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ENERGY PERFORMANCE CONTRACTING AND RENEWABLE ENERGY

A primer for Local Government Counsel

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I. Introduction and Overview

Energy Savings Performance Contracting ("EPSC") is a combination of project financing, project design, project construction and/or implementation, operation and assessment that permits facilities to achieve modifications to buildings, equipment and practices funded from a guaranteed pool of economic savings or costs avoided. ESPC has been described as a "turn-key" service, compared to design/build construction contracting, providing the customer with a comprehensive set of energy efficiency, renewable energy and distributed generation measures accompanied by a guarantee that the savings generated will finance the project costs.[i] It has also been described in terms of the service provided to the client, "providing comprehensive energy and water upgrades to clients that do not have the energy project management experience or internal capital to carry out such projects themselves." Through energy performance contracting, savings realized through the design and installation of Energy Conservation Measures, (ECMs), are paid for through a guarantee financial savings facilitated by the building, equipment and management practices upgrades and modifications.

The Energy Conservation Measure, ("ECM"), is the central functional component of the Energy Performance Contracting relationship. ECMs are the physical, mechanical, operational or management components that result in the measured energy or water savings. Defined in both statutes and contract, ECMs are comprehensive and broad. Florida law describes ECMs as a "training program, facility alteration or equipment purchase to be used in new construction, including an addition to an existing facility, which reduces energy or operating costs…." FlA ch. 489.145(3)(b).

The Building Officials Management Association Model Energy Services Performance Contract has a varying definition. That form document describes an ECM as: "the equipment, devices, materials, and/or software to be installed at the site… and all related services."[ii] Many state and federal laws or regulations define energy conservation measures by enumerating a list of equipment, devices or protocols all designed for the purpose of reducing energy or water usage in a facility or facilitating the use of an alternative (renewable) energy source. The energy conservation measures, whether physical or operational, are cost items contained the Energy Services Agreement. Arriving at the particular set of ECMs appropriate for a facility or facilities, is part of a complex set of prerequisite steps that form the basis of the Energy Services Agreement, (ESA), also known as the Energy Savings Performance Contract, (ESPC), or Energy Performance Contract, (EPC). We will use the term ESPC to describe the process through the remainder of this paper.

By now, almost all states authorize some form of energy savings performance contracting for municipalities by state statute. Because of the unique nature of the type of services provided in the ESPC arrangement, traditional procurement statutes standing alone do not form a sufficient statutory basis for these types of contracts. As the component parts of this paper will illustrate, the ESPC arrangement is a combination of functions often subject to a myriad of procurement laws. A complete, beginning to end, ESPC arrangement involves not only design and construction services, but, operations and maintenance, traditional and non-traditional finance, owner's project management services, and training. Many state procurement laws divide design

and construction services often as separate statutory procurements, limiting the opportunity for ESPC. Moreover, supplies and services are almost always separate statutory procurement processes. Recognizing these inherent impediments, states have specifically enacted procurement laws to facilitate energy savings procurement contracting and in many cases, on site renewable energy generation for local communities and state agencies.

State laws enabling municipal authorities to procure ESPC services vary in complexity but should normally address the following areas: procurement, contract term, financing, savings guarantee, contract provisions, performance and security. Some legislative models and requirements are discussed in Section II, below.

II. Statutory Enabling Authority and Legislative Models

In the municipal context, the authority to procure and contract for ESPC must come from a specific authorization. The parameters for procuring, contracting and financing the energy services arrangement should be defined in a statute or regulation promulgated pursuant to a state statute or enabling law. Although statutes will vary on their component parts, given the nature of the ESPC arrangement, normally expect the statute to address competitive selection or procurement, authority to bond or finance, term of years, guarantee requirements, performance and security and measurement and verification.

