



Volume 2

Appendices:

SAMPLE SOLICITATION AND CONTRACTING DOCUMENT

Introduction to Appendices

These appendices contain useful samples of agreements and contracts that may be used when working with ESCOs. These templates were adapted from State of Idaho Division of Public Works materials. They do not attempt to identify or address all circumstances or conditions you may encounter or desire. Adapt them to meet your needs.

Appendix A contains sample forms related to a Request for Qualifications (RFQ). Sample documents include an RFQ announcement, an RFQ cover letter, a site visit registration form, and an interview announcement. Appendix A also contains examples outlining contract terms, project schedules, evaluation criteria, an Energy Service Company (ESCO) response, and a Technical Facility profile.

Appendix B outlines the Commissioning team roles and responsibilities. This agreement covers the Technical Energy Audit and Project Development Agreement, including details of the project, including scope of work and termination terms.

Appendix C offers an example of an Energy Performance Contract. The contract outlines the Energy Management Plan agreed upon by the ESCO, including project responsibilities, energy savings measurement and calculation methods, and projected financial performance.

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Appendix A

A Guide to Contracting with ESCOs: Request for Qualifications (RFQ) for Energy Performance Contracting Service

STEP 2 Packet

Request for Qualifications (RFQ) For Energy Performance Contracting Services

Contents:

Sample Letters

- RFQ announcement
- Cover letter for RFQ
- Site visit announcement
- Interview announcement

Model Request for Qualifications (RFQ) for Energy Performance Contracting Services (with Attachments A - E)

The following RFQ was adapted from a State of Idaho Division of Public Works document. It does not attempt to identify or address all circumstances or conditions you may encounter or desire. Adapt it to meet your needs.

Recommendations, explanations and negotiating tips are included in <brackets>. Be sure to remove from the actual RFQ.

<SAMPLE>

Announcement
For Request for Qualifications (RFQ)

<Note: Use this letter to announce issuance of RFQ to all ESCOs that you want to notify. Only send out the complete RFQ to those ESCOs who specifically request it, to simplify your effort.>

<Note: RFQs need to be posted and advertised as required>

<Date>

Dear Energy Service Company:

The <company>is inviting submissions from Energy Service Companies (ESCOs) to provide a full range of capital improvements and services to reduce costs of energy and water use. Projects may be financed through an energy performance contract such that annual savings cover capital costs. Services may include a technical audit to assess energy, water and operations and maintenance savings opportunities, design, acquisition, installation or modification of energy-using equipment, and maintenance and training in the operation of such equipment.

Interested ESCOs may view the RFQ at the <website, mailed request, or other>. The RFQ describes the services requested, terms and conditions, the proposed project schedule and the energy-using systems and maintenance issues in the facilities. A description of the facility is attached.

A mandatory site visit will be held on <Date> for ESCOs wishing to respond to the RFQ. Please fax or e-mail back the completed SITE VISIT REGISTRATION form.

RFQ responses must be *received* by <Date> at <Time>.

Sincerely,

<NAME>

<TITLE>

Attachments:

Description of Facilities **<Note: Include the excerpt from the RFQ – Technical Facility Profile – that describes the facilities.>**

Fax or e-mail back the site visit registration form

<SAMPLE>

FAX TO: XXX-XXX-XXXX

E-MAIL TO: <E-mail address>

Site Visit Registration For ESCOs Responding to RFQ

<Name>, <Date>

<company> invites you to attend a walk-through tour of facilities. This site visit is mandatory because your understanding of the requirements and technical approach to the project will be evaluated.

DATE: <Date of tour>

TIME: <Start time of tour>

DURATION: <Estimated length of tour>

LOCATION: <Facility name>

 <Physical address>

See attached map. <Enclose a map>

All ESCOs will tour the facility at the same time so that all will hear the same questions, comments and answers. The following buildings will be on the tour, and the individuals listed will be available to answer questions about the facility operation, maintenance, problems, concerns and plans:

_____ ***Yes, I plan to attend the site visit.***

_____ ***I acknowledge this visit is mandatory.***

Name: _____

Company Name: _____

Mailing Address: _____

Phone: _____ **Fax:** _____

E-mail Address: _____

<SAMPLE>Cover Letter
For RFQ**<Date>**

Dear Energy Service Company:

<company> requests submissions from Energy Service Companies (ESCOs) to provide a full range of capital improvements and services to reduce costs of energy and water use. <Company is posting this RFQ on the Internet so interested ESCOs may submit their qualifications response in accordance with terms of this RFQ. Projects may be financed through an energy performance contract such that annual savings cover all capital costs. Services include a technical audit to assess energy, water and operations and maintenance savings opportunities, design, acquisition and installation or modification of energy-using equipment and maintenance and training in the operation of such equipment.

The attached RFQ describes the services requested, terms and conditions, the proposed project schedule and the energy-using systems and maintenance issues in the facilities.

A mandatory site visit will be held on **<Date>**. The site visit is mandatory for all ESCOs because understanding of requirements and technical approach will be evaluated in the submission. Please fax back the enclosed SITE VISIT REGISTRATION form.

RFQ responses must be prepared as described in Attachment D: ESCO Response. Responses must be received by <company> on **<Date>** by **<Time>** as described in the RFQ.

Sincerely,

<NAME>

<TITLE>

Attachments:

Site visit registration form
Request for Qualifications (RFQ) for Energy Performance Contracting Services

<SAMPLE>

Interview Announcement

<Note: Consider making a phone call announcement before sending out this letter to set the interview time. This letter will serve as confirmation of date, time and location.>

<Date>

Dear <Name of Energy Service Company (ESCO)>:

After reviewing submissions received for energy performance contracting services, we are inviting <quantity> energy service companies, including your firm, to participate in the interview portion of the final selection process.

Your interview is scheduled for <time> on <date> at <location>. Please include all persons with major responsibility for the project's technical design, management and contract negotiation in the interview. The interview will last <duration of interview – often 60 to 90 minutes> minutes, with <duration of presentation – often 30 to 45 minutes> minutes for your prepared presentation and the remaining <duration of questionlanswer segment – often 30 to 45 minutes> minutes for questions and answers. We will have available for your use a <audio visual equipment on hand – screen, overhead projector, etc.>.

Based on results from both the written responses to the RFQ and the oral interviews, the Project Evaluation Team will rank the ESCOs and contract negotiations will proceed with the top-ranked ESCO. Note that the interview may be tape-recorded for later use.

We look forward to meeting you and learning more about your services.

Sincerely,

<Name>

<TITLE>

Attachment:

Directions and map to interview location

REQUEST FOR QUALIFICATIONS
FOR
<COMPANY NAME>

<Date of Issuance>

REQUEST FOR QUALIFICATIONS

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Attachment A: Contract Terms and Conditions

Attachment B: Proposed Project Schedule

Attachment C: Evaluation Criteria

Attachment D: ESCO Response

Attachment E: Technical Facility Profile

Request for Qualifications for <AGENCY NAME>

Issued by:
<company>
For Energy Performance Contracting Services

<Note: This RFQ is a model document only and does not attempt to identify or address all circumstances or conditions you may encounter or desire.>

SECTION 1: Introduction

- 1.1 <company> seeks submissions from interested Energy Service Companies (“ESCOs”) to provide comprehensive services to reduce energy and water costs and implement related capital improvements in selected facilities owned or managed by a <company> such that annual energy and water cost savings are applied to annual payments for improvements. <company> is posting this RFQ on the Internet so interested ESCOs can submit a submission in accordance with the terms of this RFQ.
- 1.2 The entire process consists of four phases.
- 1.2.1 RFQ Phase: Through this RFQ, <company> will select an ESCO based on written submissions and interviews.
- 1.2.2 Technical Energy Audit Phase: <company> intends to enter into a Technical Energy Audit and Project Development Plan Agreement with the selected ESCO to further define the project scope and related issues.
- 1.2.3 Construction/Implementation Phase: Upon satisfactory results of the Technical Energy Audit, and at the option of <Company, <company> may enter into an Energy Performance Contract to implement recommended projects.
- 1.2.4 Commissioning/Monitoring Phase: The Energy Performance Contract may also include provisions for long-term follow-up monitoring.
- 1.3 <company> is not liable for any costs incurred by any ESCO in preparing or submitting a submission or related to any site visit. <company> will incur any financial liability other than what liability exists pursuant to a validly executed agreement. No property interest of any nature shall exist until a contract is signed by all parties.

SECTION 2: Background, Overview, Goals

- 1.1 <company> seek to maximize energy savings and related improvements in facilities.
- 1.2 Services and capital improvements may be financed through an Energy Performance Contract under which the <company>:

May incur no initial capital costs;

Achieves significant long-term cost savings;

Achieves a guarantee for cost savings;

Maintains consistent levels of occupant comfort and building functionality; and

Captures benefits that may accrue as a direct result of such energy-related services and capital improvements, such as environmental protection, hazardous materials disposal or recycling, improved occupant comfort, reduced maintenance needs, improved indoor air quality, or any unique benefits that may be provided by regular technology upgrades or advanced proprietary technology.

SECTION 3: Required Systems and Services Capabilities (Statement of Work)

- 1.3 ESCO must be an accredited member in or a qualified by ALL of the following:
- National Association of Energy Services Companies (NAESCO) accreditation and the Department of Energy.
- 1.4 ESCO must have performed a minimum of <YEARS> projects valued at <DOLLAR AMOUNT> Dollars (\$0,000,000) or more in the past three (3) years in any of the following states:<STATES>. (ESCO will have to provide names, contacts, size and verification that it was done by the ESCO and not by a parent company.)
- 1.5 ESCO must include fee based pricing structures and examples of fee base in submission.
- 1.6 ESCO must have the demonstrated technical and managerial capability to address a broad range of energy and water systems in buildings, provide a comprehensive set of related services, and capture the value of any directly related ancillary benefits.
- 1.7 ESCO must provide evidence of financial stability and capability to fund all costs associated with its submission.
- 1.8 Energy systems could include, but are not limited to, heating, ventilating and air conditioning (HVAC) equipment, energy management and control systems, lighting systems, domestic hot water systems, the building envelope and other energy using systems, such as laundry, kitchen, pool, and renewable energy systems. **<Note: Delete items that do not exist in the facilities, from previous sentence.>** Water systems could include, but are not limited to, devices which reduce water consumption and sewage costs, such as automatic controls, low-flow faucet aerators, low-flow toilets, cooling tower modifications, pool covers, and irrigation system controls or modifications.

1.9 Services may include but are not limited to the following:

1.9.1 Audit Phase

1.9.1.1 Technical energy and water audit to evaluate costs and savings of a variety of measures.

1.9.1.2 Project development plan, including financial analysis.

1.9.2 Construction/Implementation Phase

1.9.2.1 Design services.

1.9.2.2 Equipment procurement and purchasing.

1.9.2.3 Construction/installation.

1.9.2.4 Hazardous waste disposal or recycling.

1.9.2.5 Financing capability or ability to help find financing.

1.9.3 Commissioning/Monitoring Phase

1.9.3.1 Commissioning.

1.9.3.2 Continuing operations and maintenance for all improvements.

1.9.3.3 Staff training for <company>

1.9.3.4 on routine maintenance and operation of systems.

1.9.3.5 Training of occupants.

1.9.3.6 Monitoring and verification for measurement and reporting of the performance and savings from improvements.

1.9.3.7 Cost savings guarantee.

1.10 Facilities identified for this work are listed in Attachment E: Technical Facility Profile. <company> reserves the right to reduce the scope of work or conduct work in phases. All buildings and facilities listed may subsequently be added. **<Note: List all buildings that are potential candidates for energy saving improvements. You have your right to reduce the scope.>**

SECTION 4: Administrative Information

1.11 RFQ Phase

1.11.1 **Site Visits:** Prior to the due date of submissions, <company> will host a mandatory tour of the facilities. The site visit is mandatory for all ESCOs who will later submit a submission because an understanding of the requirements and the technical approach will be evaluated. Knowledgeable representatives will be available to answer questions about operation and maintenance practices, problems, concerns and future plans. All ESCOs will tour the facility at the same time. Any modifications to the RFQ resulting from the site visit will be provided in writing to all attending ESCOs following the site visit. The site visit will be held on <Date>. Contact the following person for site visit details:

<Contact Person for Site Visit:>

<Phone:>

<Fax:>

<E-mail address:>

1.11.2 **Submission of Written Submissions:** Submissions must be prepared as described in Attachment D: ESCO Response. All material submitted regarding this RFQ becomes the property of <company>. If any part of this RFQ is revised, an addendum notice will be sent to each responding ESCO via the Internet. A submission in response to this RFQ shall constitute a binding offer.

1.11.3 **Submission Review:** <company> will establish a project evaluation team to review and evaluate the written responses to this RFQ in accordance with the evaluation criteria identified in Attachment C: Evaluation Criteria. ESCOs are required to disclose markups for each cost category and provide a description of the intended pricing methodology. Cost analysis will be used to evaluate the markups for reasonableness. References are required from at least two (2) prior clients addressing ESCO's performance in situations similar to those faced by <company>. <company> reserves the right to reject any or all submissions and to waive informalities and minor irregularities in submissions received and to accept any submissions if deemed in the best interest of <company>.

1.11.4 **Interviews and Final Selection:** In accordance with <STATE>< Code>, up to <AMOUNT> of the proposers will be selected to participate in an interview with the project evaluation team to more fully discuss how its approach to this project satisfies the evaluation criteria and to answer questions. All persons with major responsibility for the project's contract negotiation, construction management and follow-up monitoring should be present at the interview. Interviews may be tape-recorded. Based on results from both the written responses to the RFQ and the oral interviews, an award will be made in the best interest of the <company>.

1.12 Technical Energy Audit Phase

Development of Technical Energy Audit and Project Development Plan: <company> intends to enter a contract for the Technical Energy Audit and Project Development Plan. Cost markups provided in the submission will be used in technical audit cost projections and in any final Energy Performance Contract, provided the size and scope of the resulting project remain similar.

1.13 Construction/Implementation Phase

Development of Energy Performance Contract: Following successful completion of the Technical Energy Audit and Project Development Plan Agreement, and solely at <company>'s option, <company> may enter an Energy Performance Contract to implement recommended projects.

1.14 Other RFQ Issues

1.14.1 **Inquiries.** ESCOs may make written fax inquiries concerning this RFQ to clarify requirements prior to the date indicated in Attachment B: Proposed Project Schedule. Send all inquiries to: <Name, address, fax>.

1.14.2 **Modification or Withdrawal of Submissions:** Submissions may be modified or withdrawn by the ESCO prior to the established due date and time.

1.14.3 **Acceptance of RFQ Terms:** A submission in response to this RFQ shall constitute a binding offer. The signature of ESCO shall indicate acknowledgment of this condition. ESCO must identify clearly and thoroughly any variations between its submission and the RFQ, including contract terms and conditions. Failure to do so shall be deemed an acceptance of the State's terms and conditions and a waiver of any right to modify any terms, except as outlined or specified in the RFQ.

1.14.4 **Confidential/Proprietary Information:** <STATE>Public Records Law, <STATE><CODE, CODE SECTIONS>, allows the open inspection and copying of public records. Public records include any writing containing information relating to the conduct or administration of the public's business prepared, owned, used, or retained by a state or local <company> regardless of the physical form or character. **ALL, OR MOST, OF THE INFORMATION CONTAINED IN YOUR RESPONSE TO THIS RFQ WILL BE A PUBLIC RECORD SUBJECT TO DISCLOSURE UNDER THE PUBLIC RECORDS LAW.** The Public Records Law contains certain exemptions. One exemption potentially applicable to part of your response may be for trade secrets. Trade secrets include a formula, pattern, compilation, program, computer program, device, method, technique or process that derives economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons and is subject to the efforts that are reasonable under the circumstances to maintain its secrecy. If you consider any element of your submission to be a trade secret, or otherwise protected from disclosure, you **MUST** so indicate by marking **EACH PAGE** of the pertinent document. Include the specific basis for your request that it be treated as exempt from disclosure. Marking your entire bid or proposal as exempt is not acceptable or in accordance with the bid documents or the Public Records Act. In addition, a legend or statement on one (1) page that all or substantially all of the response is exempt from disclosure is not acceptable and **WILL NOT BE HONORED. PRICES QUOTED IN THIS RFQ ARE NOT A TRADE SECRET.** The State, to the extent allowed by law and in accordance with this RFQ, will honor a request of nondisclosure. You will be required to defend any claim of trade secret or other basis for nondisclosure in the event of an administrative or judicial challenge to the State's nondisclosure. Any questions regarding the applicability of the Public Records Law should be addressed to the <company> or should be presented to your own legal counsel – **PRIOR TO SUBMISSION.**

1.14.5 **Acceptance of Submission Content:** The contents of the submission (including persons specified to implement the project) of the successful ESCO will become contractual obligations. Failure of the successful ESCO to accept these obligations in a contract, or similar authorized acquisition document, may result in cancellation of the award and such ESCO may be excluded from consideration in future energy saving projects.

1.14.6 **Certification:** Each person signing the submission certifies that:

1.14.6.1 He is the person in the ESCO's organization responsible for the decision as to the prices being offered herein and that he has not participated, and will not participate, in any action contrary to the above; or

1.14.6.2 He is not the person in the offeror's organization responsible within that organization for the decision as to the prices being offered herein but that he has been authorized in writing to act as agent for the persons responsible for such decision in certifying that such persons have not participated, and will not participate, in any action contrary to the above, and as their agent does hereby so certify; and he has not participated, and will not participate, in any action contrary to the above.

1.14.7 Special Provisions

<Note to Customer: Include any additional RFQ requirements under Special Provisions>

ATTACHMENT A: Contract Terms and Conditions

The following are the minimum terms and conditions <company> will include/require in a Technical Energy Audit and Project Development Plan Agreement and an Energy Performance Contract.

TECHNICAL ENERGY AUDIT AND PROJECT DEVELOPMENT PLAN AGREEMENT

1. **Technical Energy Audit:** The ESCO's proposed work under the Technical Energy Audit must include the performance and presentation of results from a detailed financial grade technical energy audit of acceptable quality to <company>. Markups provided by ESCO in response to this RFQ shall be included in the Technical Energy Audit and Project Development Plan Agreement and must be used in the energy audit, provided the size and scope of the project remain similar. If <company> decides not to enter into an energy performance contract after the final audit report has been accepted, the <company> agrees to pay the cost of the audit as stated in the submission in accordance with the contract terms and conditions. Only audits guaranteeing a savings over the proposed contract period will be accepted. The technical audit must include estimates of savings for each cost savings measure. Also, the cost estimate for each cost savings measure must include an estimate of all costs, including design, engineering, installation, maintenance, repairs and annual payments.
2. **Allowable Cost Savings Measures:** In considering your submission, these are the allowable cost savings measures we will consider. "Cost-savings measure" means any facility improvement, repair or alteration, or any equipment, fixture or furnishing to be added or used in any facility that is designed to reduce energy consumption and energy operating costs or increase the energy efficiency of facilities for their appointed functions that are cost effective. "Cost-savings measure" includes, but is not limited to, one (1) or more of the following:
 - a. Procurement of low-cost energy supplies of all types, including electricity, natural gas and water;
 - b. Insulating the building structure or systems in the building;
 - c. Storm windows or doors, caulking or weather stripping, multiglazed windows or door systems, heat-absorbing or heat-reflective glazed and coated window and door systems, additional glazing, reductions in glass area or other window and door system modifications that reduce energy consumption;
 - d. Automated or computerized energy control systems;
 - e. Heating, ventilation or air conditioning system modifications or replacements;
 - f. Replacing or modifying lighting fixtures to increase the energy efficiency of the lighting system;

- g. Energy recovery systems;
- h. Cogeneration systems that produce steam or forms of energy such as heat, as well as electricity, for use primarily within a building or complex of buildings;
- i. Installing new or modifying existing day lighting systems;
- j. Installing or modifying renewable energy and alternate energy technologies;
- k. Building operation programs that reduce energy costs including, but not limited to, computerized programs, training and other similar activities;
- l. Steam trap improvement programs that reduce energy costs;
- m. Devices that reduce water consumption; and
- n. Any additional building infrastructure improvements that produce energy cost savings, significantly reduce energy consumption or increase the energy efficiency of the facilities for their appointed functions and are in compliance with all applicable state building codes.

Allowable cost saving measures may **not** include:

- a. <company> in-house labor costs.
- b. <company> deferred maintenance cost.
- c. Offset of future customer capital cost.

