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Contract Clauses for Government: Net Zero Objectives

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A Standard Clause providing sample language for achieving net zero objectives in a construction contract for a government project. This Clause seeks to help government entities mitigate climate change by limiting and neutralizing greenhouse gas emissions associated with public project construction. This Standard Clause has integrated notes with important explanations and drafting tips.

DRAFTING NOTE: READ THIS BEFORE USING DOCUMENT

This Standard Clause incorporates net zero objectives into a construction contract for a government project. It benefits government entities that want their public projects to be:

- Aligned with the goals of the Paris Agreement, including efforts to limit global warming to 1.5 degrees Celsius above pre-industrial levels.
- Capable of withstanding climate-related risks that may affect the resilience of the project (see Practice Note, Identifying and Managing Project Finance Risks: Climate-Related Risks).

In 2020, approximately 38% of global carbon dioxide emissions came from the construction and operations of buildings (see Carbon Leadership Forum: Global Status Report for Buildings and Construction.) However, the traditional standards of care found in construction contracts do not explicitly require contractors to incorporate climate change mitigation or adaptation measures. As a result, government entities and their contractors often build facilities without climate-related risks or decarbonization in mind. The construction of these projects without consideration of these issues may:

- Release avoidable greenhouse gases (GHG) into the atmosphere throughout construction, contributing to the impact of climate risks.
- Expose the government entity to increased impacts from climate change, potentially compromising the physical integrity of the completed facilities. For example, buildings and infrastructure improvements may be vulnerable to extreme precipitation, flooding, storms, fires, and other hazards resulting from climate change.
- Require:
  - higher insurance premiums to compensate for the risks; and
  - greater liquidity reserves to pay for the damages to the project.

This Clause addresses these concerns by requiring the construction to meet certain defined net zero objectives. A contractor's failure to comply with these objectives results in a breach of the contract, allowing the government entity the option of exercising the contract's default remedies. For contract language similar to this Standard Clause, but providing incentives for contractors meeting net zero objectives, see Standard Clause, Contract Clauses for Government: Net Zero Incentives. The project owner should engage with the project team early on to ensure that the project design, specifications, and budget address the owner's expectations.

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The Chancery Lane Project (TCLP) published a version of this Clause for use in the United Kingdom (see TCLP: Estelle's Clause). TCLP is a pro bono initiative that brings legal professionals together to collaborate, rewrite contracts, and create legal standards to tackle the climate crisis and achieve net zero carbon emissions. Practical Law editors have adapted this Clause for use in the US. For more on TCLP and links to related resources, see TCLP: About The Chancery Lane Project.

Government entities may combine this Clause with others that focus on environmental matters or otherwise incorporate it into a larger climate change mitigation effort. For a related clause dealing with the management of construction waste materials, see Standard Clause, Contract Clauses for Government: Construction Waste Management.

Using Outside Expertise

Most government agencies lack expertise in environmental science within their staffs. A government entity may need to hire outside consultants to help it:

- Develop net zero targets (see Drafting Note, Net Zero Targets).
- Determine whether the language in this Clause fits the situation and modify the language where necessary.
- Set benchmarks to measure the Contractor's progress toward meeting the contract's net zero goals (see Drafting Note, The Net Zero Mindset).
- Implement measurement protocols for GHG emissions and assess contractors' compliance with their obligations under this Clause.

Accounting for Differences in Contractor Obligations

Users of this Clause should understand the extent of the Contractor's involvement in the planning and design of the project. Language in this Standard Clause allows users to choose between two scenarios:

- The parties' use of the traditional design-bid-build method to complete the work, with separate contracting for design professionals and prime contractors. Under this scenario, the Contractor:
  - is responsible for adhering to plans and specifications;
  - can help the government achieve its net zero goals during construction; and
  - is not responsible for design flaws that cause the project to fall short of the goals.
- The Contractor's direct involvement in the design of the project under a different project delivery system, such as design-bid-build or construction manager at risk (see Practice Note, Construction Manager at Risk in Municipal Construction Projects) . With these alternatives:
  - the Contractor accepts responsibility for assuring that the finished project meets the government entity's goals; and
  - the government entity can work with the Contractor to ensure that the project is capable of withstanding climate-related risks that may impact the resilience of the completed project (see Practice Note, Identifying and Managing Project Finance Risks: Climate-Related Risks).

