

BCK DRAFT DATED 5/17/17 #2

**PROFESSIONAL/CONSULTING SERVICES AGREEMENT
(Treasurer and Treasury Related Services)**

This PROFESSIONAL/CONSULTING SERVICES AGREEMENT (“Agreement”) is made by and between the Cape Light Compact JPE, a joint powers entity organized pursuant to Massachusetts law (the “Compact”), and [insert] (“Consultant”). The Compact and Consultant may be referred to herein collectively as the “Parties,” or either singularly as a “Party.” This Agreement is effective as of [insert].

WHEREAS, the Compact issued a Request for Quotes on May 16, 2017 for treasurer and treasury related services;

WHEREAS, the Compact seeks to enter into an agreement with Consultant for certain services which are defined in Section 2.1; and

WHEREAS, Consultant has the expertise required to provide the Compact with the services required pursuant to this Agreement.

NOW THEREFORE, in consideration of the promises and mutual covenants set forth herein, Consultant and the Compact do hereby agree as follows:

SECTION 1 TERM OF AGREEMENT AND TERMINATION

1.1 **Term.** This Agreement is effective as of the date set forth above and shall continue in force and effect until [insert], unless this Agreement is terminated before such date under the provisions of Section 1.2. In addition, the Compact may, in its sole discretion, extend the term of this Agreement for an additional [insert] year(s).

1.2 **Termination.** The Compact shall have the right to terminate or suspend this Agreement for any reason, including for convenience. Consultant may terminate this Agreement only if the Compact materially breaches its obligations under this Agreement. The terminating Party shall provide written notice to the other Party of any such termination or suspension, specifying the effective date thereof. If the terminating Party is the Compact, such notice shall be given at least fifteen (15) calendar days before such effective date; if the terminating Party is Consultant, such notice shall be given at least ninety (90) calendar days before such effective date. In addition, if the Compact terminates this Agreement for cause, the Compact shall be entitled to deduct and/or be reimbursed any costs of cure and transition costs (including reasonable attorneys’ fees) that it or a member Municipality (as defined herein) incurs related to engagement of a substitute Consultant.

1.3 **Obligations upon Termination.** Following termination of this Agreement, the Parties shall each discharge by performance all obligations due to the other Party that arose up to the date of termination of the Agreement. Consultant agrees to provide transition services requested by the Compact as may be necessary in connection with appointment of a replacement Treasurer

in order to ensure that the transition of Treasurer and related functions occurs in an orderly and professional manner. Such transition services shall be billed at the rates set forth in Section 3.1.

SECTION 2 SCOPE OF SERVICES AND RELATED MATTERS

2.1 **Services.** Consultant agrees to provide the expertise, labor, materials and supplies necessary to perform the services and deliverables described in Exhibit A attached hereto from time to time and such other services as may be specifically requested by the Compact from time to time (the “Services”). All such Services and deliverables shall be designed to achieve the anticipated outcomes specified in the description of Services and shall be provided in accordance with the terms and conditions of this Agreement.

2.2 **Changes.** The Compact may, from time to time, require changes in the scope of the Services to be performed hereunder. Such changes must be evidenced in written amendments to this Agreement. Any Services performed or proposed by Consultant shall not be reimbursed unless they are approved in writing by the Compact prior to their rendering.

2.3 **Timing of Performance.** Consultant shall commence and complete the Services in accordance with the project milestone schedule incorporated into Exhibit A. If no schedule is incorporated, Consultant shall begin to render Services on the effective date of this Agreement and shall continue to render the Services in a prompt and timely manner.

2.4 **Staffing; Background Check Requirements.** The Compact may require Consultant to remove from its project team such employees of Consultant or subcontractors of Consultant as the Compact, in its reasonable discretion, deems objectionable, or whose continued employment in connection with the Services is deemed by the Compact, in its reasonable discretion, to be contrary to the best interests of the Compact.