a. Procurement – Most state statutes governing Energy Savings Performance Contracting require some type of advertised, open, competitive procurement prior to engaging the Energy Services Company, (ESCO). A statute may provide ESPC specific procurement processes in the enabling legislation itself or may refer the municipality to procurement procedures contained in a separate section of State Code. Due to the nature of the services performed by an ESCO and the need for review and selection of a preferred contractor on criteria other than price, ESPC procurement should be conducted on a best value basis. When performing a best-value as opposed to low-bid solicitation in a public procurement, the use of standardized evaluation criteria protects both the process and the public interest. Discussed in greater detail in the section on procurement, selection criteria permit a public awarding authority to measure the full-value of the proposal and the proposer. An effective ESPC statute will make award of the contract contingent upon application of the evaluation criteria. In Georgia, the law provides: "the governmental unit shall select the qualified energy services provider that best meets the needs of the governmental unit in accordance with the criteria established by the governmental unit." 2012 Georgia Code Sec. 50-37-3(2)(d). Massachusetts law specifically enumerates certain areas, or evaluative criteria it requires the public awarding authority to consider in evaluating qualified proposers and permits the local awarding authority to supplement the statutorily defined areas with "any other factors the agency, body or authority considers reasonable and appropriate" and limits evaluation to only those criteria "set forth in the request for qualifications." MGL Ch. 25A Sec. 11.
In addition to qualifications based selection, effective ESPC procurement laws will permit the local awarding authority to discontinue negotiations with the highest

ranked proposer if unable to reach a contract and begin negotiations with the next highest ranked proposer.

b. Finance - The enabling statute will define the allowable forms of financing for the ESPC and may specify annual appropriation restrictions on the form of the contract. Traditionally, municipal finance law will require statutory authorization for annual appropriations, municipal debt and/or options to lease/purchase public or private property. The ESPC arrangement will normally involve at least two of these three components, depending on the finance mechanism elected by the municipality. Significantly, states often limit obligations to fund certain contracts to the extent of the annual appropriations available for the contractual purpose. An example is the New York statute, which provides in relevant part:

> "This contract shall be deemed executory only to the extent of the monies appropriated and available for the purpose of the contract, and no liability on account therefore shall be incurred beyond the amount of such monies. It is understood that neither this contract nor any representation by any public employee or officer creates any legal or moral obligation to request, appropriate or make available monies for the purpose of the contract." N.Y. State Energy Law, Article 9 Section 9-103.

Florida Provides in Relevant part:

> (g) The Guaranteed energy performance savings contract may extend beyond the fiscal year in which it becomes effective; however, the term of any contact expires at the end of each fiscal year and may be automatically renewed annually for up to 20 years, subject to the agency making sufficient annual appropriations based upon continued realized energy savings." FLA 489.145.

Pennsylvania addresses the appropriations issue similarly, but through "right of termination" language:

> "General rule –Guaranteed energy savings contracts which have terms which extend beyond one fiscal year of the governmental unit must include a provision which allows the governmental unit to terminate the contract if in any fiscal year during the term of the contract the governmental unit does not receive sufficient funds in its annual appropriations to make payments required under the contract." 62 PA CS # 3755.

Contrast, however, states which recognize that the ESPC arrangement can involve both financing, amortization, and lease-purchase options where the vendor places significant capital and work at risk in the front end of the transaction in the form of design, construction, and installation of permanent and semi-permanent assets. The Illinois law provides as follows:

> "Section 30 – Term; budget and appropriations. Guaranteed energy savings contracts may extend beyond the fiscal year in which they become effective. The unit of local government shall include, in its annual budget and [sic] appropriations measures for each subsequent fiscal year, any amounts payable under guaranteed energy savings contacts during that fiscal year." 50 ILCS 515/30.

Annual appropriations language normally will run to the service portion of the ESPC arrangement and the debt and/or incurred capital costs may form a separate basis in the statutory framework. As a result debt or third party financing of the capital portions of the ESPC are often treated and contained separately. The Illinois law is an example, where section 25 provides in relevant part:

> "Installation payment contract; lease purchase agreement. A unit of local government, or units of local government in combination, may enter into an installment payment contract or lease purchase agreement with a qualified provider or with a third party, as authorized by law, for the funding or financing of the purchase and installation of energy conservation measures by a qualified provider. Every unit of local government may issue certificates evidencing the indebtedness incurred pursuant to the contracts or agreements. Any such contract or agreement shall be valid whether or not an appropriation with respect thereto is first included in any annual or supplemental budget adopted by the unit of local government." 50 ILCS 515/25.

