



**ACTION SHEET**  
**CITY COUNCIL COMMITTEE MEETING OF 08/03/15**  
**ITEM FROM FINANCE COMMITTEE MEETING OF 08/12/15**

**ISSUE:**

19. Request for Approval of Procurement Under State Price Agreement and Professional Services Agreement – City’s Asset Management Plan for Facilities Division; Ameresco, Inc. (LeAnn Valdez)

**FINANCE COMMITTEE ACTION:**

Approved as Discussion item.

**FUNDING SOURCE:**

**SPECIAL CONDITIONS OR AMENDMENTS**

**STAFF FOLLOW-UP:**

Approved with direction to staff.

<b>VOTE</b>	<b>FOR</b>	<b>AGAINST</b>	<b>ABSTAIN</b>
COUNCILOR TRUJILLO	Excused		
COUNCILOR RIVERA	X		
COUNCILOR LINDELL	X		
COUNCILOR MAESTAS	X		
CHAIRPERSON DOMINGUEZ			

4-13-15

**ACTION SHEET  
ITEM FROM THE  
PUBLIC WORKS/CIP AND LAND USE COMMITTEE MEETING  
OF  
MONDAY, JULY 27, 2015**

**ITEM 6**

REQUEST FOR APPROVAL OF A PROFESSIONAL SERVICES AGREEMENT WITH AMERESCO VIA STATE PRICE AGREEMENT #15-000-14-05759 AE IN THE AMOUNT OF \$64,523.92 (INCLUSIVE OF NMGR) FOR THE FIRST YEAR AND OPTION TO RENEW UP TO 3 ADDITIONAL YEARS IN THE AMOUNT OF \$12,512.26 (INCLUSIVE OF NMGR) PER YEAR AND \$2,500 FOR REIMBURSABLE EXPENSES FOR A TOTAL AMOUNT OF \$104,560.70 (LEANNE VALDEZ)

**PUBLIC WORKS COMMITTEE ACTION: Approved**

**FUNDING SOURCE: 32125**

**SPECIAL CONDITIONS / AMENDMENTS / STAFF FOLLOW UP:**

VOTE	FOR	AGAINST	ABSTAIN
CHAIRPERSON TRUJILLO			
COUNCILOR BUSHEE		X	
COUNCILOR DIMAS	X		
COUNCILOR DOMINGUEZ	X		
COUNCILOR RIVERA	X		

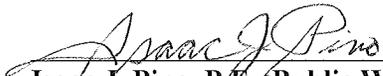
# City of Santa Fe, New Mexico

# memo

**DATE:** August 13, 2015

**TO:** City Council Committee

**VIA:**

  
Isaac J. Pino, P.E., Public Works Department Director  
David Pfeifer, Facilities Division Director 

**FROM:** LeAnn Valdez, Project Administrator 

## **ITEM AND ISSUE:**

REQUEST FOR APPROVAL OF A PROFESSIONAL SERVICES AGREEMENT FOR THE CITY OF SANTA FE ASSET MANAGEMENT PLAN WITH AMERESCO VIA STATE PRICE AGREEMENT #15-000-14-05759 AE IN THE AMOUNT OF \$64,523.92 (INCLUSIVE OF NMGR) FOR THE FIRST YEAR AND OPTION TO RENEW UP TO 3 ADDITIONAL YEARS IN THE AMOUNT OF \$12,512.26 (INCLUSIVE OF NMGR) PER YEAR AND \$2,500 FOR REIMBURSEABLE EXPENSES FOR A TOTAL AMOUNT OF \$104,560.70.

## **BACKGROUND & SUMMARY:**

Resolution No. 2015-048 was adopted by City Council on the 27<sup>th</sup> day of May 2015 directing staff to obtain services to execute a pilot project that will examine the capital funding needs for the City's buildings over the next 30 years; identify potential funding strategies to meet those needs and prepare the city to meet the growing funding requirements of its aging infrastructure. The City of Santa Fe currently occupies 107 buildings and approximately over 1,000,000 square feet.

On March 5, 2015 the State of New Mexico contracted with Qualified Providers of Energy Performance Contracting Services, which included Ameresco, Inc. As part of the State Price Agreement the scope of work pages 74-81 includes the implementation of conducting an assessment to establish interests, plans, problems and any other issues related to facilities and operations of facilities and collect data and background information of buildings, equipment and facilities operation and energy use.

Other vendors including Johnson Controls, Inc., Yearout Energy Services Company (YESCO), McKinstry Essention, LLC, Siemens Building Technologies, Energy Control/Opterra Energy and Noresco, LLC also contracted with the State of New Mexico. Below you will find a comparison in the cost per square foot for the City of Santa Fe's current buildings:

Ameresco has provided a fee summary (attached) for the pilot project in an amount less than what is provided in the state price agreement which is 8.33 cents per square foot after negotiation.

- Facility predictive life cycle forecast (3.6 cents per sq ft) = \$36,000
  - Operational efficiency review (0.95 cents per sq ft) = \$9,500
  - Software Licensing (4 year subscription \$9,440\*4) (3.78 cents per sq ft) = \$37,760
- Total cost per square foot = (8.33 cents per sq ft)

	Ameresco	Johnson Controls	Energy Control	YESCO	McKinstry	Siemens	Noresco
Investment Grade Energy Audit, Project Proposal, Pre Construction and Other Fees							
Alternative Audit Method Price per sq.ft	\$0.14 per square foot	\$0.20 per square foot	\$0.20per square foot	\$0.30 per square foot	N/A	N/A	N/A

The scope of work for the state price agreement is Phase I: Investment Grade Energy Audit and Project Proposal, Phase II: Guaranteed Utility Savings Contract and Implementation and Phase III: Performance Period.

The Facilities Division is recommending approval of Professional Services Agreement with AMERESCO for the City of Santa Fe’s Asset Management Plan.

**SCHEDULE:**

Upon approval of the PSA with AMERESCO, the City of Santa Fe Facilities Division will complete work needed for the City of Santa Fe’s Asset Management Plan.

Public Works Committee (Approved July 27, 2015)

Finance Committee (Approved August 3, 2015)

**SCOPE OF WORK:**

City of Santa Fe Facilities

The Scope of Work includes but limited to:

- One Time Fee
  1. Life Cycle Modeling and Capital Asset Plan
    - i. On site executive presentation of results
    - ii. Asset Planner, iAuditor, eDashboard training session

Memo-City Council  
PSA – City of Santa Fe Asset Management Plan  
AMERESCO  
8/13/15  
Page 3

- iii. Operational efficiency review
- 2. Software Licensing Fee
  - a. Asset Planner setup configuration, hosting 12 hours of Asset Planner support
  - b. iAuditor iPad application
  - c. 4 year subscription

**BUDGET:**

Funding is available on an as needed basis out of Business Unit No. 32125.

**RECOMMENDED ACTION:**

Approval of a Professional Service Agreement with AMERESCO in the amount of \$64,523.92 inclusive of NMGRT.

Attachment: Resolution No. 2015-048  
Professional Services Agreement with Ameresco  
Evaluations of Contractors  
State Price Agreement # 15-000-14-05759 AE

xc: Project/Book File

## CITY OF SANTA FE OTHER METHOD PROCUREMENT CHECKLIST

Contractor Name: AMERESCO

Procurement Title: Request fo approval of PSA with AMERESCO in the amount of \$64,523.92

Other Methods: State Price Agreement  Cooperative  Sole Source  Exempt  Other State Price Agreement

Department Requesting/Staff Member Public Works/Facilities Division/LeAnn Valdez

**Procurement Requirements:**

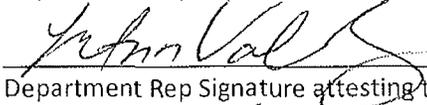
*A procurement file shall be maintained for all contracts, regardless of the method of procurement. The procurement file shall contain the basis on which the award is made, all submitted bids, all evaluation materials, score sheets, quotations and all other documentation related to or prepared in conjunction with evaluation, negotiation, and the award process. The procurement shall contain a written determination from the Requesting Department, signed by the purchasing officer, setting forth the reasoning for the contract award decision before submitting to the Committees. .*

**REQUIRED DOCUMENTS FOR APPROVAL BY PURCHASING\***

- | YES                                 | N/A                                 |  |
|-------------------------------------|-------------------------------------|--|
| <input checked="" type="checkbox"/> | <input type="checkbox"/>            | Approved Procurement Checklist (by Purchasing)                         |
| <input checked="" type="checkbox"/> | <input type="checkbox"/>            | Departments Recommendation of Award Memo addressed to Finance          |
| <input checked="" type="checkbox"/> | <input type="checkbox"/>            | State Price Agreement  |
| <input type="checkbox"/>            | <input checked="" type="checkbox"/> | Cooperative Agreement  |
| <input type="checkbox"/>            | <input checked="" type="checkbox"/> | Sole Source Request and Determination Form                             |
| <input type="checkbox"/>            | <input checked="" type="checkbox"/> | Contractors Exempt Letter  |
| <input type="checkbox"/>            | <input checked="" type="checkbox"/> | Purchasing Officers approval for exempt procurement                    |
| <input type="checkbox"/>            | <input checked="" type="checkbox"/> | BAR  |
| <input type="checkbox"/>            | <input checked="" type="checkbox"/> | FIR  |
| <input checked="" type="checkbox"/> | <input type="checkbox"/>            | Contract, Agreement or Amendment                                       |
| <input checked="" type="checkbox"/> | <input type="checkbox"/>            | Current Business Registration and CRS numbers on contract or agreement |
| <input checked="" type="checkbox"/> | <input type="checkbox"/>            | Summary of Contracts and Agreements form                               |
| <input checked="" type="checkbox"/> | <input type="checkbox"/>            | Certificate of Insurance   |
| <input type="checkbox"/>            | <input checked="" type="checkbox"/> | Other: <u>Fee Summary</u>  |

Public Works Dept./ Facilities Division LeAnn Valdez, Project Administrator

Department Rep Printed Name and Title

  
 Department Rep Signature attesting that all information included

 7/26/15  
 Purchasing Officer attesting that all information is reviewed

**REQUIRED DOCUMENTS FOR OTHER METHOD FILE\***

- | YES                                 | N/A                                 |  |
|-------------------------------------|-------------------------------------|--|
| <input checked="" type="checkbox"/> | <input type="checkbox"/>            | State Price Agreement                              |
| <input type="checkbox"/>            | <input checked="" type="checkbox"/> | Cooperative Agreement                              |
| <input type="checkbox"/>            | <input checked="" type="checkbox"/> | Sole source Request and Determination Form         |
| <input type="checkbox"/>            | <input checked="" type="checkbox"/> | Contractors Exempt Letter                          |
| <input type="checkbox"/>            | <input checked="" type="checkbox"/> | Purchasing Officers approval of exempt procurement |
| <input type="checkbox"/>            | <input checked="" type="checkbox"/> | Copies of all Sole Source submittals               |

\*

Other: \_\_\_\_\_

**AWARD\***

YES N/A

Fully executed Memo to Committees from the Department with recommendation of award  
  Other: \_\_\_\_\_

**CONTRACT\***

YES N/A

Copy of Executed Contract  
  Copy of all documentation presented to the Committees  
  Finalized Council Committee Minutes  
  Other: \_\_\_\_\_

Include all other substantive documents and records of communication that pertain to the procurement and any resulting contract.

