

COMMONWEALTH OF PENNSYLVANIA
GUARANTEED ENERGY SAVINGS MANUAL
FOR PENNSYLVANIA'S GOVERNMENT
ORGANIZATIONS

APPENDICES

TABLE OF CONTENTS

APPENDIX A-1
Pennsylvania Guaranteed Energy Savings Contracting Law2
APPENDIX A-2
DGS Procurement Handbook-Large Guaranteed Energy Savings Projects7
APPENDIX A-3
DGS Procurement Handbook-Small Guaranteed Energy Savings Projects 10
APPENDIX A-4
Governor's Executive Order No. 2004-12 13
APPENDIX B-1
DGS Request for Proposals Document 18
APPENDIX C-1
Sample Evaluation Forms 66
APPENDIX C-2
Sample Letter of Invitation to Oral Interviews 77
APPENDIX D-1
Investment Grade Energy Audit Agreement 79
APPENDIX E-1
Guaranteed Energy Services Agreement 107
APPENDIX E-2
Sample Construction Process Provisions 132
APPENDIX E-3
Alternative Dispute Resolution Provisions 139
APPENDIX F-1
Installment Purchase Agreement 141

APPENDIX A-1:

COMMONWEALTH OF PENNSYLVANIA GUARANTEED ENERGY SAVINGS CONTRACTING LAW

Title 62, PA C.S.A. Procurement, Part II, General Procurement Provisions - Chapter 37: Contract Clauses and Preference Provisions, Subchapter E. Guaranteed Energy Savings Contracts

s. 3751 - Short title of subchapter

This subchapter shall be known and may be cited as the Guaranteed Energy Savings Act.

s. 3752 - Definitions

The following words and phrases when used in this subchapter shall have the meanings given to them in this section unless the context clearly indicates otherwise:

"Allowable costs." Equipment and project costs that:

(1) the governmental unit reasonably believes will be incurred during the term of the guaranteed energy savings contract; and

(2) are documented by industry engineering standards

"Energy conservation measure." A program or facility alteration designed to reduce energy consumption or operating costs. The term may include, without limitation:

(1) Insulation of the building structure or systems within the building.

(2) Storm windows or doors, caulking or weather stripping, multiglazed windows or doors, heat-absorbing or heat-reflective glazed and coated window or door systems, additional glazing, reductions in glass area or other window and door system modifications that reduce energy consumption.

(3) Automated or computerized energy control systems.

(4) Heating, ventilating or air conditioning system modifications or replacements.

(5) Replacement or modification of lighting fixtures to increase the energy efficiency of the lighting system without increasing the overall illumination of a facility, unless an increase in illumination is necessary to conform to applicable State or local building codes for the lighting system after the proposed modifications are made.

(6) Energy recovery systems.

(7) Systems that produce steam or forms of energy such as heat as well as electricity for use within a building or complex of buildings.

(8) Energy conservation measures that provide operating cost reductions based on life cycle cost analysis.

(9) A training program or facility alteration that reduces energy consumption or reduces operating costs, including allowable costs, based on future reductions in labor costs or costs for contracted services.

(10) A facility alteration which includes expenditures that are required to properly implement other energy conservation measures.

(11) A program to reduce energy costs through rate adjustments, load shifting to reduce peak demand, and/or use of alternative energy suppliers, such as, but not limited to:

- (i) changes to more favorable rate schedules;
- (ii) negotiation of lower rates, same supplier or new suppliers, where applicable; and
- (iii) auditing of energy service billing and meters.

(12) The installation of energy information and control systems that monitor consumption, redirect systems to optimal energy sources and manage energy-using equipment.

(13) Indoor air quality improvements.

(14) Daylighting systems.

(15) Renewable and/or on-site distributed power generation systems.

"Guaranteed energy savings contract." A contract for the evaluation and recommendation of energy conservation measures and for implementation of one or more such measures.

"Governmental unit." Any officer, employee, authority, board, bureau, commission, department, agency or institution of a government agency, including, but not limited to, any Commonwealth agency, State-aided institution or any county, city, district, municipal corporation, municipality, municipal authority, political subdivision, school district, educational institution, borough, incorporated town, township, poor district, county institution district, other incorporated district or other public instrumentality which has the authority to contract for the construction, reconstruction, alteration or repair of any public building or other public work or public improvement, including, but not limited to, highway work.

"Industry engineering standards." Industry engineering standards may include the following:

- (1) Life cycle costing.
- (2) The R.S. Means-estimated method developed by the R.S. Means Company.
- (3) Historical data.
- (4) Manufacturer's data.
- (5) American Standard Heating Refrigeration Air-Conditioning Engineers (ASHRAE) standards.

"Qualified provider." A person or business which is responsible and capable of evaluating, recommending, designing, implementing and installing energy conservation measures as determined by the governmental unit.

s. 3573 - Contracting Procedures

(a) General rule.--Notwithstanding any other contrary or inconsistent provision of law, a governmental unit may enter into a guaranteed energy savings contract with a qualified provider in accordance with the provisions of this subchapter or in accordance with another statutorily authorized procurement process.

(b) Guaranteed energy savings contract.--If in accordance with applicable law the award of a contract by a governmental unit requires action at a public meeting, a governmental unit may award a guaranteed energy savings contract at a public meeting if it has provided public notice in the manner prescribed under 65 Pa.C.S. Ch. 7 (relating to open meetings), the notice including the names of the parties to the contract and the purpose of the contract. For governmental units that are not required to take actions on contracts at public meetings, the governmental unit may award a guaranteed energy savings contract in accordance with the procedures adopted by the governmental unit and the requirements of all applicable laws.

(c) Competitive sealed proposals.--For the purpose of entering into a guaranteed energy savings contract, all governmental units are authorized to utilize the competitive sealed proposal method of procurement. The governmental unit shall evaluate any proposal that meets the requirements of the governmental unit and is timely submitted by a qualified provider. The request for proposals shall be announced through a public notice from the governmental unit which will administer the program. The request for proposals shall provide all interested parties with sufficient information necessary to submit a timely and responsive proposal.

(d) Selection and notice.--The governmental unit shall select the qualified provider that best meets the needs of the governmental unit in accordance with criteria established by the governmental unit. For governmental units that are not required to take actions on contracts at public meetings, the governmental unit shall provide public notice of the award of the guaranteed energy savings contract within 30 days in the Pennsylvania Bulletin. The notice shall include the names of the parties to the contract and the purpose of the contract. For governmental units that are required to take actions on contracts at public meetings, the public notice shall be made at least ten days prior to the meeting. After reviewing the proposals pursuant to subsection (e), a governmental unit may enter into a guaranteed energy savings contract with a qualified provider if it finds that the amount it would spend on the energy conservation measures recommended in the proposal would not exceed the amount to be saved in both energy and operational costs within a 15-year period from the date of installation if the recommendations in the proposal were followed and the qualified provider provides a written guarantee that the energy or operating cost savings will meet or exceed the cost of the contract.

(e) Report.--

(1) Before the award of a guaranteed energy savings contract, the qualified provider shall provide a report as part of its proposal which shall be available for public inspection, summarizing estimates of all costs of installation, maintenance, repairs and debt service and estimates of the amounts by which energy or operating costs will be reduced.

(2) The report shall contain a listing of contractors and subcontractors to be used by the qualified provider with respect to the energy conservation measures.

(f) Bond.--A qualified provider to whom a contract is awarded shall give a sufficient bond to the governmental unit for its faithful performance. Commonwealth agencies shall obtain such bonds in accordance with the provisions of section 533 (relating to security and performance bonds). All other governmental units shall obtain such bonds in accordance with the act of December 20, 1967 (P.L. 869, No. 385), [FN1] known as the Public Works Contractors' Bond Law of 1967.

(g) Award of contract.--Notwithstanding any other provision of law governing the letting of public contracts, a governmental unit may enter into a single guaranteed energy savings contract with each responsible provider selected in accordance with the provisions of this subchapter.

s. 3754 - Contract provisions

(a) General rule.--A guaranteed energy savings contract may provide that all payments, except obligations on termination of the contract before its scheduled expiration, shall be made over a period of

time. Every guaranteed energy savings contract shall provide that the savings in any year are guaranteed to the extent necessary to make payments under the contract during that year.

(b) Written guarantee.--A guaranteed energy savings contract shall include a written guarantee that savings will meet or exceed the cost of the energy conservation measures to be evaluated, recommended, designed, implemented or installed under the contract.

(c) Payments.--A guaranteed energy savings contract may provide for payments over a period of time not to exceed 15 years and for the evaluation, recommendation, design, implementation and installation of energy conservation measures on an installment payment or lease purchase basis.

(d) Improvements not causally connected to an energy conservation measure.--An improvement that is not causally connected to an energy conservation measure may be included in a guaranteed energy savings contract if:

(1) the total value of the improvement does not exceed 15% of the total value of the guaranteed energy savings contract; and

(2) either:

(i) the improvement is necessary to conform to a law, a rule or an ordinance; or

(ii) an analysis within the guaranteed energy savings contract demonstrates that there is an economic advantage to the governmental unit implementing an improvement as part of the guaranteed energy savings contract; and the savings justification for the improvement is documented by industry engineering standards.

(e) Other expenditures.--A facility alteration which includes expenditures that are required to properly implement other energy conservation measures may be included as part of a guaranteed energy savings contract. In such case, notwithstanding any other provision of law, the installation of these additional measures may be supervised by the contractor performing the guaranteed energy savings contract.

s. 3755 - Funding

(a) 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 the payments required under the contract.

(b) Funds.--A governmental unit may use funds designated for operating, utilities or capital expenditures for any guaranteed energy savings contract, including, without limitation, for purchases on an installment payment or lease purchase basis.

(c) Grants, subsidies or other payments.--Grants, subsidies or other payments from the Commonwealth to a governmental unit shall not be reduced as a result of energy savings obtained as a result of a guaranteed energy savings contract during the life of the contract.

s. 3756 - Commonwealth Contracts

In connection with the letting of any guaranteed energy savings contract for a governmental unit under this subchapter, the department shall have the power to waive the process for selection of architects or engineers otherwise prescribed under section 905 (relating to procurement of design professional services). In exercising its discretion under this section, the department shall consider the best interests of this Commonwealth and any relevant circumstances peculiar to the proposed contract.

s. 3757 - Construction

This subchapter shall not be construed to abrogate any duty to comply with prevailing wage or residency requirements contained in any other act or part thereof.

s. 3758 - Review of proposed capital improvement projects

Prior to entering into a guaranteed energy savings contract, every governmental unit shall review all proposed capital improvement projects for potential applicability of this subchapter and shall consider proceeding with a guaranteed energy savings contract under this subchapter where appropriate.

APPENDIX A-2:

DEPARTMENT OF GENERAL SERVICES

PROCUREMENT HANDBOOK

GUARANTEED ENERGY SAVINGS

PROJECTS

Part IV, Chapter 11: Guaranteed Energy Savings Projects (for Executive Agencies only)

A. Requirements. This procedure shall be used when an agency requests, in writing, the department to proceed with a guaranteed energy savings project that does not qualify as a small guaranteed energy savings project.

B. Prequalification. Through an application for qualification process, the department prequalifies a pool of Energy Service Companies (ESCOs) to perform the larger guaranteed energy savings projects for Commonwealth agencies. The list of prequalified ESCOs is available at:
<http://www.portal.state.pa.us/portal/server.pt?open=512&objID=1300&&PageID=269159&level=4&css=L4&mode=2>

Prequalification does not guarantee these ESCOs any project or contract. As the need for an ESCO project arises, the department shall, through a request for Expressions of Interest (EOI) and review of the responses, select three ESCOs to receive the RFP based on the ESCO's qualification and the work to be done.

C. Method of Award. The department shall solicit proposals from the three qualified ESCOs through an RFP and shall award the contract to the responsible offeror whose proposal is determined to be the most advantageous to the Commonwealth. Initially the agency shall contract with the awarded ESCO for an energy audit. Then in its discretion, after the audit is completed, the agency will enter into a guaranteed energy services agreement. Standard documents have been created by the department and should be used by agencies throughout the contracting process.

D. Agency Procedures.

1. Agency.

- a. Determines the need for contractual ESCO services.
- b. Selects project site(s) and submits a written request to issue a request for Expressions of Interest (EOIs) to the department's Bureau of Facilities Management (BFM).

2. BFM.

- a. Approves or disapproves agency request.
- b. If disapproved, notifies agency with required corrections or project rejection.
- c. If approved, proceeds to issue a request for EOIs to the applicable pool of qualified ESCOs.

- d. Receives EOIs from interested ESCOs.
3. Executive Panel (comprised of Department deputy secretaries)
 - a. Reviews the EOIs and the original applications of interested ESCOs.
 - b. Selects no more than three ESCOs to receive the RFP.
4. BFM.
 - a. Appoints evaluation committee. Invites agency controller to participate.
 - b. Notifies Bureau of Minority and Women Business Opportunities (BMWBO) that an RFP for a guaranteed energy savings project is being prepared.
 - c. Forwards a final copy of RFP to BMWBO.
5. BMWBO. Assigns and notifies BFM of weight for disadvantaged business participation. Also serves as a consultant to make recommendations to the proposal evaluation committee on issues relating to disadvantaged business participation.
6. BFM.
 - a. Issues RFP to three selected ESCOs.
 - b. Notifies BMWBO of the preproposal conference date with the option to participate.
 - c. Conducts the preproposal conference.
 - d. Issues written answers to questions raised at the preproposal conference.
 - e. Receives proposals and rejects those that are not responsive to the RFP requirements.
 - f. Opens and submits the cost submittal portions of the proposals to the Evaluation Committee after the Evaluation Committee scores the technical submittals.
 - g. Determines that the ESCO and the proposed subcontractors committee are responsible in accordance with *Management Directive 215.9, Contractor Responsibility Program*.
7. Evaluation Committee.
 - a. Uses the standard evaluation forms and point values provided by BFM prior to issue of RFPs to evaluate the proposals.
 - b. Conducts oral interviews if the committee elects to do so.
 - c. Forwards portion of proposal pertaining to disadvantaged business participation to BMWBO for review.
 - d. Forwards scores for cost submittals to BFM.
 - e. Forwards scores for the technical submittals to BFM.
8. BMWBO. Reviews disadvantaged business participation submittal and provides scores to BFM.

9. BFM.
 - a. Computes the overall score using the technical submittal score, the disadvantaged business participation submittal score and the cost submittal score.
 - b. Selects for contract negotiation, the ESCO whose proposal is determined to be the most advantageous to the agency based upon the overall scores.
 - c. Prepares a written ESCO selection recommendation and forwards to Department deputy secretary for property management.
 - d. After deputy secretary for property management approval, notifies selected and nonselected ESCOs.
10. Deputy Secretary for Property Management. Reviews and approves ESCO selection recommendation.
11. Agency. Executes audit agreement with selected ESCO. (Note: Agency must fund the audit agreement separately using operating budget.)
12. ESCO. Conducts energy audit.
13. Agency.
 - a. Approves audit results.
 - b. Based on the results of the energy audit, negotiates the energy performance contract with ESCO, or decides not to proceed. If the agency decides not to proceed, the agency pays for the energy audit using operating budget.
 - c. If the agency decides to proceed, obtains BFM approval to proceed and then prepares the energy performance contract and the installment purchase agreements using the DGS model agreements. Circulates for ESCO and agency signatures.
14. Agency Comptroller. Reviews and approves for fiscal responsibility. (Note: Agency must identify cost of ESCO contract in each FY budget.)
15. Agency. Contacts selected ESCO to begin work.
16. ESCO.
 - a. Completes design of retrofit work and obtains approval from agency and DGS.
 - b. Begins construction.
17. Agency. Monitors construction with the assistance of DGS, if requested.
18. ESCO. Completes construction.
19. Agency.
 - a. Accepts and approves the project.
 - b. Guaranteed savings period begins.
 - c. Ongoing project monitoring to verify contracted savings.

APPENDIX A-3:

DEPARTMENT OF GENERAL SERVICES

PROCUREMENT HANDBOOK

GUARANTEED ENERGY SAVINGS

PROJECTS

Part IV, Chapter 12: Small Guaranteed Energy Savings Projects (for Executive Agencies only)

A. Requirements. This procedure shall be used when an agency wants to procure an energy conservation measure through a guaranteed energy savings project where all buildings included in the proposed project do not exceed \$300,000 in total annual utility bills.

B. Prequalification. Through an application for qualification (AFQ) process, the department prequalifies a pool of Energy Service Companies (ESCOs) to perform guaranteed energy savings projects for Commonwealth agencies. The list of prequalified ESCOs is available at:
<http://www.portal.state.pa.us/portal/server.pt?open=512&objID=1300&&PageID=269159&level=4&css=L4&mode=2a>

C. Method of Award. Upon written request from an agency, the department shall issue request for proposals, in the form of a Request For Letters of Interest, to ESCOs on the department's list of pre-qualified ESCOs. The request for LOI will include a Small Project ESCO Fact Sheet for interested ESCOs to complete and submit with their LOI. The ESCO completed Small ESCO Fact Sheet and the information that the ESCO provided as a part of the AFQ process will be considered the ESCO's proposal. The evaluation committee created by the department shall, using the evaluation factors identified prior to receipt of the ESCO proposals, select the responsible ESCO whose proposal that is most advantageous to the Commonwealth. Unless the agency decides not to proceed, the agency shall contract with the selected ESCO for either an energy audit only or for a guaranteed energy savings contract. When the agency contracts for the energy audit only, the agency will, in its sole discretion after the audit is completed, enter into a Guaranteed Energy Services Agreement. Standard documents have been created by the department and should be used by agencies throughout the contracting process.

D. Agency Procedures.

1. Agency.

- a. Determines the need for contractual ESCO services.
- b. Selects project site(s) and submits a written request to issue a request for LOI for a Small Guaranteed Energy Savings Project to the Department's Bureau of Facilities Management (BFM).

2. BFM.

- a. BFM approves or disapproves agency request.

- b. If disapproved, notifies agency with required corrections or project rejection.
 - c. If approved, proceeds to issue a request for LOI to ESCOs on the department's list of prequalified ESCOs. The request for LOI will include the ESCO Fact Sheet.
3. Department Evaluation Committee.
 - a. Receives LOIs and completed ESCO Fact Sheet from interested ESCOs.
 - b. Reviews and evaluates the LOIs, ESCO Fact Sheets and the information provided by interested ESCOs as a part of the AFQ process..
 - c. Selects the ESCO whose response is most advantageous to the Commonwealth.
4. BFM.
 - a. Determines that the ESCO and the proposed subcontractors are responsible in accordance with [Management Directive 215.9, Contractor Responsibility Program](#).
 - b. Prepares a written ESCO selection recommendation and forwards to the department's deputy secretary for property management.
 - c. After approval by deputy secretary for property management, notifies agency of selected ESCO.
 - d. If the agency decides to proceed, notifies selected and non-selected offerors.
5. Agency.
 - a. Decides whether or not to proceed.
 - b. If agency decides to proceed, notifies BFM in writing.
 - c. Executes audit agreement with selected ESCO.
6. ESCO. Conducts energy audit.
7. Agency.
 - a. Approves audit results.
 - b. Based on the results of the energy audit, negotiates the energy performance contract with ESCO, or decides not to proceed. If the agency decides not to proceed, the agency pays for the energy audit using operating budget.
 - c. If the agency decides to proceed, notifies BFM and prepares the energy performance contract and the installment purchase agreements using the DGS forms. Circulates for ESCO and agency signatures.
8. Agency Comptroller. Reviews and approves for fiscal responsibility. (Note: Agency must identify cost of ESCO contract in each FY budget.)
9. Agency. Contacts selected ESCO to begin work.
10. ESCO.
 - a. Completes design of retrofit work and obtains approval from agency and DGS.

- b. Begins construction.
- 11. Agency. Monitors construction with the assistance of DGS, if requested.
- 12. ESCO. Completes construction.
- 13. Agency.
 - a. Accepts and approves the project.
 - b. Guaranteed savings period begins.
 - c. Ongoing project monitoring to verify contracted savings.

APPENDIX A-4: COMMONWEALTH OF PENNSYLVANIA EXECUTIVE ORDER NO. 2004-12

Energy Management and Conservation in Commonwealth Facilities Commonwealth of Pennsylvania Governor's Office

December 15, 2004

Issued by Edward G. Rendell, Governor

WHEREAS, the cost of energy continues to rise and traditional sources of non-renewable energy continue to be depleted at a rapid pace; and

WHEREAS, the Commonwealth is a leading consumer of energy throughout Pennsylvania; and

WHEREAS, the Commonwealth must demonstrate leadership in the conservation of energy by reducing the amount of energy we consume in our own facilities; and

WHEREAS, the Department of General Services has the primary responsibility for the operation of Commonwealth-owned buildings in Harrisburg and is the primary operational agency of the Commonwealth; and

WHEREAS, the Department of Environmental Protection has substantial expertise in the conservation of energy and effective energy management techniques; and

WHEREAS, the Executive Agencies of the Commonwealth are primarily responsible for energy management and conservation in the buildings they occupy; and

WHEREAS, all Executive Agencies must work together to conserve energy and reduce energy usage; and

WHEREAS, the Commonwealth currently lacks a unified approach to energy management and conservation in Commonwealth facilities; and

WHEREAS, maximum efficiency in energy management and conservation is best achieved through the implementation of a centralized energy strategy coordinated through a single agency.

NOW, THEREFORE, I, Edward G. Rendell, Governor of the Commonwealth of Pennsylvania, by virtue of the authority vested in me by the Constitution of the Commonwealth of Pennsylvania and other laws, do hereby issue the following *Executive Order*.

1. Responsibilities.

a. The Department of General Services shall act as the centralized coordinator of the Commonwealth's energy management and conservation measures in Commonwealth facilities for the Executive Agencies. In this role, General Services shall:

(1) Work with all agencies of the Commonwealth on effective methods to include energy conservation as part of any new construction project or renovation project, by way of Green Building Practices or otherwise, and work collectively to track and monitor the results of such energy conservation methods.

(2) Apply Life Cycle Cost Analysis to the selection of energy sources, systems, and controls for all new construction projects and renovation projects.

(3) Implement programs to train appropriate personnel in Life Cycle Cost Analysis.

(4) Act as the centralized authority for all Energy Service Company (ESCO) Projects implemented by the Executive Agencies. In this role, General Services shall:

(a) act as the approving authority for all ESCO Projects requested by the Executive Agencies;

(b) develop standard procedures by which ESCO Projects may be awarded;

(c) develop a comprehensive approach to ESCO Projects applicable to all Executive Agencies;

(d) provide advisory services and guidance to the Executive Agencies for the conception and implementation of ESCO Projects; and

(e) seek to develop and implement a single financing source for all ESCO Projects.

(5) Develop procedures to reduce energy use in all leased facilities, including the possible centralized purchasing of energy for Commonwealth leases and including energy conservation measures in lease specifications.

(6) Procure Energy Star® and other energy efficient products where economical and consistent with Life Cycle Cost Analysis.

(7) Research new and innovative methods of energy conservation.

(8) Benchmark best practices for energy conservation technologies with other public and private sector organizations.

b. The Department of General Services and all other Executive Agencies shall:

(1) Develop no-cost or low-cost energy conservation measures for all Commonwealth-owned and leased buildings. Such measures should include, at a minimum, the following:

(a) the reduction of energy use during Peak Demand Periods;

(b) measures to ensure that lighting systems are turned off during non-operating hours;

(c) conversion to more energy efficient lighting systems and bulbs as existing systems and bulbs reach the end of their life cycles;

(d) maximum use of natural lighting whenever possible and consistent with temperature control;

(e) measures to ensure that HVAC systems operate at reduced levels during non-operating hours;

(f) measures to ensure that all equipment powered by electricity, including computer equipment, is turned off when not in use and that personal computers go into "sleep" mode after five minutes of inactivity;

(g) temperature reduction for hot-water heaters in all facilities except where operational needs require a specific water temperature;

(h) the removal of lighting from all vending machines in lighted areas;

(i) the removal or reduction of all other non-essential lighting;

(j) maximum use of task lighting;

(k) the setting of refrigerators to the highest possible temperature;

(l) the prohibition of personal space heaters except in areas where central HVAC systems cannot provide adequate heat under objective standards;

(m) insulation of all hot water or steam pipes and hot water heaters;

(n) replacement of conventional light switches with motion-sensor switches;

(o) replacement of incandescent lights in exit signs with LED fixtures;

(p) maximum use of more energy efficient office equipment and turning off personal computers, printers, and other office equipment during non-business hours;

(q) frequent cleaning of light fixtures;

(r) frequent cleaning and maintenance of HVAC systems and routine replacement of filters;

(s) improved insulation of windows, doors, walls, roofs, floors, and sealing of ductwork;

(t) the closing of all windows during heating and cooling periods.

(2) Develop additional energy conservation methods based upon their individual operational missions.

(3) Designate facilities managers with primary responsibility to ensure that energy conservation measures are developed and complied with.

(4) Engage janitorial crews and security forces in the implementation of energy conservation measures.

(5) Continue to explore the use of ESCO Projects, Energy Star® products, Green Building Practices, and other similar energy conservation measures and implement such programs where appropriate.

(6) Explore re-commissioning or other adjusting of HVAC systems to ensure maximum efficiency.

(7) Develop a long-range energy use and conservation plan for each Executive Agency.

(8) Develop programs to educate and train employees in energy conservation methods.

c. Executive Agencies shall within 180 days of the date of this order, file a report with the Department of General Services setting forth all measures taken to implement the requirements of this order.

d. The Department of Environmental Protection shall:

(1) Provide advice and assistance to General Services and Executive Agencies in developing the energy management and conservation requirement of this order.

(2) On a continuing basis, develop and recommend additional no-cost or low-cost energy conservation measures to be implemented by General Services and the Executive Agencies.

(3) Develop long-range energy management and conservation methods to be applied in Commonwealth facilities.

e. The Office of Administration shall ensure that specific energy management responsibilities are incorporated into relevant job descriptions in all Executive Agencies.

2. Cooperation Among Executive Agencies and independent agencies. The Department of General Services may request and receive from any Executive Agency such cooperation, information, and data needed to properly implement the intent of this order. Independent agencies not directly under the Governor's jurisdiction are also encouraged to participate in the provisions of this order.

3. Definitions. As used in this order, these terms shall have the following meanings:

a. Energy Star® Products. Those products that have been designated as such by the U. S. Environmental Protection Agency or the U. S. Department of Energy and therefore use less energy, save money, and help protect the environment.

b. Energy Service Company (ESCO) Project. A guaranteed energy savings contract, as defined in 73 P. S. §§ 1646.1 - 1646.7, providing for the acquisition of comprehensive capital energy improvements and services provided by qualified Energy Service Companies where the energy and cost savings achieved by the installed energy project cover all project costs, including financing, over a specified contract term.

c. Executive Agencies. Those agencies as defined in 62 Pa. C. S. § 103.

d. Green Building Practices. Techniques that promote construction of buildings that are healthier for both the environment and the occupants through a variety of methods, including energy and water conservation, environmentally sensitive site planning, the use of resource efficient building materials, and superior indoor environmental quality.

e. Life-Cycle Cost Analysis. A methodology for calculating the whole cost of a system from inception to disposal.

f. Peak Demand Periods. The times during a given day when energy use is at its highest and costs are greatest, particularly afternoons on hot days.

4. Effective Date. This order shall take effect immediately.

5. Termination Date. This order shall remain in effect unless revised or rescinded by the Governor.

APPENDIX B-1: COMMONWEALTH OF PENNSYLVANIA REQUEST FOR PROPOSALS¹: GUARANTEED ENERGY SAVINGS PROJECTS

COMMONWEALTH OF PENNSYLVANIA REQUEST FOR PROPOSALS FOR GUARANTEED ENERGY SAVINGS PROJECT

AT

[INSERT FACILITY NAME]

RFP # **[INSERT AGENCY SPECIFIC NUMBER]**

ISSUED **[INSERT ISSUE DATE]**

¹ This RFP has been developed by the Department of General Services for use by executive agencies of the Commonwealth. This RFP may be revised and customized for use by other public agencies such as local governments and school districts.

**REQUEST FOR PROPOSALS FOR
COMMONWEALTH OF PENNSYLVANIA
GUARANTEED ENERGY SAVINGS PROJECT**

TABLE OF CONTENTS

CALENDAR OF EVENTS	iii
PART I - GENERAL INFORMATION	1
PART II - INFORMATION REQUIRED FROM ESCOs	11
PART III - PROPOSED PROJECT SCHEDULE	15
PART IV - EVALUATION CRITERIA.....	16
PART V - PROJECT TERMS AND CONDITIONS	18
ATTACHMENTS.....	21
ATTACHMENT A - ESCO TECHNICAL SUBMITTAL FORM.....	22
ATTACHMENT A-1 – SUBCONTRACTORS’ QUALIFICATIONS FORM.....	31
ATTACHMENT A-2 - TECHNICAL ASSESSMENT	33
ATTACHMENT B – ESCO COST SUBMITTAL FORMS.....	34
ATTACHMENT C – ESCO DISADVANTAGED BUSINESS PARTICIPATION FORM	38
ATTACHMENT D - ENERGY AUDIT AGREEMENT.....	39
EXHIBIT I – PREVAILING WAGE RATES.....	40
EXHIBIT II – GUARANTEED ENERGY SAVINGS CONTRACT	41
EXHIBIT III - ACT 28 OF APRIL 9, 1990.....	42
EXHIBIT IV – TECHNICAL PROFILE OF PROJECT SITE(s).....	43

CALENDAR OF EVENTS

The Commonwealth will make every effort to adhere to the following schedule:

Activity	Responsibility	Date
Deadline to submit Questions via email to: _____ [email address] .	ESCO	
Pre-proposal Conference – Location, date and time.	Issuing Office ESCO	
Oral Interview – Location, date and time.	Issuing Office ESCO	
Sealed proposal must be received by the Issuing Office at [indicate address] .	ESCO	

**COMMONWEALTH OF PENNSYLVANIA
REQUEST FOR PROPOSALS
GUARANTEED ENERGY SAVING PROJECT**

PART I GENERAL INFORMATION

- I-1 Purpose.** This Request For Proposals (RFP) contains information and requirements for the selected Energy Service Companies (ESCOs) to prepare and submit a Proposal for a guaranteed energy savings contract, in accordance with the guaranteed energy savings contract requirements of Act 57 of 1998, 62 Pa. C.S. §3751-3757 as amended by Act 77 of 2004, 62 Pa. C.S. §3752-3758 (“Acts 57/77”), for the **[Insert name of facility]** (“Project Site(s)”). This RFP, with any amendments, contains the only instructions governing the proposals and material to be included therein; a description of the service to be provided; general evaluation criteria; and other proposal requirements.
- I-2 Issuing Office.** This RFP is issued for the Commonwealth of Pennsylvania, by **[insert Agency name]** (Agency). The Issuing Office through the Issuing Officer is the sole point of contact in the Commonwealth for this RFP. The Issuing Office address and Issuing Officer is:

(Insert correct address and contact information)

- I-3 Problem.** The Agency is interested in contracting for a full range of energy services and energy-related capital improvements (“energy conservation measures” or “ECMs”), financed through a guaranteed energy savings contract at no initial capital cost to the Agency, for the Project Site(s). The ECMs may include but are not limited to: the design, acquisition, installation, modification, maintenance and training in the operation of existing and new equipment, which will reduce energy consumption and related costs associated with the heating, ventilation and air conditioning system, lighting systems, control systems, building envelope, the hot water systems, water consumption, sewage costs and other energy using devices. Additionally, savings which would not reduce consumption per se but are aimed at cost savings, such as fuel switching, demand side management, on-site generation, utility bill auditing, utility rate changes, distribution upgrades etc. may also be considered. ECMs may also include the training of facility staff with respect to routine maintenance and operation of all improvements. ECMs must result in a guaranteed minimum energy savings with ESCO payments linked to actual documented energy and cost reductions. **Any stipulated energy and/or operational cost savings that may be attributed to this project will be rigorously reviewed and, ESCO will be required by the contract to thoroughly document and verify the savings, which must be approved by the Agency.**

The savings achieved by the ECMs in any year must be guaranteed to provide the project financing payment plus the service fees during that year for the duration of the contract. ESCOs will be required to guarantee energy and cost savings on an annual basis. No credit for the achievement of savings above and beyond the annual guarantee will be credited to satisfy performance guarantees in future years of the contract. Annual reconciliation of the achieved savings will be required. In accordance with the provisions of Acts 57/77, no contract can exceed fifteen (15) years in duration.

I-4 Description of Procurement Process. The process for the procurement of these energy conservation measures will proceed as follows:

A. Submission of Proposals. ESCOs must conduct a preliminary technical scoping audit of the Project Site(s) described in Exhibit IV, Technical Profile of Project Site(s). This audit will form the basis of the proposals submitted by selected ESCOs in response to this RFP. Each response to this RFP shall consist of four parts: (1) Technical Submittal, (2) Disadvantaged Business Participation Submittal, (3) Cost Submittal and (4) Energy Audit Agreement as defined in Paragraph E of this section.

The Agency and its designees will review and evaluate ESCO Technical Submittals first in accordance with the evaluation criteria specified in Part IV, Evaluation Criteria. ESCO responses to the Application for Qualification (AFQ) may also be considered in the evaluation of the Technical Submittals.

B. Cost Submittal and Disadvantaged Business Participation Evaluation. Upon completion of the evaluation of the Technical Submittals, the Cost Submittals and the Disadvantaged Business Participation Submittals will be evaluated.

C. Oral Interview. Each ESCO will be required to participate in an oral interview. The purpose of this session is to clarify specific aspects of the Technical Submittal, Cost Submittal, and Disadvantaged Business Participation Submittal to answer questions posed by the evaluation team about the Submittals. These oral interviews may be tape-recorded. The oral interviews will be evaluated based upon the responses given in the oral interview.

D. Selection of ESCO. The Issuing Office will notify the selected ESCO in writing of its selection for negotiation after it has determined, taking into consideration all of the evaluation factors, that the ESCO proposal that is the most advantageous to the Agency. If the Agency decides not to enter into the Energy Audit Agreement with the selected ESCO, the Agency is not obligated to pay any amount to the selected ESCO.

E. Energy Audit Agreement. If the Agency decides to proceed, the Agency will enter into an Energy Audit Agreement with the selected ESCO which includes a negotiated scope of work and cost. Under the Energy Audit Agreement, ESCO will conduct an investment grade technical energy audit of the project site(s) and propose a complete set of ECMs, including all project costs, the timetable for completing design, engineering, bid specifications, and construction work; a detailed description of services to be provided, specific financing arrangements and terms, and the projected energy and cost savings, as well as special conditions offered by the company. If the investment grade technical energy audit results in a deviation greater than ten percent (10%) of the project costs contained in the Preliminary Technical and Cost Submittal, the Agency is under no obligation to pay the agreed-upon price for the Investment Grade Technical Energy Audit and may initiate negotiations with the second ranked ESCO.

F. Guaranteed Energy Savings Contract. If the Agency decides to proceed after it receives the investment grade technical energy audit report, the Agency shall attempt to negotiate a guaranteed energy savings contract with the selected ESCO that performed the investment grade technical energy audit. If the Agency decides

not to enter into a guaranteed energy savings contract with the selected ESCO after the investment grade technical energy audit has been accepted, the Agency agrees to pay the fee negotiated within the Energy Audit Agreement. Otherwise the Agency is not liable for the payment of any amounts to the selected ESCO until a contract is negotiated, signed by ESCO, and the Agency signatures as required by law, have been obtained.

If an acceptable contract cannot be reached within 90 days from the date of ESCO selection, negotiations with the second-ranked ESCO may be initiated.

