



dated 30 March 2022

## **Efficiency as a Service (EaaS) Agreement**

**for:**

**[Efficient Heating Services]**

**[Efficient Cooling or Refrigerating Services]**

**[Efficient Compressed Air Services]**

**[Other Efficient Services]**

**KIC InnoEnergy S.E.**

[date] 2022

Version 1.0

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THE EAAS STANDARD AGREEMENT IS A RESULT OF THE 'EFFICIENCY-AS-A-SERVICE' PROJECT, WHICH AMIS TO ACCELERATE THE MARKET ACCEPTANCE OF ENERGY-EFFICIENT SOLUTIONS BY SMEs THROUGH SERVITISATION. THE EAAS PROJECT HAS RECEIVED FUNDING FROM THE EUROPEAN UNION'S HORIZON 2020 RESEARCH AND INNOVATION PROGRAMME UNDER GRANT AGREEMENT N° 892499.

### **EXPLANATORY NOTES**

This Efficiency as a Service (EaaS) Agreement includes a Service Specification Sheet and applicable EaaS General Terms and Conditions.

The EaaS Agreement was designed as a model agreement for an EaaS business model in which the end user (e.g. SME's) will receive efficient Cooling, Heating, and/or Compressed Air services from a service provider. Instead of the service provider carrying out a one-off sale of a system or project, they sell the outcome of the system and the end user pays only for this outcome or service. The end user only has to pay for the energy efficient service per agreed unit of measurement, rather than investing in the equipment (system). The service provider remains the owner of the system and is responsible for delivering a highly efficient and quality service to the user. The provider maintains the system and covers the operational costs, including the energy cost. In other words, the EaaS Agreement eliminates the upfront capital expenditure (CapEx) required by the end user for the installation of energy efficient technologies and convert it into operational expenditures (OpEx). The OpEx then includes the amortization of the system, installation, repairs, maintenance, and utility service costs. There are no further costs for the end user other than a single periodic service fee.

The Service Specification Sheet must be filled out by the service provider and the client. It contains the contact details of the service provider and the client, information on the efficiency service and system, the charges and, if any, deviations from the EaaS General Terms and Conditions.

The following is noted:

- **Additional agreements.** Nothing stated in the EaaS Agreement shall prevent or otherwise impede the end user and the service provider from entering into one or more separate additional agreements for, e.g.:
  - a) the service provider to design and upgrade and/or finance (in the case of an existing building) or to design and install and/or finance (in the case of a new building) the client's facilities and/or to service, maintain and repair the client's facilities on terms and conditions to be agreed by the parties; or
  - b) the service provider to lease the client's facilities from the client, on terms and conditions to be agreed by them.
- **Right of superficies.** Under Dutch law, certain installations may become or be deemed to be a part of the premises, as a result the owner of the premises may claim ownership of the installations by way of accession (*natrekking*). To ensure that the service provider retains ownership of its equipment (system) installed at the premises of the client, Clause 5 of the EaaS General Terms and Conditions provides that right of superficies (*opstalrecht*) should be created in favour of the service provider.
- **Regulation of heat supply.** If the Agreement is used in respect of heating services, it should be assessed in advance whether the relevant heat supply may be subject to regulation under the current Dutch Heat Act (*Warmtewet*) or the anticipated new Heat Act (*Wet collectieve warmtevoorziening*).
  - In the Netherlands, the supply of heat to small consumers (individual connections of max. 100 kW) is regulated under the Heat Act. The supply of heat to small consumers requires a supply license from the Authority for Consumers & Markets (ACM) and the maximum heat tariffs that may be charged to such small consumers is regulated by the ACM (and linked to the price of natural gas).

- It is expected that the current Heat Act will be replaced by a new Heat Act in the course of 2022. The draft new Heat Act was published by the Ministry of Economic Affairs and Climate Policy in June 2020 and includes changes in the current tariff regulation. Under the proposed new Heat Act all tariffs, for both small consumers and large users, will gradually become cost-based. The heat tariffs for small consumers will be based on costs and allowed revenues, determined by regulator ACM, enabling heat companies to recoup costs and a reasonable profit on invested capital. The tariffs for large users must reflect the actual costs of the heat company and the calculation method (which may be subject to ACM assessment) and tariffs must be transparent, non-discriminatory and based on a reasonable return.
- **Fiscal & Accounting comments.** For EaaS to qualify as an operational lease to achieve off-balance accounting under Dutch GAAP or IFRS16, please consider:
  1. The lease term (contractual duration of the EaaS contract) should not be the major part of the economic life of the asset which is being leased. The lease term should be less than 75% of the economic life of the asset.
  2. At inception of the contract, the present value of the minimum lease payments should not amount to substantially all the fair value of the leased asset. When comparing, the present value of the minimum lease payments should be less than 90% of the fair value of the asset.
  3. The leased asset should not be of specialized nature that only the lessee can use them and that the asset can be used by a different client without major modifications if needed. Article 6.2 of the contract indicates that the system will be removed from the Premises of the client, which might indicate that it might not be a specialized and/or custom-made system.
  4. The asset will not be transferred to the client by the end of the lease term.
  5. In case the contract will include a purchase option, or obligation for the lessee, such contractual clause should not indicate that the asset can be purchased at an amount (much) less than the expected fair value of the asset at the moment that such option can be exercised. This suggests that the lessor includes this 'discount' in the lease payments charged and over the lease term which strongly indicates that the lease classifies as a finance lease. If the contract indicates that the identified asset can be purchased at a discount and it is likely that the purchase option is exercised, the (discounted) purchase option should be included in the present value of minimum lease payments mentioned in point two above.

More fiscal & accounting recommendations are available to the EaaS consortium.



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## **EFFICIENCY AS A SERVICE AGREEMENT**

(1) \_\_\_\_\_ (the **Service Provider**)

and

(2) \_\_\_\_\_ (the **Client**)

(hereinafter also collectively referred to as the **Parties** and each individually as a **Party**)

**AGREE** as follows:

The Service Provider will provide and the Client will accept the Efficiency Service on the terms and conditions as set out in the Service Specification Sheet below and the attached EaaS General Terms and Conditions.