**Create a separate file folder which may contain any documents with trade secrets or other competitively sensitive, confidential or proprietary information.**

Public Works Dept./ Facilities Division LeAnn Valdez, Project Administrator

Department Rep Printed Name and Title

  
\_\_\_\_\_  
Department Rep Signature attesting that all information included

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CITY OF SANTA FE, NEW MEXICO

RESOLUTION NO. 2015-48

INTRODUCED BY:

Councilor Joseph Maestas

Councilor Ron Trujillo

A RESOLUTION

DIRECTING STAFF TO OBTAIN SERVICES TO EXECUTE A PILOT PROJECT THAT WILL EXAMINE THE CAPITAL FUNDING NEEDS FOR THE CITY'S BUILDINGS OVER THE NEXT 30 YEARS; IDENTIFY POTENTIAL FUNDING STRATEGIES TO MEET THOSE NEEDS AND PREPARE THE CITY TO MEET THE GROWING FUNDING REQUIREMENTS OF ITS AGING INFRASTRUCTURE.

WHEREAS, the City of Santa Fe can benefit from an asset management plan; and

WHEREAS, local governments across America are seeing a growing challenge with aging infrastructure (buildings, roads, bridges, waste water, etc.); and

WHEREAS, in general, aging infrastructure requires increasing amounts of funding to maintain so as to continue meeting service level requirements; and

WHEREAS, municipalities are struggling to fund these increasingly necessary capital expenses from existing tax revenues; and

WHEREAS, the City of Santa Fe owns, maintains and operates numerous buildings, roads, bridges, water treatment systems, and other infrastructure that are aging, resulting in increased capital

1 funding needs; and

2       **WHEREAS**, the City of Santa Fe continues to defer critical maintenance of its ageing  
3 infrastructure due to a lack of funding, thereby adding to its already significant funding gap; and

4       **WHEREAS**, business processes and tools provided by asset management specialists are  
5 designed to forecast capital needs in the near (1-5 years), medium (5-10 years) and long (10-30 years)  
6 term for City infrastructure, prioritize those needs in a transparent manner based on risk so funding  
7 can be allocated to the areas of greatest impact, and to project the performance of infrastructure based  
8 on different levels of funding; and

9       **WHEREAS**, asset management specialists have framework that would be incorporated into  
10 City-wide planning to help identify impact of various funding sources to meet the projected capital  
11 funding needs; and

12       **WHEREAS**, an asset management system will help maximize the life cycle of key  
13 infrastructure and recommend appropriate work to maintain it; and

14       **WHEREAS**, there is an immediate need for the City to plan and prepare for future  
15 infrastructure needs and identify potential funding strategies in advance, in order to continue  
16 providing a high level of service to all citizens and visitors.

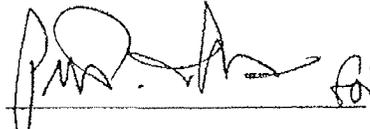
17       **NOW, THEREFOE, BE IT RESOLVED BY THE GOVERNING BODY OF THE**  
18 **CITY OF SANTA FE** that staff is directed to commence with a pilot project to examine the capital  
19 funding needs of the City's buildings over the next 30 years and identify potential funding strategies  
20 to meet those needs.

21       **BE IT FURTHER RESOLVED** that staff is directed to include in the pilot project the  
22 following items:

- 23       • Projections of capital costs for City-owned buildings for the next 30 years and the amount of  
24 funding needed to sustain them;
- 25       • Projections of currently available funding to meet the 30 year projected costs;

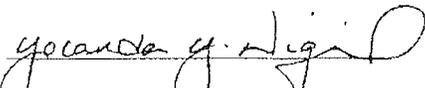
- 1 • Metrics such as the Facility Condition Index (FCI) and Unfunded Liability (UL) to assess risk  
2 and the viability of these buildings over time;  
3 • An executive report noting observations and findings highlighting life cycle projections  
4 (needs) and risks to maintain and sustain an aging infrastructure of buildings.  
5 • Identify improvements to increase efficiency that will reduce operational and maintenance  
6 costs.

7 PASSED, APPROVED and ADOPTED this 27<sup>th</sup> day of May, 2015.

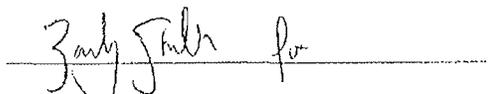
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10 JAVIER M. GONZALES, MAYOR

11 ATTEST:

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14 YOLANDA Y. VIGIL, CITY CLERK

15 APPROVED AS TO FORM:

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18 KELLEY A. BRENNAN, CITY ATTORNEY

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25 *M/Legislation/Resolutions 2015/2015-48 City Asset Management Plan*

CITY OF SANTA FE  
PROFESSIONAL SERVICES AGREEMENT

THIS AGREEMENT is made and entered into by and between the City of Santa Fe (the "City") and Ameresco, Inc. (the "Contractor"). The date of this Agreement shall be the date when it is executed by the City and the Contractor, whichever occurs last.

1. SCOPE OF SERVICES

The Contractor shall provide the following services for the City as described in Exhibit "A" attached hereto and incorporated herein:

A. *Life Cycle Modeling and Capital Asset Plan for the City of Santa Fe's* approximate 1,000,000 square feet of building space:

- 1) On Site Executive Presentation of Results.
- 2) Asset Planner, iAuditor, eDashboard Training.

B. Operational Efficiency Review to include a 2 day workshop to review operational efficiency that may yield possible operational and maintenance cost reductions.

C. Software Licensing fee for four (4) years.

D. Purchase four (4) iPad mini's.

2. STANDARD OF PERFORMANCE; LICENSES

A. The Contractor represents that it possesses the experience and knowledge necessary to perform the services described under this Agreement.

B. The Contractor agrees to obtain and maintain throughout the term of this Agreement, all applicable professional and business licenses required by law, for

itself, its employees, agents, representatives and subcontractors.

3. COMPENSATION

A. The City shall pay to the Contractor in full payment for services rendered, a sum not to exceed one hundred four thousand five hundred sixty dollars and seventy cents (\$104,560.70 ), inclusive of applicable gross receipts taxes as described in Exhibit "A" attached hereto and incorporated herein. Payment shall be made as follows:

(1) Sixty four thousand five hundred twenty three dollars and ninety two cents (\$64,523.92), inclusive of applicable gross receipts taxes for the first year.

(2) Thirty seven thousand five hundred thirty six dollars and seventy-eight cents (\$37,536.78), inclusive of applicable gross receipts taxes.

Breakdown is as follows:

(a) Twelve thousand five hundred twelve dollars and twenty six cents (\$12,512.26) per year for the remaining three (3) years of the Agreement.

(3) Two thousand five hundred dollars (\$2,500) reimbursable expenses (out of pocket expenses) with prior approval by the City.

B. The Contractor shall be responsible for payment of gross receipts taxes levied by the State of New Mexico on the sums paid under this Agreement.

C. Payment shall be made upon receipt, approval and acceptance by the City of detailed statements containing a report of services completed. Compensation shall be paid only for services actually performed and accepted by the City.

4. APPROPRIATIONS

The terms of this Agreement are contingent upon sufficient appropriations and authorization being made by the City for the performance of this Agreement. If sufficient appropriations and authorization are not made by the City, this Agreement shall terminate upon written notice being given by the City to the Contractor. The City's decision as to whether sufficient appropriations are available shall be accepted by the Contractor and shall be final.

5. TERM AND EFFECTIVE DATE

This Agreement shall be effective when signed by the City and the Contractor, whichever occurs last, and shall terminate on August 30, 2019, unless sooner pursuant to Article 6 below.

6. TERMINATION

A. This Agreement may be terminated by the City and the Contractor upon 60 days written notice to the Contractor.

(1) The Contractor shall render a final report of the services performed up to the date of termination and shall turn over to the City original copies of all work product, research or papers prepared under this Agreement.

(2) Compensation is based upon hourly rates and expenses, Contractor shall be paid for services rendered and expenses incurred through the date Contractor receives notice of such termination.

7. STATUS OF CONTRACTOR; RESPONSIBILITY FOR PAYMENT OF EMPLOYEES AND SUBCONTRACTORS

A. The Contractor and its agents and employees are independent

contractors performing professional services for the City and are not employees of the City. The Contractor, and its agents and employees, shall not accrue leave, retirement, insurance, bonding, use of City vehicles, or any other benefits afforded to employees of the City as a result of this Agreement.

B. Contractor shall be solely responsible for payment of wages, salaries and benefits to any and all employees or subcontractors retained by Contractor in the performance of the services under this Agreement.

C. The Contractor shall comply with City of Santa Fe Minimum Wage, Article 28-1-SFCC 1987, as well as any subsequent changes to such article throughout the term of this Agreement.

8. CONFIDENTIALITY

Any confidential information provided to or developed by the Contractor in the performance of this Agreement shall be kept confidential and shall not be made available to any individual or organization by the Contractor without the prior written approval of the City.

9. CONFLICT OF INTEREST

The Contractor warrants that it presently has no interest and shall not acquire any interest, direct or indirect, which would conflict in any manner or degree with the performance of services required under this Agreement. Contractor further agrees that in the performance of this Agreement no persons having any such interests shall be employed.

10. ASSIGNMENT; SUBCONTRACTING

The Contractor shall not assign or transfer any rights, privileges, obligations

or other interest under this Agreement, including any claims for money due, without the prior written consent of the City. The Contractor shall not subcontract any portion of the services to be performed under this Agreement without the prior written approval of the City.

11. RELEASE

The Contractor, upon acceptance of final payment of the amount due under this Agreement, releases the City, its officers and employees, from all liabilities, claims and obligations whatsoever arising from or under this Agreement. The Contractor agrees not to purport to bind the City to any obligation not assumed herein by the City unless the Contractor has express written authority to do so, and then only within the strict limits of that authority.

12. INSURANCE

A. The Contractor, at its own cost and expense, shall carry and maintain in full force and effect during the term of this Agreement, comprehensive general liability insurance covering bodily injury and property damage liability, in a form and with an insurance company acceptable to the City, with limits of coverage in the maximum amount which the City could be held liable under the New Mexico Tort Claims Act for each person injured and for each accident resulting in damage to property. Such insurance shall provide that the City is named as an additional insured and that the City is notified no less than 30 days in advance of cancellation for any reason. The Contractor shall furnish the City with a copy of a Certificate of Insurance as a condition prior to performing services under this Agreement.

B. Contractor shall also obtain and maintain Workers' Compensation

insurance, required by law, to provide coverage for Contractor's employees throughout the term of this Agreement. Contractor shall provide the City with evidence of its compliance with such requirement.

C. Contractor shall maintain professional liability insurance throughout the term of this Agreement providing a minimum coverage in the amount required under the New Mexico Tort Claims Act. The Contractor shall furnish the City with proof of insurance of Contractor's compliance with the provisions of this section as a condition prior to performing services under this Agreement.

13. INDEMNIFICATION

The Contractor shall indemnify, hold harmless and defend the City from all losses, damages, claims or judgments, including payments of all attorneys' fees and costs on account of any suit, judgment, execution, claim, action or demand whatsoever arising from Contractor's performance under this Agreement as well as the performance of Contractor's employees, agents, representatives and subcontractors.

14. NEW MEXICO TORT CLAIMS ACT

Any liability incurred by the City of Santa Fe in connection with this Agreement is subject to the immunities and limitations of the New Mexico Tort Claims Act, Section 41-4-1, et. seq. NMSA 1978, as amended. The City and its "public employees" as defined in the New Mexico Tort Claims Act, do not waive sovereign immunity, do not waive any defense and do not waive any limitation of liability pursuant to law. No provision in this Agreement modifies or waives any provision of the New Mexico Tort Claims Act.