- 1-5 Type of Contract.** If a contract is entered into as a result of this RFP, the Standard Guaranteed Energy Savings Contract referenced in Exhibit II will be used.
- 1-6 Rejection of Proposals.** The Agency reserves the right, in its sole and complete discretion, to reject any proposal received as a result of this RFP.
- 1-7 Incurring Costs.** The Agency is not liable for any cost or expenses incurred by ESCOs in the preparation of their written responses or for attendance at any conferences and meetings related to this RFP. Any cost or expense incurred by ESCOs in conducting the preliminary technical scoping audit or for performing any analysis associated with this RFP shall be borne by ESCO.
- 1-8 [Optional] Pre-proposal Conference.** **[NOTE: This is optional—if it is decided not to hold a conference, substitute the following language for this section: “There will be no preproposal conference for this RFP. If there are any questions, please forward them to the Issuing Officer in accordance with Section I-9.”]** The Issuing Office will hold a preproposal conference as specified in the Calendar of Events. The purpose of this conference is to provide opportunity for clarification of the RFP. ESCOs should forward all questions to the Issuing Office in accordance with **Part I, Section I-9** to ensure adequate time for analysis before the Issuing Office provides an answer. ESCOs may also ask questions at the pre-proposal conference. In view of the limited facilities available for the conference, ESCOs should limit their representation to **[insert number of persons per ESCO the selected conference room can accommodate, taking into consideration Issuing Office and other Agency requirements]** individuals per ESCO. The preproposal conference is for information only. Any answers furnished during the conference will not be official until verified, in writing, by the Issuing Office. All questions and written answers will be responded to by the Issuing Office and sent via email to the three recipients of this RFP as an addendum to, and shall become part of, this RFP. Attendance at the Pre-proposal Conference is **[indicate whether optional or mandatory (to require mandatory attendance sufficient justification must be provided to the Agency head). If the Agency wants a mandatory preproposal conference, include: “Failure to attend the preproposal conference shall disqualify an ESCO from consideration for the contract to be awarded from this RFP, and its proposal will be returned unopened.”]**.
- 1-9 Questions and Answers.** If an ESCO has any questions regarding this RFP, ESCO must submit the questions by email (**with the subject line “RFP [insert RFP number] Question”**) to the Issuing Office named in **Part I, Section I-2** of the RFP. If ESCOs have questions, they must be submitted via email **no later than** the date indicated on the Calendar of Events. ESCOs shall not attempt to contact the Issuing Officer by any

other means. The Issuing Officer shall respond via email to the three selected RFO recipients.

All questions and responses are considered as an addendum to, and part of, this RFP in accordance with RFP Part I, Section I-10. The Issuing Office shall not be bound by any verbal information nor shall it be bound by any written information that is not either contained within the RFP or formally issued as an addendum by the Issuing Office. The Issuing Office does not consider questions to be a protest of the specifications or of the solicitation. The required protest process for Commonwealth procurements is described on the Department of General Services (DGS) website.

http://www.portal.state.pa.us/portal/server.pt?open=512&objID=1486&&PageID=256775&lev el=4&css=L4&mode=2&in_hi_userid=2&cached=true

- I-10 Addenda to RFP.** If the Issuing Office deems it necessary to revise any part of this RFP before the proposal response date, the Issuing Office will contact each of the three RFP recipients via email.
- I-11 Response Date.** To be considered for selection, hard copies of proposals must arrive at the Issuing Office on or before the time and date specified in the RFP Calendar of Events. The Issuing Office will **not** accept proposals via email or facsimile transmission. ESCOs who send proposals by mail or other delivery service should allow sufficient delivery time to ensure timely receipt of their proposals. If, due to inclement weather, natural disaster, or any other cause, the Commonwealth office location to which proposals are to be returned is closed on the proposal response date, the deadline for submission will be automatically extended until the next Commonwealth business day on which the office is open, unless the Issuing Office otherwise notifies ESCOs. The hour for submission of proposals shall remain the same. The Issuing Office will reject, unopened, any late proposals.
- I-12 Proposals.** To be considered, proposals must be a complete response to the RFP. Proposals are to be straightforward, concise presentations without extraneous material. Attachment A: ESCOs Technical Submittal, Sections 1.0, 1.2, 1.3, 1.4, shall be limited to a total of no more than 30 single sided pages. Font size may be no smaller than 10 point.

ESCOs shall make no other distribution of its proposal to any other ESCO or Commonwealth official or Commonwealth consultant. Each proposal page should be numbered for ease of reference. An official authorized to bind ESCO to its provisions must sign the proposal. For this RFP, the proposal must remain valid for ninety (90) days or until a contract is fully executed. If the Issuing Office selects ESCO's proposal for award, the contents of the selected ESCO's proposal will become contractual obligations, except to the extent the contents are changed through Best and Final Offers or negotiations. The information in the proposal will become a public record upon contract execution, except as limited by Section 106 (b)(1) of the *Commonwealth Procurement Code*, 62 Pa. C.S. § 106 (b)(1).

Each ESCO submitting a proposal specifically waives any right to withdraw or modify it, except that ESCO may withdraw its proposal by written notice received at the Issuing Office's address for proposal delivery prior to the exact hour and date specified for proposal receipt. An ESCO or its authorized representative may withdraw its proposal in person prior to the exact hour and date set for proposal receipt, provided the

withdrawing person provides appropriate identification and signs a receipt for the proposal. An ESCO may modify its submitted proposal prior to the exact hour and date set for proposal receipt only by submitting a new sealed proposal or sealed modification which complies with the RFP requirements.

I-13 Disadvantaged Business Information. The Issuing Office encourages participation by small disadvantaged businesses as subcontractors and suppliers.

Small Disadvantaged Businesses are small businesses that are owned or controlled by a majority of persons, not limited to members of minority groups, who have been deprived of the opportunity to develop and maintain a competitive position in the economy because of social disadvantages. The term includes:

- A. Department of General Services Bureau of Minority and Women Business Opportunities (BMWBO)-certified minority business enterprises (MBEs) and women business enterprises (WBEs) that qualify as small businesses; and
- B. United States Small Business Administration-certified small disadvantaged businesses or 8(a) small disadvantaged business concerns.

Small businesses are businesses in the United States that are independently owned, are not dominant in their field of operation, employ no more than 100 persons and earn less than \$20 million in gross annual revenues (\$25 million in gross annual revenues for those businesses in the information technology sales or service business).

Questions regarding this Program can be directed to:

Department of General Services
Bureau of Minority and Women Business Opportunities
Room 611, North Office Building
Harrisburg, PA 17125
Phone: (717) 787-6708
Fax: (717) 772-0021
Email: gs-bmwbo@state.pa.us

Program information and a database of BMWBO-certified minority- and women-owned businesses can be accessed at www.dgs.state.pa.us, Keyword: BMWBO. The federal vendor database can be accessed at <http://www.ccr.gov> by clicking on *Dynamic Small Business Search* (certified companies are so indicated).

I-14 Information Concerning Small Businesses in Enterprise Zones. The Issuing Office encourages participation by small businesses, whose primary or headquarters facility is physically located in areas the Commonwealth has identified as *Designated Enterprise Zones*, as prime contractors, joint ventures and subcontractors/suppliers.

Small businesses are businesses in the United States that are independently owned, are not dominant in their field of operation, employ no more than 100 persons and earn less than \$20 million in gross annual revenues (\$25 million in gross annual revenues for those businesses in the information technology sales or service business).

There is no database or directory of small businesses located in Designated Enterprise Zones. Information on the location of *Designated Enterprise Zones* can be obtained by contacting:

Aldona M. Kartorie
Center for Community Building
PA Department of Community and Economic Development
4th Floor, Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120-0225
Phone: (717) 720-7409
Fax: (717) 787-4088
Email: akartorie@state.pa.us

- I-15 Economy of Preparation.** ESCOs should prepare proposals simply and economically, providing a straightforward, concise description of ESCO's ability to meet the requirements of the RFP. **[Issuing Office may include limit on the number of pages of the proposal.]**
- I-16 Alternate Proposals.** The Issuing Office has identified the basic approach to meeting its requirements, allowing ESCOs to be creative and propose their best solution to meeting these requirements. The Issuing Office will not accept alternate proposals.
- I-17 Prime Contractor Responsibilities.** The contract will require the selected ESCO to assume responsibility for all services offered in its proposal whether it produces them itself or by subcontract. The Issuing Office will consider the selected ESCO to be the sole point of contact with regard to contractual matters.
- I-18 Proposal Contents.** ESCOs should not label proposal submissions as confidential or proprietary. The Issuing Office will hold all proposals in confidence and will not reveal or discuss any proposal with competitors for the contract, unless disclosure is required:
- A. Under the provisions of any Commonwealth or United States statute or regulation; or
 - B. By rule or order of any court of competent jurisdiction.

After a contract is executed, however, the successful proposal is considered a public record under the *Right-to Know Law*, 65 P.S. § 66.1—66.9, and therefore subject to disclosure. The financial capability information submitted under **Part II-3** shall not be disclosed in the final contract. All material submitted with the proposal becomes the property of the Commonwealth of Pennsylvania and may be returned only at the Issuing Office's option. The Issuing Office, in its sole discretion, may include any person other than competing ESCOs on its proposal evaluation committee. The Issuing Office has the right to use any or all ideas presented in any proposal regardless of whether the proposal becomes part of a contract.

- I-19 Best and Final Offers.** The Issuing Office reserves the right to conduct discussions with ESCOs for the purpose of obtaining "best and final offers." To obtain best and final offers from ESCOs, the Issuing Office may do one or more of the following:
- A. Enter into pre-selection negotiations;

- B. Schedule oral presentations; and
- C. Request revised proposals.

The Issuing Office will limit any discussions to responsible ESCOs (those that have submitted responsive proposals and possess the capability to fully perform the contract requirements in all respects and the integrity and reliability to assure good faith performance) whose proposals the Issuing Office has determined to be reasonably susceptible of being selected for award. The Evaluation Criteria described in **Part IV**, shall also be used to evaluate the best and final offers. Price reductions offered through any reverse online auction shall have no effect upon ESCO's Technical Submittal. Dollar commitments to Disadvantaged Businesses and Enterprise Zone Small Businesses can be reduced only in the same percentage as the percent reduction in the total price offered through negotiations, including the online auction.

- I-20 News Releases.** ESCOs shall not issue news releases, Internet postings, advertisements or any other public communications pertaining to this project without prior written approval of the Issuing Office, and then only in coordination with the Issuing Office.
- I-21 Restriction of Contact.** From the issue date of this RFP until the Issuing Office selects a proposal for award, the Issuing Officer is the sole point of contact concerning this RFP. Any violation of this condition may be cause for the Issuing Office to reject the offending ESCO's proposal. If the Issuing Office later discovers that ESCO has engaged in any violations of this condition, the Issuing Office may reject the offending ESCO's proposal or rescind its contract award. ESCOs must agree not to distribute any part of their proposals beyond the Issuing Office. An ESCO who shares information contained in its proposal with other Commonwealth personnel and/or competing ESCO personnel may be disqualified.
- I-22 Debriefing Conferences.** ESCOs whose proposals are not selected will be notified of the name of the selected ESCO and given the opportunity to be debriefed. The Issuing Office will schedule the time and location of the debriefing. The debriefing will not compare ESCO with other ESCOs, other than the position of ESCO's proposal in relation to all other ESCO proposals. An ESCO's exercise of the opportunity to be debriefed does not constitute the filing of a protest.
- I-23 Term of Contract.** The contract will commence on the Effective Date, which will be fixed by the Issuing Office after the contract has been fully executed by the selected ESCO and by the Commonwealth, and all approvals required by Commonwealth contracting procedures have been obtained. The contract term will end no longer than 15 years after the Commencement Date which shall be the first day of the month after the month in which the ESCO has delivered a Notice to Agency that it has installed and commenced operating all of the Equipment, and Agency has inspected and accepted said installation and operation as evidenced by a Certificate of Acceptance. The selected ESCO shall not start the performance of any work prior to the Effective Date of the contract and the Commonwealth shall not be liable to pay the selected ESCO for any service or work performed or expenses incurred before the Effective Date of the contract.

I-24 ESCO's Representations and Authorizations. By submitting its proposal, each ESCO understands, represents, and acknowledges that:

- A. All of ESCO's information and representations in the proposal are material and important, and the Issuing Office may rely upon the contents of the proposal in awarding the contract(s). The Commonwealth shall treat any misstatement, omission or misrepresentation as fraudulent concealment of the true facts relating to the Proposal submission, punishable pursuant to 18 Pa. C.S. § 4904.
- B. ESCO has arrived at the price(s) and amounts in its proposal independently and without consultation, communication, or agreement with any other ESCO or potential ESCO.
- C. ESCO has not disclosed the price(s), the amount of the proposal, nor the approximate price(s) or amount(s) of its proposal to any other firm or person who is an ESCO or potential ESCO for this RFP, and ESCO shall not disclose any of these items on or before the proposal submission deadline specified in the Calendar of Events of this RFP.
- D. ESCO has not attempted, nor will it attempt, to induce any firm or person to refrain from submitting a proposal on this contract, or to submit a proposal higher than this proposal, or to submit any intentionally high or noncompetitive proposal or other form of complementary proposal.
- E. ESCO makes its proposal in good faith and not pursuant to any agreement or discussion with, or inducement from, any firm or person to submit a complementary or other noncompetitive proposal.
- F. To the best knowledge of the person signing the proposal for ESCO, ESCO, its affiliates, subsidiaries, officers, directors, and employees are not currently under investigation by any governmental agency and have not in the last four years been convicted or found liable for any act prohibited by State or Federal law in any jurisdiction, involving conspiracy or collusion with respect to bidding or proposing on any public contract, except as ESCO has disclosed in its proposal.
- G. To the best of the knowledge of the person signing the proposal for ESCO and except as ESCO has otherwise disclosed in its proposal, ESCO has no outstanding, delinquent obligations to the Commonwealth including, but not limited to, any state tax liability not being contested on appeal or other obligation of ESCO that is owed to the Commonwealth.
- H. ESCO is not currently under suspension or debarment by the Commonwealth, any other state or the federal government, and if ESCO cannot so certify, then it shall submit along with its proposal a written explanation of why it cannot make such certification.
- I. ESCO has not made, under separate contract with the Issuing Office, any recommendations to the Issuing Office concerning the need for the services described in its proposal or the specifications for the services described in the proposal.

- J. Each ESCO, by submitting its proposal, authorizes all Commonwealth agencies to release to the Commonwealth information related to liabilities to the Commonwealth, including but not limited to taxes, unemployment compensation and workers' compensation liabilities.
- K. Until the selected ESCO receives a fully executed and approved written contract from the Issuing Office, there is no legal and valid contract, in law or in equity, and ESCO shall not begin to perform.
- I-25 Notification of Selection.** The Issuing Office will notify the selected ESCO in writing of its selection for negotiation after the Issuing Office has determined, taking into consideration all of the evaluation factors, the proposal that is the most advantageous to the Issuing Office.
- I-26 RFP Protest Procedure.** The RFP Protest Procedure is on the DGS website at <http://www.portal.state.pa.us/portal/server.pt?open=512&objID=1230&mode=2>. A protest by a party not submitting a proposal must be filed within **seven** days after the protesting party knew or should have known of the facts giving rise to the protest, but no later than the proposal submission deadline specified in the Calendar of Events of the RFP. ESCOs may file a protest within seven days after the protesting ESCO knew or should have known of the facts giving rise to the protest, but in no event may an ESCO file a protest later than seven days after the date the notice of award of the contract is posted on the DGS website. The date of filing is the date of receipt of the protest. A protest must be filed in writing with the Issuing Office.
- I-27 Agency Participation.** The Agency shall approve equipment specifications and installation plans for all proposed changes prior to the implementation of any modifications. . The Agency has the right to make routine inspections and be present during any equipment and systems commissioning procedures conducted by ESCO and prior to the issuing of a Notice to The Agency that it has installed and commenced operating all of the Equipment and systems.
- I-28 DGS Project Management Fee.** The selected ESCO will be required to include a one-time Project Management Fee based upon a percentage of the value of the total project cost as defined in Attachment B-1. Project management fee values are stipulated in Attachment B-3.
- I-29 State Heating Systems to be Fueled by Coal.** The contractor will be required to comply with the provisions of Act 28 of April 9, 1990 (71 P.S. §2420) that requires heating systems or heating units installed in state-owned facilities to be fueled by coal unless exempted by the Secretary of the Department of General Services as provided for under the Act. A copy of Act 28 can be found in Exhibit III.
- I-30 Payment and Performance Bond.** The contractor shall be required to provide payment and performance bonds in the amount of 100% of the total contract amount.
- I-31 Prevailing Wage Rates.** Exhibit I to this RFP contains a link to the prevailing wage rates that the contractor and its subcontractors shall be required to pay workers on this project. The contract shall be subject to the provisions, duties, obligations, remedies, and penalties of the Pennsylvania Prevailing Wage Act, Act of August 15, 1961, P.L. 981, as amended, 43 P.S. Section 165-1 et seq.

I-32 Steel Products Procurement Act. In the performance of any contract awarded pursuant to this RFP, the contractor, subcontractors, material men, or suppliers shall use only steel products, rolled, formed, shaped, drawn, extruded, forged, cast, fabricated, or otherwise similarly processed, or processed by a combination of two or more of such operations, from steel made in the United States by the open hearth, basic oxygen, electric furnace, Bessemer or other steel-making process. Steel Products include not only case iron products but also machinery and equipment listed in the United States Department of Commerce Standard Industrial Classification 25 (furniture and fixture), 35 (machinery, except electrical), and 37 (transportation equipment) and made of, fabricated from, or containing steel components. If a product contains both foreign and United States steel, such products shall be determined to be a United States Steel product only if at least 75% of the cost of the articles, materials, and supplies have been mined, produced, or manufactured, as the case may be, in the United States.

When unidentified steel products are supplied under a contract, before any payment will be made, the contractor must provide documentation including, but not limited to, invoices, bills of lading, and mill certification that the steel was melted and manufactured in the United States. If a steel product is identifiable from its face, the contractor must submit certification that satisfies the Commonwealth that the contractor has fully complied with these requirements. Any such payments made to any person by the Department, which should not have been made as a result of these requirements, shall be recoverable directly from the contractor, subcontractor, manufacturer, or supplier who did not comply.

In addition to withholding payments, any person who willfully violates any of these provisions shall be prohibited from submitting any bids to any public agency for a period of five (5) years from the date of the determination that a violation has occurred. In the event the person who violates the provisions of the Act is a subcontractor, manufacturer or supplier, such person shall be prohibited from performing any work or supplying any materials to a public agency for a period of five (5) years from the date it is determined a violation has occurred.

The contractor shall include the provisions of this Steel Products Procurement Act clause in any subcontract and supply contract, so that the provisions of these provisions shall be binding upon each subcontractor and supplier.

1-33 Prohibition Against the Use of Certain Steel and Aluminum Products. In accordance with the Trade Practices Act of July 23, 1968 P.L. 686 (71 P.S. § 773.101 et seq.), the contractor cannot and shall not use or permit to be used in the work any aluminum or steel products made in a foreign country which is listed below as a foreign country which discriminates against aluminum or steel products manufactured in Pennsylvania. The countries of Brazil, South Korea, Spain, and Argentina have been found to discriminate against certain products manufactured in Pennsylvania. Therefore, the purchase of use of those countries' products, as listed below, is not permitted.

A. BRAZIL: Welded carbon steel pipes and tubes; carbon steel wire rods; tool steel; certain steel products, including hot-rolled stainless steel bar; stainless steel wire rod and cold-formed stainless steel bar; pre-stressed concrete steel wire strand; hot-rolled carbon steel plate in coil; hot-rolled carbon steel sheet and cold-rolled carbon steel sheet.

- B. SPAIN: Certain stainless steel products, including stainless steel wire rod, hot-rolled stainless steel bars and cold-formed stainless steel bars; pre-stressed concrete steel wire strands certain steel products, including hot-rolled steel plate, cold-rolled carbon steel plate, carbon steel structural shapes, galvanized carbon steel sheet, hot-rolled carbon steel bars and cold-formed carbon steel bars.
- C. SOUTH KOREA: Welded carbon steel pipes and tubes; hot-rolled carbon steel plate; hot-rolled carbon steel sheet and galvanized steel sheet.
- D. ARGENTINA: Carbon steel wire rod and cold-rolled carbon steel sheet.

Penalties for violations of this paragraph may be found in the Trade Practices Act, which penalties include becoming ineligible for public works contracts for a period of three years.

Note: This provision in no way relieves the contractor of its responsibility to comply with those provisions of this RFP that prohibit the use of foreign-made steel and cast iron products.

I-34 Post-consumer Recycled Content. Any products which are provided to the Commonwealth of Pennsylvania as a part of the performance of this project, must either meet the minimum percentage levels for total recycled content as specified under the Environmental Protection Agency’s adopted procurement guidelines defined by the Resource and Recovery Act of 1976 (P.L. 94-580, 42 U.S.C. Section 6901 et seq.) as amended, or by The Department of General Services’ policy guidelines, whichever reflects the higher level of post-consumer recycled content.

I-35 Site Visits. The Issuing Office will arrange inspection tours of the buildings to be audited. Site representatives will be available to answer questions about the operation of facilities and any technical information supplemental to material contained in this RFP will be made available for review and inspection onsite.

To make arrangements, please contact:

[Insert correct information]

Name: _____

Phone: () _____ Email Address: _____

I-35 Statewide Building Code. Due to changes resulting from passage of the Statewide Building Code, the Department of Labor and Industry (L&I) has sole responsibility for plan review and inspection for all State-owned facilities.

This project shall be subject to the Uniform Construction Code. ESCO, along with its design professionals and subcontractors, shall become familiar with and adhere to the UCC, including but not limited to: L&I’s plans submission and review for approval to obtain the project building permit and site inspection procedures set forth in L&I’s Inspection procedures. The most recent list of inspections required by L&I can be found on L&I’s website:

<http://www.dli.state.pa.us/landi/cwp/view.asp?a=310&q=210892&landiRNavrad1BF74=>

ESCO must include L&I plans review and inspections to the extent they are applicable to the scope of work on the project.

PART II INFORMATION REQUIRED FROM ESCOS

II-1 General. ESCOs must submit their proposals in the format, including heading descriptions, outlined below. To be considered, the proposal must respond to all requirements in this part of the RFP. ESCOs should provide any other information thought to be relevant, but not applicable to the enumerated categories, as an appendix to the Proposal. Each Proposal shall consist of the following three (3) separately sealed submittals:

- a. Attachment A, Technical Submittal, which shall be a response to RFP Part II, Sections II-2 below;
- b. Attachment B, Cost Submittal, in response to RFP Part II, Section II-3 below;
- c. Attachment C, Disadvantaged Business Information Submittal, in response to RFP Part II, Section II-4 below; and
- d. Attachment D, The properly completed and signed Energy Audit Agreement, in response to RFP Part II, Section II-6 below.

The Issuing Office reserves the right to request additional information which, in the Issuing Office's opinion, is necessary to assure that ESCO's competence, number of qualified employees, business organization, and financial resources are adequate to perform according to the RFP.

The Issuing Office may make investigations as deemed necessary to determine the ability of ESCO to perform the Project, and ESCO shall furnish to the Issuing Office all requested information and data. The Issuing Office reserves the right to reject any proposal if the evidence submitted by, or investigation of, such ESCO fails to satisfy the Issuing Office that such ESCO is properly qualified to carry out the obligations of the RFP and to complete the Project as specified.

II-2 Technical Submittals.

- **Attachment A: ESCOs Technical Submittal.** Provide **the original, six (6) hard copies and one (1) electronic version on a CD** of complete responses to the information requested in Attachment A to this RFP.
- **Attachment A-1: Subcontractor Qualifications Form.** Complete the attached form for each identified subcontractor who will be directly involved in this project. Provide **the original, six (6) hard copies and one (1) electronic version on a CD** of the complete form.
- **Attachment A-2: Technical Assessment and Preliminary Technical Energy Audit Report.** Include under separate cover, **the original, six (6) hard copies and one (1) electronic version on a CD** clearly labeled "Attachment A-2: Technical Assessment and Preliminary Technical Energy Audit Report" with the name of the submitting firm on the outside of the envelope. This audit is to be conducted by your firm on the project sites identified in Exhibit IV.

II-3 Attachment B: ESCO's Cost Submittal: The information requested in this section is required to determine the reasonableness of your quotation. **One copy labeled as "Attachment B: Preliminary Cost Submittal" must be bound and sealed and submitted separately from the remainder of the proposal.** ESCOs are required to use and follow the instructions and submit the required information in the format found in Attachment B to this RFP. **ESCO's Cost Submittal must contain only one base case project to be evaluated and ranked. Base case submittals should clearly marked. Alternative Preliminary Cost Proposals may be included, but must be clearly marked as Alternative Cost Proposals.**

II-4 Attachment C-1: Disadvantaged Businesses Information: To receive credit for subcontracting with a Small Disadvantaged Business (including purchasing supplies and/or services through a purchase agreement), a company must include proof of Disadvantaged Business qualification in the Disadvantaged Business submittal of the proposal:

- A. Small Disadvantaged Businesses qualifying as a result of MBE/WBE certification from BMWBO must provide a photocopy of their BMWBO certificate.
- B. Disadvantaged Businesses qualifying as a result of certification from the U.S. Small Business Administration as an 8(a) or Small Disadvantaged Business must submit proof of Small Business Administration Certification. The owners of such businesses must also submit proof of United States citizenship.
- C. All companies claiming Small Disadvantaged Business status, whether as a result of BMWBO certification or Small Business Administration certification as an 8(a) or Small Disadvantaged Business, must attest to the fact that the business has 100 or fewer employees.
- D. All companies claiming Small Disadvantaged Business status, whether as a result of BMWBO certification or Small Business Administration certification as an 8(a) or Small Disadvantaged Business, must submit proof that their gross annual revenues are less than \$20,000,000 (\$25,000,000 for those businesses in the information technology sales or service business). This can be accomplished by including a recent tax or audited financial statement.

In addition to these verifications, this portion of the proposal should include the following information:

- The name and telephone number of your project (contact) person for the Small Disadvantaged Business(es).
- The company name, address, telephone number of the prime contact person for each specific Small Disadvantaged Business included in the proposal. The contractor must specify the Small Disadvantaged Business(es) to which it is making commitments. The contractor will not receive credit by stating it will find a Small Disadvantaged Business after the contract is awarded or by listing several companies and stating it will select one later.

- The specific work, goods, or services the Small Disadvantaged Business(es) will perform or provide.
- The location where the Small Disadvantaged Business(es) will perform these services.
- The timeframe for the Small Disadvantaged Business(es) to provide or deliver the goods or services.
- The amount of capital, if any, the Small Disadvantaged Business(es) will be expected to provide.
- The form and amount of compensation each Small Disadvantaged Business will receive. In the Disadvantaged Business submittal of the proposal, provide the estimated dollar value of the contract to each Small Disadvantaged Business.
- The percent of the total value of services or products purchased/subcontracted under the proposal that will be provided by the Small Disadvantaged Business(es).
- If subcontracting, a signed subcontract or letter of intent must be included in the Disadvantaged Business portion of the proposal.
- Include in the Disadvantaged Business Submittal any and all information concerning the contractor's proposed utilization of small businesses located in *Designated Enterprise Zones* as required by Section II-4, Enterprise Zone Small Business Utilization Response.

The Disadvantaged Business submittal of the proposal must be clearly identified as Disadvantaged Business Information and sealed in an envelope separately from the remainder of the proposal. Only one copy of the Disadvantaged Business section is needed.

The dollar value of the commitment to each Small Disadvantaged Business must be sealed in the same envelope with the Disadvantaged Business submittal of the proposal. The Small Disadvantaged Business commitment cannot be less than the amount of the commitment made in the ESCO's Expression of Interest submittal and should be based on the value of the project hard costs (see Attachment B-1 for definition of Hard Costs). **The selected contractor's Disadvantaged Business commitment amount, name of the Disadvantaged Business, services to be provided including timeframe for performing services will be included as a contractual obligation when the contract is executed.**

II-5 Attachment C-2: Enterprise Zone Small Business Utilization Response: To receive credit for being an enterprise zone small business or entering into a joint venture agreement with an enterprise zone small business or subcontracting with an enterprise zone small business, a company must include the following information in the Disadvantaged Business submittal of the proposal:

- Proof of the location of the business' headquarters (such as a lease or deed or Department of State corporate registration).
- Confirmation of the enterprise zone in which it is located (obtained from the local enterprise zone office).
- Proof of United States citizenship of the owners of the business.
- Certification that the business employs 100 or fewer employees.
- Proof that the business's gross annual revenues are less than \$20,000,000 (\$25,000,000 for those businesses in the information technology sales or service business). This can be accomplished by including a recent tax or audited financial statement.

In addition to these verifications, this portion of the Submittal should include the following information:

- The company name, address, name and telephone number of the primary contact person for each Enterprise Zone Small Business included in the proposal. The contractor must specify the Enterprise Zone Small Business to which it is making commitments. The contractor will not receive credit by stating that it will find a Enterprise Zone Small Business after the contract is awarded or by listing several companies and stating it will select one later.
- The specific work, goods, or services the Enterprise Zone Small Business will perform or provide.
- The location where the Enterprise Zone Small Business will perform these services.
- The timeframe for the Enterprise Zone Small Business to provide or deliver the goods or services.
- The amount of capital, if any, the Enterprise Zone Small Business will be expected to provide.
- The form and amount of compensation each Enterprise Zone Small Business will receive. In the Disadvantaged Business portion of the proposal, provide the estimated dollar value of the contract to each Enterprise Zone Small Business.
- The percent of the total value of services or products purchased/subcontracted under the proposal that will be provided by the Enterprise Zone Small Business.
- In the case of a joint venture agreement, a copy of the agreement, signed by all parties, must be included in the Disadvantaged Business Submittal of the proposal. If subcontracting, a signed subcontract or letter of intent must be included in the Disadvantaged Business Submittal of the proposal.

The dollar value of the commitment to each Enterprise Zone Small Business must be sealed in the same envelope with the Disadvantaged Business Submittal of the proposal. The selected contractor's Enterprise Zone Small Business commitment amount, name of Enterprise Zone Small Business, and services to be provided including timeframe for performing services will be included as a contractual obligation when the contract is executed.

ESCO's submittals must contain only the base case project to be evaluated by BMWBO.

II-6 Attachment D: Energy Audit Agreement. The Energy Audit Agreement referenced in Attachment D must be properly signed and returned with ESCO proposal. **The ENERGY AUDIT AGREEMENT shall be submitted in a separate sealed envelope** and kept separate from the Technical Submittal, Cost Submittal, and Disadvantaged Businesses Information. **One (1) copy shall be submitted and clearly marked "Attachment D: ENERGY AUDIT AGREEMENT" with the name of the submitting ESCO on the outside of the envelope.**

PART III PROPOSED PROJECT SCHEDULE

(TO BE COMPLETED BY THE AGENCY – Fill in with specific dates)

<u>Activity</u>	<u>Date</u>
Issue RFP	Week 1
Site Visit* (to be arranged)	Weeks 1-6
Proposals Due	Week 7
Proposals Reviewed, Evaluated and Ranked	Weeks 7-10
Oral Interviews	Week 13
ESCO Recommended	Week 14
Approval of Selected ESCO	Week 15
Audit Contract Executed	Week 19
Audit Conducted	Weeks 20-28
Contract Negotiations	Weeks 20-32
Contract Presented and Signed	Week 33

***Site visits can be arranged by contacting: (To be completed by The Agency)**

PART IV EVALUATION CRITERIA

IV-1. Mandatory Responsiveness Requirements. To be eligible for selection, a proposal must be (a) timely received from an ESCO; (b) properly signed by ESCO; and (c) formatted such that all cost data including but not limited to cost data relating to the proposal, Disadvantaged Business Information cost data and Energy Audit Agreement cost data is kept separate from and not included in the Technical Submittal.

IV-2. Technical Nonconforming Proposals. The Issuing Office reserves the right, in its sole discretion, to waive technical or immaterial nonconformities in an ESCO's proposal.

IV-3. Evaluation. The Issuing Office has selected a committee of qualified personnel to review and evaluate timely submitted proposals. Responses will be evaluated based on the completeness and quality of the information provided in Attachment A, ESCO's Preliminary Technical Submittal, Attachment B, ESCO's Preliminary Cost Submittal and Client References as identified in ESCOs responses to the Application for Qualifications (AFQ). Failure to provide any of the requested information may result in disqualification. ESCOs qualifications in response to the AFQ issued by the Commonwealth will be made available for review and consideration by the Agency. The criteria listed below will be used in the evaluation of the Preliminary Technical and Cost Submittals, Client References and the responses of the short listed ESCOs during final selection interviews, as appropriate. These are not ranked in order of importance. The criteria have been weighted using the letters A, B & C as indicators: A=More Significant; B=Significant; C=Less Significant. Independent of the committee, BMWBO will evaluate the Disadvantaged Business Submittal and provide the Issuing Office with a rating for this component of each proposal.

IV-4. Experience

- B Reliability of equipment performance on past projects.

- A Documented energy savings of previous projects.

- A Ability to plan and complete all phases of the project on schedule.

- B Quality of Project History and Client Reference documentation.

IV-5. Project Management

- A Qualifications and experience of the individuals assigned to this project and clear assignment of responsibility for various project tasks to specific individuals.

- B Clarity, organization, and level of detail in Submittal.

- A Ability to effectively manage project construction.

- B Quality of communication skills of ESCO's representatives at the oral interview.

- B Clarity and reasonableness of proposed milestones and timeline for project implementation.
- B Comprehensiveness of monitoring, maintenance, and measurement and verification services on past projects.

IV-6. Technical Approach

- B Quality of proposed training for facility staff.
- A Quality of project-specific Preliminary Technical Energy Audit Report including comprehensiveness of analysis and understanding of existing building systems and conditions.
- B Comprehensiveness of the technical approach to past projects.
- B Conceptual design creativity demonstrated during the oral interview.
- A Quality of baseline energy calculations.
- A Quality of proposed Project Commissioning Plan.
- A Quality of proposed Maintenance Plan.
- A Quality of proposed Measurement and Verification Plan.

IV-7. Financial Approach

- A Reasonableness of proposed financing arrangement and financial analysis assumptions proposed for this project.
- A Reasonableness of the Preliminary Cost Submittal.
- B Completeness of most recent annual financial report.
- B Dollar value of projected energy savings.
- B Dollar value of projected operating savings and clarity of supporting documentation.
- C ESCO's proposed interest rate.

IV-8. Disadvantaged Business Participation Criteria:

Each proposal will be rated based upon the amount of its commitment to utilize small disadvantaged businesses as subcontractors and suppliers.

IV-9. Enterprise Zone Small Business Participation

The following options will be considered as part of the final criteria for selection:

Priority Rank 1. Proposals submitted by an Enterprise Zone Small Business will receive the highest score.

Priority Rank 2. Proposals submitted by a joint venture with an Enterprise Zone Small Business as a joint venture partner will receive the next highest score for this criterion.

Priority Rank 3. Proposals submitted with a subcontracting commitment to an Enterprise Zone Small Business will receive the lowest score for this criterion.

Priority Rank 4. Proposals with no Enterprise Zone Small Business Utilization shall receive no points under this criterion.

To the extent that a proposal is submitted as a prime contractor by an Enterprise Zone Small Business, the Enterprise Zone Small Business cannot enter into contract or subcontract arrangements for more than 40% of the total estimated dollar amount of the contract.

PART V PROJECT TERMS AND CONDITIONS

These sections describe the minimum conditions the **Agency** will accept from the selected ESCO. Part V-1 defines the **Scope of Services**, and Part V-2 defines **Key Contractual Provisions**.