<b>SERVICE SPECIFICATION SHEET</b>	
<b>1. Contact Details</b>	
Contract reference number	[●]
Service Provider	[Full company name and address]
Client	[Full company name and address]
Contact person for Service Provider	[Contact for daily affairs and notices]
Contact person for Client	[Contact for daily affairs and notices]
<b>2. Efficiency Service</b>	
Efficiency Service	[full description of the Efficiency Service]  [ <b>Example for cooling service:</b> The provision by the Service Provider of a continuous supply of chilled water from a chiller system / refrigerant liquid and/or gas from a variable refrigerant flow (VRF) system owned by the Service Provider to the Delivery Point, to satisfy the Client's requirements for air-conditioning.]
Premises	[Address of the Client at which the Efficiency Service will be provided]
Unit	[E.g., GJ, kWh]
Maximum Monthly Usage	[●] Units
Service Start Date	[day-month-year], 00:01 hours
Service End Date	[day-month-year], 23:59 hours
Service Temperature	[●]
Service Temperature Range	[Cooling & Refrigeration Services: [●] to [●] degrees [Celsius] at the Delivery Point]



Normal Usage Hours	<b><i>[●] hours to [●] hours, on the following days of the week [●], including / excluding bank holidays]</i></b>
Permitted Availability Tolerance	<b><i>[●]% of the Normal Usage Hours (i.e., a maximum unavailability of [●] hours per month during the Normal Usage Hours)</i></b>
Unacceptable Interruption	the Permitted Availability Tolerance is exceeded for more than [●] consecutive months or the Efficiency Service is interrupted for a period exceeding [●] consecutive hours
Maximum Single Planned Outage Duration	[●] hours
Maximum Annual Planned Outage Duration	[●] hours
Permitted Tolerance of Meter Error	± [●]%
<b>3. System</b>	
System	<b><i>[Description of the System]</i></b>  <b><i>[Example for cooling service: All of the equipment comprised in the chiller system / variable refrigerant flow (VRF) system [select system] owned/controlled and operated by the Service Provider to provide the Cooling Services, including without limitation, compressors, condensers, evaporators, expansion valves, power panels, controls units, water boxes, pumps, heat exchangers, heat recovery units and motors, as the case may be.]</i></b>
Client's Facilities	<b><i>[Description of the Client's Facilities] [all installations, fittings and fixtures from the Delivery Point to the [space to be cooled or heated or [●]] which facilitate the transmission of the Efficiency Service, including but not limited to, pipes, gauges, supports, valves, fittings, sensors, controls, fan coils, evaporator units, heat exchangers, air handling units, monitoring and control devices and other associated apparatus owned and/or controlled by the Client which are incorporated into and form a part of the relevant building(s) on the Premises to which the Efficiency Service is being supplied]</i></b>
Licensed Area	<b><i>[Description of the part or parts of the Premises required by the Service Provider and agreed by the Client, on which to install the System, drawing of the situation to be attached as Schedule [●]]</i></b>
Delivery Point	<b><i>[Description of the point at which Efficiency Service is delivered to the Client's Facilities and metered, drawing to be attached as Schedule [●]]</i></b>  <b><i>[Example for cooling service: "(a) at the outlet of a single chiller; or (b) at the common outlet point of a multi-chiller system (in the case of a multi-chiller system); or (c) at the outlets of the outdoor units (in the case of a VRF system)"]</i></b>
Service Requirements	<b><i>[Example for cooling service: The Service Provider undertakes to regulate the temperature of the Efficiency Service so that the Client will receive the Cooling Service from the chiller or VRF system at the Delivery Point at the Service Temperature under normal operating conditions]</i></b>



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Electricity Procurement Responsible Party	[Client / Service Provider]
Water Procurement Responsible Party	[Client / Service Provider]
[Load Head]	[Specific for Cooling & Refrigeration Services]
<b>4. Charges</b>	
Usage Charge	[●]
Unit Rate	[●]
Unit Rate Adjustment	<p>The Unit Rate is subject to [annual] adjustment based on changes in the values of the two components. The adjustment is calculated by multiplying the prevailing Unit Rate by the aggregate of the Electricity Factor Adjustment and the Non-Electricity Factor Adjustment, whereby:</p> <ul style="list-style-type: none"><li>the Electricity Factor Adjustment is [0.60] times the percentage of change of the applicable electricity tariffs; and</li><li>the Non-Electricity Factor Adjustment is [0.40] times the CPI.</li></ul> <p><b>[The values between square brackets are default values and can be determined on a case-by-case basis.]</b></p>
Availability Charge	[●]
Availability Charge Adjustment	[●]
Default Interest Rate	[●]
Security Deposit	[●]
Interruption Liquidated Damages	[●]
Client Termination Fee	[●]
Service Provider Termination Fee	[●]
<b>5. Deviation from EaaS General Terms and Conditions</b>	
<b>Clause:</b>	<b>To be replaced by:</b>
[●]	[●]

**SIGNATURES OF THE PARTIES:****Service Provider****Client**

by: [●]  
function: [●]

by: [●]  
function: [●]



## **EaaS GENERAL TERMS AND CONDITIONS**

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**Schedule 1: Definitions and interpretation**

**Schedule 2: Form of deed of superficies**



## **1. APPLICABILITY, DEFINITIONS AND INTERPRETATION**

- 1.1 These EaaS General Terms and Conditions are applicable to, and form an integral part of, the Efficiency as a Service Agreement (the **Agreement**).
- 1.2 In the Agreement, unless explicitly provided otherwise, capitalized words and expressions have the meanings ascribed thereto in Schedule 1 (*Definitions and interpretation*).