15. THIRD PARTY BENEFICIARIES

By entering into this Agreement, the parties do not intend to create any

right, title or interest in or for the benefit of any person other than the City and the Contractor. No person shall claim any right, title or interest under this Agreement or seek to enforce this Agreement as a third party beneficiary of this Agreement.

16. RECORDS AND AUDIT

The Contractor shall maintain, throughout the term of this Agreement and for a period of three years thereafter, detailed records that indicate the date, time and nature of services rendered. These records shall be subject to inspection by the City, the Department of Finance and Administration, and the State Auditor. The City shall have the right to audit the billing both before and after payment. Payment under this Agreement shall not foreclose the right of the City to recover excessive or illegal payments.

17. APPLICABLE LAW; CHOICE OF LAW; VENUE

Contractor shall abide by all applicable federal and state laws and regulations, and all ordinances, rules and regulations of the City of Santa Fe. In any action, suit or legal dispute arising from this Agreement, the Contractor agrees that the laws of the State of New Mexico shall govern. The parties agree that any action or suit arising from this Agreement shall be commenced in a federal or state court of competent jurisdiction in New Mexico. Any action or suit commenced in the courts of the State of New Mexico shall be brought in the First Judicial District Court.

18. AMENDMENT

This Agreement shall not be altered, changed or modified except by an amendment in writing executed by the parties hereto.

19. SCOPE OF AGREEMENT

This Agreement incorporates all the agreements, covenants, and

understandings between the parties hereto concerning the services to be performed hereunder, and all such agreements, covenants and understandings have been merged into this Agreement. This Agreement expresses the entire Agreement and understanding between the parties with respect to said services. No prior agreement or understanding, verbal or otherwise, of the parties or their agents shall be valid or enforceable unless embodied in this Agreement.

20. NON-DISCRIMINATION

During the term of this Agreement, Contractor shall not discriminate against any employee or applicant for an employment position to be used in the performance of services by Contractor hereunder, on the basis of ethnicity, race, age, religion, creed, color, national origin, ancestry, sex, gender, sexual orientation, physical or mental disability, medical condition, or citizenship status.

21. SEVERABILITY

In case any one or more of the provisions contained in this Agreement or any application thereof shall be invalid, illegal or unenforceable in any respect, the validity, legality, and enforceability of the remaining provisions contained herein and any other application thereof shall not in any way be affected or impaired thereby.

22. NOTICES

Any notices required to be given under this Agreement shall be in writing and served by personal delivery or by mail, postage prepaid, to the parties at the following addresses:

City of Santa Fe:  
Facilities Division  
2651 Siringo Road, Bldg E  
Santa Fe, NM 87501

Contractor:  
Ameresco, Inc.  
60 E. Rio Salado Parkway, Suite 1001  
Tempe, AZ 85281

IN WITNESS WHEREOF, the parties have executed this Agreement on the date set forth below.

CITY OF SANTA FE:

CONTRACTOR:  
AMERESCO, INC.

\_\_\_\_\_  
JAVIER M. GONZALES, MAYOR

\_\_\_\_\_  
NAME AND TITLE

DATE: \_\_\_\_\_

DATE: \_\_\_\_\_

Federal Tax ID No. \_\_\_\_\_

ATTEST:

City of Santa Fe Business  
Registration # \_\_\_\_\_

\_\_\_\_\_  
YOLANDA Y. VIGIL, CITY CLERK

APPROVED AS TO FORM:

*MDM* *7/16/15*  
\_\_\_\_\_  
KELLEY A. BRENNAN, CITY ATTORNEY

APPROVED:

\_\_\_\_\_  
OSCAR RODRIGUZ, FINANCE DIRECTOR

32125  
Business Unit Line Item

Fee Summary

Prepared for  
City of Santa Fe

July 7, 2015



## Executive Summary

Ameresco Asset Sustainability Group (ASG) appreciates the opportunity to submit this scoping document addressing City of Santa Fe's desire to establish a prioritized capital planning process to support both long-term and short-term decision-making. ASG has worked with similar customers offering "capital asset plans" in an effort to enhance the *Quality Community & Living (QCL)*.

Professionals in charge of infrastructure struggle with the constant pressure to improve the condition and long term sustainability of their aging infrastructure, while reducing capital and operational spending. Challenges to make effective capital and operational spending decisions include an incomplete, inaccessible collection of infrastructure data, and not having a proven method to prioritize funding.

To enhance decision making and create a decision development framework, ASG delivers:

- Establishment of **Life Cycle Models** for major building components and systems (incorporating both short term [5 Year] and long term [30 Year] planning renewal and life cycle data as well as current information from phone-based Asset Reviews for City of Santa Fe's assets
- Identification of the **Unfunded Liability** – graphical presentation of each asset based on ASG's life cycle models;
- Establishment of the **Facility Condition Index (FCI)** profile for each asset based on ASG's life cycle models;
- **Executive Summary** – portfolio wide summary of the life cycle and asset planning findings;
- **Presentation** to City of Santa Fe's Senior Team and Stakeholders - based on life cycle findings and results;
- **A unique data management process** – that engages staff to support and manage on-going capital needs and prioritization.
- Review **operational efficiency** opportunities (based on possible best practice gaps) that may yield possible operational and maintenance cost reductions – 2 day concurrent workshop.

The ASG team is pleased to look beyond the project specific requests and ensure that data and information is used to enhance decision-making including investment spending and redevelopment impacts as it affects Quality of Community & Living (QCL), Asset Sustainment, and Financial Stewardship along with Stakeholder impact.



\*Rate schedule excludes applicable taxes and out of pocket expenses. Software subscription rate schedule excludes inflationary adjustments applied each year.

Any additional services outside the scope of the project will be charged according to the rate schedule below. Rate Schedules for the various staff members are listed as follows:

- Vice President/Executive \$225 /hour
- Project Director \$155/hour
- Project Management \$130/hour
- Cost Analysts \$110/hour
- Data Analysts \$ 85/hour
- Technical Support \$ 85/hour
- Administration Staff \$ 55/hour

Only if required, on-site condition assessment services can be priced separately taking advantage of the data previously collected by City of Santa Fe and blending the life cycle cost information developed by ASG as outlined in this scoping document.

Title	# of hours	Rate * 1.4	Year 1	ea. Year for 4 Years	Notes
Life Cycle Modeling \$0.036/sq. ft.			\$ 36,000.00		for 1,000,000 square feet/107 buildings
Operational Efficiency Review			\$ 9,500.00		
1 Auditor (4 Years)			\$ 9,440.00	\$ 9,440.00	
<b>Subtotal of Prof. Services</b>			<b>\$ 54,940.00</b>		
Ipad Mini * 4			\$ 3,512.00	\$ 2,112.00	Initial Purchase (\$350*4) plus (\$44/month*12*4 each year)
<b>Personnel</b>					
Asset Review Step 2	32	\$ 25.00	\$ 800.00		I used 22.5 minutes for the 25 larger buildings and 5 min for the 82 smaller building
Burden 0.4			\$ 320.00		
On-Site Validation					This will take about 3-4 months Passing 4 Ipad mini's around during inspections of all buildings
<b>Subtotal</b>			<b>\$ 59,572.00</b>	<b>\$ 11,552.00</b>	
<b>NMGRT @ 8.3125%</b>			<b>\$ 4,951.92</b>	<b>\$ 960.26</b>	
<b>Total</b>			<b>\$ 64,523.92</b>	<b>\$ 12,512.26</b>	





**City of Santa Fe  
Summary of Contracts, Agreements, & Amendments**

**Section to be completed by department for each contract or contract amendment**

- |   |                               |                                     |                             |                          |
|---|-------------------------------|-------------------------------------|-----------------------------|--------------------------|
| 1 | <b>FOR:</b> ORIGINAL CONTRACT | <input checked="" type="checkbox"/> | CONTRACT AGREEMENT          | <input type="checkbox"/> |
|   | MAINTENANCE AGREEMENT         | <input type="checkbox"/>            | LICENSE AGREEMENT           | <input type="checkbox"/> |
|   | LEGAL SERVICES AGREEMENT      | <input type="checkbox"/>            | MEMORANDUM OF UNDERSTANDING | <input type="checkbox"/> |
|   | MEMORANDUM OF AGREEMENT       | <input type="checkbox"/>            | JOINT POWERS AGREEMENTS     | <input type="checkbox"/> |
|   | GRANT AGREEMENTS              | <input type="checkbox"/>            | CHANGE ORDERS               | <input type="checkbox"/> |

2 Name of Contractor AMERESCO

3 Complete information requested  Plus GRT  
 Inclusive of GRT

Original Contract Amount: \$64,523.92

Termination Date: August 30, 2019

Approved by Council Date: August 12, 2015

or by City Manager Date: \_\_\_\_\_

**Contract is for:** PSA with AMERESCO in the amount of \$64,523.92 for City Asset Management Plan

Amendment # \_\_\_\_\_ to the Original Contract# \_\_\_\_\_

Increase Amount \$ \_\_\_\_\_

Extend Termination Date to: \_\_\_\_\_

Approved by Council Date: \_\_\_\_\_

or by City Manager Date: \_\_\_\_\_

**Amendment is for:**

-----

4 **History of Contract & Amendments:** (option: attach spreadsheet if multiple amendments)  Plus GRT  
 Inclusive of GRT

Amount \$ 64,523.92 of original Contract# \_\_\_\_\_ Termination Date: 08/30/2019

Reason: Original Agreement

Amount \$ \_\_\_\_\_ amendment # \_\_\_\_\_ Termination Date: \_\_\_\_\_

Reason: \_\_\_\_\_

Amount \$ \_\_\_\_\_ amendment # \_\_\_\_\_ Termination Date: \_\_\_\_\_

Reason: \_\_\_\_\_

Amount \$ \_\_\_\_\_ amendment # \_\_\_\_\_ Termination Date: \_\_\_\_\_

Reason: \_\_\_\_\_

5

Total of Original Contract plus all amendments: \$ 64,523.92



**City of Santa Fe  
Summary of Contracts, Agreements, & Amendments**

6 **Procurement Method of Original Contract:** (complete one of the lines) \_\_\_\_\_

RFB  RFQ  Sole Source  Other

7 \_\_\_\_\_

**Procurement History:** First year of 4 year contract \_\_\_\_\_

8 example: (First year of 4 year contract) \_\_\_\_\_

**Funding Source:** Municipal Facility Repair **BU/Line Item:** 32125.572400 \_\_\_\_\_

9 **Any out-of-the ordinary or unusual issues or concerns:** \_\_\_\_\_

None \_\_\_\_\_

(Memo may be attached to explain detail.) \_\_\_\_\_

**Staff Contact who completed this form:** LeAnn Valdez *LV* Phone # 955-5938 \_\_\_\_\_

**Division Contract Administrator:** David J. Pfeifer *on Behalf of D.P. J.* \_\_\_\_\_

**Division Director:** David J. Pfeifer *on Behalf of D.P. J.* \_\_\_\_\_

**Department Director:** Isaac J. Pino P.E. \_\_\_\_\_

10 **Certificate of Insurance attached.** (if original Contract)  \_\_\_\_\_

11 **Description of your efforts to reduce the cost of the contract including information on efforts to obtain other quotes for the contracted activity:** State Price Agreement \_\_\_\_\_

12 **Prior year's contract amount?:** N/A \_\_\_\_\_

13 **Describe service impact from an ongoing commitment to the contractor:** \_\_\_\_\_

14 **Why staff cannot perform the work?:** required licenses \_\_\_\_\_

15 **If extending contract, why?:** none required \_\_\_\_\_

16 **Was a Santa Fe company awarded contract? If not, why?:** No Local Contractors \_\_\_\_\_

**Has the contract been approved as to form by City Attorney's Office?:** Yes \_\_\_\_\_

**To be recorded by City Clerk: Yes**

17 **Is this for City Manager or Council approval?:** City Council \_\_\_\_\_

**To be recorded by City Clerk**

Contract # \_\_\_\_\_

Date of contract Executed (i.e., signed by all parties): \_\_\_\_\_

Note: If further information needs to be included, attach a separate memo.