Types of Public Projects

Language in this Standard Clause allows users to choose between identifying an undertaking as either a "Project" or an "Asset." These alternatives recognize that government entities hire contractors for a wide variety of work, such as:

- Buildings.
- Roads.
- Utility facilities, including projects supporting water, sewer, or electrical utilities.
- Parks and recreational facilities.
- Custom-built fire trucks or other specialized vehicles and equipment.

Assumptions

This Standard Clause assumes that:

- The government entity intends to:
  - incorporate the language in this Clause into the entity's construction contract forms; or

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  - include the language as an amendment or addendum to other standard construction contract forms, such as those published by the American Institute of Architects (AIA) or the Engineers Joint Contract Documents Committee (EJCDC). For more information on commonly used form documents for construction projects, see Practice Note, Standard Construction Industry Documents: Overview.
- The construction contract includes and defines terms such as "Owner," "Contractor," "Parties," "Project," "Work," "Contract Documents," "Plans," "Specifications," and "Substantial Completion." Counsel should change these terms as necessary to conform to defined terms used elsewhere in the user's construction contracts.

Formatting

Counsel should revise the formatting and numbering in this Standard Clause to be consistent with the government entity's contract forms.

Bracketed Items

Bracketed items in sentence case are either optional provisions or include alternative language choices to be selected, edited, or deleted at the drafter's discretion. The drafter should replace bracketed text in ALL CAPS with information specific to the circumstances or the government entity's preferences.

1. Net Zero Objectives.

1.1 Definitions. The following terms, when used in the Contract Documents, have the following meanings:

(a) "**GHG Emissions**" means emissions of [the greenhouse gases listed in Annex A of the 1998 Kyoto Protocol to the UNFCCC,[as may be amended from time to time,] including:]carbon dioxide (CO_2), methane (CH_4), nitrous oxide (N_2O), nitrogen trifluoride (NF_3), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs) and sulfur hexafluoride (SF_6), each expressed as a total in units of carbon dioxide equivalent (CO_2e) and calculated in accordance with [applicable guidance from the Greenhouse Gas Protocol/[EMISSIONS CALCULATION STANDARDS]].

(b) "**Net Negative**" means that the aggregate of a party's actions to reduce its GHG Emissions and remove them from the atmosphere exceeds its unabated GHG Emissions.

(c) "**Net Zero**" means a state of balance between the volumes of GHG produced and GHG removed from the atmosphere[in each calendar year], achieved by both a reduction of GHG Emissions overall and a removal of GHG Emissions.

(d) "**Net Zero Benchmarks**" means specific measures to be accomplished by the Contractor during various stages of constructing the [Project/Asset][and to be met by the [Project/Asset] after completion], as set out in Exhibit [IDENTIFIER], which is attached hereto and made a part of this Contract by reference.

(e) "**Net Zero Objectives**" means carrying out the Work:

(i) responsibly, sustainably, ethically, and in accordance with all applicable laws and best practices;

(ii) consistently with both the Contractor's and the Owner's Net Zero Targets and in a manner that prioritizes reducing GHG Emissions prior to Offsetting any Residual Emissions;

(iii) using practices that meet Net Zero Benchmarks as shown in the Specifications[or using other measures agreed to by the Owner to limit the GHG Emissions produced during construction to no more than the level that would be produced by meeting the Net Zero Benchmarks (using Offsetting only for Residual Emissions)][; and]

(iv) to ensure that the cumulative GHG Emissions from construction of the [Project/Asset] are Net Zero or are completely Offset at Substantial Completion (by Offsetting only Residual Emissions)[; and]