V-1 SCOPE OF SERVICES--TECHNICAL REQUIREMENTS

- A. All energy audits, feasibility studies, engineering, design, plans and specifications shall be prepared, reviewed and approved by Professional Engineers licensed in the Commonwealth of Pennsylvania.
- B. The Commonwealth reserves the right of final approval of any selected equipment or modifications proposed. Only prior reviewed and approved equipment and modifications will be permitted. Review and approval shall be conducted by the Commonwealth in a timely manner.
- C. ESCO will be required to work with current building management and maintenance personnel, to coordinate construction and provide appropriate training in the operation of all retrofits. No equipment shall be installed that will require the hiring of additional personnel by the Commonwealth unless contract negotiations produce an explicit exemption from this rule for a specific installation.
- D. ESCO must provide two (2) complete sets of reproducible "as built" or such electronic equivalents as may be agreed to with the Agency) and record 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 to be submitted

within 30 days of the completed installation.

- E. ESCO shall be responsible for the proper removal offsite of all packaging materials and all replaced or demolished materials or equipment.
- F. Asbestos-containing materials and lead based paint may be present in locations where the work is to be performed. An asbestos-containing material is defined as any material or product containing asbestos in any amount greater than one percent. All suspect asbestos-containing building materials impacted by the work outlined in this RFP shall be tested or verified for the presence of asbestos which is the responsibility of ESCO. Individuals who perform asbestos work as part of this RFP shall comply with the Pennsylvania Labor and Industry Asbestos Occupation Accreditation and Certification Act as it may apply.
 - 1. It is required that ESCO does not disturb asbestos-containing materials and/or lead based paint in the course of its work causing building contamination. If the work as outlined in this RFP requires asbestos containing materials and/or lead to be disturbed and/or removed, it shall be performed by Pennsylvania Labor and Industry certified individuals for asbestos work complying with all applicable EPA and OSHA regulatory protocol for asbestos and lead. It is the responsibility of ESCO to provide control measures to protect building occupants whenever asbestos-containing materials are disturbed.
 - 2. All suspect asbestos-containing building materials impacted by the work outlined in this RFP shall be verified for the presence of asbestos prior to the start of work by one of the following procedures:
 - a) The Commonwealth has had asbestos surveys performed for suspect asbestos-containing materials at this facility. It is the responsibility of the ESCO to review Commonwealth asbestos survey reports for completeness and determine whether or not the materials that are to be impacted by the work of the RFP contain asbestos.
 - b) Samples shall be collected by a Pennsylvania Labor and Industry certified Building Inspector, following AHERA sampling protocol, for each suspect asbestos-containing building material. Samples must be sent to an asbestos laboratory for analysis via Polarized Light Microscopy (PLM) to determine if it is an asbestos-containing material. The laboratory utilized must be NVLAP accredited for PLM analysis. Sample locations shall be appropriately patched where samples are taken.
 - 3. Surveys for lead based paint have not been performed by the Commonwealth. The facility may have records available. If not, it is the responsibility of ESCO to sample lead painted surfaces for lead as it may apply to the scope of work. It is the responsibility of ESCO to follow OSHA regulations regarding lead based paint and take the appropriate steps, during the course of work as outlined in this RFP as it may apply to protect building occupants.

4. ESCO shall be responsible for all work that is performed by a subcontractor.
- G. ESCO will be required to fully disclose all costs and fees associated with this project as required in Attachment B: ESCO's Cost Submittal.
- H. Using the EPA's ENERGY STAR™ tools and resources for each eligible facility, the selected ESCO may be required to provide an estimated pre-retrofit Energy Performance Rating using Portfolio Manager, and an estimated post-retrofit Energy Performance Rating using the Delta Score Estimator as part of the Investment Grade Technical Energy Audit. The selected ESCO will be required to submit a completed Cash Flow Opportunity spreadsheet using the Cash Flow Opportunity Calculator (CFO Calculator) as part of the Investment Grade Technical Energy Audit Report. The selected ESCO will also be required to submit an updated ENERGY STAR™ rating for each eligible facility upon completion of each guaranteed year as part of the Guaranteed Energy Savings Agreement. Schedule P, DGS Reporting Requirements. Information regarding ENERGY STAR™ tools and resources, and a list of eligible facility types can be found at:
- http://energystar.gov/index.cfm?c=tools_resources.bus_energy_management_tools_resources
<http://www.energystar.gov/index.cfm?c=delta.index>
http://www.energystar.gov/ia/business/cfo_calculator.xls

In Attachment B-1, ESCO's Proposed Project Cost Form, include the projected cost to provide services and complete the application for all eligible buildings to receive the ENERGY STAR™ rating, if applicable. Include the projected cost of these services for each year of the contract in the column for Annual Service Fees in Attachment B-2, ESCO's Preliminary Annual Cash Flow Analysis Form.

V-2 CONTRACTUAL PROVISIONS:

- A. The contents of the AFQ and RFP as well as ESCO's proposal become part of the final contract.
- B. The Commonwealth reserves the right of final approval over the scope of work and all end-use conditions. Only prior reviewed and approved equipment and modifications will be permitted by the Agency.
- C. ESCO must carry the level of insurance required by the Commonwealth for both the construction and operations phases.
- D. All drawings, reports and materials prepared by ESCO in performance of the contract shall become the property of the Agency and shall be delivered to them as needed or within **XX [Insert number]** days after construction is completed and accepted by the Agency that the project is fully installed and operating.
- E. ESCO must secure all necessary licenses and permits and comply with all federal and state laws with respect to this project. All work completed under this contract must be in compliance with all building codes and appropriate accreditation, certification and licensing standards.

- F. The repayment obligation and term of the financing for this project must be arranged to coincide with the acceptance by the Agency that the project is fully installed and operating.
- G. ESCO's will be required to guarantee energy and cost savings on an annual basis. No credit for the achievement of savings above and beyond the annual guarantee will be credited to satisfy performance guarantees in future years of the contract. Annual reconciliation of the achieved savings will be required.
- H. Any change in subcontractors must be approved by the Agency.

V-3 Contract Requirements – Disadvantaged Business Participation and Enterprise Zone Small Business Participation: Commitments to Disadvantaged Businesses and/or Enterprise Zone Small Businesses made at the time of proposal submittal or contract negotiation must be maintained throughout the term of the contract. Any proposed change must be submitted to BMWBO which will make a recommendation as to a course of action to the contracting officer. All contracts containing Disadvantaged Business participation and/or Enterprise Zone Small Business participation must include a provision requiring Small Disadvantaged Business subcontractors and Enterprise Zone Small Business subcontractors to perform at least 50 percent of the subcontract.

If a contract is assigned to another contractor, the new contractor must maintain the Disadvantaged Businesses participation and/or Enterprise Zone Small Business participation of the original contract.

The contractor shall complete the Prime Contractor's Quarterly Utilization Report (or similar type document containing the same information) and submit it to the contracting officer of the Agency that awarded the contract and BMWBO within 10 workdays at the end of each quarter the contract is in force. If there was no activity, the form must also be completed, stating "No activity in this quarter." This information will be used to determine the actual dollar amount paid to Small Disadvantaged Business and/or Enterprise Zone Small Business subcontractors and suppliers, and Small Disadvantaged Businesses and/or Enterprise Zone Small Businesses involved in Joint Ventures. Also, it is a record of fulfillment of the commitment your firm made and for which it received Disadvantaged Business and Enterprise Zone Small Business points.

NOTE: EQUAL EMPLOYMENT OPPORTUNITY AND CONTRACT COMPLIANCE STATEMENTS REFERRING TO COMPANY EQUAL EMPLOYMENT OPPORTUNITY POLICIES OR PAST CONTRACT COMPLIANCE PRACTICES DO NOT CONSTITUTE PROOF OF DISADVANTAGED BUSINESS STATUS OR ENTITLE A PROPOSER TO RECEIVE CREDIT FOR DISADVANTAGED BUSINESS UTILIZATION.

ATTACHMENTS

ATTACHMENT A

ESCO's TECHNICAL SUBMITTAL

Each respondent is required to fully answer all questions in each category listed below. Provide your responses on 8 ½ " x 11" sheets of paper and number and title each answer to the corresponding category. Font size should be no smaller than 10 point. All pages in your response to this attachment should be numbered sequentially. Respondents must also include a Table of Contents that indicates the section and page numbers corresponding to the information included.

1. PROJECT MANAGEMENT

1.0 Project Summary

Summarize the scope of services (design, financial, operations, maintenance, training, etc.) offered by your firm for this project including the added value to the Commonwealth of your firm's services.

Include the following forms in the Project Summary:

1.0.1 ESCOs ECM SUMMARY FORM

1.0.2 ESCOs PROJECTED ANNUAL ENERGY SAVINGS DATA FORM

http://www.portal.state.pa.us/portal/server.pt?open=512&objID=1300&&SortOrder=100&level=3&parentid=1298&css=L3&mode=2&in_hi_userid=160673&cached=true

Use the following rates to calculate Avoided Emissions:

Emission Rate	Electric (per KWH)	Natural Gas (per MCF)	Steam* (per Mlbs)
Nox (lbs)	0.002723	000.01530	000.196820
SO2 (lbs)	0.009527	000.00061	000.000785
CO2 (lbs)	1.234000	119.342300	153.627000

* Assume 80% boiler efficiency and steam heat content of 1060 BTU/lb

1.0.3 ESCOs PROJECTED ANNUAL ENERGY SAVINGS DATA FORM IN MMBtus.

Forms are available in Adobe Acrobat Reader (.pdf) format at the DGS website for Guaranteed Energy Savings:

http://www.portal.state.pa.us/portal/server.pt?open=512&objID=1300&&SortOrder=100&level=3&parentid=1298&css=L3&mode=2&in_hi_userid=160673&cached=true

Use only the available forms to develop the Project Summary. Samples of these forms follow.

**ESCO's ECM SUMMARY FORM
(ATTACHMENT A – 1.0.1)
COMMONWEALTH OF PENNSYLVANIA
GUARANTEED ENERGY SAVING CONTRACT**

Proposed ECM	Installed Hard Costs ¹ \$	Annual Savings \$	Simple Payback (years)
1.			
2.			
3.			
4.			
5.			
6.			
7.			
8.			
9.			
10.			
11.			
12.			
13.			
14.			
15.			
16.			
17.			
18.			
19.			
20.			
Project Summary			

Optional ECM	Installed Hard Costs ¹ \$	Annual Savings \$	Simple Payback (years)
1.			
2.			
3.			
4.			
5.			
6.			
7.			
8.			
9.			
10.			

¹The total value of Hard Costs is defined in accordance with standard AIA definitions that include: Labor Costs, Subcontractor Costs, Cost of Materials and Equipment, Temporary Facilities and Related Items, and Miscellaneous Costs such as Permits, Bonds Taxes, Insurance, Mark-ups, Overhead, Profit, etc.

ESCO's PROJECTED ANNUAL ENERGY SAVINGS DATA FORM
(ATTACHMENT A – 1.0.2)
COMMONWEALTH OF PENNSYLVANIA
GUARANTEED ENERGY SAVING CONTRACT

The projected annual savings for each fuel type MUST be completed using the following format. Data should be given in the form of fuel units that appear in the utility bills.

	Proposed Savings Annual	Proposed Savings Total Project Term	Comments
Electric Demand KW			
Electric Energy KWH			
Natural Gas (Units)			
Fuel Oil (Units)			
Steam (Units)			
Water (Units)			
Other (Specify) (Units)			
Other (Specify) (Units)			
AVOIDED EMISSIONS¹			
NOX			
SO₂			
CO₂			

¹ESCOs are to use the rates indicated in the RFP, under Attachment A 1.0 Project Summary, to calculate Avoided Emissions.

ESCO's PROJECTED ANNUAL ENERGY SAVINGS DATA FORM IN MMBTUs
(ATTACHMENT A – 1.0.3)
COMMONWEALTH OF PENNSYLVANIA
GUARANTEED ENERGY SAVING CONTRACT

The projected annual energy savings for each fuel type MUST be completed using the following format. Data should be given in equivalent MMBTUs.

ENERGY/WATER	Proposed Savings Annual	Proposed Savings Total Project Term	Comments
Electric Energy (MMBTUs)			
Natural Gas (MMBTUs)			
Fuel Oil (MMBTUs)			
Steam (MMBTUs)			
Other (Specify) (MMBTUs)			
Other (Specify) (MMBTUs)			

1.0 Organization Chart and Project Team Members

Submit an organizational chart that clearly identifies the roles and relationships of all key team members.

Describe the relevant experience, qualifications and educational background of up to ten (10) individual team members assigned to this project using the following form:

- 1.1. ESCOs Team Member Qualification Form.** Do not include individual resumes in lieu of this information.

Forms are available in Adobe Acrobat Reader (.pdf) format at the DGS website for Guaranteed Energy Savings:

http://www.portal.state.pa.us/portal/server.pt?open=512&objID=1300&&SortOrder=100&level=3&parentid=1298&css=L3&mode=2&in_hi_userid=160673&cached=true

Use only the available form to provide the required information for each of the Project Team Members. A sample form follows.

**ATTACHMENT A-- 1.1
ESCOs Team Member Qualification Form**

Personnel Information	
Name of project team member:	
Current Employment Current job title: Job responsibilities: Number of years with ESCO: Primary office location: Job responsibilities:	
Previous Employment Company name: Number of years with firm: Job responsibilities:	
Educational Background Degrees/disciplines: College/university:	
Professional/Technical Professional affiliations: Publications: Technical training: Indicate the total years of relevant energy-related experience for this individual:	
Five Year History of Energy Performance Contracting Project Experience	
List all energy performance contracting projects this individual has been involved with during the past five years including: project location: type of facilities: year implemented: dollar value of installed project costs:	
Describe the specific role and responsibilities this individual had for each listed project.	
Provide a detailed description of the role and responsibilities this individual will have for the duration of this project.	
Describe any other relevant technical experience.	

1.2 Project Work Plan and Milestones

Describe your proposed management plan for accomplishing the work. Provide a project work plan to include all tasks and activities and along with a sample timeline of milestones necessary to implement all phases of the project.

1.3 Training Provisions

Describe your firm's proposed approach to providing technical training for facility personnel. Indicate the proposed number of personnel to be trained and the type and frequency of training to be provided for the duration of the contract. Indicate how your firm will address any turnover of key facility personnel as it relates to project performance.

1.4 Project Financing

Describe your firm's preferred approach to providing or arranging financing for this project. Describe the structure of the financing arrangement including projected interest rate, financing term, repayment schedule, equipment ownership, security interest required, the responsibilities/liabilities of each party, and any special terms and conditions that may be associated with the financing of this project. Describe how construction will be financed. Include your firm's bonding references including company name, address, contact person, telephone number and information on your firm's maximum bonding capability.

1.5 Annual Report

Submit a copy of your firm's most recent annual report.

1.6 Project History And Client Reference Form

Provide at least 5 (five) and no more than 10 (ten) energy performance contracting projects (client references) in repayment by and currently under contract with your firm. **Each project must have at least one (1) year of documented savings performance data.** Each client reference shall be completed utilizing the following form:

http://www.portal.state.pa.us/portal/server.pt?open=512&objID=1300&&SortOrder=100&level=3&parentid=1298&css=L3&mode=2&in_hi_userid=160673&cached=true

All information requested is required.

Forms are available in Adobe Acrobat Reader (.pdf) format at the DGS website for Guaranteed Energy Savings:

http://www.portal.state.pa.us/portal/server.pt?open=512&objID=1300&&SortOrder=100&level=3&parentid=1298&css=L3&mode=2&in_hi_userid=160673&cached=true

Limit your response to ONLY those projects that have been managed directly by the specific branch, division, office or any individual in such branch, division or office that will be specifically assigned to this project. Please put an asterisk by any project references involving buildings similar to the building(s) described in the technical appendices.

Information for each of the Annual Savings listed MUST be completed using the format provided. DO NOT provide energy savings in terms of BTU's or dollars. Data should be given in the form of fuel units that appear in the utility bills.

Use only the available form to develop the Project History and Client References. A sample form follows.

<p>ESCO PROJECT HISTORY AND CLIENT REFERENCE FORM (ATTACHMENT A—1.6) COMMONWEALTH OF PENNSYLVANIA GUARANTEED ENERGY SAVINGS CONTRACT</p>

Project History	
Project Name and Location	
Type of Facility(s) and Use; Number of Buildings; Total Square Footage	
Number and Types of ECMs	
Project Dollar Amount (installed project costs)	
Financed Project Cost	
Source of Project Financing	
Construction Start and End Dates	
Guarantee Period Start & End Dates	
Indicate if the project was completed on schedule. If not, please explain.	
Dollar Value of Projected Annual Energy Savings	
Dollar Value of Guaranteed Annual Energy Savings	
Dollar Value and Type of Annual Operational Cost Savings, if applicable (e.g., outside maintenance contracts, material savings, etc.).	
Method(s) of Savings Measurement and Verification	
Identify all ESCO personnel associated with this project and their specific role(s) and responsibility(s). Limit the identification of personnel to those who will be assigned to this project.	
Provide current and accurate telephone and fax numbers and email address of the owner(s)' representatives with whom your firm did business on this project. You should ensure that all representatives are familiar with this project.	

PROJECT HISTORY SAVINGS FORM

Project Name, Location							
Performance Information							
Annual Savings (List Commodity Savings in Units – not Dollars)	Projected	Guaranteed	Achieved				
			Year 1	Year 2	Year 3	Year 4	Year 5
Electric Demand (KW)							
Electric Energy (KWH)							
Natural Gas							
Fuel Oil							
Steam							
Water							
Other (Specify)							
Other (Specify)							
Material (\$)							
• Maintenance Contracts (\$)							
Total Annual Savings (\$)							
ESCO Notes or Comments							

ATTACHMENT A-1

SUBCONTRACTORS QUALIFICATIONS FORM

The **SUBCONTRACTORS QUALIFICATIONS FORM, ATTACHMENT A-1** must be submitted for each of the identified subcontractors who will be involved in this project.

Forms are available in Adobe Acrobat Reader (.pdf) format at the DGS website for Guaranteed Energy Savings:

http://www.portal.state.pa.us/portal/server.pt?open=512&objID=1300&&SortOrder=100&level=3&parentid=1298&css=L3&mode=2&in_hi_userid=160673&cached=true

Use only the available forms to submit the qualifications of the subcontractors. A sample form follows.

ATTACHMENT A-1
INFORMATION REQUIRED FROM SUBCONTRACTORS
Statement of Qualifications

The following information must be submitted for each of the identified subcontractors who will be involved in this project.

1. Firm Name _____

Business Address _____

City _____ State _____ Zip Code _____

1a. Names and Titles of Two Contact People

1) _____ Phone (_____) _____

2) _____ Phone (_____) _____

2. Type of Firm: Corporation Partnership Sole Ownership Joint Venture

3. Federal Employer Identification Number _____ 4. Year Firm was Established _____

5. Name and Address of Parent Company, if applicable: _____

6. Former Firm Name(s), if applicable: _____

7. Five Year Summary of Contract Values for Energy-Related Projects:

20__ : \$ _____ (to date) 20__ : \$ _____

20__ : \$ _____ 20__ : \$ _____ 20__ : _____

8. **CORPORATE BACKGROUND/HISTORICAL DATA**

8a. How many years has your firm been in business under its present business name? ____ Years

8b. Indicate all other names by which your organization has been known and the length of time known by each name.

8c. How many years has your firm been involved in energy-related business? ____ Years

8d. Certify that your company does not owe the Commonwealth any taxes.

8e. Certify that your company is not currently under suspension or debarment by the Commonwealth, any other state, or the federal government.

9. **TECHNICAL QUALIFICATIONS AND PERSONNEL INFORMATION**

9a. Attach the resumes of the principal individuals who will be directly involved in this project. Indicate their specific qualifications including educational background, supervisory responsibilities, number of years of relevant experience and the specific role they will play in this project.

10. FINANCIAL REFERENCES

- 10a. Provide a company prospectus to include a Balance Sheet and Cash Flow statement not more than a year old.
- 10b. Please provide the name, address, and the telephone number of the firm(s) that prepared the Financial Statements.

NOTE: All questions must be addressed in order for this qualification form to be properly completed. Failure to answer any question, or comply with any directive contained in this form may be used by the Commonwealth as grounds to find the respondent ineligible. If a question or directive does not pertain to your organization in any way, please indicate that fact with the symbol N/A.

ATTACHMENT A-2 TECHNICAL ASSESSMENT

Include under separate cover clearly labeled "Attachment A-2: Technical Assessment and Preliminary Technical Energy Audit Report" with the name of the submitting firm on the outside of the envelope.

2.0 Technical Site Assessment

Based upon your preliminary technical energy audit and available information discuss the site conditions, status of building systems, current operating procedures and potential cost-effective energy improvement opportunities. Describe any equipment modifications, installations or replacements at the facilities that you propose to implement and those that warrant further study. Describe any operational changes you would recommend.

2.1 Energy Baseline Calculation Methodology, Procedure for Calculating Energy and Cost Savings, and Measurement and Verification Plan

Describe in the methods used to compute baseline energy use. Describe any computerized modeling programs used by your firm to establish baseline consumption. Please summarize procedures, formulas and methodologies including any special metering or equipment, your firm will use to measure and calculate energy savings for this project. Describe the methods used to adjust the guaranteed level of savings from any material changes that occur due to such factors as weather, occupancy, facility use changes, etc. Provide a project-specific Measurement and Verification Plan. Indicate any operational cost savings opportunities and how such savings are to be identified, documented and measured. Describe your firm's proposed approach to treatment of savings achieved during construction and how those savings will be documented and verified.

2.2 Project Commissioning

Provide a proposed project-specific Commissioning Plan.

2.3 Equipment Maintenance Plan

Submit a proposed project-specific Maintenance Plan. Include a description of any major changes in operations or maintenance for this project that your company anticipates. Include a description of the types of maintenance services projected for this project. Address how you would approach the role of The Agency personnel in performing maintenance on the new and

existing and equipment. Discuss the relationship of maintenance services to the savings guarantee, any required duration of the maintenance agreement and what impact termination of maintenance prior to the end of the contract term would have on the guarantee.

2.4 ESCO's Preliminary Technical Audit Report

This audit is to be conducted by your firm on the project sites identified in Exhibit IV. **At a minimum**, the following information is required:

- Identification of preliminary ECMs
- Detailed energy and operational cost savings calculations
- Technical data and assumptions used in this analysis
- Methods to develop baseline consumption
- Methods to calculate & document operational cost savings

ATTACHMENT B

ESCOs COST PROPSAL

The Cost Submittal forms shall be submitted in a separate sealed envelope and kept separate from the Technical Submittal, Disadvantaged Businesses Information, and Energy Audit Agreement. One (1) copy shall be submitted and clearly marked "**Attachment B: Cost Submittal**" with the name of the submitting ESCO on the outside of the envelope. ESCO's Cost Submittal must contain only one base case project to be evaluated and ranked. The base case submittal should clearly marked.

In the Cost Submittal include the following forms:

1. ESCOs PROPOSED PROJECT COST FORM Attachment B-1:

ESCOs PRELIMINARY ANNUAL CASH FLOW ANALYSIS FORM, Attachment B-2:

Forms are available in Adobe Acrobat Reader (.pdf) format at the DGS website for Guaranteed Energy Savings:

http://www.portal.state.pa.us/portal/server.pt?open=512&objID=1300&&SortOrder=100&level=3&parentid=1298&css=L3&mode=2&in_hi_userid=160673&cached=true

Use only the following forms to develop the Cost Submittal. Samples of these forms follow.

(ATTACHMENT B-1)

**ESCOs PROPOSED FINAL PROJECT COST FORM FOR BASE CASE PROJECT
COMMONWEALTH OF PENNSYLVANIA
GUARANTEED ENERGY SAVING CONTRACT**

Project Name:
Agency Name:

ESCO Name:

Fee Category	Fees ⁽¹⁾ Dollar (\$) Value	Percentage of Hard Costs
Estimated Value of Hard Costs ^{(2):}		
Project Service Fees		
Investment Grade Energy Audit		
Design Engineering Fees		
Construction Management		
System Commissioning		
Equipment Initial Training Fees		
Contingency Costs		
Construction Interest		
DGS Project Management Fee ⁽³⁾		
Project Service Fees Sub Total		
TOTAL FINANCED PROJECT COSTS:		

PROPOSED ANNUAL SERVICE FEES

First Year Annual Service Fees	Fees ⁽¹⁾ Dollar (\$) Value	Percentage of Hard Costs
Measurement and Verification		
ENERGY STAR™ Services		
Maintenance		
Performance Monitoring		
On-going Training Services		
Verification Reports		
TOTAL FIRST YEAR ANNUAL SERVICES		

NOTES:

1. Fees should include all mark-ups, overhead, and profit. Figures stated as a range will not be accepted.
2. The total value of Hard Costs is defined in accordance with standard AIA definitions that include: Labor Costs, Subcontractor Costs, Cost of Materials and Equipment, Temporary Facilities and Related Items, and Miscellaneous Costs such as Permits, Bonds Taxes, Insurance, Mark-ups, Overhead and Profit, etc.
3. The DGS Project Management Fee to be included should be based on the values contained in Attachment B-3

ESCO's proposed interest rate available at the time of submission:

Financial Institution:

Contact person:

**(ATTACHMENT B-2) ESCO's PRELIMINARY ANNUAL CASH FLOW ANALYSIS FORM
COMMONWEALTH OF PENNSYLVANIA - GUARANTEED ENERGY SAVING CONTRACT**

Financed Project Cost ¹:
 Finance Term (months):
 Annualized Interest Rate:
 Construction Period² (months):
 Escalation Rates for Annual Fees:

Escalation Rates by Utility & Fuel
 Electric: 2.0% Water: 3.0%
 Natural Gas: 2.5% Operational: 2.0%
 Steam: 3.0% Coal: 3.0%
 Fuel Oil: 2.5% Other (Specify): 0.0%

Yr.	Electric Cost Savings	Natural Gas Cost Savings	Fuel Oil Cost Savings	Steam Cost Savings	Water Cost Savings	Operational Cost Savings	Other	Total Cost Savings	Guaranteed Cost Savings	Annual Service Fees ³	Financing Payment	Net Savings
1												
2												
3												
4												
5												
6												
7												
8												
9												
10												
11												
12												
13												
14												
15												
Total												

NOTES: 1. Includes: Hard costs and project service fees defined in ESCO's PROPOSED PROJECT COST FORM, Attachment B-1.

2. No payments are made by Agency during the construction period.

3. This figure should equal the value indicated on the ESCO's PROPOSED PROJECT COST FORM, Attachment B-1. DO NOT include in the Financed Project Costs.

ATTACHMENT B-3

Commonwealth of Pennsylvania

GESA Management Fee Schedule

Total Amount of Project	Total \$ Flat Fee
\$ 100,000 to \$ 199,999	\$ 4,000
\$ 200,000 to \$ 299,999	\$ 5,000
\$ 300,000 to \$ 399,999	\$ 6,000
\$ 400,000 to \$ 499,999	\$ 7,000
\$ 500,000 to \$ 599,999	\$ 8,000
\$ 600,000 to \$ 699,999	\$ 9,000
\$ 700,000 to \$ 799,999	\$ 10,000
\$ 800,000 to \$ 899,999	\$ 11,000
\$ 900,000 to \$ 999,999	\$ 13,000
\$ 1,000,000 to \$ 1,999,999	\$ 15,000
\$ 2,000,000 to \$ 2,999,999	\$ 20,000
\$ 3,000,000 to \$ 3,999,999	\$ 25,000
\$ 4,000,000 to \$ 4,999,999	\$ 30,000
\$ 5,000,000 to \$ 5,999,999	\$ 35,000
\$ 6,000,000 to \$ 6,999,999	\$ 40,000
\$ 7,000,000 to \$ 7,999,999	\$ 45,000
\$ 8,000,000 to \$ 8,999,999	\$ 50,000
\$ 9,000,000 to \$ 9,999,999	\$ 55,000
\$10,000,000 to \$19,999,999	\$ 60,000
\$20,000,000 to \$29,999,999	\$ 80,000
\$30,000,000 to \$39,999,999	\$100,000
\$40,000,000 to \$49,999,999	\$120,000
\$50,000,000 to \$59,999,999	\$140,000

ATTACHMENT C

DISADVANTAGED BUSINESS INFORMATION & ENTERPRISE ZONE SMALL BUSINESS UTILIZATION DOCUMENTATION

The Disadvantaged Business Information & Enterprise Zone Small Business Utilization Documentation shall be submitted in a separate sealed envelope and kept separate from the Technical Submittal, Cost Submittal, and Energy Audit Agreement. One (1) copy shall be submitted and clearly marked "Attachment C: Disadvantaged Business Information" with the name of the submitting ESCO on the outside of the envelope.

The required documentation included with the Disadvantaged Business Information & Enterprise Zone Small Business Utilization Documentation is detailed in Parts II-4 and II-5 of this RFP.

ATTACHMENT D

ENERGY AUDIT AGREEMENT

A completed and signed ENERGY AUDIT AGREEMENT shall be submitted in a separate sealed envelope and kept separate from the Technical Submittal, Cost Submittal, and Disadvantaged Businesses Information. One (1) copy shall be submitted and clearly marked "Attachment D: ENERGY AUDIT AGREEMENT" with the name of the submitting ESCO on the outside of the envelope.

The ENERGY AUDIT AGREEMENT is available in Microsoft WORD document format at the DGS website for Guaranteed Energy Savings:

http://www.portal.state.pa.us/portal/server.pt?open=512&objID=1300&&SortOrder=100&level=3&parentid=1298&css=L3&mode=2&in_hi_userid=160673&cached=true

Each ESCO must download, properly sign and return the Energy Audit Agreement with their proposal. Use only the most current document from the DGS website.

EXHIBIT I

PREVAILING WAGE RATES

Regulations for Prevailing Wage Act: Subchapter E. PREVAILING REGULATIONS can be found at the following Internet address:

<http://www.dli.state.pa.us/landi/CWP/view.asp?a=185&Q=58341>

Following are the prevailing wage rates that the contractor and its subcontractors shall be required to pay workers on this project. The contract shall be subject to the provisions, duties, obligations, remedies, and penalties of the Pennsylvania Prevailing Wage Act, Act of August 15, 1961, P.L. 981, as amended, 43 P.S. Section 165-1 et seq. If the Agency decides to proceed and executes an Energy Audit Agreement and / or a Guaranteed Energy Savings Contract with the selected ESCO, the selected ESCO will be responsible for using the most current Wage Rate information available.

[Instructions to RFP Issuer:

Use the form at the following internet address to request the latest Prevailing Wage information from the Pennsylvania Department of Labor & Industry.

http://www.dli.state.pa.us/landi/li_apps/requestPW.asp.

The information provided by the Pennsylvania Department of Labor & Industry is valid for a period of 120 days.]

EXHIBIT II

GUARANTEED ENERGY SAVINGS CONTRACT

A standard copy of the most current GUARANTEED ENERGY SAVINGS CONTRACT can be found at the DGS web site at the following Internet address:

http://www.portal.state.pa.us/portal/server.pt?open=512&objID=1300&&SortOrder=100&level=3&parentid=1298&css=L3&mode=2&in_hi_userid=160673&cached=true

The link for the standard contract is labeled: 'GUARANTEED ENERGY SAVINGS AGREEMENT'. It is the responsibility of ESCOs responding to this RFP to be familiar with this document. If a guaranteed energy savings contract is executed with the selected ESCO, this contract will be used.

EXHIBIT III

ACT 28 OF APRIL 9, 1990, (71 P.S. §2420) Section 2420. State Heating Systems to be Fueled by Coal.

- I. The following words and phrases when used in this article shall have, unless the context clearly indicates otherwise, the meanings given to them in this section:

"Coal." Coal produced from mines in Pennsylvania or any mixture or synthetic derived, in whole or in part, from coal produced from mines in Pennsylvania.

"Mixture derived, in whole or in part, from coal." Includes, but is not limited to, both the intermittent and the simultaneous burning of natural gas with coal or a coal derivative if the intermittent or simultaneous burning of natural gas would:

 - A. lower the cost of using coal or a coal derivative produced from mines in Pennsylvania; or
 - B. enable coal or a coal derivative produced from mines in Pennsylvania to be burned in compliance with present and reasonable anticipated environmental laws and regulations.
- II. Any heating system or heating unit installed in a facility owned by the State on or after the effective date of this section shall be fueled by coal.
- III. Any heating system or heating unit shall be exempt from the requirement of subsection (b) if the Secretary of General Services determines that:
 - A. using coal as the fuel for that heating system or heating unit would violate existing or reasonably anticipated environmental laws or regulations;
 - B. using coal as the fuel for that heating system or heating unit would not be cost effective when compared to using other forms of energy;
 - C. using electricity generated primarily from the combustion of coal would be more cost effective when compared to using coal as the fuel for that heating system or heating unit;
 - D. the principal fuel for that heating system or heating unit would be natural gas from wells located in Pennsylvania or wood from forests located in Pennsylvania, if such fuel were at least as cost effective as using coal as the fuel; or
 - E. that heating system or heating unit was in or beyond the design stage before the effective date of this act.
- IV. In the determining cost-effectiveness under clauses (2), (3) and (4) of subsection (c), the Secretary of General Services shall perform a life cycle cost analysis.
- V. The Secretary of General Services shall report to the Appropriations Committees of the House of Representatives and the Senate the basis for any determination that a heating system or heating unit shall be exempt from the requirement of subsection (b).

EXHIBIT IV

TECHNCAL PROFILE OFPROJECT SITE(s)

[Insert the Attachment A: Technical Facility Profile, information that accompanied the Request For Expression of Interest. Furthermore, this is your opportunity to focus ESCOs toward specific needs of your facility.]

APPENDIX C-1:

SAMPLE EVALUATION FORMS

Phase 1: Written Qualifications

Phase 2: Client Reference Checks

Phase 3: Evaluation: Oral Interviews

Insert Name of Agency
Guaranteed Energy Savings Project

Sample Form for Phase 1 Evaluation
Written Qualifications

Your Name: _____

ESCO Name: _____

INSTRUCTIONS: Please note the difference between the rankings of "Not Acceptable" and "Unable To Rank." If you feel you do not have the expertise or knowledge to rank a specific criterion, please indicate "No Value" (NV) under "Unable to Rank." This ranking will not penalize the respondent. If a respondent fails to address a specific criterion or is nonresponsive to any criterion, please indicate "Not Acceptable" (0 points). This ranking will be factored into the overall ranking for the responding firm. The criteria have been weighted to reflect it's relative significance. Criteria labeled "A" are weighted by a factor of 3 (most significant), and "B" criteria are weighted by a factor of 2 (significant).

PLEASE NOTE: The following criteria and weightings can be added to or changed in accordance with your agency's specific needs.