Statutes that contain executory and appropriations limitations on the contract need to provide separate, effective enabling legislation for some portion of the debt. Florida provides in a separate section:

> "(f) A guaranteed energy performance savings contact may provide for financing, including tax exempt financing, by a third party. The contract for third party financing may be separate from the energy performance contract." Fla Ch. 489.145(4)(f)

c. Term – To be sustainable from a cost perspective yet attractive enough to industry, ESPC must be contracts for an extended period of time. The length of the contract permits the municipality to amortize the cost of otherwise unaffordable but necessary equipment repairs, modifications and replacement over a period of time and fund costs in a capital budget that represent actual "costs avoided" on the operational side. This is the essence of the Energy Savings Performance Contract. Each statute which provides enabling authority also limits the duration of the contract. The periods vary among jurisdictions from anywhere from ten to thirty-five years. It is not uncommon, however, to see some statutorily imposed condition or restraint on the term of years allowable. For instance, in New York the enabling legislation limits the contract to a period up to 35 years duration, "provided, that the duration of any such contract shall not exceed the reasonably expected useful life of the energy facilities or equipment subject to such contract." New York State Energy Law 9-103.

d. Additional Statutory Provisions

    a. Guarantee provision - In order to protect the integrity of the ESPC arrangement, some statutory enactments require that the contract guarantee that the costs of the improvements or the costs of the improvements and the service will be covered in their entirety by the guarantee savings. Although all ESPCs contain a savings guarantee clause an essential component of the agreement, in many states inclusion of the clause is not left to the parties, but instead mandated by law. Although this seems duplicative, simply enabling

governmental units to engage in ESPC procurements is no guarantee that the savings will inure after expenditures of initial capital costs, incurring of debt or entry into long-term lease purchase agreements. Accordingly, some legislatures see fit to require any contract to have a guarantee provision. For instance, Florida law provides in relevant part that the energy performance savings contract must provide that the "annual savings are guaranteed to the extent necessary to make annual payments ." Fla. 489.145(5)(b). Some statutes tie the savings guarantee to the statutorily allowed term of the energy performance contract, for instance, Virginia law provides that an energy performance based contract shall include:

> "A guarantee by the energy performance contractor that annual energy and or operation cost savings will meet or exceed the amortized cost of the energy conservation measures. The guaranteed energy savings contact shall included a written guarantee of the qualified provider that either the energy operation cost savings or both, will meet or exceed within 20 years the costs of the energy and operational savings measures. The qualified provider shall reimburse the contracting entity for any shortfall of guarantee energy savings projected in the contract." Code of Virginia, 11-34.3(f)(1).

Massachusetts law provides similar protection requirements:
"(h) The energy management services contract shall include written guarantee of the qualified provider that either the amount of energy savings guaranteed shall be achieved or the qualified provider shall reimburse the state agency, local governmental body or building authority for the shortfall amount." MGL Ch 25A Sec 11I.

b. Surety and Performance. To protect the local contracting authority, many statutes will specifically include a provision requiring the ESCO to provide payment and performance bonds. Florida Law requires that the contract issued by the municipality include a provision requiring the contractor to provide a 100 percent public construction bond. Fla. 489.145(5)(c). To a broader extent, in Virginia the ESCO is required to "provide a 100 percent performance guaranty bond to the contracting entity for the installation and faithful performance of the installed energy savings measures as outlined in the contract." Code of Virginia Sec. 11-34.3. In Massachusetts, the statute speaks to both payment and performance bonds, and provides in relevant part:

> "(l) Before entering into an energy management services contact, the state agency, local governmental body or building authority shall require the qualified provider to file with the agency, body or authority a payment or a performance bond relating to the installation of energy savings measures in an amount equal to 100 percent of the estimated contract value. . .." MGL ch 25A Sec 11I(l).

Statutes may also provide for bonds protecting not simply installation, but performance of the ESCO's ongoing performance under the contract. Illinois law provides in relevant part:

"A qualified provider shall provide a sufficient bond to the unit of local government for the installation and the faithful performance of all the measures included in the contract. " 50 ILCS 515/22.

III. Procurement and Contracting

a. Identification of a Procurement Method

The procurement process will begin with identification and selection of the statutorily authorized procurement vehicle. The public agency may wish to proceed under either a Request for Qualifications, (RFQ), or Request for Proposals, (RFP), model. Where both methods are authorized by statute, the public agency must decide whether it wishes to first select an ESCO to perform both audit and implementation services or whether it would like to proceed directly to a RFP for the full range of audit, design, construction and implementation phases. By issuing an RFQ, the public agency would look strictly at the qualifications of the various ESCO firms, their competencies, performance history, references, size and financial strength and business structure and select the most qualified firm without respect to evaluation of a specific proposal or scope of services associated with the agency's physical plant needs. The ESCO fee would be the only price point contained in the evaluation under the RFQ model.