Client#: 2793

AMERESCO

ACORD™

CERTIFICATE OF LIABILITY INSURANCE

DATE (MM/DD/YYYY)

08/04/2015

THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AFFIRMATIVELY OR NEGATIVELY AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW. THIS CERTIFICATE OF INSURANCE DOES NOT CONSTITUTE A CONTRACT BETWEEN THE ISSUING INSURER(S), AUTHORIZED REPRESENTATIVE OR PRODUCER, AND THE CERTIFICATE HOLDER.

IMPORTANT: If the certificate holder is an ADDITIONAL INSURED, the policy(ies) must be endorsed. If SUBROGATION IS WAIVED, subject to the terms and conditions of the policy, certain policies may require an endorsement. A statement on this certificate does not confer rights to the certificate holder in lieu of such endorsement(s).

PRODUCER: William Gallagher Associates, Insurance Brokers, Inc. 470 Atlantic Avenue, Boston, MA 02210. CONTACT NAME: INSURER(S) AFFORDING COVERAGE: INSURER A: Zurich-American Insurance Compa, INSURER B: Steadfast Insurance Company, INSURER C: , INSURER D: , INSURER E: , INSURER F: .

COVERAGES CERTIFICATE NUMBER: REVISION NUMBER:

THIS IS TO CERTIFY THAT THE POLICIES OF INSURANCE LISTED BELOW HAVE BEEN ISSUED TO THE INSURED NAMED ABOVE FOR THE POLICY PERIOD INDICATED. NOTWITHSTANDING ANY REQUIREMENT, TERM OR CONDITION OF ANY CONTRACT OR OTHER DOCUMENT WITH RESPECT TO WHICH THIS CERTIFICATE MAY BE ISSUED OR MAY PERTAIN, THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, EXCLUSIONS AND CONDITIONS OF SUCH POLICIES. LIMITS SHOWN MAY HAVE BEEN REDUCED BY PAID CLAIMS.

Table with columns: INSR LTR, TYPE OF INSURANCE, ADDL INSR, SUBR WVD, POLICY NUMBER, POLICY EFF (MM/DD/YYYY), POLICY EXP (MM/DD/YYYY), LIMITS. Rows include General Liability, Automobile Liability, Umbrella Liab, Excess Liab, Workers Compensation and Employers' Liability, and Professional Liability.

DESCRIPTION OF OPERATIONS / LOCATIONS / VEHICLES (Attach ACORD 101, Additional Remarks Schedule, if more space is required) Certificate holder is included as additional insured where required by written contract. 30 days notice of cancellation except for 10 days for nonpayment of premium is provided.

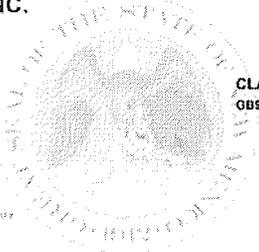
CERTIFICATE HOLDER: City of Santa Fe, Facilities Division, 2651 Siringo Road, Bldg E, Santa Fe, NM 87501. CANCELLATION: SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, NOTICE WILL BE DELIVERED IN ACCORDANCE WITH THE POLICY PROVISIONS. AUTHORIZED REPRESENTATIVE: [Signature]

**STATE OF NEW MEXICO**  
CONSTRUCTION INDUSTRIES DIVISION

---

**AMERESCO, INC.**  
LICENSE NUMBER  
**90760**  
Qualifying Party(S)  
WOLFE JAMES P

EXPRES  
**07/31/2016**  
CLASSIFICATION(S)  
GB98



*James P. Wolfe*  
DIRECTOR

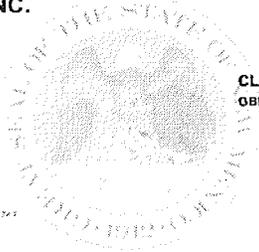
This card is the property of the CID and shall be surrendered upon demand

**STATE OF NEW MEXICO**  
CONSTRUCTION INDUSTRIES DIVISION

---

**AMERESCO, INC.**  
LICENSE NUMBER  
**90760**  
Qualifying Party(S)  
WOLFE JAMES P

EXPRES  
**07/31/2016**  
CLASSIFICATION(S)  
GB98



*James P. Wolfe*  
DIRECTOR

This card is the property of the CID and shall be surrendered upon demand

**STATEWIDE PRICE AGREEMENT**

**#15-000-14-05759AE**

**STATE OF NEW MEXICO**

**FOR**

**Qualified Providers of Energy Performance Contracting Services, ESCO**

THIS AGREEMENT is made and entered into by and between the **General Services Department** and the **State of New Mexico**, herein after referred to as the "Agency", and **Ameresco, Inc.** herein after referred to as the "Contractor."

IT IS MUTUALLY AGREED BETWEEN THE PARTIES:

**1. DEFINITIONS**

**"Agencies"** or **"Agency"** means eligible governmental entities under the Public Facilities Energy Efficiency and Water Conservation Act [NMSA 1978, 6-23], which are state government, local governments, public schools, higher educational institutions, and other instrumentalities of state government.

**"Agreement Administrator"** shall mean the State Purchasing Division (SPD) of the General Service Department.

**"Close of Business"** means 5:00 PM Mountain Standard or Mountain Daylight Time, whichever is in effect on the given date.

**"Contract"** means any agreement for the procurement of items of tangible personal property, services or construction derived from an Invitation to Bid or RFP.

**"Deliverable"** means any measurable, tangible, verifiable outcome, result, or item that must be produced to complete a project or part of a project.

**"ECMD"** means the Energy Conservation and Management Division of the Energy, Minerals and Natural Resources Department.

**"EMNRD"** means the Energy, Minerals and Natural Resources Department which is responsible for managing the Whole-building Investments for Sustainable Efficiency (WISE) Program.

**"Energy Conservation Measure,"** or **"ECM"**, means a training program or a modification to a facility, including buildings, systems or vehicles, designed to reduce energy consumption or conservation-related operating costs. More specifically, ECMs that may be proposed by Qualified Providers are stated in the EPC Statute and include:

- a) Insulation of the building structure or systems within the building;
- b) Storm windows or doors, caulking or weather-stripping, multi-glazed 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;
- c) Automated or computerized energy control systems;
- d) Heating, ventilating or air conditioning system modifications or replacements;

- e) Replacement of 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 the applicable state or local building code or nationally accepted standards for the lighting system after the proposed modifications are made;
- f) Energy recovery systems;
- g) Solar heating and cooling systems or other renewable energy systems;
- h) Cogeneration or combined heat and power systems that produce steam, chilled water or forms of energy such as heat, as well as electricity, for use primarily within a building or complex of buildings;
- i) Energy conservation measures that provide long-term operating cost reductions;
- j) Maintenance and operation management systems that provide long-term operating cost reductions;
- k) Traffic control systems; or
- l) Alternative fuel options or accessories for vehicles.

ECMs may also include “conservation-related cost savings,” which are cost savings, other than utility cost savings, in the operating budget of a Governmental Unit that are a direct result of energy or water conservation measures implemented pursuant to a Guaranteed Utility Savings Contract.

**“Energy Performance Contracting”** or **“EPC”** means a project that is backed up by a written guarantee stating that the utility cost savings and conservation-related cost savings will meet or exceed the costs of implemented ECMs or WCMs.

**“ESCO”** means Energy Service Company that can provide energy audit, project development, implementation, financing, and monitoring services to Agencies for ECMs or WCMs.

**“Guaranteed Utility Savings Contracts,”** means contracts for the evaluation and recommendation of energy or water conservation measures and for the implementation of one or more of those measures, and which contract provides that all payments, except obligations on termination of the contract before its expiration, are to be made over time and the savings are guaranteed to the extent necessary to make the payments for the conservation measures.

**“Investment-Grade Energy Audit”** means a study approved by a Professional Engineer registered in New Mexico that evaluates in detail the technical and economic issues necessary to justify the investment related to the proposed ECMs or WCMs.

**“Local Public Body”** means every political subdivision of the state and the agencies, instrumentalities and institutions thereof.

**“New Mexico State Purchasing Agent”** or **“NMSPA”** means the purchasing agent for the State of New Mexico or a designated representative. May be used interchangeably with "State Purchasing Agent" or "SPA".

**“Pre-qualified”** means the status of an ESCO or vendor that has been selected through an RFP process, certified by EMNRD as a Qualified Provider, and has established a statewide price agreement with the State Purchasing Agent. A pre-qualified ESCO or vendor is eligible for secondary selection processes for EPC services that Agencies may conduct.

**“Price Agreement”** means a definite quantity contract or indefinite quantity contract which requires the contractor to furnish items of tangible personal property or service to the procuring agency which issues a purchase order, if the purchase order is within the quantity limitations of the contract, if any.

**“Procuring Agency”** means any state agency or local public body that chooses to procure products or services under this agreement. Other units of government, including cities, counties, school districts, institutions of higher education and other jurisdictions not subject to the procurement authority of the SPA, are authorized to buy from this agreement.

**“Products and Services Schedule”** refers to the complete list of products and services offered under this agreement and the price for each. Product and service descriptions may be amended with the prior approval of the Agreement Administrator. New products and services shall not be added to the Products and Services Schedule.

**“Qualified Provider”** means a person experienced in the design, implementation and installation of energy or water conservation measures and who meets EMNRD’s experience qualifications for energy conservation measures or the Office of the State Engineer for water conservation measures.

**“State (the State)”** means the State of New Mexico.

**“Statewide Price Agreement,”** means the contract that selected Offerors would execute in order to be deemed a Qualified Provider.

**“State Purchasing Agent,”** or SPA, means the purchasing agent for the State of New Mexico or a designated representative.

**“Utility Cost Savings”** means the amounts saved by a Governmental Unit in the purchase of energy or water that are a direct result of energy or water conservation measures implemented pursuant to a Guaranteed Utility Savings Contract.

**“Water Conservation Measure,”** or **“WCM”**, means a training program, change in maintenance practices, or facility or landscape alteration designed to reduce water consumption or conservation-related operating costs.

**“You”** and **“your”** refers to **Ameresco, Inc.** **“We,”** **“us”** or **“our”** refers to the State of New Mexico, agencies, commissions, institutions, political subdivisions and local public bodies allowed by law to participate in the Agreement and whose accounts are created under this Agreement.

## 2. SCOPE OF WORK

Pre-qualified Energy Services Companies (ESCOs) will provide Energy Performance Contracting (EPC) services for New Mexico governmental entities (“Agencies” or “Agency”). ESCOs selected through the Request for Proposals (RFP) process and who also enter into statewide price agreements, will each be deemed Qualified Providers through the WISE<sup>1</sup> Program coordinated by the Energy Conservation and Management Division (ECMD) of the Energy, Minerals and Natural Resources Department (EMNRD). ESCOs selected through separate federal, state, or private procurement processes for EPC services are not pre-qualified.