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(v) [to provide a completed [Project/Asset] that:

(A) meets the Net Zero Benchmarks established for the completed [Project/Asset]; and

(B) is capable of withstanding the projected physical impacts of climate change, including increased intensity and frequency of catastrophic weather events and gradual onset climatic changes in the region[, as assumed under Shared Socioeconomic Pathway [2/3/4/[OTHER PATHWAY NUMBER]] in the Sixth Assessment Report (AR6) of the United Nations Intergovernmental Panel on Climate Change] from Substantial Completion until [[DATE]/[15/[NUMBER]] years after Substantial Completion]][; and]

(vi) [in a manner that satisfies the requirements of, and does not place the Owner in breach or default of, the terms of the Owner's sustainable financing[, said terms being enumerated in Exhibit [IDENTIFIER], which is attached hereto and made a part of this Contract by reference]].

(f) "**Net Zero Target**" means an organization's [Paris Aligned]target to be achieved incrementally by 2050, resulting in a balance between the volumes of GHG Emissions produced and GHG removed from the atmosphere in a calendar year and for each subsequent year thereafter by both reducing GHG Emissions overall and removing GHG Emissions.

(g) "**Offset**" or "**Offsetting**" means the purchase of carbon credits to compensate for GHG Emissions from the Work done under this Contract. For purposes of this Contract, Offsetting must come from a project that:

(i) has been verified in accordance with [[NAME OF STANDARD]/the UNFCCC Clean Development Mechanism (CDM)[or [successor/equivalent] UNFCCC mechanism]];

(ii) in relation to GHG removals, employs long-lived storage methods that have low risk of reversal over millennia; and

(iii) prioritizes the removal of GHGs from the atmosphere rather than avoiding or reducing third party GHG Emissions.

(h) ["**Paris Aligned**" means alignment with the three goals set out in Article 2.1 of the Paris Agreement, in particular, pursuing efforts to limit global temperature increase to 1.5 degrees Celsius above pre-industrial levels and achieve Net Zero or Net Negative emissions by 2050 or sooner.]

(i) "**Residual Emissions**" means the Scope 1, 2, and 3 Emissions from all operations of a party or relating to a project or an asset that are emitted after all reasonable efforts have been made to reduce the Scope 1, 2, and 3 Emissions.

(j) "**Scope 1, 2, and 3 Emissions**" means the three classifications of emissions in the GHG Protocol Corporate Accounting and Reporting Standard (see https://ghgprotocol.org/sites/default/files/standards/ghg-protocol-revised.pdf) as updated from time to time.

(k) ["**UNFCCC**" means the United Nations Framework Convention on Climate Change.]

[ADDITIONAL DEFINITIONS.]

DRAFTING NOTE: DEFINITIONS

Definitions can avoid ambiguity by providing clear meanings for certain terms used in a contract. Uses of defined terms should be consistent throughout the construction contract, including any addenda or exhibits. If there is a general definitions section elsewhere in the contract, incorporating these definitions into that section instead of including them here may be preferable. The government entity may also add additional definitions of other relevant terms if it makes changes to this Standard Clause that use terms not already defined.

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Climate Change Terminology

This Clause includes terms that may not be familiar to attorneys without environmental law experience. Counsel advising governments on the use of this Clause in a construction contract should become acquainted with these terms. For a glossary of terms that are relevant to this resource, see Glossary of Energy Decarbonization Terms (September 2021).