The procurement for an ESCO can proceed then in either a Request for Qualifications (RFQ) or Request for Proposals (RFP) fashion. The difference between the two methods of securing the services of the ESCO is apparent. The request for qualifications will deal strictly with the qualifications, experience, references, financial strength, bonding ability and project "concept" of the proposed vendors and will not address the two areas of project technical approach or project price. A request for proposals will include project and price specific information and contain additional evaluation and decision points for the owner to consider. Proceeding with an RFP will facilitate a shorter project delivery window and save the municipality from an additional step in the procurement process. Proceeding with the RFQ will allow the owner to secure, in its opinion, the most qualified ESCO and then proceed to a period of open negotiations to discuss the scope and cost of the investment grade energy audit, project design and implementation, methodology for measurement and verification of savings, savings guarantee, and of course, pricing. Proceeding under either procurement model, providing it is allowed and provided for by statute, the owner should short list three most qualified ESCOs and condition final award of the Energy Savings Performance Contract upon successfully completing the negotiations, leaving open the option to discontinue negotiations with the selected vendor and proceed to negotiate with the next highest ranked proposer. Some states specifically allow this form of proposer selection and negotiation or simply do not preclude it provided that it is specifically spelled out in the public solicitation for proposals.[iii]

b. General Principles of ESPC Procurement

Procurement and contracting for ESPC agreements provides the foundation for effective design, implementation and operation of energy savings measures. Although construction and installation comprise a large part of the ESCO service, the traditional method of procuring design and construction related services in two phases and with the later being based upon a low bid selection, is neither an effective nor beneficial method for selecting and energy service provider. Energy Performance Contracting is a mulit-phased, qualifications based procurement that lends itself entirely to "qualifications based selection." Selection decisions need to be based primarily on comparative evaluation criteria other than price in order to select an ESCO whose qualifications and program proposals best meet the needs of the public owner.

The traditional design-bid-build method of procuring design and construction services for public building modifications or equipment upgrades is not the preferred method of procurement for the combined nature of the ESPC model. In traditional design-bid-build, separate firms are engaged to design and then to construct the improvements. Because ESPC involves not only design and construction, but ongoing operation, maintenance and measurement and verification of implemented modifications and new equipment and their impact on energy costs, the procurement becomes a mixed product of design, construction, and services. There are essentially four separate functional areas under one umbrella, design, construction, operations and maintenance as well measurement and verification. The mixed nature of the service and the fundamental need for the most qualified provider drives ESPC to a design-build-operate model and necessitates the appropriate qualifications based selection.

Understanding the nature of the service provided by the ESCO can help to understand what drives the procurement and project delivery model selection. Essentially, the following areas comprise the scope of services provided by a traditional ESCO in a traditional, full service ESPC arrangement:

1. Analyze facility energy usage
2. Design the project and the Energy Conservation Measures, (ECMs)
3. Install/construct the systems, modifications and upgrades
4. Operate, maintain and monitor the equipment (Note: this function may be shared with public owner)
5. Measurement, verification, reporting of energy saving results

What becomes evident is design, construction, O&M and quality assurance are performed by a single entity. Accordingly, in designing the procurement documents and the comparative evaluation criteria, each functional area needs to be included as not only a scope of service point, but also an opportunity to evaluate a proposer's record on

performance and metrics on each point of responsibility. In its manual, the Florida Energy Offices outlines the most common and specific functions performed by an ESCO and they are worthy of replication in their entirety here, they include:

- An investment grade technical energy audit that analyzes current building conditions, establishes base year energy consumption, recommends energy conservation measures (ECMs) and calculates associated energy cost savings
- A sound technical project, which included capital equipment and ongoing energy services
- Project engineering and design
- Tax-exempt project financing options
- Construction bonding to comply with statutory and agency requirements
- Equipment acquisition
- Complete project installation and construction management
- Guaranteed savings for the life of the contract
- Project commissioning
- Savings measurement and verification
- Project monitoring services
- On-going equipment service and maintenance
- Extensive training for building operators and facility personnel[iv]