The WISE Program provides a standardized process with direction and accountability for all participants in development, implementation, and measurement and verification of EPC projects by defining roles and responsibilities; formalizing process steps; establishing maximum cost schedules; providing standard contract documents; and establishing measurement and verification guidelines. Qualified Providers are approved to provide proposals to Agencies that may choose to utilize EPC services for upgrading facilities, fleets, and water infrastructure with energy and water conservation measures (ECMs and WCMs). Such EPC services are allowed by the Public Facility Energy Efficiency and Water Conservation Act (**APPENDIX P**) (“EPC Statute”), as amended. The statute citation is New Mexico Statutes Annotated (NMSA) 1978, Chapter 6, Article 23 (6-23).

Eligible Agencies under the EPC Statute are state agencies, K-12 public school districts, higher education governmental entities, municipal and county governments, and other political subdivisions. EPC enables these Agencies to access financing and accomplish energy projects without using capital budgets; project financing costs are offset by energy cost savings. The Agencies and selected Qualified Providers will follow the EPC statute and program guidelines of EMNRD.

The selected ESCOs will commit to the EPC Statute and EMNRD’s program guidelines via subsequent contracts with Agencies for specific projects. The term of the Statewide Price Agreement will be four (4) years, with continuation subject to an annual review by EMNRD of each Qualified Provider’s performance. The Statewide Price Agreement will contain schedules of markups and fees as stated in the Offeror’s RFP response. Compensation to Qualified Providers for specific work projects will be detailed in the resulting contracts with Agencies to implement EPC projects.

Qualified Providers market their services in conjunction with the WISE Program to potential participants. When a potential project is identified, the Qualified Provider shall work with the Agency to engage EMNRD and the WISE Program for project support. The Qualified Provider will be required to develop proposals for potential projects. Agreements established between the Qualified Provider and the Agency, as described in the following, will incorporate current state statutes and directives that directly relate to EPC, including:

- Public Facility Energy Efficiency and Water Conservation Act [NMSA 1978, 6-23] (**APPENDIX P**); and
- Energy Efficiency Standards for Public Buildings, [NMSA 1978, 15-3-36] (**APPENDIX R**).

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<sup>1</sup> “Whole-building Investments for Sustainable Efficiency” is the current name of the EMNRD energy efficiency program for public facilities and is supported by the State Energy Program, US Department of Energy.

The selection of ESCOs and subsequent contracting with Qualified Providers serves as a major step to enable Agencies to initiate EPC projects that upgrade facilities and generate avoided energy costs. There are three (3) phases possible in a complete EPC project, after an Agency's selection of a Qualified Provider, as follows:

***Phase 1: Investment-Grade Energy Audit and Project Proposal***

The selected Qualified Provider and the Agency will execute the Investment-Grade Energy Audit and Project Proposal contract (**APPENDIX L**). This contract sets specific expectations and provides a detailed process for both the Qualified Provider and the Agency. The contract also defines the deliverables to Agency and establishes the basis for the Guaranteed Utility Savings Contract to follow. The Investment-Grade Energy Audit and Project Proposal will identify and evaluate cost-saving measures and define the proposed project scope, cost, savings, and cash-flow over the proposed financing term. A project proposal will present bundled ECMs and WCMs that can be financed through guaranteed savings.

***Phase 2: Guaranteed Utility Savings Contract and Implementation***

Upon satisfactory completion of the Investment-Grade Energy Audit and Project Proposal, the Agency will have the option to execute a Guaranteed Utility Savings Contract (**APPENDIX N**) with the Qualified Provider to implement the recommended project. The Guaranteed Utility Savings Contract will define the final agreed upon scope of work and all its associated costs and mutual responsibilities between the Qualified Provider and Agency, as well as improvement measures, the equipment and labor costs associated with them, and all guaranteed energy and maintenance cost savings. The Qualified Provider will solicit financing companies on behalf of Agency using the Financing Bid Package (**APPENDIX M**). A separate financing agreement will be developed including Qualified Provider payment schedules and lender financing terms and schedules. Upon execution of the Guaranteed Utility Savings Contract, the Qualified Provider proceeds to final design, construction, and commissioning of the ECMs and WCMs.

***Phase 3: Performance Period***

The Performance Period of the Guaranteed Utility Savings Contract begins upon construction completion and project acceptance by Agency. The Guaranteed Utility Savings Contract may include a number of services the Qualified Provider will provide until the end of the contract, including, but not limited to, measurement and verification of savings, the savings guarantee, staff training, and contract maintenance services.

Each of the Agencies has the option to procure services of an ESCO to implement ECMs and WCMs in Agency facilities, which will avoid Agency energy costs. Selected ESCOs that establish Statewide Price Agreements will be deemed Qualified Providers for selection by any of the Agencies. The primary purposes of this Qualified Provider selection process are:

1. To ensure the Qualified Provider meets minimum qualifications and can implement successful EPC projects;
2. To provide each Agency with the opportunity to procure services of a Qualified Provider in a timely and cost-effective way;
3. To increase the number of successful Guaranteed Utility Savings Contracts statewide, as a means to implement comprehensive energy, transportation, and water efficiency projects.

There will be multiple ESCOs selected to become Qualified Providers. Selection will be based on the quality of proposals as determined by the evaluation committee. The number of EPC projects is not pre-determined and inclusion on a statewide price agreement is not a guarantee of engaging in EPC projects. However, it is also possible that the Qualified Provider may be engaged in developing and implementing more than one project at any point in time. The number of EPC projects moving forward for Agency facilities will depend on the subsequent proposals for potential projects, as requested by the Agencies.

### **3. PAYMENT PROVISIONS**

All payments under this agreement are subject to the following provisions.

A. Acceptance - In accordance with Section 13-1-158 NMSA 1978, the agency shall determine if the product or services provided meet specifications. No payment shall be made for any products or services until the products or services have been accepted in writing by the procuring agency. Unless otherwise agreed upon between the procuring agency and the contractor, within fifteen (15) days from the date the procuring agency receives written notice from the contractor that payment is requested for services or within thirty (30) days from the receipt of products, the procuring agency shall issue a written certification of complete or partial acceptance or rejection of the products or services. Unless the procuring agency gives notice of rejection within the specified time period, the products or services will be deemed to have been accepted.

B. Issuance of Orders - Only written signed orders are valid under this Price Agreement. A Purchase Order is the approved form for state agencies issuing Contract Orders under this Price Agreement. Other authorized government entities may utilize Purchase Orders or forms adapted by them for their own use.

C. Payment of Invoice - Upon acceptance that the products or services have been received and accepted, payment shall be tendered to the contractor within thirty (30) days after the date of invoice. After the thirtieth (30<sup>th</sup>) day from the date that written certification of acceptance is issued, late payment charges shall be paid on the unpaid balance due on the contract to the contractor at the rate of one and one half percent (1.5 %) per month. Contractor may submit invoices for payment no more frequently than monthly. Payment will be made to the contractor's designated mailing address. Payment on each invoice shall be due within thirty (30) days from the date of the acceptance of the invoice. The Procuring Agencies and the State agree to pay in full the balance shown on each account's statement, by the due date shown on said statement.

D. Late Charges - If the State fails to pay as required above, the Contractor may assess a late fee on the unpaid balance of more than sixty (60) days. Late fees will be assessed at a rate based upon the billing address of each State or Procuring Agency account; therefore, the periodic (monthly) late fee rate shall be one and one half percent (1.5%) and the corresponding Annual Percentage Rate for the State of New Mexico will be eighteen percent (18%). No late fee on new purchases will be assessed during the billing cycle when the purchase was made.

**4. TERM**

**THIS PRICE AGREEMENT SHALL NOT BECOME EFFECTIVE UNTIL APRIL 15, 2015.** The agency reserves the right to renew the Price Agreement on an annual basis by mutual agreement not to exceed a total of four (4) years. *[Handwritten signature]*

**5. DEFAULT**

The State reserves the right to cancel all or any part of any orders placed under this Price Agreement without cost to the State, if the Vendor fails to meet the provisions of this Price Agreement and, except as otherwise provided herein, to hold the Vendor liable for any excess cost occasioned by the State due to the Vendor's default. The Vendor shall not be liable for any excess costs if failure to perform the order arises out of causes beyond the control and without the fault or negligence of the Vendor; such causes include, but are not restricted to, acts of God or the public enemy, acts of the State or Federal Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, unusually severe weather and defaults of subcontractors due to any of the above, unless the State shall determine that the supplies or services to be furnished by the subcontractor were obtainable from other sources in sufficient time to permit the Vendor to meet the required delivery scheduled. The rights and remedies of the State provided in this paragraph shall not be exclusive and are in addition to any other rights now being provided by law or under this contract.

**6. TERMINATION**

A. For Cause - Either party may terminate this agreement for cause based upon material breach of this agreement by the other party, provided that the non-breaching party shall give the breaching party written notice specifying the breach and shall afford the breaching party a reasonable opportunity to correct the breach. If within thirty (30) days after receipt of a written notice the breaching party has not corrected the breach or, in the case of a breach which cannot be corrected in thirty (30) days, begun and proceeded in good faith to correct the breach, the non-breaching party may declare the breaching party in default and terminate the agreement effective immediately. The non-breaching party shall retain any and all other remedies available to it under the law.

**7. AMENDMENT**

This Price Agreement may be amended by mutual agreement of the State Purchasing Agent and the contractor upon written notice by either party to the other. An amendment to this Price Agreement SHALL NOT AFFECT ANY OUTSTANDING ORDERS issued prior to the effective date of the amendment as mutually agreed upon, and as published by the State Purchasing Agent. Amendments affecting price adjustments and/or extension of contract expiration are not allowed unless specifically provided for in the bid and contract documents.

**8. STATUS OF CONTRACTOR**

The contractor, and contractor's agents and employees, are independent contractors for the agency and are not employees of the State of New Mexico. The contractor, and contractor's agents and employees, shall not accrue leave, retirement, insurance, bonding, use of state vehicles, or any other benefits afforded to employees of the State of New Mexico as a result of this agreement. The contractor acknowledges that all sums received hereunder are personally reportable by it for income tax purposes as self-employment or business income and are reportable for self-employment tax.

**9. ASSIGNMENT**

A. Neither this price agreement, any orders placed under this price agreement, any interest therein, nor claim thereunder, shall be assigned or transferred by the Vendor, except as set forth in Subparagraph 10B below or as expressly authorized in writing by the State Purchasing Agent. No such assignment or transfer shall relieve the Vendor from the obligations and liabilities under this Price Agreement.

B. Vendor agrees that any and all claims for overcharge resulting from antitrust violations which are borne by the State as to goods, services, and materials purchased in connection with this bid are hereby assigned to the State.

**10. SUBCONTRACTING**

The contractor shall not subcontract any portion of any services to be performed under this agreement without written approval from the State Purchasing Agent. The following subcontractor(s) have been approved to supply resources for this agreement

< \_\_\_\_\_ >.

**11. NON-COLLUSION**

In signing this agreement, the Vendor certifies he/she has not, either directly or indirectly, entered into action in restraint of free competitive bidding in connection with this offer submitted to the State Purchasing Agent.

**12. INSPECTION OF PLANT**

The State Purchasing Agent may inspect, at any reasonable time, during Contractor's regular business hours and upon prior written notice the part of the contractor's, or any subcontractor's plant or place of business, which is related to the performance of this contract.

