



Contract No. 955-xxxx-xx

# RETROCOMMISSIONING PROVIDER AGREEMENT for Subcontractor Services San Diego Retrocommissioning Program

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This “Agreement” is made and entered into by and between Portland Energy Conservation, Inc. (“PECI”), designated as Program Administrator of the San Diego Retrocommissioning (RCx) Program (“Program”)\* and **SUBCONTRACTOR** (“Subcontractor”) for the services specified herein and provided by the Subcontractor to the Program. PEGI and Subcontractor may be referred to herein as a “Party” or the “Parties.”

Contract Period – **START DATE** through December 31, 2011

## Subcontractor Information

<b>Subcontractor Company Name</b>	
<b>Key Personnel Identified</b>	
<b>Phone Number</b>	
<b>Email</b>	
<b>Address</b>	
<b>City, State, Zip</b>	
<b>Tax Identification Number</b>	

## Program Administrator Information

<b>Program Administrator</b>	Portland Energy Conservation, Inc.
<b>Program Manager</b>	Allie Robbins
<b>Phone Number</b>	503.961.6140
<b>Email</b>	arobbins@peci.org
<b>Address</b>	1400 SW 5 <sup>th</sup> Ave Ste 700
<b>City, State, Zip</b>	Portland OR 97201

## Term

The term of this Agreement (“Term”) shall commence on **START DATE** and continue in effect until December 31, 2011, unless the Parties agree in writing to extend the Term, or unless this Agreement is earlier terminated in accordance with the Early Termination provisions below.

## Services

This Agreement covers the services specified in **Attachments** (containing Scope(s) of Work and Schedule(s) for building projects), which is attached hereto and incorporated herein, and hereby made a part of this Agreement. Subcontractor agrees to perform the services specified in Attachments in the manner and within the time

specified therein. The services support retrocommissioning investigation activities through the Program, and delivery of these services must follow the Program process, as detailed in the Program Toolkit and communicated to Subcontractor at the Program Orientation. All deliverables listed in the Scope of Work(s) require PECI's review and approval before considered final.

Except as expressly provided elsewhere in this Agreement, any and all modifications or revisions to this Agreement and the Attachments (including, but not necessarily limited to, additions, deletions and extensions) must be in writing and signed by both Parties. Should additional buildings be assigned to Subcontractor under the Program, additional attachments reflecting the subject project's scope of work and schedules may be incorporated into this Agreement in an amendment signed by both Parties, and shall be subject to the terms and conditions of this Agreement.

## **Billing and Payment**

Subcontractor shall be compensated by PECI for the services provided for pursuant to this Agreement.

The implementation and follow-up incentives for all work completed after December 31, 2008, will be contingent upon CPUC approval of the 2009-2011 Program. Should the CPUC approve the 2009-2011 Program, the terms of that Program will govern this Agreement.

Subcontractor shall submit itemized invoices for such services to:

San Diego RCx Program Manager  
Portland Energy Conservation, Inc.  
1400 SW 5th Ave Ste 700  
Portland, OR 97201

Subcontractor may separately contract directly with a Program customer to provide assistance for implementing measures. Unless arranged otherwise, the billing and payment for these services is negotiated and contracted between the Subcontractor and the Program customer, and PECI is not responsible for payment to the Subcontractor for the tasks beyond those as set forth in Attachments.

## **Invoice Documentation**

Subcontractor shall maintain records documenting all fees and all reimbursable expenses in excess of \$25.00, incurred either by Subcontractor or any subcontractor of Subcontractor in the performance of this Agreement. During regular business hours and upon reasonable notice, PECI, or its designee, shall have the right to inspect and audit all records required to be maintained under this Agreement upon reasonable notice and subject to Subcontractor's security procedures. In addition, via the San Diego Gas & Electric-PECI contract, SDG&E reserves the right to designate its own employee representative(s) or its contracted representative(s) with a certified public accounting firm, who shall have the right to audit and to examine any cost, payment, settlement or other supporting documentation resulting from any work performed under this Agreement. Any such audit or examination shall be undertaken by SDG&E or its contracted representative at reasonable times during normal business hours and in conformance with generally accepted auditing standards. Subcontractor agrees to fully cooperate with such audit(s), including, without limitation, allowing such auditors reasonable access to such documentation during normal business hours and allowing interviews of employees, agents or representatives of Subcontractor who might reasonably have information related to such documentation or to the work.