The following items and contract terms may be negotiated:

- a. Escalation rates.
- b. Interest rates.
- c. <company> equity cash outlay (Company's option).

The following items and contract terms will not be negotiated: **<NOTE: If any items from preceding section are, in fact, not negotiable, delete from preceding section and insert here. Otherwise delete this section.>**

- a.
- b.

Any cost savings related to maintenance and operation of the facilities will be rigorously reviewed and, if agreed to, will be limited to those that can be thoroughly documented and approved by <company>.

3. **Use of Stated Cost Markups:** The pricing methodology and individual cost markups provided in a submission will be the maximum markups to be used in any subsequent technical audit or performance contract, providing the scope and size of the project remain similar. Cost markups in a submission can be decreased in a subsequent contract.
4. **Professional Architect/Engineer Involvement:** A registered architect or professional engineer must review and approve design work done and must be involved throughout the process of auditing, design, construction, and installation. The architect or engineer may be an employee of the ESCO and must be registered/licensed in <STATE>.
5. **Plan Review:** Plans and specifications must be submitted to and approved by the State of <STATE> Division of Building Safety and the State Fire Marshal. ESCO shall pay all plan check fees. Plans and specifications are also subject to review by <REVIEWER>.
6. **Termination:** The State may terminate the contract without cause upon at least fourteen (14) days' written notice to the ESCO. In the event of such termination, the ESCO shall be compensated by the State for expenses actually incurred prior to termination.
7. **Insurance:** *<Note: The coverage amounts required here were drafted for projects anticipated to be for large dollar amounts. You may consider lessening amounts for small projects. Consult your legal counsel or <company> before doing so.>* Before commencing any work under this Agreement, and for the duration of the contract, ESCO shall file with <company> insurance policies as specified below:
 - a. Workers' Compensation Insurance with limits as required by statute, and Employer's Liability Insurance with limits of not less than \$100,000 per Accident, \$500,000 Disease, Policy Limit and \$100,000 Disease, Each Employee.
 - b. Automobile Liability, including non-owned and hired - \$1,000,000.
 - c. For the duration of the contract, ESCO shall maintain Comprehensive General Liability Insurance written on an "occurrence" basis. Such insurance shall bear a combined single limit per occurrence and annual aggregate of not less than \$1,000,000, exclusive of defense costs. Such insurance will name <company> as an additional insured as respects ESCO's acts or omissions, and shall contain standard cross-liability or severability of interest provisions and waiver of litigation.
 - d. ESCO shall maintain in full force and effect, at ESCO's expense, an Errors and Omissions or Professional Liability Insurance Policy in the amount of \$1,000,000 minimum coverage. Such coverage may be on a "claims made" basis. If such insurance is on a "claims made" basis, it shall remain in effect for the duration of the applicable statute of limitations for claims against professionals such as ESCO. The ESCO shall be responsible for all claims, damages, losses or expenses, including attorneys' fees, arising out of or resulting from the performance of professional services contemplated by this Agreement, provided that any such claim is attributable to bodily injury or death, or injury to or destruction of tangible personal property, or to failures of the work, including the loss of use resulting therefrom, and is caused, in whole or in part, by any negligent act, error or omission of the ESCO, or any consultant or associate thereof, anyone directly or indirectly employed by the ESCO. The ESCO shall submit a Certificate of Insurance verifying said coverage upon execution of this Agreement and also any notices of renewals of such policy as they occur.

ENERGY PERFORMANCE CONTRACT

Construction/Implementation Phase

1. **Contract Term:** No energy performance contract shall exceed [_____] years in duration and is subject to annual appropriations. **Note to ESCO: It is <company> policy that such contracts not exceed <YEARS> except in exceptional situations.**

2. **Insurance:** *<Note: The coverage amounts required here were drafted for projects anticipated to be for large dollar amounts. You may consider lessening amounts for small projects. Consult your legal counsel or <company> before doing so.>*
 - a. Prior to the commencement of any work and for the duration of this Agreement, the ESCO must provide and maintain insurance as set forth below. The ESCO shall require all subcontractors to maintain the same insurance required herein of the ESCO. All such insurance shall be written on a Comprehensive Form of Policy. Failure to provide satisfactory evidence of coverage may result in rejection of a submission and/or contract cancellation. Insurance required by this section shall name <NAME> as an additional named insured and shall be with insurers rated A-VII or better in the latest *Bests Rating Guide* and in good standing and authorized to transact business in <STATE>. The coverage provided by such policy shall be primary to any coverage of the State on or related to the Contract and shall provide that the insurance afforded applies separately to each insured against whom a claim is made, except with respect to the limitation of liability. Any “other insurance” provisions contained in any policy including the state of <STATE> as an additional added insured shall not apply. All required policies shall require sixty (60) days’ notice to the State, by certified or registered mail, return receipt requested, prior to any cancellation, potential reduction in aggregate limits, refusal to renew or any material change in the nature or extent of the coverage provided. All policies shall contain waivers of subrogation. ESCO waives all rights against the State and its agents, officers, directors and employees for recovery of damages to the extent these damages are covered by the required policies. Policies may contain deductibles but such deductibles shall not be deducted from any damages due to the State.

By requiring insurance herein, the State does not represent that coverage and limits will necessarily be adequate to protect the ESCO and such coverage and limits shall not be deemed as a limitation on the ESCO’s liabilities under the indemnities granted to the State.

 - b. The following are required:
 - i) Workers’ Compensation with limits as required by statute, and Employer Liability Insurance with limits of not less than \$100,000 per accident, \$500,000 per disease, policy limit and \$100,000 disease, each employee.

- ii) Automobile Liability, including non-owned and hired – \$1,000,000.
 - iii) <INSURANCE>including premises operation, owners and contractors protective liability, products and completed operations liability, personal injury liability (including employee acts), broad form property damage liability and blanket contractual liability in amounts of not less than \$5,000,000. ESCO shall maintain Commercial General Liability (CGL) and, if necessary, commercial umbrella or excess liability with a limit of not less than \$5,000,000 each occurrence/Annual Aggregate and the Annual Aggregate shall be endorsed to apply separately for each job site or location. The Schedule of Underlying Insurance in the Umbrella Policy shall include the CGL, the auto policy and the Employer’s Liability Policy. In the event any of the hazards of explosion, collapse and underground, normally referred to as XCU, exist, then such hazards shall be covered and protection afforded under the policy and such exclusions must be removed from the policy.
 - iv) ESCO shall maintain in full force and effect, at ESCO’s expense, an Errors and Omissions or Professional Liability Insurance Policy in the amount of \$2,000,000 minimum coverage. Such coverage may be on a “claims made” basis. If such insurance is on a “claims made” basis, it shall remain in effect for the duration of the applicable statute of limitations for claims against professionals such as ESCO. The ESCO shall be responsible for all claims, damages, losses or expenses, including attorneys’ fees, arising out of or resulting from the performance of professional services contemplated by this Agreement, provided that any such claim is attributable to bodily injury or death, or injury to or destruction of tangible personal property, or to failures of the work, including the loss of use resulting therefrom, and is caused, in whole or in part, by any negligent act, error or omission of the ESCO, or any consultant or associate thereof, anyone directly or indirectly employed by the ESCO. The ESCO shall submit a Certificate of Insurance verifying said coverage upon execution of this Agreement and also any notices of renewals of such policy as they occur.
 - v) ESCO shall maintain in full force and effect, at ESCO’s expense, an Installation Floater, with limits of not less than One Million and 00/100 Dollars (\$1,000,000.00), for coverage of the ESCO’s labor, materials and any equipment to be used for completion of work under this contract. Coverage is to be on an all risk of physical damage form, including earthquake and flood. This insurance shall include the State of<STATE>, <company>, the contractor, and its subcontractors as their interests may appear.
3. **Open Book Pricing:** Open book pricing will be required, such that the ESCO will fully disclose all costs, including all subcontractor and vendor costs. ESCO will maintain cost accounting records on authorized work performed under actual costs for labor and material, or other basis requiring accounting records. ESCO will afford <company> access to these records and preserve them for a period of three (3) years after final payment. Costs will be evaluated through price analysis to compare costs with reasonable criteria such as established catalog and market prices or historical prices.
4. **Meeting Project Schedule:** ESCO must provide a final schedule of project milestones, including equipment-servicing and preventive maintenance provisions, that will become part of any final contract. ESCO is responsible for meeting schedule deadlines or notifying <company> of any schedule changes. In the event any milestone or service provision is not met as scheduled without prior approval from <company> reserves the right to consider it a default and withdraw from all contractual obligations without penalty.

5. **Inspection:** <company> must have the right to inspect, test and approve the work conducted in the facilities during construction and operation. <company> shall have the right and access to the account books, records, and other compilations of data that pertain to the performance of the provisions and requirements of this Agreement. Records shall be kept on a generally recognized accounting basis, and calculations will be kept on file in legible form and retained for three (3) years after close-out. <company> retains the right to have its representative visit the site during the audit and implementation phases of the project, and to attend relevant on-site or off-site meetings of the ESCO and/or its subcontractors.
6. **Final Approval by <company>:** <company> retains final approval over the scope of work and all end-use conditions. <company> may delay the initiation of savings payments until so approved.
7. **Compliance:** All work completed under this contract must be in compliance with all applicable federal, state and local laws, rules and regulations such as building codes and appropriate accreditation, certification and licensing standards. Work must be in accordance with sound engineering and safety practices and in compliance with all applicable regulations relative to the premises. ESCO and its subcontractors will be responsible for obtaining any and all required governmental permits, consents and authorizations, and for payment of any and all state and city required taxes and fees which result from this contract. Where laws, rules or regulations require <company> to secure approvals for the work of this contract, ESCO shall assist <company> obtain such approvals and drawing review and on-site inspections, and incorporate such costs into the energy performance contract.
8. **Handling of Hazardous Materials:** All work completed under this contract must be in compliance with all applicable federal, state and local laws, rules and regulations regarding waste disposal and treatment/disposal of any hazardous materials that could result from this project. In the event the ESCO encounters any such materials, the ESCO shall immediately notify the project manager and stop work pending further direction from the project manager. <company> may, in its sole discretion, suspend work on the project pending removal of such materials or terminate this Agreement.
9. **Authorized to Do Business:** Before entering into a contract, the Contractor (ESCO) shall be authorized to do business in the state and shall submit a properly executed Contractor's Affidavit Concerning Taxes.
10. **Forms:** ESCO shall complete and return to <company> forms as required by tax collector, showing dates, names, addresses, contracting parties, including all subcontractors, and all other relevant information that may be required.
11. **Permits:** ESCO shall pay for plumbing and electrical permits required by the <STATE> Division of Building Safety. ESCO shall obtain and pay for all licenses and permits and shall pay all fees and charges for connections to outside services and for the use of municipal or private property for storage of materials, parking, utility services, temporary obstructions, enclosures, opening and patching of streets, etc., arising from the construction and completion of the work.
12. **Public Works Contractor's State License Law:** ESCO and its subcontractors and sub-subcontractors shall comply with <STATE> Code with specific reference to Public Works Contractor's State License Law, <REFERENCE>.
13. **Construction Manager:** If construction management is used, the Construction Manager shall be licensed as a Public Works Construction Manager, and all construction management shall comply with <STATE> Code, <REFERENCE>.

14. **Employment of <STATE> Residents:** Pursuant to <CODE> it is provided that each ESCO must employ ninety-five percent (95%) bona fide <STATE> residents as employees, except where under such contracts fifty (50) or less persons are employed, the ESCO may employ ten percent (10%) non-residents, provided, however, in all cases employers must give preference to the employment of bona fide residents in the performance of said work, and no contract shall be let to any person, firm, association or corporation refusing to execute an agreement with the above-mentioned provisions in it; provided that in contracts involving the expenditure of Federal Aid Funds, this act shall not be enforced in such a manner as to conflict with or be contrary to the federal statutes prescribing a labor preference to honorable discharged soldiers, sailors, or marines, prohibiting as unlawful any other preference or discrimination among citizens of the United States.
15. **Subcontractor Approval:** <company> retains the right to reasonably reject any ESCO-selected subcontractor prior to its commencement of work on this project. Names and qualifications must be submitted at least two (2) weeks in advance.
16. **Bonding Requirements:** The ESCO will provide to <company> at contract signing separate performance and labor and material payment bonds, each in the sum of 100 percent (100%) of the cost of the construction work. Bonds shall be issued by a surety rated A-VII or better in the latest Bests Rating Guide and in good standing and authorized to transact business in <STATE>.
17. **Standards of Comfort:** Specific standards of comfort, safety and functionality will not be degraded from the existing condition and must meet minimum established industry standards. The ESCO will be responsible for maintaining the levels of comfort for each building as specified in this RFQ or in any final agreement. Persistent failure to maintain the defined climate and lighting conditions will constitute a default.
18. **Management:** The ESCO will work with current building management and maintenance personnel in order to coordinate construction and provide appropriate training in operations and maintenance of all installed improvements.
19. **Equipment Compatibility or Standardization:** All equipment installed that is comparable to similar equipment at other sites operated by <company> shall be of the same manufacturer for standardization of equipment <company>-wide and/or for compatibility with existing systems, unless excepted by <company>. *<Note: Could include name of existing controls system, if new controls systems will have to be compatible with an existing brand of controls.>*
20. **As-Built Drawings:** Where applicable, ESCO must provide durable, reproducible record drawings (or such electronic equivalents as may be agreed to by <company> and <company>) from the “as-built drawings” of all existing and modified conditions associated with the project, conforming to typical engineering standards. These should include architectural, mechanical, electrical, structural, and control drawings and operating manuals and will be delivered prior to acceptance. *<Note: Include note about required format: paper, electronic, AutoCAD version xx.>*

Commissioning/Monitoring Phase

1. **Guaranteed Cost Savings:** Improvements and services must result in guaranteed minimum cost savings to be achieved each year. The guarantee is required to equal the calculated savings attributable to all energy saving measures for each year during the contract period. The combined annual savings must be sufficient to cover all project costs to the ESCO, less <company>'s initial purchase equity, if any, including debt service and contractor fees, and maintenance, monitoring and other services, for the duration of the contract term. Annual cost savings beyond the guaranteed minimum savings will be held by the <company>, and will not be allocated to shortfalls in other years.
2. **<company> Payments:** Payments must be based on actual measurements comparing post-retrofit improvements to building performance before the installation of any energy systems and service improvements. Payments for capital improvements shall be structured as equal payments at constant intervals to be made by the <company> through the term of the contract.
3. **Monitoring and reports:** During the term of each performance contract, the ESCO shall monitor the reductions in energy consumption and cost savings attributable to the cost-savings measures installed pursuant to the performance contract and shall annually prepare and provide a report to the Director of the Department of Administration documenting the performance of the cost-savings measures.
4. **Annual Reconciliation:** Annual savings will be verified at a specified time each year in order to determine if the ESCO's guarantee was satisfied.
5. **Methodology to Adjust for Changes:** The contract must contain a clause whereby unanticipated changes in facility use, occupancy, schedule and/or utility rates can be accommodated in a fair manner agreeable to both parties. The ESCO's proposed method for adjusting the energy use baseline should be identified in the RFQ response.
6. **Maintenance Responsibilities:** No equipment or other improvements will be installed that would require the <company> to hire additional personnel unless contract negotiations produce an explicit exemption for a specific installation. Maintenance responsibilities shall be set forth in detail in the contract.
7. **Follow-up Monitoring and Maintenance Services:** Following the installation and implementation of improvements, the ESCO will be responsible for maintaining and monitoring the measures to ensure optimal performance, however, the <company> has the option to decline these services or negotiate for a reduced term of services. All maintenance and monitoring fees will be paid through guaranteed savings.
8. **Operation and Maintenance Manuals:** At least three (3) maintenance manuals for each site will be provided for all equipment replacements and/or upgrades at each location. Manuals are subject to approval of <company>.
9. **Training:** The ESCO will be required to train the <company>'s operational and maintenance personnel in all aspects of efficiently operating and maintaining all equipment and systems of all installed improvements. Training and retraining shall include all existing and new personnel responsible for operation and maintenance of all installed improvements during the term of the contract.

10. **Continuing Activities:** <company> reserve the right to make energy and water improvements to the work sites and to monitor the performance of the installations independently of the ESCO. Additionally, <company> may wish to integrate other identified capital needs with ESCO projects, which may or may not contain energy and water saving opportunities.

GENERAL TERMS (FOR BOTH AUDIT AND ENERGY PERFORMANCE CONTRACTS)

1. **Appropriation by Legislature Required:** It is understood and agreed that the State is a government entity and this Agreement shall in no way or manner be construed so as to bind or obligate the State of <STATE> or using <company> beyond the term of any particular appropriation of funds by the State's Legislature as may exist from time to time. The State reserves the right to terminate this Agreement in whole or in part if, in its judgment, the Legislature of the State of <STATE> fails, neglects, or refuses to appropriate sufficient funds as may be required for the State to continue any payments required under this Agreement. All affected future rights and liabilities of the parties hereto shall thereupon cease within ten (10) days after notice to the ESCO. It is understood and agreed that the State's payments herein provided for shall be paid from <STATE> State Legislative appropriations and, in some instances, direct federal funding.
2. **Assignment and Delegation:** Neither party to any resulting contract may assign or delegate any portion of the contract without the prior written consent of the other party.
3. **Indemnification:** The ESCO shall indemnify, save and hold harmless the <company>, its employees and agents, against any and all claims, damages, liability and court awards, including costs, expenses, and attorney fees incurred as a result of any act or omission by the ESCO or its employees, agents, subcontractors, or assignees pursuant to the terms of a contract resulting from this RFQ.
4. **Ownership of Contract Products/Services:** Submissions, upon established opening time, become the property of <company>. All products/services produced in response to the contract resulting from this RFQ will be the sole property of <company>, unless otherwise noted in the RFQ. The contents of the successful ESCO's submission will become contractual obligations.
5. **Non-Discrimination:** The ESCO shall comply with all applicable state and federal laws, rules and regulations involving non-discrimination on the basis of race, color, religion, national origin, age or sex.
6. **Property of Drawings, Reports and Materials:** All drawings, reports and materials prepared by the ESCO specifically in performance of this contract shall become the property of <company> and will be delivered to <company> no later than forty-five (45) days after completion of construction.
7. **Taxes:** The ESCO, in consideration of securing the business of erecting or constructing public works in this state, recognizing that the business in which it is engaged is of a transitory character, and that in the pursuit thereof, its property used therein may be without the state when taxes, excises, or license fees to which it is liable become payable, agrees:
 - a. To pay promptly when due all taxes (other than on real property), excises and license fees due to the state, its sub-divisions, and municipal and quasi-municipal corporations therein, accrued or accruing during the term of this contract, whether or not the same shall be payable at the end of such term;

- b. That if the said taxes, excises, and license fees are not payable at the end of said term, but liability for the payment thereof exists even though the same constitute liens upon its property, to secure the same to the satisfaction of the respective officers charged with the collection thereof; and
- c. That, in the event of its default in the payment or securing of such taxes, excises, and license fees, to consent that the department, officer, board, or taxing unit entering into this contract may withhold from any payment due it hereunder the estimated amount of such accrued and accruing taxes, excises, and license fees for the benefit of all taxing units to which said ESCO is liable.
8. **Pre-Payment Non-Penalty:** The contract must permit <company> to prepay the ESCO, in part or in whole, without penalty.
9. **Contract Re-Negotiation:** <company> reserve the right to renegotiate the terms of the contract due to changes in the regulatory or utility climates or <company>'s non-discretionary use of energy, or if <company> desire to add sites as identified in this RFQ.
10. **Preventive Maintenance Schedule:** Upon completion of the contract, ESCO shall provide to the <company> a single comprehensive schedule of necessary preventive maintenance for all installations for the five (5) years following contract expiration or termination.
11. **Contract Cancellation:** <company> reserves the right to cancel, for cause, any contract resulting from this RFQ by providing timely written notice to the ESCO.
12. **Contract Relationship:** It is distinctly and particularly understood and agreed between the parties hereto that the <company> is in no way associated or otherwise connected with the performance of any service under this Agreement on the part of the ESCO or with the employment of labor or the incurring of expenses by the ESCO. Said ESCO is an independent contractor in the performance of each and every part of this Agreement, and solely and personally liable for all labor, taxes, insurance, required bonding and other expenses, except as specifically stated herein, and for any and all damages in connection with the operation of this Agreement, whether it may be for personal injuries or damages of any other kind. The ESCO shall exonerate, indemnify and hold the <company> harmless from and against and assume full responsibility for payment of all federal, state and local taxes or contributions imposed or required under unemployment insurance, social security, worker's compensation and income tax laws with respect to the ESCO or ESCO's employees engaged in performance under this Agreement. The ESCO will maintain any applicable worker's compensation insurance and will provide certificate of same if requested. There will be no exceptions made to this requirement and failure to provide a certification of worker's compensation insurance may, at the State's option, result in cancellation of this Agreement or in a contract price adjustment to cover the State's cost of providing any necessary worker's compensation insurance. The State does not assume liability as an employer.
13. **State of <STATE> Minimum Wage Law:** It will be the responsibility of the ESCO to fully comply with <STATE> law regarding the minimum wage law for residents hired to help on projects and jobs in <STATE>.
14. **Use of the <company> Name:** ESCO agrees that it will not, prior to, in the course of, or after performance under this Agreement use the State's name in any advertising or promotional media as a customer or client of ESCO without the prior written consent of the State.