Upon request by the Compact, Consultant shall comply with the Compact’s written requirements for employee background checks, as set forth in Exhibit C, and as may be amended from time to time by the Compact.

[] required [] not required

2.5 **Conflicts of Interest.** Consultant covenants that it presently has no interest, and shall not acquire any interest, directly or indirectly that would conflict in any manner or degree with the performance of the Services. Consultant agrees to diligently serve and endeavor to further the best interests of the Compact, as known or made known to Consultant. Consultant further agrees not to undertake activities that conflict, or are not in accordance with, the best interests of the Compact, and will disclose any other employment or engagements that could conflict with its obligations under this Agreement. Consultant further covenants that it shall comply with all relevant provisions of G.L. c. 268A.

2.6 **Points of Contact.** Consultant names **[insert]**, as the day-to-day point of contact for the Compact for all issues arising under this Agreement and the person responsible for ensuring over the entire term of this Agreement that the Services are performed and completed in a manner

satisfactory to the Compact and in accordance with the terms of this Agreement. The Compact names [insert] to be the day-to-day point of contact for Consultant for all issues arising under this Agreement.

2.7 Appointment of Treasurer. Consultant appoints the person designated in Exhibit A to serve as the Compact's Treasurer. The designation of the Treasurer shall be subject to the review, approval and election by the Compact's Governing Board. Consultant and Treasurer agree that the Treasurer shall abide by all provisions of the Joint Powers Agreement of the Compact, as in effect as of April 12, 2017, and as may be amended from time to time (the "JPA"). Consultant and Treasurer each understand and agree that the Treasurer shall perform the Services in accordance with the votes of the Compact's Governing Board (with the guidance and direction of the JPE Administrator in accordance with such votes), which may occur after execution of this Agreement. Consultant and the Treasurer each understand and agree that the Treasurer shall be primarily responsible for the performing the Services. Unless approved by the Compact's Governing Board, only administrative or clerical tasks set forth in Exhibit A or administrative or clerical tasks related thereto may be performed by other Consultant staff.

Consultant shall also designate a person to serve as Assistant Treasurer in the event that the Treasurer is unavailable due to disability, prolonged or extended absence from work, termination from employment or emergency circumstances. The designation of the Assistant Treasurer shall be subject to the review, approval and election by the Compact's Governing Board. The Assistant Treasurer shall be bound by all provisions applicable to the Treasurer under this Agreement.

In addition, Consultant understands and agrees that the Treasurer designated by Consultant and approved by the Compact's Governing Board in accordance with Section 2.1 serves at the pleasure of the Governing Board. Consultant agrees and acknowledges that at any time, the Governing Board may vote to remove the Treasurer and vote to appoint another employee of Consultant to serve as Treasurer, or may vote to terminate this Agreement and appoint another Treasurer.

SECTION 3 COMPENSATION AND RELATED MATTERS

3.1 Rates of Compensation. Consultant shall be compensated by the Compact for the Services in accordance with the terms and rates set forth in Exhibit B hereto. The Compact may reject any invoices using billing rates that are not consistent with Exhibit B, unless the Compact has previously accepted such substitute rates in a written amendment to this Agreement.

3.2 Invoicing and Payment. Consultant shall submit monthly invoices to the Compact by the 10th day of each month, unless otherwise authorized in writing by the Compact. The Compact will remit payment within forty-five (45) calendar days of the Compact's receipt of each monthly invoice. Payment may be contingent upon final inspection and/or acceptance of the Services. Upon request, Consultant shall provide to the Compact all backup documentation required to establish the value of the Services in place as represented by Consultant's monthly invoices.

3.3

3.4 3.3 **Effect of Payment.** The Compact shall not be deemed to have accepted any improper Services, materials or performance by virtue of any payment made to Consultant. Payments shall be deemed advances and are subject to adjustment for errors, overpayments, or the Compact's good faith determination that the remaining balance of payments may be insufficient to ensure completion of the Services.