Definitions in this Clause include references, some marked as optional, to international agreements, protocols, standards, and reports that are integral to the construction contract. For example, the definitions refer to:

- The Paris Agreement, adopted in 2015, under which participating nations agree to specific measures aimed at limiting global warming (see UNFCCC: Paris Agreement). The US withdrew from the Paris Agreement during the Trump administration but re-entered into the Agreement in 2021. Many municipal governments across the world have jointly committed to the effort to limit global warming to 1.5 degrees Celsius (see C40 Cities: About C40). Hundreds of private companies have also pledged to reduce their GHG emissions in furtherance of the Paris Agreement's goals. However, some local governments may prefer to:
  - set their climate goals without reference to these international agreements; or
  - cite specific provisions from the international agreements within their contracts.
- The United Nations Framework Convention on Climate Change (UNFCCC) (see United Nations: Climate Change). For more information on the UNFCCC's Clean Development Mechanism, see UNFCCC: Clean Development Mechanism (CDM).
- A list of GHGs incorporated into the Kyoto Protocol (see UNFCCC: Kyoto Protocol). The definition allows drafters to either directly refer to the Kyoto Protocol as the source of the list or to list the GHGs without identifying the source.
- Guidance from the Greenhouse Gas Protocol for use in calculating GHG emissions (see Greenhouse Gas Protocol: About Us). The definitions also refer to Scope 1, 2, and 3 Emissions as classified in the GHG Protocol's Corporate Accounting and Reporting Standard (see Greenhouse Gas Protocol: A Corporate Accounting and Reporting Standard, at 25). Alternative language allows the parties to use other emissions calculation standards. Government entities may need to use special consultants for assistance in determining the best and most practical way to measure emissions and emissions reductions associated with the project (see Drafting Note, Using Outside Expertise).
- The Intergovernmental Panel on Climate Change (IPCC) (see IPCC: About the IPCC). The definition for net zero objectives includes an optional reference to the IPCC's Sixth Assessment Report (AR6) (see a summary of the report for policy makers at IPCC: Climate Change 2022). The definition allows the parties to set resilience standards based on one of the Shared Socioeconomic Pathways (SSPs) described in AR6. These SSPs provide varying scenarios of the effects of global events. It may be necessary to update these references in the definitions as the IPCC updates its reports or other relevant information becomes available.

For a more thorough explanation of the UNFCC, the Kyoto Protocol, and the Paris Agreement, see Practice Note, UNFCCC, the Kyoto Protocol and the Paris Agreement. The drafter may also reference applicable US, state, and local agencies and standards in addition to or in lieu of those used in this Standard Clause.

Carbon Offsets

This Clause allows the Contractor to partially fulfill its net zero obligations through carbon offsets. The definition section defines offsetting to include only purchases of carbon offsets that are verifiable and meet other prescribed standards. Additionally, the definition of Net Zero Objectives makes it clear that the parties intend to prioritize reduction of GHG emissions over offsetting, recognizing that:

- Lowering the project's GHG emissions carries out the objectives more directly because it reduces the total amount of GHG emissions.
- Paying a third party for sustainability efforts at another location:
  - involves less real effort by the Contractor to achieve the objectives; and
  - only balances out GHG emissions rather than reducing them.

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- The effectiveness of measures used by a third party to remove GHG emissions may be difficult to verify and measure.

For a discussion of how offsetting works, see Practice Note, Lower-Carbon, Carbon-Neutral, and "Green" LNG: Carbon Offsets.

The Net Zero Mindset

Beyond understanding what net zero entails, users of this Clause should understand the definitions of these terms and the differences between them:

- **Net zero target** refers to the ultimate goal a party has adopted to take part in zeroing out GHG emissions for the long term. For more on setting net zero targets and the value of hiring contractors who have their own targets, see Drafting Note, Net Zero Targets.
- **Net zero objectives** represent the project-specific goals to be achieved under the contract. The net zero objectives are meant to move the parties closer to their targets.
- **Net zero benchmarks** set specific measures the Contractor must take to fulfill the net zero objectives. The government entity should:
  - include these benchmarks in the specifications or other contract documents so that potential contractors are aware of them upfront; and
  - be open to proposals by the Contractor to amend or supplement the benchmarks.

Options and Alternatives for Net Zero Objectives

The definition for net zero objectives includes optional language that:

- Holds the Contractor responsible for ongoing net zero compliance of the finished project, depending on the project delivery system used by the government (see Drafting Note, Project Delivery System Options).
- Refers to sustainable financing the government might use to fund the project (see Drafting Note, Sustainable Financing).