15. **Special Terms Govern:** In the event of any conflict between these standard terms and conditions and any special terms and conditions included in a contract, the special terms and conditions will govern.
16. **Force Majeure:** Neither party shall be liable or deemed to be in default for any Force Majeure delay in performance occasioned by unforeseeable causes beyond the control and without the fault or negligence of the parties, including, but not restricted to, acts of God or the public enemy, fires, floods, epidemics, quarantine, restrictions, strikes, freight embargoes, unusually severe weather, provided that in all cases the ESCO shall notify <company> promptly in writing of any cause for delay and the State concurs that the delay was beyond the control and without the fault or negligence of the ESCO. If reasonably possible, the ESCO shall make every reasonable effort to complete performance as soon as possible.
17. **Governing Law and Severability:** This Agreement shall be construed in accordance with, and governed by the laws of the state of <STATE>. Any action to enforce the provisions of this Agreement shall be brought in state district court in [_____] County, <STATE>. In the event any term of this Agreement is held to be invalid or unenforceable by a court, the remaining terms of this Agreement will remain in force. <Note: Use county where project is located or where <company> is located. Consult legal counsel to decide.>
18. **Remedies Upon Default:** Upon an Event of Default, the non-defaulting party may, without a waiver of other remedies that exist in law or equity, exercise all remedies available at law or in equity or other appropriate proceedings, including bringing an action or actions from time to time for recovery of amounts due and unpaid, and/or for damages which shall include all costs and expenses reasonably incurred, including attorneys' fees or may terminate this contract.
- a. Any of the following shall constitute an event of default by <company>.
- 1) Any failure to pay any sum due hereunder for a service and maintenance period of more than thirty (30) days after written notification of delinquency;
 - 2) Any other material failure to perform or comply with the terms and conditions of this contract, including breach of any covenant contained herein, provided that such failure continues for thirty (30) days after notice demanding that such failures to perform be cured or if such cure cannot be effected in such thirty (30) days, defaulting party shall be deemed to have cured default upon the commencement of a cure within such thirty (30) days and diligent subsequent completion thereof;
 - 3) Any representation or warranty made in this contract was false or misleading in any material respect when made; or
 - 4) The filing of a bankruptcy petition, whether by defaulting party or its creditors against the defaulting party, which proceeding shall not have been dismissed within ninety (90) days of its filing, or an involuntary assignment for the benefit of all creditors of the liquidation of the defaulting party.

- b. Any of the following shall constitute an event of default by the ESCO.
- 1) The standards of comfort and service set forth in an agreement are not provided due to failure of ESCO to properly design, install, maintain, repair or adjust the equipment except that such failure, if corrected or cured within seven (7) days after written notice by <company> to ESCO demanding that such failure be cured, shall be deemed cured for purposes of this contract;
 - 2) Any representation or warranty made in this contract was false or misleading in any material respect when made;
 - 3) Failure to furnish and install equipment as required and make it ready for use within the time specified by this contract;
 - 4) Provided that the operation of the facility is not adversely affected and provided that the standards of comfort are maintained, any failure by ESCO to perform or comply with the terms and conditions of this contract, including breach of any covenant contained herein except that such failure, if corrected or cured within thirty (30) days after written notice to ESCO demanding that such failure to perform be cured, shall be deemed cured for purposes of this contract;
 - 5) Any lien or encumbrance upon the equipment by any subcontractor, laborer or materialman of ESCO which is not released in thirty (30) days;
 - 6) The filing of a bankruptcy petition whether by ESCO or its creditors against ESCO which proceeding shall not have been dismissed within ninety (90) days of its filing, or an involuntary assignment for the benefit of all creditors or the liquidation of ESCO; or
 - 7) Failure by the ESCO to pay any amount due, or perform any obligation under the terms of this contract.
19. **Officials, Agents and Employees of the <company> Not Personally Liable:** It is agreed by and between the parties hereto that in no event shall any official, officer, employee or agent of the <COMPANY> be in any way personally liable or responsible for any covenant or agreement contained in this contract whether express or implied, nor for any statement, representation or warranty made herein or in any connected with this contract. This section shall not apply to any remedies in law or at equity against any person or entity that exist by reason of fraud, misrepresentation or outside the terms of this contract.
20. **Commodity Status:** Unless otherwise agreed in writing by <company>, any equipment or item that is to be installed under this contract shall be new. Demonstrators, previously rented, refurbished or reconditioned items are not considered “new.” In addition, “new” means items have not been used previously and are actively marketed by the manufacturer or ESCO and that meet the manufacturer’s new product standards. New items must come with a full warranty.

ATTACHMENT B: Proposed Project Schedule

The following schedule is the proposed schedule and may change during the project.

<Note: Insert actual dates in the schedule. Adjust as necessary.>

<u>ACTIVITY</u>	<u>DATE</u>
<u>RFQ Phase</u>	
Issue RFQ	Week 1
<i><Note: Put RFQ notice on the <company> Homepage></i>	
Site Visit (to be arranged).....	Weeks 1-5
Written inquiries accepted from prospective ESCOs	Week 4
Submissions Due	Week 6
Submission Review and Selection of Interviewees	Weeks 6-7
ESCO Interviews, Ranking and Award	Weeks 7-8
(includes Permanent Building Fund Advisory Council approval of ESCO)	
<u>Technical Energy Audit Phase</u>	
Development of Technical Energy Audit and Contract Development Agreement	Weeks 9-11
Technical Audit and Project Development Plan Agreement, Final Report.....	Weeks 11-22
<u>Energy Performance Contract Phase</u>	
Development of Energy Performance Contract	Weeks 23-30
Installation	To be determined
<u>Commissioning/Monitoring Phase</u>	
Commissioning.....	To be determined
Monitoring.....	To be determined
Staff Training	To be determined
Other	To be determined
Proposed Contract Term	Year __ to Year __

Note: This schedule is subject to change.

ATTACHMENT C: Evaluation Criteria

The evaluation criteria will be used and considered in the evaluation of written submissions and interviews. The scoring weight is listed for each criterion.

Submissions should include all necessary information that is pertinent to these evaluation criteria. Additional information required for proper assessment of submissions may be requested from the ESCO at the discretion of the State.

1. **Qualifications and Capability (Scoring Weight: 20 %)**
2. **Project Management (Scoring weight: 20%)**
3. **Technical Approach (Scoring Weight: 20%)**
4. **Financial Approach (Scoring Weight: 10%)**
5. **Cost, Including Technical Energy Audit Phase and Construction/Installation Phase (Scoring Weight: 30%)**

A qualifications-type analysis will be used to evaluate costs, with an emphasis on approach to pricing and reasonableness. This will involve a combination of “price analysis” and “cost analysis” such that the project evaluation team will use judgment, knowledge and experience to determine reasonableness and consistency, and to evaluate costs based on established catalog and market prices, historical prices and independent cost estimates.

- a. **Technical Energy Audit Phase: Cost of technical energy audit.** Cost to the <company> of the Technical Energy Audit for the proposed scope of buildings. Include total cost with itemization of number of hours, hourly rate of each wage class, description of each wage class, markups and any other defining category. This cost will be evaluated on the basis of reasonableness for the size and scope of the project. An unrealistically low cost will be devalued.

For purposes of evaluation, the following buildings will be audited: *<Note: List all buildings that could potentially be audited and verify that square footage, use of building and other information is included in Appendix E: Technical Facility Profile. The scope may be reduced.>* <company> reserves the right to reduce the scope.

<Note: The energy audit is only a small fraction of overall cost so is not a true indicator of project costs. Beware of abnormally low costs here.>

b. **Construction/Installation Phase: Markup Costs.** Reasonableness of markup costs.

The following markup costs are disclosed for two purposes: i) to provide <company> with typical project costing approach for a project of similar scope and size, and ii) to establish costs for use in the technical energy audit. ESCO may use different customized categories or present an alternative pricing structure.

<u>Cost category</u>	<u>% of project construction cost</u>
Overhead	_____
Profit	_____
Markups on subcontractors	_____
Markups on equipment/supplies/rentals	_____
Markups on self-performed work	_____
Design	_____
Construction Management	_____
Commissioning	_____
Monitoring and verification	_____
Hourly rate for each wage class	_____
Other categories used by ESCO	_____

ATTACHMENT D: ESCO Response

This attachment provides information about the response required from the ESCO. The first section provides details about submitting the submission, including what must be sent, the number of copies and the time and date of the deadline. The next two sections, ESCO Profile and ESCO Qualifications and Approach to Project, provide forms that must be filled in and submitted by the ESCO as part of its response.

PART 1: QUALIFICATION SUBMISSION

General information:

Refer to the RFQ for an overview.

Submissions that are materially at variance with requirements and that require a major rewrite may not be accepted. Failure to complete any questions in whole or in part may be grounds for rejection.

All submissions become the property of <company> and will not be returned to the ESCO.

All costs associated with submission preparation or interviews are the responsibility of the submitting ESCO.

Submissions may be modified or withdrawn in writing by ESCO prior to the due date and time.

Submit the following:

“ESCO Profile” and “ESCO Qualifications and Approach to Project”

Quantity: <Number (___); *One for each review committee member*> Clearly mark one (1) submission as “ORIGINAL”

Sample Technical Energy Audit

Quantity: One (1) copy <*request more if desired*>

Packaging and Delivery

Cover Sheet: Include a Cover Sheet to accompany each of the above submittals, as given below.

To: <company>, Attention: **<Contact Person>**
 RE: Response to RFQ – Energy Performance Contracting Services
 <company> Project No. **<XXXXXX>**

Date: _____

From:

Firm Name: _____

Address: _____

General Phone Number: _____

Contact Person

Name: _____

Title: _____

Phone: _____

Fax: _____

E-mail Address (if applicable): _____

Name: _____ Title: _____

Signature: _____ Date: _____

Submit To:

<company>, Attention: **<Contact Person>**

(Address for overnight or hand-delivery)

(Mailing address)

Due Date:

Submittals must be received at the above address on or before **<Date>** by **<Time>**. Late submissions may not be accepted.

For further information, please contact:

<Name of contact person>

<Address>

<Phone>

<Fax>

<E-mail>

PART 2: ESCO PROFILE

<Note to ESCO:

An electronic copy of this RFQ is available for easier preparation.

Answer all questions or state "N/A" if not applicable.>

Number all pages.

1. General Firm Information

Firm Name: _____

Mailing Address: _____

Physical Address: _____

Names, Titles and Phone Numbers of two principal contact persons:

_____	_____	_____
_____	_____	_____
Name	Title	Phone

Submittal is for:

- Parent Company
- Subsidiary
- Division
- Branch Office

List any Division or Branch Offices that participated materially in the development of the submission and would participate materially in the conduct of any services provided.

Name of Office: _____

Address: _____

Name and Address of Parent Company (if applicable)

Name: _____

Address: _____

Former Name(s) of Firm (if applicable)

Name: _____

Address: _____

2. Date Prepared: _____

3. Type of Firm:

- Corporation
- Partnership
- Sole Proprietorship
- Joint Venture

4. Federal Employer Identification Number: _____

5. Year Firm Established: _____

6. Five-year summary of contract values for energy related services:

<YEAR>: \$ _____

<YEAR>: \$ _____

<YEAR>: \$ _____

<YEAR>: \$ _____

<YEAR>: \$ _____ (to date)

Estimate of total value for all energy-related contracts that are currently in force:

\$ _____ (total value) as of _____ (date).

7. Corporate Background:

a. **Years Under Present Name.** How many years has your firm been in business under its present business name? _____ Years

b. **Former Names.** Indicate all other names by which your organization has been known and the length of time known by each name.

Name: _____ Years: _____

Name: _____ Years: _____

c. **Years in Energy Business.** How many years has your firm been providing energy-efficiency related business? _____ years. How many years your firm has offered performance contracting services? _____ years.

d. **Number of Contracts.** Indicate the number of energy savings performance contracts actually implemented by your firm. (NOTE: If this response is submitted by a branch office or division of a parent company, indicate the number of projects that have been managed directly by the specific branch or division.)

e. **State Qualification.** Identify all states in which your firm is legally qualified to do business. Include Public Works Contractor, Public Works Construction Manager, Architect and Engineer licensing for <STATE>.

f. **Lawsuit Involvement.** Provide information on any lawsuit involvement.

g. **National Labor Relations Board or Similar Involvement.** Has your firm been involved in any lawsuits, administrative proceedings or hearings involving the National Labor Relations Board, the Occupational Safety and Health Administration or other state or federal agencies during the past five (5) years? _____ Yes _____ No. If so, identify the nature of the claim and the ultimate resolution of the proceeding.

8. Financial Information

- a. **Financial Statement.** Attach audited financial statements (including total revenue, net income and total assets) for each of the last three (3) years. If audited financial data is unavailable, explain in full the reason, and provide the latest non-audited financial information to include balance sheet, income statement, as well as statements of cash flows and change in financial position. Include information to attest to the accuracy of the information provided.
- b. **Statement of Financial Conditions.** Attach the most recent annual Statements of Financial Conditions, including balance sheet, income statement and statement of cash flow, dated within the past twelve (12) months
- c. **Accounting Firm Information.** If these financial documents (8.a. and 8.b.) were not produced in-house, indicate the name, address and phone number of the firm(s) that prepared these financial documents.

- 9. **Attachments.** List all attachments created to address additional information. List by number and heading in this ESCO Profile. If a computer-generated form is used, detailed descriptions can be included in the appropriate section rather than prepared as an attachment.

<u>Item #</u>	<u>Heading Name</u>
Attachment for # _____	_____
Attachment for # _____	_____
Attachment for # _____	_____
Attachment for # _____	_____

PART 3: ESCO QUALIFICATIONS AND APPROACH TO PROJECT

Please number and re-state each element, followed by your responses.

Number all pages.

1. General Qualifications

- a. **Project History.** Briefly describe all energy performance contracts or related projects that *your* firm has managed within the last three (3) years. (Do not include projects/contracts managed by team members or subcontractors.) Identify those project references involving buildings similar to the building(s) described in the technical appendices and in similar types of locations (rural or metropolitan) and under similar types of ownership to that of <company>.

NOTE: If this response is submitted by a branch office or division of a parent company, please provide project histories for those that have been managed directly by the specific branch or division. Projects that have been managed by individuals who will be specifically assigned to this project should also be included and identified.

Include the following information on each project:

- 1) **Project Identification.** Name the project owner, state the type of project (generic building type such as hospital, school, etc.). Provide the location by city and state.
- 2) **Project Dates.** Project actual construction start and end dates.
- 3) **Project Size.** Number of buildings and total square footage.
- 4) **Project Dollar Amount.** Provide the total contract amount and the total project capital expenditure amount.
- 5) **Source of Funds.** Describe the source of funds used for the project and your firm's role, if any, in securing those funds.
- 6) **Contract Terms.** Describe the type of contract (shared-savings, lease purchase, guaranteed savings), the duration of the contract term, and the financing arrangement.
- 7) **Technical Design Personnel.** Include name(s) of primary technical design personnel.
- 8) **Project Schedule.** Indicate if the project was completed on schedule. If not, please explain.
- 9) **List of Improvements.** List the retrofits and operational improvements related to energy, water and O&M cost savings.
- 10) **Projected Annual Savings.** State the projected annual energy, water and O&M savings (Therms, kWh, kW, Gallons, etc.). (See sample form below.)
- 11) **Guaranteed Savings.** State the amount of the guarantee (see sample form below). Also describe how the guarantee functioned and if your firm was required to pay funds to meet the guarantee.

- 12) Actual Annual Savings. State the actual annual energy, water and O&M savings (Therms, kWh, kW, Gallons). Also describe if savings were measured or stipulated. (See sample form below.)
- 13) Savings Summary. Summarize savings results in a format similar to that shown here:

Project Name: _____

Projected annual energy savings	Guaranteed energy savings	Actual Energy Savings				
		Year #1	Year #2	Year #3	Year #4	Year #5
KWh	kWh					
Therms	Therms					
KW	kW					
gal	gal					

- 14) Comments. Comment on any special features, services, conditions, etc.
 - 15) References. Provide current names and telephone numbers of the owner(s)' representatives that can supply references.
- b. Personnel Information.** Provide the following information as it relates to your approach to the proposed project.
- 1) Full-Time Personnel. Indicate the number of full-time personnel employed by your firm and the percent available to work on this project.
 - 2) Qualifications and Experience. Identify who will have the primary responsibility for each task and phase of the project, including technical analysis, engineering design, construction management, construction, training and post-contract monitoring. For each of the individuals listed, indicate the following: name, title, intended role and responsibilities for the duration of the contract, educational background, specific qualifications related to role and responsibilities, past relevant experience, number of years of relevant experience, supervisory responsibilities (if relevant to role), list of projects individual was associated with during the last five (5) years, including type of project and project cost, resume.
 - 3) Areas of Expertise. List all areas of expertise related to potential energy and water improvements in facilities. Include specialized areas of expertise in areas that might be relevant to the project (swimming pools, laboratories, renewable energy system application or rehabilitation, daylight design, etc.). Also describe the professional and skilled trades that your firm customarily performs with employees.
 - 4) Subcontractors. Describe the nature of work generally conducted by subcontractors. Include percentage of work generally conducted by subcontractors.

2. General Approach

- a. **Project Summary** (not to exceed five [5] pages): Summarize the scope of services (auditing, design, construction, monitoring, operations, maintenance, training, financing, etc.) that would be offered for this project. Include a brief description of your firm’s approach to management and the specific benefits your firm can offer <company>. Propose a preliminary project schedule.
- b. **Training Provisions**. Describe your firm’s capabilities in providing technical training for <company>’s facility personnel and experience on past projects. Describe your firm’s involvement in developing training manuals for facility staff.
- c. **Engineering Design**. Describe your firm’s approach to the technical design of this project.
- d. **Monitoring and Verification**. Describe the methodology proposed for ongoing monitoring and savings verification of each recommended project’s performance, including the frequency of such efforts. Note if an industry standard such as the International Monitoring and Verification Protocol is used and describe the preferred method.
- e. **Cost of Audit**. State the total fixed cost of the technical energy audit. This will be the reimbursable cost if no performance contract is executed, providing the audit meets the requirements described in Attachment A: Contract Terms and Conditions. Note that this cost will be evaluated on the basis of reasonableness, so an unrealistically high or low cost will be devalued in the evaluation process. No cost of the audit will be reimbursed if the audit does not indicate that an energy savings contract is viable within the applicable terms of the contract.
- f. **Markup Costs**. The following markup costs are disclosed to provide <company> with typical project costing approach for a project of similar scope and size. These rates will be the maximum markups to be used in any subsequent Technical Energy Audit or Energy Performance Contract, provided the scope and size of the project remain similar. Cost markups may be decreased in a subsequent contract.