3.4 **Withholding.** The Compact may withhold a payment of all or a part of any invoice to the extent as may be necessary to protect itself from loss caused by: (i) defective Services not remedied; (ii) claims filed or reasonable evidence indicating probable filing of claims by other parties against Consultant or the Compact in connection with the Services;; (iv) unsatisfactory performance of the Services; (v) Consultant's failure to pay any amounts due to the Compact; or (vi) Consultant's failure to perform any of its obligations under this Agreement. In addition, if the Compact has a reasonable indication that the unpaid balance will be insufficient to cover the cost to complete the Services or that the Services will not be completed within the project milestone schedule (if any), the Compact may withhold payment of all or a part of any invoice to the extent as may be necessary to protect itself from such anticipated losses. The Compact shall notify Consultant of the grounds for any withholding. When Consultant provides performance assurance satisfactory to the Compact that will protect the Compact for the amount withheld, payment will be made. When deemed reasonable by the Compact, the Compact may use such withheld funds to undertake remedial measures.

SECTION 4 PERFORMANCE STANDARDS

4.1 **General Performance Standard and Warranty.** Consultant assumes professional and technical responsibility for the performance of the Services in accordance with the terms of this Agreement and Good Industry Practice, and any additional guarantee or warranty specified in the description of Services set forth in Exhibit A. If, during the performance of the Services or within one (1) year following completion thereof, the Services fail to meet such standards, Consultant shall promptly and timely (no more than five business days) furnish all remedial services and materials necessary to correct such deficiencies at Consultant's sole cost and expense. Consultant shall also be responsible for reimbursement of the Compact's losses related to such defective Services during the warranty period. For purposes of this Section 4.1, the term "Good Industry Practice" means the practices, methods and acts (including, but not limited to, the practices, methods and acts engaged in or approved by a significant portion of the accounting and financial services industries in the performance of professional accounting and financial services) that, at a particular time, in the exercise of reasonable judgment in light of the facts known or that should have been known at the time a decision was made, would have been expected to accomplish the desired result in a manner consistent with law, regulation, reliability, economy and expedition. Good Industry Practice includes generally accepted accounting principles, and is not intended to be limited to consideration of any one practice, method or act, to the exclusion of all others, but rather, is intended to require the consideration of a spectrum of possible practices, methods or acts.

4.2 **Representations, Warranties and Continuing Covenants.** In performing its obligations hereunder during the term of this Agreement, Consultant represents and warrants that it shall: (i) exercise reasonable care to assure that its operations are prudently and efficiently

managed; (ii) employ an adequate number of competently trained and experienced personnel to carry out the Services; (iii) spend such time in performing the Services as is reasonable and necessary to fulfill effectively its obligations under this Agreement; (iv) comply with all relevant industry standards and practices for the delivery of Services to the Compact; (v) comply with applicable laws and professional licensing requirements; (vi) ensure that it validly owns or licenses all intellectual property used in the performance of the Services, with a right to sublicense to the extent necessary, and that such licenses are maintained at all times during the term of this Agreement; and (vii) provide the required notice under Section 7.5 (Notice of Claims) of this Agreement.

4.3 Correction of the Services. Consultant is required to correct in a prompt and timely fashion any Services rejected by the Compact. Consultant shall correct at its own cost and bear the expense of additional services performed to correct non-conforming Services. If Consultant fails to cure the default or produce a plan acceptable to the Compact (in its reasonable discretion) to cure the default in a prompt and timely fashion, the Compact may take over the Services or any separable part thereof, and complete the same or have the same completed at Consultant's expense. In taking over, the Compact shall have the right, for the purpose of completing the Services, to take possession of all equipment, supplies and materials belonging to Consultant and purchased or leased for the performance of the Services. For such purpose, this Agreement shall be construed as an assignment by Consultant to the Compact of said equipment, supplies and materials.