## **2. SUBJECT OF THE AGREEMENT**

- 2.1 The Agreement governs the provision of the Efficiency Service by the Service Provider to the Client and the acceptance of the Efficiency Service by the Client.
- 2.2 The Service Provider will provide the Efficiency Service to the Premises using the System and the Client's Facilities in accordance with this Agreement.
- 2.3 The Service Provider will perform the Efficiency Service with reasonable care and skill and use reasonable endeavours to perform the Efficiency Service in accordance with the Service Requirements.

## **3. PROVISION OF THE EFFICIENCY SERVICE**

- 3.1 The Service Provider shall provide the Efficiency Service to the Client during the period (the **Service Term**) which commences at the Service Start Date and ends on the Service End Date.
- 3.2 The Service Term may be extended by written agreement between the Parties.

## **4. PRE-COMMENCEMENT: INSTALLATION OF THE SYSTEM**

- 4.1 The Service Provider shall at its own costs provide and install the System and ensure that the System is commissioned and fully operational to provide the Efficiency Service and to commence the Service by the Service Start Date.
- 4.2 The Client shall at its own costs arrange for the Client's Facilities to be in conformity with technical guidance and requirements reasonably requested by the Service Provider.

### **Electricity procurement**

- 4.3 If it is indicated in the Service Specification Sheet that the Client is the Electricity Procurement Responsible Party, the Client shall procure that (i) the Service Provider receives the required electricity supply for the System, (ii) the Premises are suitable for such purpose, (iii) a sub-meter is installed at an appropriate point for the purpose of metering and recording the volumes of electricity used by the System, and (iv) the Service Provider receives a copy of the relevant electricity supply agreement and applicable tariffs.
- 4.4 If it is indicated in the Service Specification Sheet that the Service Provider is the Electricity Procurement Responsible Party, the Client shall procure that (i) the Premises are suitable for the Service Provider to procure the required electricity supply for the System, and (ii) the Service Provider is allowed and facilitated to install the required electricity supply and utility infrastructure to enable the efficient operation and functioning of the System.

### **Water procurement**

- 4.5 If it is indicated in the Service Specification Sheet that the Client is the Water Procurement Responsible Party, the Client shall procure that (i) the Service Provider receives the required water supply for the System, (ii) the Premises are suitable for such purpose, (iii) a sub-meter is installed at an appropriate



point for the purpose of metering and recording the volumes of water used by the System, and (iv) the Service Provider receives a copy of the relevant water supply agreement and applicable tariffs.

- 4.6 If it is indicated in the Service Specification Sheet that the Service Provider is the Water Procurement Responsible Party, the Client shall procure that (i) the Premises are suitable for the Service Provider to procure the required water supply for the System, and (ii) the Service Provider is allowed and facilitated to install the required water supply and utility infrastructure to enable the efficient operation and functioning of the System.

## **5. CONDITION PRECEDENT: RIGHT OF SUPERFICIES**

- 5.1 As a condition precedent to the installation of the System and the commencement of the Efficiency Service, a right of superficies (*opstalrecht*) in respect of the System shall be established for the benefit of the Service Provider, for the duration of the System Term, in order to secure the Service Provider's ownership of the System.
- 5.2 The Client agrees and shall cooperate to the establishment of the right of superficies, materially in accordance with the deed of superficies included in Schedule 2 (*Form of deed of superficies*). At the first request of the Service Provider, the Client shall sign an unconditional power of attorney to authorize the Service Provider to establish the right of superficies.
- 5.3 The external costs related to the establishment of the right of superficies (including the costs of the notary and the land registry) shall be borne by the Service Provider.
- 5.4 If the Premises are encumbered with a right of mortgage, the Client shall procure a written permission from the relevant mortgagee for the establishment of the right of superficies.
- 5.5 If the Client is not the owner of the Premises, the Client shall procure that the owner of the Premises cooperates to the establishment of the right of superficies to secure the Service Provider's ownership of the System.

## **6. SYSTEM**

- 6.1 The Client confirms and acknowledges that the Service Provider is and remains the legal owner of the System at all times. The Service Provider shall at all times retain ownership and control of the System which allows it to utilise the System as contemplated herein and under no circumstances shall the System become or be deemed to be a part of the Premises. The Service Provider shall be entitled to attach to each part of the System appropriate plates, labels, stamps or other means of identifying the Service Provider as the owner of or being entitled to the System.
- 6.2 **(optional)** The Client has the option to purchase the System after the Service End Date for the applicable market value at that time. The applicable market value shall be determined by mutual agreement. If the Client wishes to execute this purchase right, the Client shall notify the Service Provider thereof in writing within one month after the Service End Date, if no notification has been received or if Parties are unable to reach an agreement on the market value the Service Provider shall remove the System from the Premises.
- 6.3 The Service Provider shall at its own costs be responsible for servicing, maintaining, repairing, auditing, planning, designing, procuring, constructing, installing, testing, commissioning and operating the System, unless otherwise agreed in this Agreement.
- 6.4 The Service Provider shall, at its sole discretion, be entitled from time to time to substitute and replace the System or any part thereof or item comprised therein with more advanced and improved parts or items, which will enhance the efficiency of the System and reduce operational costs incurred by the Service Provider.



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6.5 The Client may request an increase or decrease, as the case may be, of the capacity of the System by giving written notice to the Service Provider. The Service Provider may decline such request, unless the Client agrees in writing to pay for the costs of the relevant adjustment of the System.

6.6 The Service Provider may create security rights on the System for (re)financing purposes, provided that the provision of the Efficiency Service under this Agreement is not negatively affected.

## **7. CLIENT'S FACILITIES**

The Client shall maintain the Client's Facilities in good order and repair to accommodate the provision of the Efficiency Service.

## **8. METERING**

8.1 The Service Provider shall install a main Meter and a "back-up" Meter at the Delivery Point, to measure the quantity of Units supplied as part of the Efficiency Service. The main Meter shall be the primary Meter used for this purpose and the "back-up" Meter shall be used in the event of a malfunction of or inaccurate reading from the main Meter.

8.2 The Service Provider shall maintain the Meters and ensure that the Meters shall at all times be accurate subject only to the Permitted Tolerance of Meter Error.