<u>Cost Category</u>	<u>Percent of Project Construction Cost</u>
Overhead	_____
Profit	_____
Markups on subcontractors	_____
Markups on equipment/supplies	_____
Markups on self-performed work	_____
Design	_____
Construction Management	_____
Commissioning	_____
Monitoring and verification	_____
Other	_____

- g. **Baseline Calculation Methodology.** Describe in detail the methodology your firm normally uses to compute baseline of energy and water use as well as performance.
- h. **Adjustment to Baseline Methodology.** Describe the method(s) used to adjust the energy, water and O&M baseline due to such factors as weather and facility use changes. Describe factors that would necessitate adjustment. Refer to Attachment E: Technical Facility Profile and address issues regarding buildings projected to have substantial changes in use.
- i. **Savings Calculations.** List all procedures, formulas and methodologies, including special metering or equipment your firm will use to calculate energy, water and O&M savings. Include assumptions made in the calculations.
- j. **Dollar Savings Calculations.** Describe the procedure to assign dollar values to the O&M and energy and water savings.
- k. **ESCO Fee Calculation.** Describe your methods for calculating your firm's fees as a function of the project's total combined savings. Describe the specific services for which your firm will be paid over the contract term. Describe the method by which your firm will be paid for those services and how often payment will be made.
- l. **Cost Savings Guarantee Calculations.** Describe your firm's procedures and schedule for measuring financial performance of projects. Describe how the guarantee provisions work in the event that project results vary from projections. Also describe how excess savings will be documented for <company>'s benefit.
- m. **Billing and Invoices.** Describe your standard billing procedures and attach a sample invoice.
- n. **Provision of Financing.** Describe how you would work with <company> to utilize tax-exempt financing or other methods to keep financing costs at a minimum. Briefly describe the types of financing arrangements provided by your firm for past performance contracting projects. Include a brief description of the source of funds and the potential dollar amounts currently available to your firm to finance these types of projects. Indicate what representative interest rates may be available, financing terms and other variable economic factors associated with each method.
- o. **Provision of Insurance.** Describe level and types of all insurance policies applicable to the project. (NOTE: This will not change insurance requirements described in this RFQ.)
- p. **Environmental Liability.** State your firm's position with respect to the acceptance of liability for any hazardous materials encountered during the course of the project. If the firm is willing to accept any level of environmental liability, state the level and provide a cost analysis.
- q. **Provision of Warranties.** State the nature and term of all warranties that will apply to the project.
- r. **Equipment Ownership and Service Responsibility.** Describe the status of equipment ownership and service responsibility at contract expiration.

- s. **Maintenance Contract Flexibility**. Describe the types of services included in the maintenance contract. Comment on whether <company>'s maintenance staff can perform some of these duties if desired, and describe any impact on the guarantee. (These duties could include programming and maintaining the control system, installing lighting retrofits, maintaining HVAC equipment, etc.). Describe the required length of the maintenance contract and the relationship with the guarantee in the event that <company> chooses to terminate the maintenance contract prior to the end of the performance contract.
- t. **Open Book Pricing**. Describe your firm's approach and experience in providing open-book pricing.
- u. **Sample Technical Audit**. Briefly describe your approach to auditing a facility. Submit a sample technical audit conducted by your firm for a similar project (as directed in the Submission Submittal Information). This audit must include detailed energy and economic calculations.

3. Site Specific Approach

- a. **Technical Site Analysis**. Based on your preliminary assessment of the information provided, describe any equipment modifications, installations or replacements at the facility that your firm would consider installing as a part of this project. Address energy, water and O&M opportunities. Also describe any special features, renewable technologies, or advanced technologies that might be applicable. Describe your approach to achieve standardization of equipment in the facilities to be addressed. Describe any special features or services associated with your proposed improvements that would add value to <company>.
- b. **Operations and Maintenance**. Describe any major changes in operations or maintenance of <company>'s facilities that your firm foresees based on the information provided. Briefly describe the maintenance responsibilities of your firm and the <company>. Describe how your firm would provide appropriate training in operations and maintenance of installed improvements.
- c. **Standards of Comfort**. Describe standards of comfort and functionality that will be used for light levels, space temperatures, ventilation rates, etc. in the intended facilities. Also describe how those standards will be maintained throughout the contract term.
- d. **Project Management**. Describe how your firm would work with current building management and maintenance personnel in order to coordinate construction and avoid conflicts with the building's operation and use. Describe your flexibility and/or any limitations regarding possible <company> activities such as <company>'s management of additional energy and water projects, <company>'s monitoring of installation and performance of ESCO projects, <company>'s integration of other identified capital needs with ESCO projects which may or may not contain energy and water saving opportunities.
- e. **Project Financing**. Describe your firm's preferred approach to providing or arranging financing for the proposed project. Describe the mechanics of the financing arrangement, including equipment ownership, responsibilities/liabilities of each party, security interest required and any special terms and conditions that may be associated with the financing.

ATTACHMENT E: Technical Facility Profile

<Note: ESCOs will need a description of the facilities that are candidates for energy efficiency improvements in order to evaluate the opportunity to implement a successful energy performance contract. While it will not be practical to provide every technical detail, a certain minimum level of information must be contained in the RFQ. Agencies should also be prepared to respond to more specific questions from the ESCOs about the buildings. Please provide the following for each building under your ownership (where you pay all utility bills).>

The information in this technical facility profile is provided to inform the ESCO about the condition of the <company>'s facilities. The ESCO is responsible for verifying the accuracy, as necessary.

1. General Facility Data

- a. Name of building (include all buildings that could be potential candidates, then scale-back during contract negotiations if desired).
- b. Address of building.
- c. Primary use of building.
- d. Total square footage of conditioned space. (If the total areas, which are heated and cooled, differ in size, please describe their respective sizes.)
- e. Number of floors.
- f. Year constructed.
- g. Year of any major modifications.
- h. Building operator name and telephone.
- i. Building engineer name and telephone.
- j. Building manager name and telephone.

2. Past Energy Improvement Efforts

- a. Describe any major energy-related changes made during the past ten (10) years.
- b. State if any previous audits were conducted.

3. Future Plans

- a. Briefly describe any major changes to building operation or structure during the last four (4) years that significantly affected annual building energy use. What was done? What were the effects on energy use?
- b. Describe any major change planned to occur during the next five (5) years that could significantly affect annual energy use. What change? Anticipated effects?

4. Operating Information

- a. Describe the typical hours of operation for the facility, including weekday/weekend and seasonal changes.
- b. Describe the janitorial hours and describe habits regarding turning off lights and other equipment.
- c. State the general summer and winter temperature setpoints and any special temperature, humidity or ventilation requirements.

5. Building Envelope Description

- a. Briefly describe the predominant wall and roof construction.
- b. Describe the type and condition of existing windows.

6. Energy-Using Systems Description

- a. Heating System: Briefly describe the type(s) of heating system(s) serving the building(s) (e.g., terminal reheat, multizone, variable air volume, etc.). Include the type of fuel used to operate the system (electricity, natural gas, propane, etc.). Describe the manufacturer, age, type and condition of heating systems.
- b. Cooling System: Briefly describe the type of cooling system serving the building (chiller, roof-tops, etc.). What type of fuel is used to operate the system? Describe the manufacturer, age, type and condition of heating systems.
- c. Controls System: If you have a controls system to control space temperatures and heating and cooling equipment, please describe its capability (what is controlled), type (pneumatic compressed air system, direct digital control system), condition, list the manufacturer, and year installed.
- d. Lighting System, Interior: Estimate the percentage of total area lighted by fluorescent ballasts and bulbs, and incandescent bulbs. If the hours of operation for the lighting systems differ from the hours of operation of the facility listed above, please describe.
- e. Lighting System, Exterior: Describe the type of exterior lighting systems (only include systems if your facility pays for their operation).
- f. Water Heating System: Describe the domestic water heating system. Is it part of the space heating system?

- g. Laundry Systems: Briefly describe any laundry operation on the premises, including fuel type of washers and dryers, quantity of units, frequency of use.
- h. Kitchen/Food Preparation Systems: Briefly describe any kitchen operation on the premises, including frequency of use.
- i. Laboratory/Medical Equipment: Briefly describe any major labs or medical equipment.
- j. Solar/Renewable Technologies: Please describe any existing solar systems, their condition and age.
- k. Describe any other energy consuming equipment or facilities that contribute significantly to your annual energy consumption (e.g. incinerator, pool, etc.).

7. Water-Using Systems

- a. Briefly describe any water use including showers, laundry use, irrigation, cooling tower use, etc.

8. Energy and Water Consumption Data

- a. Identify the present utility companies that provide electricity, gas, water, etc.
- b. Is natural gas or propane used? If propane, is natural gas available in the area?
- c. Provide monthly consumption and cost information for electricity, gas, water, etc. for the past three (3) year period.
- d. Attach copies of utility rate schedules that apply to the facilities or include a sample utility bill for electricity, gas, etc. for each facility or meter for both winter and summer. If under contract for natural gas, provide the fuel purchase agreement and a monthly price history, if available.

9. Maintenance Data

- a. Describe the general maintenance practices and schedule for the building and its energy-related systems.
- b. Include information sufficient to quantify all continuing maintenance costs, including staff and labor hours, materials and supplies, etc.
- c. Describe any known maintenance problems and/or needs associated with deferred maintenance.

10. Improvement Opportunities

- a. Briefly describe any comfort problems.
- b. Describe maintenance problems related to energy-using systems in your buildings, including ability of existing maintenance staff or contractors to address problems.
- c. Describe maintenance problems related to water systems in your buildings. Include water quality problems.
- d. Identify any major equipment scheduled for replacement during the next five (5) years.
- e. Briefly list any major energy conservation options identified by a previous analysis of your building.
- f. Describe any building improvements that Agencies would like to investigate during this project.

11. Additional Site Data Available from <company> Upon Request

- a. Additional utility bill information.
- b. More detailed information on major mechanical equipment and control systems.
- c. Copies of any previous technical analysis or recommendations of energy conservation options in your building.
- d. Detailed documentation relating to energy management system.

Appendix B

A Guide to Building Commissioning: Commissioning Team Roles and Responsibilities

STEP 3 Packet

Technical Energy Audit & Project Development Agreement

Contents:

Sample Technical Energy Audit and Project Development Agreement with negotiating tips

The contract is a sample document only and does not attempt to identify or address all circumstances or conditions you may encounter or desire. Consult with your legal counsel and procurement staff to adapt this to meet your needs.

<SAMPLE>

Technical Energy Audit & Project Development Agreement

This Technical Energy Audit & Project Development Agreement (the “Agreement”) is made and entered into as of <Date>, between <Energy Service Company Name> (ESCO), having its principal offices at <ESCO Address>, for <company> (<company>).

WITNESSETH

WHEREAS, ESCO is a company with experience and technical and management capabilities to provide for the discovery, engineering, packaging, procurement, installation, financing, maintenance and monitoring of energy and water saving measures at facilities similar in size, function and system type to <company>’s facilities; and

WHEREAS, ESCO has submitted a response to <Company’s> Request for Proposals (RFP) pertaining to the discovery, engineering, packaging, procurement, installation, financing, maintenance and monitoring of energy and water saving measures at <company>’s facilities.

WHEREAS, <company> has selected ESCO to provide the services described herein; and

WHEREAS, <company> desires to enter into an agreement to have ESCO perform a Technical Energy Audit and Project Development Proposal to determine the feasibility of entering into an Energy Performance Contract to provide for installation and implementation of energy and water saving measures at <company>’s facilities.

WHEREAS, if energy and water saving measures are determined to be feasible, and if the amount of savings can be reasonably sufficient to cover all costs, as defined by <company>, associated with an energy performance contracting project, the parties intend to negotiate an Energy Performance Contract under which the ESCO will design, procure, install, implement, maintain and monitor such energy and water saving measures. However, this intent does not commit <company> to entering into such Energy Performance Contract.

THEREFORE, the parties agree as follows:

1. Technical Energy Audit and Project Development Agreement

ESCO agrees to perform a Technical Energy Audit in accordance with the Scope of Work described below. ESCO agrees to complete the Technical Energy Audit and present to <contracting agency> and the <company> a final report within **<Number of Days –about 45 to 90 days recommended depending on size and complexity of facilities>** calendar days from the execution of this Agreement.

The <contracting agency> agrees to assist the ESCO in performing the Technical Energy Audit in accordance with the Scope of Work described below. The <company> agrees to work diligently to provide full and accurate information. ESCO agrees to work diligently to assess validity of information provided and to confirm or correct the information as needed.

ESCO agrees to offer a Project Development Agreement with a proposal of Energy Performance Contract terms and conditions, based on a recommended package of energy and water saving measures selected by the ESCO. The proposal will include details as specified in the Scope of Work below.

2. Compensation to ESCO

Except as provided for below, within **<Number of Days: about 45 to 60 days recommended>** days after ESCO's submission of the final Technical Audit report, The <contracting agency> shall compensate ESCO for performance of the Audit by payment to ESCO of **<Audit Cost Amount>** **<Note to Customer: Expect about \$0.06 to \$0.12 per square foot depending on project complexity, size and scope of project, and geographic location.>**:

- a. The <contracting agency> and <company> shall have no payment obligations at the time of execution of this Agreement, but acknowledges that the fee indicated above shall be incorporated into ESCO's project costs, in the event ESCO and <contracting agency> execute an Energy Performance Contract within **<Number of Days – allow sufficient time for contract negotiation and signing; 60 to 75 days recommended>** days, or such longer period as the parties may mutually agree, after submission of the final Technical Energy Audit report and Project Development Agreement by ESCO to <contracting company>.
- b. Should the ESCO determine any time during the Technical Energy Audit that savings cannot be attained to meet <contracting agency>'s terms as set forth in the RFP, the Technical Energy Audit will be terminated by written notice of the ESCO to the <contracting agency>. In this event this Agreement shall be cancelled and <contracting agency> shall have no obligation to pay, in whole or in part, the amount specified.
- c. <Contracting agency> and <company> shall have no payment obligations under this Agreement in the event that ESCO's final Technical Energy Audit report does not contain a package of energy and water saving measures which, if implemented, will provide the <company> with guaranteed cash savings to meet the following terms: Sufficient to fund <contracting agency>'s payments of all costs and fees associated with the Energy Performance Contract, including any annual fees to the ESCO, less any cash payment the <contracting agency> may choose to contribute. Analysis will be based on ESCO's proposed financing

terms including a conventional, level payment, fully amortizing (less a nominal final purchase option price of \$1.00) lease-purchase agreement over a fixed twenty-five (25) year maximum term with a fixed rate of interest actually available to the <company>.

3. Scope of Work

The Technical Energy Audit and Project Development Agreement shall be performed as described below:

a. Establish allowable cost and savings factors approved for consideration by Division of Public Works and the <company>. The <contracting agency> will provide ESCO with sufficient guidance to develop savings estimates.

- 1) Savings estimates may include:
 - a) Procurement of low-cost energy supplies of all types, including electricity, natural gas and water;
 - b) Insulating the building structure or systems in the building;
 - c) Storm windows or doors, caulking or weather stripping, multiglazed windows or door systems, heat-absorbing or heat-reflective glazed and coated window and door systems, additional glazing, reductions in glass area or other window and door system modifications that reduce energy consumption;
 - d) Automated or computerized energy control systems;
 - e) Heating, ventilation or air conditioning system modifications or replacements;
 - f) Replacing or modifying lighting fixtures to increase the energy efficiency of the lighting system;
 - g) Energy recovery systems;
 - h) Cogeneration systems that produce steam or forms of energy such as heat, as well as electricity, for use primarily within a building or complex of buildings;
 - i) Installing new or modifying existing day lighting systems;
 - j) Installing or modifying renewable energy and alternate energy technologies;
 - k) Building operation programs that reduce energy costs including, but not limited to, computerized programs, training and other similar activities;
 - l) Steam trap improvement programs that reduce energy costs;
 - m) Devices that reduce water consumption; and
 - n) Any additional building infrastructure improvements that produce energy cost savings, significantly reduce energy consumption or increase the energy efficiency of the facilities for their appointed functions and are in compliance with all applicable state building codes.
- 2) Savings estimates will not include:
 - a) <contracting company> in-house labor costs
 - b) <contracting company> deferred maintenance cost
 - c) Offset of future customer capital cost
- 3) The following items may be negotiated:
 - a) Escalation rates for natural gas, electricity, water, material/commodity cost savings, and allowable labor savings. These are rates to be used in cash flow projections for project

development purposes. Actual rates and a floor rate may be used in a subsequent performance contract. *<Note: Check with your local utilities to ensure reasonableness. Also note that rates could vary in different years during the contract term.>*

- b) Interest rates (municipal tax-exempt rates for public institutions)
- c) <company> equity cash outlay (<company>'s option)
- 4) The following items may not be negotiated:
 - a) *<Note: Insert non-negotiable items from above list.>*
- 5) The following markup costs are disclosed to provide <company> with typical project costing approach for a project of similar scope and size. These rates will be expected to be used in the Technical Energy Audit and subsequent Energy Performance Contract, however, scope and size of project may change and necessitate a change in the markups provided below. .

<Note: Include any additional categories your ESCO uses in its pricing structure.>

<u>Cost category</u>	<u>% of project construction cost</u>
Overhead	_____
Profit	_____
Markups on subcontractors	_____
Markkups on equipment/supplies	_____
Markups on self-performed work	_____
Design	_____
Construction Management	_____
Commissioning	_____
Monitoring and Verification	_____
Other	_____

<Note: It is important to negotiate these costs prior to entering this Agreement. Also, identify how markups and fixed fees were determined and how they will be applied.>

- b. **Collect data and background information from <company>** concerning facility operation and energy use for the most recent three years from the effective date of this Agreement as follows.
 - 1) Building square footage.
 - 2) Construction date of buildings and major additions
 - 3) Utility company invoices
 - 4) Occupancy and usage information
 - 5) Description of all energy-consuming or energy-saving equipment used on the premises, as available.
 - 6) Description of energy management procedures utilized on the premises
 - 7) Description of any energy-related improvements made or currently being implemented
 - 8) Description of any changes in the structure of the facility or energy-using or water-using equipment

- 9) Description of future plans regarding building modifications or equipment modifications and replacements
- 10) Drawings, as available (may include mechanical, plumbing, electrical, building automation and temperature controls, structural, architectural, modifications and remodels)
- 11) Original construction submittals and factory data (specifications, pump curves, etc.), as available
- 12) Operating engineer logs, maintenance work orders, etc., as available
- 13) Records of maintenance expenditures on energy-using equipment, including service contracts
- 14) Prior energy audits or studies, if any

The <contracting agency> agrees to work diligently to furnish ESCO, upon request, accurate and complete data and information as available. Where information is not available from the <contracting agency>, ESCO will make a diligent effort to collect such information through the facility inspection, staff interviews, and utility companies.

ESCO agrees to work diligently to assess validity of information provided and to confirm or correct the information as needed.

c. Perform a facility inspection.

- 1) Interview the facility manager, maintenance staff or others regarding:
 - a) Facility operation, including energy management procedures
 - b) Equipment maintenance problems
 - c) Comfort problems and requirements
 - d) Equipment reliability,
 - e) Projected equipment needs, etc.
 - f) Occupancy and use schedules for the facility and specific equipment.
 - g) Facility improvements, past and planned
- 2) Inspect major energy-using equipment, including:
 - a) Lighting (indoor and outdoor)
 - b) Heating and heat distribution systems
 - c) Cooling systems and related equipment
 - d) Automatic temperature control systems and equipment
 - e) Air distribution systems and equipment
 - f) Outdoor ventilation systems and equipment
 - g) Exhaust systems and equipment
 - h) Hot water systems
 - i) Electric motors, transmission and drive systems
 - j) Special systems (kitchen/dining equipment, swimming pools, laundry equipment, etc.)
 - k) Renewable energy systems
 - l) Other energy using systems
 - m) Water consuming systems (restroom fixtures, water fountains, irrigation systems, etc.)
- 3) Perform “late-night” surveys outside of normal business hours or on weekends to confirm building system and occupancy schedules, if deemed necessary.
- 4) Develop a preliminary list of potential energy and water saving measures. Consider the following

for each system:

- a. Comfort and maintenance problems
- b. Energy use, loads, proper sizing, efficiencies and hours of operation
- c. Current operating condition
- d. Remaining useful life
- e. Feasibility of system replacement
- f. Hazardous materials and other environmental concerns
- g. <company>'s future plans for equipment replacement or building renovations
- h. Facility operation and maintenance procedures that could be affected

The <contracting agency> will allow ESCO reasonable access to facility staff to ensure understanding of existing systems and opportunities.

ESCO agrees to work diligently to assess validity of information provided and to confirm or correct the information as needed.

d. Establish base year consumption and reconcile with end use consumption estimates.

- 1) Examine utility bills for the past 3 years and establish base year consumption for electricity, gas, steam, water, etc. in terms of energy units (kWh, kW, ccf, Therms, gallons, or other units used in bills) and in terms of dollars. Describe the process used to determine the base year (averaging, selecting most representative contiguous 12 months, etc.). Consult with facility personnel to account for any anomalous schedule or operating conditions on billings that could skew the base year representation. ESCO will account for periods of time when equipment was broken or malfunctioning in calculating the base year.
- 2) Estimate loading, usage and/or hours of operation for all major end uses representing over five percent of total facility consumption including, but not limited to:
 - a) Lighting
 - b) Heating
 - c) Cooling
 - d) HVAC motors (fans and pumps)
 - e) Plug loads
 - f) Kitchen equipment
 - g) Other/miscellaneous

Where loading or usage are highly uncertain (including variable loads such as cooling), ESCO will use its best judgment, spot measurements or short-term monitoring. ESCO should not assume that equipment run hours equal the operating hours of the building(s) or facility staff estimates.