4.4 Periodic Reporting. Upon the request of the Compact, Consultant shall promptly submit a report detailing the status of the Services including the progress toward achieving completion of any deliverables or project milestones. Additional reporting requirements may be set forth in Exhibit A.

4.5 Fiduciary Duty. Consultant and Treasurer each agree that it/he has fiduciary duties to the Compact.

SECTION 5 INTELLECTUAL PROPERTY MATTERS; OWNERSHIP OF BOOKS AND RECORDS

5.1 Intellectual Property Rights; Work for Hire. Consultant agrees that any work of authorship created or developed by Consultant during performance or delivery of services to the Compact, either individually or jointly with others, in the course of the rendering the Services to the Compact shall be deemed a "work for hire," and the exclusive property of the Compact. To the extent not deemed a "work for hire" by operation of law, with respect to any invention, trade secret, or work of authorship created or developed in the course of the rendition of services to the Compact, Consultant hereby irrevocably assigns, transfers, and conveys to the Compact all of Consultant's right, title and interest in such property, including but not limited to, all rights of patent, copyright, trade secret or other proprietary right in such property. Further, Consultant agrees to execute any documents or take any action reasonably requested by the Compact to perfect the Compact's ownership of any such property. Consultant further agrees that, to the best of its knowledge, all work created or developed by Consultant will be original and non-infringing.

5.2 Dissemination of Information. Consultant shall not disseminate any information, reports, information, data, etc., created, prepared, assembled or obtained in performance or delivery of Services to any third party without the prior written consent of the Compact. Consultant shall not issue publicity, advertising, news releases, grant press interviews or create or distribute social media regarding the Services or the Compact during or after the performance or delivery of the Services without the prior written consent of the Compact.

5.3 Ownership of Books and Records. The books and records (including electronic and digital records) pertaining to the Compact which are in the possession or under the control of Consultant shall be the property of the Compact. The Compact shall have access to such books and records at all times during Consultant's normal business hours. Copies of all such books and records shall be provided by Consultant to the Compact at the Compact's expense. The Compact shall have view only permissions to electronically view and access the Compact's accounts at all times.

SECTION 6 INSURANCE

Unless waived by the Compact in writing, upon a finding under special circumstances giving rise to minimal liability under the contract and risk to the Compact, Consultant shall, at its sole expense, procure and maintain the following insurance:

- (a) Until completion of the Services:
 - i. Workers' Compensation and Employers' Liability Insurance covering each and every worker employed in, about or upon the Services, as provided for in each and every statute applicable to the Workers' Compensation and Employers' Liability Insurance.
 - ii. Commercial General Liability Insurance, written on an occurrence form including coverages for Bodily Injury, Broad Form Property Damage, Personal Injury, and Contractual Liability (to specifically include coverage for the indemnification clause of this Agreement), with minimum limits of \$1,000,000 per occurrence/\$2,000,000 general aggregate.
 - iii. Automobile Liability Insurance covering all owned, non-owned and/or hired motor vehicles to be used in connection with the Services with a minimum combined single limit of \$1,000,000 bodily injury and property damage,
 - iv. Umbrella Liability Insurance covering over underlying General Liability, Auto Liability and Employers' Liability Insurance with a minimum limit of \$1,000,000.
 - v. Professional Liability Insurance covering Consultant's errors and omissions relating to the scope of Services to be provided. Such insurance shall be provided at a limit of at least \$1,000,000. Such insurance may be maintained on a "claims made" basis but in such case it shall always be subject to a retroactive date that is effective prior to the effective date of this Agreement.

vi. Crime/Fidelity/Employee Dishonesty insurance, including coverage for loss resulting from dishonesty, theft, forgery and alteration, and computer fraud by any Consultant employee with minimum coverage limits of \$1,000,000 per occurrence. Such insurance shall also extend to Compact Accounts and Funds under Consultant's responsibility.