Project Delivery System Options

The net zero objectives definition provides options that expand the Contractor's responsibilities, depending on whether the Contractor is involved in the design of the project. When contractors are not involved in the design phase, the government cannot expect them to accept responsibility for design-related issues that result in substandard performance of completed projects.

However, if the Contractor also has project design responsibilities, the government entity should use the optional language that extends the Contractor's obligations to design-related issues arising after completion. (See Drafting Note, Accounting for Differences in Contractor Obligations.) This language includes assurance that the completed project will withstand the effects of catastrophic weather events and climatic changes. For example, depending on the assumptions the parties agree to, the project design may need to include measures such as:

- Reinforcement strapping to prevent hurricanes or tornados from separating:
  - roofs from buildings; or
  - buildings from foundations.
- Roof construction that can withstand the weight of heavy snows.
- A higher elevation to prevent flooding or withstand coastal storm surges or sea level increases.
- Drought-resistant landscaping.

Sustainable Financing

The definition for net zero objectives also includes an optional reference to the terms of the Owner's sustainable financing. While a relatively new alternative for government project financing, green bonds or other types of specialized debt options are sometimes used by government entities to finance environmentally friendly projects. For more information on using green bonds for government projects, see Practice Note, Green Bonds and Local Infrastructure Projects.

1.2 Contractor's Warranty.

(a) [In addition to other warranties and obligations that are part of this Contract, the Contractor warrants that it will carry out the Work in accordance with the Net Zero Objectives.

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OR

In addition to other warranties and obligations that are part of this Contract, the Contractor warrants that:

(i) it will carry out the Work in accordance with the Net Zero Objectives; and

(ii) the [Project/Asset] will achieve the Net Zero Objectives at Substantial Completion and until [[DATE]/[15/[NUMBER]] years after Substantial Completion]].

(b) The Contractor must obtain warranties from its Subcontractors that require Subcontractors to carry out their work in accordance with the Net Zero Objectives.

DRAFTING NOTE: CONTRACTOR'S WARRANTY

This section obligates the Contractor to perform its work in a way that fulfills the Net Zero Objectives, as defined in Section 1.1. For contractors involved in the design phase, this section includes alternative language that extends the warranty to design-related issues that arise after completion (see Drafting Notes, Accounting for Differences in Contractor Obligations and Project Delivery System Options). The warranty in this section is in addition to other warranties included elsewhere in the contract. The Contractor must also obtain warranties from subcontractors.

Measures contractors use to address environmental matters vary depending on the type of work. Well before construction work begins, the planning and design phases should address the Owner's net zero expectations. Plans and specifications can reflect net zero targets by including elements such as:

- Placement of buildings in locations with optimal weather impact.
- Components that:
  - protect buildings from heat and cold; and
  - come from sources that generate a smaller carbon footprint.
- Energy systems that use alternative sources, such as solar power.
- Energy-efficient appliances, fixtures, and systems.

Even when the work toward achieving net zero begins before the Contractor is involved, the Contractor can still play a significant role. In addition to following the measures included in the plans and specifications, contractors can take steps to lessen the environmental impact of the building process, such as:

- Procuring supplies and materials from sources that:
  - require less transportation; or
  - reflect the supplier's or manufacturer's commitment to sustainability. Services like Sustainalytics provide environmental, social, and governance (ESG) ratings for many industries (see Sustainalytics: Company ESG Risk Ratings). For more on ESG reporting and ratings, see Practice Note, ESG Disclosure & Sustainability Reporting Frameworks: ESG Data and Ratings Providers.
- Using reused or recycled materials.
- Using vehicles that require less fuel (such as electric vehicles) where practical and operating vehicles more efficiently.
- Following measures included in "stretch codes." Some communities have adopted these codes, which go beyond the standards included in other building codes to focus on energy savings. Even when stretch codes are not mandatory in a community, the local government may want its own construction projects to set an example and follow higher standards. For more on stretch codes, see New Buildings Institute: Stretch Codes.
- Consciously incorporating other practices that result in low GHG emissions.