**13. COMMERCIAL WARRANTY**

The Vendor agrees that the tangible personal property or services furnished under this price agreement shall be covered by the most favorable commercial warranties the Vendor gives to any customer for such tangible personal property or services, and that the rights and remedies provided herein shall extend to the State and are in addition to and do not limit any rights afforded to the State by any other clause of this order. Vendor agrees not to disclaim warranties of fitness for a particular purpose of merchantability.

**14. CONDITION OF PROPOSED ITEMS**

All proposed items are to be NEW and of most current production, unless otherwise specified.

**15. RECORDS OF AUDIT**

During the term of this agreement and for three years thereafter, the contractor shall maintain detailed records pertaining to the services rendered and products delivered. These records shall be subject to inspection by the agency, the State Auditor and other appropriate state and federal authorities. The agency shall have the right to audit billings both before and after payment. Payment under this agreement shall not foreclose the right of the agency to recover excessive or illegal payments.

**16. APPROPRIATIONS**

The terms of this agreement, and any orders placed under it, are contingent upon sufficient appropriations and authorization being made by the legislature of New Mexico for the performance of this agreement. If sufficient appropriations and authorization are not made by the legislature, this agreement, and any orders placed under it, shall terminate upon written notice being given by the agency to the contractor. The agency's decision as to whether sufficient appropriations are available shall be accepted by the contractor and shall be final.

**17. RELEASE**

The contractor, upon final payment of the amount due under this agreement, releases the agency, its officers and employees, and the State of New Mexico from all liabilities, claims and obligations whatsoever arising from or under this agreement. The contractor agrees not to purport to bind the State of New Mexico, unless the contractor has express written authority to do so, and then only within the strict limits of that authority.

**18. CONFIDENTIALITY**

Any confidential information provided to or developed by the contractor in the performance of this agreement shall be kept confidential and shall not be made available to any individual or organization by the contractor without prior written approval by the procuring agency.

**19. CONFLICT OF INTEREST**

The contractor warrants that he presently has no interest and shall not acquire any interest, direct or indirect, which would conflict in any manner or degree with any performance required under this agreement. The contractor shall comply with any applicable provisions of the New Mexico Governmental Conduct Act and the New Mexico Financial Disclosures Act.

**20. APPROVAL OF CONTRACTOR REPRESENTATIVES**

The agency reserves the right to require a change in contractor representatives if the assigned representatives are not, in the opinion of the agency, serving the needs of the State of New Mexico adequately.

**21. SCOPE OF AGREEMENT**

This agreement incorporates all the agreements, covenants, and understandings between the parties hereto concerning the subject matter hereof, and all such covenants, agreements and understandings have been merged into this written agreement. No prior agreement or understandings, verbal or otherwise, of the parties or their agents shall be valid or enforceable unless embodied in this agreement.

**22. NOTICE**

The Procurement Code, Sections 13-1-28 through 13-1-199 NMSA 1978, imposes civil and misdemeanor criminal penalties for its violation. In addition, the New Mexico criminal statutes impose felony penalties for bribes, gratuities and kickbacks.

**23. EQUAL OPPORTUNITY COMPLIANCE**

The contractor agrees to abide by all federal and state laws, rules and regulations, and executive orders of the governor of the State of New Mexico, pertaining to equal employment opportunity. In accordance with all such laws, rules, and regulations, and executive orders of the governor of the State of New Mexico, the contractor agrees to assure that no person in the United States shall

on the grounds of race, color, religion, national origin, sex, sexual preference, age or handicap, be excluded from employment with or participation in, be denied the benefits of, or be otherwise subjected to discrimination under, any program or activity performed under this agreement. If contractor is found to be not in compliance with these requirements during the life of this agreement, contractor agrees to take appropriate steps to correct these deficiencies.

#### **24. INDEMNIFICATION**

The contractor shall hold the state and its agencies and employees harmless and shall indemnify the state and its agencies and employees against any and all claims, suits, actions, liabilities and costs of any kind, including attorney's fees for personal injury or damage to property arising from the acts or omissions of the contractor, its agents, officers, employees or subcontractors. The contractor shall not be liable for any injury or damage as a result of any negligent act or omission committed by the agency, its officers or employees.

#### **25. NEW MEXICO EMPLOYEES HEALTH COVERAGE.**

A. If Contractor has, or grows to, six (6) or more employees who work, or who are expected to work, an average of at least 20 hours per week over a six (6) month period during the term of the contract, Contractor certifies, by signing this agreement, to:

- 1) have in place, and agree to maintain for the term of the contract, health insurance for those employees and offer that health insurance to those employees no later than July 1, 2008 if the expected annual value in the aggregate of any and all contracts between Contractor and the State exceed one million dollars or;
- 2) have in place, and agree to maintain for the term of the contract, health insurance for those employees and offer that health insurance to those employees no later than July 1, 2009 if the expected annual value in the aggregate of any and all contracts between Contractor and the State exceed \$500,000 dollars or;
- 3) have in place, and agree to maintain for the term of the contract, health insurance for those employees and offer that health insurance to those employees no later than July 1, 2010 if the expected annual value in the aggregate of any and all contracts between Contractor and the State exceed \$250,000 dollars.

B. Contractor agrees to maintain a record of the number of employees who have (a) accepted health insurance; (b) declined health insurance due to other health insurance coverage already in place; or (c) declined health insurance for other reasons. These records are subject to review and audit by a representative of the state.

C. Contractor agrees to advise all employees of the availability of State publicly financed health care coverage programs by providing each employee with, as a minimum, the following web site link to additional information: <http://insurenw.mexico.state.nm.us/>.

D. For Indefinite Quantity, Indefinite Delivery contracts (price agreements without specific limitations on quantity and providing for an indeterminate number of orders to be placed against it); Contractor agrees these requirements shall apply the first day of the second month after the Offeror reports combined sales (from state and, if applicable, from local public bodies if from a statewide price agreement) of \$250,000, \$500,000 or \$1,000,000, depending on the dollar value threshold in effect at that time.

**26. APPLICABLE LAW**

This agreement shall be governed by the laws of the State of New Mexico.

**27. LIMITATION OF LIABILITY**

The contractor's liability to the agency, or any procuring agency, for any cause whatsoever shall be limited to the purchase price paid to the contractor for the products and services that are the subject of the agency's, or the procuring agency's, claim. The foregoing limitation does not apply to paragraph 27 of this agreement or to damages resulting from personal injury caused by the contractor's negligence.

**28. BINDING ARBITRATION**

Any controversy or claim arising between the parties shall be settled by binding arbitration pursuant to the Commercial Arbitration Rules of the American Arbitration Association and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

**29. INCORPORATION BY REFERENCE AND PRECEDENCE**

This agreement is derived from (1) the request for proposal, (including any written clarifications to the request for proposals and any agency response to questions); (2) the contractor's best and final offer; and (3) the contractor's response to the request for proposals.

In the event of a dispute under this agreement, applicable documents will be referred to for the purpose of clarification or for additional detail in the following order of precedence: (1) amendments to the agreement in reverse chronological order; (2) the agreement, including the scope of work; (3) the request for proposals, including attachments thereto and written responses to questions and written clarifications; (4) the contractor's best and final offer; and (5) the contractors response to the request for proposals.

**30. WORKERS' COMPENSATION**

The contractor agrees to comply with state laws and rules applicable to workers' compensation benefits for its employees. If the contractor fails to comply with the Workers' Compensation Act and applicable rules when required to do so, this agreement may be terminated by the agency.

**31. IMPRACTICALITY OF PERFORMANCE**

A party shall be excused from performance under this agreement for any period that the party is prevented from performing as a result of an act of God, strike, war, civil disturbance, epidemic, or court order, provided that the party has prudently and promptly acted to take any and all steps that are within the party's control to ensure performance. Subject to this provision, such non-performance shall not be deemed a default or a ground for termination.

**32. INVALID TERM OR CONDITION**

If any term or condition of this agreement shall be held invalid or unenforceable, the remainder of this agreement shall not be affected and shall be valid and enforceable.

**33. ENFORCEMENT OF AGREEMENT**

A party's failure to require strict performance of any provision of this agreement shall not waive or diminish that party's right thereafter to demand strict compliance with that or any other provision. No waiver by a party of any of its rights under this agreement shall be effective unless

express and in writing, and no effective waiver by a party of any of its rights shall be effective to waive any other rights.

#### **34. PATENT, COPYRIGHT AND TRADE SECRET INDEMNIFICATION**

The contractor shall defend, at its own expense, the state and its agencies against any claim that any product or service provided under this agreement infringes any patent, copyright to trademark in the United States or Puerto Rico, and shall pay all costs, damages and attorneys' fees that a court finally awards as a result of any such claim. In addition, if any third party obtains a judgment against the agency based upon contractor's trade secret infringement relating to any product or services provided under this agreement, the contractor agrees to reimburse the state for all costs, attorneys' fees and amount of the judgment. To qualify for such defense and or payment, the agency shall:

- A. give the contractor prompt written notice within 48 hours of any claim;
- B. allow the contractor to control the defense of settlement of the claim; and
- C. cooperate with the contractor in a reasonable way to facilitate the defense or settlement of the claim.

If any product or service becomes, or in the contractor's opinion is likely to become the subject of a claim of infringement, the contractor shall at its option and expense:

- A. provide the agency the right to continue using the product or service and fully indemnify the agency against all claims that may arise out of the agency's use of the product or service;
- B. replace or modify the product or service so that it becomes non-infringing; or,
- C. accept the return of the product or service and refund an amount equal to the value of the returned product or service, less the unpaid portion of the purchase price and any other amounts, which are due to the contractor. The contractor's obligation will be void as to any product or service modified by the agency to the extent such modification is the cause of the claim.

#### **35. SURVIVAL**

The agreement paragraph titled "patent, copyright, trademark, and trade secret indemnification; indemnification; and limit of liability" shall survive the expiration of this agreement. Software licenses, leases, maintenance and any other unexpired agreements that were entered into under the terms and conditions of this agreement shall survive this agreement

#### **36. DISCLOSURE REGARDING RESPONSIBILITY**

*The Contractor and/or any of its Principals who seek to enter into a contract greater than twenty thousand dollars (\$20,000.00) with any state agency or local public body for professional services, tangible personal property, services or construction agree to disclose whether they, or any principal of their company:*

*Are presently debarred, suspended, proposed for debarment, or declared ineligible for award of contract by any federal entity, state agency or local public body.*

*Have within a three-year period preceding this offer, been convicted of or had civil judgment rendered against them for: commission of fraud or a criminal offense in connection with*

*obtaining, attempting to obtain, or performing a public (federal, state or local) contract or subcontract; violation of Federal or state antitrust statutes related to the submission of offers; or commission in any federal or state jurisdiction of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, violation of Federal criminal tax law, or receiving stolen property.*

*Are presently indicted for, or otherwise criminally or civilly charged by any (federal, state or local) government entity with, commission of any of the offenses enumerated in Paragraph B of this disclosure.*

*Have preceding this offer, been notified of any delinquent federal or state taxes in an amount that exceeds \$3,000.00 of which the liability remains unsatisfied.*

- A. Taxes are considered delinquent if both of the following criteria apply:
- 1) The tax liability is finally determined. The liability is finally determined if it has been assessed. A liability is not finally determined if there is a pending administrative or judicial challenge. In the case of a judicial challenge of the liability, the liability is not finally determined until all judicial appeal rights have been exhausted.
  - 2) The taxpayer is delinquent in making payment. A taxpayer is delinquent if the taxpayer has failed to pay the tax liability when full payment was due and required. A taxpayer is not delinquent in cases where enforced collection action is precluded.
  - 3) The taxpayer has within a three year period preceding this offer, had one or more contracts terminated for default by any federal or state agency or local public body.