The RFP in an ESPC serves a dual purpose of defining the scope of the project and inviting specific, detail oriented proposals from only "qualified" vendors. As such, in addition to contained comparative evaluation criteria for both the proposer and the project proposals, the RFP should contain minimum evaluation criteria. In addition to the criteria, the complex nature of the ESPC procurement requires detailed information and processes to be included in the scope of the documents. Several important items need to be included. A look at owner and industry generated practice guides and template ESPC contracts provides the following general and specific categories of information to be included in the RFP to be supplied by the proposers:

- Experience with implementing performance contracting requirements
- Understanding of and experience in ECMs to be employed
- Financial strength and bonding capability of proposer
- Project finance experience
- Peformance record of past EPC projects managed by the project team who will be assigned to the agency's project
- Calculation methods used to compute base-year utility use and project savings
- Savings measurement and verification and project monitoring methods
- Proposed approach to ongoing maintenance and other services
- Proposed structure for the savings guarantee and ESCO fee payments
- Technical energy audit cost
- Training Services for the facility staff
- Sample investment-grade technical energy audit, project commissioning plan, maintenance plan and customer savings report.[v]

It should be noted that some states enabling laws will provide specific contents for the RFP as well as the contract. Where state law prescribes certain minimum items to be contained in the RFP, the drafters need to include but not limit the RFP to these submission areas and items.

c. Understanding the ESPC Transaction

A general guide on procurement having been provided, understanding the essential components of the ESPC contractual arrangement requires a strong, fundamental understanding of what the complete transaction contains. Breaking the ESPC transaction into its component parts will help form the basis of what will become the documented obligations of the parties in multiple contract form.

The transactional arrangement and as a corollary, the associated contractual documents trace the functional areas of the ESPC relationship. The component parts involve the Investment Grade Energy Audit and Project Proposal, the Energy Savings Performance Contract and Guarantee, the Measurement and Verification of savings, and the financial transaction. Each functional area has its own set or "schedule" of documents. General documents and their component parts will be discussed in section d, below.

Investment Grade Energy Audit.

The Investment Grade Energy Audit is the functional starting point for the project. Connecticut law defines the investment grade energy audit as "a study by the qualified energy services provider selected for a particular energy savings performance contract project which includes detailed descriptions of the improvements recommended for the project, the estimated costs of the improvements, and the utility and operations and maintenance cost savings projected to result from the recommended improvements."[vi] Essentially, as defined in the Best Practices Guide, the "investment grade energy audit is conducted to analyze all cost-effective ECMS for systems such as lighting, HVAC equipment, building envelope, steam, chilled water, domestic hot water and other water using systems, building controls, energy generation and distribution and waste management systems."[vii] When the qualified ESCO performs the IGA, the public owner has a picture of both the proposed energy, water and process improvements that are recommended to be employed to generate savings, and just how much and how those savings will cover the cost of the recommended improvements over the life of an ESPC. The IGA will then become a basis and an integral part of the ESPC. The IGA will include information describing the existing facilities and systems, base line energy consumption data to be used later in measurement and verification, proposed retrofits for consideration, post construction conditions and standards of comfort, firm fixed price for implementation of ECMs, guaranteed savings, construction means and schedules, recommended measurement and verification protocols and other general information regarding the proposed project. Generally, the parties

contract separately for the IGA portion of the project and a fixed cost for this phase of the project is contained in the proposer's response to the RFP. Generally, the cost of the IGA is borne by the proposer and rolled into the overall project cost if the transaction moves forward to an ESPC, otherwise, there is an agreement for the owner to absorb the cost if it walks away from the project after an IGA. This phase of the project will be governed by the Investment Grade Energy Audit and Proposal Agreement.

Project Design and Implementation

The project design and implementation phase comes next and involves design, implementation and construction of the system modifications, new systems, controls or training identified in the IGA. During this phase, the ESCO will provide design, construction management, construction, implementation, testing, commissioning, start up and operation of the cost-effective ECMS agreed upon with the owner. Properly implemented and phased, cost-savings can begin as early as the commissioning and start-up operation of the earlier ECMs. It is common for the proposer and the owner to agree upon a construction schedule which permits installations which are least costly but achieve greater savings earlier in the phases while extending more costly or time consuming modifications to later phases of the project but keeping the entire implementation under the umbrella of a single ESPC to satisfy the investment based objectives of each party and make the transaction financeable. This phase of the project will be governed by either the ESPC and a schedule of design and construction related sub-agreements or a separate, stand-alone design and construction agreement.