With current technology, it is unlikely that a contractor can carry out a construction or manufacturing process that results in zeroing out GHG emissions without relying on offsetting. This Standard Clause anticipates that contractors will need to supplement their efforts to reduce GHG emissions by purchasing carbon offsets. However, the process should emphasize GHG reductions before relying on offsetting. For more on offsetting, see Drafting Note, Carbon Offsets.

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1.3 Net Zero Targets.

(a) The Owner and the Contractor each affirm that they have adopted Net Zero Targets[as described in Exhibit [IDENTIFIER], which is attached hereto and made a part of this Contract by reference].

(b) The Owner affirms that the [Project/Asset] as [proposed/described and depicted in the Plans and Specifications] is consistent with its respective Net Zero Targets.

DRAFTING NOTE: NET ZERO TARGETS

In this section, both parties warrant that they have net zero targets, as defined in Section 1.1. Optional language provides for a description of the targets to be included in an exhibit to the contract. To ensure that potential contractors are like-minded about wanting to minimize their environmental impact, government entities can:

- Include their own net zero targets in bid invitations and requests for proposals.
- Prequalify contractors to limit the pool of bidders to those demonstrating a commitment to green construction practices. Prequalification procedures can include asking potential bidders to:
  - describe the net zero targets they have adopted; and
  - explain the measures they are taking and plan to take to achieve their net zero targets.

Net zero targets typically:

- Set interim goals extending until 2050, aligning with the Paris Agreement's worldwide goals. While the targets are not usually project specific, government entities can design construction projects to align with their net zero targets.
- Include pathways for achieving those goals.

For example, to achieve the goal of reducing GHG emissions by 40% by 2030, 75% by 2040, and 100% by 2050, the City of Houston developed strategies related to:

- Transportation.
- Energy transition.
- Building optimization.
- Materials management.

For more on Houston's goals, see City of Houston: Houston Climate Action Plan, at 20-21.

To develop achievable net zero targets, government entities should plan on:

- Hiring outside consultants with expertise in net zero strategies (see Drafting Note, Using Outside Expertise).
- Engaging with stakeholders, including:
  - departments and agencies that are part of the government entity; and
  - members of the community or representatives of those served by the entity.
- Seeking third-party validation that the targets are realistic and robust. In the private sector, the Science Based Targets initiative (SBTi) offers validation of corporate net zero targets (see SBTi: Set A Target). Unless a similar service becomes available for evaluation of government net zero targets, government entities may need to seek out a separate private consultant. This consultant should be independent of the outside expert used to develop the entity's targets.

1.4 Net Zero Objectives Reporting.

(a) The Contractor must provide a report to the Owner [on the [first/last/[ORDINAL]] day of each [month/quarter/[TIME FRAME]]/with each payment request] [and at such other intervals as reasonably requested by the Owner], describing the Contractor's progress toward the Net Zero Benchmarks and other measures the Contractor has taken to satisfy the Net Zero Objectives (the "**Net Zero Report**"). [The Owner may withhold payment toward a

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payment request if the Contractor has not submitted a required Net Zero Report or if a required Net Zero Report is incomplete.]

(b) [[NUMBER] [months/years] after substantial completion, the Contractor shall provide a final report (the **"Final Net Zero Report"**) to the Owner describing how the completed [Project/Asset] meets the Net Zero Objectives, including:

(i) the success in reducing GHG emissions produced by the completed [Project/Asset] from the level of emissions that would have been produced if the Net Zero Objectives had not been followed; and

(ii) the measures that are in place to withstand the projected physical impacts of climate change in accordance with the Net Zero Objectives.]