## **Insurance**

Subcontractor, and any entity engaged by Subcontractor to perform work hereunder, in Subcontractor's performance of its obligations under this Agreement, shall carry and maintain fully paid commercial general liability, automobile liability and workers compensation insurance at levels and in amounts as set forth with specificity in subsections 1-5, inclusive, below. All policies shall be written only by insurers admitted to do business in California and having an A.M. Best Company rating of A-VII. All policies shall be endorsed to: (a) specify PECI as an additional insured to the full extent of its right to indemnification under this Agreement, and

(b) provide that PECI shall be given no less than thirty (30) days advance written notice of cancellation or material change in coverage. Certificates of insurance shall be sent to PECI before work begins.

1. Subcontractor shall obtain the following minimum insurance coverage (“Required Insurance”) prior to the Effective Date, at its expense, and keep the Required Insurances in effect during the Term (except with respect to Professional Liability Insurance, when they shall be kept in effect for a period of the Term plus two years):
2. Commercial General Liability Insurance shall be carried and maintained on an “occurrence” form commercial general liability policy or policies, insuring against liability arising from bodily injury, death, property damage, personal and advertising injury, products/completed operations liability, contractual liability covering all operations of Contractor for Work performed under this agreement. There shall be no explosion, collapse or underground exclusion. Such coverage shall be in an amount of not less than \$3,000,000 (Three Million Dollars) per occurrence. If the policy maintains a policy aggregate, such aggregate shall not be less than twice the per occurrence limit;
3. Commercial or Business Automobile Liability Insurance policies shall be maintained to insure against liability for damages because of bodily injury, death or damage to property, (including loss of use thereof), and occurring in any way related to the use by or on behalf of Contractor, in pursuit of Work, including loading or unloading of any of the Contractor’s automobiles (including owned, non-owned, leased, rented and/or hired vehicles). Such coverage shall be in an amount of not less than \$1,000,000 (One Million Dollars) combined single limit;
4. Worker’s Compensation & Employer’s Liability Insurance in accordance with the laws of the State(s), in which the Work shall be performed, Contractor shall maintain in force workers compensation insurance for all of its employees. If applicable, Contractor shall obtain US Longshoremen’s and Harbor Workers compensation insurance, separately, or as an endorsement to workers compensation insurance. Contractor shall also maintain Employer’s Liability coverage in the amount of not less than \$1,000,000 (One Million Dollars) per accident and per employee for disease. In lieu of such insurance, Contractor may maintain a self-insurance program meeting the requirements of the State(s) in which the work shall be performed along with the require Employer’s Liability insurance; and,
5. Professional Liability Insurance shall be maintained covering liability arising out of an error, omission or negligent act in the performance, or lack thereof, of professional services contemplated under this Agreement in an amount of not less than \$1,000,000 (One Million Dollars) per claim. If the policy maintains a policy aggregate, such aggregate shall not be less than twice the per occurrence limit. This is to protect against all loss suffered by PECI or third parties, including financial and consequential loss, caused by error, omission, or negligent acts related to provision of the Services;

In the event Subcontractor fails to maintain, or require its subcontractors to maintain, insurance policies or self-insurance in compliance with this provision, PECI may in its discretion either purchase such insurance coverage and charge the premium to Subcontractor or treat such failure as an event of default by Subcontractor and terminate this Agreement for breach of contract.

## **Governing Law, Venue and Attorney’s Fees**

This Agreement shall be interpreted, governed, and construed under the laws of the State of California as if executed and performed wholly within the State of California. Any action brought to enforce or interpret this Agreement shall be filed in San Diego County, California. In the event of legal suit or action, including any appeals therefrom, brought by either party against the other to enforce any of the obligations hereunder or arising out of any dispute concerning the terms and conditions hereby created, the losing party shall reimburse the prevailing party for its reasonable attorney fees and costs incurred in the suit or action including investigation costs, expert witness fees and all costs of depositions. If any part of this agreement is found to be in conflict with applicable laws, such parts shall be inoperative, null and void so far as it is in conflict with said laws, but the remainder of this agreement shall be in full force and effect.