Operation of the Installed ECMs

The next phase involves operation of the ECMs. In this phase, the following functional processes take place: operations, maintenance, monitoring of systems, training of personnel, repair of systems and quality assurance. These functions begin subsequent to installation and start-up of the first ECMs and then run simultaneously with continued project construction and implementation through the end of the ESPC term. It is significant to note that some of the preceding functions may be contractor provided functions or shared with the owner and its operations and maintenance staff, depending upon the nature of the ECM and the terms of the contract. As discussed below, it is important to specifically define in the contract document who bears the operational, monitoring and maintenance responsibility for each ECM and who bears the risk of failure of the same. The standard arrangement may be for an owner's maintenance staff to operate and maintain the ECMs in accordance with manufacturer's and ESCO's required standards and to record compliant steps and activity in maintenance and reporting logs. This phase of the project will be governed by the ESPC document and its schedules and attachments.

Measurement and Verification

Just as the ECM is the cornerstone of the ESPC project, the ongoing Measurement and Verification of savings is the operative cornerstone of the contracts savings guarantee. As such, Measurement and Verification, (M&V), like operations and maintenance, are ongoing processes during the term of the agreement. As the Best Practices Guide suggests, "the measurement and verification of energy savings is the most important metric of an ESPC project."[viii] The Guide acknowledges the Efficiency Value Organization's (EVO) definition as follows: "Measurement & Verification, (M&V) is the process of using measurement to reliably determine actual savings created within an individual facility by an energy management, energy conservation or energy efficiency project or program. As savings cannot be directly measured, the savings can be determined by comparing measured use before and after implementation of a project, making appropriate adjustments for changes in conditions."[ix] Measurement and Verification will rely upon the initial baseline energy usage and conditions contained in the IGA, adjusted for changes in conditions, levels of comfort and operation, occupancy or other changes in use which effect the baseline measurement. This process will be governed by a schedule to the ESPC specifically addressing Measurement and Verification. It is significant to note that the industry standard as a rule is the International Performance Measurement and Verification Protocol, (IPMVP). This standard, most recent adaptation or version, should be incorporated into the ESPC.

Project Finance

The savings guarantee contained in the ESPC facilitates the ability to finance the ECMs. Simply put, by providing a savings on the demand side of the energy equation that converts to operational costs avoided in the form of reduced utility bills or decreased maintenance and operations costs, municipalities are able to accelerate, or simply able to afford where they could not previously afford, system repair, modifications, improvements or replacement. As the Best Practices Guide notes, "A primary feature of an ESPC is the ability to finance energy savings measures to ensure that finance payments are equal to or less than the monetary savings gained from the measures."[x] Finance in an ESPC generally takes one of several forms. As one report has noted, the trend today is away from ESCO financed deals to third-party financing using a variety of financing vehicles.[xi] Specifically, the financing vehicles most commonly used in public ESPC projects are:

- Tax-Exempt Lease Purchase Agreements, also called Municipal Leases which allow the customer to finance an EPC project without carrying a liability on its balance sheet.
- State or Local Government Leasing Pools, sometimes called Master Leases, which allow individual projects to lower their financing costs by participating in a larger aggregated financing.
- State or Local Government Bonds, which can offer slightly lower interest rates than Municipal Leases, but are time consuming to execute and often require voter approval.

- Revolving Loan Pools, which offer subsidized interest rates, but have multi-year waiting lists.
- Power Purchase Agreements, (PPAs), in which the customer buys the output of a distributed generation project, rather than the actual project.[xii]

The Finance Agreements are separate and distinct from the ESPC and are normally executed between a third-party financing entity and the project owner. In many cases, as part of the RFP or service provided by the ESCO, the ESCO can facilitate but not provide project financing. The ESPC and Finance Agreement are normally coterminous and executed at the same time. It goes without saying that the two are entirely interdependent.

d. The Contractual Family of Documents and Essential Provisions for Successful and Owner Protective ESPC Arrangements.

