

## **EnergyCAP® Enterprise Implementation Services Agreement**

(rev. 06/01/10)

1. This Agreement provides the terms and conditions by which EnergyCAP, Inc. ("ECI") agrees to furnish Software Implementation Services ("Services") to Licensee in order to assist Licensee in making EnergyCAP Enterprise software ("Software") operational, as required by Licensee, in a timely manner.
2. **Scope.** ECI shall, as an independent contractor, provide certain consulting, software development, implementation, training, and other services as described in Quote form or Software Purchase Proposal which lists the specific implementation tasks and functional requirements for the Services. Any Services not listed in Quote form or Software Purchase Proposal are not included in this Agreement. All software delivered under this Software Implementation Services Agreement shall be included in the definition of "Software" set forth in the EnergyCAP Enterprise Software End-User License and referred to in the Software Purchase Agreement as Software End-User License. Accordingly, ECI shall support all software delivered under this Software Implementation Services Agreement under the terms of any in-force EnergyCAP Maintenance Agreement.
3. **Diligence.** ECI shall appoint sufficient staff of suitable training and skills to provide the services called for by this Agreement. ECI shall endeavor to complete tasks per the delivery dates shown in Quote form or Software Purchase Proposal. Completion dates may be extended at no fault to ECI due to uncontrollable factors which may include, but are not limited to: inclement weather that prevents travel or forces office closure; delays by Licensee in making supporting systems, information and personnel available; and changes in scope by Licensee.
4. **Acceptance of Deliverables.** Each deliverable shall be subject to review by Licensee to verify that the deliverable is acceptable to Licensee. In the event that any deliverable is not acceptable to Licensee, Licensee shall give ECI written notice thereof and shall cooperate with ECI in identifying what aspect of the deliverable fails to conform. ECI shall, at no cost to Licensee, promptly correct any deficiencies which prevent such deliverable from conforming. If the deliverable does not conform within a reasonable period of time after initial delivery to Licensee, Licensee may (i) immediately terminate this Software Implementation Services Agreement, the Software Purchase Agreement and/or any attachment thereto, for cause in accordance with Section 9 of this Software Implementation Services Agreement, or (ii) require ECI to continue to attempt to correct the deficiencies, reserving the right to terminate as above at any time.
5. **Limitation of Liability.** IN NO EVENT SHALL EITHER PARTY BE LIABLE TO THE OTHER PARTY FOR ANY INCIDENTAL OR CONSEQUENTIAL, OR ANY INDIRECT LOSS OR DAMAGE, INCLUDING WITHOUT LIMITATION LOST PROFITS, ARISING OUT OF THIS AGREEMENT OR ANY OBLIGATION RESULTING THEREFROM, WHETHER IN AN ACTION FOR OR ARISING OUT OF ANY CAUSE WHATSOEVER, REGARDLESS OF THE FORM OF ACTION, WHETHER IN CONTRACT, TORT INCLUDING NEGLIGENCE, STRICT LIABILITY OR OTHERWISE. THE ENTIRE LIABILITY OF EITHER PARTY FOR ANY CLAIM, LOSS, DAMAGE OR EXPENSE ARISING IN CONNECTION WITH THE PERFORMANCE OF THIS AGREEMENT, REGARDLESS OF THE FORM OF ACTION, WHETHER IN CONTRACT, TORT INCLUDING NEGLIGENCE, STRICT LIABILITY OR OTHERWISE, SHALL BE LIMITED TO DIRECT DAMAGES.
6. **Remedies.** EXCEPT FOR OTHER REMEDIES SET FORTH IN THIS SOFTWARE IMPLEMENTATION SERVICES AGREEMENT, THE SOLE AND EXCLUSIVE REMEDY FOR FAILURE OF ECI TO PROVIDE THE SERVICES OR FOR ANY BREACH OF THIS SOFTWARE IMPLEMENTATION SERVICES AGREEMENT BY ECI SHALL BE TERMINATION OF THE

SERVICES BY LICENSEE IN EXCHANGE FOR A FULL REFUND OF ALL AMOUNTS PAID UNDER THE SOFTWARE IMPLEMENTATION SERVICES AGREEMENT.

7. Limited Warranty Regarding Services. ECI warrants that (a) it shall make its best effort to provide the Services substantially free of defects and malfunctions, (b) each deliverable will have all of the functions and features and perform as agreed by the parties in Quote form or Software Purchase Proposal, (c) the deliverables do not and shall not infringe any patents, copyrights, trade secrets, or other intellectual property, proprietary or contractual rights of any third party, and (d) Licensee shall have the full right to use and exploit such materials in accordance with the terms and conditions of this Software Implementation Services Agreement without claims from any third party, including, without limitation, any employee, agent or subcontractor of ECI. ECI shall remedy any failure to comply with the foregoing warranties at no cost to Licensee, including, without limitation, by repairing or replacing any non-conforming deliverables and/or obtaining any necessary third party rights.

8. Disclaimer. EXCEPT AS PROVIDED EXPRESSLY IN THIS SOFTWARE IMPLEMENTATION SERVICES AGREEMENT, YOUR SOFTWARE PURCHASE AGREEMENT AND ANY OTHER ATTACHMENT THERETO, ECI HEREBY DISCLAIMS ALL IMPLIED AND EXPRESS WARRANTIES, INCLUDING WITHOUT LIMITATION IMPLIED WARRANTIES FOR MERCHANTABILITY, ACCURACY, INTEGRATION, OR FITNESS FOR PARTICULAR PURPOSE, RELATING TO THE SERVICES, INCLUDING WITHOUT LIMITATION ANY SOFTWARE, HARDWARE, TECHNOLOGY, OR TANGIBLE OR INTANGIBLE PROPERTY THEREIN.

9. Term. This Agreement shall remain in full force and effect until Services have been completed by ECI, accepted by Licensee, and paid in full, except that Licensee may terminate this Software Implementation Services Agreement, the Software Purchase Agreement and/or any attachment thereto, by providing written notice to ECI if (a) ECI fails to satisfactorily perform its contracted duties and responsibilities in accordance with this Software Implementation Services Agreement, the Software Purchase Agreement and/or any attachment thereto, or (b) ECI materially breaches any representation, warranty or covenant set forth in this Software Implementation Services Agreement, the Software Purchase Agreement and/or any attachment thereto, and ECI is unable to cure such failure or breach within thirty (30) days of receipt of notice from Licensee specifying Licensee's intention to terminate if such deficiency is not cured. The rights and remedies of Licensee provided in this clause shall not be exclusive and are in addition to any other rights and remedies provided by or in law, equity or under this Agreement.

10. Independent Contractor Status. ECI will render the services hereunder as an independent contractor (and not as an employee or agent of, or joint venturer with, Licensee) and, accordingly, neither ECI nor Licensee will (a) participate in any of the other parties' employee benefits plans nor receive any other compensation beyond that stated in this Agreement, (b) have the power or authority to bind the other party or to assume or create any obligation or responsibility, express or implied, on the other party's part or in the other party's name, except as otherwise set forth in this Agreement, or (c) represent to any person or entity that Licensee or ECI or any employee of Licensee or ECI has such power or authority. Each party shall be solely responsible for determining the manner and means by which it performs the duties and responsibilities assigned to it, and shall be solely responsible and liable for its employees and agents and their acts. Licensee shall make the payments due to ECI under this Agreement without any deductions for Social Security, employment, payroll or similar taxes, in accordance with the status of ECI as an independent contractor. ECI shall indemnify Licensee for any losses resulting from any failure of ECI to pay withholding, employment, or unemployment taxes or worker's compensation payments with respect to ECI's employees or approved subcontractors.