8.3 The accuracy of the Meters shall be verified upon their installation and the Service Provider shall thereafter have the Meters independently tested at regular intervals (not exceeding two years) in accordance with the standard established by the manufacturer to ensure that the Meters are working properly and the Client shall receive a copy of the relevant test report and calibration certificates.

8.4 If any Meter for any reason becomes faulty or inaccurate beyond the Permitted Tolerance of Meter Error, the Service Provider shall as soon as reasonably possible procure the service, repair, recalibration and/or replacement of such Meter as may be appropriate.

8.5 The Client may at any time by written notice to the Service Provider (but no more than twice in any given year) request that the accuracy of one or both of the Meters be tested. Upon receipt of the Client's request, the Service Provider shall arrange for the testing and calibration of the relevant Meter. The costs of the testing as requested by the Client shall be borne by the Client unless such testing reveals that the relevant Meter is inaccurate beyond the Permitted Tolerance of Meter Error, in which case (i) the costs of the testing shall be borne by the Service Provider, and (ii) the Service Provider shall, if appropriate, recalculate (with retroactive effect) the invoices in respect of the period during which the relevant Meter is found to have been inaccurate.

## **9. USE AND ACCESS (CLIENT)**

9.1 The Client's monthly use of the Efficiency Service shall not exceed the Maximum Monthly Usage.

9.2 The Service Provider shall provide the Client with any necessary instructions and directives relating to the Client's use of the Efficiency Service and access to the System (if required), subject to supervisory monitoring and control provided by the Service Provider, which may be done remotely.

9.3 The Client shall use the Efficiency Service strictly in accordance with such instructions and directives which are provided by the Service Provider.

9.4 The Client shall not:

- (a) tamper with the System save for the prevention of immediate harm to person or property, in which event the Service Provider must be promptly notified;

- (b) use, or allow any person to use, the Efficiency Service in any way other than in accordance with this Agreement;
- (c) interfere, or allow any person to interfere, with the provision of the Efficiency Service to the Client or to any other person, including disconnecting supply to another person or re-connecting supply which has been disconnected by the Service Provider;
- (d) use the System for any purpose other than as stated herein;
- (e) take, permit or allow any action which affects the operation of the System, without the prior written consent of the Service Provider.

## 10. ACCESS (SERVICE PROVIDER)

- 10.1 By entering into the Agreement, the Client grants to the Service Provider an irrevocable licence for the entire duration the Agreement to use the Licensed Area for the purposes of installing, operating and maintaining the System and performing its obligations and exercising its rights pursuant to this Agreement.
- 10.2 The Service Provider shall be entitled to unrestricted access to the Licensed Area and shall further advise the Client what additional access to the Premises is required for the Service Provider to:
- (a) install and connect the System to the Client's Facilities;
  - (b) install, read, test, service or replace any Meter;
  - (c) provide, restore or protect the provision of the Efficiency Service to the Premises;
  - (d) monitor the performance of the System;
  - (e) protect or prevent danger or damage to the System;
  - (f) upgrade, repair, service, maintain, test or protect the System;
  - (g) suspend and/or disconnect the provision of the Efficiency Service, as permitted hereunder; or
  - (h) take any action reasonably required to perform its obligations and exercise its rights pursuant to this Agreement.

## 11. CHARGES

- 11.1 The Client shall pay to the Service Provider the following charges:
- (a) a fixed monthly charge (the **Availability Charge**); and
  - (b) a monthly charge for the Client's use of the Efficiency Service (the **Usage Charge**), which Usage Charge is calculated as follows:

$$\text{Usage Charge} = \text{Measured Units} \times \text{Unit Rate}$$

- 11.2 The charges shall only be adjusted accordance with the provisions of this Agreement. The Availability Charge Adjustment and the Unit Rate Adjustment are set out in the Service Specification Sheet.
- 11.3 For avoidance of doubt, if in any month (or part thereof) the Client does not use the Efficiency Service or the Efficiency Service cannot be (fully) provided due to an act of omission of the Client, this shall not affect the Client's obligation to pay the Availability Charge in full.

## 12. CHARGES FOR ELECTRICITY AND WATER

- 12.1 The Service Provider shall be responsible for and pay all costs of and relating to the supply of electricity and water required for the operation of the System and the provision of the Efficiency Service.

The Service Provider shall be responsible for and pay all costs of and relating to the supply of electricity and water required for the operation of the System and the provision of the Efficiency Service (including, for avoidance of doubt, any environmental taxes, levies or other taxes in this respect, either imposed directly to the Client or charged to the Client by its energy or water supplier, which may be recharged by the Client to the Service Provider).

- 12.2 If the Service Provider receives electricity supply and/or water supply for the System from the Client, the Service Provider shall, on a monthly basis, pay to the Client an amount to cover the electricity and/or water consumed by the System based on a prorated amount of the bill received by the Client for the supply of electricity and/or water to the Premises determined by the consumption shown from the reading of the relevant sub-meter. The Service Provider will be entitled to satisfy the liability to the Client under this Clause by deducting the relevant amounts from the immediately next invoice to be issued by the Service Provider.
- 12.3 If the Service Provider receives electricity supply for the System from the Client and a change of the applicable electricity price is announced, the Service Provider and the Client shall enter into good faith discussion to agree on the impact of the electricity price change on the Agreement.

## 13. INVOICING AND PAYMENT

- 13.1 The invoice shall be payable by the Client in euros, within 14 days of the date of the relevant invoice.
- 13.2 In respect of the Usage Charge, the invoice shall include a record of the Meter reading (or, as the case may be, an indication that Average Meter Readings were used).