(c) The Owner must notify the Contractor within [10/[NUMBER]] days of receiving a Net Zero Report if the Owner determines that the Contractor is not meeting the Net Zero Objectives and must take remedial action.[The Owner must notify the Contractor within [10/[NUMBER]] days of receiving the Final Net Zero Report if the Owner determines that the [Project/Asset] does not meet the Net Zero Objectives and that the Contractor must take remedial action.] The Owner's notification must set out the deficiencies resulting in the Owner's determination. Failure to meet any of the Net Zero Benchmarks may constitute a deficiency, provided that a Net Zero Report may:

(i) highlight other measures the Contractor has taken to compensate for its failure to meet a Net Zero Benchmark; or

(ii) explain circumstances beyond the Contractor's control that resulted in its failure to meet a Net Zero Benchmark.

(d) If the Owner issues a notice under Section 1.4(c), the Contractor must, within [five/[NUMBER]] days of receiving the notice:

(i) submit a remediation plan (the "**Remediation Plan**") to the Owner, detailing how the Contractor plans to correct the deficiencies as described in the Owner's notice (including any temporary Offsetting required to realign the Contractor's activities with the Net Zero Objectives)[, provided that the Remediation Plan must be verified by [THIRD PARTY] as adequately addressing the deficiencies and revised as determined necessary by [THIRD PARTY]]; and

(ii) take all measures described in the Remediation Plan and, within [20/[NUMBER]] Business Days, notify the Owner of the remediation measures that have been implemented.

(e) [The Contractor shall submit the Net Zero Report[and the Final Net Zero Report] in the format shown in Exhibit [IDENTIFIER], which is attached hereto and made a part of this Contract by reference.]

DRAFTING NOTE: NET ZERO OBJECTIVES REPORTING

This section provides a mechanism for the Owner and Contractor to check in with each other periodically for an assessment of the Contractor's progress in fulfilling the contract's net zero objectives. The drafter should choose an appropriate time frame for the Contractor to submit reports documenting the measures it has taken. The Owner may want to have the reports timed to coincide with the Contractor's payment requests. If the Contractor's progress toward benchmarks or alternative measures is unsatisfactory, the Owner may identify the deficiencies in the Contractor's performance. The Contractor must then submit a plan for correcting its deficiencies and notify the Owner once the corrective measures are in place.

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Optional language in this section provides:

- That the Owner may:
  - request additional reports at intervals other than those specified; and
  - withhold payment if the Contractor fails to submit a required report or submits a report that is incomplete. Counsel should verify that this language complies with state prompt payment act requirements, if applicable, or reword it to comply (see Prompt Payment Acts (Public Projects): State Comparison Chart).
- For the Contractor to:
  - submit a final net zero report at a point after a project is complete. The time frame for submitting this report should allow enough time to assess the performance of the completed project in meeting the Owner's net zero goals. This language should apply if the Contractor has responsibility for project design (see Drafting Note, Accounting for Differences in Contractor Obligations);
  - seek verification from a designated third party that the plan for remediating deficiencies is adequate. This third party may be the same outside expert the Owner used to develop Net Zero Benchmarks for the project (see Drafting Note, Using Outside Expertise); and
  - follow a reporting format included as an exhibit to the contract. This allows the Owner to ensure that the report includes the information needed to adequately assess the Contractor's compliance.

The government entity may need to have a project manager or outside consultant verify the accuracy of the net zero report. In assessing the Contractor's fulfillment of the obligations set out in this Clause, the Owner should recognize:

- That it may not be realistic to expect precise measurements of GHG emissions and reductions.
- The Contractor's good faith efforts to honor the intent of this Clause.
- The benefits of a give-and-take approach that allows the parties to adjust their strategies throughout the term of the contract.
- Matters that are outside the Contractor's control, such as supply chain issues.

However, if the Contractor's efforts are obviously lackluster, the Owner should reject the Contractor's work and require the Contractor to satisfy its obligations. If the Contractor disagrees with the Owner's rejection of its work, the Contractor may seek to have the disagreement resolved under Section 1.7 of this Standard Clause.