## **Good Faith Negotiation/Mediation**

The Parties shall attempt in good faith to resolve any dispute arising out of or relating to this Agreement promptly by negotiations between the Parties' authorized representatives. The disputing Party shall give the other Parties written notice of any dispute. Within twenty (20) days after delivery of such notice, the authorized representatives shall meet at a mutually acceptable time and place, and thereafter as often as they reasonably deem necessary to exchange information and to attempt to resolve the dispute. If the matter has not been resolved within thirty (30) days of the first meeting, any Party may initiate a mediation of the dispute. The mediation shall be facilitated by a mediator that is acceptable to all Parties and shall conclude within sixty (60) days of its commencement, unless the Parties agree to extend the mediation process beyond such deadline. Upon agreeing on a mediator, the Parties shall enter into a written agreement for the mediation services with each Party paying a pro rate share of the mediator's fee, if any. The mediation shall be conducted in accordance with the Commercial Mediation Rules of the American Arbitration Association; provided, however, that no consequential damages shall be awarded in any such proceeding and each Party shall bear its own legal fees and expenses.

## **Suspension of Work**

### **Suspension by PECE**

PECE may suspend, in writing, all or a portion of Subcontractor's services under Attachments in the event unforeseen circumstances make normal progress in the performance of the Subcontractor's work commercially impracticable in the commercially reasonable opinion of PECE. Subcontractor may request that the work be suspended by notifying PECE, in writing, of circumstances which are interfering with normal progress of the work. The time for completion of the remaining work shall be extended by the number of days the work is suspended by PECE, unless both Parties can mutually agree upon a new completion time. Under all circumstances, work must be completed within the Term of this Agreement.

In the event the period of suspension exceeds 30 days, the terms of this Agreement may be subject to renegotiation; provided, however, that if such renegotiation of a mutually acceptable replacement contract has not occurred within 90 days after suspension ("Renegotiation Period"), then either Party may terminate this Agreement in accordance with the early termination provision hereof, provided further, that the failure to renegotiate this Agreement within the Renegotiation Period shall not be construed as a breach of the Agreement by either Party.

### **Suspension by Subcontractor**

Subcontractor may suspend, in writing, all or any portion of its services under this Agreement, but only if and to the extent PECE fails to make timely payment in accordance with the terms of this Agreement or is otherwise in material breach in accordance with the terms of this Agreement. PECE shall have a period of sixty (60) days from the date on which payment was due ("Cure Period") within which to satisfy any arrearages in payment. Subcontractor shall resume performance of any suspended services upon receipt of payment of any arrearages from PECE within the Cure Period.

## **Early Termination**

### **Early Termination of Subcontractor's Service by PECE**

PECE may cancel or terminate, in writing, all or any portion of Subcontractor's services under Attachments at its convenience. Reasons for termination may include, but are not limited to, Subcontractor neglecting to follow the Program guidelines or adhere to the agreed-upon project schedule. Failure to meet any scheduled deliverable submission date without prior written agreement may be considered breach of contract, and may be cause for early termination of service. If PECE finds Subcontractor neglectful or in breach of this Agreement and terminates services, PECE reserves the right to assign the remaining work to another Subcontractor. PECE shall provide the Subcontractor with at least seven (7) days written notice of any early termination of work under this Agreement. In the event of such termination, Subcontractor shall cease all work on the project and provide all project documentation to PECE. Subcontractor shall be compensated for completed and approved project

deliverables per the amounts and payment schedule in Attachments. If PECE cancels all Subcontractors' services under this Agreement in accordance with this provision, then the Agreement shall terminate and neither Party shall be deemed in breach thereof.

### **Early Termination of Agreement Prior to Expiration of the Term**

Either Party shall have the right, but not the obligation, to terminate this Agreement, on sixty (60) days written notice, in the event the other Party's service or performance fails to conform to the requirements of this Agreement. Subcontractor shall have the right, but not the obligation, to terminate this Agreement, effective upon expiration of the Cure Period, in the event PECE fails to pay any arrearage within the Cure Period. Either Party shall have the right but not the obligation, to terminate this Agreement in the event work is suspended under this Agreement for a period in excess of ninety (90) days and no renegotiation of this Agreement has occurred within the Renegotiation Period. Any right of early termination shall be in addition to, not in replacement of, any and all rights and remedies a Party may have for breach of the Agreement by the other Party.

### **Outside Subcontractors**

As a pre-qualified retrocommissioning provider under the Program, the Subcontractor must receive pre-approval to subcontract any of the work under this Agreement.