Criteria	5 points	4 points	3 points	2 points	1 point	0 points	Unable to Rank (No Value)	Discussion
Experience:								
Level of past experience with similar projects A								
Qualifications of key personnel assigned to this project A								
Ability to achieve projected energy savings on past projects A								
Amount of experience in arranging project financing B								

Criteria	5 points	4 points	3 points	2 points	1 point	0 points	Unable to Rank (No Value)	Discussion
Project Management:								
Clarity, organization and level of detail in written response B								
Clear assignment of responsibility for various tasks to specific individuals. A								
Quality of Project History and Client Reference documentation A								
Project Management (cont'd):								
Quality of sample training description B								
Clarity of standard billing procedures & <i>Sample Customer Savings Report</i> B								
Approach to construction scheduling B								
Technical:								
Quality of preliminary technical assessment and approach to project B								
Quality of sample savings measurement and verification plan A								
Accuracy and clarity of baseline calculations and quality of computer modeling programs A								
Method(s) for determining and making baseline adjustments A								
Quality of approach to technical energy audit and analysis B								

Criteria	5 points	4 points	3 points	2 points	1 point	0 points	Unable to Rank (No Value)	Discussion
Understanding of the existing building conditions, systems, operations and schedules B								
Quality and attractiveness of approach to project operation and maintenance B								
Quality of Sample Maintenance Plan B								
Quality of approach and project commissioning and Sample Commissioning Plan B								
Quality of Sample Investment Grade Technical Energy Audit A								
Financial:								
Financial soundness of ESCO A								
Estimated audit cost B								
Attractiveness of the ESCO's proposed fee calculation B								
Accuracy and clarity of methods for measuring project's financial performance and documenting energy and operational cost savings A								
Attractiveness of proposed savings guarantee and methods of reconciliation A								
Attractiveness of the ESCO's preferred approach to project financing B								

Insert Name of Agency
Guaranteed Energy Savings Project

Sample Form for Phase 2 Evaluation
Client Reference Checks

Your Name: _____ ESCO Name: _____
 Reference Name And Title: _____ Phone: (____) _____
 Project Facility Type/Use: _____ Installed Project Cost: \$ _____
 Construction Completion Date: _____ Description of Equipment Installed: _____

The evaluation criteria listed below, corresponds to the interview questions to be used when conducting client reference checks. The ranking system uses the qualities listed below, to evaluate the information provided by the references in response to each of the criterion outlined below. Please be certain that each client reference indicates a specific ranking in response to each of the questions asked. It is extremely important to instruct the client references on the difference between the "Inadequate" and "Unable to Rank" categories. An "Inadequate" ranking is given when the information requested to be provided or asked of the ESCO is insufficient, nonresponsive or of poor quality. An "Inadequate" ranking has a negative impact on point scoring. An "Unable to Rank" scoring, however, has no impact on point scoring and is assigned when the evaluator has insufficient personal knowledge or experience to be able to fairly evaluate the information provided. It is recommended that interviews be conducted by phone. Please do not attempt to interpret client reference responses. The discussion space next to each criterion is provided for you or the reference to elaborate on any problems or instances of outstanding performance as applicable. Criteria labeled "A" are weighted by a factor of 3 (most significant), and "B" criteria are weighted by a factor of 2 (significant).

PLEASE NOTE: The following criteria and weightings can be added to or changed in accordance with your agency's specific needs

Criteria	5 points	4 points	3 points	2 points	1 point	0 points	Unable to Rank (No Value)	Discussion
Experience:								
Please rank your satisfaction with achieved energy savings to-date A								

Criteria	5 points	4 points	3 points	2 points	1 point	0 points	Unable to Rank (No Value)	Discussion
Please rank the overall competence of the ESCO's project staff A								
Please rank the ESCO's ability to complete the project on schedule B								
Experience (cont'd):								
Please rank the quality of the ESCO's communication skills and responsiveness to staff's requests for information A								
Please rank the ESCO's management of subcontractors B								
Please rank their ability to meet the design phase schedule of the project. A								
Please rank their ability to meet the construction schedule. A								
Please rank the ESCO's coordination of construction scheduling with facility staff A								
Please rank the quality of the project's technical design A								
Please rank the quality of the project's technical documentation provided by the ESCO B								
Please rank the quality of technical training provided by the ESCO B								
Technical:								
Please rank the ESCO's understanding of your facility's equipment and systems A								

Criteria	5 points	4 points	3 points	2 points	1 point	0 points	Unable to Rank (No Value)	Discussion
Please rank the comprehensiveness of the retrofits designed and installed by the ESCO A								
Please rank the quality of the ESCO's equipment commissioning services A								
Please rank the reliability of the project's equipment performance B								
Technical (cont'd):								
Please rank the quality of the ESCO's maintenance and monitoring services B								
Please rank your satisfaction with the ESCO's method of measuring and documenting project savings A								
Financial:								
Please rank the ESCO's ability to arrange timely and attractive project financing B								
Please rank the ESCO's consistency in providing customer savings reports on schedule. B								
Please rank the quality of the ESCO's customer savings reports. B								
Please rank your satisfaction with terms of the ESCO's energy savings guarantee A								
Please rank the reasonableness of project costs and ESCO fees for services A								

Please have your client references respond to the following three questions and record their responses in the space provided below. This information is for discussion purposes only and will not be ranked.

1. Why did you select this particular company?
2. In your opinion what was the ESCO's greatest strength?
3. In your opinion, what was the ESCO's greatest weakness?
4. If you could change any aspect or provision of your contract with this company, what would that change be?
5. Would you enter into another contract with this company? Why or why not?

Insert Name of Agency
Guaranteed Energy Savings Project

Sample Form for Phase 3 Evaluation
Oral Interviews

Your Name _____ ESCO Name _____

INSTRUCTIONS: Please note the difference between the rankings of "Not Acceptable" and "Unable To Rank." If you feel you do not have the expertise or knowledge to rank a specific criterion, please indicate "No Value" (NV) under "Unable to Rank." This ranking will not penalize the respondent. If a respondent fails to address a specific criterion or is nonresponsive to any criteria, please indicate "Not Acceptable" (0 points). This ranking will be factored into the overall ranking for the responding firm. Criteria labeled "A" are weighted by a factor of 3 (most significant), and "B" criteria are weighted by a factor of 2 (significant).

PLEASE NOTE: The following criteria and weightings can be added to or changed in accordance with your agency's specific needs

Criteria	5 points	4 points	3 points	2 points	1 point	0 points	Unable to Rank (No Value)	Discussion
Experience:								
Qualifications and responses of the ESCO's technical design personnel A								
Qualifications and responses of the ESCO's technical personnel B								
Adequacy of the ESCO's discussion of past project performance B								
Project Management:								
Overall quality of communication skills of the ESCO's representatives B								

Criteria	5 points	4 points	3 points	2 points	1 point	0 points	Unable to Rank (No Value)	Discussion
Quality of the ESCO's approach to project development and construction management B								
Quality and scope of the ESCO's proposed training services B								
Project Management (cont'd):								
Details of the ESCO's proposed approach to project maintenance B								
Quality of the ESCO's proposed equipment monitoring services and savings reporting A								
Technical:								
Demonstrated understanding of existing building conditions and facility systems A								
Technical creativity of the ESCO's representatives A								
Details of preliminary technical energy measures A								
Details of approach to project commissioning A								
Details of approach to energy savings measurement and verification A								
Financial:								
Details of proposed financial arrangement B								

Criteria	5 points	4 points	3 points	2 points	1 point	0 points	Unable to Rank (No Value)	Discussion
Adequacy of methods for measuring the project's financial performance B								
Terms of proposed energy savings guarantee & annual reconciliation A								
Quality of preliminary utility cost savings projections B								
Method for determining the ESCO's annual fees B								
ESCO's willingness to comply with open book pricing policies B								

APPENDIX C-2:

SAMPLE LETTER OF INVITATION TO ORAL INTERVIEWS

ORAL INTERVIEW INSTRUCTIONS FOR ESCOs

(NOTE: This letter can be reproduced on Agency letterhead.)

Dear *(insert name of ESCO)*:

The oral interview format has been chosen to preserve the integrity of each ESCOs specific project proposal. It is anticipated that this competitive format will encourage ESCOs to fully disclose their unique solutions for the facility. The evaluation team should be prepared to present an estimated range of energy and demand savings available in the facility and the basis of the estimates. ESCOs also are asked to estimate the range of gross annual energy and cost savings available in the facility(ies) and the basis for their estimates.

Logistics

Oral presentations/interviews will be held on _____, 20____ in the _____ conference room at _____. The exact time of your presentation has been sent to you under separate cover. Should questions still exist as to what time your session is, please contact: _____ at (____) _____.

Please inform _____ by 5:00 p.m. on _____, 2____, if you will have any special requirements regarding presentation media (e.g., slide projectors, overhead projectors, screens, movie or video tape machines, easels, etc.) Also, please let us know the expected number of people in your party so that enough chairs and refreshments can be provided.

Interview Format

General Interview Segment (1-1 1/2 Hours)

Introductions

Companies will be limited to no more than a 20-minute presentation to overview their qualifications and approach to the proposed project. This should include design, construction, financing, training, O&M services, performance monitoring, and performance enhancement. A detailed description of the responsibilities assigned to each member of the project team over the life of the project is requested. (The 20-minute time limit will be enforced).

The remaining portion of this segment will be used to ask specific questions which will include but not be limited to the topics that follow. The company will be asked to respond to direct questions posed by the evaluation team during this portion of the interview process. The company will not be required to prepare formal responses in advance of the interview.

Interview Topics

1. Accuracy of predicted performance on past projects installed or managed by the firm.
2. Ability to complete construction on schedule.

3. Methodology used to calculate project savings, measure performance, and assign dollar values to savings over the term of the contract.
4. Method of project invoicing.
5. Proposed arrangements for equipment service and maintenance provisions over the contract term.
6. Terms of the guarantee offered to insure the project's financial performance.
7. The firm's preferred approach to project financing.
8. Key provisions and flexibility of legal agreement submitted.

Site Specific Segment (1 Hour)

This segment will focus on the firm's technical approach to improving the energy efficiency and reducing energy costs at the facility. In lieu of a formal presentation you will be asked to respond to specific questions that will include but not be limited to the following topics:

1. Technical measures likely to be included in a contract, measures that merit more study, and measures previously proposed which seem likely to be rejected.
2. Site-specific operational and maintenance changes proposed.
3. Estimated range of energy and demand savings available and the basis for those estimates.
4. Estimated range of gross annual energy and cost savings available and the basis for those estimates.
5. Specific methods of equipment commissioning and savings performance monitoring.

If you have any questions or require additional information please contact: (Insert name, address, phone and fax numbers).

Sincerely,

Contact Person
Title

APPENDIX D-1: COMMONWEALTH OF PENNSYLVANIA INVESTMENT GRADE ENERGY AUDIT AGREEMENT

ENERGY AUDIT AGREEMENT

[Insert Agency Name]

[Insert Facility Name]

This Energy Audit Agreement is entered into on _____, 200__, by and between the _____ (*Insert the name of the agency*) of the Commonwealth of Pennsylvania (hereinafter referred to as the "**Agency**") and _____ (the "**ESCO**"). The Agency and the ESCO are referred to herein as the "**Parties**".

Whereas, the Agency has issued a Request for Proposals (RFP) to select a qualified energy performance contractor to implement a guaranteed energy savings contract in accordance with the requirements of Act 57 of 1998, 62 Pa. C.S. §3751-3757 as amended by Act 77 of 2004, 62 Pa. C.S. §3752-3758 ("Acts 57/77") at _____ (the "Facility(s)");

Whereas, the ESCO submitted a proposal in response to the RFP;

Whereas, the Agency has evaluated the proposals submitted by qualified energy service companies and has selected the ESCO;

Whereas, the Agency is responsible for the operation, management and maintenance of the Facility(s);

Whereas, a comprehensive investment grade energy use and savings analysis (the "**Energy Audit**" and **Report**) must be performed at the Facility(s) in order to determine the feasibility of entering into a guaranteed energy savings contract to provide for the installation and implementation of energy conservation measures (ECMs) at the Facility(s);

Whereas, if the ECMs are demonstrated to be feasible, and if the amount of energy savings can be reasonably ascertained and guaranteed in an amount sufficient to cover all costs associated with the project at the Facility(s) and in accordance with the guaranteed energy savings contract requirements of Act 57, the Parties intend to enter into a guaranteed energy savings contract under which the ESCO shall design, procure, install, implement, maintain and monitor such energy conservation measures at the Facility(s);

Now, Therefore, intending to be legally bound hereby, the Parties agree as follows:

ARTICLE 1: SCOPE OF INVESTMENT GRADE ENERGY AUDIT AND REPORT.

The ESCO will perform an Investment Grade Energy Audit and prepare a detailed engineering and economic report (the "Report") in accordance with the requirements of Acts 57/77 and which specifically identifies the energy improvements and operational changes which are recommended to be installed or implemented at the Facility(s). The Report shall contain detailed projections of energy and cost savings to be obtained at the Facility(s) as a result of the installation of the recommended energy conservation measures (ECMs). The savings calculations must utilize assumptions, projections and baselines which best represent the true value

of future energy or operational savings for the Facility(s), i.e.: utilize: accurate marginal cost for each unit of savings at the time the audit is performed; documented material and operational costs actually avoided; adjustments to the baseline to reflect current conditions at the Facility(s) compared to the historic base period; calculations which account for the interactive effects of the recommended ECMs; etc. The Report shall clearly describe how utility tariffs were used to calculate savings for all ECMs. The Report shall describe the ESCO's plan for installing or implementing the measures in the Facility(s), including all anticipated costs associated with such installation and implementation. The primary purpose of the Report is to provide an engineering and economic basis for negotiating the guaranteed energy savings contract between the Agency and the ESCO; however, the Agency shall be under no obligation to negotiate such a contract.

The ESCO shall perform the following tasks in performing the Energy Audit and preparing the Report:

A. Collect General Facility(s) Information

The ESCO shall collect general Facility(s) information such as: size, age, construction type, condition and general use of the Facility(s). The ESCO shall also collect and summarize Facility(s) utility cost and consumption data for the most recent 36-month period. The ESCO shall evaluate the impact on utility cost and consumption of any energy initiatives, currently being installed or currently contemplated to be installed by the Agency in the Facility(s), which will remain separate from the guaranteed energy savings contract throughout the duration of that contract.

Agency shall furnish (or cause its energy suppliers to furnish) all available records and data concerning energy and water usage for the Facility(s) for the most current 36 month period, if available, including: Utility records; occupancy information; descriptions of any changes in the structure of the Facility(s) or its heating, cooling, lighting or other systems or energy requirements; descriptions of all major energy and water consuming or energy and water saving equipment used in the Facility(s); any comfort problems, code deficiencies, and a description of current energy management procedures. The Agency shall also furnish a record of any energy related improvements or modifications that have been installed during the past three years, or are currently being installed or are currently contemplated to be installed by the Agency in the Facility(s) separate from the guaranteed energy savings contract throughout the duration of that contract. The Agency shall also provide copies of drawings, equipment logs and maintenance work orders to the ESCO.

B. Analyze Existing Systems and Equipment

The ESCO shall compile an analysis based on a physical inspection of the major electrical and mechanical systems at the Facility(s), including:

- Cooling systems and related equipment
- Heating and heat distribution systems
- Automatic temperature control systems and equipment
- Air distribution systems and equipment
- Outdoor ventilation systems and equipment
- Kitchen and associated dining room equipment, if applicable
- Exhaust systems and equipment
- Hot water systems
- Electric motors 5 HP and above, transmission and drive systems
- Interior and exterior lighting
- Laundry equipment, if applicable
- Water consumption end uses, such as restroom fixtures, water fountains, irrigation, etc.
- Other major energy using systems, if applicable

The analysis shall address the following considerations:

1. the loads, proper sizing, efficiencies or hours of operation for each system; (Where Facility(s) operating or climatic conditions necessitate, engineering estimates may be used, but for large fluctuating loads with high potential savings appropriate measurements are required unless waived by the Agency);
2. current operating condition for each system;

The ESCO shall conduct interviews with Facility(s) operation and maintenance staff regarding the Facility(s)'s mechanical systems operation, occupancy patterns and problems with comfort levels or equipment reliability.

C. Establish Base Year Consumption and Reconcile with End Use Consumption Estimates

The ESCO shall examine the most recent 36 months of utility bills and establish Base Year consumption for electricity, fossil fuels and water by averaging; or selecting the most representative contiguous 12 months. The ESCO shall consult with Facility(s) staff and account for any unusual or anomalous utility bills which may skew Base Year consumption from a reasonable representation.

The ESCO shall analyze all major end uses representing more than 5% of total Facility(s) consumption including, but not limited to:

- lighting
- heating
- cooling
- HVAC motors (fans and pumps)
- plug load
- kitchen equipment
- other equipment
- miscellaneous

Where loading and/or usage are highly uncertain, the ESCO shall employ spot measurement and/or short term monitoring at its discretion, or at the request of the Agency. Reasonable applications of measurement typically include variable loads that are likely candidates for conservation measures, such as cooling equipment.

D. Develop List of Potential Energy Conservation Measures (ECMs)

The ESCO shall:

1. Identify and propose potential ECMs for installation or implementation at the Facility(s), including cut sheets on proposed equipment.² For non-standard ECMs provide information regarding product site installations.
2. Provide a detailed estimate of the cost, savings and life expectancy of each proposed ECM.
3. Specify Facility(s) operations and maintenance procedures which will be affected by the installation/implementation of the proposed ECMs.
4. Provide analysis methodology, supporting calculations and assumptions used to derive baselines (e.g. lighting operating hours) and estimate savings. Provide the existing and proposed air and hot water temperatures, amount of outdoor air ventilation (CFMs) lighting and acoustic levels.

² **(Optional)** ECMs of particular interest to Agency are specified in Attachment A and should be addressed in the Report. The attached list is not intended to be exhaustive nor limit the Company's evaluation and development of a comprehensive list of potential ECMs.

Provide copies of the utility tariffs and commodity price histories used in savings calculations. Manual calculations should disclose essential data, assumptions, formulas, etc. so that a reviewer could replicate the calculations based on the data provided.

5. For savings estimates using computer simulations, the ESCO shall provide access to the program and all inputs and assumptions used, if requested by the Agency.
6. Provide a detailed preliminary savings measurement and verification plan for each proposed ECM.
7. Provide a detailed preliminary commissioning plan for the proposed ECMs.
8. Provide detailed calculations for any rate saving proposals.
9. Provide detailed supporting calculations for any proposed maintenance, material or other operational savings. Describe annual variances in savings from year to year (e.g. lighting, warranties).
10. Estimate any environmental costs or benefits of the proposed ECMs (e.g. disposal costs, avoided emissions, water conservation, etc.). Provide emissions reductions data for NOX, CO2 and SO2. Segment emissions data for direct site emissions reductions (e.g. fossil fuels) and indirect emissions reduction data (e.g. electricity/water).
11. **(OPTIONAL. NOTE: The RFP does requires that the Cash Flow Opportunity Calculator be completed and submitted as part of the Report)** Using the EPA's ENERGY STAR™ tools and resources for each eligible facility, provide an estimated pre-retrofit Energy Performance Rating using Portfolio Manager and an estimated post-retrofit Energy Performance Rating using the Delta Score Estimator and submit a completed Cash Flow Opportunity spreadsheet using the Cash Flow Opportunity Calculator. Report. Upon completion of each guarantee year of the Guaranteed Energy Savings Contract, ESCO will also be required to submit an updated ENERGY STAR™ rating for each eligible facility. upon completion of each guaranteed year as part of the Guaranteed Energy Savings. Information regarding ENERGY STAR™ tools and resources, and a list of eligible facility types can be found at:

http://energystar.gov/index.cfm?c=tools_resources.bus_energy_management_tools_resources

<http://www.energystar.gov/index.cfm?c=delta.index>

http://www.energystar.gov/ia/business/cfo_calculator.xls

In Exhibit B-1, ESCO's Proposed Final Project Cost Form, include the projected cost to provide services and complete the application for all eligible buildings to receive the ENERGY STAR™ rating. Include the projected cost of these services for each year of the contract in the column for Annual Service Fees in Exhibit B-2, ESCO's Proposed Final Annual Cash Flow Analysis Form.

12. The selected ESCO will be required to include a one-time Project Management Fee based upon a percentage of the value of the total project cost as defined in Attachment B-1. Project management fee values are stipulated in Attachment B-3.
13. For all proposed ECMs, the ESCO shall comply with all applicable state, federal and local codes and regulations in effect at the time of this analysis.

E. Select Final Recommended ECMs

The ESCO shall, in consultation with the Agency, recommend specific ECMs from its preliminary compilation for installation and implementation at the Facility(s).

F. Cost and Fee Estimates

The ESCO shall provide detailed estimates of all costs and fees associated with the installation and implementation of the ECMs including:

- engineering/design costs for individual ECMs
- contractor/vendor estimates for individual ECM hard costs
- contingency costs for individual ECM hard cost
- construction management fees for the project
- commissioning costs for individual ECMs
- initial training costs
- annual service fees including
 - measurement and verification
 - maintenance
 - performance monitoring
 - ongoing training services
 - other costs/fees (specify)
- DGS management fee (see Attachment B-3)

G. Savings Estimates

The Agency has endeavored to provide the ESCO with sufficient general and specific guidance in this ARTICLE 1 to develop the savings estimates for the Report. In the event that questions arise as to the calculation of savings or whether certain items will be allowed as savings, the ESCO shall seek written guidance from the Agency. Agency rejection of certain calculations of savings or rejection of certain items as allowable savings in the Report shall be at the risk of the ESCO.

The following items will be allowed as savings or in the development of savings:

- Agency material/commodity cost**
- Outside maintenance labor costs (if applicable)**
- Escalation rates of _____% for natural gas²**
- Escalation rates of _____% for electricity**
- Escalation rates of _____% for water**
- Escalation rates of _____% for material/commodity cost savings**
- Escalation rates of _____% for allowable labor savings**

The following items will not typically be credited as savings derived from a proposed ECM. The ESCO may seek exemptions from the Agency on a case-by-case basis. However, the final determination of allowable savings in each case considered shall reside with the Agency: **Agency in-house labor cost; Agency deferred maintenance cost**

H. Report Format:

The ESCO shall prepare a two-volume report as follows:

Each volume should be submitted using 8 ½ " x 11" sheets of paper and a font size no smaller than 10 point. The pages in each volume should be numbered sequentially, include a Table of Contents and tabbed with the visible titles of corresponding Schedules (Volume 1) or Sections (Volume 2).

1. ^{2.} It should be noted that the value of fuel and water unit savings will be escalated using actual rates increases as they occur over the term of the contract. It is also noted that the base rate value for each fuel and water unit will not devalue in the event of any rate decrease.

Volume 1 of 2 shall include the presentation of information in the following Schedules required for the Guaranteed Energy Services Agreement (GESA) to the extent the information has been developed during the course of performing the audit. Preliminary information and incomplete schedules will be finalized during audit negotiations, prior to execution of the GESA.

Schedules

Schedule A	Equipment to be Installed by ESCO
Schedule B	Description of Premises; Pre-Existing Equipment Inventory
Schedule C	Energy Saving 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	Agency's Maintenance Responsibilities
Schedule L	Facility Maintenance Checklist
Schedule M	ESCO's Training Responsibilities
Schedule N	Installment Purchase and Payment Schedule
Schedule O	Proposed Final Project Cost & Proposed Final Project Cash Flow Analysis (See Exhibits B-1 & B-2 at the end of this Energy Audit Agreement)
Schedule P	DGS Annual Reporting Requirements
Schedule Q	[Sets forth each parties' specific responsibilities in regard to the removal, remediation and disposal of all hazardous waste materials responsibilities, but ESCO shall bear the cost and assumes full responsibility for scheduling and coordination]

Exhibits

Exhibit I	Performance Bond/Construction Bond
Exhibit II (i)	Certificate of Acceptance—Technical Audit
Exhibit II (ii)	Certificate of Acceptance—Installed Equipment
Exhibit II (iii)	Certificate of Acceptance – Negotiated Hazardous Material Removal
Exhibit III	Equipment Warranties

Volume 2 of 2 shall include all of the information required in Section D and the Sections below, and presented in the following format:

1. **Executive Summary:** Provide an executive summary which describes the Facility(s), measures evaluated, analysis methodology, results and a summary table presenting the cost and savings estimates for each recommended measure. Include a summary of the recommended measures and costs using the table format provided below. A 15-year project should show a 15-year total, not one year average, of ongoing costs such as measurement & verification, maintenance or training fees. Refer to Attachment B for cost definitions and see table on following page.

	ECM	Hard Cost	Financed Cost	Annual Energy Cost Savings	Simple Payback (yrs.)
1					
2					
3					
4					
5					
6					
7					
8					
	Project Summary				
Estimated Annual Costs (Total for life of the project)					
Total Budget Cost for Project (Financed Cost and Estimated Annual Costs)					

2. **Measures Not Evaluated:** Include a discussion of measures not evaluated in detail and the explanation of why a detailed analysis was not performed.
3. **Baselines:** Provide a summary of all utility bills, consumption baselines and how they were established, and end use reconciliation with respect to the baselines including a discussion of any unusual characteristics and findings.
4. **ECM Summaries:** Provide detailed descriptions for each ECM including analysis method, supporting calculations (may be submitted in appendices), results, proposed equipment and implementation issues. Provide a financial analysis for each proposed ECM (See Section F).
5. **Cost and Savings Estimates:** Conclusions, observations and caveats regarding cost and savings estimates.
6. **Appendices:** Provide thorough appendices which document the data relied upon to prepare the analysis and how that data was collected.

Submission of the Report

The Report shall be completed and submitted to Agency within _____ days (**suggested range of 60-120 days**) of the date of execution of this Energy Audit Agreement. The Agency shall conduct and complete a technical review within 60 days of their receipt of the Report.

J. Acceptance of the Report– If Energy Conservation Measures are Feasible.

The Agency shall accept the Report if the recommended ECMs are feasible. If the Agency determines that one or more of the recommended ECMs are not feasible, the Agency shall give the ESCO written notice of any and all said objections, in detail, within thirty (30) business days of receipt of the Report. The ESCO shall, if necessary, correct the Report and submit a second draft within thirty (30) days of said notification. The Agency shall have ten (10) business days from receipt of the revised Report to notify the ESCO if any objections have not been corrected. Upon such notification, the ESCO shall have thirty (30) days to resubmit the Report, and Agency shall have ten (10) business days to respond. This re-submission process may continue until: (1) the date all material concerns are resolved and the Report is accepted, (2) the dispute is resolved in accordance with the provisions of Article 3 P. If the Agency fails to give the ESCO any written notice within the time provided for in this Article 1.J, the Report is deemed to have been accepted by the Agency.

ARTICLE 2: GUARANTEED ENERGY SAVINGS AGREEMENT.

The Parties intend to enter into a Guaranteed Energy Savings Agreement (GESA) under which the ESCO shall design, install and implement energy conservation 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 a GESA. The terms and provisions of such a GESA shall be set forth in a separate agreement.

ARTICLE 3: STANDARD TERMS AND CONDITIONS.

A. TERM OF AGREEMENT

The term of this Agreement shall commence on the Effective Date (as defined below) and shall end on _____ (the Expiration Date) subject to the other provisions of this Agreement.

The Effective Date shall be the date this Agreement has been fully executed by the ESCO and by the Agency and all approvals required by Agency contracting procedures have been obtained. This Agreement shall not be a legally binding contract until after the Effective Date and when the fully-executed Agreement has been sent to the ESCO.

The Contracting Officer shall issue a written Notice to Proceed to the ESCO directing the ESCO to start performance on a date which is on or after the Effective Date. The ESCO shall not start the performance of any work prior to the date set forth in the Notice to Proceed and the Agency shall not be liable to pay the ESCO for any service or work performed or expenses incurred before the date set forth in the Notice to Proceed. No agency employee has the authority to verbally direct the commencement of any work under this Agreement.

B. INDEPENDENT CONTRACTOR

In performing the services required by this Agreement, the ESCO will act as an independent Contractor and not as an employee or agent of the Agency.

C. COMPLIANCE WITH LAW

ESCO shall perform its obligations hereunder in compliance with any and all applicable federal, state, and local laws, rules, and codes, regulations, in effect at the time of this agreement and in accordance with sound engineering and safety practices, and in compliance with any and all reasonable rules of Agency relative to the Premises.

The ESCO shall comply with all statutes and regulations of the Commonwealth of Pennsylvania concerning environmental quality control administered by DEP. These include but are not limited to, the Clean Streams Law, the Clean Water Act, Pennsylvania Sewage Facilities Act, Air Pollution Control Act, Surface Mining Conservation and Reclamation Act, Bituminous Coal Open Pit Mining Conservation Act, Dams and Encroachments Act, Water Well Driller's Act, Water Works Act and Atomic Energy Act, all as amended to date. The ESCO is responsible for any violations and shall secure all required permits. Erosion control measures are shown on drawings and specifications and/or specified in the General Requirements. An erosion control permit, if required, will be obtained by the ESCO.

D. ENVIRONMENTAL PROVISIONS

In the performance of this Agreement, the ESCO shall minimize pollution and shall strictly comply with all applicable environmental laws and regulations.

E. POST-CONSUMER RECYCLED CONTENT

Except as specifically waived by the Department of General Services in writing, any products which are provided to the Agency as a part of the performance of this Agreement must meet the minimum percentage levels for total recycled content as specified in Exhibits A-1 through A-3 of this Agreement.

F. COMPENSATION/EXPENSES

It is clearly understood by both parties hereto that, if the Parties successfully negotiate and execute a GESA, no payment shall be due for the Energy Audit or Report under the terms of this Agreement. This Agreement shall automatically terminate upon the execution of a GESA by the ESCO and the Agency for an energy performance contracting project at the Facility(s). It is further understood that provisions for payment of the audit fee of \$_____ shall be incorporated into the GESA.

The ESCO shall be required to perform the specified services at the price(s) quoted above. All services shall be performed within the time period(s) specified in this Agreement. In the event the Agency terminates this Agreement as provided for in Article 3(O.) (iii), the ESCO shall be compensated only for work performed to the satisfaction of the Agency. The ESCO shall not be allowed or paid travel or per diem expenses except as specifically set forth in this Agreement and payment for said specified services shall be made in accordance with Article 3 (O.) (iv).

G. TAXES

The Agency is exempt from all excise taxes imposed by the Internal Revenue Service and has accordingly registered with the Internal Revenue Service to make tax-free purchases under Registration No. 2374001-K. With the exception of purchases of the following items, no exemption certificates are required and none will be issued: undyed diesel fuel, tires, trucks, gas-guzzler emergency vehicles, and sports fishing equipment. The Agency is also exempt from Pennsylvania state sales tax, local sales tax, public transportation assistance taxes and fees and vehicle rental tax. The Department of Revenue regulations provide that exemption certificates are not required for sales made to governmental entities and none will be issued. Nothing in this paragraph is meant to exempt a construction ESCO from the payment of any of these taxes or fees which are required to be paid with respect to the purchase, use, rental, or lease of tangible personal property or taxable services used or transferred in connection with the performance of a construction contract.

H. WARRANTY

The ESCO warrants that all services performed by the ESCO, its agents and subcontractors shall be free and clear of any defects in workmanship or materials. Unless otherwise stated in this Agreement, all services and parts are warranted for a period of one year following completion of performance by the ESCO and acceptance by the Agency. The ESCO shall correct any problem with the service and/or replace any defective part with a part of equivalent or superior quality without any additional cost to the Agency.

I. STATEWIDE BUILDING CODE

Due to changes resulting from passage of the Statewide Building Code, the Department of Labor and Industry (L&I) has sole responsibility for plan review and inspection for all State-owned facilities.

This project shall be subject to the Uniform Construction Code. The ESCO, along with its design professionals and subcontractors, shall become familiar with and adhere to the UCC, including but not limited to: L&I's plans submission and review for approval to obtain the project building permit and site inspection procedures set forth in L&I's Inspection procedures. The most recent information regarding L&I requirements can be found on L&I's website at:

<http://www.dli.state.pa.us/landi/cwp/view.asp?a=310&q=210892&landiRNavrad93A43=|>

The ESCO must include L&I plans review and inspections to the extent they are applicable to the scope of work on the project.

J. PATENT, COPYRIGHT, AND TRADEMARK INDEMNITY

1. The ESCO shall hold the Agency harmless from any suit or proceeding which may be brought by a third party against the Agency, its departments, officers or employees for the alleged infringement of any United States or foreign patents, copyrights, or trademarks, or for a misappropriation of trade secrets arising out of performance of this Agreement, including all work, services, materials, reports, studies, and computer programs provided by the ESCO, and in any such suit or proceeding will satisfy any final award for such infringement, including costs. The Agency agrees to give Contractor prompt notice of any such claim of which it learns. Pursuant to the Agency Attorneys Act 71 P.S. § 732-101, et seq., the Office of Attorney General (OAG) has the sole authority to represent the Agency in actions brought against the Agency. The OAG may, however, in its sole discretion and under the terms it deems appropriate, delegate its right of defense. If OAG delegates the defense to the ESCO, the Agency will cooperate with all reasonable requests of Contractor made in the defense of such suits. No settlement which prevents the Agency from continuing to use the items provided by the ESCO shall be made without the Agency's prior written consent. In all events, the Agency shall have the right to participate in the defense of any such suit or proceeding through counsel of its own choosing. It is expressly agreed by the ESCO that, in the event it requests that the Agency to provide support to the ESCO in defending any such claim, the ESCO shall reimburse the Agency for all expenses (including attorneys' fees, if such are made necessary by the ESCO's request) incurred by the Agency for such support. If OAG does not delegate the defense of the matter, the ESCO's obligation to indemnify ceases. The ESCO will, at its expense, provide whatever cooperation OAG requests in the defense of the suit.
2. The ESCO agrees to exercise reasonable due diligence to prevent claims of infringement on the rights of third parties. The ESCO certifies that, in all respects applicable to this Agreement, it has exercised and will continue to exercise due diligence to ensure that all works produced under this Agreement do not infringe on the patents, copyrights, trademarks, trade secrets or other proprietary interests of any kind which may be held by third parties. The ESCO also agrees to certify that work produced for the Agency under this Agreement shall be free and clear from all claims of any nature.
3. If the defense of the suit is delegated to the ESCO, the ESCO shall pay all damages and costs awarded therein against the Agency. If information and assistance are furnished by the Agency at ESCO's written request, it shall be at the ESCO's expense, but the responsibility for such expense shall be only that within the ESCO's written authorization.
4. If, in the ESCO's opinion, the products, materials, reports, studies, or computer programs furnished hereunder are likely to or do become subject to a claim of infringement of a United States patent, copyright, or trademark, or for a misappropriation of trade secret, then without diminishing the ESCO's obligation to satisfy any final award, the ESCO may, at its option and expense, substitute functional equivalents for the alleged infringing products, materials, reports, studies, or computer programs or, at the ESCO's option and expense, obtain the rights for the Agency to continue the use of such products, materials, reports, studies, or computer programs.
5. If any of the products, materials, reports, studies, or computer programs provided by the ESCO are in such suit or proceeding held to constitute infringement and the use or publication thereof is enjoined, the ESCO shall, at its own expense and at its option,

either procure the right to publish or continue use of such infringing products, materials, reports, studies, or computer programs, replace them with non-infringing items, or modify them so that they are no longer infringing.

6. If the ESCO is unable to do any of the preceding, the ESCO agrees to pay the Agency:
 - a. any amounts paid by the Agency less a reasonable amount based on the acceptance and use of the deliverable;
 - b. any license fee less an amount for the period of usage of any software; and
 - c. the prorated portion of any service fees representing the time remaining in any period of service for which payment was made
7. The obligations of the ESCO under this Section continue without time limit and survive the termination of this Agreement.
8. Notwithstanding the above, the ESCO shall have no obligation for:
 - a. modification of any product, service, or deliverable provided by the Agency;
 - b. any material provided by the Agency to the ESCO and incorporated into, or used to prepare, a product, service, or deliverable;
 - c. use of the product, service, or deliverable in other than its specified operating environment;
 - d. the combination, operation, or use of the product, service, or deliverable with other products, services, or deliverables not provided by the ESCO as a system or the combination, operation, or use of the product, service, or deliverable, with any products, data, or apparatus that ESCO did not provide;
 - e. infringement of a non-ESCO product alone.
 - f. the Agency's distribution, marketing or use beyond the scope contemplated by the Agreement; or
 - g. the Agency's failure to use corrections or enhancements made available to the Agency by the ESCO at no charge.
9. The obligation to indemnify the Agency, under the terms of this Section, shall be the ESCO's sole and exclusive obligation for the infringement or misappropriation of intellectual property.

