Energy Education®
Empowering Your Vision.

Explanation Brief
San Leandro USD CA

This explanation brief, together with our revised contract, is our specific response to the contract changes you requested and the issues you raised. As you know, we have previously made many changes the District has requested (this is compare version 5-4). Even though we were not able to accommodate all of your requested changes, we wanted to provide you additional background and explanations.

Energy Education Specialist, paragraph 3 (a) and (e)

You requested that we remove the phrase "mutually acceptable" concerning the salary to be paid to the energy specialist. One problem with this requested change is that it would restrict or reduce our participation in the hiring process including the decision concerning the salary and hiring of the energy specialist. This contract language is to help assure that Energy Education maintains a seat at the table during these important decisions. As the decision should be, the decision as to the person to be selected and the salary is the final decision of the District. We made changes to try to clarify that the District retains that ultimate control and makes the final decision. However, like the District, we have a vested interest in finding the compensation level that is just right to attract the right person. If the position is underpaid, then you will not be able to recruit and retain qualified people and the program will likely underperform and you will lose savings. On the other hand, if you overpay, then it is money out of your pocket. Likewise, the selection of the right person is vital to the success of the Program. We have the confidence that we can make a valuable contribution to the search process (including salary decisions) based upon our 26 years of experience in partnering with over 1,200 clients in 48 states – while leaving the ultimate decision to the District.

You also requested that we insert a sentence that the District was not required to pay the employee for overtime. The nature of this position makes it virtually impossible to say there will be no overtime. For example, in order to have an effective program that is being substantially implemented, it will be necessary for the energy specialist to periodically perform building audits at odd hours, such as 10:00 p.m. and 5:00 a.m. Also, for building shutdowns right before breaks and holidays (summer vacation, Christmas vacation, etc.), it will be necessary for this person to spend additional time to be sure every savings opportunity has been captured. In

addition, in the financial savings matrix provided to the District (which includes projected savings and cost information), there is included an estimated salary

for the energy specialist and it includes $5,000 for night, weekend and holiday work. Therefore, we were not able to make this change but wanted to provide you this explanation.

Savings Guarantee, paragraph 8

You indicated a concerns that the "savings guarantee" is merely a contractual promise and about the District's remedies. While the question is understandable, in our 26 year history as a company, we have never been sued by a client for any reason, but specifically have not been sued for a failure to make a payment under the savings guarantee. We have provided the District with a number of client references that can give information about our performance under the contracts. Therefore, the District can obtain information from those that work with us to confirm that we fulfill our obligations. Our contract (as previously revised) does provide that CA law applies and that any lawsuit would have venue in Alameda County or the U.S. District Court for the Northern District of CA.

Occasionally, when a question like this is asked, the thought might be that a performance bond could be provided. Equipment vendors and construction companies commonly provide bonds on their capital improvement projects. However, we provide a service rather than sell a piece of equipment and liken our contracts to other service provider contracts. It is not common for service providers such as attorneys, accountants, etc., to provide bonds. We do not have any history of providing bonds or other security with respect to the services we provide in connection with our people-oriented energy conservation program. Accordingly, we would have to decline any request for any additional "security" for performance of the contract.

Termination Fee, paragraph 9

Because you have expressed concern about the termination for convenience fee, we want to further explain our decision to include termination fees at this level in all of our contracts.

From our perspective, because the savings guarantee assures that EEI will pay the District for the difference if the savings do not cover the costs of the program, as long as the District appropriates funds for the utility costs, there should not be a non-appropriations issue. Keep in mind that we are committed for the full contract period and beyond. As you know, our contract specifically provides that the District can continue to use our energy conservation program for so long as it continues implementation of the program. Our extended commitment relies on the District also being committed for the full contract period.

Let us explain how the termination fee relates to our service commitment to the District. As you would expect with an effort that is focused on changing habits and instilling a culture of conservation, our work is particularly intensive in the early phases of our client programs. It is this early effort, our tremendous push of resources on-site, that allows our clients to experience

substantial savings early (even in the first few months) while at the same time a strong foundation for future savings growth is being established. Our shared goal is for a sustainable program in which you receive early savings that continue to grow. Our Transformational Energy Management® process requires us to invest

considerable effort and expense during the initial stages of implementation. These early months also represent a time when energy savings are at their lowest level – after all, the energy conservation program is just getting started in the District.

While our services are front-end loaded your fee payments are not. In fact, there are no fees for the earliest months of your program and with the savings guarantee, the only fees you ever pay come from your savings. We structure the fee payments in all of our contracts to help our client partners realize a positive ROI on its investment in our program as soon as possible and to sustain and grow the level of net savings over time.