### **Confidentiality**

1. "Confidential Information" means any information that (i) drives actual or potential economic value from not being generally known to, and not being readily ascertainable by proper means by, persons who can obtain economic value from its disclosure or use, or (ii) concerns a member of the public or a business, is not normally available to the general public, and would be considered by those members or businesses to be private information which they did not want to be disclosed. Without limiting the generality of the foregoing, Confidential Information includes all information gathered about participants through the Program, including but not limited to name, address, amount of Incentives paid, and other information which has been communicated by one Party to the other Party in connection with this Agreement, and all non-public information communicated between the Parties in connection with this Agreement, including their respective business relationships and business activities and plans, and utility data, except as otherwise specifically provided in this Agreement.
2. Each Party agrees that all Confidential Information disclosed to it by the other Party will remain confidential. Each Party further agrees it will not use any Confidential Information, or permit its directors, officers, managers, employees, agents, subsidiaries, representatives, subcontractors or affiliates to use any Confidential Information, for any purpose other than as permitted or required for the performance of its obligations under this Agreement. Neither Party shall disclose any Confidential Information to any third party except as expressly authorized in this Agreement or in writing by the other Party.
3. Disclosure of Confidential Information to a Party's directors, officers, managers, employees, agents, subsidiaries, representatives, subcontractors, or affiliates is authorized only to the extent such disclosure is necessary in connection with the performance of this Agreement. Each Party will take all reasonable steps to ensure that its directors, officers, managers, employees, agents, subsidiaries, representatives, subcontractors, or affiliates will take at least the same steps to protect Confidential Information as that Party is required to take pursuant to this Agreement. At the conclusion of the Term, or at such time as this Agreement is earlier terminated, each Party will within a reasonable time return or destroy, at the other Party's written direction, all the Confidential Information remaining in its possession or under its control or in the possession or under control of its directors, officers, managers, employees, agents, subsidiaries, representatives, subcontractors, or affiliates.
4. The Parties are not required to treat as "Confidential Information" any information that (i) was known or readily ascertainable by proper means prior to its disclosure as "Confidential Information," (ii) is or becomes available to the general public without fault or action by a disclosing Party, (iii) is lawfully

disclosed to either Party by a third party who is under no obligation of confidentiality with respect to such information, and (iv) is required to be disclosed by law. Should either Party intend to disclose Confidential Information on the basis that it is required by law to do so, it shall prior to that disclosure first notify the other Party of the intended disclosure in such a manner so as to give the other Party a reasonable opportunity to act to prevent or limit the disclosure.

5. The proceedings and award in any arbitration held pursuant to this Agreement will be considered Confidential Information. This Agreement itself will not be considered Confidential Information except as to those portions, which would customarily be considered confidential to a party, such as rates, amounts, or other proprietary business information. The Parties will advise each other on execution of the Agreement which portions of the Agreement that each requests be kept confidential, and those portions will be treated as Confidential Information, except as otherwise provided by this Agreement.
6. Notwithstanding anything to the contrary contained in this Agreement, or any other express or implied agreement, arrangement or understanding, the parties and their respective affiliates, employees, representatives and other agents may disclose to any and all persons and/or entities the tax structure and any of the tax aspects of the transaction(s) contemplated by this Agreement, which are necessary to describe or support any United States federal income tax benefits that may result there from or any materials relating thereto, except where confidentiality is reasonably necessary to comply with United States federal or state securities laws. For the purposes of this provision, "tax structure" is limited to facts relevant to the U.S. federal income tax treatment of the transaction(s) and does not include information relating to the identity of the parties, their affiliates, agents, or advisors.
7. San Diego Gas & Electric Company (SDG&E<sup>®</sup>) considers all customer usage information to be confidential and protected. Each Party agrees that the customers' released utility data will be held in confidence and used only to evaluate energy use patterns.

## **Relationship of Parties**

Subcontractor is an independent contractor, and this Agreement is not intended to form a partnership or joint venture between the Parties. Individuals employed by Subcontractor are not employees or agents of PECI. Each Party is solely responsible for payment of compensation to its employees and personnel and will withhold and pay to the appropriate authorities all taxes, contributions, and assessments imposed or required under all laws with respect to payments. The Subcontractor will require these terms in all agreements with subcontractors for work undertaken for this Agreement.

## **Return of Records**

On termination of this Agreement, the Subcontractor will consult with the appropriate project manager at PECI about whether pertinent records should be returned. If requested, the Subcontractor will deliver to PECI all records, reports, data memoranda, notes, models or publications whether electronic or hard-copy, equipment and supplies of any nature, and receipts for any and all billing made to PECI that are in possession or under control of the Subcontractor, prepared or acquired in the course of the contract with PECI. Further, the Subcontractor agrees not to keep or withhold such information or data, or reproductions of such information or data that relate to the business activities of PECI or to parties in a contract relationship with PECI. Alternatively, if the return of records and equipment or supplies is not requested, Subcontractor agrees to retain these items for three years after the completion of this Agreement and to notify the PECI project manager at the end of that time before disposing of them. Subcontractor shall include a provision substantially identical to the foregoing in all its Subcontractor Agreements.