***[NOTE: To be decided by implementors whether Usage Charge may be invoiced in advance based on 1/12<sup>th</sup> of estimated annual volume (to mitigate seasonality), with periodical reconciliation based on meter readings.]***

- 13.3 If the Client disputes in good faith any invoice from the Service Provider, the Client shall notify the Service Provider thereof in writing as soon as reasonably practicable and the Client may withhold payment of such sums as are in dispute pending resolution of such dispute in accordance with this Agreement.
- 13.4 Each Party shall be entitled to receive interest on any payment not made when properly due pursuant to the terms of this Agreement, calculated from day to day at a rate per annum equal to the Default Interest Rate, and payable from the day after the date on which payment was due up to and including the date of payment.
- 13.5 All charges and payments to be made under this Agreement are stated exclusive of any applicable VAT and other relevant taxes, which shall be paid by the paying Party at the rate and in the manner prescribed by applicable law.

## 14. SECURITY DEPOSIT

- 14.1 The Client shall pay the Security Deposit prior to the Service Start Date. The Service Provider may use the Security Deposit to recover any amount owed by or outstanding from the Client at any time. The amount of the Security Deposit payable by the Client may be increased by the Service Provider in accordance with Clause 19.2.



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- 14.2 The Service Provider shall repay the Security Deposit, or the remaining balance thereof, to the Client at the end of the Service Term either by crediting it to the Client's final invoice or by way of refund within 30 days of the payment of the Client's final invoice. No interest shall accrue on the Security Deposit and no interest shall be payable to the Client in relation to the Security Deposit.

## **15. CLIENT'S OBLIGATIONS**

### **15.1 The Client shall:**

- (a) promptly inform the Service Provider if it has not received an invoice from the Service Provider when due;
- (b) promptly inform the Service Provider if an invoice is incorrect;
- (c) promptly inform the Service Provider of any changes to the Client's account information or contact details;
- (d) inform the Service Provider in advance if the Client vacates the Premises to allow a reasonable period for the Service Provider to remove its System;
- (e) ensure that if the Premises are occupied by another person, such occupier complies with all relevant provisions of this Agreement;
- (f) provide the Service Provider with any information relating to the Client, the Premises, the Client's Facilities, the System and the Service which the Service Provider may reasonably request.

### **15.2 The Client shall not:**

- (a) charge any third party (such as a tenant or occupier of the Premises or any part thereof) for the use of any Efficiency Service without the prior written consent of the Service Provider, which consent shall not be unreasonably withheld;
- (b) supply the Efficiency Service received from the Service Provider to any building or premises other than the Premises;
- (c) use or install any other system to provide the Premises with energy or efficiency services similar to the Efficiency Service without the prior written consent of the Service Provider;
- (d) make or allow any modifications of or additions to the Client's Facilities which materially adversely affect the load on and efficiency of the System.

## **16. AVAILABILITY AND OUTAGES**

### **Availability**

- 16.1 The Efficiency Service shall be provided and be available at the Premises for the Normal Usage Hours at all times during the Service Term subject to the Permitted Availability Tolerance and this Clause 16.
- 16.2 The Service Provider shall use its best efforts to prevent any interruption in the provision of the Efficiency Service and to minimise the duration of any such interruption.
- 16.3 The Service Provider shall notify the Client as soon as is reasonably practicable if any unexpected significant event occurs which causes or is expected to cause an interruption of the Efficiency Service.

- 16.4 If an Unacceptable Interruption occurs (which is not due to a Service Suspension, Planned Outage or Urgent Outage), the Client may claim Interruption Liquidated Damages.

**Planned Outages**

- 16.5 The Service Provider shall, in scheduling any servicing, maintenance, repair, upgrade, connection, disconnection for maintenance purposes, extension and/or other work in the System (**Planned Outage**), endeavour in as far as is reasonably practicable to:

- (a) consult with the Client as to the scheduling of the execution of a Planned Outage;
- (b) undertake the execution of the Planned Outage outside the Normal Usage Hours;
- (c) undertake the execution of the Planned Outage in phases; and
- (d) ensure that a single Planned Outage does not exceed the Maximum Planned Outage Duration; and
- (e) the aggregate of all Planned Outages for any one year of the Service Term does not exceed the Maximum Annual Planned Outage Duration.

- 16.6 The Service Provider shall in any event give the Client at least 7 business days' prior written notice of the execution of any Planned Outage, and such notice shall state the dates on, and times at which the Planned Outage will be executed, and the extent to which the provision of the Service at the Premises will be interrupted.

**Urgent Outages**

- 16.7 Nothing in this Agreement shall restrict the Service Provider from taking immediate action to avoid injury to persons or significant damage to property on the occurrence of any emergency, provided that the Service Provider shall give the Client as much prior notice as possible and the duration of the interruption (the **Urgent Outage**) is minimised as much as possible.

**17. TAXES AND TAX CONCESSIONS**

- 17.1 In the event that any payment to be made in respect of any invoice is subject by law to any withholding tax, the payer will make payment to the payee of the amount owed, less a deduction for such withholding tax and will account to the relevant tax authority for the withholding tax. Provided always that the payer has possession, as furnished by the payee, of declaration(s) of tax residence on the prescribed forms and certification (or equivalent) of the relevant taxation authorities which are current and accurate in order to confirm the applicability and availability of any reduced rate of withholding tax under the provisions of the relevant double taxation convention and/or treaty, the amount of withholding tax deducted will be calculated by the payer in accordance with any appropriate double taxation convention and/or treaty between the states in which the payer and the payee respectively reside. The payee will furnish declaration(s) of tax residence on the prescribed forms and obtain certification (or equivalent) of the taxation authorities in order that the payer may confirm the applicability and availability of any reduced rate of withholding tax under the provisions of the relevant double taxation convention and/or treaty as envisaged above. Payment of such net sum to the payee and to the relevant tax authority of the said withholding tax will, for the purposes of this Agreement, constitute full settlement of the sums owing under the relevant invoice.
- 17.2 Without prejudice to payment in accordance with Clause 17.1 constituting full settlement of the sums owing under the relevant invoice, the payer will use reasonable endeavours to obtain and provide to the payee evidence from the relevant local tax authority of the payment of the said withholding tax (including, where available, tax deduction certificates or the equivalent thereof). Where the payer is not able to obtain such evidence (having used reasonable endeavours), the payer will provide written confirmation itself to the payee of the payment of said withholding tax.