vii. Network Security and Privacy Liability (aka Cyber Liability) Insurance including coverage for liability arising from loss or disclosure of Business Data; system or privacy breach; denial or loss of service; introduction, implantation or spread of malicious software code; and unauthorized access to or use of computer systems or Business Data with minimum coverage limits of \$1,000,000 each occurrence/claim. If coverages are provided on a claims made basis, any applicable coverage retroactive date shall always be the effective date of this Agreement

(b) After the Services are complete:

i. Professional Liability Insurance required above shall be maintained with a limit of at least \$1,000,000 for at least three years.

ii. If Network Security and Privacy Liability (aka Cyber Liability) Insurance required above applies on a claims made basis, it shall be maintained with a limit of at least \$1,000,000 for at least three years.

The Compact reserves the right to refuse any exception to the standard limits and coverages if it is determined that the exception is not in the best interest of the Compact. Consultant's insurance companies are to be licensed as "admitted" carriers in Massachusetts with minimum acceptable A.M. Best ratings of "A" and size Class VIII, or as otherwise acceptable to the Compact, in its discretion. The Compact reserves the right of final approval of Consultant's insurance companies.

Consultant agrees to waive any rights of subrogation against the Compact, the Compact's members, and their respective employees, subcontractors, workers and agents. Consultant shall name the Compact and its officials and employees as additional insureds on its commercial general liability insurance, automobile liability insurance and umbrella liability insurance policies.

Consultant shall not begin rendering Services without first submitting to the Compact the insurance certificate(s) that indicate the coverages required by this Agreement. The insurance certificate(s) shall provide that there will be no cancellation or reduction of coverage without thirty (30) days prior written notice to Consultant and Consultant shall in turn provide at least (thirty) 30 days advance notice of cancellation to the Compact. If the policy expires prior to completion of the Services, Consultant must submit replacement insurance certificate(s) prior to the policy expiration date. Failure to submit new certificates shall result in withholding

payments and/ or may lead to the termination of this Agreement. Consultant shall be solely responsible for tracking and reporting to the Compact the expiration of the policies shown on the insurance certificate(s) provided.

SECTION 7 INDEMNIFICATION BY CONSULTANT¹ AND DAMAGES FOR BREACH; BOND AND RELATED MATTERS

7.1 Indemnification. To the fullest extent allowed by law, Consultant (and its officers, directors, employees, servants, agents, representatives, attorneys, independent contractors, successors and assigns) shall indemnify, defend, and hold harmless the Compact, and the individual members (and all of the respective officials, officers, directors, employees, servants, agents, representatives, attorneys, independent contractors, successors and assigns of the Compact each individual Member) from and against any and all costs, claims, liabilities, damages, expenses (including reasonable attorneys' fees and expenses), causes of action, suits, and/or judgments caused by, arising out of, or related to any act or failure to act of Consultant (and/or its officers, directors, employees, servants, agents, representatives, attorneys, independent contractors, successors and assigns) related to this Agreement, including, but not limited to, any failure on the part of Consultant (and/or its officers, directors, employees, servants, agents, representatives, attorneys, independent contractors, successors and assigns) to perform or comply with any of the covenants, agreements, terms, or conditions contained in this Agreement on its part to be performed or complied with. Consultant's indemnification obligation includes claims related to the unauthorized use of any trade secrets, patent infringement, or trademark or copyright violation. Consultant's indemnification obligation is not limited in any way by the amount or type of damages or compensation payable by the Compact. Consultant agrees to pay all costs relating to indemnification claims, including reasonable attorneys' fees incurred in investigating and responding to claims, within thirty (30) days of receipt of a payment request.

7.2 Duty to Mitigate. Each Party agrees that it has a duty to mitigate damages and covenants that it will use commercially reasonable efforts to minimize any damages it may incur as a result of the other Party's performance or non-performance of this Agreement.