i. General Document Requirements

The purpose of reviewing the component and functional areas of the ESPC arrangement in Section III c above was to not only provide an understanding of the process, but lay the foundation for the functional need for a complex family of contractual documents and schedules that will need to be included to define and limit the obligations of the respective parties. The complete content, scope and best language models for such agreements are beyond the scope of this introductory paper and development of the appropriate form of agreements for your project should take place only upon consultation with experienced legal counsel and an energy consultant. Three major agreements will normally comprise the ESPC transaction. These include:

1. The Investment Grade Energy Audit and Proposal Contract
2. The Energy Performance Contract
3. The Finance Agreement

The nature, number of, and delineation between functional areas will vary among the various projects based in part on project scope, owner and contractor preference, third-party lender requirements and preference of project counsel. What in some cases may be a stand-alone agreement may in another ESPC arrangement be an attachment, exhibit, or schedule to a master agreement. A perfect example of this is whether the construction contract will be a separate contract or be a schedule or attachment to the ESPC.

Given the complexity, number and inter-relationship of documents in the energy services transaction, it will be increasingly important to include conflicts and prioritization language in some master agreement and proceed carefully when incorporating by reference the terms of one agreement into another. Where multiple agreements are used, treating the ESPC as a “Master-agreement” and including the prioritization and resolution of conflicts between documents language in that agreement is a best practice in this transactional field.

ii. Recommended Documents and Schedules and Their Prescribed Purpose.

1. Investment Grade Audit Agreement and Project Proposal Contract: This document is the first transaction between the parties after submission of the proposal and selection of the ESCO. This document provides the basis and parameters for the ESCO to proceed with the Investment Grade Energy Audit. It should define compensation for the cost of the Audit and provide an option for the owner to pay the cost of the audit if it does not proceed to the ESPC stage. It will contain a scope of work and schedule of facilities and systems subject to the audit. The contract should limit the maximum amount of time allowable for the ESCO to complete the audit. The IGA contract may include a statement of the parties intent to subsequently negotiate an ESPC but will not obligate them to enter into an agreement. Standard insurance and indemnification language should be included. The IGA agreement should specifically provide a mechanism for the owner to accept the IGA report prior to engaging in the ESPC.
2. Energy Savings Performance Contract: This complex document will address design and implementation of ECMs, project scope, the savings guarantee, ESCO compensation, shortfalls, sharing of excess savings, performance and surety, insurance and indemnification, operations and maintenance responsibility, measurement and verification, reporting, where not addressed in a separate construction contract: testing, start-up and commissioning, labor and materials bonds, where not covered in a separate design or construction contract: review of ECM designs, ownership of project documents and software, allocation of installation period savings, term, commencement, performance period, access to premises and work schedules, training, equipment malfunction, repair and replacement, emergency repair, termination, default and remedies. A key provision of this contract is the requirement that the energy savings guarantee be sufficient to fund the cost of the improvements, including the ESCO fee for ongoing services. The contract should require the ESCO to make up for savings shortfalls in a given year but should not permit the ESCO to aggregate excess savings in one or more years to apply to future or past shortfalls. The contract should include a mechanism to use qualified professionals to resolve any disputes regarding measurement and verification applications during the life of the contract.
3. Design and Construction Contracts. The owner has the option of including the ESCO's design and construction responsibilities in the ESPC itself, in a separate schedule to the ESPC or as a stand-alone construction contract. In any event, the key issues that will be addressed are schedule, quality of workmanship and materials,

design and construction warranties, performance and surety, technical and performance based specifications for equipment and equipment operation, commissioning, start-up and testing, insurance and indemnity, delay damages, liquidated damages, change orders, unforeseen circumstances, warranties, permits, hazardous materials, standards of comfort and project acceptance. Specific provisions of the contract will vary with the project scope and owner's willingness to accept certain levels of risk.

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[i] Introduction to Energy Performance Contracting, Prepared for the US EPA ENERGY STAR Buildings, by ICF International, October 2007 at 1.
[ii] BOMA Energy Services Performance Contract, 2008 Form.
[iii] See, for example, MGL ch 25A Sec 11I.
[iv] Florida Manual at p. 6
[v] Florida Manual at p. 16
[vi] Connecticut Public Act #11-80 Section 123(10).
[vii] Best Practices Gude, supra, at 29.
[viii] Id. At 49
[ix] Id.
[x] Best Practices Guide at 35.
[xi] Introduction to Energy Performance Contracting, Prepared for the US EPA ENERGY STAR Buildings, by ICF International, October 2007 at 4.
[xii] Id. At 4-6