- 17.3 Prior to planning, designing and acquiring the System, the Service Provider shall ascertain from the Client what concessions, waivers and exemptions it may be entitled to and the Service Provider shall make reasonable endeavours to plan and design the System in a manner that will allow the application of any such concessions, waivers and exemptions as well as include in the System, items that will attract similar concessions, waivers and exemptions, but without adversely affecting the efficiency and affordability of the System.

***[NOTE tax adviser: For Dutch tax purposes, it is not expected that any withholding taxes should be withheld on the payments in relation to the EaaS contract.]***

## **18. INSURANCE**

- 18.1 The Service Provider shall be responsible for arranging and maintaining adequate insurance coverage on the System based on its replacement value.
- 18.2 In the event that the System or any part thereof is damaged or destroyed and the insurance money under the insurance of the Service Provider becomes wholly or partly irrecoverable by reason of any act or default by the Client, its employees and/or agents, the Client shall be liable to pay to the Service Provider the whole or (as the case may require) a fair proportion of the cost of replacing the damaged part of the System.
- 18.3 The Service Provider shall obtain and maintain comprehensive general liability insurance for operations and contractual liability adequate to cover the liability assumed by the Service Provider hereunder, including without limitation the liability for liquidated damages, and with adequate limits in respect of each occurrence of property damage and personal injury.
- 18.4 The Client shall not take any action which may render any policy of insurance of the Service Provider on the System void or voidable or whereby the rate of premium thereon may be increased.

***[NOTE: Clause 18 to be reviewed case-by-case with insurance adviser.]***

## **19. EVENTS OF DEFAULT**

- 19.1 The occurrence of any of the following events shall constitute an event of default on the part of the Client (a **Client Event of Default**):
- (a) the failure or refusal by the Client to pay any amount payable by the Client on the date such amount is due and payable under this Agreement;
  - (b) any act or omission of the Client materially affecting the efficiency and/or safety of the System;
  - (c) any act or omission by the Client which prevents the Service Provider from providing the Efficiency Service in accordance with this Agreement;
  - (d) the Client denies or prevents the Service Provider's access to the Premises, including the Licensed Area, and/or the Meter;
  - (e) the Client tampers with the System, or allows any other person to do so;
  - (f) the Client materially fails to use the Efficiency Service in accordance with the instructions and directions provided by the Service Provider thereby causing or allowing damage to the System;
  - (g) the Client commits any other material breach of this Agreement;
  - (h) the Client becomes insolvent or goes bankrupt;



which event has not been remedied by the Client within a reasonable period after the Service Provider has given written notification thereof.

19.2 If a Client Event of Default occurs, the Service Provider may (without limitation to any other rights it may have) do any or all of the following:

- (a) discontinue the Efficiency Service (in accordance with Clause 20 below);
- (b) reasonably increase the amount of the Security Deposit;
- (c) terminate this Agreement upon giving seven (7) business days written notice; and
- (d) take any other action which the Service Provider may consider necessary to obtain any other available legal remedy, including an injunction to prevent a further breach of this Agreement.

19.3 The occurrence of any of the following events shall constitute an event of default on the part of the Service Provider (a **Service Provider Event of Default**):

- (a) the failure or refusal by the Service Provider to pay any amount payable to the Client on the date such amount is due and payable under this Agreement;
- (b) the occurrence of an Unacceptable Interruption;
- (c) the Service Provider commits any other material breach of this Agreement;
- (d) the Service Provider becomes insolvent or goes bankrupt;

which event has not been remedied by the Service Provider within a reasonable period after the Client has given written notification thereof.

19.4 If a Service Provider Event of Default occurs, the Client may (without limitation to any other rights it may have) do any or all of the following:

- (a) in case of a Service Provider Event of Default as indicated in Clause 19.3(a): set off the amount due against any invoice received from the Service Provider; and
- (b) terminate this Agreement upon giving seven (7) business days written notice.

## 20. **SUSPENSION OF SERVICE; DISCONNECTION AND RECONNECTION**

20.1 The Service Provider shall be entitled to suspend the Efficiency Service and for this purpose disconnect the System from the Client's Facilities (the **Service Suspension**) upon the occurrence of a Client Event of Default and any of the following events:

- (a) a need to protect the health and safety of any person lawfully on the Premises or the general public or to prevent damage to any property; or
- (b) an order or direction given by a competent authority or by law requires the Service Provider to do so.

20.2 In the event of a Service Suspension, the Service Provider shall reconnect the System and resume the Efficiency Service as soon as the event leading to the disconnection is remedied to its reasonable satisfaction. If the disconnection was effectuated pursuant to a Client Event of Default, the Client shall pay the Service Provider's reasonable costs in respect of the relevant disconnection and reconnection.





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- 20.3 A Service Suspension shall not affect the Client's obligation to pay the Availability Charge, save and except that if the suspension or disconnection is due to any of the reasons stated in Clauses 20.1(a) and 20.1(b), the Client will not be liable to pay the Availability Charge for more than 3 months while the suspension or disconnection subsists.

## **21. TERMINATION AND THE EFFECTS OF TERMINATION**

- 21.1 Either Party may terminate this Agreement for convenience at any time, in whole or in part, upon giving at least six (6) months' prior written notice to the other Party (provided that the Party giving notice shall not have committed or is reasonably likely to commit an event of default at the time of giving notice).

- 21.2 Upon termination of this Agreement for convenience pursuant to Clause 21.1:

- (a) the Service Provider shall be entitled to remove the System from the Premises and the costs of such removal shall be borne by the Client if the Client is the terminating Party and shall be borne by the Service Provider if the Service Provider is the terminating Party;
- (b) if the terminating Party is the Client, the Client shall pay to the Service Provider the Client Termination Fee;
- (c) if the terminating Party is the Service Provider, the Service Provider shall pay to the Client the Service Provider Termination Fee.