Principal, for the purpose of this disclosure, means an officer, director, owner, partner, or a person having primary management or supervisory responsibilities within a business entity or related entities.

The Offeror shall provide immediate written notice to the Procurement Manager or Buyer if, at any time prior to contract award, the Offeror learns that its disclosure was erroneous when submitting or became erroneous by reason of changed circumstances.

A disclosure that any of the items in this requirement exist will not necessarily result in withholding an award under this solicitation. However, the disclosure will be considered in the determination of the Offeror's responsibility. Failure of the Offeror to furnish a disclosure or provide additional information as requested will render the Offeror nonresponsive.

Nothing contained in the foregoing shall be construed to require establishment of a system of records in order to render, in good faith, the disclosure required by this document. The knowledge and information of an Offeror is not required to exceed that which is the normally possessed by a prudent person in the ordinary course of business dealings.

The disclosure requirement provided is a material representation of fact upon which reliance was placed when making an award and is a continuing material representation of the facts. If during the performance of the contract, the contractor is indicted for or otherwise criminally or civilly charged by any government entity (federal, state or local) with commission of any offenses named in this document the contractor must provide immediate written notice to the Procurement

Manager or Buyer. If it is later determined that the Offeror knowingly rendered an erroneous disclosure, in addition to other remedies available to the Government, the State Purchasing Agent or Central Purchasing Officer may terminate the involved contract for cause. Still further the State Purchasing Agent or Central Purchasing Officer may suspend or debar the contractor from eligibility for future solicitations until such time as the matter is resolved to the satisfaction of the State Purchasing Agent or Central Purchasing Officer.

**37. NOTIFICATION**

Either party may give written notice to the other party in accordance with the terms of paragraph 38. Any written notice required or permitted to be given hereunder shall be deemed to have been given on the date of delivery if delivered by personal service or hand delivery or three (3) business days after being mailed.

To agency:	Lawrence O. Maxwell, State Purchasing Agent
Office address:	1100 South St. Francis Drive
(for express carrier and hand deliveries)	Joseph M. Montoya Building, Rm. 2016 Santa Fe, New Mexico 87505-4108 (505) 827-0472 (voice); (505) 827-2484 (fax) <a href="mailto:lawrence.maxwell@state.nm.us">lawrence.maxwell@state.nm.us</a>

For all US Mail use:	P. O. Box 6850 Santa Fe, New Mexico 87505
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To contractor:	<b>Ameresco, Inc.</b> <b>60 E. Rio Salado Parkway, Suite 1001</b> <b>Tempe, AZ 85281</b> <b>Sarah Price (480) 499-9123</b>
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Either party may change its representative or address above by written notice to the other in accordance with the terms of Paragraph 38. The carrier for mail delivery and notices shall be the agent of the sender.

**38. AMENDMENTS**

This agreement shall only be amended by written instrument executed by the parties.

**39. SUCCESSION**

This agreement shall extend to and be binding upon the successors and assigns of the parties.

IN WITNESS WHEREOF, the parties have executed this agreement as of the date of execution by:

The records of the Taxation and Revenue Department reflect that the contractor is registered with the Taxation and Revenue Department of the State of New Mexico to pay gross receipts and compensating taxes.

TAXATION AND REVENUE DEPARTMENT

NM State Tax ID No.: 03-009549-002

BY: [Signature]

DATE: 2-24-15

STATE OF NEW MEXICO  
General Services Department

BY: [Signature]

TITLE: \_\_\_\_\_  
State Purchasing Agent

DATE: 3/5/15

CONTRACTOR:  
**Ameresco, Inc.**  
60 E. Rio Salado Parkway, Suite 1001  
Tempe, AZ 85281  
Sarah Price (480) 499-9123

Federal Tax ID No.: 04-3512838

BY: [Signature]

TITLE: Vice President

DATE: February 6, 2015

**AMERESCO**

Project Price Category	Max Markup Commitment (Percentage)
Subcontractors (under contract to ESCO)	0% (Overhead and Profit applied below)
Other Direct Purchases of Equipment, Material, Supplies (Supplied directly to ESCO)	0% (Overhead and Profit applied below)
Engineering & Design	8% of Subcontractors and Other Direct Purchases
Construction Management	8% of Subcontractors and Other Direct Purchases
Permits	1% of Subcontractors and Other Direct Purchases
Performance Bond	1.5% of Subcontractors and Other Direct Purchases
Commissioning	3% of Subcontractors and Other Direct Purchases
Training	2% of Subcontractors and Other Direct Purchases
Construction Measurement and Verification	3% of Subcontractors and Other Direct Purchases
Legal Services	1.5% of Subcontractors and Other Direct Purchases
Travel	3% of Subcontractors and Other Direct Purchases
Contingency	8% of Subcontractors and Other Direct Purchases
OTHER unspecified markups	A
	B
	C
	D
Overhead	12.0%
Profit	8.0%
<b>Investment Grade Energy Audit, Project Proposal, Pre-Construction, and Other Unspecified Fees</b>	
Alternative Audit Method Price per Square Foot	.14 per sq ft
Solicit & Evaluate Project Financing Proposals	0%
Pre-Construction	0%
OTHER unspecified fees	A
	B
	C
	D
	E
<b>Post-Project Fees</b>	
Measurement and Verification (post-retrofit)	10% of Annual Energy Savings
Warranty Service	2% of Construction Costs
Maintenance on Installed Measures	Varies on the scope of work selected by the agency
Contingency	8%
OTHER unspecified fees	A
	B
	C
	D

**APPENDIX L – Model Investment-Grade Energy Audit & Project Proposal Contract**

STATE OF NEW MEXICO  
NAME OF AGENCY  
PROFESSIONAL SERVICES CONTRACT # \_\_\_\_\_  
FOR  
INVESTMENT-GRADE ENERGY AUDIT AND PROJECT PROPOSAL

THIS AGREEMENT is made and entered into by and between the State of New Mexico, **NAME OF AGENCY**, a governmental entity hereinafter referred to as the "Agency," and **NAME OF CONTRACTOR**, hereinafter referred to as the "Contractor," and is effective as of the date set forth below upon which it is executed by the Department of Finance and Administration ("DFA").

**RECITALS**

WHEREAS, this Agreement was created for use by New Mexico government entities to obtain an Investment-Grade Energy Audit of a facility from a private energy service company (CONTRACTOR);

WHEREAS, authority exists in the law for Agency to enter into this contract, and funds have been budgeted, appropriated and otherwise made available; a sufficient unencumbered balance thereof remains available for payment; and the required approval, clearance and coordination have been accomplished from and with appropriate agencies;

WHEREAS, Contractor is a company with experience and technical and management capabilities to provide for the discovery, engineering, procurement, installation, financing, savings guarantee, maintenance and monitoring of energy and water conserving measures at facilities similar in size, function and system type to Agency's facilities;

WHEREAS, Contractor has submitted a proposal, in response to Agency's Request for Proposals (RFP), pertaining to the discovery, engineering, procurement, installation, financing, savings guarantee, maintenance and monitoring of energy and water conserving measures at Agency's facilities;

WHEREAS, Agency has selected Contractor to provide the services described herein;

WHEREAS, Agency desires to enter into a contract to have Contractor perform an Investment-Grade Energy Audit and Project Proposal to determine the feasibility of entering into an Guaranteed Utility Savings Contract to provide for installation and implementation of energy and water conserving measures at Agency's facilities; and

WHEREAS, if energy and water conserving measures are determined to be feasible, and if the amount of savings can be reasonably sufficient to cover all costs, as defined by Agency, associated with an Energy Savings Performance Contracting project, the parties intend to negotiate an Guaranteed Utility Savings Contract under which the Contractor will design, procure, install, implement, maintain and monitor such energy and water conserving measures. However, this intent does not commit Agency to entering into such a Guaranteed Utility Savings Contract.

NOW, THEREFORE, in consideration of the mutual promises and covenants contained herein, and intending to be legally bound hereby, Agency and Contractor hereto covenant and agree that the following Exhibits are attached hereto (or will be, as provided in this Agreement) and are made a part of this Agreement by reference.

IT IS AGREED BETWEEN THE PARTIES:

1. Scope of Work.

Contractor shall:

A. Perform an Investment-Grade Energy Audit (Audit) in accordance with this Agreement. Contractor shall work diligently to assess validity of information provided and to confirm or correct the information as needed to provide a complete and accurate Audit. Agency will assist Contractor in performing the Audit as described in this Agreement. Agency will work diligently to provide full and accurate information needed by Contractor for the Audit. The parties contemplate that development of the Audit will be an iterative process and that Agency will have a reasonable amount of time, not less than 30 calendar days but not exceeding 90 calendar days from Agency receipt of Audit report, to review and determine acceptance of Audit report before considering issuance of the Notice of Acceptance (Exhibit A).

B. Submit a Project Proposal (Proposal) to Agency within 30 calendar days of Audit report submittal that provides a package of energy and water conserving measures, including details as specified in this Agreement.

C. In order to successfully implement this project, Contractor shall:

I. Conduct Assessment

(a) Meet with Agency to establish interests, plans, problems, and any other issues related to facilities and operation of facilities.

(b) Collect data and background information on buildings, equipment and facilities operation and energy use for the most recent three years from the effective date of this Contract as follows:

- (1) Building square footage;
- (2) Construction data of buildings and major additions including building envelope;
- (3) Utility company invoices;
- (4) Occupancy and usage information;
- (5) Description of all energy-consuming or energy-saving equipment used on the premises, as available;
- (6) Description of energy management procedures utilized on the premises;
- (7) Description of any energy-related improvements made or currently being implemented;
- (8) Description of any changes in the structure of the facility or energy-using or water-using equipment;
- (9) Description of future plans regarding building modifications or equipment modifications and replacements;

- (10) Drawings, as available (may include mechanical, plumbing, electrical, building automation and temperature controls, structural, architectural, modifications and remodels);
  - (11) Original construction submittals and factory data (specifications, pump curves, and any similar documentation), as available;
  - (12) Operating engineer logs, maintenance work orders, and any similar documentation, as available;
  - (13) Records of maintenance expenditures on energy-using equipment, including service contracts;
  - (14) Prior energy audits or studies, if any.
- (c) Perform a preliminary walk-through of facilities and interview staff and occupants to identify potential measures.
- (d) Meet with Agency to present preliminary findings and establish agreement on measures to analyze.

## II. Identify Potential Measures

- (e) Interview the facility manager, maintenance staff, subcontractors and occupants of each building regarding:
- (1) Facility operation, including energy management procedures;
  - (2) Equipment maintenance problems;
  - (3) Comfort problems and requirements;
  - (4) Equipment reliability;
  - (5) Projected equipment needs;
  - (6) Occupancy and use schedules for the facility and specific equipment;
  - (7) Past, planned, and desired facility improvements.
- (f) Survey major energy-using equipment, including indoor and outdoor lighting, heating and heat distribution systems, cooling systems and related equipment, automatic temperature control systems and equipment, air distribution systems and equipment, outdoor ventilation systems and equipment, exhaust systems and equipment, hot water systems, electric motors, transmission and drive systems, special systems (including kitchen/dining equipment), renewable energy systems, other energy using systems, and water consuming systems (restroom fixtures, water fountains, irrigation systems, and other water systems).
- (g) Perform "late-night" surveys outside of normal business hours or on weekends to confirm building system and occupancy schedules, if deemed necessary.
- (h) Develop a preliminary list of potential energy and water conserving measures. Consider the following for each system:
- (1) Comfort and maintenance problems;
  - (2) Energy use, loads, proper sizing, efficiencies and hours of operation;
  - (3) Current operating condition;
  - (4) Remaining useful life;
  - (5) Feasibility of system replacement;
  - (6) Hazardous materials and other environmental concerns;
  - (7) Agency's future plans for equipment replacement or building renovations;
  - (8) Facility operation and maintenance procedures that could be affected;

- (9) Capability to monitor energy performance and verify savings.