7.3 Limitations. NO PARTY HERETO SHALL BE LIABLE FOR CONSEQUENTIAL, INCIDENTAL, PUNITIVE, EXEMPLARY OR INDIRECT DAMAGES, LOST PROFITS OR OTHER BUSINESS INTERRUPTION DAMAGES, BY STATUTE, IN TORT OR CONTRACT. Notwithstanding the foregoing, Consultant acknowledges that the preceding sentence shall not limit the Compact's rights to seek indemnification from Consultant for consequential, punitive, or incidental damages or other such losses claimed by third parties.

7.4 No Cap on Consultant's Liability.² Consultant's liability under this Agreement shall not be limited to the value of the Services rendered under this Agreement; further, Consultant's liability shall not be limited by the availability of its insurance coverage.

¹ Note to Consultant: In accordance with guidance received from the Massachusetts Office of Attorney General, the Compact cannot indemnify private parties.

² Note to Consultants: The Compact does not accept liability caps as a matter of public policy, and the constitutional prohibition on providing private parties with indemnification rights may also apply.

7.5 **Notice of Claims.** Consultant will provide formal written notice to the Compact in the event that Consultant receives notice of pending or threatened litigation, claims or assessments against Consultant or the Compact in connection with the Services rendered by Consultant under this Agreement.

7.6 **Bond.** Consultant and Treasurer understand and agree that the Treasurer shall be required to post a bond in accordance with Massachusetts law. The Compact shall reimburse Consultant and/or Treasurer for the costs of the bond. Consultant and Treasurer each agree that in the event of a breach by Consultant or Treasurer under this Agreement, the bond shall be the last resort to cover losses related to such breach. Consultant shall be liable in the first instance.

7.7 **Waiver of Immunities.** Consultant and Treasurer each agree that it/he shall not raise any claim of immunity that may be available to municipal officers under Massachusetts law with respect to any claim that may be raised or asserted by the Compact.

SECTION 8 CHOICE OF LAW AND DISPUTE RESOLUTION

This Agreement shall be construed under and governed by the laws of the Commonwealth of Massachusetts, without regard to its rules regarding choice of laws. Any dispute that arises regarding this Agreement that cannot be resolved by informal negotiations shall be submitted to nonbinding mediation. If the Parties cannot agree upon a mediator, the Parties shall request that the American Arbitration Association, Boston, Massachusetts, appoint a mediator. Each Party shall bear its own mediation costs. Injunctive relief may be sought by either Party without resorting to mediation to prevent irreparable harm. Exclusive venue for any judicial proceeding involving a dispute arising from this Agreement shall be Barnstable County Superior Court, Massachusetts. In any judicial action, the “Prevailing Party” shall be entitled to payment from the opposing party of its reasonable costs and fees, including, but not limited to, attorneys’ fees arising from the civil action. “Prevailing Party” means the Party who most substantially prevails in its claims or defenses in the civil action. Consultant shall diligently carry on the Services and maintain the project milestone schedule during any dispute resolution proceedings, unless otherwise agreed to by the Compact in writing.

SECTION 9 ASSIGNMENT AND SUBCONTRACTING

None of the Services shall be subcontracted or assigned, in whole or in part, without the prior written approval of the Compact, in its sole discretion.

SECTION 10 CONFIDENTIALITY

Through the term of this Agreement, the Parties may share certain confidential or proprietary information with each other. The Parties agree not to use this information for any purposes other than as needed to meet their respective obligations under this Agreement and to protect such information to the same standards as each Party holds its own confidential or proprietary information.