K. OWNERSHIP RIGHTS

The Agency shall have unrestricted authority to reproduce, distribute, and use any submitted report, data, or material, and any software or modifications and any associated documentation that is designed or developed and delivered to the Agency as part of the performance of this Agreement. The ESCO shall have no responsibility to Agency or others for any use of information provided by the ESCO unless it is implemented through a subsequently-executed GESA.

L. ASSIGNMENT OF ANTITRUST CLAIMS

The ESCO and the Agency recognize that in actual economic practice, overcharges by the ESCO's suppliers resulting from violations of state or federal antitrust laws are in fact borne by the Agency. As part of the consideration for the award of this Agreement, and intending to be legally bound, the ESCO assigns to the Agency all right, title and interest in and to any claims the ESCO now has, or may acquire, under state or federal antitrust laws relating to the products and services which are the subject of this Agreement.

M. INDEMNIFICATION AND HOLD HARMLESS PROVISION

1. ESCO shall hold the Commonwealth and the Agency harmless from and indemnify them against any and all third party claims, demands and actions based upon or arising out of any activities performed by ESCO and its employees and agents under this Agreement, provided the Agency gives ESCO prompt notice of any such claim of which it learns.
2. Pursuant to the Commonwealth Attorneys Act (71 P.S. § 732-101 et seq.), the Office of Attorney General (OAG) has the sole authority to represent the Agency in actions brought against the Agency. The OAG may, however, in its sole discretion and under such terms as it deems appropriate, delegate its right of defense to ESCO. If OAG delegates the defense to ESCO, the Agency will cooperate with all reasonable requests of ESCO made in the defense of such suits. If OAG does not delegate the defense of the matter, ESCO's obligation to indemnify ceases. ESCO will, at its expense, provide whatever cooperation OAG requests in the defense of the suit. Notwithstanding the above, neither party shall enter into any settlement without the other party's written consent, which shall not be unreasonably withheld.

N. AUDIT PROVISIONS

The Agency shall have the right, at reasonable times and at a site designated by the Agency, to audit the books, documents and records of the ESCO to the extent that the books, documents and records relate to costs or pricing data for this Agreement. The ESCO agrees to maintain records which will support the prices charged and costs incurred for this Agreement.

The ESCO shall preserve books, documents, and records that relate to costs or pricing data for this Agreement for a period of three (3) years from date of final payment. The ESCO shall give full and free access to all records to the Agency and/or their authorized representatives.

O. TERMINATION PROVISIONS

1. By ESCO:

ESCO may terminate this Agreement prior to the completion of the Energy Audit and Report or subsequent to the completion of the Energy Audit and Report if:

- a. it determines that it cannot guarantee a minimum 15% savings in energy costs through the implementation of an energy performance contracting project at the Facility(s); or
- b. it determines that even though it can guarantee a 15% savings in energy costs, that amount would be insufficient to cover the costs associated with performing this analysis, installing energy conservation measures and related maintenance and monitoring services.

In the event ESCO terminates the Agreement pursuant to subsection A (i), or (ii), the Agency shall not be obligated to pay any amount to ESCO for services performed or expenses incurred by ESCO in performing the Energy Audit and Report required under this Agreement. ESCO shall provide the

Facility(s) with any preliminary notes, reports or analysis which have been produced or prepared prior to the effective date of the termination.

Termination under this section shall be effective upon Agency's receipt of written notification from the ESCO stating the reason for the termination and all documents which support termination pursuant to subsection A (i), or (ii) herein.

2. By Agency:

Agency may terminate this Agreement:

- a. If the ESCO fails to complete the Energy Audit and deliver the Report to the Agency by the date established in Article 1, above; or fails to obtain a written extension of that date from the Agency. Termination under this subsection (i) shall be effective upon ESCO's receipt of written notification from the Agency that the deadline for submission of the Report has past. In this event, the Agency shall not be obligated to pay any amount to ESCO for services performed or expenses incurred by the ESCO in performing the Energy Audit and preparing the Report required under this Agreement. ESCO shall provide the Facility(s) with any preliminary notes, reports or analysis which have been produced or prepared prior to the effective date of the termination.
- b. If, prior or subsequent to the completion of the Energy Audit, the ESCO notifies the Agency in writing that it is unable to guarantee a sufficient level of savings pursuant to subsection A (i), or (ii) above. Termination under this subsection B (ii) shall be effective upon ESCO's receipt of written notification from the Agency. In this event, the Agency shall not be obligated to pay any amount to ESCO for services performed or expenses incurred by ESCO in performing the Energy Audit and preparation of the Report required under this Agreement. ESCO shall provide the Facility(s) with any preliminary notes, reports or analysis which have been produced or prepared prior to the effective date of the termination.
- c. If, prior or subsequent to the completion of the Energy Audit, the Agency notifies the ESCO in writing that it has elected to terminate this Agreement for its convenience or for unavailability of funds and not enter into an ESA, the Agency shall reimburse the ESCO for actual documented time, material and ancillary expenses incurred, as of the effective date of the termination, but in no event shall the Agency's liability exceed the audit fee set forth in Section F. ESCO shall not be entitled to loss of anticipated profit, loss of use of money, or administrative or overhead costs. Termination under this subsection B (iii) shall be effective upon ESCO's receipt of written notification from the Agency and payment for actual expenses incurred shall be made in accordance with the provisions of subsection B (iv) as follows.
- d. The Agency shall put forth reasonable efforts to make payment by the required payment date. The required payment date is: (a) the date on which payment is due under the terms of the Agreement; (b) thirty (30) days after a proper invoice actually is received at the "Agency" address if a date on which payment is due is not specified in this Agreement (a "proper" invoice is not received until the Agency accepts the service as satisfactorily performed); or (c) the payment date specified on the invoice if later than the dates established by (a) and (b) above. Payment may be delayed if the payment amount on an invoice is not based upon the price(s) as stated in this Agreement. If any payment is not made within fifteen (15) days after the required payment date, the Agency may pay interest as determined by the Secretary of Budget in accordance with Act No. 266 of 1982 and regulations promulgated pursuant thereto. Payment should not be construed by the ESCO as acceptance of the service performed by the ESCO. The Agency reserves the right to conduct further testing and inspection after payment, but within a reasonable time after performance, and to reject the service if such post payment testing

or inspection discloses a defect or a failure to meet specifications. The ESCO agrees that the Agency may set off the amount of any state tax liability or other obligation of the ESCO or its subsidiaries to the Agency against any payments due the ESCO under any contract with the Agency.

ESCO agrees to provide the Agency with any preliminary notes, reports, analyses, or the complete Energy Audit if available, which have been produced prior to the effective date of the termination. Such documentation shall be used by the Agency to verify the extent of work completed by ESCO prior to termination and shall become the property of the Agency.

P. CONTRACT CONTROVERSIES

1. In the event of a controversy or claim arising from the Agreement, the ESCO must, within six months after the cause of action accrues, file a written claim with the Agency contracting officer for a determination. The claim shall state all grounds upon which the ESCO asserts a controversy exists. If the ESCO fails to file a claim or files an untimely claim, the ESCO is deemed to have waived its right to assert a claim in any forum.
2. The contracting officer shall review timely filed claims and issue a final determination, in writing, regarding the claim. The final determination shall be issued within 120 days of the receipt of the claim, unless extended by consent of the contracting officer and the ESCO. The contracting officer shall send his/her written determination to the ESCO. If the contracting officer fails to issue a final determination within the 120 days (unless extended by consent of the parties), the claim shall be deemed denied. The contracting officer's determination shall be the final order of the purchasing agency.
3. Within fifteen (15) days of the mailing date of the determination denying a claim or within 135 days of filing a claim if, no extension is agreed to by the parties, whichever occurs first, the ESCO may file a statement of claim with the Agency Board of Claims. Pending a final judicial resolution of a controversy or claim, the ESCO shall proceed diligently with the performance of the Agreement in a manner consistent with the determination of the contracting officer and the Agency shall compensate the ESCO pursuant to the terms of the Agreement.

Q. ASSIGNABILITY AND SUBCONTRACTING

1. Subject to the terms and conditions of this Paragraph, this Agreement shall be binding upon the parties and their respective successors and assigns.
2. The ESCO shall not subcontract with any person or entity to perform all or any part of the work to be performed under this Agreement without the prior written consent of the Contracting Officer, which consent may be withheld at the sole and absolute discretion of the Contracting Officer.
3. The ESCO may not assign, in whole or in part, this Contract or its rights, duties, obligations, or responsibilities hereunder without the prior written consent of the Contracting Officer, which consent may be withheld at the sole and absolute discretion of the Contracting Officer.
4. Notwithstanding the foregoing, the ESCO may, without the consent of the Contracting Officer, assign its rights to payment to be received under this Agreement, provided that the ESCO provides written notice of such assignment to the Contracting Officer together with a written acknowledgement from the assignee that any such payments are subject to all of the terms and conditions of this Contract.

5. For the purposes of this Agreement, the term "assign" shall include, but shall not be limited to, the sale, gift, assignment, pledge, or other **transfer of any** ownership interest in the ESCO provided, however, that the term shall not apply to the sale or other transfer of stock of a publicly traded company.
6. Any assignment consented to by the Contracting Officer shall be evidenced by a written assignment agreement executed by the ESCO and its assignee in which the assignee agrees to be legally bound by all of the terms and conditions of this Agreement and to assume the duties, obligations, and responsibilities being assigned.
7. A change of name by the ESCO, following which the ESCO's federal identification number remains unchanged, shall not be considered to be an assignment hereunder. The ESCO shall give the Contracting Officer written notice of any such change of name.

R. NONDISCRIMINATION/SEXUAL HARASSMENT CLAUSE

During the term of this Agreement, ESCO agrees as follows:

1. In the hiring of any employees for the manufacture of supplies, performance of work, or any other activity required under this Agreement or any subcontract, the ESCO, subcontractor or any person acting on behalf of the ESCO or subcontractor shall not by reason of gender, race, creed, or color discriminate against any citizen of this Agency who is qualified and available to perform the work to which the employment relates.
2. Neither the ESCO nor any subcontractor nor any person on their behalf shall in any manner discriminate against or intimidate any employee involved in the manufacture of supplies, the performance of work or any other activity required under this Agreement on account of gender, race, creed, or color.
3. The ESCO and its subcontractors shall establish and maintain a written sexual harassment policy and shall inform its employees of the policy.
4. The ESCO and each subcontractor shall furnish all necessary employment documents and records to and permit access to its books, records, and accounts by the contracting officer and the Department of General Services' Bureau of Contract Administration and Business Development for purposes of investigation to ascertain compliance with the provisions of this Nondiscrimination/Sexual Harassment Clause. If the ESCO or any subcontractor does not possess documents or records reflecting the necessary information requested, it shall furnish such information on reporting forms supplied by the contracting officer or the Bureau of Contract Administration and Business Development.
5. The ESCO shall include the provisions of this Nondiscrimination/Sexual Harassment Clause in every subcontract so that such provisions will be binding upon each subcontractor.
6. The Agency may cancel or terminate this Agreement, and all money due or to become due under the Contract may be forfeited for a violation of the terms and conditions of this Nondiscrimination/Sexual Harassment Clause.

S. CONTRACTOR INTEGRITY PROVISIONS

1. For purposes of this clause only, the words "confidential information," "consent," "ESCO," "financial interest," and "gratuity" shall have the following definitions.

- a) **Confidential information** means information that is not public knowledge, or available to the public on request, disclosure of which would give an unfair, unethical, or illegal advantage to another desiring to contract with the Agency.
 - b) **Consent** means written permission signed by a duly authorized officer or employee of the Agency, provided that where the material facts have been disclosed, in writing, by prequalification, bid, proposal, or contractual terms, the Agency shall be deemed to have consented by virtue of execution of this agreement.
 - c) **ESCO** means the individual or entity that has entered into the Agreement with the Agency, including directors, officers, partners, managers, key employees and owners of more than a five percent interest.
 - d) **Financial interest** means:
 - (1) Ownership of more than a five percent interest in any business; or
 - (2) Holding a position as an officer, director, trustee, partner, employee, or the like, or holding any position of management.
 - e) **Gratuity** means any payment of more than nominal monetary value in the form of cash, travel, entertainment, gifts, meals, lodging, loans, subscriptions, advances, deposits of money, services, employment, or contracts of any kind.
2. The ESCO shall maintain the highest standards of integrity in the performance of this Agreement and shall take no action in violation of state or federal laws, regulations, or other requirements that govern contracting with the Agency.
 3. The ESCO shall not disclose to others any confidential information gained by virtue of this Agreement.
 4. The ESCO shall not, in connection with this or any other agreement with the Agency, directly, or indirectly, offer, confer, or agree to confer any pecuniary benefit on anyone as consideration for the decision, opinion, recommendation, vote, other exercise of discretion, or violation of a known legal duty by any officer or employee of the Agency.
 5. The ESCO shall not, in connection with this or any other agreement with the Agency, directly or indirectly, offer, give, or agree or promise to give to anyone any gratuity for the benefit of or at the direction or request of any officer or employee of the Agency.
 6. Except with the consent of the Agency, neither the ESCO nor anyone in privity with him or her shall accept or agree to accept from, or give or agree to give to, any person, any gratuity from any person in connection with the performance of work under this Agreement except as provided therein.
 7. Except with the consent of the Agency, the ESCO shall not have a financial interest in any other ESCO, subcontractors, or supplier providing services, labor, or material on this project.
 8. The ESCO, upon being informed that any violation of these provisions has occurred or may occur, shall immediately notify the Agency in writing.
 9. The ESCO, by execution of this Agreement and by the submission of any bills or invoices for payment pursuant thereto, certifies, and represents that he or she has not violated any of these provisions.

10. The ESCO, upon the inquiry or request of the Inspector General of the Agency or any of that official's agents or representatives, shall provide, or if appropriate, make promptly available for inspection or copying, any information of any type or form deemed relevant by the Inspector General to the ESCO's integrity or responsibility, as those terms are defined by the Agency's statutes, regulations, or management directives. Such information may include, but shall not be limited to, the ESCO's business or financial records, documents or files of any type or form which refers to or concern this Agreement. Such information shall be retained by the ESCO for a period of three years beyond the termination of this Agreement unless otherwise provided by law.
11. For violation of any of the above provisions, the Agency may terminate this and any other agreement with the ESCO, claim liquidated damages in an amount equal to the value of anything received in breach of these provisions, claim damages for all expenses incurred in obtaining another ESCO to complete performance hereunder, and debar and suspend the ESCO from doing business with the Agency. These rights and remedies are cumulative, and the use or nonuse of any one shall not preclude the use of all or any other. These rights and remedies are in addition to those the Agency may have under law, statute, regulation, or otherwise.

T. ESCO RESPONSIBILITY PROVISIONS

1. The ESCO certifies, for itself and all its subcontractors, that as of the date of its execution of this Agreement, that neither the ESCO, nor any subcontractors, nor any suppliers are under suspension or debarment by the Agency or any governmental entity, instrumentality, or authority and, if the ESCO cannot so certify, then it agrees to submit, along with this Agreement, a written explanation of why such certification cannot be made.
2. The ESCO also certifies for itself and all of its subcontractors, that as of the date of its execution of this Agreement, it has no tax liabilities or other Agency obligations.
3. The ESCO's obligations pursuant to these provisions are ongoing from and after the effective date of the Agreement through the termination date thereof. Accordingly, the ESCO shall have an obligation to inform the Agency if, at any time during the term of this Agreement, it becomes delinquent in the payment of taxes, or other Agency obligations, or if it or any of its subcontractors are suspended or debarred by the Agency, the federal government, or any other state or governmental entity. Such notification shall be made within 15 days of the date of suspension or debarment.
4. The failure of the ESCO to notify the Agency of its suspension or debarment by the Agency, any other state, or the federal government shall constitute an event of default of this Agreement with the Agency.
5. The ESCO agrees to reimburse the Agency for the reasonable costs of investigation incurred by the Office of State Inspector General for investigations of the ESCO's compliance with the terms of this or any other agreement between the ESCO and the Agency, which results in the suspension or debarment of the ESCO. Such costs shall include, but shall not be limited to, salaries of investigators, including overtime; travel and lodging expenses; and expert witness and documentary fees. The ESCO shall not be responsible for investigative costs for investigations that do not result in the ESCO's suspension or debarment.
6. The ESCO may obtain a current list of suspended and debarred Agency Companies by either searching the internet at <http://www.dgsapp.state.pa.us/debarmentlist/> or contacting:

Department of General Services
Office of Chief Counsel
603 North Office Building
Harrisburg, PA 17125
Telephone No. (717) 783-6472
FAX No. (717) 787-9138

U. AMERICANS WITH DISABILITIES ACT

1. Pursuant to federal regulations promulgated under the authority of The Americans With Disabilities Act, 28 C.F.R. § 35.101 et seq., the ESCO understands and agrees that it shall not cause any individual with a disability to be excluded from participation in this Agreement or from activities provided for under this Agreement on the basis of the disability. As a condition of accepting this contract, the ESCO agrees to comply with the "General Prohibitions Against Discrimination," 28 C.F.R. § 35.130, and all other regulations promulgated under Title II of The Americans With Disabilities Act which are applicable to all benefits, services, programs, and activities provided by the Agency of Pennsylvania through contracts with outside contractors.
2. The ESCO shall be responsible for and agrees to indemnify and hold harmless the Agency of Pennsylvania from all losses, damages, expenses, claims, demands, suits, and actions brought by any party against the Agency of Pennsylvania as a result of the ESCO's failure to comply with the provisions of subparagraph a above.

V. HAZARDOUS SUBSTANCES

The ESCO shall provide information to the Agency about the identity and hazards of hazardous substances supplied or used by the ESCO in the performance of this Agreement. The ESCO must comply with Act 159 of October 5, 1984, known as the "Worker and Community Right to Know Act" (the "Act") and the regulations promulgated pursuant thereto at 4 Pa. Code Section 301.1 et seq.

1. Labeling. The ESCO shall insure that each individual product (as well as the carton, container or package in which the product is shipped) of any of the following substances (as defined by the Act and the regulations) supplied by the ESCO is clearly labeled, tagged or marked with the information listed in Paragraph (1) through (4):
 - a) Hazardous substances:
 - 1) The chemical name or common name,
 - 2) A hazard warning, and
 - 3) The name, address, and telephone number of the manufacturer.
 - b) Hazardous mixtures:
 - 1) The common name, but if none exists, then the trade name,
 - 2) The chemical or common name of special hazardous substances comprising .01% or more of the mixture,
 - 3) The chemical or common name of hazardous substances consisting 1.0% or more of the mixture,
 - 4) A hazard warning, and

- 5) The name, address, and telephone number of the manufacturer.
- c) Single chemicals:
- 1) The chemical name or the common name,
 - 2) A hazard warning, if appropriate, and
 - 3) The name, address, and telephone number of the manufacturer.
- d) Chemical Mixtures:
- 1) The common name, but if none exists, then the trade name,
 - 2) A hazard warning, if appropriate,
 - 3) The name, address, and telephone number of the manufacturer, and
 - 4) The chemical name or common name of either the top five substances by volume or those substances consisting of 5.0% or more of the mixture.

A common name or trade name may be used only if the use of the name more easily or readily identifies the true nature of the hazardous substance, hazardous mixture, single chemical, or mixture involved.

Container labels shall provide a warning as to the specific nature of the hazard arising from the substance in the container.

The hazard warning shall be given in conformity with one of the nationally recognized and accepted systems of providing warnings, and hazard warnings shall be consistent with one or more of the recognized systems throughout the workplace. Examples are:

- NFPA 704, Identification of the Fire Hazards of Materials.
- National Paint and Coatings Association: Hazardous Materials Identification System.
- American Society for Testing and Materials, Safety Alert Pictorial Chart.
- American National Standard Institute, Inc., for the Precautionary Labeling of Hazardous Industrial Chemicals.

Labels must be legible and prominently affixed to and displayed on the product and the carton, container, or package so that employees can easily identify the substance or mixture present therein.

2. Material Safety Data Sheet. The ESCO shall provide Material Safety Data Sheets (MSDS) with the information required by the Act and the regulations for each hazardous substance or hazardous mixture. The Agency must be provided an appropriate MSDS with the initial shipment and with the first shipment after an MSDS is updated or product changed. For any other chemical, the ESCO shall provide an appropriate MSDS, if the manufacturer, importer, or supplier produces or possesses the MSDS. The ESCO shall also notify the Agency when a substance or mixture is subject to the provisions of the Act. Material Safety Data Sheets may be attached to the carton, container, or package mailed to the Agency at the time of shipment.

W. COVENANT AGAINST CONTINGENT FEES

The ESCO warrants that no person or selling agency has been employed or retained to solicit or secure this Agreement upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, except bona fide employees or bona fide established commercial or selling agencies maintained by the ESCO for the purpose of securing business. For breach or violation of this warranty, the Agency shall have the right to terminate this Agreement without liability or in its discretion to deduct from the Agreement price or consideration, or otherwise recover the full amount of such commission, percentage, brokerage, or contingent fee.

X. APPLICABLE LAW

This Agreement shall be governed by and interpreted and enforced in accordance with the laws of the Agency of Pennsylvania (without regard to any conflict of laws provisions) and the decisions of the Pennsylvania courts. The ESCO consents to the jurisdiction of any court of the Commonwealth of Pennsylvania and any federal courts in Pennsylvania, waiving any claim or defense that such forum is not convenient or proper. The ESCO agrees that any such court shall have in personam jurisdiction over it, and consents to service of process in any manner authorized by Pennsylvania law.

Y. INTEGRATION

This Agreement, including all referenced documents, constitutes the entire agreement between the parties. No agent, representative, employee or officer of either the Agency or the ESCO has authority to make, or has made, any statement, agreement or representation, oral or written, in connection with this Agreement, which in any way can be deemed to modify, add to or detract from, or otherwise change or alter its terms and conditions. No negotiations between the parties, nor any custom or usage, shall be permitted to modify or contradict any of the terms and conditions of this Agreement. No modifications, alterations, changes, or waiver to this Agreement or any of its terms shall be valid or binding unless accomplished by a written amendment signed by both parties. All such amendments will be made using the appropriate Agency form.

Z. MATERIALS, EQUIPMENT AND SUPPLIES

The ESCO shall provide or cause to be provided all facilities, materials, equipment and supplies necessary to perform the Energy Audit and prepare the Report.

AA. SUBCOMPANY DISCLOSURE

As of the execution date of this Agreement, the following subcontractors are expected to perform work pursuant to this Agreement and to be paid with funds provided hereunder:

Name	Address	Anticipated \$ Amount
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If, during the term of this Agreement, the ESCO retains subcontractors to be paid with funds provided by this Agreement who were not disclosed, the ESCO shall so notify the Agency and the Parties shall file an amendment to this Agreement stating the names and addresses of and anticipated amount of payment to each subcontractors.

BB. PERSONNEL

All personnel necessary for the effective performance of the Investment Grade Energy Audit shall be employed by ESCO and its designated subcontractors, shall be qualified to perform the services required under this Agreement, and shall in all respects be subject to the rules and regulations of ESCO governing

staff members and employees. Neither ESCO, its designated subcontractors, nor its personnel shall be considered to be agents or employees of the Agency.

CC. NOTICE

1. Any written notice under this Agreement to the Agency is sufficient if mailed to:

2. Any written notice under this Agreement to ESCO is sufficient if mailed to:

DD. AGREEMENT

The following documents are incorporated in, and made a part of, this Agreement:

EE. PROJECT MANAGEMENT

All necessary and ordinary communications, submittals, approvals, requests and notices related to Project work shall be issued or received by:

For Agency:

For ESCO:

IN WITNESS WHEREOF, the parties have executed this Agreement this _____ day of _____, 200__.

WITNESS:

**COMMONWEALTH OF PENNSYLVANIA
AGENCY**

[Name]

Signature

Signature

ATTEST:

ENERGY SERVICE COMPANY (ESCO)

[Name]

Signature of Secretary, Assistant Secretary
Treasurer, or Assistant Treasurer

Signature of President or Vice President

Title

Title

(Corporate Seal)

Federal Identification No. _____

APPROVED AS TO FORM AND LEGALITY:

Office of Chief Counsel - Agency

N/A

Office of General Counsel

N/A

Office of Attorney General

APPROVED:

Comptroller

Recycled Products Provisions

- Exhibit A-1: Insulation
- Exhibit A-2: Lubricating Oils
- Exhibit A-3: Selected Papers and Paper Products

ESCO's Project Cost Information

- Exhibit B-1: Proposed Final Project Cost
- Exhibit B-2: Proposed Final Project Cash Flow Analysis
- Exhibit B-3: DGS Project Management Fees

RECYCLED CONTENTS PRODUCTS PROVISION EXHIBIT A-1 INSULATION

Any products provided to the Agency as part of the ESCO's performance of this Agreement shall meet the minimum percentage levels for total recycled content and post-consumer recycled content as specified below and in Exhibits A-2 and A-3:

Material Type	Percent by Weight
Cellulose Loose-Fill and Spray On	75% Postconsumer Recovered Paper
Perlite Composite Board	23% Postconsumer Recovered Paper
Plastic Rigid Foam, Polyisocyanurate/Polyurethane:	9% Recovered Material
Rigid Foam	-----
Foam-In-Place	5% Recovered Material
Glass Ridge Foam	6% Recovered Material
Phenolic Ridge Foam	5% Recovered Material
Rock Wool	50% Recovered Material

"Post-consumer Recovered Paper" is defined as "Any paper, paperboard, and fibrous wastes from retail stores, office buildings, homes and so forth, after they have passed through their end-usage as a consumer item including: used corrugated boxes, old newspapers, old magazines, mixed waste paper, tabulating cards, and used cordage, as well as all paper, paperboard, and fibrous wastes that enter and are collected from municipal solid waste."

"Recovered Material" is defined as "Waste material and byproducts which have been recovered or diverted from solid waste, but such term does not include those materials and byproducts generated from, and commonly reused within, an original manufacturing process."

**EXHIBIT A-2
LUBRICATING OILS**

All lubricating oil provided by the ESCO and sold to the Agency must have a minimum re-refined oil content of twenty-five percent (25%).

“Re-refined oil” is defined as “Used oil from which the physical and chemical contaminants acquired through previous use have been removed through a refining process.”

**EXHIBIT A-3
SELECTED PAPERS AND PAPER PRODUCTS**

	Minimum Percentage of Recovered Materials	Minimum Percentage of Postconsumer Recovered Materials	Minimum Percentage of Secondary Waste Paper
• Newsprint		40	
• High Grade Bleached Printing and Writing Papers:			
• Offset Printing		10	50
• Mimeo and Duplicator Paper		10	50
• Writing (Stationery)		10	50
• Office Paper (e.g., Note Pads)		10	50
• Paper in High-Speed Copiers		10	
• Envelopes		10	50
• Form Bond Including Computer Paper and Carbonyls		10	
• Book Papers		10	50
• Bond Papers		10	50
• Ledger		10	50
• Cover Stock		10	50
• Cotton Fiber Papers	25		
• Tissue Products:			
• Toilet Tissue		20	
• Paper Towels		40	
• Paper Napkins		30	
• Facial Tissue		5	
• Doilies		40	
• Unbleached Packaging:			
• Corrugated Boxes		35	
• Fiber Boxes		35	
• Brown Papers (e.g., Bags)		5	
• Recycled Paperboard:			
• Recycled Paperboard Products Including Folding Cartons		80	
• Pad Backing		90	

“Post-consumer Recovered Material” is defined as “Any product generated by a business or consumer which has served its intended end use, and which has been separated or diverted from solid waste for the purpose of collection, recycling, and disposition. The term includes industrial by-products that would otherwise go to disposal or processing facilities. The term does not include internally generated scraps that is commonly returned to industrial or manufacturing processes.”

“Secondary wastepaper” is defined as “Paper waste generated after the completion of a papermaking process (that is, those manufacturing operations up to and including the cutting and trimming of the paper machine reel into smaller rolls or rough sheets), such as post-consumer waste material, envelope cuttings, bindery trimmings, printing waste, cutting and other converting waste, butt rolls and mill wrappers. It does not include fibrous waste generated during the manufacturing process, such as fibers recovered from waste water or trimmings of paper machine rolls, fibrous by-products of harvesting, extractive or woodcutting process, or forest residue such as bark.”

(EXHIBIT B-1)

**ESCOs PROPOSED FINAL PROJECT COST FORM
COMMONWEALTH OF PENNSYLVANIA**

GUARANTEED ENERGY SAVING CONTRACT

Project Name:
Agency Name:

ESCO Name:

PROPOSED PROJECT COST

Fee Category	Fees⁽¹⁾ Dollar (\$) Value	Percentage of Hard Costs
Estimated Value of Hard Costs^{(2):}		
Project Service Fees		
Investment Grade Energy Audit		
Design Engineering Fees		
Construction Management		
System Commissioning		
Equipment Initial Training Fees		
Contingency Costs		
Construction Interest		
DGS Project Management Fee⁽³⁾		
Project Service Fees Sub Total		
TOTAL FINANCED PROJECT COSTS:		

PROPOSED ANNUAL SERVICE FEES

First Year Annual Service Fees	Fees⁽¹⁾ Dollar (\$) Value	Percentage of Hard Costs
Measurement and Verification		
ENERGY STAR™ Services OPTIONAL		
Maintenance		
Performance Monitoring		
On-going Training Services		
Verification Reports		
TOTAL FIRST YEAR ANNUAL SERVICES		

NOTES:

1. Fees should include all mark-ups, overhead, and profit. Figures stated as a range will not be accepted.
2. The total value of Hard Costs is defined in accordance with standard AIA definitions that include: Labor Costs, Subcontractor Costs, Cost of Materials and Equipment, Temporary Facilities and Related Items, and Miscellaneous Costs such as Permits, Bonds Taxes, Insurance, Mark-ups, Overhead and Profit, etc.
3. The value of the DGS Project Management Fee to be included should be based on the values contained in Exhibit B-3

ESCO's proposed interest rate available at the time of submission:

Financial Institution:

Contact person:

**ESCO's PROPOSED FINAL ANNUAL CASH FLOW ANALYSIS FORM
(EXHIBIT B-2) COMMONWEALTH OF PENNSYLVANIA - GUARANTEED ENERGY SAVING CONTRACT**

Financed Project Cost ¹:
 Finance Term (months):
 Annualized Interest Rate:
 Construction Period² (months):
Escalation Rate for
 Annual Fees:

Escalation Rates by Utility & Fuel

Electric:	2.0%	Operational:	2.0%
Natural Gas:	2.5%	Coal:	3.0%
Fuel Oil:	2.5%	Other (specify):	0.0%
Steam:	3.0%		
Water:	3.0%		

Yr.	Electric Cost Savings	Natural Gas Cost Savings	Fuel Oil Cost Savings	Steam Cost Savings	Water Cost Savings	Operational Cost Savings	Other	Total Cost Savings	Guaranteed Cost Savings	Annual Service Fees ³	Financing Payment	Net Savings
1												
2												
3												
4												
5												
6												
7												
8												
9												
10												
11												
12												
13												
14												
15												
Total												

NOTES:1. Includes: Hard costs and project service fees defined in ESCOs PROPOSED PROJECT COST FORM, Exhibit B-1.
 2. No payments are made by Agency during the construction period.
 3. This figure should equal the value indicated on the ESCOs PROPOSED PROJECT COST FORM, Exhibit B-1. DO NOT include in the Financed Project Costs.

Exhibit B-3
Commonwealth of Pennsylvania
GESA Management Fee
Schedule

Total Amount of Project	Total \$ Flat Fee
\$ 100,000 to \$ 199,999	\$ 4,000
\$ 200,000 to \$ 299,999	\$ 5,000
\$ 300,000 to \$ 399,999	\$ 6,000
\$ 400,000 to \$ 499,999	\$ 7,000
\$ 500,000 to \$ 599,999	\$ 8,000
\$ 600,000 to \$ 699,999	\$ 9,000
\$ 700,000 to \$ 799,999	\$ 10,000
\$ 800,000 to \$ 899,999	\$ 11,000
\$ 900,000 to \$ 999,999	\$ 13,000
\$ 1,000,000 to \$ 1,999,999	\$ 15,000
\$ 2,000,000 to \$ 2,999,999	\$ 20,000
\$ 3,000,000 to \$ 3,999,999	\$ 25,000
\$ 4,000,000 to \$ 4,999,999	\$ 30,000
\$ 5,000,000 to \$ 5,999,999	\$ 35,000
\$ 6,000,000 to \$ 6,999,999	\$ 40,000
\$ 7,000,000 to \$ 7,999,999	\$ 45,000
\$ 8,000,000 to \$ 8,999,999	\$ 50,000
\$ 9,000,000 to \$ 9,999,999	\$ 55,000
\$10,000,000 to \$19,999,999	\$ 60,000
\$20,000,000 to \$29,999,999	\$ 80,000
\$30,000,000 to \$39,999,999	\$100,000
\$40,000,000 to \$49,999,999	\$120,000
\$50,000,000 to \$59,999,999	\$140,000

APPENDIX E-1: COMMONWEALTH OF PENNSYLVANIA GUARANTEED ENERGY SERVICES AGREEMENT

GUARANTEED ENERGY SERVICES AGREEMENT

This Guaranteed Energy Services Agreement (the "Agreement") is made and entered into as of this day of _____, at _____, in the County of _____, Commonwealth of Pennsylvania, by and between _____ ("ESCO"), having its principal offices at _____, and _____ ("Agency") with its principal offices at _____, for the purpose of installing certain energy saving equipment, described in Schedule A, and providing other services designed to save energy for the Agency's property and buildings, known as _____, located at _____ (the "Premises").

RECITALS

WHEREAS, Agency owns and operates the Premises, and is in need of energy saving equipment and service designed to save energy and associated energy costs at said Premises; and

WHEREAS, Agency solicited proposals from qualified firms through the issuance of a request for proposal ("RFP") set forth in Appendix A; and

WHEREAS, ESCO submitted a proposal dated _____ (the "Proposal") in response to the RFP. The ESCO proposal is set forth in Appendix B; and

WHEREAS, ESCO has made an assessment of the energy consumption characteristics of the Premises and existing Equipment described in Schedule B, which Agency has approved.

WHEREAS, Agency desires to retain ESCO to purchase, install and service certain energy efficiency equipment of the type or class described in Schedule A, attached hereto and made part hereof and to provide other services for the purpose of achieving energy cost reductions within Premises, as more fully set forth herein; and

WHEREAS, Agency desires to compensate ESCO for its services based upon the value of energy and operations savings that are obtained; and

WHEREAS, Agency is authorized under the Constitution and the laws of the Commonwealth of Pennsylvania to enter into this contract for the purposes set forth herein.

NOW, THEREFORE, in consideration of the mutual promises and covenants contained herein, and intending to be legally bound hereby, Agency and ESCO hereto covenant and agree as follows:

SECTION 1. ENERGY MANAGEMENT PLAN

Section 1.1 Plan Details. ESCO has prepared the complete Technical Energy Audit and Analysis of the Premises set forth in Appendix C and dated _____ which has been approved and

accepted by Agency as set forth in Exhibit II (i). The audit includes all energy conservation measures agreed upon by the parties.