- 3) Reconcile annual end-use estimated consumption with the annual base year consumption to within five percent for electricity (kWh), fuels and water. The miscellaneous category can be no greater than five percent. This reconciliation will place reasonable limits on potential savings.

- 4) Propose adjustments to the baseline for energy and water saving measures that will be implemented in the future and that will remain separate from the Energy Performance Contract.

e. Develop a preliminary analysis of potential energy and water saving measures.

This list shall be compiled and submitted to <contracting agency> and the <company> within <days> of the execution of this Agreement.

- 1) Identify measures which appear likely to be cost effective and therefore warrant detailed analysis
- 2) For each measure, prepare a preliminary estimate of energy or water cost savings including description of analysis methodology, supporting calculations and assumptions used to estimate savings.

f. Meet with <Contracting Agency> and the <company> to present preliminary findings prior to thorough analysis. Describe how the projected project economics meet <contracting agency>'s and the <company>'s terms for completing the Technical Energy Audit and Project Development Agreement. Discuss assessment of energy use, savings potential, retrofit opportunities, and potential for developing an energy performance contract. Develop a list of recommended measures for further analysis. <contracting agency>'s rejection of calculations of savings, potential savings allowed, or retrofit recommendation shall be at the risk of the ESCO.

g. Analyze savings and costs for each energy and water saving measure.

- 1) Consider technologies in a comprehensive approach including, but not limited to: lighting systems, heating/ventilating/air conditioning equipment and distribution systems, controls systems, building envelope, motors, kitchen equipment, pools, renewable energy systems or other special equipment, irrigation, water saving devices.
- 2) Follow the methodology of ASHRAE or other nationally-recognized authority and be based on the engineering principle(s) identified in the description of the retrofit option
- 3) Utilize assumptions, projections and baselines which best represent the true value of future energy or operational savings. Include accurate marginal costs for each unit of savings at the time the audit is performed, documentation of material and labor cost savings, adjustments to the baseline to reflect current conditions at the facility, calculations which account for the interactive effects of the recommended measures.
- 4) Use best judgement regarding the employment of instrumentation and recording durations so as to achieve an accurate and faithful characterization of energy use
- 5) Use markups and fees stated above where applicable in all cost estimates
- 6) Develop a preliminary measurement and verification plan for each measure
- 7) Follow additional guidelines for analysis and report preparation given below

h. Prepare a draft “Technical Energy Audit” report. The primary purpose of the report is to provide an engineering and economic basis for negotiating a potential Energy Performance Contract between the <company> and the ESCO. The report shall be completed within <days> of the date of execution of this

Agreement. The report shall include:

- 1) Overview
 - a) Contact information
 - b) Summary table of recommended energy and water saving measures, with itemization for each measure of design and construction cost, annual maintenance costs, the first year cost avoidance (in dollars and energy units), simple payback and equipment service life
 - c) Summary of annual energy use and costs of existing or base year condition
 - d) Calculation of cost savings expected if all recommended measures are implemented. Include total percentage savings.
 - e) Description of the existing facility, mechanical and electrical systems
 - f) Summary description of measures, including estimated costs and savings for each as detailed above
 - g) Discussion of measures considered but not investigated in detail
 - h) Conclusions and recommendations
- 2) Full description of each energy and water saving measure including:
 - a) Written description
 1. Existing conditions
 2. Recommendations. Include discussion of facility operations and maintenance procedures that will be affected by installation/implementation. Present the plan for installing or implementing the recommendation.
 - b) Base year energy use
 1. Summary of all utility bills
 2. Base year consumption and description of how established
 3. End use reconciliation with base year (include discussion of any unusual findings)
 - c) Savings calculations
 1. Base year energy use and cost
 2. Post-retrofit energy use and cost
 3. Savings estimates including analysis methodology, supporting calculations and assumptions used. Clearly state how utility tariffs were used in calculating savings.
 4. Conclusions, observations, caveats
 5. Savings estimates must be limited to savings allowed by <company> as described above.
 6. Percent cost-avoidance projected
 7. Description and calculations for any proposed rate changes
 8. Explanation of how savings interactions between retrofit options is accounted for in calculations.
 9. Operation and maintenance savings, including detailed calculations and description
 10. If computer simulation is used, include a short description and state key input data. If requested by <contracting agency>, access will be provided to the program and all assumptions and inputs used, and/or printouts shall be provided of all input files and important output files and included in the Technical Energy Audit with documentation that explains how the final savings figures are derived from the simulation program output printouts.

11. If manual calculations are employed, formulas, assumptions and key data shall be stated.
- d) Cost estimate -- detailed scope of the construction work needed, suitable for cost estimating. Include all anticipated costs associated with installation and implementation.
 1. Engineering/design costs
 2. Contractor/vendor estimates for labor, materials, equipment; include special provisions, overtime, etc., as needed to accomplish the work with minimum disruption to the operations of the facilities.
 3. Permit costs
 4. Construction management fees
 5. Commissioning costs (or present this category in the Project Development Agreement total project cost below)
 6. Other costs/fees
 7. Company overhead/profit
 8. Environmental costs or benefits (disposal, avoided emissions, handling of hazardous materials, etc.)
 9. Note that all markups and fees stated in this Agreement shall be used in the cost estimates, unless otherwise documented and justified due to change in scope or size of project or other unforeseen circumstances.
 10. Conclusions, observations, caveats
 - e) Other
 1. Estimate of average useful service life of equipment
 2. Preliminary commissioning plan
 3. Preliminary measurement and verification plan, explaining how savings from each measure is to be measured and verified (stipulated by agreement, utility bill analysis, end-use measurement and calculation, etc.)
 4. Discussion of impacts that facility would incur after contract ends. Consider operation and maintenance impacts, staffing impacts, budget impacts, etc.
- 3) Complete appendices that document the data used to prepare the analyses. Describe how data were collected.
 - i. **Meet with <company>** to:

<company> agrees to work diligently to provide full and accurate information, and will also allow ESCO reasonable access to facility staff to ensure understanding of existing systems and opportunities
 - j. **Revise Audit as directed by <company>**.
 - k. **Prepare a proposed “Project Development Agreement”** in anticipation of ESCO and <contracting agency> and the <company> entering into an Energy Performance Contract to design, install, and monitor the energy and water saving measures proposed in the Technical Energy Audit.
 - 1) Project Cost is the total amount the <company> will pay for the project and ESCO’s services.

Costs must be consistent with maximum markups and fees established above. Costs may include but are not limited to:

- a) Engineering, designing, packaging, procuring, installing (from Technical Energy Audit Report results)
 - b) Financing (based on interest rates likely available to <contracting agency> or the <company> at this time)
 - c) Performance/payment bond costs
 - d) Construction management fees
 - e) Commissioning costs
 - f) Maintenance fees
 - g) Monitoring fees
 - h) Training fees
 - i) Legal services
 - j) Overhead and profit margins not included above
- 2) Include a List of Services that will be provided as related to each cost.

I. Prepare a preliminary analysis of energy performance contract terms to include:

- 1) List of energy and water saving measures included in recommended package
- 2) Interest rate used in the analysis
- 3) Expected contract term (in number of years)
- 4) Analysis of annual cashflow for <company> during the contract term
- 5) Explanation of how savings will be calculated and adjusted due to weather (such as heating or cooling degree days), occupancy changes or other factors.

4. Termination

ESCO may terminate this Agreement at any time as described in Section 2.b. above.

<contracting agency> may terminate this Agreement without cause upon at least 14 days written notice to the ESCO. In this event the ESCO shall be compensated by the <contracting agency> for expenses actually incurred prior to termination.

This Agreement may be terminated by either party upon 14 days' written notice should the other party fail to perform substantially. Termination shall be effective 14 days from receipt of written notice.

5. Insurance

Before commencing any Work under this Agreement, ESCO shall file with <contractng agency> insurance policies as specified below:

- a. Workers' Compensation Insurance with statutory limits as required by statute, and Employer's Liability Insurance with limits of not less than \$500,000.

- b. For the duration of the Agreement, ESCO shall maintain Comprehensive General liability Insurance written on an “occurrence” basis. Such insurance shall bear a combined single limit per occurrence and annual aggregate of not less than \$5,000,000 and the annual aggregate shall be endorsed to apply separately for each job site or location, exclusive of defense costs. Such insurance will name <contracting agency> as an additional insured as respects ESCO’s acts or omissions, and shall contain standard cross-liability or severability of interest provisions and waiver of litigation.

6. Energy Performance Contract

The Parties intend to negotiate an Energy Performance Contract under which the ESCO will design, install and implement energy and water saving measures which the Parties have agreed to and provide certain maintenance and monitoring services. However, nothing in this Agreement should be construed as an obligation on any of the Parties to execute such an agreement. The terms and provisions of such an Energy Performance Contract will be set forth in a separate agreement.

IN WITNESS WHEREOF, and intending to be legally bound, the parties hereto subscribe their names to this agreement on the date first written above.

ESCO

<company>

By: _____

By: _____

<Name>

Its: _____

<Title>

<company>

By: _____

Its: _____

Appendix C

A Guide to Contracting with ESCOs: Energy Performance Contract

DRAFT
<TEMPLATE>

Energy Performance Contract

This Energy Performance Contract (“Contract”) is made and entered into as of *<date>*, by and between *<name of energy service company>* (“ESCO”), having its principal offices at *<ESCO’s physical address>*.

RECITALS

<company> owns and operates facilities, and wishes to acquire equipment and services to reduce energy costs and related expenses in the facilities.

ESCO has experience and technical management capabilities to identify and evaluate energy cost saving opportunities, and provide for engineering, packaging, procurement, installation, financing, maintenance and measurement of cost effective energy and water cost saving measures (“CSMs”).

ESCO has delivered to *<company>* a response to *<company>*’s Request for Qualifications (“RFQ”) pertaining to the engineering, design, packaging, procurement, installation, financing and measurement of cost effective CSMs at *<company>*’s facilities.

In accordance with the provisions of the RFQ, ESCO was selected to perform a technical energy audit and pursuant to the Technical Energy Audit and Project Development Plan Agreement, dated _____, has delivered to *<company>* a Technical Energy Audit Report and Project Development Plan (“Audit Report”) which includes an assessment of the energy consumption characteristics of *<company>*’s facilities and the identification and evaluation of viable CSMs, as well as estimates of expected energy and operational savings and associated project costs for each recommended CSM.

<company> desires to contract with ESCO for the design, installation, financing, maintenance and measurement of the CSMs all as set forth herein. **<Note: If there will be no financing under the Contract, reference to “financing” should be removed here and in other appropriate parts of the Contract.>**

ESCO and *<company>* all acknowledge and agree that the purpose of this Contract is to achieve the Cost Saving Measures contemplated by this Contract to the benefit of *<company>* and all agree to cooperate to achieve the purpose of this Contract.

NOW, THEREFORE, the parties agree as follows:

SECTION 1. ENERGY MANAGEMENT PLAN

Section 1.1. Plan Details. ESCO has prepared the final Audit Report, dated _____, which is set forth in Appendix A and incorporated by reference. The Audit Report has been approved and accepted by <company>. The Audit Report includes all identified CSMs .

<Note: The Audit Report must be completed before executing this Energy Performance Contract. This section records <company>'s approval and acceptance of the Audit Report and makes the Audit Report part of the Contract . If the list of CSMs is not completely finalized prior to signing this contract, include language to that effect.>

<Note: If you anticipate using a lease-purchase agreement to finance CSMs under this contract, do not accept an Audit Report unless ESCO has included an estimate of the acquisition-cost weighted average useful service life of the recommended CSMs.>

Section 1.2. Schedules, Exhibits and Appendices. ESCO has prepared and <contracting and <company> have approved and accepted the Schedules and Exhibits as set forth below, copies of which are attached hereto (or will be as provided for in this Contract) and are made a part of this Contract by reference.

Schedules:

Schedule A	Equipment to be Installed by ESCO
Schedule B	Description of Premises; Pre-Existing Equipment Inventory
Schedule C	Energy Savings Guarantee
Schedule D	Compensation to ESCO
Schedule E	Baseline Energy Consumption
Schedule F	Savings Measurement & Calculation Formulae; Methodology to Adjust Baseline
Schedule G	Construction and Installation Schedule
Schedule H	Systems Start-Up and Commissioning; Operating Parameters of Installed Equipment
Schedule I	Standards of Comfort
Schedule J	ESCO's Maintenance Responsibilities
Schedule K	<company>'s Maintenance Responsibilities
Schedule L	Facility Maintenance Checklist
Schedule M	ESCO's Training Responsibilities
Schedule N	General Conditions
Schedule O	Annual Installment Payment Schedule <Or may be titled "Financing Amortization Schedule", "Debt Service Payment Schedule", etc.>
Schedule P	Pre-existing Service Agreements
Schedule Q	Current and Known Capital Projects at Facility
Schedule R	Projected Financial Performance

<Note: Schedules P, Q and R are not yet specifically listed in the body of the Contract. If they are used, reference as to their function should be made in the body of the Contract.>

Exhibits:

Exhibit I	Certificate of Acceptance — Installed Equipment
Exhibit II	Operations and Maintenance Manuals (to be provided)
Exhibit III	Equipment Warranties (to be provided)

Appendices:

Appendix A	Technical Energy Audit Report and Project Development Plan
Appendix B	RFQ
Appendix C	ESCO Proposal
Appendix D	Lease Agreements and Documents, if applicable

<Note: The contract schedules detail the substantive technical parameters of the projects negotiated and agreed to by the parties. These schedules are referenced throughout the Contract. Their titles can be included here for easy reference or at the end of the Contract. If any schedules need to be completed after contract execution, include language to that effect.>

<Note: For Schedule N: General Conditions – If this schedule is used, specify which articles and paragraphs apply to this contract.>

<Note: Descriptions for each schedule, exhibit and appendix are provided at the end of this sample contract in Attachment I.>

Section 1.3. Other Documents. The RFQ and ESCO Proposal for this Project, Appendix B (RFQ) and Appendix C (ESCO Proposal) respectively are attached and incorporated by reference. The provisions of this Contract and the attached Schedules shall govern in the event of any inconsistencies between the RFQ, ESCO proposal or Audit Report and the provisions of this Contract.

<Note: This section makes the original RFQ and ESCO response a part of the contract. If there is any future discrepancy between the RFQ, ESCO proposal or Audit Report and in this Contract, the terms of this Contract apply. Thus, be sure the Contract and Schedules are complete and accurate.>

SECTION 2. ENERGY USAGE RECORDS AND DATA

<company> has furnished or shall furnish (or cause its energy suppliers to furnish if reasonably possible) to ESCO, upon request, all of its records and complete data concerning energy usage and energy-related maintenance for the Premises described in Schedule B (**Description of Premises; Pre-Existing Equipment Inventory**), including the following data for the most current twenty-four (24) month period; utility records; occupancy information; descriptions of any changes in the building structure or its heating, cooling, lighting or other systems or energy requirements; descriptions of all energy consuming or saving equipment used in the Premises; bills and records relating to maintenance of energy-related equipment, and a description of energy management procedures presently utilized. If requested, <company> shall also provide any prior energy audits of the Premises and shall make employees who are familiar with such records available for consultations and discussions with ESCO.

By the _____ day after receipt, <company> shall provide ESCO with copies (hard or electronic) of all energy bills for the Premises that it shall have received for the preceding month. Upon receipt of the required information, ESCO shall calculate the savings in accordance with the agreed-upon calculation formulae in Schedule F (**Savings Calculation Formulae; Methodology to Adjust Baseline**).

<Note: This section ensures that ESCO has access to historical energy consumption, facility operations records and occupancy data necessary to formulate baseline utility consumption. At a minimum, there should be twenty-four (24) months of data, however, thirty-six (36) months is recommended. Existing facility conditions, operations and equipment need to be carefully documented to establish an accurate baseline. This will serve as a record of the state of your buildings before project installation and will be critical to establishing and adjusting the baseline and measurement of savings. Any prior technical studies and energy audits should also be made available for ESCO's review and information. This Section also requires that <company> provide copies of energy bills for the Premises and requires that ESCO calculate the savings based on those bills. >

SECTION 3. COMMENCEMENT DATE AND TERMS; INTERIM PERIOD

Section 3.1. Commencement Date. The Commencement Date shall be the first day of the month after the month in which all of the following have occurred: (i) all schedules are in final form and accepted by <company>; (ii) ESCO has delivered a Notice to <company> that it has installed and commenced operating all of the Equipment specified in Schedule A (**Equipment to be Installed by ESCO**) and in accordance with the provisions of Section 8 (**Construction Schedule and Equipment Installation; Approval**) and Schedule H (**Systems Start-Up and Commissioning; Operating Parameters of Installed Equipment**); and (iii) <company> has inspected and accepted said installation and operation as evidenced by the Certificate of Acceptance as set forth in Exhibit I (**Certificate of Acceptance—Installed Equipment**). Compensation payments due to ESCO for service and maintenance under this Contract as set forth in Schedule D (**Compensation to ESCO**) shall begin no earlier than thirty (30) days from the Commencement Date as defined herein.

<Note: This section determines the Commencement Date when the savings guarantee period begins. This date is usually the first month AFTER ESCO has completed construction and delivered a notice that all equipment is installed and operating, and <company> has signed the Certificate of Acceptance. The Certificate of Acceptance should be attached to the Contract. It also states that no payment for ESCO service and maintenance will be made prior to the Commencement Date. If applicable, the repayment obligation for project financing should be arranged to coincide with the Commencement Date. The Commencement Date may also need to accommodate <company>'s fiscal year for the purpose of appropriations and budgeting. Also, be sure to specify "fiscal year" if that is necessary>.

Section 3.2. Term of Contract; Interim Period. Subject to the following sentence, the term of this Contract shall be <contract term in years> years measured beginning with the Commencement Date. Nonetheless, the Contract shall be effective and binding upon the parties immediately upon its execution, and the period from contract execution until the Commencement Date shall be known as the "Interim Period". All energy savings achieved during the interim period will be fully credited to <company>.

<<STATE CODE> provides that a performance contract term may not exceed twenty-five (25) years. It is <company> policy that such contracts not exceed ten (10) years. Prior to the Commencement Date (Section 3.1) the final contract and schedules are negotiated and executed by signature. At that time ESCO typically begins final project design and construction. The “Interim Period” is the design and construction period. Some savings will be realized during this period. The savings can be credited to ESCO’s guarantee or credited to <company>. If these savings are credited to ESCO’s guarantee, the credit should be extended for a maximum one to two year period. If ESCO is credited, ESCO will need to develop an approach to measure these savings.>

SECTION 4. PAYMENTS TO ESCO

Section 4.1. Energy Savings Guarantee. ESCO has formulated and, subject to the adjustments provided for in Section 14, **(Material Changes)** has guaranteed the annual level of energy and operations savings to be achieved as a result of the installation and operation of the Equipment and provision of services provided for in this Contract as specified in Schedule J (**ESCO’s Maintenance Responsibilities**) and in accordance with the Savings Calculation Formula as set forth in Schedule F (**Savings Calculation Formulae; Methodology to Adjust Baseline**). The Energy Savings Guarantee is set forth in annual increments for the term of the Contract as specified in Schedule C (**Energy Savings Guarantee**).

<Note: This section establishes the term of the energy savings guarantee to be on an annual basis.>

Section 4.2. Review and Reimbursement/Reconciliation. If at the end of any **<Note: insert “fiscal” if applicable>** year during the guarantee period as specified in Schedule C (**Energy Savings Guarantee**) ESCO has failed to achieve the annual Energy Savings Guarantee specified in Schedule C (**Energy Savings Guarantee**), upon written request by <company>, which shall be given no earlier than the end of such year and no later than thirty (30) days thereafter, ESCO will pay <company> the difference between the annual amount guaranteed and the amount of actual energy and operations savings achieved at the Premises in accordance with the provisions of Schedule C (**Energy Savings Guarantee**). ESCO shall remit such payments to <company> within thirty (30) days of written notice by <company> of such monies due. When the total energy savings in any one year during the guarantee period exceed the Energy Savings Guarantee as set forth in Schedule C (**Energy Savings Guarantee**) and are in addition to those monies due ESCO for compensation for services as set forth in Schedule D (**Compensation to ESCO**), such excess savings shall be the property of <company>. ESCO shall annually prepare and provide a report to the Administrator of <company> documenting the performance of the CSMs.