SECTION 11 MISCELLANEOUS

11.1 **Notices.** All notices, demands, requests, consents or other communications required or permitted to be given or made under this Agreement shall be in writing and

if to Consultant to:

[insert]

Prior to July 1, 2017, if to the Compact to:

Margaret T. Downey JPE Administrator
Cape Light Compact
3195 Main Street
Open Cape Building
Barnstable, MA 02630
mdowney@capelightcompact.org (email)

After July 1, 2017, if to the Compact to:

Margaret T. Downey
JPE Administrator
Cape Light Compact
261 White's Path
South Yarmouth, MA 02664
mdowney@capelightcompact.org (email)

Except for any notice required by law to be given in another manner, all notices, waivers, demands, or other communications required or permitted by this Agreement to be effective shall be in writing, properly addressed, and shall be given by: (i) personal delivery; (ii) established overnight commercial courier delivery service with charges prepaid or duly charged by the sender; or (iii) registered or certified mail, return receipt requested, first class, postage prepaid. Notices given hereunder shall be deemed sufficiently given on: (i) the date of personal delivery if so delivered; (ii) the day after sending if sent by established overnight commercial courier delivery service; or (iii) the fifth day after sending if sent by registered or certified mail. Either Party may additionally provide notice by electronic mail, facsimile, or telephone communication, but this shall not relieve the Party of the obligation to provide notice as specified above.

11.2 **Entire Agreement; Amendments.** This Agreement constitutes the entire agreement between the Parties hereto with respect to the subject matter hereof and supersedes all prior oral or written agreements and understandings between the Parties relating to the subject matter hereof. To the extent any of the exhibits to this Agreement contain terms that conflict with the terms set forth in the main body of this Agreement, the language in the exhibits shall be disregarded. This Agreement may only be amended or modified by a written instrument signed by both Parties hereto.

11.3 Independent Contractor; No Joint Venture. Consultant will perform all Services under this Agreement as an independent contractor. Consultant understands and agrees that none of its employees are Compact employees by virtue of entering into this Agreement. Nothing herein contained shall be deemed to constitute either Party a partner, agent or legal representative of the other Party or to create a joint venture, partnership, agency or any relationship between the Parties. The obligations of the Compact and Consultant hereunder are individual and neither collective nor joint in nature.

Consultant and the Treasurer each agree is performing the Services as an officer of the Compact and is subject to all legal constraints that arise by the JPA and by law.

11.4 Joint Workproduct; Independent Counsel. This Agreement shall be considered the workproduct of both Parties hereto. Each Party acknowledges that it has been represented by independent counsel or has had the opportunity to seek counsel in connection with this Agreement and all matters pertinent to it, and each Party waives the benefit of the rules of construction providing that an agreement should be construed against its drafter.

11.5 Waiver. No waiver by either Party hereto of any one or more defaults by the other Party in the performance of any provision of this Agreement shall operate or be construed as a waiver of any future default, whether of like or different character. No failure on the part of either Party hereto to complain of any action or non-action on the part of the other Party, no matter how long the same may continue, shall be deemed to be a waiver of any right hereunder by the Party so failing. A waiver of any of the provisions of this Agreement shall only be effective if made in writing and signed by the Party who is making such waiver.

11.6 Records; Audit. Consultant shall maintain books, records, and other compilations of data pertaining to the requirements of this Agreement to the extent and in such detail as shall properly substantiate claims for payment under this Agreement. Consultant agrees that the Compact may audit Consultant's books, records, and other compilations of data associated with the performance of this Agreement to ascertain that the payments requested by Consultant represent the value of the Services. All records shall be kept for a period of six (6) years commencing on the first day after final payment under this Agreement. If any litigation, claim, negotiation, audit or other action involving the records is commenced prior to the expiration of the retention period, all records shall be retained until the completion of the action and resolution of all issues resulting therefrom, or until the end of the retention period, whichever is later.

11.7 Headings and Captions. The headings and captions appearing in this Agreement are intended for reference only, and are not to be considered in construing this Agreement.

11.8 Political Activity Prohibited. None of the services to be provided by Consultant hereunder shall be used for any partisan political activity, to further the election or defeat of any candidate for public office, or in connection with any referendum question or legislative or grass-roots lobbying activities.