## **Facsimile/Scanned Signatures**

Facsimile transmission of any signed original document, and the retransmission of any signed facsimile transmission, shall be the same as delivery of the original signed document. Scanned original documents transmitted to PECI as an attachment via electronic mail shall be the same as delivery of the original signed document. At the request of PECI, Subcontractor shall confirm documents with a facsimile transmitted signature or a scanned signature by providing an original document.

## **Indemnification**

Subcontractor shall, at its own cost, defend, indemnify and hold harmless PECEI, SDG&E<sup>®</sup> and all officers, agents, employees, assigns, and successors in interest of SDG&E<sup>®</sup> and PECEI, from and against any and all liability, damages, losses, claims, demands, actions, causes of action, costs, including attorney's fees (which shall include allocable costs of in-house counsel) and expenses or any of them, resulting or arising from any (i) negligent or wrongful acts or omissions of the Subcontractor or of its officers, employees, agents, representatives, subcontractors, or affiliates, (ii) breach by the Subcontractor of its officers, employees, agents, representatives, subcontractors, or affiliates of this Agreement, or (iii) any willful or negligent conduct of the Subcontractor, its officers, employees, agents, representatives, and affiliates, arising out of the performance of the Subcontractor's obligation under this Agreement.

## **Force Majeure**

Failure of a Party to perform its obligations under this Agreement by reason of any of the following shall not constitute an event of default or breach of this Agreement: strikes, picket lines, boycott efforts, earthquakes, fires, floods, war (whether or not declared), revolution, riots, insurrections, acts of God, acts of government (including, without limitation, any agency or department of the United States of America), acts of terrorism, acts of the public enemy, scarcity or rationing of gasoline or other fuel or vital products, inability to obtain materials or labor, or other causes which are reasonably beyond the control of such Party.

## **Miscellaneous**

Neither Party may assign its rights under this Agreement without the prior written consent of the other. Any assignment of such rights hereunder without such consent shall be deemed void. No waiver, consent or modification of any other provisions of this Agreement shall be binding unless in writing and signed by duly authorized representatives of all Parties, and no waiver by any Party of any default of the other shall be deemed to be a waiver by such Party of any other default. Each Party represents and warrants to the other Party that they are duly authorized to execute, deliver and perform their respective obligations under this Agreement.

## **Taxes**

Subcontractor is required to submit a completed W9 for tax purposes. Unless Subcontractor is exempt, incentives greater than \$600 will be reported to the IRS as income on form 1099. Please consult your tax advisor concerning the taxability of incentives.

## **Severability**

Should any provision of this Agreement be held by a tribunal of competent jurisdiction to be invalid or unenforceable, the remainder of the Agreement will remain in full force and effect.

## **Notices**

Notices required to be made under this Agreement shall be in writing and served personally, by facsimile transmission, by overnight courier to the address shown above, or by email, with a duplicate sent by certified mail, return receipt requested. Notice shall be effective only upon receipt by the party being served.

## Effective Date and Term

This Agreement and all attachments shall be effective immediately after being signed by both parties.

**Portland Energy Conservation, Inc.  
Program Management Contractor**

**RCx Firm Name  
Retrocommissioning Provider Firm**

\_\_\_\_\_  
Signature of Authorized Representative

Phil Welker

\_\_\_\_\_  
Authorized Representative Name

Executive Director

\_\_\_\_\_  
Title

\_\_\_\_\_  
Date

\_\_\_\_\_  
Signature of Authorized Representative

\_\_\_\_\_  
Authorized Representative Name

\_\_\_\_\_  
Title

\_\_\_\_\_  
Date

\* The San Diego Retrocommissioning Program is administered by Portland Energy Conservation, Inc. (PECI) under a contract awarded by San Diego Gas & Electric Company (SDG&E®). This program is funded by California utility customers under the auspices of the California Public Utilities Commission. California customers who choose to participate in this program are not obligated to purchase any additional services offered by the contractor. The trademarks used herein are the property of their respective owners.

## Attachment A: Scope of Work