1.5 Applicability to Subcontractors. The Contractor must ensure that each subcontract for any portion of the Work includes equivalent provisions to [Section 1.2/Sections 1.2, 1.3, and 1.4] of this Contract. The Contractor's failure to enforce such provisions will be a basis for default under Section 1.6 herein.

DRAFTING NOTE: APPLICABILITY TO SUBCONTRACTORS

The Contractor should use subcontractors who are willing and able to do their part to advance the contract's net zero goals. In addition to agreeing to the warranties under Section 1.2, the Contractor must include similar warranty provisions in its subcontracts. Optional language also obligates the Contractor to include subcontract provisions that require subcontractors to:

- Provide their own net zero targets, as the Contractor must do under Section 1.3.
- Submit periodic net zero reports, similar to those the Contractor submits under Section 1.4. This requirement allows the Contractor to monitor and evaluate the performance of its subcontractors in meeting the overall net zero goals for the project.

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1.6 Default. If the Contractor does not comply with Sections 1.2, 1.3, 1.4, and 1.5 of this Contract, the Contractor will be in breach of the Contract and such breach will be deemed an event of default subject to Section [SECTION NUMBER].

DRAFTING NOTE: DEFAULT

The Contractor's noncompliance with the net zero obligations in this Clause results in a breach of contract. This section cross-references the default provisions contained elsewhere in the contract. These provisions generally set out the Owner's remedies when the Contractor is in default. Contracts for public construction projects may also have a termination for convenience clause that allows the Owner to end the contract for reasons other than default.

While a government entity may ultimately have the right to terminate a contract when the Contractor defaults on its net zero performance obligations, the Owner may want to proceed with caution, considering:

- The Contractor's overall performance of its obligations aside from the breach and whether the Contractor's performance warrants allowing the Contractor to finish out the contract.
- The possibility that the Net Zero Objectives are unachievable or impractical and should be reformulated.
- The likelihood of expensive litigation if the Contractor challenges the Owner's actions.
- Whether the Contractor has acted in good faith.
- The toll termination will take on the project schedule and budget.
- The risk involved in selecting a new contractor.

For more on default and termination provisions in construction contracts, see Standard Clause, Termination of Contractor for Cause (Construction) and Fixed Price Construction Contracts: Owner's Drafting Checklist: Define How Defaults are Treated and Define Grounds for Terminating the Contract.

A default may also occur post construction, especially for contractors who have project design responsibilities. For example, a completed project's failure to maintain sustainability goals may result in a default. The Owner should add new default provisions if the contract's other default provisions do not provide adequate remedies for defaults related to the contract's Net Zero Objectives. A letter of credit or other long-term maintenance security can also provide assurance that post-construction issues will be corrected.

1.7 Dispute Resolution. Disputes or other matters in controversy arising out of or related to the Contractor's performance of its duties under this Section 1 will be subject to the dispute resolution measures set out in Section [SECTION NUMBER] of the Contract.

DRAFTING NOTE: DISPUTE RESOLUTION

This section refers to the main contract's dispute resolution procedures for resolving any disagreements regarding the Contractor's fulfillment of its responsibilities under this Standard Clause. For example, the Contractor may invoke the procedures to resolve a disagreement about the Owner's determination that the Contractor is not meeting the net zero objectives.

Construction contracts often include multi-tiered dispute resolution mechanisms, allowing an opportunity to negotiate a resolution informally before moving on to formal mediation or other methods. If the contract requires arbitration to resolve a dispute related to this Clause, the Owner should ensure that the arbitrators have a background in green construction practices. For more on dispute resolution mechanisms,

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see Practice Note, Dispute Resolution Mechanisms in Construction Contracts in the US.

The parties should not let minor or easily resolvable disagreements disrupt progress on a project. If the dispute resolution procedures that otherwise apply under the contract are not appropriate for this Clause, the drafter may want to provide a simplified procedure.

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