in the guaranteed amounts. In the event the accumulated amount is still not sufficient to compensate the said differentials, ESCO shall compensate the same on its own account. Non-performance caused by the non-conformance of the basic assumption considered in the saving calculation method shall not warrant ESCO's compensation. In such cases, the Host shall compensate the differential in the event the funds in the joint account are insufficient.
- 19.3 **Total Project Cost** The total Project cost shall be itemised as tender award cost as per PAA, variation cost as per Article 5.5, ESCO project management cost as per Article 1.5, and ESCO and Host feasibility study costs as per Article 1.6. Tender award cost, variation cost, ESCO and Host feasibility study costs shall be financed by the Scheme, whereas the ESCO project management cost shall be financed by the ESCO.
- 19.4 **Scheme Loan** The amount financed by the Scheme shall be converted to 36 months term loan of monthly instalment of RM30,000 at an annual interest rate of four (4) percent. In the event the saving is not sufficient to meet the payment amount, the management of such event shall be in accordance to Article 19.2.
- 19.5 **ESCO Project Management Cost** The amount financed by the ESCO shall be converted to 36 months term loan of monthly instalment of RM3,000 at an annual interest rate of five (5) percent and shall be payable to ESCO. In the event the saving is not sufficient to meet the payment amount, the management of such event shall be in accordance to Article 19.2.

19.6 **Parties Monthly Payments** ESCO shall guarantee a monthly payment of RM2,000 for the Parties. In the event the saving is not sufficient to meet the payment amount, the management of such event shall be in accordance to Article 19.2.

19.7 **Adjustment** ESCO shall adjust the terms and amounts stated in Articles 19.4, 19.5 and 19.6 according to the actual amount incurred in the implementation of the Project. In the event the adjusted terms and amounts are inferior to ones stated, the Parties shall use their good judgments in the acceptance of the adjusted terms and amounts. In case of disagreement or dispute, the matter shall be solved in pursuant to Article 2.2.

ARTICLE 20. TRANSFER

20.1 **By Host** In the event that the Host, for whatsoever reason decide to transfer the rights and obligations of this MESA to another party, it shall be deemed to be termination by the Host if the ESCO does not consent to the transfer.

20.2 **By ESCO** In the event that the ESCO, for whatsoever reason decide to transfer the rights and obligations of this MESA to another party, it shall be deemed to be termination by the ESCO if the Host does not consent to the transfer.

ARTICLE 21. INDEMNIFICATION

Parties shall indemnify themselves from any claims (including death) resulting from the sole negligence or wilful misconduct of that Party's employees, representatives, agents including contractors / subcontractors.

IN WITNESS WHEREOF, and intending to be legally bound, the Parties hereto subscribe their names to this instruments on the date and year first written above.

< ESCO Company Address >

< Host Company Address>

By: _____
Title: _____
Signature: _____
Date: _____

By: _____
Title: _____
Signature: _____
Date: _____

By: _____
Title: _____
Signature: _____
Date: _____

By: _____
Title: _____
Signature: _____
Date: _____

List of Attachments

Attachment 1: Address of the factory

Attachment 2: Description of the Project

Attachment 3: Terms and conditions of the loan scheme set up at the Malaysian Industrial Development Finance Bhd (MIDF)

Attachment 4: Terms and conditions of the loan details by MIDF

Attachment 5: Terms of Reference (ToR) on the financing of the Project

Attachment 6: Terms of Reference (ToR) of Project Team that decides on the day-to-day implementation of the Project

Attachment 7: Terms of Reference (ToR) of the Project Supervisory Committee, which acts as an intermediary between the Parties and the arbitrator

Attachment 8: Guidelines for tendering procedures adopted from the World Bank and Asian Development Bank

Attachment 9: Terms of Reference (ToR) for operating and maintaining the commissioned Project