<Note: This section is drafted to provide for the review and potential reimbursement annually. If the <company> does not want to wait until the conclusion of an entire year for potential reimbursement, <company> may consider doing this more frequent, for example, semi-annually. <company> may also want to consider making the review more frequent during the first few years of the contract only or during the years that measurement and verification will be done by ESCO.>

Open book pricing will be required, such that ESCO will fully disclose all costs, including all subcontractor and vendor costs. ESCO will maintain cost accounting records on authorized work performed under actual costs for labor and material, or other basis requiring records. ESCO will afford <company> access to these records and preserve them for a period of three (3) years after final payment. Costs will be evaluated through price analysis to compare costs with reasonable criteria such as established catalog and market prices or historical prices.

ESCO and <company> agree to work in good faith to resolve any disagreement over the calculation of the energy savings. Should an irresolvable disagreement arise as to the calculation of energy savings, an independent public accounting firm may be engaged by either party to conduct a review and give an opinion on whether the calculation of savings or deficiencies as prepared by ESCO is fairly stated in accordance with this Contract. The independent public accounting firm shall be mutually agreed upon by the parties (if the parties cannot agree upon an accounting firm, then each shall designate a firm; and the two designated firms shall identify a mutually agreeable third firm). The independent public accounting firm shall include in its report any exceptions determined by its review. Exercise of the right to request a review shall in no way affect <company>'s obligation to make current payments pursuant to this Contract unless otherwise described herein. Any payments between the parties necessary to resolve any irregularities identified in the review will be made within sixty (60) days after submission of the review to the parties. If ESCO calls the review, ESCO shall pay the cost of the review. If the review is called by <company>, the following structure will be applied to paying for the review:

If the review determines that ESCO's preparation of the Energy Savings Guarantee was more than ten percent (10%) in error, ESCO shall pay the entire cost of the review; however if ESCO's determination of the Energy Savings Guarantee are in error of ten percent (10%) or less than the amounts as determined by the independent public accounting firm, <AGENCY> shall pay for the entire cost of the review. In any case, the _____ shall be changed to reflect the findings of the review and the calculations of savings relating to the guarantee will be modified if necessary.

<Note: At the end of each contract year, usually within a specified 45-60 days, there will be a review and reconciliation of the actual achieved savings (subject to any adjustments made for weather, occupancy, operations etc.) vs. ESCO's guaranteed savings projections. If there is a savings shortfall, ESCO is contractually liable to reimburse <company> for the difference between what was actually achieved and the guaranteed amount. If in any year, the achieved savings exceed the guarantee, <company> shall retain excess savings. As an incentive for ESCO to look even deeper for additional savings, a shared savings arrangement could be part of this agreement.>

Section 4.3. **ESCO Compensation and Fees:** ESCO has structured the Energy Savings Guarantee referred to in Section 4.1 above, so as to be sufficient to equal or exceed the sum of any and all annual payments required to be made by <company> in connection with the acquisition of Equipment to be installed by ESCO under this Contract as set forth in Schedule O (**Annual Installment Payment Schedule**) and any and all annual fees to be paid by <company> to ESCO for the provision of services as set forth and in accordance with the provisions of Schedule D (**Compensation to ESCO**) and Schedule J (**ESCO's Maintenance Responsibilities**).

<Note: This section ensures that ESCO's savings guarantee will at least cover annual project financing costs (principal and interest) and all annual ESCO service fees for maintenance and measurement and verification.>

Section 4.4. **Billing Information Procedure.** Payments due to ESCO under this Section 4 shall be calculated in accordance with the provisions of Schedule D. ESCO shall provide <company> with an invoice of the total amount due.

Section 4.5. Effective Date of Payment Obligation. Notwithstanding the above provisions in Section 4, <company> shall not be required to begin any payments to ESCO under this Contract unless and until all equipment installation is completed by ESCO in accordance with the provisions of Section 8 (**Construction and Equipment Installation; Approval**) and Schedule H (**Systems Start-Up and Commissioning; Operating Parameters of Installed Equipment**), and accepted by <company> as evidenced by the signed Certificate of Acceptance as set forth in Exhibit I (**Certificate of Acceptance — Installed Equipment**), and unless and until said equipment is fully and properly functioning.

<Note: This section states that no ESCO fees shall be paid until all equipment is installed and operating in accordance with the agreed upon Construction Schedule and until <company> has accepted the completed installation and signed the required Certificate of Acceptance — Installed Equipment.>

SECTION 5. PERMITS AND APPROVALS; COORDINATION

Section 5.1. Permits and Approvals. <company> shall use its best efforts to assist ESCO in obtaining all necessary permits and approvals for installation of the Equipment. In no event shall <company> be responsible for payment of any permits fees. The Equipment and the operation of the Equipment by ESCO shall at all times conform to all federal, state and local code requirements. ESCO shall furnish copies of each permit or license, which is required to perform the work to <company>, before ESCO commences the portion of the work requiring such permit or license.

ESCO shall pay for plumbing and electrical permits required by the <STATE, STATE DEPT>. ESCO shall obtain and pay for all licenses and permits and shall pay all fees and charges for connections to outside services and for the use of municipal or private property for storage of materials, parking, utility services, temporary obstructions, enclosures, opening and patching of streets, etc., arising from the construction and completion of the installation and maintenance contemplated by this Contract.

<Note: This standard construction provision requires ESCO comply with all code requirements, pay all associated permit fees and provide <company> with copies of each permit and license required to do the work. <company> agrees to assist ESCO to the best of its ability to obtain required permits and approvals.>

Section 5.2. Coordination During Installation. <company> and ESCO shall coordinate the activities of ESCO's equipment installers with <company> employees, and agents. ESCO shall not commit or permit any act that will interfere with the performance of business activities conducted by <company> or its employees without prior written approval of <company>.

<Note: This standard provision directs both <company> and ESCO to coordinate equipment installation to avoid interference with <company>'s business activities. If an installation requires interference, ESCO must first obtain <company>'s written approval to proceed. If a facility generates revenue for <company> (e.g. civic center, theater, arena etc.) and scheduled revenue-producing activities are interrupted due to the fault of ESCO, either during project installation or operation, then a provision for the collection of damages may be negotiated.>

SECTION 6. LOCATION AND ACCESS

<company> shall provide sufficient space on the Premises for the installation and operation of the Equipment and shall take reasonable steps to protect such Equipment from harm, theft and misuse. <company> shall provide access to the Premises for ESCO to perform any function related to this Contract during regular business hours, or such other reasonable hours as may be requested by ESCO and acceptable to <company>. <company> shall not unreasonably restrict ESCO's access to Premises to make emergency repairs or corrections as ESCO may determine are needed.

<Note: This provision states <company>'s responsibility for providing adequate space and protection for the installed equipment and authorizes ESCO's access to the facility to perform routine and emergency operations.>

SECTION 7. PERFORMANCE BY ESCO

ESCO shall perform all tasks/phases under the Contract, including construction, and install the Equipment in such a manner so as not to harm the structural integrity of the buildings or their operating systems and so as to conform to the standards set forth in Schedule I (**Standards of Comfort**) and the construction schedule specified in Schedule G (**Construction and Installation Schedule**). ESCO shall repair and restore to its original condition any area of damage caused by ESCO's performance under this Contract. <company> reserves the right to review the work performed by ESCO and to direct ESCO to take certain corrective action if, in the opinion of <company>, the structural integrity of the Premises or its operating system is or will be harmed. All costs associated with such corrective action to damage caused by ESCO's performance of the work shall be borne by ESCO.

ESCO shall remain responsible for the professional and technical accuracy of all services performed, whether by ESCO or its subcontractors or others on its behalf, throughout the term of this Contract.

<Note: This section directs ESCO to protect the premises and its contents and repair and restore to the original condition any damage caused by ESCO in connection with this contract. Any costs incurred to correct such damage will be paid by ESCO. ESCO is solely responsible for the technical professional accuracy of all work performed under this Contract including work done by subcontractors or others.>

SECTION 8. CONSTRUCTION SCHEDULE AND EQUIPMENT INSTALLATION; APPROVAL

Section 8.1. Construction and equipment installation shall proceed in accordance with the construction schedule approved by <company> and attached hereto as Schedule G (**Construction and Installation Schedule**).

<Note: The construction/installation phase of the project must be managed in compliance with <company>'s requirements and governing statutes. Since construction is just one component of the overall project, a separate construction contract may be desirable and in some cases may be necessary. The construction contract would be referenced in the body of the contract and attached, or the appropriate construction language could be incorporated into the body of the contract.>

Section 8.2. Systems Startup and Equipment Commissioning: ESCO shall conduct a thorough and systematic performance test of each element and total system of the installed Equipment in accordance with the procedures specified in Schedule H (**Systems Start-Up and Commissioning; Operating Parameters of Installed Equipment**) and prior to acceptance by <company>. ESCO shall provide notice to <company> of the scheduled test(s) and <company> and/or its designees shall have the right to be present at any or all such tests conducted by ESCO and/or manufacturers of the Equipment. ESCO shall be responsible for correcting and/or adjusting all deficiencies in systems and Equipment operations that may be observed during system commissioning procedures.

Section 8.3. Inspection and Final Approval: <company> have the right to inspect, test and approve the work conducted in the facilities during construction and operation. <company> shall have the right and access to the account books, records, and other compilations of data that pertain to the performance of the provisions and requirements of this Contract. Records shall be kept on a generally recognized accounting basis, and calculations will be kept on file in legible form and retained for three (3) years after close-out.

<Note: This section requires ESCO to do commissioning to ensure the system is functioning properly, testing equipment performance and verifying the specified operating parameters. Commissioning typically occurs before the owner's final project acceptance, however, language can be included here to provide for testing after project acceptance. It also requires ESCO notify <company> when testing will take place and gives <company> (or its designee) the right to be present during all tests. Have the commissioning report include manufacturer's startup and performance sheets.>

SECTION 9. STANDARDS OF COMFORT

ESCO will maintain and operate the Equipment in a manner that will provide the standards of heating, cooling, hot water, and lighting as described in Schedule I (**Standards of Comfort**).

<Note: This section references the standards of comfort contained in Schedule I that ESCO is contractually liable to maintain throughout the contract term. These standards are negotiated between ESCO and <company> to reflect realistic ranges of heating, cooling and hot water temperatures, lighting levels, chilled water requirements, and other specified comfort and operating parameters to be maintained.>

SECTION 10. EQUIPMENT WARRANTIES AND COMPATIBILITY

ESCO covenants and agrees that all equipment installed, as part of this Contract, is new, in good and proper working condition and protected by appropriate written warranties covering all parts and equipment performance. Demonstrators, previously rented, refurbished, or reconditioned items are not considered "new" except as specifically provided in this section. "New" means items that have not been used previously and that are being actively marketed by the manufacturer. Equipment may contain new or minimal amounts of recycled or recovered parts that have been reprocessed to meet the manufacturer's new product standards. Equipment must have the State of <STATE> as their first customer and must not have been previously sold, installed, demonstrated, or used in any manner (such as rentals, demonstrators, trial units, etc.). Equipment offered must be provided with a full, unadulterated, and undiminished new item warranty against defects in workmanship and materials. The warranty is to include replacement, repair, and any labor for the warranty period. ESCO further agrees to deliver to <company> for inspection and approval all such written warranties, which shall be attached and set forth as Exhibit II

(Equipment Warranties); to transfer warranties to <company>; to pursue rights and remedies against the manufacturer of the equipment under the warranties in the event of equipment malfunction or improper or defective function, and defects in parts, workmanship and performance; and to notify <company> whenever defects in equipment parts or performance occur or when warranty rights and remedies are exercised by ESCO. The cost of any risk of damage or damage to the equipment and its performance, including damage to property and equipment of <company> or the Premises, due to ESCO's failure to exercise its warranty rights shall be borne solely by ESCO.

All warranties shall specify that only new, and not reconditioned parts, may be used and installed when repair is necessitated by malfunction. All warranties required hereunder shall be in force for a minimum of one (1) year from the Commencement Date.

Notwithstanding the above, nothing in this Section shall be construed to alleviate/relieve ESCO from complying with its obligations to perform under all terms and conditions of this Contract and as set forth in all attached Schedules.

<Note: This warranty provision ensures all installed equipment is new and protected by appropriate written manufacturers warranties for parts and performance for a minimum of one (1) year. It requires that warranties provide for replacement with new parts (not used or reconditioned) during the warranty period. While equipment warranties will be transferred to <company> after completed project installation, ESCO is responsible for pursuing any necessary remedies during the warranty period. If ESCO fails to exercise the warranty and damages occur, ESCO is responsible for all costs of repair and any lost savings. Manufacturer warranties can not supersede Sections 3.1>

SECTION 11. TRAINING BY ESCO

ESCO shall conduct the training program described in Schedule M (**ESCO's Training Responsibilities**) hereto. The training specified in Schedule M (**ESCO's Training Responsibilities**) must be completed prior to acceptance of the Equipment installation. ESCO shall provide ongoing training whenever needed with respect to updated or altered Equipment, including upgraded software, and including newly hired maintenance personnel during the term of the Contract. Such training shall be provided at no charge to the <company>.

<Note: In many performance contracts training of facility personnel is conducted before acceptance of the completed installation. If it is necessary to conduct training after project acceptance, note this in the appropriate schedule. If there are charges for unscheduled training, it should be noted in this section.>

SECTION 12. EQUIPMENT SERVICE

Section 12.1. Actions by ESCO. ESCO shall provide all service, repairs, and adjustments to the Equipment installed under terms of this Contract pursuant to Schedule J (**ESCO's Maintenance Responsibilities**). <company> shall incur no cost for Equipment service, repairs, and adjustments, except as set forth in Schedule D (**Compensation to ESCO**), provided, however, that when the need for maintenance or repairs principally arises due to the negligence or willful misconduct of <company> or any employee or other agent of <company>, and ESCO can so demonstrate such causal connection, ESCO may charge <company> for the actual cost of the maintenance or repair insofar as such cost is not covered by any warranty or insurance proceeds.

<Note: This section refers to the maintenance and service responsibilities of each party as specified in Schedules J and D. It also states that if <company> is at fault for causing additional maintenance or repair to the equipment, <company> will be charged by ESCO for maintenance or repair costs.>

Section 12.2. Malfunctions and Emergencies. <company> shall use its best efforts to notify ESCO or its designee(s) within twenty-four (24) hours after <company>'s actual knowledge and occurrence of: (i) any malfunction in the operation of the Equipment or any preexisting energy related equipment that might materially impact upon the guaranteed energy savings, (ii) any interruption or alteration to the energy supply to the Premises, or (iii) any alteration or modification in any energy-related equipment or its operation.

Where <company> exercises due diligence in attempting to assess the existence of a malfunction, interruption, or alteration it shall be deemed not at fault in failing to correctly identify such conditions as having a material impact upon the guaranteed energy savings. <company> shall notify ESCO within twenty-four (24) hours upon its having actual knowledge of any emergency condition affecting the Equipment. ESCO, or its designee(s) shall respond within ____ hours and shall promptly proceed with corrective measures. Any telephonic notice of such conditions by <company> shall be followed within three (3) business days by written notice to ESCO from <company>. If <company> unreasonably delays in notifying ESCO of a malfunction or emergency, and the malfunction or emergency is not otherwise corrected or remedied, such conditions will be treated as a Material Change and the applicable provisions of Section 14 (**Material Changes**) shall be applied.

ESCO will provide a written record of all service work performed. This record will indicate the reason for the service, description of the problem and the corrective action performed.

<Note: This section requires <company> to notify ESCO within a specified number of hours of actually knowing about any situation that impacts the performance of the equipment. The impacts cover both pre-existing energy related equipment and the newly installed equipment including equipment malfunction or modification, interruption of power supply or any emergency situation which may affect the energy savings guarantee. If such an impact is known by <company> to have occurred and <company> delays notifying ESCO and doesn't correct the situation, it will be treated as a Material Change and the baseline will be adjusted accordingly. If <company> makes an effort to assess the situation and incorrectly determines it doesn't have an impact, then ESCO will not fault <company>, although an adjustment to the baseline may still be warranted.>

Section 12.3. Actions by <company>. <company> shall not move, remove, modify, alter, or change in any way the Equipment or any part thereof without the prior written approval of ESCO except as set forth in Schedule K (**<company>'s Maintenance Responsibilities**). Notwithstanding the foregoing, <company> may take reasonable steps to protect the Equipment if, due to an emergency, it is not possible or reasonable to notify ESCO before taking any such actions. In the event of such an emergency, <company> shall take reasonable steps to protect the Equipment from damage or injury and shall follow instructions for emergency action provided in advance by ESCO. <company> agrees to maintain the Premises in good repair and to protect and preserve all portions thereof, which may in any way affect the operation or maintenance of the Equipment.

<Note: This section states <company> may not make any changes to the operation and maintenance of the equipment without prior written approval of ESCO unless otherwise indicated in Schedule K or if there is an emergency and ESCO can't be reasonably notified. In the case of such emergency, <company> should follow instructions provided by ESCO for emergency action.>

SECTION 13. UPGRADING OR ALTERING THE EQUIPMENT

ESCO shall at all times have the right, subject to <company>'s prior written approval, which approval shall not be unreasonably withheld, to change the Equipment, revise any procedures for the operation of the equipment or implement other energy saving actions in the Premises, provided that:

(i) ESCO complies with the standards of comfort and services set forth in Schedule I (**Standards of Comfort**) herein;

(ii) such modifications or additions to, or replacement of the Equipment, and any operational changes, or new procedures are necessary to enable ESCO to achieve the energy savings at the Premises and;

(iii) any cost incurred relative to such modifications, additions or replacement of the Equipment, or operational changes or new procedures shall be the responsibility of ESCO.

All modifications, additions or replacements of the Equipment or revisions to operating or other procedures shall be described in a supplemental Schedule(s) to be provided to <company> for approval, which shall not be unreasonable withheld, provided that any replacement of the Equipment shall be new as set forth in Section 10 and have equal or better potential to reduce energy consumption at the Premises than the Equipment being replaced. ESCO shall update any and all software to be used in connection with the Equipment in accordance with the provisions of Section 18.1 (**Ownership of Certain Proprietary Rights**). All replacements of and alterations or additions to the Equipment shall become part the Equipment described in Schedule A (**Equipment to be Installed by ESCO**) and shall be covered by the provisions and terms of Section 8 (**Construction Schedule and Equipment Installation; Approval**).

<Note: This section describes the terms and conditions under which ESCO may make changes to the equipment, operating procedures or take other energy savings actions. If such changes are implemented during any time during the Contract they must be described in a supplemental schedule and be approved by <company>. Any equipment replaced is required to be new and have the potential to produce at least as much or more savings. If computer software is updated, the licensing provisions of Section 18.1 still apply.>

SECTION 14. MATERIAL CHANGES

<Note: It is typical for the percent of deviation to be negotiated as a value ranging between two percent (2%) and five percent (5%) based on aggregate consumption costs. The lower value (2%) may be appropriate for large facilities (over \$20,000/month utility bills) and the higher value (5%) may be appropriate for small facilities (less than \$5,000/month utility bills).>

Section 14.1. **Material Change Defined:** A Material Change shall include any change in or to the Premises, whether structural, operational or otherwise in nature which reasonably could be expected, in the judgment of <company>, to increase or decrease annual energy consumption in accordance with the provisions and procedures set forth in Schedule E (**Baseline Energy Consumption**) and Schedule F (**Savings Measurement and Calculation Formulae; Methodology to Adjust Baseline**) by at least ____ percent (___%) after adjustments for climatic variations. Actions by <company>, which may result in, a Material Change include but are not limited to the following:

- (i) manner of use of the Premises by <company>; or
- (ii) hours of operation for the Premises or for any equipment or energy using systems operating at the Premises; or
- (iii) permanent changes in the comfort and service parameters set forth in Schedule I (**Standards of Comfort**); or
- (iv) occupancy of the Premises; or
- (v) structure of the Premises; or
- (vi) types and quantities of equipment used at the Premises or
- (vii) modification, renovation or construction at the Premises; or
- (viii) <company>'s failure to provide maintenance of and repairs to the Equipment in accordance with Schedule K (**<company>'s Maintenance Responsibilities**); or
- (ix) any other conditions other than climate affecting energy use at the Premises.