- 21.3 Upon termination of this Agreement following an event of default (in accordance with Clause 19.2(b) or 19.4(b)):

- (a) the Service Provider shall be entitled to remove the System from the Premises and the cost of such removal shall be borne by the Client in case of a Client Event of Default and shall be borne by the Service Provider in case of a Service Provider Event of Default;
- (b) in case of a Client Event of Default, the Client shall pay to the Service Provider the Client Termination Fee;
- (c) in case of a Service Provider Event of Default, the Service Provider shall pay to the Client the Service Provider Termination Fee.

## **22. LIMITATION AND EXCLUSION OF LIABILITY**

- 22.1 Except as expressly set out in this Agreement, the Parties disclaim and waive any representations and warranties. In particular, the Service Provider does not warrant the uninterrupted supply of Efficiency Service to the Client.
- 22.2 Neither Party shall be liable to the other Party for any consequential or indirect damages, including without limitation loss of revenue, loss of profit, loss of customers, loss of goodwill or loss of business opportunity.

## **23. ASSIGNMENT AND TRANSFER**

A Party shall not be entitled to assign or transfer any of its rights and obligations under this Agreement to a third party without the other Party's prior written consent, such consent not to be unreasonably withheld.

## **24. CHANGE IN LAW**

- 24.1 In the event of a Change in Law, which does not prevent performance of a Party of any of its obligations but compliance with which would either:

- (a) require the Service Provider to incur any increase in capital expenditure or operational costs in order to continue to meet its obligations hereunder; or
- (b) otherwise materially and adversely affect the performance by the Service Provider of its obligations or the enjoyment by the Service Provider of its rights under or pursuant to this Agreement; or
- (c) result in cost savings to the Service Provider;

the Unit Rate shall be adjusted to reasonably compensate the actual, demonstrable effect of such Change in Law on the Service Provider.

- 24.2 Promptly on becoming aware of such Change in Law, the Service Provider shall advise the Client of the relevant change and the estimated increase in capital expenditure or operational costs. The Service Provider shall use reasonable efforts to mitigate the financial impact on the Service Provider and on the Client of any such Change in Law, and any costs incurred by the Service Provider in connection with such mitigation shall be taken into account for purposes of determining the effect of the Change in Law on the Service Provider.

## **25. GENERAL PROVISIONS**

### **Notices**

- 25.1 Any notice to be given under this Agreement shall be a written notice and be either delivered personally or sent by registered post or any other available and acceptable means. The address for service of each Party is its address stated in the Service Specification Sheet (which address may be amended by the relevant Party by giving prior written notice thereof to the other Party). A notice is deemed to have been served, if personally delivered, at the time of delivery, and if mailed by certified or registered mail, at the expiration of 5 business days after the envelope containing it is delivered into the custody of the postal authorities.

### **No Waiver, Remedies Cumulative**

- 25.2 No failure or delay by either Party in exercising any right or remedy under this Agreement shall operate as a waiver thereof, nor shall any single or partial exercise of any right or remedy prevent any further or other exercise thereof or the exercise of any other right or remedy. The rights and remedies provided in this Agreement are cumulative and not exclusive of any rights or remedies provided by law.

### **Entire Agreement; Amendments**

- 25.3 This Agreement contains all of the representations and warranties, undertakings, covenants and agreements between the Parties. All prior accepted terms from negotiations, understandings, undertakings, covenants, representations and agreements, whether oral or written, in connection with this Agreement are merged herein. This Agreement may not be amended or modified except by a written agreement executed by both Parties.

### **Order of preference**

- 25.4 If and to the extent of any inconsistency or conflict between any parts of this Agreement, the order of priority is as follows: the Service Specification Sheet, Clauses and recitals, Schedules, any appendices to the Schedules.

### **Severability**

- 25.5 If any provision of this Agreement is prohibited or unenforceable in any jurisdiction, such prohibition or unenforceability shall not invalidate the remaining provisions hereof.

### **Counterparts**

- 25.6 This Agreement may be executed in any number of counterparts, each of which shall be deemed to be an original and all of which taken together shall be deemed to constitute one and the same instrument.

**No Dissolution or Nullification**

- 25.7 The Parties waive their respective rights to (partly) dissolve (*ontbinden*) or nullify (*vernietigen*) this Agreement on the basis of Sections 6:265 (*ontbinding bij tekortkoming*) or 6:228 (*vernietiging bij dwaling*) of the Dutch Civil Code or any foreign equivalent of this law.

**Exclusion Title 1 Book 7 Dutch Civil Code (*koop*) and Vienna Convention**

- 25.8 The Parties acknowledge that the agreement is a service agreement and not a lease (*huur*) or sale (*koop*) agreement and the Parties acknowledge that they exclude the applicability of Title 1 Book 7 of the Dutch Civil Code (*koop*) and of the Vienna Convention on the International Sale of Goods (1980) and that they do not have any rights there under.

**Confidentiality**

- 25.9 The Parties undertake that they will not at any time disclose or use for any purpose detrimental or potentially detrimental to the other Party (i) any information concerning this Agreement and/or the Efficiency Service, (ii) any other document concerning the business and affairs of the other Party, except (a) to the extent required by law or any competent authority, (b) to their professional advisers subject to a duty of confidentiality and only to the extent necessary for any lawful purpose, and (c) to the extent that at the date hereof or hereafter such information is or shall become public knowledge otherwise than through improper disclosure by any person.

**Governing Law**

- 25.10 This Agreement shall be governed by and construed in accordance Dutch law.

**Dispute Resolution**

- 25.11 All disputes arising in connection with this Agreement and/or any agreements related thereto or resulting therefrom, as well as any disputes with regard to the entering into and/or the existence or validity of this Agreement, shall be settled by the competent court in Amsterdam.
- 25.12 If both Parties agree, a dispute may also be settled by way of binding advice (*bindend advies*) by the Energy Dispute Committee for SMEs (*Geschillencommissie Energie voor zakelijke afnemers*) in accordance with the rules of such Committee ([www.geschillencommissie.nl](http://www.geschillencommissie.nl)).