Section 1.2 Schedules, Exhibits and Appendices. ESCO has prepared and Agency has approved and accepted the Schedules as set forth below, copies of which are attached hereto (or will be as provided for in the contract), set forth in their entirety as Attachment I and 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 Saving 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	Agency's Maintenance Responsibilities
Schedule L	Facility Maintenance Checklist
Schedule M	ESCO's Training Responsibilities
Schedule N	Installment Purchase and Payment Schedule
Schedule O	Final Project Costs and Final Project Cash Flow Analysis
Schedule P	DGS Annual Reporting Requirements
Schedule Q	[Sets forth each parties' specific responsibilities in regard to the removal, remediation and disposal of all hazardous waste materials responsibilities, but ESCO shall bear the cost and assumes full responsibility for scheduling and coordination]

Exhibits

Exhibit I	Performance Bond/Construction Bond
Exhibit II (i)	Certificate of Acceptance—Technical Audit
Exhibit II (ii)	Certificate of Acceptance—Installed Equipment
Exhibit II (iii)	Certificate of Acceptance—Negotiated Hazardous Material Removal
Exhibit III	Equipment Warranties

Appendices

Appendix A	RFP for ESCO Solicitation
Appendix B	ESCO Proposal
Appendix C	Technical Audit

Section 1.3 Other Documents. This Agreement incorporates herein and makes a part hereof the entire RFP and ESCO Proposal for this Project labeled Appendix A and B respectively. Acceptance by the Agency of the Technical Energy Audit and Analysis Report is reflected in Exhibit II (i). Notwithstanding, the provisions of this Agreement and the attached Schedules shall govern in the event of any inconsistencies between the Technical Energy Audit and Analysis and the provisions of this Agreement.

SECTION 2. ENERGY USAGE RECORDS AND DATA

Agency has furnished or shall furnish (or cause its energy suppliers to furnish) to ESCO, upon its request, all of its records and complete data concerning energy usage and energy-related maintenance for the Premises described in Schedule B, including the following data for the most current thirty-six (36)

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, Agency shall also provide any prior energy audits of the Premises, and copies of Agency's financial statements and records related to energy usage and operations for said thirty-six (36) month period at said Premises, and shall make agents and employees familiar with such records available for consultations and discussions with ESCO.

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 schedules are in final form and accepted by Agency, ESCO has delivered a Notice to Agency that it has installed and commenced operating all of the Equipment specified in Schedule A and in accordance with the provisions of Section 6 and Schedule H; and Agency has inspected and accepted said installation and operation as evidenced by the Certificate of Acceptance as set forth in Exhibit II (ii). Compensation payments due to ESCO for service and maintenance under this Agreement as set forth in Schedule D shall begin no earlier than ____ from the Commencement Date as defined herein.

Section 3.2 Term of Agreement: Interim Period. Subject to the following sentence, the term of this Agreement shall be fourteen (14) years measured beginning with the Commencement Date. Nonetheless, the Agreement shall be effective and binding upon the parties immediately upon the "Effective Date." The Effective Date is the date this Agreement is sent to ESCO after it has been fully executed by Agency and ESCO and all approvals required by Commonwealth contracting procedures have been obtained. The period from Agreement 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 Agency.

SECTION 4. PAYMENTS TO ESCO

Section 4.1 Energy Savings Guarantee. ESCO has formulated and, subject to the adjustments provided for in Section 16, 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 Agreement as specified in Schedule J and in accordance with the Savings Calculation Formula as set for in Schedule F. The Energy Savings Guarantee is set forth in annual increments for the term of the Agreement as specified in Schedule C and has been structured by the ESCO so as to be sufficient to cover any and all annual payments required to be made by the Agency as set forth in Schedule D and Schedule N.

Section 4.2 Annual Review and Reimbursement/Reconciliation. If at the end of any year during the guarantee period as specified in Schedule C, the ESCO has failed to achieve the annual Energy Savings Guarantee specified in Schedule C, upon written request by the Agency, which shall be given no earlier than the end of such year and no later than ____ () days thereafter, the ESCO will pay the Agency 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. The ESCO shall remit such payments to the Agency within ____ () days of written notice by the Agency 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 and are in addition to those monies due the ESCO for compensation for services as set forth in Schedule D, such excess savings shall first be applied to reimburse ESCO for any payment ESCO made to Agency to meet ESCO's guarantee for previous years in which the energy savings fell short of ESCO's Energy Savings Guarantee under the terms as set forth in Schedule C. In no event shall credit for excess savings be used to satisfy performance guarantees in future years of the contract.

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 include any and all annual payments required to be made by the Agency in connection with financing/purchasing the Equipment to be installed by ESCO under this Agreement as set forth in Schedule N. Actual energy and operations savings achieved by ESCO through the operation of Equipment and performance of services by ESCO shall be sufficient to cover any and all annual fees to be paid by Agency to ESCO for the provision of services as set forth and in accordance with the provisions of Schedules D and J.

Section 4.4 Billing Information Procedure. Payments due to ESCO under Schedules D and J shall be calculated each _____ in the following manner:

(i) By the _____ day after receipt, Agency shall provide ESCO with copies of all information required as per Schedule F for the Premises which it shall have received for the preceding month;

(ii) Upon receipt of the required information, ESCO shall calculate the savings in accordance with the agreed-upon calculation formulae in Schedule F.

(iii) Based upon paragraphs (i) and (ii) above, ESCO shall prepare and send to Agency a _____ invoice which shall set forth for each _____ the amounts of the energy and operations dollar savings calculated in accordance with Schedule F. The invoice will set forth the total _____ payment due from Agency.

(iv) Agency shall pay ESCO within thirty (30) days of receipt of ESCO's invoice.

Section 4.5 Installment Payments. Agency agrees to make installment payments to ESCO, or its assignee, for the Equipment in accordance with the terms and conditions of this Agreement and Schedule N. Agency's obligation to make the Installment Payments in Schedule N shall be absolute and unconditional in all events except as expressly set forth in Sections 5 and 19. After acceptance of the Equipment, Agency covenants that it will not assert any right to setoff, counterclaim, abatement, or recoupment of the Installment Payments.

Section 4.6 Effective Date of Payment Obligation. Notwithstanding the above provisions in Section 4, Agency shall not be required to begin any payments to ESCO under Schedules D and J unless and until all Equipment installation is completed by ESCO in accordance with the provisions of Section 6 and Schedule H, and accepted by Agency as evidenced by the signed Certificate of Acceptance as set forth in Exhibit II (ii), and unless and until said Equipment is fully and properly functioning.

Section 4.7 Offset Provision. Except as provided in Section 4.5, ESCO agrees that Agency may set off the amount of any state tax liability or other obligation of ESCO or its subsidiaries to the Commonwealth of Pennsylvania against any payments due ESCO under any contract with the Commonwealth of Pennsylvania.

SECTION 5. NONAPPROPRIATION OF FUNDS

In the event no Agency funds or insufficient Agency funds are appropriated and budgeted in any Commonwealth of Pennsylvania Fiscal Year for payments due under this Agreement, then Agency will immediately notify ESCO or its assignee of such occurrence and this Agreement shall terminate on the last day of Commonwealth's Fiscal Year for which appropriations were received without penalty or expense to Agency of any kind whatsoever. In the event of such termination, Agency agrees to peaceably surrender possession of all the Equipment in good operating condition, subject to normal wear and tear to ESCO or its assignee on the date of such termination. ESCO or its assignee will have all legal and equitable rights and remedies to take possession of the Equipment. Upon such termination, title to the Equipment will revert to ESCO or its assignee.

If, on the thirtieth (30th) day after the commencement of any Fiscal Year, sufficient funds have not been appropriated for the purpose of making all of the payments scheduled to be paid in such Fiscal Year, Agency shall cause to be delivered written notice thereof (a "notice of nonappropriation") to ESCO within ten (10) calendar days after such thirtieth (30th) day. Upon ESCO's receipt of a notice of nonappropriation, this Agreement shall terminate, as of the end of the Fiscal Year just ended; provided, however, such termination shall not become effective as of the end of such Fiscal Year just ended if, within ten (10) calendar days of the thirtieth (30th) day after the end of such Fiscal Year just completed, Agency shall cause to be delivered to ESCO a written statement to the effect that it reasonably expects sufficient funds for the then-current Fiscal Year to be appropriated therefore, and in such event the term shall continue into the then-current Fiscal year so long, but only so long, as an appropriation becomes available from which to make the payments.

Notwithstanding the foregoing, Agency agrees that (i) it will not cancel this Agreement under the provisions of this paragraph if any funds are appropriated to it, or by it, for the acquisition, retention or operation of the Equipment or other equipment performing functions similar to the Equipment for the Fiscal Year in which such termination occurs and (ii) it will not, during the term of the Agreement, give priority in the application of funds to any other functionally similar equipment or purchase of services such as outsourcing.

SECTION 6. CONSTRUCTION SCHEDULE AND EQUIPMENT INSTALLATION; APPROVAL

Section 6.1 ESCO shall be responsible for the professional and technical accuracy, of all construction and services performed, whether by ESCO or its subcontractors or others on its behalf, throughout the term of this Agreement.

Section 6.2 ESCO shall provide overall coordination, management, and responsibility, and shall assure that all work is completed in a good and workmanlike manner. ESCO's services shall include the following:

- a. Engineering Design: A survey of the Premises for purposes of designing the Program.
- b. Procurement, Installation, Start-Up: Subject to other provisions of this Agreement, ESCO will act as a turn-key general contractor assuming total responsibility for the procurement of labor and material for installation and start-up of the Equipment, including: selecting subcontractors in concert with Agency; awarding subcontracts; receiving and evaluating submitted drawings on the Equipment; progress inspections during installation; developing and presenting subcontractor punch lists after each inspection; receiving and evaluating record drawings; and operation and maintenance manuals from subcontractors; providing for training of Agency personnel on proper operation of the newly installed Equipment; and final inspection and recommendation for approval to the Agency for acceptance of the Equipment.

Section 6.3 Construction and Equipment installation shall proceed in accordance with the construction schedule approved by Agency and attached hereto as Schedule G.

Section 6.4 Systems Startup and Equipment Commissioning: The 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 and prior to acceptance of the project by Agency. The ESCO shall provide notice to the Agency of the scheduled test(s) and the Agency 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. The 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 6.5 In order for ESCO to receive payments during the design/build stages of the Agreement, the Agency shall authorize disbursements from any escrow account established and

maintained pursuant to any escrow agreement entered into between ESCO and any third party financing company. Agency shall request disbursements from the escrow account only for portions of the Equipment that are functionally complete, operationally independent, and accepted by the Agency.

Section 6.6 Statutory Requirements. In the installation of the Equipment, ESCO shall be required, and shall require its contractors and subcontractors to comply with the statutory requirements of Chapter 39 of Act 57 of May 5, 1998, as amended, 62 Pa. C.S. §3901 et seq.; the Prevailing Wage Act (43 P.S. §165-1 et seq.); the Steel Products Procurement Act (73 P.S. §1881 et seq.) the Trade Practices Act of July 23, 1968 (71 P.S. §686 et seq.); Uniform Construction Code; Act 28 of April 9, 1990 (71 P.S. §2420). as found in Part I of the RFP. ESCO must submit the technical scope of work to the Department of Labor and Industry for plans review and inspections subject to the requirements of the Department and provisions of the Uniform Construction Code to the extent they are applicable to the scope of work on the project.

SECTION 7. WARRANTIES

Section 7.1 General. Should any item of Equipment be found to be defective within one (1) year from the date of installation, ESCO agrees to repair such item or, if necessary, furnish and install, without charge, similar items to replace it; provided, however, that the original item is returned to ESCO and inspection by the manufacturer establishes the claim. All shipping and transportation costs involved in the repair or replacement of the defective Equipment shall be paid by ESCO.

On all systems installed pursuant to this Agreement, ESCO shall provide, at no charge during the warranty period, any labor required to repair or replace defective Equipment or parts. Such labor shall include adjustment of controls, air balancing, and correction of mechanical difficulties if such adjustments are due to defective Equipment or improper installation.

If the Equipment fails to fulfill the performance guarantees, ESCO shall have the opportunity to make such changes as it deems necessary to fulfill such guarantees. If a demonstration is required, ESCO shall be given the opportunity to test the Equipment under requisite conditions.

The warranty provisions under this Section 7.1 are in addition to and not in lieu of any warranties made by equipment or component manufacturers. After installation of all ECMs, Contractor shall deliver to the Agency all manufacturer warranty certificates, documents, operation and maintenance instructions and manuals, and similar documents.

Section 7.2 Equipment Warranties. ESCO covenants and agrees that all Equipment installed as part of this Agreement is new, in good and proper working condition and protected by appropriate written warranties covering all parts and Equipment performance. ESCO further agrees to deliver to the Agency for inspection and approval, all such written warranties and which shall be attached and set forth as Exhibit III, to pursue rights and remedies against 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, to notify the Agency whenever defects in Equipment parts or performance occur which give rise to such rights and remedies and those 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 the Agency or the Premises, due to ESCO's failure to exercise its warranty rights shall be borne solely by ESCO.

All warranties shall be transferable and extend to the Agency. The 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 year from the Commencement Date as defined in Section 3.1 hereof.

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

SECTION 8. TRAINING BY ESCO

The ESCO shall conduct the training program described in Schedule M hereto. The training specified in Schedule M must be completed prior to acceptance of the Equipment installation; such acceptance shall not be unreasonably delayed by the Commonwealth. The ESCO shall provide ongoing training whenever needed with respect to updated or altered Equipment, including upgraded software. Such training shall be provided at no additional charge to the Agency.

SECTION 9. PERMITS AND APPROVALS; COORDINATION

Section 9.1 Permits and Approvals. ESCO shall be responsible for obtaining all necessary permits and approvals for installation of the Equipment and shall pay any and all permit fees. Agency shall use its best efforts to assist ESCO in obtaining all necessary permits and approvals for installation of the Equipment. In no event shall Agency, however, be directly responsible for payment of any permit fees. The Equipment and the operation of the Equipment by ESCO shall at all times conform to all federal, state and local code requirements in effect at the time of installation. ESCO shall furnish copies of each permit or license which is required to perform the work to the Agency before the ESCO commences the portion of the work requiring such permit or license.

Section 9.2 Coordination During Installation. The Agency and ESCO shall coordinate the activities of ESCO's equipment installers with those of the Agency, its employees, and agents. ESCO shall not commit or permit any act which will interfere with the performance of business activities conducted by the Agency or its employees without prior written approval of the Agency.

SECTION 10. PERFORMANCE BY ESCO

Section 10.1 ESCO shall perform all tasks/phases under the Agreement, 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 and the construction schedule specified in Schedule G. ESCO shall repair and restore to its original condition any area of damage caused by ESCO's performance under this Agreement. The Agency reserves the right to review the work performed by ESCO and to direct ESCO to take certain corrective action if, in the opinion of the Agency, 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.

Section 10.2 ESCO shall remain responsible for the professional and technical accuracy of all services performed, whether by the ESCO or its subcontractors or others on its behalf, throughout the term of this Agreement.

Section 10.3 ESCO is responsible for general broom cleaning at its cost. At least once a week, ESCO shall remove from the Premises all discarded material and rubbish resulting from the work and assure that the Premises are clean and free of such materials and rubbish.

Section 10.4 DGS Annual Reporting Requirements; Annual ENERGY STAR Rating. At the end of each during the guarantee period as specified in Schedule C and no later than ninety (90) days thereafter, the ESCO shall complete and submit the data required in Schedule P. The ESCO shall provide an ENERGY STAR rating for each eligible facility for each year of the guarantee period.

SECTION 11. OWNERSHIP

Section 11.1 Ownership of Certain Proprietary Property Rights. Agency shall not, by virtue of this Agreement, acquire any interest in any formulas, patterns, devices, secret inventions or processes, copyrights, patents, other intellectual or proprietary rights, or similar items of property which are or may be used in connection with the Equipment. The ESCO shall grant to the Agency a perpetual, irrevocable royalty-free license for any and all software or other intellectual property rights necessary for the Agency to continue to operate, maintain, and repair the Equipment in a manner that will yield maximal energy consumption reductions.

Section 11.2 Ownership of Existing Equipment. Ownership of the Equipment and materials presently existing at the Premises at the time of execution of this Agreement shall remain the property of the Agency even if it is replaced or its operation made unnecessary by work performed by ESCO pursuant to this Agreement. If applicable, ESCO shall advise the Agency in writing of all equipment and materials to be replaced at the Premises and the Agency shall within ____ days designate in writing to the ESCO which equipment and materials that should not be disposed of off-site by the ESCO. It is understood and agreed to by both Parties that the Agency shall be responsible for and designate the location and storage for any equipment and materials that should not be disposed of off-site. The ESCO shall be responsible for the disposal of all equipment and materials, including any hazardous waste materials, such as asbestos, designated by the Agency as disposable off-site in accordance with all applicable laws and regulations regarding such disposal. Agency shall be responsible for the removal and disposal of all asbestos and lead containing materials.

Section 11.3 Ownership of New Equipment. Upon installation of the Equipment by ESCO and acceptance by Agency, the Agency shall own the Equipment. Agency shall execute the documents necessary for ESCO or the third party financing company to secure and maintain a security interest in the Equipment.

Section 11.4 Non-Equipment, Project Related Hazardous Materials. The ESCO shall be responsible for the cost of proper removal, remediation and disposal of all hazardous waste materials (including but not limited to asbestos) as required to complete the scope of work defined in this agreement. The agency and ESCO may negotiate the methodology for these hazardous waste materials responsibilities, but ESCO shall bear the cost and assumes full responsibility for scheduling and coordination. Each party's specific responsibilities will be set forth in SCHEDULE Q and accepted in EXHIBIT II (iii).

SECTION 12. LOCATION AND ACCESS

Agency shall provide sufficient rent-free 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. Agency shall provide access to the Premises for ESCO to perform any function related to this Agreement during regular business hours, or such other reasonable hours as may be requested by ESCO and acceptable to the Agency. The ESCO's access to Premises to make emergency repairs or corrections as it may determine are needed shall not be unreasonably restricted by the Agency.

SECTION 13. EQUIPMENT SERVICE

Section 13.1 Actions by ESCO. ESCO shall provide all service, repairs, and adjustments to the Equipment installed under terms of this Agreement pursuant to Schedule J. Agency shall incur no cost for Equipment service, repairs, and adjustments, except as set forth in Schedules D, J and K where applicable, provided, however, that when the need for maintenance or repairs principally arises due to the negligence or willful misconduct of the Agency or any employee or other agent of Agency, and ESCO can so demonstrate such causal connection, ESCO may charge Agency for the actual cost of the maintenance or repair insofar as such cost is not covered by any warranty or insurance proceeds.

Section 13.2 Malfunctions and Emergencies. Agency shall use its best efforts to notify the ESCO or its designee(s) within 24 hours after the Agency'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 Agency 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. Agency shall notify ESCO within twenty-four (24) hours upon its having actual knowledge of any emergency condition affecting the Equipment. ESCO shall respond or cause its designee(s) to respond within ____hours and shall promptly proceed with corrective measures. Any telephonic notice of such conditions by Agency shall be followed within three business days by written notice to ESCO from Agency. If Agency unreasonably delays in so 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 16 shall be applied.

Section 13.3 Actions by Agency. Agency 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. Notwithstanding the foregoing, Agency 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, Agency shall take reasonable steps to protect the Equipment from damage or injury and shall follow instructions for emergency action provided in advance by ESCO. Agency 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.

SECTION 14 UPGRADING OR ALTERING THE EQUIPMENT

ESCO shall at all times have the right, subject to Agency'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) the ESCO complies with the standards of comfort and services set forth in Schedule I herein;
- (ii) such modifications or additions to, or replacement of the Equipment, and any operational changes, or new procedures are necessary to enable the 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 the 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 the Agency for approval, which shall not be unreasonably withheld, provided that any replacement of the Equipment shall be new and have equal or better potential to reduce energy consumption at the Premises than the Equipment being replaced. The ESCO shall update any and all software to be used in connection with the Equipment in accordance with the provisions of Section 11.1. All replacements of and alterations or additions to the Equipment shall become part of the Equipment described in Schedule A and shall be covered by the provisions and terms of Section 6.

SECTION 15. STANDARDS OF COMFORT

ESCO will maintain and operate the Equipment in a manner which will provide the standards of heating, cooling, hot water, and lighting as described in Schedule I.

SECTION 16. MATERIAL CHANGES

Section 16.1 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 the Agency or as identified by the ESCO, to increase or decrease annual energy consumption in accordance with the provisions and procedures set forth in Schedule E and Schedule F by at least ___% after adjustments for climatic variations. Actions by the Agency which may result in a Material Change include but are not limited to the following:

- (i) manner of use of the Premises by the Agency; 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; 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) the Agency's failure to provide maintenance of and repairs to the Equipment in accordance with Schedule K; or
- (ix) any other conditions other than climate affecting energy use at the Premises.

Section 16.2 Reported Material Changes; Notice by Agency: The Agency shall use its best efforts to deliver to the 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 the 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 the Agency within ___ hours after having actual knowledge that the event constituting the Material Change occurred or was discovered by the Agency to have occurred.

Section 16.3 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 should not change more than ___% 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 deviates by more than ___ percent (___%) from the energy consumption for the same month of the preceding contract year after adjustments for changes to climactic conditions, then such deviation shall be timely reviewed by the ESCO to ascertain the cause of deviation. The ESCO shall report its findings to the Agency in a timely manner and the ESCO and Agency shall determine what, if any, adjustments to the baseline will be made in accordance with the provisions set forth in Schedule F.

SECTION 17. PROPERTY/CASUALTY/INSURANCE; INDEMNIFICATION

Section 17.1 At all times during the term of this Agreement, ESCO shall maintain in full force and effect, at its expense: (1) Workers' compensation insurance sufficient to cover all of the employees of ESCO and those of any subcontractor working to fulfill this Agreement, (2) casualty and liability insurance on the Equipment and public liability insurance for its employees and the possession, operation, and service of the Equipment and (3) property damage insurance. The limits of such insurance shall be not less than \$500,000 each person and \$2,000,000 each occurrence personal injury

and property damage combined. Such policies shall be occurrence rather than claims-made and shall name Commonwealth of Pennsylvania as an additional insured. The insurance shall not contain any endorsements or any other form designed to limit and restrict any action by the Commonwealth of Pennsylvania, as an additional insured, against the insurance coverage in regard to the work performed for Agency and otherwise consistent with this Agreement as offered by the ESCO. Prior to commencement of work under this Agreement, ESCO will be required to provide Agency with current certificates of insurance specified above. These certificates shall contain a provision that coverages afforded under the policies will not be canceled or changed until at least thirty (30) days' prior written notice has been given to Agency.

Section 17.2 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 Agreement.

Section 17.3 ESCO shall defend, indemnify and hold harmless Agency and its officers, agents and employees or any of them from any and all claims, demands, actions, damages, losses, expenses or liability of any nature based upon or arising out of any work performed by ESCO, its agents or employees under this Agreement.

SECTION 18. RISK OF LOSS

Upon acceptance of the Equipment, the Agency assumes all risk of loss of or damage to the Equipment from any cause whatsoever (except as provided in Section 7, 13 and 17), and no such loss of or damage to the Equipment shall relieve the Agency of the obligation to make payments or to perform any other obligation under this Agreement. In the event of damage to any item of Equipment, the Agency will immediately notify ESCO or its assignee and place the same in good repair except as provided in Sections 7, 13 and 17. If Agency determines that any of the Equipment is lost, stolen, destroyed, or damaged beyond repair and ESCO is not responsible for repair or replacement under Sections 7, 13 and 17, then the savings guarantee will be adjusted by mutual agreement to account for the losses associated with the Equipment and Agency will: either (a) replace the same with like Equipment in good repair, or (b) on the next payment date following occurrence of loss, pay ESCO (i) all amounts for said lost, stolen, destroyed, or damaged beyond repair Equipment then owed by the Agency to ESCO under this Agreement, including the payment for such item(s) due on such date and (ii) the proportionate amount of applicable Concluding Payment set forth in Schedule N. In the event that Agency is obligated to make such payment with respect to less than all of the Equipment, ESCO will provide Agency with the pro rata amount of the payment and the Concluding Payment to be made by Agency with respect to the Equipment which has been lost, stolen, destroyed or irreparably damaged.

SECTION 19. CASUALTY OR CONDEMNATION OF PREMISES

Any construction or restoration of the Premises following or necessitated by fire, flood, or other casualty, or any condemnation affecting any portion of the Premises, shall be deemed a Material Change, and the provisions of Section 16 shall be applicable. If the casualty or condemnation renders fifty percent (50%) or more of the Premises uninhabitable or unusable and, in the case of a casualty, the affected portion is not reconstructed or restored within one hundred and twenty (120) days from the date of such casualty, Agency shall have the option to terminate this Agreement by a notice to ESCO. In the event of condemnation, Agency agrees that ESCO shall be entitled to that portion of the condemnation award equal to the purchase option value applicable at that time with appropriate adjustments for applicable portions of the Premises which are condemned versus portions of the Premises which are unaffected. Upon such termination, ESCO may remove the Equipment from the condemned portion of the Premises.

SECTION 20. CONDITIONS BEYOND CONTROL OF THE PARTIES

If a party ("performing party") shall be unable to reasonably perform any of its obligations under this Agreement due to acts of God, insurrections or riots, or similar events, this Agreement 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 21. TERMINATION FOR CONVENIENCE

This Agreement may be terminated, in whole or in part, by Agency upon thirty (30) days' written notice whenever Agency shall determine that such termination is in the best interest of the Commonwealth. Any such termination shall be effected by delivery to ESCO of a notice of termination specifying the extent to which performance under this Agreement is terminated either in whole or in part and the date on which termination becomes effective. The Agreement shall be equitably adjusted to compensate for such termination and the Agreement modified accordingly. Failure to agree to any such adjustment shall be a dispute concerning a question of fact within the meaning of Section 24 of this Agreement. In no event, however, shall ESCO be paid for loss of anticipated profits if ESCO's performance is terminated by the Commonwealth.

SECTION 22. EVENTS OF DEFAULT

Section 22.1. Events of Default by Agency. Each of the following events or conditions shall constitute an "Event of Default" by Agency:

- (i) Any failure by Agency to pay ESCO any sum due for a service and maintenance period of more than sixty (60) days after written notification by ESCO that Agency is delinquent in making payment and provided that ESCO is not in default in its performance under the terms of this Agreement; or
- (ii) Any other material failure by Agency to perform or comply with the terms and conditions of this Agreement, including breach of any covenant contained herein, provided that such failure continues for sixty (60) days after notice to Agency demanding that such failures to perform be cured or if such cure cannot be effected in sixty (60) days, Agency 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 Agency in this Agreement which was false or misleading in any material respect when made.

Section 22.2 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 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 Agency to ESCO demanding that such failure be cured, shall be deemed cured for purposes of this Agreement;
- (ii) Any representation or warranty furnished by ESCO in this Agreement 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 Agreement as set forth in Schedules A and G;
- (iv) Any other material failure by ESCO to perform or comply with the terms and conditions of this Agreement, including breach of any covenant contained herein, provided that such failure continues for thirty (30) days after written notice to ESCO demanding that such failure to perform be cured, if corrected or cured within

thirty (30) days after ESCO's receipt of such written notice shall be deemed cured for the purpose of this Agreement.

- (v) Any lien or encumbrance upon the Equipment by any subcontractor, laborer or materialman 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 thirty (30) days of its filing, or an involuntary assignment for the benefit of all creditors or the liquidation of ESCO;
- (vii) Any change in majority ownership or control of the ESCO without the prior approval of the Agency, which shall not be unreasonably withheld;
- (viii) Failure by the ESCO to pay any amount due the Agency or perform any obligation under the terms of this contract or the Energy Savings Guarantee as set forth in Schedule C; or
- (ix) Repossession or removal of the Equipment by ESCO or a third party without good cause.

SECTION 23. REMEDIES UPON DEFAULT

Section 23.1 Remedies upon Default by Agency. If an Event of Default by Agency occurs, ESCO may, without a waiver of other remedies which exist in law or equity, elect one or both of the following remedies:

- (i) Exercise any and 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 Agency, and/or for damages which shall include all costs and expenses reasonably incurred in exercise of its remedy;
- (ii) Without recourse to legal process, terminate this Agreement by delivery of a notice declaring termination, enter the Premises, and dismantle and/or remove its Equipment from the Premises, without liability to Agency.

Section 23.2 Remedies Upon Default by ESCO. In the Event of Default by ESCO, Agency shall have the choice of one or more of the following remedies without waiving any other rights or remedies in law or equity:

- (i) 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;
- (ii) If the payments under this Agreement have been assigned, and the Equipment has been accepted by Agency, the Agency shall declare ESCO to be in default, but continue to make the payments under Schedule N for the Equipment which has been so accepted. If no Equipment has been so accepted, Agency may terminate this Agreement without liability to make any payments;
- (iii) If the payments under this Agreement have not been assigned, Agency may set off or counterclaim against its obligation to make any of the payments provided in default; or
- (iv) ESCO (but not the assignee) will be liable to Agency for damages incurred by Agency as a result of any default by ESCO. Such damages may include, but are

not limited to: (a) payments made to ESCO or its assignee which represents payment towards a unit of Equipment for which acceptance was revoked because of a latent defect (b) the difference in price between the market price of the Equipment which was not delivered or which was rejected (or the actual purchase price if Agency purchases replacements (like Equipment) for any undelivered or rejected unit of Equipment) and the purchase price indicated in the Agreement for such units of Equipment) (c) damages as a result of breach of warranty, failure to meet specifications, or damages incurred by Agency resulting from the delivery of Equipment which is defective or fails to meet specifications, or resulting from ESCO's failure to comply with any other requirements of this Agreement, and (d) any other damages recoverable by law.

SECTION 24. CONTROVERSIES

- a. In the event of a controversy or claim arising under this Agreement, ESCO must, within six months after the cause of action accrues, file a written claim with the agency contracting officer for a determination. The claim shall state all grounds upon which ESCO asserts a controversy exists. If ESCO fails to file a claim or files an untimely claim, ESCO is deemed to have waived its right to assert a claim in any forum.
- b. The contracting officer shall review timely-filed claims and issue a final determination, in writing, regarding the claim. The final determination shall be issued within 120 days of the receipt of the claim, unless extended by consent of the contracting officer and ESCO. The contracting officer shall send his/her written determination to ESCO. If the contracting officer fails to issue a final determination within the 120 days (unless extended by consent of the parties), the claim shall be deemed denied. The contracting officer's determination shall be the final order of the Agency.
- c. Within fifteen (15) days of the mailing date of the determination denying a claim or within 135 days of filing a claim if, no extension is agreed to by the parties, whichever occurs first, ESCO may file a statement of claim with the Commonwealth Board of Claims. Pending a final judicial resolution of a controversy or claim, ESCO shall proceed diligently with the performance of the Agreement in a manner consistent with the determination of the contracting officer and the Commonwealth shall compensate ESCO pursuant to the terms of the Contract.

SECTION 25. ASSIGNMENT

ESCO acknowledges that Agency is induced to enter into this Agreement by, among other things, the professional qualifications of ESCO. ESCO agrees that neither this Agreement nor any right or obligations hereunder may be assigned in whole or in part to another firm, without the prior written approval of Agency.

Section 25.1 Assignment by ESCO. ESCO may, with prior written approval of Agency, delegate its duties and performance under this Agreement, and/or utilize contractors, provided that any assignee(s), delegee(s), or contractor(s) shall fully comply with the terms of this Agreement. Notwithstanding the provisions of this paragraph, ESCO shall remain jointly and severally liable with its assignee(s) or transferee(s) to Agency for all of its obligations under this Agreement.

Section 25.2 Assignment by Agency. Agency may transfer or assign this Agreement and its rights and obligations herein to a successor or purchaser of the Buildings or an interest therein. The Agency shall remain jointly and severally liable with its assignees or transferees to the ESCO for all of its obligations under this Agreement.

SECTION 26. 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 Agreement and perform its obligations hereunder;
- (ii) Its execution, delivery, and performance of this Agreement have been duly authorized by, or are in accordance with, its organic instruments, and this Agreement 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 Agreement 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.

SECTION 27. ADDITIONAL REPRESENTATIONS OF THE PARTIES.

Section 27.1 Agency hereby warrants, represents and promises that:

- (i) It has provided or shall provide timely to ESCO, all records relating to energy usage and energy-related maintenance of Premises requested by ESCO and the information set forth therein is, and all information in other records to be subsequently provided pursuant to this Agreement will be true and accurate in all material respects; and
- (ii) It has not entered into any leases, contracts 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. Agency 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 which may be executed from time to time hereafter within thirty (30) days after execution thereof.

Section 27.2 ESCO hereby warrants, represents and promises that:

- (i) Before commencing performance of this Agreement:
 - (a) It is or shall become licensed or otherwise permitted to do business in the Commonwealth of Pennsylvania
 - (b) It shall have provided proof and documentation of required insurance pursuant to Section 17 it shall make available, upon reasonable request, all documents relating to its performance under this Agreement, including all contracts and subcontracts entered into;

- (ii) 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;
- (iii) That it is financially solvent, able to pay its debts as they mature and possessed of sufficient working capital to complete the Work and perform its obligations under this Agreement.

SECTION 28. WAIVER OF LIENS

ESCO will obtain and furnish to Agency a Waiver of Liens from each vendor, material manufacturer and laborer in the supply, installation and servicing of each piece of Equipment.

SECTION 29. 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 Agency relative to the Premises.

SECTION 30. INDEPENDENT CAPACITY OF THE CONTRACTOR

The parties hereto agree that ESCO, and any agents and employees of ESCO, in the performance of this Agreement, shall act in an independent capacity and not as officers, employees, or agents of the Agency.

SECTION 31. NO WAIVER

The failure of ESCO or Agency to insist upon the strict performance of the terms and conditions hereof shall not constitute or be construed as a waiver or relinquishment of either party's right to thereafter enforce the same in accordance with this Agreement in the event of a continuing or subsequent default on the part of ESCO or Agency.

SECTION 32. PATENT, COPYRIGHT, AND TRADEMARK INDEMNITY

- a. ESCO shall hold the Agency harmless from any suit or proceeding which may be brought by a third party against the Commonwealth, its departments, officers or employees for the alleged infringement of any United States or foreign patents, copyrights, or trademarks, or for a misappropriation of trade secrets arising out of performance of this Contract, including all work, services, materials, reports, studies, and computer programs provided by ESCO, and in any such suit or proceeding will satisfy any final award for such infringement, including costs. The Agency agrees to give ESCO prompt notice of any such claim of which it learns. Pursuant to the Agency Attorneys Act 71 P.S. § 732-101, et, seq., the Office of Attorney General (OAG) has the sole authority to represent the Agency in actions brought against the Commonwealth. The OAG may, however, in its sole discretion and under the terms it deems appropriate, delegate its right of defense. If OAG delegates the defense to ESCO, the Agency will cooperate with all reasonable requests of contractor made in the defense of such suits. No settlement which prevents the Agency from continuing to use the items provided by ESCO shall be made without the Agency's prior written consent. In all events, the Agency shall have the right to participate in the defense of any such suit or proceeding through counsel of its own choosing. It is expressly agreed by ESCO that, in the event it requests that the Agency to provide support to ESCO in defending any such claim, ESCO shall reimburse the Agency for all expenses (including attorneys' fees, if such are made necessary by ESCO's request) incurred by the Agency for such support. If OAG does not delegate the defense of the matter, ESCO's obligation to indemnify ceases. ESCO will, at its expense, provide whatever cooperation OAG requests in the defense of the suit.