<Note: This section defines the term "Material Change" which covers any condition other than weather, that affects building energy use by more than the negotiated percentage (see above discussion).>

Section 14.2. **Reported Material Changes; Notice by <company>:** <company> shall use its best efforts to deliver to ESCO a written notice describing all actual or proposed Material Changes in the Premises or in the operations of the Premises at least __ (___) days before any actual or proposed Material Change is implemented or as soon as is practicable after an emergency or other unplanned event. Notice to ESCO of Material Changes which result because of a bona fide emergency or other situation which precludes advance notification shall be deemed sufficient if given by <company> within _____ (___) hours after having actual knowledge that the event constituting the Material Change occurred or was discovered by <company> to have occurred.

<Note: This section requires <company> to notify ESCO in writing if there are any actual or planned changes to the facility which would effect energy consumption by more than the negotiated percentage (see above discussion). In the event of an emergency or situation that would prevent advance notification, <company> has a specified number of hours to inform ESCO that a Material Change has occurred.>

Section 14.3. Unreported Material Change. In the absence of any Material Changes in the Premises or in their operations, the baseline energy consumption as set forth in Schedule E (**Baseline Energy Consumption**) should not change more than ___ percent (___%) during any month from the projected energy usage for that month, after adjustments for changes in climatic conditions. Therefore, if energy consumption for any month as set forth in Schedule E (**Baseline Energy Consumption**) deviates by more than ___ percent (___%) from the energy consumption for the same month of the preceding contract year after adjustments for changes to climatic conditions, then such deviation shall be timely reviewed by ESCO to ascertain the cause of deviation. ESCO shall report its findings to <company> in a timely manner and ESCO and <company> shall determine what, if any, adjustments to the baseline will be made in accordance with the provisions set forth in Schedule F (**Savings Measurement and Calculation Formulae; Methodology to Adjust Baseline**) and Schedule E (**Baseline Energy Consumption**).

<Note: This section states that if all building conditions and operations stay the same, then energy consumption will not vary more than the negotiated percentage (see above discussion) during any month when compared to the baseline use for that month and after adjustments for weather are made. In the event such a variation occurs, ESCO will try to determine the cause of the deviation and report its findings to <company>. ESCO and <company> will then determine what adjustments will be made to the baseline as described in Schedule F. Disputes may need to be addressed here.>

SECTION 15. REPRESENTATIONS AND WARRANTIES

Each party warrants and represents to the other that:

- (i) it has all requisite power, authority, licenses, permits, and franchises, corporate or otherwise, to execute and deliver this Contract and perform its obligations hereunder;
- (ii) its execution, delivery, and performance of this Contract have been duly authorized by, or are in accordance with, its organic instruments, and this Contract has been duly executed and delivered for it by the signatories so authorized, and it constitutes its legal, valid, and binding obligation;
- (iii) its execution, delivery, and performance of this Contract will not breach or violate, or constitute a default under any Contract, lease or instrument to which it is a party or by which it or its properties may be bound or affected; or
- (iv) it has not received any notice, nor to the best of its knowledge is there pending or threatened any notice, of any violation of any applicable laws, ordinances, regulations, rules, decrees, awards, permits or orders which would materially and adversely affect its ability to perform hereunder.

<Note: This boilerplate provision states that each party has the requisite authority and ability to enter into this contract.>

SECTION 16. ADDITIONAL REPRESENTATIONS OF THE PARTIES.

<company> hereby warrants, represents and promises that it has not entered into any undisclosed leases, or contracts with other persons or entities regarding the leasing of energy efficiency equipment or the provision of energy management services for the Premises or with regard to servicing any of the energy related equipment located in the Premises. <company> shall provide ESCO with copies of any successor or additional leases of energy efficiency equipment and contracts for management or servicing of preexisting equipment at Premises that may be executed from time to time hereafter within sixty (60) days after execution thereof.

<company> agrees that it shall adhere to, follow and implement the energy conservation procedures and methods of operation to be set forth on Schedule K (**<company>'s Maintenance Responsibilities**), to be attached hereto and made a part hereof after <company>'s approval.

<company> agrees that ESCO shall have the right once a month, with prior notice, to inspect Premises to determine if <company> is complying, and shall have complied with such obligations. For the purpose of determining <company>'s said compliance, the checklist to be set forth at Schedule L (**Facility Maintenance Checklist**) as completed and recorded by ESCO during its monthly inspections, shall be used to measure and record <company>'s said compliance. <company> shall make the Premises available to ESCO for and during each monthly inspection, and shall have the right to witness each inspection and the recordation on the checklist.

ESCO hereby warrants, represents and promises that:

- (i) before commencing performance of this Contract:
 - (a) it shall have become licensed or otherwise permitted to do business in the State of <STATE>.
 - (b) it shall have provided proof and documentation of required insurance pursuant to Section 17 (**Insurance Requirements**);
 - (c) it shall submit a properly executed Contractor's Affidavit Concerning Taxes.
- (ii) it shall make available, upon reasonable request, all documents relating to its performance under this Contract, including but not limited to all contracts and subcontracts entered into;
- (iii) it shall use qualified subcontractors and delegees, licensed and bonded in this state to perform the work so subcontracted or delegated pursuant to the terms hereof;
- (iv) it is financially solvent, able to pay its debts as they mature and possessed of sufficient working capital to complete and perform its obligations under this Contract.

The parties acknowledge and agree that ESCO has entered into this Contract in reliance upon the prospect of earning compensation based on guaranteed energy savings in energy used at Premises, as set forth on Schedules C (**Energy Saving Guarantee**) and D (**Compensation to ESCO**), attached hereto and made a part hereof. The parties further acknowledge and agree that the said guaranteed energy savings would not likely be obtained unless certain procedures and methods of operation designed for energy conservation shall be implemented, and followed by <company> on a regular and continuous basis.

<Note: This provision protects both ESCO and <company> by establishing a method for ESCO to supervise <company>'s compliance with the scheduled routine and preventative maintenance activities to be performed by <company> (either by in-house personnel or existing maintenance contract). This checklist should be developed for both the newly installed and pre-existing energy-related equipment.>

<Note: These additional representations address several areas specific to the performance contract. <company> declares it has not entered into any leases or service contracts relating to energy equipment or servicing of pre-existing equipment and will notify ESCO within a specified period of time if it does so.

ESCO certifies that before beginning work under this contract it will: have become licensed to business in the state of <State>; provide proof of required insurance; give <company> access to all document relating to the project (including all contracts and subcontracts) upon request; use <STATE>-licensed and qualified subcontractors; and is financially able to complete the project and perform under the terms of this contract.>

SECTION 17. PROPERTY/CASUALTY/INSURANCE; INDEMNIFICATION

Prior to commencement of any work and for the duration of this Agreement, ESCO must provide and maintain insurance as set forth below. ESCO shall require all subcontractors to maintain the same insurance required herein of ESCO. All such insurance shall be written on a Comprehensive Form of Policy. Failure to provide satisfactory evidence of coverage may result in rejection of a submission and/or contract cancellation. Insurance required by this section shall name the State of <STATE> as an additional named insured and shall be with insurers rated A-VII or better in the latest *Bests Rating Guide* and in good standing and authorized to transact business in <STATE>. The coverage provided by such policy shall be primary to any coverage of the State on or related to the Contract and shall provide that the insurance afforded applies separately to each insured against whom a claim is made, except with respect to the limitation of liability. Any "other insurance" provisions contained in any policy including the state of <STATE> as an additional insured shall not apply. All required policies shall evidence that the policies have been endorsed to require sixty (60) days' notice to the State, by certified or registered mail, return receipt requested, prior to any cancellation, potential reduction in aggregate limits, refusal to renew or any material change in the nature or extent of the coverage provided. All policies shall contain waivers of subrogation. ESCO waives all rights against the State and its agents, officers, directors and employees for recovery of damages to the extent these damages are covered by the required policies. Policies may contain deductibles but such deductibles shall not be reduced from any damages due to the State.

By requiring insurance herein, the State does not represent that coverage and limits will necessarily be adequate to protect ESCO and such coverage and limits shall not be deemed a limitation on ESCO's indemnity liabilities under the Contract.

The following are required:

- a. Workers' Compensation Insurance with statutory limits as required by statute, and Employer's Liability Insurance with limits of not less than One Hundred Thousand and 00/100 Dollars (\$100,000.00) per Accident, Five Hundred Thousand and 00/100 Dollars (\$500,000.00) Disease, Policy Limit and One Hundred Thousand and 00/100 Dollars (\$100,000.00) Disease, Each Employee.
- b. Automobile Liability, including non-owned and hired with a limit not less than One Million and 00/100 Dollars (\$1,000,000.00).
- c. Commercial General Liability and Umbrellas Liability Insurance including premises, operation, owners and contractors protective liability, products and completed operations liability, personal injury liability (including employee acts), broad form property damage liability and blanket contractual liability in amounts of not less than Five Million and 00/100 Dollars (\$5,000,000.00). ESCO shall maintain Commercial General Liability (CGL) and, if necessary, commercial umbrella or excess liability with a limit of not less than Five Million and 00/100 Dollars (\$5,000,000.00) each occurrence/ Annual Aggregate and the Annual Aggregate shall be endorsed to apply separately to each job site or location. The Schedule of Underlying Insurance in the Umbrella Policy shall include the CGL, the auto policy and the Employer's Liability Policy. In the event any of the hazards of explosion, collapse and underground, normally referred to as XCU, exist, then such hazards shall be covered and protection afforded under the policy and such exclusions must be removed from the policy.
- d. ESCO shall maintain in full force and effect, at ESCO's expense, an Errors and Omissions or Professional Liability Insurance Policy in the amount of \$2,000,000 minimum coverage. Such coverage may be on a "claims made" basis. If such insurance is on a "claims made" basis, it shall remain in effect for the duration of the applicable statute of limitations for claims against professionals such as ESCO. ESCO shall be responsible for all claims, damages, losses or expenses, including attorneys' fees, arising out of or resulting from the performance of professional services contemplated by this Agreement, provided that any such claim is attributable to bodily injury or death, or injury to or destruction of tangible personal property or to failures of the work, including the loss of use resulting there from, and is caused, in whole or in part, by any negligent act, error or omission of ESCO, or any consultant or associate thereof, anyone directly or indirectly employed by ESCO. ESCO shall submit a Certificate of Insurance verifying said coverage upon execution of this Agreement and also any notices of renewals of such policy as they occur.
- e. ESCO shall maintain in full force and effect, at ESCO's expense, an Installation Floater, with limits of not less than One Million and 00/100 Dollars (\$1,000,000.00), for coverage of the ESCO's labor, materials, and any equipment to be used for completion of work under this contract. Coverage is to be on an all risk of physical damage form, including earthquake and flood. This insurance shall include the State of <STATE>, <company>, the contractor and its subcontractors as their interests may appear.

ESCO shall be responsible for (i) any damage to the Equipment or other property on the Premises and (ii) any personal injury where such damage or injury occurs as a result of ESCO's performance under this Contract.

ESCO shall save and hold harmless <company> and their officers, agents and employees or any of them from any and all claims, demands, actions or liability of any nature based upon or arising out of any services performed by ESCO, its agents or employees under this Contract.

<Note: This section needs to reflect <company>'s requirements with regard to insurance and indemnification.>

SECTION 18. OWNERSHIP

Section 18.1. Ownership of Certain Proprietary Property Rights. <company> shall not, by virtue of this Contract, acquire any interest in any formulas, patterns, secret inventions or processes, copyrights, patents, or other intellectual or proprietary rights that are or may be used in connection with the Equipment. ESCO shall grant to <company> a perpetual, irrevocable royalty-free license for any and all software or other intellectual property rights necessary for <company> to continue to operate, maintain, and repair the Equipment in a manner that will yield maximal energy consumption reductions.

<Note: In most cases, this provision addresses ESCO's proprietary rights over customized (or exclusive) software used in an energy management system which may control, manage and perform other functions in conjunction with the project (there may be other technical designs, processes, formulas etc., which this provision would cover). Of particular importance is the stipulation that grants <company> a continuing license (at no charge) to use and operate the project without violating ESCO's proprietary rights.>

Section 18.2. Ownership of Existing Equipment. The equipment and materials at the Premises at the time of execution of this Contract shall remain the property of <company> even if it is replaced or its operation made unnecessary by work performed by ESCO pursuant to this Contract. If applicable, ESCO shall advise <company> in writing of all equipment and materials to be replaced at the Premises and <company> shall within thirty (30) days designate in writing to ESCO which equipment and materials should not be disposed of off-site by ESCO. It is understood and agreed to by both Parties that <company> shall be responsible for and designate the storage location for any equipment and materials that should not be disposed of off-site. ESCO shall be responsible for the disposal of all equipment and materials designated by <company> as disposable off-site in accordance with all applicable laws and regulations regarding such disposal.

<Note: This provision states that <company> has ownership of all existing equipment and ESCO shall notify <company> in writing of what equipment and materials are to be replaced. If <company> chooses to keep the equipment to be replaced, ESCO will be notified and <company> will be responsible for identifying the location of where the property is to be stored or relocated. ESCO is responsible for all equipment and materials to be disposed>

Section 18.3 Ownership of Drawings. All drawings, reports and materials prepared by ESCO specifically in performance of this Contract shall become the property of <company> and will be delivered to <company> no later than forty-five (45) days after completion.

SECTION 19. EVENTS OF DEFAULT

Section 19.1. Events of Default by <company>. Each of the following events or conditions shall constitute an “Event of Default” by <company>:

- (i) any failure by <company> to pay ESCO any sum due for a service and maintenance period of more than sixty (60) days after written notification by ESCO that <company> is delinquent in making payment and provided that ESCO is not in default in its performance under the terms of this Contract;
- (ii) any other material failure by <company> to perform or comply with the terms and conditions of this Contract, including breach of any covenant contained herein, provided that such failure continues for sixty (60) days after notice to <company> demanding that such failures to perform be cured or if such cure cannot be effected in sixty (60) days, <company> shall be deemed to have cured default upon the commencement of a cure within sixty (60) days and diligent subsequent completion thereof; or
- (iii) any representation or warranty furnished by <company> in this Contract, which was false, or misleading in any material respect when made.

Section 19.2. Events of Default by ESCO. Each of the following events or conditions shall constitute an “Event of Default” by ESCO:

- (i) the standards of comfort and service set forth in Schedule I (**Standards of Comfort**) are not provided due to failure of ESCO to properly design, install, maintain, repair or adjust the Equipment except that such failure, if corrected or cured within thirty (30) days after written notice by Customer to ESCO demanding that such failure be cured, shall be deemed cured for purposes of this Contract;
- (ii) any representation or warranty furnished by ESCO in this Contract is false or misleading in any material respect when made;
- (iii) failure to furnish and install the Equipment and make it ready for use within the time specified by this Contract as set forth in Schedules A (**Equipment to be Installed by ESCO**) and G (**Construction and Installation Schedule**);
- (iv) provided that the operation of the facility is not adversely affected and provided that the standards of comfort in Schedule I (**Standards of Comfort**) are maintained, any failure by ESCO to perform or comply with the terms and conditions of this Contract, including breach of any covenant contained herein except that such failure, if corrected or cured within thirty (30) days after written notice by the Customer to ESCO demanding that such failure to perform be cured, shall be deemed cured for purposes of this Contract;
- (v) any lien or encumbrance is placed upon the Equipment by any subcontractor, laborer, supplier or lender of ESCO;

(vi) the filing of a bankruptcy petition whether by ESCO or its creditors against ESCO which proceeding shall not have been dismissed within ninety (90) days of its filing, or an involuntary assignment for the benefit of all creditors or the liquidation of ESCO;

(vii) Any change in ownership or control of ESCO without the prior approval of <company>, which shall not be unreasonably withheld; or

(viii) failure by ESCO to pay any amount due <company> or perform any obligation under the terms of this Contract or the Energy Savings Guarantee as set forth in Schedule C (**Energy Savings Guarantee**).

SECTION 20. REMEDIES UPON DEFAULT

Section 20.1. Remedies upon Default by <company>. If an Event of Default by <company> occurs, ESCO may exercise all remedies available at law or in equity or other appropriate proceedings including bringing an action or actions from time to time for recovery of amounts due and unpaid by <company>, and/or for damages which shall include all costs and expenses reasonably incurred in exercise of its remedy. Election of one (1) remedy is not a waiver of other available remedies.

Section 20.2. Remedies Upon Default by ESCO. In the Event of Default by ESCO, <company> may exercise and any all remedies at law or equity, or institute other proceedings, including, without limitation, bringing an action or actions from time to time for specific performance, and/or for the recovery of amounts due and unpaid and/or for damages, which shall include all costs and expenses reasonably incurred, including attorney's fees. Election of one (1) remedy is not a waiver of other available remedies.

SECTION 21. CONDITIONS BEYOND CONTROL OF THE PARTIES

If a party ("performing party") shall be unable to reasonably perform any of its obligations under this Contract due to acts of God, insurrections or riots, or other event beyond its control, this Contract shall at the other party's option (i) remain in effect but said performing party's obligations shall be suspended until the said events shall have ended; or, (ii) be terminated upon ten (10) days' notice to the performing party, in which event neither party shall have any further liability to the other.

SECTION 22. ASSIGNMENT

Section 22.1. Assignment by ESCO. ESCO acknowledges that <company> is induced to enter into this Contract by, among other things, the professional qualifications of ESCO. ESCO agrees that neither this Contract nor any right or obligations hereunder may be assigned in whole or in part to another firm, without the prior written approval of the State. Notwithstanding the provisions of this paragraph, ESCO shall remain jointly and severally liable with its assignees(s), or transferee(s) for all of its obligations under this Contract.

<Note: This assignment provision acknowledges that <company> selected ESCO for its unique expertise and qualifications to perform the services specified in the contract. ESCO may not assign this contract to another ESCO without the written approval of <company> and any ESCO assigned this contract must fully comply with all terms and conditions. ESCO and any assignee remain contractually liable for fulfilling all of ESCO's obligations as specified in the contract.>

Section 22.2. Assignment by <company>. <company> may transfer or assign this Contract and its rights and obligations herein to a successor or purchaser of the facility(ies) subject to this Contract or an interest therein.

<Note: This provision allows <company> to transfer or assign this contract to a new building owner or occupant. >

SECTION 23. MISCELLANEOUS PROVISIONS

Section 23.1 Nonappropriation of Funds. It is understood and agreed that <company> are <STATE> state government entities and this Agreement shall in no way or manner be construed so as to bind or obligate <company> beyond the term of any particular appropriation of funds by the State's Legislature as may exist from time to time. <company> reserves the right to terminate this Agreement in whole or in part if, in its judgment, the Legislature of the State of <STATE> fails, neglects, or refuses to appropriate sufficient funds as may be required for <company> to continue any payments required under this Agreement. All affected future rights and liabilities of the parties hereto shall thereupon cease within ten (10) days after notice to ESCO. It is understood and agreed that <company>'s payments herein provided for shall be paid from <STATE> State Legislative appropriations and, in some instances, direct federal funding.

Section 23.2. Waiver of Claims/Liens. ESCO shall obtain and furnish to <company> a Waiver of Claims or Liens from each vendor, material manufacturer and laborer in the supply, installation and servicing of each piece of Equipment.

Section 23.3. Compliance with Law and Standard Practices. ESCO shall perform its obligations hereunder in compliance with any and all applicable federal, state, and local laws, rules, and regulations, in accordance with sound engineering and safety practices and in compliance with any and all reasonable rules of relative to the Premises. ESCO shall be responsible for obtaining all governmental permits, consents, and authorizations as may be required to perform its obligations hereunder. Failure in this Contract to specifically identify any applicable law does not affect its applicability.

Section 23.4. Independent Capacity of the Contractor. It is distinctly and particularly understood and agreed between the parties hereto that the state of <STATE> is in no way associated or otherwise connected with the performance of any service under this Contract on the part of ESCO or with the employment of labor or the incurring of expenses by ESCO. Said ESCO is an independent contractor in the performance of each and every part of this Contract, and solely and personally liable for all labor, taxes, insurance, required bonding and other expenses, and for any and all damages in connection with the operation of this Contract, whether it may be for personal injuries or damages of any other kind.

Section 23.5. Severability. In the event that any clause or provision of this Contract or any part thereof shall be declared invalid, void, or unenforceable by any court having jurisdiction, such invalidity shall not affect the validity or enforceability of the remaining portions of this Contract unless the result would be manifestly inequitable or unconscionable.