Consider the following aspects of our fee structure:

- There are no fees in the first four months (our Fast Track period). This gives you a valuable head start to realize net savings from first implementing our Transformational Energy Management® process,
- Your fees are spread out evenly over the 48 months of the contract period which makes budgeting easier and avoids spikes in payment requirements when the services provided are more intense;
- At the end of the contract period, the District may continue to implement the program and receive services from Energy Education but will not pay any additional fees.

The only downside to this arrangement is that it leaves us exposed financially should the District unexpectedly decide to terminate its energy management program early or fail to substantially implement the program and recommendations made by Energy Education.

As can be clearly seen, if the District chooses to terminate for convenience, Energy Education has significant exposure to financial loss. Our termination fee helps us recoup the upfront investment we made to get the energy program underway.

Please note that our contract is not like other contracts that you review. Specifically, the contract we have proposed eliminates rather than presents budget risks for the District. There is no financial risk for the District. And while the District can improve its financial position, it cannot lose money with this program.

In addition, the District actually controls whether the contract will be terminated in a manner that would require payment of a termination fee. If the District chooses to terminate for convenience, even if Energy Education desires otherwise, that is an election the District is allowed to make. The District will know in advance the cost of such an election.

Our program requires both parties to be fully engaged for the program to be successful. The presence of a termination fee encourages the District to be as committed as Energy Education is to substantially implement the recommendations made by our firm.

Finally, it is important to recognize that termination fees are not applicable to every termination of the contract. By the terms of the contract, the termination fee section does not limit the District from pursuing the full range of available legal rights and remedies if we do not satisfy our material obligations under the contract (see the last two sentences of Section 9 of the contract). Essentially, if we fail to honor the contract and the services we are contractually committed to provide, the District reserves the right to terminate without the requirement to remit a termination fee.

We look forward to a long and productive relationship with the District and we desire its commitment for the full contract period. We would rather not offer the termination fee option at all, but we accept that the District could elect not to continue the program for its own reasons or alternatively, for reasons entirely under the control of the District, the District could elect not to substantially implement the program.

Termination Event (paragraph 10) and Proprietary Information (paragraph 11)

You raised questions concerning these 2 paragraphs and the use of our Intellectual Property or continuing with the energy specialist position after termination. We wanted to provide you with some background.

We recognize these provisions (and others in our contract) that relate to our proprietary information may seem harsh. Yet, these provisions are a matter of business necessity for our company.

We are intent on maintaining exclusive ownership of and available legal protections for our proprietary program at all times and in all circumstances. We are equally intent on clearly communicating such intent to our prospects. Thus, we present and negotiate for contracts including clauses that are designed specifically to protect our proprietary program. Examples of these protection clauses include: (1) an express acknowledgment that Energy Education owns the proprietary program, (2) the confidentiality provisions, and (3) the clause in paragraph 10 that you questioned (concerning discontinuing the employment of energy specialists trained by Energy Education in that position).

A termination is a rejection of the contract terms and the relationship between the school district and Energy Education. It is our firmly held belief that in such a circumstance it is inappropriate for a school district to continue to use the proprietary program, which relies in large part on the collaboration and support of our specialists. Furthermore, we cannot tolerate the risks of our proprietary program being held or used by a school district that has rejected

the contract and the relationship. To retain all available protection, we only permit use of our proprietary program under written contract. Accordingly, a school district must cease using the proprietary program and return all materials if the contract is terminated. We do not believe it would be possible for an energy specialist we have trained to continue to serve in that capacity without using the proprietary program they have been exposed to in their training. Therefore we insist on discontinuing that person in that position. We negotiate with each of our clients for agreement on this referenced clause which is standard for our contracts.

However, we also want to be sure it is clear that the provision in paragraph 10 does not mean that the district has to terminate the energy specialist's employment with the District – they simply cannot

continue to serve in the position of energy specialist. This can be particularly important where, as in the case of your District, the energy specialist position is a part-time position. This person can continue working for the District in any other position – just not as an energy specialist.

Equally important is what this provision does not prohibit. The District is not prohibited from hiring another person – not trained by Energy Education – and putting them in an energy manager position.

Therefore, without using any of the people trained by Energy Education or any of the documents and processes provided by Energy Education, the District is free to maintain an energy program.

We have made other contract changes based upon our discussions in the following paragraphs: 2nd paragraph on page 1; 2, 3(a), 3(b), 3(c), 4(b), 4(c), 10, 12(a), 12(e), 12(g). Our hope is that this background information will be helpful as the District evaluates these important issues.