- b. ESCO agrees to exercise reasonable due diligence to prevent claims of infringement on the rights of third parties. ESCO certifies that, in all respects applicable to this Contract, it has exercised and will continue to exercise due diligence to ensure that all works produced under this Contract do not infringe on the patents, copyrights, trademarks, trade secrets, or other proprietary interests of any kind which may be held by third parties. ESCO also agrees to certify that work produced for the Agency under this contract shall be free and clear from all claims of any nature.
- c. If the defense of the suit is delegated to ESCO, ESCO shall pay all damages and costs awarded therein against the Agency. If information and assistance are furnished by the Agency at ESCO's written request, it shall be at ESCO's expense, but the responsibility for such expense shall be only that within ESCO's written authorization.
- d. If, in ESCO's opinion, the products, materials, reports, studies, or computer programs furnished hereunder are likely to or do become subject to a claim of infringement of a United States patent, copyright, or trademark, or for a misappropriation trade secret, then without diminishing ESCO's obligation to satisfy any final award, ESCO may, at its option and expense, substitute functional equivalents for the alleged infringing products, materials, reports, studies, or computer programs or, at ESCO's option and expense, obtain the right for the Agency to continue the use of such products, materials, reports, studies, or computer programs.
- e. If any of the products, materials, reports, studies, or computer programs provided by ESCO are in such suit or proceeding held to constitute infringement and the use or publication thereof is enjoined, ESCO shall, at its own expense and at its option, either procure the right to publish or continue use of such infringing products, materials, reports, studies, or computer programs, replace them with the non-infringing items, or modify them so that they are no longer infringing.
- f. If ESCO is unable to do any of the preceding, ESCO agrees to pay the Agency:
 - (1) any amounts paid by the Agency less a reasonable amount based on the acceptance and use of the deliverable;
 - (2) any license fee less an amount for the period of usage of any software; and
 - (3) the prorated portion of any service fees representing the time remaining in any period of service for which payment was made
- g. The obligations of ESCO under this section continue without time limit and survive the termination of this contract.
- h. Notwithstanding the above, ESCO shall have no obligation for:
 - (1) modification of any product, service, or deliverable provided by the Agency;
 - (2) any material provided by the Agency to ESCO and incorporated into, or used to prepare, a product, service, or deliverable;
 - (3) use of the product, service, or deliverable in other than its specified operating environment;
 - (4) the combination, operation, or use of the product, service, or deliverable with other products, services, or deliverables not provided by ESCO as a system or

the combination, operation, or use of the product, service, or deliverable, with any products, data, or apparatus that ESCO did not provide;

(5). infringement of a non-ESCO product alone.

(6). the Agency's distribution, marketing or use beyond the scope contemplated by the Contract;

(7). the Agency's failure to use corrections or enhancements made available to the Agency by ESCO at no charge.

- i. The obligation to indemnify the Agency, under the terms of this Section, shall be ESCO's sole and exclusive obligation for the infringement or misappropriation of intellectual property.

SECTION 33. NONDISCRIMINATION/SEXUAL HARASSMENT CLAUSE

During the term of the Agreement, ESCO agrees as follows:

- a. In the hiring of any employees for the manufacture of supplies, performance of work, or any other activity required under the Agreement or any subcontract, ESCO, subcontractor, or any person acting or behalf of ESCO or subcontractor shall not by reason of gender, race, religious creed, or color, discriminate against any citizen of this Commonwealth who is qualified and available to perform the work to which the employment relates.
- b. Neither ESCO nor any subcontractor nor any person on their behalf shall in any manner discriminate against or intimidate any employee involved in the manufacture of supplies, the performance of work, or any other activity required under the Agreement on account of gender, race, religious creed, or color.
- c. ESCO and subcontractors shall establish and maintain a written sexual harassment policy and shall inform its employees of the policy.
- d. ESCO and each subcontractor shall furnish all necessary employment documents and records to and permit access to its books, records, and accounts by the contracting officer and the Department of General Services' Bureau of Contract Administration and Business Development for purposes of investigation to ascertain compliance with the provisions of this Nondiscrimination/Sexual Harassment Clause. If ESCO or any subcontractor does not possess documents or records reflecting the necessary information requested, it shall furnish such information on reporting forms supplied by the contracting officer or the Bureau of Contract Administration and Business Development.
- e. ESCO shall include the provisions of this Nondiscrimination/Sexual Harassment Clause in every subcontract so that such provisions will be binding upon each subcontractor.
- f. Agency may cancel or terminate the Agreement, and all money due or to become due under the Agreement may be forfeited for a violation of the terms and conditions of this Nondiscrimination/Sexual Harassment Clause.

34. CONTRACTOR INTEGRITY PROVISIONS

34.1 Definitions.

- a. Confidential information means information that is not public knowledge, or available to the public on request, disclosure of which would give an unfair, unethical, or illegal advantage to another desiring to contract with the Commonwealth of Pennsylvania (Commonwealth).
 - b. Consent means written permission signed by a duly authorized officer or employee of Commonwealth, provided that where the material facts have been disclosed, in writing, by prequalification, bid, proposal, or contractual terms, Commonwealth shall be deemed to have consented by virtue of execution of this Agreement.
 - c. Contractor means ESCO including its directors, officers, partners, managers, key employees, and owners of more than a five percent (5%) interest.
 - d. Financial interest means:
 - 1) Ownership of more than a five percent (5%) interest in any business; or
 - 2) Holding a position as an officer, director, trustee, partner, employee, or the like, or holding any position of management.
 - e. Gratuity means any payment of more than nominal monetary value in the form of case, travel, entertainment, gifts, meals, lodging, loans, subscriptions, advances, deposits of money, services, employment, or contracts of any kind.
- 34.2 The contractor shall maintain the highest standards of integrity in the performance of this agreement and shall take no action in violation of state or federal laws, regulations, or other requirements that govern contracting with Commonwealth.
- 34.3 The contractor shall not disclose to others any confidential information gained by virtue of this Agreement.
- 34.4 The contractor shall not, in connection with this or any other agreement with the Commonwealth, directly or indirectly, offer, confer, or agree to confer any pecuniary benefit on anyone as consideration for the decision, opinion, recommendation, vote, other exercise of discretion, or violation of a known legal duty by any officer or employee of Commonwealth.
- 34.5 The contractor shall not, in connection with this or any other agreement with Commonwealth, directly or indirectly, offer, give, or agree or promise to give to anyone any gratuity for the benefit of or at the direction or request of any officer or employee of Commonwealth.
- 34.6 Except with the consent of Agency, neither the contractor nor anyone in private with him or her shall accept or agree to accept from, or give or agree to give to, any person, any gratuity from any person in connection with the performance of work under this agreement except as provided therein.

- 34.7 Except with the consent of Agency, the contractor shall not have a financial interest in any other contractor, subcontractor, or supplier providing services, labor, or material on this project.
- 34.8 The contractor, upon being informed that any violation of these provisions has occurred or may occur, shall immediately notify Agency in writing.
- 34.9 The contractor, by execution of this Agreement and by the submission of any bills or invoices for payment pursuant thereto, certifies and represents that he or she has not violated any of these provisions.
- 34.10 The contractor, upon the inquiry or request of the Inspector General of the Commonwealth or any of that official's agents or representatives, shall provide, or if appropriate, make promptly available for inspection or copying, any information of any type or form deemed relevant by the Inspector General to the contractor's integrity or responsibility, as those terms are defined by Commonwealth's statutes, regulations, or management directives. Such information may include, but shall not be limited to, the contractor's business or financial records, documents or files of any type or form which refer to or concern this Agreement. Such information shall be retained by the contractor for a period of three (3) years beyond the termination of the Agreement unless otherwise provided by law.
- 34.11 For violation of any of the above provisions, Agency may terminate this and any other agreement with the contractor, claim liquidated damages in an amount equal to the value of anything received in breach of these provisions, claim damages for all expenses incurred in obtaining another contractor to complete performance hereunder, and debar and suspend the contractor from doing business with Commonwealth. These rights and remedies are cumulative, and the use or nonuse of any one shall not preclude the use of all or any other. These rights and remedies are in addition to those the Agency may have under the law, statute, regulation, or otherwise.

35. CONTRACTOR RESPONSIBILITY PROVISIONS

- 35.1 ESCO certifies that it is not currently under suspension or debarment by the Commonwealth of Pennsylvania, any other state, or the federal government.
- 35.2 If ESCO enters into any subcontracts under this Agreement with subcontractors who are currently suspended or debarred by Commonwealth or federal government or who become suspended or debarred by Commonwealth or federal government during the term of this Agreement or any extensions or renewals thereof, Agency shall have the right to require ESCO to terminate such subcontracts.
- 35.3 ESCO agrees that it shall be responsible for reimbursing Agency for all necessary and reasonable costs and expenses incurred by the Office of the Inspector General relating to an investigation of ESCO's compliance with the terms of this or any other agreement between ESCO and Agency which results in the suspension or debarment of the ESCO.

SECTION 36. PROVISIONS CONCERNING THE AMERICANS WITH DISABILITIES ACT

During the term of this Agreement, ESCO agrees as follows:

- 36.1 Pursuant to federal regulations promulgated under the authority of The Americans With Disabilities Act, 28 CFR §35. 1 01 et seq., ESCO understands and agrees that no individual with a disability shall, on the basis of the disability, be excluded from participation in this Agreement or from activities provided for under this Agreement. As a condition of accepting and executing this Agreement, ESCO agrees to comply with all

regulations promulgated under Title H of The Americans With Disabilities Act which are applicable to the benefits, services, programs, and activities provided by Commonwealth of Pennsylvania through contracts with outside contractors.

- 36.2 ESCO shall be responsible for and agrees to indemnify and hold harmless Agency from all losses, damages, expenses, claims, demands, suits, and actions brought by any party against Commonwealth as a result of ESCO's failure to comply with the provisions of Paragraph 36.1 above.

SECTION 37. SEVERABILITY

In the event that any clause or provision of this Agreement 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 Agreement unless the result would be manifestly inequitable or unconscionable.

SECTION 38. COMPLETE CONTRACT

This Agreement, when executed, together with all Appendices and all Schedules attached hereto or to be attached hereto, as provided for by this Agreement shall constitute the entire contract between both parties and this Agreement may not be amended, modified, or terminated except by a written contract signed by the parties hereto. The Audit Agreement previously executed between the parties, dated _____, shall become null and void upon execution of this Agreement and Agency shall not be required to make any payments to ESCO under the Audit Agreement.

SECTION 39. ORDER OF PRECEDENCE

If any conflicts or discrepancies should arise in the terms and conditions of this Agreement or the interpretation thereof, the language of the Agreement shall be the first point of reference, ESCO's proposal, the second point of reference, and the Request for Proposals, the third point of reference.

SECTION 40. PRESERVATION OF RECORDS

ESCO shall maintain and preserve for a period extending until three (3) years after date of final payment to ESCO and during that period shall produce, upon request of Agency, all data, records, and other evidence pertaining to costs incurred by ESCO in connection with this Agreement for the purpose of an audit or other examination.

SECTION 41. 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 Agreement.

SECTION 42. APPLICABLE LAW

This Agreement and the construction and enforceability thereof shall be interpreted under the laws of the Commonwealth of Pennsylvania.

SECTION 43. ENVIRONMENTAL PROVISIONS

In the performance of this Agreement, ESCO shall minimize pollution and shall strictly comply with all applicable environmental laws and regulations.

The Contractor shall comply with all statutes and regulations of the Commonwealth of Pennsylvania concerning environmental quality control administered by DEP. These include but are not

limited to, the Clean Streams Law, the Clean Water Act, Pennsylvania Sewage Facilities Act, Air Pollution Control Act, Surface Mining Conservation and Reclamation Act, Bituminous Coal Open Pit Mining Conservation Act, Dams and Encroachments Act, Water Well Drillers Act, Water Works Act and Atomic Energy Act, all as amended to date. The Contractor is responsible for any violations and shall secure all required permits. Erosion control measures are shown on drawings and specifications and/or specified in the General Requirements. An erosion control permit, if required, will be obtained by the Professional.

SECTION 44. 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:, Complete address.>**
< Include COPY TO: information for ESCO, if applicable.>

TO AGENCY: **<Agency Name, Attention:, Complete address.>**
< Include COPY TO: information for AGENCY, if applicable. >

SECTION 45. AGENCY'S COMPLIANCE WITH FACILITIES MAINTENANCE CHECKLIST

Section 45.1 The parties acknowledge and agree that ESCO has entered into this Agreement in reliance upon the prospect of earning compensation based on guaranteed energy savings in energy used at Premises, as set forth on Schedules C and D, attached hereto and made a part hereof.

Section 45.2 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 Agency on a regular and continuous basis.

Section 45.3 Agency agrees that it shall adhere to, follow and implement the energy conservation procedures and methods of operation to be set forth on Schedule K, to be attached hereto and made a part hereof after Agency's approval.

Section 45.4 Agency agrees that ESCO shall have the right once a month, with prior notice, to inspect Premises to determine if Agency is complying, and shall have complied with its obligations as set forth above in Section 34.3. For the purpose of determining Agency's said compliance, the checklist to be set forth at Schedule L as completed and recorded by ESCO during its monthly inspections, shall be used to measure and record Agency's said compliance. Agency shall make the Premises available to ESCO for and during each monthly inspection, and shall have the right to witness each inspection and the recordations on the checklist.

SECTION 46. HEADINGS

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

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

WITNESS:

**COMMONWEALTH OF PENNSYLVANIA
AGENCY**

[Name]

Signature

Signature

WITNESS:

ENERGY SERVICE COMPANY (ESCO)

[Name]

Signature of Secretary, Assistant Secretary
Treasurer or Assistant Treasurer

Signature of President or Vice President

Title

Title

(Corporate Seal)

Federal Identification No. _____

APPROVED AS TO FORM AND LEGALITY:

Office of Chief Counsel - Agency

N/A

Office of General Counsel

N/A

Office of Attorney General

APPROVED:

Comptroller

**CONTRACT ATTACHMENT I:
Schedules, Exhibits, Appendices**

Schedule A:	Equipment to be Installed by ESCO
Schedule B:	Description of Premises; Pre-Existing Equipment Inventory
Schedule C:	Energy Saving 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:	Agency's Maintenance Responsibilities
Schedule L:	Facility Maintenance Checklist
Schedule M:	ESCO's Training Responsibilities
Schedule N:	Installment Purchase and Payment Schedule
Schedule O:	Final Project Costs and Final Project Cash Flow Analysis
Schedule P:	DGS Annual Reporting Requirements
Schedule Q:	Hazardous Material Removal [Sets forth each parties' specific responsibilities in regard to the removal, remediation and disposal of all hazardous waste materials responsibilities, but ESCO shall bear the cost and assumes full responsibility for scheduling and coordination]

Exhibits

Exhibit I	Performance Bond/Construction Bond
Exhibit II (i)	Certificate of Acceptance—Technical Audit
Exhibit II (ii)	Certificate of Acceptance—Installed Equipment
Exhibit II (iii)	Certificate of Acceptance—Hazardous Material Removal
Exhibit III	Equipment Warranties

Appendices (Optional)

Appendix A	<u>RFP for ESCO Solicitation</u>
Appendix B	<u>ESCO Proposal</u>
Appendix C	<u>Technical Audit</u>

Note: The following schedules can be included as optional and included or combined with others or may be contained in the audit report as desired:

Pre-Existing Service Contracts

Energy Savings Projections

Projected Financial Performance

Facility Changes Checklist

Current and Known Capital Projects at Facility

Schedule P- DGS Annual Reporting Requirements

Agency Name/Agency Contact (Include Email and Phone Number)	
Facility Name/Facility Contact (Include Email and Phone Number)	
ESCO Name/ESCO Contact (Include Email and Phone Number)	
Total Square Footage of Project Site/Contract Start Date/Contract End Date	
Current Repayment Year (ex. Yr. 3/ 2005)	
Reporting Timeframe (ex. Jan 1-Dec. 31)	
Installed Project Cost (no financing costs)	
Total Contract Value of Guaranteed Savings	
Annual Value of Guaranteed Savings	
Measured Energy Savings	
Operational Savings (break out avoided capital costs if applicable)	
Annual Dollar Value of Achieved Savings	
Total Annual Achieved Energy Savings (MMBTU)	
Electric	
Natural Gas	
Oil	
Coal	
Steam	
Other	
Annual Water Savings (kgal)	
Annual Avoided NOx Emissions (Tons)	
Annual Avoided SOx Emissions (Tons)	
Annual Avoided CO2 Emissions (Tons)	
ENERGY STAR Rating (if applicable)	

APPENDIX E-2:

COMMONWEALTH OF PENNSYLVANIA

SAMPLE CONSTRUCTION PROCESS

PROVISIONS

A.1 Sample Construction Process

A.1.1 Description of the Work

The design, procurement, fabrication, installation and commissioning of the ECMs specified in Schedule A (*Equipment to be Installed*) and the Training services described in Schedule J (*Company Training Responsibilities*), which are integral to the operation of the ECMs, are referred to in this Agreement as the "Work." The maintenance, monitoring, and savings measurement and verification services detailed in Schedules G and O and the any Post-Acceptance Training services detailed in Schedule J (*Company Training Responsibilities*), performance of which does not commence until after the Commencement Date, are not part of the Work.

A.1.2 Supervision of the Work

The COMPANY shall supervise and direct the performance of the Work using its best skill, attention, and judgment. The COMPANY shall be solely responsible for site safety and for all construction means, methods, techniques, sequences, and procedures and for coordinating all portions of the Work under this Agreement.

A.1.3 Rejection of the Work by the Customer

The CUSTOMER may reject any sequences or procedures proposed by the COMPANY in connection with the Work which might constitute or create a hazard to the Premises, or to persons or property, or which deviate from the Project Documents or will result in schedule delays or additional costs to the CUSTOMER. This provision shall not be construed to mean that Work which is not rejected is therefore approved.

A.1.4 Responsibility for the Work

The COMPANY shall not be relieved of its obligations to perform the Work in accordance with the Project Documents by reason of observations or inspections, tests or approvals by any person or entity except as expressly agreed to in writing by an authorized representative of the CUSTOMER.

A.1.5 Coordination of the Work

The COMPANY shall consult with the personnel designated by the CUSTOMER in order to coordinate the Work, including installation of any ECM, and to provide appropriate training in the operation of any ECM. The COMPANY shall not permit any act that will interfere with the performance of the CUSTOMER's business activities at the Premises without the prior written approval of the CUSTOMER. The COMPANY may install no ECM that will require the hiring of additional personnel by the CUSTOMER without the express permission and written approval of the CUSTOMER.

The COMPANY shall consult with the CUSTOMER regarding the coordination of the Work with any other work being performed by other Companies at the Premises.

A.1.6 Sufficient Workforce

The COMPANY shall furnish a competent and adequate staff as necessary for the proper administration, coordination and supervision of the Work; organize the procurement of all materials and equipment so that they will be available at the time they are needed for the Work; and ensure that an adequate force of skilled workmen are available to complete the Work in accordance with all requirements of this Agreement.

A.1.7 Project Manager

The COMPANY shall employ a competent project manager who shall be responsible for the coordination of the Work, and who shall be authorized to commit the COMPANY with regard to manpower, schedule, coordination, and cooperation. The project manager shall not have less than two years of documented experience in responsible field supervision for projects of comparable size and complexity. The COMPANY shall give the CUSTOMER advance written notice if it intends to remove or replace the project manager. In the event the project manager fails to perform its duties under this Agreement the COMPANY shall provide a competent replacement.

A.1.8 Harm to Structure of the Premises

The COMPANY shall perform the Work under this Agreement and install the ECMs in such a manner so as not to harm the structural integrity of the Premises or their operating systems, except as specifically described in the Project Documents which have been approved by the CUSTOMER. The COMPANY shall repair and restore to its condition immediately preceding the performance of the Work, any area of damage caused by its performance under this Agreement which has not been so described in the Project Documents and approved by the CUSTOMER. The COMPANY's failure to complete the repair or restoration required under this paragraph A.1.8 shall constitute an Event of Default under paragraph 11.3 hereof.

A.1.9 Responsibility for Damages

The COMPANY shall be responsible for all loss or damage to the Work, the Premises, or to improvements or personal property thereon and the work of other Companies caused by the COMPANY's performance of the Work.

A.1.10 Verification of Dimensions and Existing Conditions

The COMPANY is responsible for becoming knowledgeable of the conditions of the Premises relating to the performance of the Work and the conditions under which the Work is to be performed, other than concealed conditions which the COMPANY should not have reasonably been expected to discover or anticipate. All dimensions and existing conditions have been verified by the COMPANY during the energy audit conducted at the Premises by actual measurement and observation. All discrepancies between the requirements of the Project Documents and the existing conditions or dimensions shall be reported to the CUSTOMER as soon as they are discovered. Failure to verify and report prior to the commencement of work shall constitute the COMPANY's acceptance of existing conditions as fit for the proper execution of the Work under this Agreement, other than concealed conditions which the COMPANY should not have reasonably been expected to discover or anticipate.

A.1.11 Changed Conditions

Should the COMPANY encounter subsurface or latent physical conditions at the site which differ materially from those indicated in the Project Documents or from those ordinarily encountered and generally recognized as inherent in work of the character provided for in this Agreement, the COMPANY shall give written notice to the CUSTOMER before any such condition is disturbed or further disturbed. No claim of the COMPANY under this provision will be allowed unless the COMPANY has given the required notice. The CUSTOMER will promptly investigate and, if it is determined that the conditions materially differ from those which COMPANY should reasonably have been expected to discover or anticipate, the CUSTOMER will approve such changes in the Project Documents as may be necessary. If

such changed conditions cause an increase or decrease in the COMPANY's cost or time of performance, the parties may negotiate a mutually acceptable solution.

A.2 The Customer's Right to Carry-Out the Work

In the event that the COMPANY neglects or fails to carry out the Work in accordance with this Agreement and the Project Documents, the CUSTOMER may correct such deficiencies after giving twenty (20) business days written notice to the COMPANY and its surety. This shall be without prejudice to any other remedy the CUSTOMER may have. CUSTOMER may deduct from the payments to be made to the COMPANY for the Work, pursuant to paragraph 6.1 hereof and of Schedule C (*Compensation to Company*), the amount of all costs incurred in correcting deficiencies made necessary by such neglect or failure. If such payments to be made to the COMPANY are not sufficient to cover such amount, the COMPANY shall be liable in such amount to the CUSTOMER.

A.2.1 Emergencies

In case of bona fide emergencies as determined by the CUSTOMER involving public health or public safety or to protect against further loss or damage to the CUSTOMER's property or to prevent or minimize serious disruption of CUSTOMER services or to insure the integrity of CUSTOMER's records, the CUSTOMER may cause such Work as is necessary to be performed without prior notice to the COMPANY or its surety.

A.2.2 Right to Reject or Stop the Work

The CUSTOMER may reject any of the Work which does not conform to the Project Documents. If the COMPANY fails to correct defective Work or fails to supply labor, materials or equipment in accordance with the Project Documents or to execute the Work in a workmanlike manner, the CUSTOMER may order the COMPANY to stop the Work, or any portion thereof, until the cause for such order has been eliminated.

A.2.3 Right to Terminate the COMPANY's Performance of the Work

If the COMPANY fails or refuses to prosecute the Work with such diligence as to allow completion of the Work substantially in accordance with the Project Installation Schedule, or commits a material breach of any other provision of this Agreement or the Project Documents, and provided that such breach continues for thirty (30) days after written notice to the COMPANY demanding that such breach be cured or if cure cannot be effected in such thirty (30) days, COMPANY's failure to propose and commence a cure acceptable to the CUSTOMER within such thirty (30) days, the CUSTOMER may terminate the COMPANY's right to proceed with the Work as specified herein. In no event shall the CUSTOMER have any obligation to compensate the COMPANY for delays arising pursuant to the COMPANY's failure or refusal to complete the Work and damages arising in connection therewith.

In such case, the CUSTOMER will give the COMPANY and its surety written notice of intention to terminate the COMPANY's right to complete the Work and the reason therefor and, unless within seven (7) business days the delay or violation shall cease or a cure acceptable to the CUSTOMER for correcting the situation is proposed, the CUSTOMER may issue a termination notice to such effect for the COMPANY and its surety. Thereupon, the surety will be given the opportunity to complete the Work in accordance with the Project Documents. Such completion may include, but not be limited to, the use of a completing COMPANY, satisfactory to the CUSTOMER, pursuant to a written takeover agreement, the payment of a sum of money required to allow the CUSTOMER to complete the Work, or other arrangements agreed to by the CUSTOMER and the surety.

If within seven (7) business days following the issuance of the termination notice, the surety fails to notify the CUSTOMER that it intends to exercise its right to undertake the Work, the CUSTOMER may take over the Work, exclude the COMPANY from the Premises and take possession of all of the COMPANY's tools, appliances, equipment and machinery at the Premises and use the same to the full extent they could have been used by the COMPANY

(without liability for trespass or conversion), incorporate into the Work all materials and equipment stored at the Premises and finish the Work as the CUSTOMER may deem expedient.

In the event the CUSTOMER terminates the COMPANY's right to complete the Work under this paragraph A.2, the COMPANY shall not be entitled to receive further payments until a Certificate of Acceptance has been delivered pursuant to Article 7 hereof specifying the amount, if any, payable to the COMPANY pursuant to Schedule C (*Compensation to Company*). If the CUSTOMER's expenses in completing the Work exceed the COMPANY's Compensation for the Work, the COMPANY shall pay the difference to the CUSTOMER upon demand therefor.

Provided further, that a Certificate of Acceptance directing payment to the COMPANY for any portion of the Work be issued only if the notification required pursuant to Article 7 has been delivered by the COMPANY. If the COMPANY is not able to deliver such notification, the CUSTOMER shall not execute and deliver a Certificate of Acceptance and may terminate this Agreement in accordance with the provisions of Article 11 and may pursue any and all remedies provided therein.

A.3 Permits and Approvals

The COMPANY shall obtain and pay for all necessary permits and approvals for the design, installation and operation of the ECMs. The CUSTOMER shall exercise its best efforts to assist the COMPANY. The ECMs and the operation of the ECMs by the COMPANY shall at all times conform to all applicable codes. The CUSTOMER cannot and will not waive any permits or approvals required from any other governmental bodies.

The COMPANY shall furnish copies of each permit or license which is required to perform the Work to the CUSTOMER before the COMPANY commences the portion of the Work requiring such permit or license.

If the COMPANY observes that any of the Project Documents are at variance with permits or licenses granted, or laws, ordinances, codes, rules or regulations of governmental authorities, the COMPANY shall promptly notify the CUSTOMER in writing and shall make any necessary changes, subject to the approval thereof by the CUSTOMER in accordance with the terms of this Agreement. If the COMPANY performs any Work which is contrary to any permit or license granted, or any applicable laws, ordinances, codes, rules or regulations, the COMPANY shall make changes as required to comply therewith and shall bear all costs arising therefrom without additional compensation from the CUSTOMER.

A.4 Royalties and Patents

The COMPANY shall pay all royalties and license fees due to third parties in connection with the Work. The approval of any method of construction, invention, appliance, process, article, device, material, or equipment of any kind by the CUSTOMER will only be an approval of its adequacy for the Work, and will not be an approval of the use thereof by the COMPANY in violation of any Patents or other rights of any third person. The COMPANY shall indemnify the CUSTOMER against all suits and claims that may be based on an infringement of Patents, trademark or trademark on designs.

A.5 Project Schedule

The COMPANY shall consult with the CUSTOMER concerning the development of a detailed *Project Installation Schedule* and, recognizing that time is of the essence of this Agreement, shall perform the Work in such manner and with such sufficient equipment and forces to complete the Work in accordance with Schedule K (*Project Installation Schedule*).

A.6 Extensions

Extensions of time will be allowed for delays which affect critical items on the *Project Installation Schedule* arising from unforeseeable causes beyond the control and without the fault or negligence of the COMPANY.

A request for an extension of time must be made in writing to the CUSTOMER within fifteen (15) calendar days after the cause of delay. In the case of a continuing cause of delay, only one request is necessary. The grant of an extension of time to the COMPANY shall not impair or prejudice the rights of the CUSTOMER hereunder.

A.7 Compensation for Delay

- (a) Certain risks and uncertainties in connection with the Work are assumed by the COMPANY as a part of this Agreement and are included in the COMPANY Compensation for the Work. Thus, the COMPANY, except as otherwise definitely specified herein, shall bear all loss or damage for hindrances or delays during the progress of any portion of the Work and also all loss or damage arising out of the nature of the work to be done, or from inclement weather, or from any unforeseen and unexpected conditions or circumstances encountered in connection with the Work, and except as otherwise definitely specified in this Agreement, no payment shall be made by the CUSTOMER for such loss or damage.
- (b) The COMPANY shall be entitled to payment from the CUSTOMER only for those actual damages, costs, or expenses which are directly attributable to delays in the performance of the Work which are caused by the CUSTOMER.

A.8 Subcontracts and Subcontractors

The COMPANY shall have the right to have any of the services to be provided by the COMPANY under this Agreement accomplished by subcontractors pursuant to written subcontracts between the COMPANY and such subcontractors.

The COMPANY shall, upon entering into any agreement with a subcontractor, furnish the CUSTOMER with an executed copy thereof. All subcontracts shall be subject to, consistent with, and in conformance with all applicable State and federal laws, rules, regulations, and codes, and shall contain provisions that require all services to be performed in strict accordance with the requirements of this Agreement and shall provide that the subcontractors are subject to all the terms of this Agreement. Provided that such agreements do not prejudice any of the CUSTOMER's rights under this Agreement, such agreements may contain different provisions than are provided herein with respect to extensions of schedule, time of completion, payments, guarantees, and matters not affecting the quality of the Work.

The COMPANY shall not grant, or allow to exist, any lien or security interest for labor or material or otherwise on the ECMs, the Premises or any other property owned by the CUSTOMER.

A.9 Interim Savings; and Utility Rebates

- (a) Interim Savings
Interim Savings as defined in Article 4 belong to the CUSTOMER.
- (b) Utility Rebates
Utility rebates secured or obtained due to the installation of the ECMs at the Premises belong to the CUSTOMER.

A.10 Material and Workmanship

- (a) The COMPANY shall ensure that all materials used by the COMPANY and its subcontractors and workmanship performed or caused to be performed by the COMPANY in connection with the Work meets or exceeds all applicable codes and is performed in a workmanlike manner. Where conflicts exist between applicable codes, the more stringent provision shall apply;
- (b) The COMPANY shall ensure that all equipment and materials to be used in the Work for which Underwriters Laboratory labeling services is provided shall be UL labeled;
- (c) The COMPANY shall obey the following list of codes where applicable:
 - (1) Applicable construction and electrical code;
 - (2) Underwriters Laboratories (UL);
 - (3) Insulated Power Cable Engineers Association (IPCEA);
 - (4) National Electrical Code (NEC);
 - (5) National Electrical Manufacturers Association (NEMA);
 - (6) American National Standards Institute (ANSI); and
 - (7) Institute of Electrical and Electronic Engineers (IEEE).
- (d) The COMPANY shall timely advise the CUSTOMER in writing of all existing equipment and materials to be replaced at the Premises as part of the Work and the CUSTOMER shall within _____ () days designate in writing to the COMPANY the equipment and materials which should not be disposed of off-site by the COMPANY. The COMPANY shall be responsible for the disposal of all equipment and materials removed or replaced through its performance of the Work in accordance with all applicable laws and regulations regarding such disposal, except those items designated by the CUSTOMER as nondisposable . The cost of disposal to be performed by the COMPANY is included in the COMPANY compensation for the Work set forth in Schedule C (*Compensation to Company*).

A.11 Warranty of Materials

The COMPANY warrants that all materials and equipment installed as part of the Work will be new unless otherwise specified, and that all work will be of good quality, free from faults and defects, and in conformance with the Project Documents. All work not so conforming to these requirements may be considered defective. If required by the CUSTOMER, the COMPANY shall furnish satisfactory evidence as to the kind and quality of materials and equipment. This warranty is not limited by the provisions of paragraph 8.1 below. This warranty of materials, equipment and workmanship is separate from, independent of, and in addition to any other guarantees in this Agreement or any other warranties in this Agreement or required by the Project Documents.

A.12 Responsibility for Materials

The CUSTOMER does not assume any responsibility for the availability of any controlled materials or other materials and equipment required for the Work. However, CUSTOMER reserves the right to review and approve the quality and standards for all materials. The COMPANY shall be responsible for the contracted quality and standards of all materials, components or completed Work furnished by the COMPANY pursuant to the terms hereof. Materials, components or completed Work which fails to comply with this Agreement and the Project Documents may be rejected by the CUSTOMER and shall be replaced by the COMPANY at no cost to the CUSTOMER. The COMPANY shall remove from the Premises within a reasonable time any materials or components so rejected at the entire expense of the COMPANY, after written notice has been delivered by the CUSTOMER to the COMPANY that such materials or components have been rejected. (*Optional*)

A.13 Inspections

- (a) All materials and equipment and each part of the detail of the Work shall be subject at all times to inspection by the CUSTOMER or its designated representatives or consultants, and the COMPANY will be held strictly to the true intent of this Agreement and the Project Documents with regard to quality of materials, workmanship, and diligent execution of Work.
- (b) The COMPANY shall allow the CUSTOMER access to all parts of the Work, and shall furnish such information and assistance as is required to make a complete and detailed inspection or inspections.
- (c) All material and equipment installed as part of the Work must be inspected, tested and approved in accordance with the Project Documents and this Agreement prior to its use.
- (d) The COMPANY shall, if the CUSTOMER requests, remove or uncover such portions of the finished Work as the CUSTOMER may direct. After the examination, the COMPANY shall restore said portion of the Work to the standard required by this Agreement and the Project Documents. If the Work thus exposed or examined proves acceptable, the expenses of uncovering or removing and the replacing of the parts removed shall be the responsibility of the CUSTOMER and such uncovering, removing and replacing shall be deemed to be an excusable event of delay, if a delay in completion is caused thereby. If the Work so exposed or examined has not been performed in accordance with the Project Documents, the expense of uncovering, removing and replacing any portion of the Work necessary to comply with this Agreement and the Project Documents shall be borne by the COMPANY and requests for a time extension or claims for delay will not be granted.
- (e) Upon written request by the COMPANY, the CUSTOMER shall schedule preliminary inspections of the Work as soon as practicable after notification by the COMPANY that major ECMs or systems are substantially installed. If such Work is not acceptable to the CUSTOMER at the time of such preliminary inspections, the COMPANY will be provided written notice as to the particular defects to be remedied before the Work will be accepted. The date such Work is approved by the CUSTOMER, shall be the date of beneficial use to the CUSTOMER for the applicable ECM, relative to the commencement of the warranty period set forth in Schedule R (*Warranties*) for such ECM.

Notwithstanding the foregoing, the *Certificate of Acceptance* shall not be executed until a final inspection has been performed.

A.15 Project Meetings

The COMPANY shall provide for regularly scheduled project meetings in *the Project Installation Schedule*, and shall give timely advance written notice and agenda of such meetings to the CUSTOMER. The COMPANY shall record minutes and distribute copies of minutes of meetings to the CUSTOMER within five (5) business days after each meeting. The COMPANY shall schedule additional project meetings if requested by the CUSTOMER.

A.16 Assignment of Claims

The CUSTOMER shall not be bound by any assignment by the COMPANY to third parties of moneys due or to become due or of any other claims it may have under this Agreement except where the CUSTOMER consents in writing to be so bound.

A.17 Claims and Disputes

The COMPANY shall promptly notify the CUSTOMER in writing of any claims or disputes relating to the Work. Failure to notify the CUSTOMER in such instances may result in rejection of any such claim.