Section 23.6. Complete Contract. This Contract, when executed, together with all Schedules attached hereto or to be attached hereto, as provided for by this Contract shall constitute the entire Contract between both parties and this Contract may not be amended, modified, or terminated except by a written amendment signed by the parties hereto.

Section 23.7. Further Documents. The parties shall execute and deliver all documents and perform all further acts that may be reasonably necessary to effectuate the provisions of this Contract.

Section 23.8. Applicable Law. This Agreement shall be construed in accordance with, and governed by the laws of the state of <STATE>. Any action to enforce the provisions of this Agreement shall be brought in state district court in [_____] County, <STATE>. In the event any term of this Agreement is held to be invalid or unenforceable by a court, the remaining terms of this Agreement will remain in force. **<Note: May consider using county where <company> is located. Consult counsel.>**

Section 23.9. Notice. Any notice required or permitted hereunder shall be deemed sufficient if given in writing and delivered personally or sent by registered or certified mail, return receipt requested, postage prepaid, or delivered to a nationally recognized express mail service, charges prepaid, receipt obtained, to the address shown below or to such other persons or addresses as are specified by similar notice.

TO ESCO: <ESCO Name, Attention:, Mailing address.>
< Include COPY TO: information for ESCO, if applicable.>

TO <company>: <<company> Name, Attention:, Mailing address.>
< Include COPY TO: information for <company>, if applicable. >

Section 23.10. Headings. Headings and subtitles used throughout this Contract are for the purpose of convenience only, and no heading or subtitle shall modify or be used to interpret the text of any section.

Section 23.11. Handling of Hazardous Materials: All work completed under this Contract must be in compliance with all applicable federal, state and local laws, rules and regulations regarding waste disposal and treatment/disposal of any hazardous materials that could result from this project. In the event ESCO encounters any such materials, ESCO shall immediately notify the project manager and stop work pending further direction from the project manager. <company> may, in its sole discretion, suspend work on the project pending removal of such materials or terminate this Agreement.

Section 23.12. Public Works Contractor's State License Law: ESCO and its subcontractors and sub-subcontractors shall comply with <STATE> Code with specific reference to Public Works Contractor's State License Law, <citation>.

Section 23.13. Construction Manager: If construction management is used, the Construction Manager shall be licensed as a Public Works Construction Manager, and all construction management shall comply with <STATE> Code, <citation>.

Section 23.14. Architects: If applicable, construction work done under this Contract must have plans and specifications approved by an architect licensed in <STATE>.

Section 23.15. Permanent Building Fund Advisory Council: ESCO shall make presentations as required related to this Contract to the Permanent Building Fund Advisory Council.

Section 23.16. Employment of <STATE> Residents: Pursuant to Sections 44-1001 and 44-1002, <STATE> Code, it is provided that each ESCO must employ ninety-five percent (95%) bona fide <STATE> residents as employees, except where under such contracts fifty (50) or less persons are employed, ESCO may employ ten percent (10%) non-residents, provided, however, in all cases employers must give preference to the employment of bona fide residents in the performance of said work, and no contract shall be let to any person, firm, association or corporation refusing to execute an agreement with the above-mentioned provisions in it; provided that in contracts involving the expenditure of Federal Aid Funds, this act shall not be enforced in such a manner as to conflict with or be contrary to the federal statutes prescribing a labor preference to honorable discharged soldiers, sailors, or marines, prohibiting as unlawful any other preference or discrimination among citizens of the United States.

Section 23.17. Subcontractor Approval: retains the right to reasonably reject any ESCO-selected subcontractor prior to its commencement of work under this Contract. If not previously provided, names and qualifications must be submitted at least two (2) weeks in advance.

Section 23.18. Bonding Requirements: ESCO will provide to <COMPANY> separate performance and labor and material payment bonds, each in the sum of one hundred percent (100%) of the cost of the construction work. Bonds shall be issued by a surety rated A-VII or better in the latest *Bests Rating Guide* and in good standing and authorized to transact business in <STATE>.

Section 23.19. As-Built Drawings: Where applicable, ESCO must provide durable, reproducible record drawings (and such CADD documents as may be agreed to by <COMPANY> and <company>) from the “as-built drawings” of all existing and modified conditions associated with the project, conforming to typical engineering standards. These should include architectural, mechanical, electrical, structural, and control drawings and operating manuals and will be delivered prior to acceptance. Drawing format should be in an electronic format as per AIA standard CAD layering AutoCAD version 2000.

Section 23.20. Follow-up Monitoring/Measurement and Maintenance Services: Following the installation and implementation of improvements, ESCO will be responsible for maintaining and measuring to ensure optimal performance, however, <company> has the option to decline these services or negotiate for a reduced term of services. All maintenance and measurement fees will be paid through guaranteed savings.

Section 23.21. Operation and Maintenance Manuals: At least three (3) maintenance manuals for each site will be provided for all equipment replacements and/or upgrades at each location. Manuals are subject to approval of <COMPANY> and <company>.

Section 23.22. Continuing Activities: <COMPANY> and <company> reserve the right to make energy and water improvements to the work sites and to monitor the performance of the installations independently of ESCO. Additionally, <COMPANY> or <company> may wish to integrate other identified capital needs with ESCO projects, which may or may not contain energy and water savings opportunities.

Section 23.23. Non-Discrimination: ESCO shall comply with all applicable state and federal laws, rules and regulations involving non-discrimination on the basis of race, color, religion, national origin, age or sex.

Section 23.24. Taxes: ESCO, in consideration of securing the business of erecting or constructing public works in this state, recognizing that the business in which it is engaged is of a transitory character, and that in the pursuit thereof, its property used therein may be without the state when taxes, excises, or license fees to which it is liable become payable, agrees:

(i) To pay promptly when due all taxes (other than on real property), excises and license fees due to the state, its sub-divisions, and municipal and quasi-municipal corporations therein, accrued or accruing during the term of this Contract, whether or not the same shall be payable at the end of such term;

(ii) That if the said taxes, excises, and license fees are not payable at the end of said term, but liability for the payment thereof exists even though the same constitute liens upon its property, to secure the same to the satisfaction of the respective officers charged with the collection thereof; and

(iii) That, in the event of its default in the payment or securing of such taxes, excises, and license fees, to consent that the department, officer, board, or taxing unit entering into this Contract may withhold from any payment due it hereunder the estimated amount of such accrued and accruing taxes, excises, and license fees for the benefit of all taxing units to which said ESCO is liable.

Section 23.25. Contract Re-Negotiation: <COMPANY> and <company> reserve the right to renegotiate the terms of the Contract due to changes in the regulatory or utility climates or <company>'s non-discretionary use of energy, or if <COMPANY> and <company> desire to add sites as identified in the RFQ.

Section 23.26. Preventive Maintenance Schedule: Upon completion of measurement and verification by ESCO, ESCO shall provide to <company> a single comprehensive schedule of necessary preventive maintenance for all installations for the five (5) years following Contract expiration or termination.

Section 23.27. State of <STATE> Minimum Wage Law: It will be the responsibility of ESCO to fully comply with <STATE> law regarding the minimum wage law for residents hired to help on projects and jobs in <STATE>.

Section 23.28. Use of <company>'s Name: ESCO agrees that it will not, prior to, in the course of, or after performance under this Agreement use <company>'s name in any advertising or promotional media as a customer or client of ESCO without the prior written consent of <company>.

Section 23.29. Officials, Agents and Employees of the State Not Personally Liable: It is agreed by and between the parties hereto that in no event shall any official, officer, employee or agent of the State of <STATE> be in any way personally liable or responsible for any covenant or agreement contained in this Contract whether express or implied, nor for any statement, representation or warranty made herein or in any way connected with this Contract.

Section 23.30. Drafting Not to be Construed Against any Party: All parties acknowledge and agree that each has had a full opportunity to review and have input into this Contract and that any ambiguity found shall not be construed against any party as drafter. Reference to “year” shall mean calendar year unless a fiscal year is specified. If a fiscal year is specified that year is July 1 through June 30.

IN WITNESS WHEREOF, and intending to be legally bound, the parties hereto subscribe their names to this Contract by their duly authorized officers on the date first above written.

 <Name of ESCO>

 <Name of <company>>

By: _____
 (Signature)

By: _____
 (Signature)

 (Name and Title)

 (Name and Title)

<COMPANY>

By: _____
 (name and title)

ATTACHMENT I: Schedules, Exhibits, Appendices

SCHEDULE A. EQUIPMENT TO BE INSTALLED BY ESCO

<Note: Schedule A: This schedule will be furnished by ESCO based on the final Audit Report. It should specify all of the newly installed equipment including manufacturer, quantity, location and warranties (you can also have a separate schedule for warranties). This schedule should also describe any modifications that may have been made to existing equipment, if applicable.>

SCHEDULE B. DESCRIPTION OF PREMISES; PRE-EXISTING EQUIPMENT INVENTORY

<Note: Schedule B: This schedule is based on the final Audit Report. It contains basic information about the condition of the premises at the time of contract execution. Such information would include facility square footage, building construction, use, occupancy, hours of operation etc., and any special conditions that may exist.

The inventory is important to include for the purpose of identifying what equipment was in place and how it was configured at the time of contract execution. This schedule is important to the accurate establishment of baseline, savings measurement and may need to be referred to in the later years of the contract.>

SCHEDULE C: ENERGY SAVINGS GUARANTEE

<Note: Schedule C: This schedule should fully describe all provisions and conditions of the energy saving guarantee provided by ESCO. The guarantee should be defined in units of energy to be saved for the duration of the contract term and provide a mechanism to calculate dollar savings. Reference to the annual reconciliation of achieved vs. guaranteed savings should be included (there is also language in the body of the contract regarding annual reconciliation See Section 4.2).>

<Note: Actual savings of energy costs attributable to all measures for each year of the contract should be more than the calculated savings for that year.>

<Note: This schedule should contain the projected energy savings in units for each year of the contract. Often these projections are broken down on a measure by measure basis, although some measures may be aggregated into general categories such as lighting or HVAC. If there are several buildings involved in the project, this schedule should contain projections for each facility, even though they may all be covered under a single guarantee.>

SCHEDULE D: COMPENSATION TO ESCO

<Note: Schedule D: This should contain the amount and frequency of any payments that may be made to ESCO for maintenance, measurement and verification or other services negotiated as part of the contract. It should contain information about how the compensation is calculated (e.g. a percentage of savings above and beyond the guarantee, flat fee etc.), and if an annual inflation index is to be used to escalate fees over the duration of the contract term. An hourly fee structure can also be included to cover ESCO costs for any services provided beyond the scope agreed to at the time of contract execution. If ESCO is not the financing arm and will be paid for audit services previously performed, that could be included here.>

SCHEDULE E: BASELINE ENERGY CONSUMPTION

<Note: Schedule E: The baseline energy consumption is the “yardstick” by which all savings achieved by the installed project will be measured. The methodology and all supporting documentation used to calculate the baseline should be in this schedule including unit consumption and current utility rates for each fuel type. This schedule may also include baseline documentation regarding other cost savings such as material savings (e.g. bulbs, ballast, filters, chemicals etc.), and cost savings associated with the elimination of outside maintenance contracts. >

<For each site or project, the baseline and post-installation energy use will usually be defined using metering, billing analysis and/or engineering calculations (including computer simulations) either individually or in combination. In addition, values for certain factors that affect energy use and savings that are beyond ESCO’s control may be stipulated using historical data, analyses and/or results of spot or short-term metering. <company> or ESCO can define baseline conditions. If <company> defines the baseline, ESCO will have the opportunity to verify it. If the baseline is defined by ESCO, <company> will have the opportunity to verify.

<Baseline physical conditions (equipment inventory and conditions, occupancy, nameplate data, energy consumption rate, control strategies, etc.) are typically determined through well-documented audits, surveys, inspections and/or spot or short-term metering. This documentation will define the baseline for calculating savings and document baseline conditions in case future changes require baseline energy use adjustments.>

SCHEDULE F: SAVINGS CALCULATION FORMULAE; METHODOLOGY TO ADJUST BASELINE

<Note: Schedule F: This schedule contains a description of the energy savings measurement, monitoring and calculation procedures used to verify and compute the savings performance of the installed equipment. This calculation will include a method to compare the level of energy that would have been consumed without the project (referred to as the “Baseline”) with what amount of energy actually consumed during a specific time period (monthly, quarterly, etc.). All methods of measuring savings including engineered calculations, metering, equipment run times, pre- and post-installation measurements, etc. should be explicitly described for all equipment that is installed.

Periodically (typically on an annual basis), the baseline will be adjusted to account for the prevailing conditions (e.g., weather, billing days, occupancy, etc.) during the measurement period. All methodologies used to account for any adjustments to the baseline needs to be clearly defined in this schedule.

Use FEMP Measurement and Verification Guidelines. You will need to incorporate these by reference. Be sure to identify by current year, edition or version.>

Examples of baseline adjustments include: change in the amount of space being air conditioned, changes in auxiliary systems (towers, pumps, etc.), and changes in occupancy or schedule. For example, if a chiller retrofit was completed in a building with 100,000 square feet of conditioned space and during the contract term the conditioned space is reduced to 75,000 square feet, post-installation energy use would be lower making savings higher. If there are no records of the amount of originally conditioned space, the baseline could not be adjusted. Baseline adjustments for issues such as changes in production shifts, facility closures, adding new wings or loads (such as computer labs) require a conceptual approach versus a method to cover each eventuality. Clearly predictable annual variations are usually handled through established procedures for each identified factor in the savings formulas. Permanent changes, such as changes in square footage, are handled through agreement clauses that allow predictable or expected changes and/or through a “re-open” clause that allows either party to renegotiate the baseline.>

<A Facility Changes Checklist or other method may be provided by ESCO for <company> to notify ESCO of any changes in the facility that could have an impact on energy use (occupancy, new equipment, hours of use, etc.). This checklist is generally submitted on a monthly or quarterly basis.>

SCHEDULE G: CONSTRUCTION AND INSTALLATION SCHEDULE

<Schedule G: The timetables and milestones for project construction and installation should be contained in this schedule. If so desired, documentation of required insurance, and subcontractor lists may be included in this schedule or broken out into a separate schedule. NOTE: It is important that the construction/installation phase of the project (for example bonds and insurance) be treated in compliance with individual institutional requirements and the appropriate governing statutes. Since construction is just one component of the overall project, a separate construction contract may be desirable and in some cases necessary. The construction contract would then be referred to in the body of the contract and attached as an exhibit, appendix or other type of attachment. Another approach would be to consolidate the appropriate construction language for inclusion in the body of the final contract. This will need to be decided as appropriate on a case-by-case basis.>

SCHEDULE H: SYSTEMS START-UP AND COMMISSIONING; OPERATING PARAMETERS OF INSTALLED EQUIPMENT

<Note: Schedule H: This section should specify the performance testing procedures that will be used to start-up and commission the installed equipment and total system. The schedule also provides for <company> to be notified of and have the right to be present during all commissioning procedures. This schedule should contain a provision for the documentation of <company>’s attendance at the various tests and acceptance of ESCO’s certification that the tests followed the specified procedures and met or exceed the expected results. Use of manufacturer’s start up and performance sheets are required.

<The operating parameters should contain any specified parameters for the operation of the installed equipment such as temperature setbacks, equipment run times, load controlling specifications and other conditions for the operation of the equipment.>

SCHEDULE I: STANDARDS OF COMFORT

<Note: Schedule I: The standards of comfort to be maintained for heating, cooling, lighting levels, hot water temperatures, humidity levels and/or any special conditions for occupied and unoccupied areas of the facility should be explicitly described in this schedule. >

SCHEDULE J: ESCO'S MAINTENANCE RESPONSIBILITIES

<Note: Schedule J: A complete description of ESCO's specific operations and maintenance responsibilities should be included in this schedule along with the time intervals for their performance of the stated O&M activities.>

SCHEDULE K: <company>'S MAINTENANCE RESPONSIBILITIES

<Note: Schedule K: This schedule describes the operations and maintenance responsibilities that may be assigned to facility staff as agreed to by both parties. In some instances it will contain no more than a description of routine O&M currently being performed on existing energy consuming equipment in the facility. In other cases, facility staff may be used to provide some maintenance on the new equipment installed under the performance contract, with ESCO providing any specialized services as needed.>

SCHEDULE L: FACILITY MAINTENANCE CHECKLIST

<Note: Schedule L: This checklist is a method by which ESCO may record and track compliance with operations and maintenance procedures performed by facility personnel. The checklist typically specifies simple list of tasks and the corresponding schedule for the performance of the prescribed procedures. Facility staff will complete the checklist and forward it to ESCO, usually on a monthly basis. (This checklist is a very useful tool for both ESCO and <company> to verify that the required maintenance activities are being performed at the scheduled intervals).

SCHEDULE M: ESCO'S TRAINING RESPONSIBILITIES

<Note: Schedule M: The description of ESCO's training program or sessions for facility personnel should be contained in this schedule. The duration and frequency of the specified training should also be included. Any provisions for on-going training, commitments to train newly hired facility personnel, and training with respect to possible future equipment or software upgrades should also be described. Any fees associated with requests for training beyond what ESCO is contractually bound to provide should also be specified.>

SCHEDULE N: GENERAL CONDITIONS

<Note: Schedule N: Where applicable, insert standard GENERAL CONDITIONS. Where referenced in Section 1.2, describe which of the paragraphs of the general conditions apply to this contract.>

SCHEDULE O: ANNUAL INSTALLMENT PAYMENT SCHEDULE

<Schedule O: This schedule contains the amortized financing payments to be made to the financing institution for the total, itemized capitalized costs (principal and interest) of the project. This schedule will indicate the frequency (monthly, quarterly semi-annually) of payment, the specific amount due. The actual lease agreement and associated documents are located in Appendix D. This Schedule may identify the costs of the audit that the ESCO will expect to recover, if ESCO is the financing institution. If ESCO is not the financing institution, be sure to identify in some schedule the costs of the audit that ESCO will be paid for.>

SCHEDULE P: PRE-EXISTING SERVICE AGREEMENTS

<Note: Schedule P: Include information on the scope and cost of pre-existing equipment service contracts. This gives <company> and ESCO information about how and when existing equipment is being serviced. If ESCO is credited with any maintenance savings or is taking over any existing service contracts, the scopes and costs of these agreements will be useful in tracking the performance of ESCO in providing required services and documenting attributable cost savings.>

SCHEDULE Q: CURRENT AND KNOWN CAPITAL PROJECTS AT FACILITY

<Note: Schedule Q: Include a description or discussion of any current or planned capital projects to be implemented. This information could prove useful in the out-years of the contract to avoid potential disputes over long-term energy savings performance. An installment payment/amortization schedule may need to be included depending on the type of financing used.>

SCHEDULE R: PROJECTED FINANCIAL PERFORMANCE

<Note: Schedule R: This schedule should include a spreadsheet depiction of expected financial performance of the project for the entire contract term. It should clearly identify all financial components of the project including interest rates, current fuel prices, any escalation rates to be applied, guaranteed savings, ESCO compensation figures, cash-flow projections and projected Net Present Value of any cumulative positive cash flow benefits to the building owner.>

EXHIBITS

EXHIBIT I CERTIFICATE OF ACCEPTANCE — INSTALLED EQUIPMENT

APPENDICES

APPENDIX A: TECHNICAL ENERGY AUDIT REPORT AND PROJECT DEVELOPMENT

APPENDIX B: RFQ

APPENDIX C: ESCO PROPOSAL

APPENDIX D: LEASE AGREEMENTS AND DOCUMENTS (if applicable)

ADDITIONAL OPTIONAL SCHEDULES

<The following schedules can be included as optional and included or combined with others or may be contained in the audit report, as desired. If any of the following schedules are used, references to these schedules may need to be added to the contract body.>

ENERGY SAVINGS PROJECTIONS

<This schedule should contain the projected energy savings in units for each year of the contract. Oftentimes these projections are broken down on a measure by measure basis although some measures may be aggregated into general categories such as lighting or HVAC. If there are several buildings involved in the project, this schedule should contain projections for each facility, even though they may all be covered under a single guarantee.>

FACILITY CHANGES CHECKLIST

<A “Facility Changes Checklist” or other method may be provided by ESCO for the client to notify ESCO of any changes in the facility that could have an impact on energy consumption (e.g. occupancy, new equipment acquisition, hours of use etc.). This checklist is generally submitted on a monthly basis or quarterly basis.>

U.S. DEPARTMENT OF
ENERGY

Energy Efficiency &
Renewable Energy

EERE Information Center
1-877-EERE-INF (1-877-337-3463)
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