## SCHEDULE 1: DEFINITIONS AND INTERPRETATION

1. In this Agreement, unless the context otherwise requires:

<b>Agreement</b>	has the meaning as defined in Clause 1.1;
<b>Availability Charge</b>	has the meaning as set out in the Service Specification Sheet;
<b>Availability Charge Adjustment</b>	has the meaning as set out in the Service Specification Sheet;
<b>Average Meter Readings</b>	means either (a) the average of the Meter readings from the invoices for three consecutive months immediately preceding the occurrence of the event resulting in the use of the Average Meter Readings; or (b) in the case of an inaccurate Meter, the three consecutive months immediately preceding the last known accurate reading;
<b>C</b>	means units of temperature measurement in degrees Celsius;
<b>Change in Law</b>	means any law, statute, proclamation, regulation, subsidiary legislation, order or legal interpretation which amends or modifies the applicable law;
<b>Clause</b>	means a clause in these EaaS General Terms and Conditions;
<b>Client Event of Default</b>	has the meaning as defined in Clause 19.1;
<b>Client's Facilities</b>	has the meaning as set out in the Service Specification Sheet;
<b>Client Termination Fee</b>	has the meaning as set out in the Service Specification Sheet;
<b>CPI</b>	means the Consumer Price Index as published by the designated body in the country in which the Efficiency Service is provided;
<b>Default Interest Rate</b>	has the meaning as set out in the Service Specification Sheet;
<b>Delivery Point</b>	has the meaning as set out in the Service Specification Sheet;
<b>Efficiency Service</b>	has the meaning as set out in the Service Specification Sheet;
<b>Electricity Procurement Responsible Party</b>	has the meaning as set out in the Service Specification Sheet;
<b>Interruption Liquidated Damages</b>	has the meaning as set out in the Service Specification Sheet;
<b>Licensed Area</b>	has the meaning as set out in the Service Specification Sheet;
<b>Maximum Monthly Usage</b>	has the meaning as set out in the Service Specification Sheet;
<b>Measured Units</b>	means the metered consumption quantity in respect of the relevant Month, stated in Units, as indicated by the Meter (or based on Average Meter Readings if the Service Provider is unable to conduct a Meter reading);



<b>Meter</b>	means any or all of the metering devices utilised to measure and record the quantity of Units supplied to the Client as part of the efficiency Service pursuant to this Agreement;
<b>Normal Usage Hours</b>	has the meaning as set out in the Service Specification Sheet;
<b>Permitted Availability Tolerance</b>	has the meaning as set out in the Service Specification Sheet;
<b>Permitted Tolerance of Meter Error</b>	has the meaning as set out in the Service Specification Sheet;
<b>Planned Outage</b>	has the meaning as defined in Clause 16.5;
<b>Premises</b>	has the meaning as set out in the Service Specification Sheet;
<b>Security Deposit</b>	has the meaning as set out in the Service Specification Sheet;
<b>Service End Date</b>	means (i) the Service End Date as set out in the Service Specification Sheet, or (ii) if this Agreement is terminated earlier in accordance with its terms, the relevant early termination date;
<b>Service Provider Event of Default</b>	has the meaning as defined in Clause 19.3;
<b>Service Provider Termination Fee</b>	has the meaning as set out in the Service Specification Sheet;
<b>Service Start Date</b>	has the meaning as defined in Clause 3.1;
<b>Service Requirements</b>	has the meaning as set out in the Service Specification Sheet;
<b>Service Specification Sheet</b>	means the Service Specification Sheet as included in the Agreement;
<b>Service Start Date</b>	has the meaning as set out in the Service Specification Sheet;
<b>Service Suspension</b>	has the meaning as defined in Clause 20.1;
<b>Service Temperature</b>	has the meaning as set out in the Service Specification Sheet;
<b>Service Temperature Range</b>	has the meaning as set out in the Service Specification Sheet;
<b>Service Term</b>	has the meaning as defined in Clause 3.1;
<b>System</b>	has the meaning as set out in the Service Specification Sheet;
<b>System Term</b>	means the period commencing on the date of the installation of the System and ending one (1) month after the Service End Date;
<b>Unit</b>	has the meaning as set out in the Service Specification Sheet;
<b>Unit Rate</b>	has the meaning as set out in the Service Specification Sheet;
<b>Unit Rate Adjustment</b>	has the meaning as set out in the Service Specification Sheet;
<b>Urgent Outage</b>	has the meaning as defined in Clause 16.7;
<b>Usage Charge</b>	has the meaning as defined in Clause 11.1(b);

**Water Procurement Responsible Party** has the meaning as set out in the Service Specification Sheet.

2. In this Agreement,
- (a) Unless the context requires otherwise, words importing a singular number shall include the plural number and vice versa.
  - (b) Clause headings and the titles of paragraphs and sections of this Agreement are inserted for convenience of reference only and shall have no effect on the interpretation or operation hereof.
  - (c) The Schedules form an integral part of this Agreement and shall have effect as if set out in full in the body of this Agreement. Any reference to this Agreement includes the Schedules.
  - (d) References to “person” shall include any natural person, corporation, judicial entity, association, statutory body, partnership, limited liability company, joint venture, trust, estate, unincorporated organisation or government, state or any political subdivision, instrumentality, agency or authority, and shall be construed as a reference to such person’s successors or permitted assigns.
  - (e) Unless the context requires otherwise, a reference to one gender shall include a reference to the other genders.
  - (f) A reference to a statute or statutory provision is a reference to it as amended, extended or re-enacted from time to time. A reference to a statute or statutory provision shall include all subordinate legislation made from time to time under that statute or statutory provision.
  - (g) Any words following the terms: including, include, in particular, for example or any other similar expression shall be construed as illustrative and shall not limit the sense of the words, description, definition, phrase or terms preceding those terms.



dated 30 March 2022

## **SCHEDULE 2: FORM OF DEED OF SUPERFICIES**

*[Insert form of deed of superficies]*