11.9 Anti-Boycott Warranty. Consultant hereby warrants that, during the term of this Agreement, neither it nor any "affiliate of the Consultant," as hereafter defined, shall participate

in or cooperate with an international boycott, as defined in 26 U.S.C.A. §999 (b) (3) and (4), or engage in conduct declared unlawful by G.L. c. 151E, §2. An “affiliate of the Consultant” shall be any business entity of which at least 51% of the ownership interests are directly or indirectly owned by Consultant, or by a person or persons or business entity or entities that directly or indirectly own at least 51% of the ownership interests of Consultant.

11.10 Non-Discrimination in Employment and Affirmative Action. Consultant shall take affirmative action to ensure that its employees, and any member of the public eligible for service under the Energy Efficiency Plan, are treated without regard to race, color, sex, marital status, sexual orientation, age, religion, national origin, ancestry, handicap, disability, or veteran status. Consultant agrees to comply with all applicable federal, state, and local laws, rules, and regulations prohibiting discrimination in employment and in public accommodations.

11.11 Procurement Process. In entering into the Agreement, the Parties complied with the competitive procurement procedures required under G.L. c. 30B and have executed this Agreement in accordance therewith. If this Agreement was procured under G.L. c. 30B, Consultant represents that it has executed all certifications required by such statute, or will provide them concurrently with execution of this Agreement.

11.12 Savings Clause. If any section, sentence, clause, or other portion of this Agreement is for any reason held invalid or unconstitutional by any court, federal or state agency of competent jurisdiction, such portion shall be deemed a separate, distinct and independent provision, and such holding shall not affect the validity of the remaining portions hereof.

11.13 Survival of Obligations. Termination of this Agreement for any reason shall not relieve either Party of any obligation accrued or accruing prior to such termination. In addition, the terms of Section 7 (Indemnification) and Section 8 (Dispute Resolution) and any other term that by its nature should survive, shall survive the expiration of termination of this Agreement.

11.14 Counterpart Execution; Scanned Copy. This Agreement may be executed in several counterparts, each of which, when executed, shall be deemed to be an original, but all of which together shall constitute one and the same instrument. The Parties agree that a scanned or electronically reproduced copy or image of this Agreement bearing the signatures of the Parties hereto shall be deemed an original and may be introduced or submitted in any action or proceeding as competent evidence of the execution, terms and existence of this Agreement notwithstanding the failure or inability to produce or tender an original, executed counterpart of this Agreement and without the requirement that the unavailability of such original, executed counterpart of this Agreement first be proven.

11.15 Obligation to Modify. Consultant understands and agrees that the Compact may submit this Agreement to the Massachusetts Department of Revenue (MADOR) for its review and comment. Consultant agrees that it is obligated to modify this Agreement to conform to any guidance received from MADOR to the extent that such modifications are commercially reasonable. The Parties shall use their best efforts to conform such modifications to the original intent of this Agreement and to do so in a timely fashion.

11.16 **Provisions Applicable to Treasurer.** The Treasurer shall not be a Party to this Agreement, but agrees to be personally bound by and to the following provisions: Sections 2.7 (Appointment of Treasurer), 4.5 (Fiduciary Duty), 7.6 (Bond), 7.7 (Waiver of Immunities) and 11.3 (Independent Contractor). By signing below, the Treasurer affirms that he or she has read the entirety of this Agreement and understands and agrees his/her obligations under this Agreement.

IN WITNESS WHEREOF, the Parties hereto have executed this Agreement as of the effective date first above written.

CONSULTANT

CAPE LIGHT COMPACT JPE

Signature
Print Name: _____
Title: _____

Signature
Margaret T. Downey
JPE Administrator/Chief Procurement Officer

Date

Date

TREASURER

Signature
Print Name: _____

LIST OF EXHIBITS

- Exhibit A - Services
- Exhibit B - Compensation
- Exhibit C - Background Check Policy

**EXHIBIT A
SERVICES**

EXHIBIT B
COMPENSATION

EXHIBIT C
BACKGROUND CHECK POLICY