APPENDIX E-3: COMMONWEALTH OF PENNSYLVANIA ALTERNATIVE DISPUTE RESOLUTION PROVISIONS

OPTIONAL SCHEDULE

ALTERNATIVE DISPUTE RESOLUTION (ADR)³

1. All Disputes: In the event any dispute or claim should arise between any of the parties to this Agreement, each party agrees to exercise good faith efforts to resolve the matter fairly, amicably, and in a timely manner. The parties shall consider litigation as a last resort, to be employed only when ADR methods fail. To this end, the parties agree to take affirmative steps to communicate effectively, to keep lines of communication open, and to handle all disputes in a reasonable and businesslike manner, which may include the use of a dispute resolution board.
2. Mediation: Disputes under \$50,000: Each party to any dispute under \$50,000 agrees, upon the request of any other party to the dispute, to submit the matter to mediation. The parties shall first confer informally with one another to attempt to resolve the dispute. The mediator shall be a person the parties agree is unbiased and qualified to understand the dispute and make the determinations that are required.
3. Methods of ADR: Disputes over \$50,000: Each party to any dispute over \$50,000 agrees, upon the request of any other party to the dispute, to submit the matter to ADR, in a form to be determined by agreement of the parties. The parties shall first confer informally with one another to attempt to resolve the dispute. In the event that the assistance of an unbiased neutral is required, the parties shall meet and come to an agreement as to what form the ADR should take and who the unbiased neutral should be. Forms of ADR that may be utilized include, but are not limited to, mediation and mini-trials, but do not include formal arbitration. The unbiased neutral may be a professional mediator, an attorney, an architect, an engineer, a board composed of two (2) or more qualified persons, or any person(s) the parties agreed is unbiased and qualified to understand the dispute and make the determinations that may be required.
4. Authority: When ADR is utilized, regardless of the dollar value of the dispute, each party agrees to have in attendance at their mediation (or whatever method is utilized) a person with actual authority to resolve the dispute.
5. Non-parties: Persons who have a stake in the dispute but who are not parties to this Agreement may be included in the ADR by consent of the parties. When disputes arise between only persons involved in the project who are not parties to this Agreement, the parties agree to encourage and facilitate the use of ADR when possible.
6. Court of Claims: The parties agree that ADR is a condition precedent to the filing of a Court of Claims action or other administrative proceeding seeking economic recovery from the other party in an amount greater than \$50,000.

³ The use of ADR is not permitted for executive agencies of the Commonwealth.

7. Costs of ADR: When ADR is utilized, the parties included in the process agree to equally share the costs of same.\
8. Appendixes: Any and all written agreements for mediation or other method of ADR must be agreed to by all contractual parties and shall be incorporated into the contract.
9. Legal Remedy: Both parties to the agreement reserve the right to seek whatever legal remedy available in the event the ADR process does not result in resolution of any disputes.

CUSTOMER ACCEPTANCE INITIALS: _____ DATE: _____

COMPANY ACCEPTANCE INITIALS: _____ DATE: _____

APPENDIX F-1: COMMONWEALTH OF PENNSYLVANIA INSTALLMENT PURCHASE AGREEMENT

INSTALLMENT PURCHASE AGREEMENT AND PAYMENT SCHEDULE

This **Installment Purchase Agreement and Payment Schedule** (this "Agreement") is dated as of the _____ day of _____, 2000 between _____ ("Contractor") and the Commonwealth of Pennsylvania ("Commonwealth"), acting through the _____ (name of agency).

WHEREAS, Contractor and Commonwealth have entered into an agreement for the Commonwealth's acquisition for energy-savings improvements at _____; and

WHEREAS, Commonwealth wants to pay for the energy-savings improvements on an installment payment method with tax-exempt financing.

NOW THEREFORE, intending to be legally bound hereby, Contractor agrees to sell to Commonwealth, and Commonwealth agrees to purchase from Contractor, the items of Equipment (the "Equipment"), all as described in EQUIPMENT EXHIBIT 1 attached to this Agreement, on an installment payment basis upon the following terms and conditions:

1. DELIVERY AND ACCEPTANCE; ESCROW AGREEMENT

The Equipment will be delivered by Contractor to Commonwealth at the location specified in EQUIPMENT EXHIBIT 1. Commonwealth will accept operationally independent and functionally complete components of the Equipment upon completion of delivery and installation, which acceptance will be evidenced by Commonwealth's execution and delivery to _____ (Third Party Financing Company) and Escrow Agent (defined below) of a Certificate of Acceptance in the form attached hereto as Exhibit A. Commonwealth shall make payments to Third Party Financing Company, as assignee of Contractor, pursuant to Section 3 hereof.

To assure the availability of moneys to pay to Contractor the cost of the Equipment, facilitate the acquisition of the Equipment, Third Party Financing Company and _____, as escrow agent ("Escrow Agent"), have at the request of Commonwealth, entered into an Escrow Agreement dated as of _____, (the "Escrow Agreement"). Pursuant to and in accordance with the Assignment and Security Agreement dated as of _____ (the "Assignment") between Contractor and Third Party Financing Company, Third Party Financing Company will deposit in the Equipment Acquisition Fund established and maintained pursuant to the Escrow Agreement the sum of \$ _____ to be held, invested, and disbursed in accordance with the Escrow Agreement. Commonwealth's obligation to make the payments pursuant to Section 3 hereof shall commence on the date of such deposit and interest shall accrue on the amount of such deposit on such date. Commonwealth's obligation to make payments under Section 3 hereof shall be in consideration and repayment of the deposit to the Equipment Acquisition Fund

made by Third Party Financing Company. Commonwealth shall request disbursements from the Equipment Acquisition Fund for the payment of the cost of the Equipment by completing, for each requested disbursement, a Payment Request Form in the form attached to the Escrow Agreement as Exhibit A. Commonwealth shall request disbursements from the Equipment Acquisition Fund only for portions of the Equipment that are functionally complete and operationally independent. In the event that the amounts in the Equipment Acquisition Fund are insufficient to pay the acquisition costs of the Equipment, Commonwealth shall deposit additional funds into the Equipment Acquisition Fund to eliminate such insufficiency.

2. TERM

This Agreement will become effective upon receipt of a fully-executed Agreement by Contractor. This Agreement will, unless earlier terminated as expressly provided for in this Agreement, continue until all payments set forth in PAYMENT SCHEDULE I attached hereto have been made in full (hereinafter, the "Agreement Term").

3. PAYMENT

Commonwealth agrees to pay to Third Party Financing Company, as assignee of Contractor, or any assignee of Third Party Financing Company, the payments including the interest portion as specified in PAYMENT SCHEDULE 1 at the office of Third Party Financing Company (or such other place as Third Party Financing Company or its assignee may from time to time designate in writing). Such payments will be made, commencing on _____, and thereafter on the dates set forth in PAYMENT SCHEDULE 1. Except as otherwise provided in this paragraph, Commonwealth's obligation to make the payments shall commence on the date that funds are deposited in the Equipment Acquisition Fund and shall be absolute and unconditional in all events except as expressly provided in Section 4 and Section 19(b). Notwithstanding any dispute between Commonwealth and manufacturer or Contractor or any other person, Commonwealth shall make all payments when due and shall not withhold any payments, or portions thereof, for any reason whatsoever. Commonwealth covenants it will not assert any right to setoff, counterclaim, abatement, or recoupment for any reason whatsoever. Contractor agrees that, prior to the effective date of the Assignment, the Commonwealth may set off the amount of any state tax liability or other obligation of the Contractor or its subsidiaries to the Commonwealth against any payments due the Contractor under this Agreement.

Commonwealth reasonably believes that funds can be obtained sufficient to make all payments during the Agreement Term and hereby covenants that it will do all things lawfully within its power to obtain, maintain, and properly request and pursue funds from which the payments may be made, including making provisions for such payments to the extent necessary in each budget submitted for the purpose of obtaining funding, using its bona fide best efforts to have such portion of the budget approved and exhausting all available administrative reviews and appeals in the event such portion of the budget is not approved.

It is Commonwealth's intent to make payments for the full Agreement Term if funds are legally available therefor and in that regard Commonwealth represents that the use of the Equipment is essential to its proper, efficient, and economic operation.

During the Agreement Term, Commonwealth will, upon the request of Contractor, annually make available to Contractor or its assignee current financial statements, budgets, proof of appropriation for the ensuing fiscal period, and such other financial information as may be requested by Contractor or any assignee relating to the ability of Commonwealth to continue to make installment payments and other sums due under this Agreement.

If payment or other sums owed by Commonwealth hereunder is not paid when due, interest may accrue in accordance with State law.

4. NONAPPROPRIATION OF FUNDS

In the event no funds or insufficient funds are appropriated and budgeted in any Commonwealth Fiscal Period for payments due under this Agreement, then Commonwealth will immediately notify Contractor or its assignee of such occurrence and this Agreement shall terminate on the last day of Commonwealth's Fiscal Period for which appropriations were received without penalty or expense to Commonwealth of any kind whatsoever. In the event of such termination, Commonwealth agrees to peaceably surrender possession of all Equipment requested by Contractor in good operating condition, subject to normal wear and tear to Contractor or its assignee on the date of such termination, packed for shipment in accordance with manufacturer's published specifications and with freight and insurance prepaid to Contractor's or its assignee's nearest warehouse location in the United States, such location to be specified by Contractor or its assignee. Contractor or its assignee will have all legal and equitable rights and remedies to take possession of the Equipment. Upon such termination, title to the Equipment will revert to Contractor or its assignee.

If, on the thirtieth (30th) day after the commencement of any Fiscal Period, sufficient funds have not been appropriated for the purpose of making all of the payments scheduled to be paid in such Fiscal Period, Commonwealth shall cause to be delivered written notice thereof (a "notice of nonappropriation") to Contractor or its assignee within ten (10) calendar days after such thirtieth (30th) day. Upon Contractor's receipt of a notice of nonappropriation this Agreement shall terminate, as of the end of the Fiscal Period just ended; provided, however, such termination shall not become effective as of the end of such Fiscal Period just ended if, within ten (10) calendar days of the thirtieth (30th) day after the end of such Fiscal Period just completed, Commonwealth shall cause to be delivered to Contractor a written statement to the effect that it reasonably expects sufficient funds for the then-current Fiscal Period to be appropriated for this Agreement, and in such event the term shall continue into the then-current Fiscal Period so long, but only so long, as an appropriation becomes available from which to make the payments.

Notwithstanding the foregoing, Commonwealth agrees that (i) it will not cancel this Agreement under the provisions of this paragraph if any funds are appropriated to it, or by it, for the acquisition, retention, or operation of the Equipment or other equipment performing functions similar to the Equipment for the Fiscal Period following the Fiscal Period in which funds were appropriated; and (ii) it will not during the Agreement Term give priority in the application of funds to any other functionally similar equipment or purchase of services, such as outsourcing.

5. AUTHORITY AND AUTHORIZATION

Commonwealth represents, covenants, and warrants, and will at its expense deliver an opinion of counsel satisfactory to Contractor to the effect that: (a) the execution, delivery, and performance by Commonwealth of this Agreement have been duly authorized by necessary action on the part of Commonwealth; (b) this Agreement has been duly executed and delivered on behalf of Commonwealth and constitutes a legal, valid, and binding obligation of Commonwealth enforceable in accordance with its terms; and (c) Commonwealth has complied with all bidding requirements, where necessary, and by due notification presented this Agreement for approval and adoption as a valid obligation on its part. Commonwealth agrees that: (i) Commonwealth will do or cause to be done all things necessary to preserve and keep the Agreement in full force and effect; (ii) Commonwealth has sufficient appropriations or other funds available to pay all amounts due hereunder for the current Fiscal Period; (iii) Commonwealth's obligations hereunder are not guaranteed by the United States of America or any agency or instrumentality thereof; (iv) Commonwealth has not established and will not establish any sinking fund, redemption fund, debt service fund, reserve fund, replacement fund, or similar fund to be used to pay principal or interest composing the payments due hereunder; (v) Commonwealth will use the Equipment only to perform essential governmental or proprietary functions of Lessee within the scope of Lessee's authority; (vi) Commonwealth will not permit the Equipment to be used in or for any private

commercial activity; (vii) Commonwealth will take no action that would cause the interest portion of the payments due hereunder to become included in gross income of the recipient for federal income tax purposes under the Internal Revenue Code of 1986, as amended (the "Code"), and Treasury Regulations promulgated thereunder (the "Regulations"), and Commonwealth will take and will cause its officers, employees, and agents to take all affirmative actions legally within its power necessary to ensure that the interest portion of the payments due hereunder does not become included in gross income of the recipient for federal income tax purposes under the Code and Regulations, all as amended from time to time (including, without limitation, the calculation and payment of any rebate required to preserve such exclusion); and (viii) Commonwealth will sign and submit to Contractor for filing with the Secretary of the Treasury information reporting statements and other information relating to this Agreement and the Escrow Agreement at the times and in the forms required by the Code and the Regulations.

6. TITLE

Upon acceptance of the Equipment by Commonwealth hereunder, title to the Equipment will vest in Commonwealth; provided however, that (i) in the event of termination of this Agreement by Commonwealth pursuant to NONAPPROPRIATION OF FUNDS paragraph hereof and delivery of the Equipment to Third Party Financing Company or (ii) upon repossession of the Equipment in the event of a default, title will immediately vest in Contractor or its assignee.

7. SECURITY INTEREST

In order to secure all of its obligations hereunder, Commonwealth hereby (i) grants to Contractor a first and prior security interest in any and all right, title, and interest of Commonwealth in the Equipment and in all additions, attachments, accessions and substitutions thereto, and on any proceeds therefrom; (ii) agrees that this Agreement may be filed as a financing statement evidencing such security interest; and (iii) agrees to execute and deliver all financing statements, certificates of title, and other instruments necessary or appropriate to evidence such security interest. Once all payments set forth on PAYMENT SCHEDULE I have been made, then Commonwealth will own the Equipment free and clear of all liens or other encumbrances.

8. PERSONAL PROPERTY

The Equipment is, and will remain, personal property, and will not be deemed to be affixed to or a part of the real estate on which it may be situated, notwithstanding that the Equipment or any part thereof may be or hereafter become in any manner physically affixed or attached to real estate or any building hereon.

9. MAINTENANCE

Commonwealth, at its own cost and expense, will maintain the Equipment in good operating condition for the duration of this Agreement and will not use or deal with the Equipment in any manner which is inconsistent with any laws or regulations. The Equipment will not be misused, abused, wasted, or be allowed to deteriorate except for ordinary wear and tear resulting from its intended use. Commonwealth agrees to cause the Equipment to be maintained pursuant to manufacturer's standard maintenance specifications and will provide proof of proper maintenance at Contractor's request.

10. ALTERATIONS

Commonwealth will not make any Alterations, additions or improvements to the Equipment without Contractor's prior written consent unless such Alterations, additions, or improvements may be readily removed without damage to the Equipment.

11. LOCATION: INSPECTION

The Equipment may be moved at Commonwealth's option to any locations within the Commonwealth of Pennsylvania. In the event Commonwealth moves the Equipment. Commonwealth will notify Contractor in writing within thirty (30) days of the new Location(s). Commonwealth will maintain a list of all Equipment by model and serial numbers and provide said list throughout the Agreement Term upon written request of Contractor. Contractor will be entitled to enter upon Equipment Location(s) during reasonable business hours and upon reasonable notice, consistent with Commonwealth security and production requirements and accompanied by Commonwealth personnel, to inspect the Equipment or observe its use and operation.

12. LIENS AND ENCUMBRANCES

Commonwealth shall keep the Equipment free and clear of all levies, liens and encumbrances except those created under this Agreement. Commonwealth shall pay, when due, all charges which may now or hereafter be imposed upon the ownership, leasing, rental, sale, purchase, possession, or use of the Equipment, excluding, however, all taxes on or measured by Contractor's income. If Commonwealth fails to pay said charges when due, Contractor shall have the right, but shall not be obligated, to pay said charges. If Contractor pays any charges for which Commonwealth is responsible or liable under this Agreement, Commonwealth shall reimburse Contractor therefor.

13. RISK OF LOSS; DAMAGE; DESTRUCTION

Upon acceptance of the Equipment, Commonwealth assumes all risk of loss of or damage to the Equipment from any cause whatsoever, and no such loss of or damage to the Equipment or defect therein or unfitness or obsolescence thereof shall relieve Commonwealth of the obligation to make payments or to perform any other obligation under this Agreement. In the event of damage to any item of Equipment, Commonwealth will immediately notify Contractor or its assignee and place the same in good repair. If Commonwealth determines that any item of Equipment is lost, stolen, destroyed or damaged beyond repair, Commonwealth will either: (a) replace the same with like Equipment in good repair; or (b) on the next payment Date following occurrence of loss, pay Contractor (i) all amounts for said lost, stolen, destroyed or damaged beyond repair Equipment then owed by Commonwealth to Contractor under this Agreement, including the payment for such item(s) due on such date, and (ii) the proportionate amount of applicable Concluding Payment set forth in PAYMENT SCHEDULE 1. In the event that Commonwealth is obligated to make such payment with respect to less than all of the Equipment, Contractor will provide Commonwealth with the pro rata amount of the payment and the Concluding Payment to be made by Commonwealth with respect to the Equipment which has suffered the event of loss.

14. INSURANCE

Commonwealth will self-insure against any or all risks assumed in this Agreement. Commonwealth shall demonstrate to the satisfaction of Contractor or assignee that adequate self-insurance is provided. In the event of any loss, damage, injury, or accident involving the Equipment, Commonwealth will promptly provide Contractor with written notice within ten (10) days thereof and make available to Contractor all information and documentation relating thereto.

Commonwealth assumes all risks and liabilities for injury to or death of any person or damage to any property, in any manner arising out of possession, use, operation, custody, control, condition

or storage of the Equipment by Commonwealth whether such injury or death be with respect to Commonwealth's property or the property of other; provided, however, that said damage or injury results from the negligence of Commonwealth, its agents or employees, and that either Commonwealth agrees to settle such claim or judgment has been obtained against Commonwealth. This subsection (b) shall not be construed to limit or waive in any way the sovereign immunity of Commonwealth, liability of which under subsection (b) is limited to amounts in which Commonwealth is otherwise permitted or required to respond in accordance with applicable law.

15. EARLY PAYMENT OPTION

Upon thirty (30) days' prior written notice from Commonwealth to Contractor, and provided that there is no Event of Default, or an event with which notice or lapse of time, or both, could become an Event of Default, then existing, Commonwealth will have the right to terminate Commonwealth's continued obligation to make payments as specified in PAYMENT paragraph and PAYMENT SCHEDULE I to Contractor on the purchase of the Equipment by payment to Contractor or its assigns of the Concluding Payment and any accrued outstanding payments. Upon satisfaction by Commonwealth of such purchase conditions, Contractor shall henceforth have no rights, title, and interest in the Equipment.

16. ASSIGNMENTS

Without Contractor's prior written consent, Commonwealth will not either (i) assign, transfer, pledge, or grant any security interest in or otherwise dispose of this Agreement the Equipment or any interest in this Agreement, the Equipment, or (ii) lease or lend the Equipment or permit it to be used by anyone other than Commonwealth, Commonwealth's employees or other qualified Commonwealth government agencies. Contractor may assign its rights, title, and interest in and to this Agreement, the Equipment and any other documents executed with respect to this Agreement and/or grant or assign a security interest in this Agreement and the Equipment, in whole or in part. Any such assignee (including Third Party Financing Company) shall have all of the rights (but none of the obligations) of Contractor under this Agreement. Subject to the foregoing, this Agreement inures to the benefit of and is binding upon the heirs, executors, administrators, successors, and assigns of the parties hereto.

Upon assignment of Contractor's interests herein, Contractor will cause written notice of such assignment to be sent to Commonwealth which will be sufficient if it discloses the name of the assignee and address to which further payments hereunder should be made. No further action will be required by Contractor or by Commonwealth to evidence the assignment, but Commonwealth will acknowledge such assignments in writing if so requested.

Notwithstanding the foregoing, no such assignments of Contractor's interests shall be effective against Commonwealth unless Commonwealth receives notification in writing of said Agreement designating the name and address of any such assign. In compliance with Section 149(a) of the Internal Revenue Code, Commonwealth agrees to affix a copy of each notification of assignment to Commonwealth's counterpart of the Agreement.

Commonwealth hereby acknowledges that Contractor has assigned to Third Party Financing Company all of Contractor's right, title and interest in and to this Agreement, the Equipment, and Commonwealth shall make all payments hereunder to Third Party Financing Company, as assignee of Contractor, in accordance with the terms hereof.

NOT BEING THE MANUFACTURER OR VENDOR OF THE EQUIPMENT, ANY ASSIGNEE OF CONTRACTOR SHALL BE DEEMED TO HAVE MADE NO WARRANTY OR REPRESENTATION, EITHER EXPRESS OR IMPLIED, AS TO THE VALUE, DESIGN, CONDITION, MERCHANTABILITY, OR FITNESS FOR A PARTICULAR PURPOSE OR FITNESS FOR USE OF THE EQUIPMENT. In no event shall any assignee be liable for any

incidental, indirect, special, or consequential damage in connection with or arising out of this Agreement or the existence, furnishing, functioning, or Commonwealth's use of any item of Equipment or products or services provided for in this Agreement.

17. EVENTS OF DEFAULT BY COMMONWEALTH

The term "Event of Default," as used herein, means the occurrence of any one or more of the following events:

- (a) Commonwealth fails to make any payment as it becomes due in accordance with the terms of this Agreement, and any such failure continues for sixty (60) days after receipt of written notice of Default;
- (b) Commonwealth fails to perform or observe any other covenant, condition or agreement to be performed or observed by it hereunder and such failure is not cured within sixty (60) days after written notice thereof by Contractor: or
- (c) Any representation or warranty of Commonwealth contained herein or in any related document was untrue in any material respect when made.

18. REMEDIES BY CONTRACTOR

Upon the occurrence of an Event of Default, and as long as such Event of Default is continuing, Contractor may at its option, exercise any one or more of the following remedies:

- (a) By written notice to Commonwealth, with or without terminating this Agreement, declare an amount equal to all amounts then due under this Agreement, and all remaining payments due for which funds have been appropriated, to be immediately due and payable, whereupon the same shall become immediately due and payable;
- (b) By written notice to Commonwealth, request Commonwealth to (and Commonwealth agrees that it will), at Commonwealth's expense, promptly return the Equipment to Contractor in the manner set forth in NONAPPROPRIATION OF FUNDS paragraph hereof, or Contractor, at its option, may enter upon the premises where the Equipment is located and take immediate possession of and remove the same, and Commonwealth hereby expressly waives any damages occasioned by such actions not caused by Contractor's willful misconduct or negligence;
- (c) Sell or lease the Equipment or lease it for the account of Commonwealth, and apply any proceeds of such disposition in the following order: (i) all costs (including, but not limited to, attorneys' fees) incurred in securing possession of the Equipment; (ii) all expenses incurred in completing the disposition; (iii) any sales or transfer taxes; (iv) the applicable Concluding Payment; and (v) the balance of any payments owed by Commonwealth for which funds have been appropriated. Any disposition proceeds remaining after the requirements of clauses (i), (ii), (iii), (iv), and (v) have been met shall be paid to Commonwealth; and
- (d) Exercise any other right, remedy or privilege which may be available to it under applicable laws of the Commonwealth of Pennsylvania or any other applicable law or proceed by appropriate court action to enforce the terms of this Agreement or to recover damages for the breach of this Agreement or to terminate this Agreement as to any or all of the Equipment. In addition, Commonwealth will remain liable to the extent not prohibited by law for all covenants under this Agreement and for all fees, other costs and expenses incurred by Contractor with respect to the enforcement of any of the remedies listed above or any other remedy available Contractor.

19. EVENTS OF DEFAULT BY CONTRACTOR AND REMEDIES BY COMMONWEALTH

In the event of default by Contractor, Commonwealth may pursue one or more of the following remedies:

- (a) If the payments under this Agreement have been assigned by Contractor. Commonwealth may declare Contractor to be in default and exercise its rights and remedies for damages against Contractor, but continue to make installment payments for the Equipment.
- b) If the payments under this Agreement have not been assigned, Commonwealth may set off or counterclaim against its obligation to make the payments provided in PAYMENT SCHEDULE I any and all damages incurred by Commonwealth as a result of Contractor's default.
- (c) Contractor or Contractor's surety (but not the assignee) will be liable to Commonwealth for damages incurred by Commonwealth as a result of the default of Contractor. Such damages may include, but are not limited to: (i) installment payments made to Contractor or assignee which represents payment towards a unit of Equipment for which acceptance was revoked because of a latent defect; (ii) the difference in price between the market price of the Equipment which was not delivered or which was rejected (or the actual purchase price if Commonwealth purchases replacements (like Equipment) for any undelivered or rejected unit of Equipment) and the purchase price indicated in the Agreement for such units of Equipment; (iii) damages as a result of breach of warranty, failure to meet specifications, or damages incurred by Commonwealth resulting from the delivery of Equipment which is defective or fails to meet specifications, or resulting from Contractor's failure to comply with any other requirements of this Agreement; and (iv) any other damages recoverable by law.

20. NOTICES

All notices to be given under this Agreement shall be made in writing and mailed by certified mail, return receipt requested, to the other party at its address set forth herein or at such address as the party may provide in writing from time to time. Any such notice shall be deemed to have been received five (5) days after mailing.

21. NONDISCRIMINATION/SEXUAL HARASSMENT CLAUSE

During the term of this Agreement, Contractor agrees as follows:

- a. In the hiring of any employees for the manufacture of supplies, performance of work, or any other activity required under this Agreement any subcontract, Contractor, subcontractor or any person acting on behalf of contractor or subcontractor shall not by reason of gender, race, creed, or color discriminate against, any citizen of this Commonwealth who is qualified and available to perform the work to which the employment relates.
- b. Neither Contractor nor any subcontractor nor any person on their behalf shall in any manner discriminate against or intimidate any employee involved in the manufacture of supplies, the performance of work or any other activity required under this Agreement on account of gender, race, creed, or color.
- c. Contractor and any subcontractors shall establish and maintain a written sexual harassment policy and shall inform their employees of the policy. This policy must

contain a notice that sexual harassment will not be tolerated and employees who practice it will be disciplined.

- d. Contractor shall not discriminate by reason of gender, race, creed, or color against any subcontractor or supplier who is qualified to perform the work to which this Agreement relates.
- e. Contractor and each subcontractor shall furnish all necessary employment documents and records to and permit access to its books, records, and accounts by the contracting officer and the Department of General Services' Bureau of Contract Administration and Business Development for purposes of investigation to ascertain compliance with the provisions of this Nondiscrimination/Sexual Harassment Clause. If the Contractor or any subcontractor does not possess documents or records reflecting the necessary information requested, it shall furnish such information on reporting forms supplied by the contracting officer or the Bureau of Contract Administration and Business Development.
- f. Contractor shall include the provisions of this Nondiscrimination/Sexual Harassment Clause in every subcontract so that such provisions will be binding upon each subcontractor.
- g. The Commonwealth may cancel or terminate this Agreement, and all money due or to become due under the Agreement may be forfeited for a violation in the terms and conditions of this Nondiscrimination/Sexual Harassment Clause. In addition, the agency may proceed with debarment or suspension and may place Contractor in the Contractor Responsibility File.

22. CONTRACTOR INTEGRITY PROVISIONS

- a. For purposes of this clause only, the words "confidential information," "consent," "contractor," "financial interest," and "gratuity" shall have the following definitions.
 - 1) **Confidential information** means information that is not public knowledge, or available to the public on request, disclosure of which would give an unfair, unethical, or illegal advantage to another desiring to contract with the Commonwealth.
 - 2) **Consent** means written permission signed by a duly authorized officer or employee of the Commonwealth, provided that where the material facts have been disclosed, in writing, by prequalification, bid, proposal, or contractual terms, the Commonwealth shall be deemed to have consented by virtue of execution of this Agreement.
 - 3) **Contractor** means the individual or entity that has entered into the Contract with the Commonwealth, including directors, officers, partners, managers, key employees and owners of more than a five percent interest.
 - 4) **Financial Interest** means:
 - a) Ownership of more than a five percent interest in any business; or
 - b) Holding a position as an officer, director, trustee, partner, employee, or the like, or holding any position of management.
 - 5) **Gratuity** means any payment of more than nominal monetary value in the form of cash, travel, entertainment, gifts, meals, lodging, loans, subscriptions, advances, deposits or money, services, employment, or contracts of any kind.

- b. Contractor shall maintain the highest standard of integrity in the performance of the Contract and shall take no action in violation of state or federal laws, regulations, or other requirements that govern contracting with the Commonwealth.
- c. Contractor shall not disclose to others any confidential information gained by virtue of the Contract.
- d. Contractor shall not, in connection with this or any other agreement with the Commonwealth, directly or indirectly, offer, confer, or agree to confer any pecuniary benefit on anyone as consideration for the decision, opinion, recommendation, vote, other exercise of discretion, or violation of a known legal duty by any officer or employee of the Commonwealth.
- e. Contractor shall not, in connection with this or any other agreement with the Commonwealth, directly or indirectly, offer, give, or agree or promise to give to anyone any gratuity for the benefit of or at the direction or request of any officer or employee of the Commonwealth.
- f. Except with the consent of the Commonwealth, neither Contractor nor anyone in privity with him or her shall accept or agree to accept from, or give or agree to give to, any person, any gratuity from any person in connection with the performance of work under the Contract except as provided therein.
- g. Except with the consent of the Commonwealth, Contractor shall not have a financial interest in any other contractor, subcontractor, or supplier providing services, labor, or material on this project.
- h. Contractor, upon being informed that any violation of these provisions has occurred or may occur, shall immediately notify the Commonwealth in writing.
- i. Contractor, by execution, of the Contract and by the submission of any bills or invoices for payment pursuant thereto, certifies, and represents that he or she has not violated any of these provisions.
- j. Contractor, upon the inquiry or request of the Inspector General of the Commonwealth or any of that official's agents or representatives, shall provide, or if appropriate, make promptly available for inspection or copying, any information of any type or form deemed relevant by the Inspector General to the Contractor's integrity or responsibility, as those terms are defined by the Commonwealth's statutes, regulations, or management directives. Such information may include, but shall not be limited to, the contractor's business or financial records, documents or files of any type or form which refers to or concern the Contract. Such information shall be retained by Contractor for a period of three years beyond the termination of the Contract unless otherwise provided by law.
- k. For violation of any of the above provisions, the Commonwealth may terminate this and any other agreement with Contractor, claim liquidated damages in an amount equal to the value of anything received in breach of these provisions, claim damages for all expenses incurred in obtaining another contractor to complete performance hereunder, and debar and suspend Contractor from doing business with the Commonwealth. These rights and remedies are cumulative, and the use or nonuse of any one shall not preclude the use of all or any other. These rights and remedies are in addition to those the Commonwealth may have under law, statute, regulation, or otherwise.

23. CONTRACTOR RESPONSIBILITY PROVISIONS

- a. Contractor certifies, for itself and all its subcontractors, that as of the date of its execution of this Agreement, that neither Contractor, nor any subcontractors, nor any supplier are under suspension or debarment by the Commonwealth or any governmental entity, instrumentality, or authority and, if Contractor cannot so certify, then it agrees to submit, a written explanation of why such certification cannot be made.
- b. Contractor also certifies, that as of the date of its execution of this Agreement, it has no tax liabilities or other Commonwealth obligations.
- c. Contractor's obligations pursuant to these provisions are ongoing from and after the effective date of the Agreement through the termination date thereof. Accordingly, Contractor shall have an obligation to inform the Commonwealth if, at any time during the term of the Agreement, it becomes delinquent in the payment of taxes, or other Commonwealth obligations, or if it or any of its subcontractors re suspended or debarred by the Commonwealth, the federal government, or any other state or governmental entity. Such notification shall be made within 15 days of the date of suspension or debarment.
- d. The failure of Contractor to notify the Commonwealth of its suspension or debarment by the Commonwealth, any other state, or the federal government shall constitute an event of default of this Agreement with the Commonwealth.
- e. Contractor agrees to reimburse the Commonwealth for the reasonable costs of investigation incurred by the Office of State Inspector General for investigations of the contractor's compliance with the terms of this or any other agreement between Contractor and the Commonwealth, which results in the suspension or debarment of Contractor. Such costs shall include, but shall not be limited to, salaries of investigators, including overtime; travel and lodging expenses; and expert witness and documentary fees. Contractor shall not be responsible for investigative costs for investigations that do not result in Contractor's suspension or debarment.
- f. Contractor may obtain a current list of suspended and debarred Commonwealth contractors by either searching the Internet at <http://www.dgs.state.pa.us/debarment.htm> or contacting the:

Department of General Services
Office of Chief Counsel
603 North Office Building
Harrisburg, PA 17125
Telephone No. (717) 783-6472
Fax No. (717) 787-9138

24. AMERICANS WITH DISABILITIES ACT

- a. Pursuant to federal regulations promulgated under the authority of The Americans With Disabilities Act, 28 C.F.R. §35.101 et seq., Contractor understands and agrees that it shall not cause any individual with a disability to be excluded from participation in this Agreement or from activities provided for under this Agreement on the basis of the disability. As a condition of accepting this contract, Contractor agrees to comply with the "General Prohibitions Against Discrimination", 28 C.F.R. §35.130, and all other regulations promulgated under Title II of The Americans With Disabilities Act which are applicable to all benefits, services, programs, and activities provided by the Commonwealth of Pennsylvania through the contracts with outside contractors.
- b. Contractor shall be responsible for and agrees to indemnify and hold harmless the Commonwealth of Pennsylvania from all losses, damages, expenses, claims, demands,

suits, and actions brought by any party against the Commonwealth of Pennsylvania as a result of Contractor's failure to comply with the provisions of subparagraph above.

25. PARAGRAPH HEADINGS

All section headings contained herein are for the convenience of reference only and are not intended to define or limit the scope of any provision of this Agreement.

26. GOVERNING LAW

This Agreement shall be construed in accordance with, and governed by the laws of, the Commonwealth of Pennsylvania.

27. DELIVERY OF RELATED DOCUMENTS

Commonwealth will execute or provide, as requested by Contractor, such other documents and information as are reasonably necessary with respect to the transaction contemplated by this Agreement.

Commonwealth agrees that, pursuant to Section 149(a) of the Internal Revenue Code of 1986, as amended (the "Code"), and any temporary and final income tax regulations promulgated thereunder, it shall file the applicable Internal Revenue Service Form 8038G or 8038-GC (Information Return for Tax Exempt Governmental Bond Issues). Additionally, Commonwealth, pursuant to Section 149 (a) of the Code, hereby appoints Contractor, or any assignee thereof, as "Agent" of the Lessee to keep a record of the assignees who maintain an interest in this Lease. Commonwealth agrees that it shall remit to the Internal Revenue Service any rebates due as provided by the Code.

28. ENTIRE AGREEMENT; WAIVER

This Agreement, together with the Certificate of Final Acceptance, EQUIPMENT EXHIBIT 1, PAYMENT SCHEDULE I and the documents delivered pursuant to the requirements of Paragraph 23 of this Agreement, constitute the entire Agreement between the parties with respect to the financing of the Equipment, and this Agreement shall not be modified amended, altered, or changed except with the written consent of Commonwealth and Contractor. Any provision of this Agreement found to be prohibited by law shall be ineffective to the extent of such prohibition without invalidating the remainder of this Agreement. The waiver by Contractor or Commonwealth of any breach by the other party of any term, covenant, or condition hereof shall not operate as a waiver of any subsequent breach thereof

IN WITNESS WHEREOF the parties to this Agreement have executed it through their respective duly authorized officers, to be effective as of the date first above written. This Agreement will not be fully executed and binding on the parties unless and until all signatures are affixed hereto.

ATTEST:

ENERGY SERVICE COMPANY (ESCO):

[Name]

Signature

Signature

Title

Title

Federal Identification No. _____

ATTEST:

COMMONWEALTH OF PENNSYLVANIA

[Agency Name]

Signature

Signature

APPROVED AS TO FORM AND LEGALITY:

Office of Chief Counsel – [Agency]

N/A

Office of General Counsel

N/A

Office of Attorney General

CERTIFICATION OF FUNDS:

I HEREBY CERTIFY THAT FUNDS IN THE AMOUNT OF \$ _____ ARE AVAILABLE UNDER APPROPRIATION: _____

Comptroller

Date