### III. Analyze Measures

(i) Establish base year consumption by examining utility bills for the past three years for electricity, gas, steam, water, and any other energy or fuel types. Present base year consumption in terms of energy units as used in utility bills, in terms of dollars, and in terms of dollars per square foot. Describe the process used to determine the base year (such as averaging, selecting most representative contiguous 12 months, or other methods). Consult with facility personnel to account for any anomalous schedule or operating conditions on billings that could skew the base year representation. Contractor shall account for periods of time when equipment was broken or malfunctioning in calculating the base year.

(j) Estimate loading, usage and/or hours of operation for all major end uses of total facility consumption including, but not limited to: lighting, heating, cooling, motors (fans and pumps), plug loads, and other major energy and water using equipment. Where loading or usage are highly uncertain (including variable loads such as cooling), Contractor will use its best judgment, spot measurements or short-term monitoring. Contractor should not assume that equipment run hours equal the operating hours of the building(s) or facility staff estimates.

(k) Reconcile annual end-use estimated consumption with the annual base year consumption. This reconciliation will place reasonable "real-world" limits on potential savings.

(l) Propose adjustments to the baseline for energy and water conserving measures that will be implemented in the future. Adjustments made to the energy baseline shall only be made for any of the following changes in conditions affecting the facility:

- (1) utility rates;
- (2) number of days in the utility billing cycle;
- (3) floor area of the facility;
- (4) operational schedule of the facility;
- (5) facility temperature;
- (6) weather, if change is significant;
- (7) amount of equipment or lighting used in the facility, if change is significant;
- (8) space type(s) in the facility, if change is significant; and
- (9) material change(s) in or to the facility.

(m) Develop a preliminary analysis of potential energy and water conserving measures. This resulting list of measures shall be compiled and submitted to Agency within 90 calendar days of the execution of this Contract. Furthermore:

- (1) List all potential measures, whether cost-effective or not. Consider technologies in a comprehensive approach including, but not limited to: lighting systems, heating/ventilating/air conditioning equipment and distribution systems, controls systems, building envelope, motors, kitchen equipment, pools, renewable energy systems, other special equipment, irrigation systems, and water conserving devices.
- (2) Identify measures which appear likely to be cost effective and therefore warrant detailed analysis.

- (3) For each measure, prepare a preliminary estimate of energy or water cost savings, including description of analysis methodology, supporting calculations and assumptions used to estimate savings.

(n) Meet with Agency to present preliminary findings prior to thorough analysis. Describe how the projected project economics meet the Agency's terms for completing the Investment-Grade Energy Audit and Proposal Contract. Discuss assessment of energy use, savings potential, project opportunities, and potential for developing an energy performance contract. Develop a list of recommended measures for further analysis. The Agency shall have the option to reject calculations of savings, potential savings allowed, or project recommendations.

(o) Perform final analysis of savings and costs for each energy and water conserving measure, including the following:

- (1) Follow the methodology of American Society of Heating, Refrigerating, and Air-Conditioning Engineers or other nationally-recognized authority following the engineering principle(s) identified for each retrofit option.
- (2) Utilize assumptions, projections and baselines which best represent the true value of future energy or operational savings. Include accurate marginal costs for each unit of savings at the time the audit is performed, documentation of material and labor cost savings, adjustments to the baseline to reflect current conditions at the facility, calculations which account for the interactive effects of the recommended measures.
- (3) Use best judgment regarding the employment of instrumentation and recording durations so as to achieve an accurate and faithful characterization of energy use.
- (4) Use markups and fees stated above in all cost estimates.
- (5) Develop a preliminary measurement and verification plan for each measure.
- (6) Follow additional guidelines for analysis and report preparation given below.
- (7) Include cost to provide services and complete application for Energy Star Label, LEED-EB certification for Existing Buildings, or other certification. Also include cost for EPA's Tools for Schools or other such program related to improved air quality.

#### IV. Provide Investment-Grade Energy Audit Report

The report provides an engineering and economic basis for negotiating a potential Guaranteed Utility Savings Contract between the Agency and the Contractor.

(p) Contractor shall prepare and submit to Agency a draft Investment-Grade Energy Audit Report within 90 calendar days of the date of execution of this Contract. The report shall provide the following information:

- (1) Overview, which shall include:
  - i) Contact information;
  - ii) Summary table of recommended energy and water conserving measures, with itemization for each measure of total design and construction cost, annual

- maintenance costs, the first year cost avoidance (in dollars and energy units), simple payback and equipment service life;
- iii) Summary of annual energy and water use by fuel type and costs of existing or base year condition;
  - iv) Calculation of cost savings expected if all recommended measures are implemented and total percentage savings of total facility energy cost;
  - v) Description of the existing facility, mechanical and electrical systems;
  - vi) Summary description of measures, including estimated costs and savings for each as detailed above;
  - vii) Discussion of measures considered but not investigated in detail;
  - viii) Conclusions and recommendations.
- (2) Base year energy use, which shall include:
- i) Description and itemization of current billing rates, including schedules and riders;
  - ii) Summary of all utility bills for all fuel types and water;
  - iii) Identification and definition of base year consumption and description of how established;
  - iv) Reconciliation of estimated end use consumption (i.e. lighting, cooling, heating, fans, plug loads, etc) with base year (include discussion of any unusual findings).
- (3) Full written description of each energy and water conserving measure, which shall include:
- i) Existing conditions;
  - ii) Description of equipment to be installed and how it will function;
  - iii) Discussion of facility operations and maintenance procedures that will be affected by installation/implementation;
  - iv) Plan for installing or implementing the recommended measure.
- (4) Allowable cost and savings factors approved for consideration. Agency will provide Contractor with sufficient guidance to develop savings estimates, which shall include:
- i) Payment sources that can be incorporated:
    - Energy and water cost savings;
    - Material/commodity savings, including scheduled replacement of parts (only for years that these cost savings are applicable);
    - Outside labor cost savings, including maintenance contracts;
    - In-house labor costs;
    - Deferred maintenance cost;
    - Offset of future capital cost;

- Outside incentive funds (utility incentives, grants, etc.);
- Any savings related to maintenance and operation of the facilities will be limited to those that can be thoroughly documented;
- ii) Payment sources that may also be considered and negotiated;
- iii) Additional factors related to establishing savings that cover all costs:
  - Escalation rates that apply to each payment source. These are rates to be used in cash flow projections for project development purposes; *NOTE: Use federal government guidelines on utility escalation rates to ensure reasonableness.*
  - Interest rates (municipal tax-exempt rates for public agencies);
  - Agency cash outlay (Agency's sole discretion);
- iv) The markup costs are presented in Exhibit B: Cost and Pricing. These rates will be used in the Investment-Grade Energy Audit and subsequent Guaranteed Utility Savings Contract.

(e) Savings calculations

- (1) Base year energy use and cost.
- (2) Post-retrofit energy use and cost.
- (3) Savings estimates including analysis methodology, supporting calculations and assumptions used.
- (4) Annual savings estimates. The cost savings for all energy conserving measures must be estimated for each year during the contract period. Savings must be able to be achieved each year (cannot report average annual savings over the term of the contract).
- (5) Savings estimates must be limited to savings allowed by the Agency as described above.
- (6) Percent cost-avoidance projected.
- (7) Description and calculations for any proposed rate changes.
- (8) Explanation of how savings interactions between retrofit options are accounted for in calculations.
- (9) Operation and maintenance savings, including detailed calculations and description. Ensure that maintenance savings are only applied in the applicable years and only during the lifetime of the particular equipment.
- (10) If computer simulation is used, include a short description and state key input data. If requested by Agency, access will be provided to the program and all assumptions and inputs used, and/or printouts shall be provided of all input files and important output files and included in the Investment-Grade Energy Audit

with documentation that explains how the final savings figures are derived from the simulation program output printouts.

- (11) If manual calculations are employed, formulas, assumptions and key data shall be stated.
- (12) Conclusions, observations, and caveats.

(f) Cost estimate -- detailed scope of the construction work needed, suitable for cost estimating. Include all anticipated costs associated with installation and implementation. Provide specifications for major mechanical components as well as detailed lighting and water fixture counts.

- (1) Engineering/design costs.
- (2) Contractor/vendor estimates for labor, materials, and equipment; include special provisions, overtime, etc., as needed to accomplish the work with minimum disruption to the operations of the facilities.
- (3) Permit costs.
- (4) Construction management fees.
- (5) Environmental costs or benefits (disposal, avoided emissions, handling of hazardous materials, etc.).
- (6) Note that all markups and fees stated in this Contract shall be used in the cost estimates, unless otherwise documented and justified due to change in scope or size of project or other unforeseen circumstances.
- (7) Conclusions, observations, and caveats.
- (8) Other cost categories as defined above under "markups" in Section 3b above.

(g) Other (1)

- Estimate of average useful service life of equipment.
- (2) Preliminary commissioning plan.
- (3) Preliminary measurement and verification plan, following the International Performance Measurement and Verification Protocol (IPMVP), explaining how savings from each measure is to be measured and verified (stipulated by Contract, utility bill analysis, end-use measurement and calculation, etc.). The Preliminary M&V plan shall follow the format provided in Exhibit C: Guidelines for Draft Measurement and Verification Plan.
- (4) Discussion of impacts that facility would incur after contract ends. Consider operation and maintenance impacts, staffing impacts, budget impacts, etc., and identify who is responsible for maintenance.
- (5) Compatibility with existing systems. NOTE: Include the name of the existing controls system, if new controls systems will have to be compatible with an existing brand of controls. Also note if a sole-source vendor is established for controls systems.
- (6) Complete appendices that document the data used to prepare the analyses. Describe how data were collected.

(b) Contractor shall meet with Agency to: review the recommendations, savings calculations and impact of the measures on the operations of the facility; describe how the projected project economics meet the Agency's terms for completing the Investment-Grade Energy Audit and Project Proposal; and discuss the willingness and capability of Agency to make capital contributions to the project to improve the economics of the overall project.

(c) Contractor shall revise Audit Report as directed by Agency and shall submit **final Investment-Grade Energy Audit Report** within 30 days of the above meeting.

V. Provide Project Proposal (Term Sheet)

(a) In anticipation of Contractor and Agency entering into an Guaranteed Utility Savings Contract to design, install, and monitor the energy and water conserving measures proposed in the Investment-Grade Energy Audit Report, Contractor shall prepare a proposal for terms to be incorporated in the Guaranteed Utility Savings Contract, which shall include:

- (5) Project Cost is the total amount Agency will pay for the project and Contractor's services. Costs must be consistent with maximum markups and fees established above. Costs may include but are not limited to: engineering, designing, packaging, procuring, installing (from Investment-Grade Energy Audit Report results); performance/payment bond costs; construction management fees; commissioning costs; maintenance fees; monitoring fees; training fees; legal services; overhead and profit; other markups.
- (6) Include a List of Services that will be provided as related to each cost.
- (7) Expected term of the Energy Performance Contract.
- (8) Description of how the project will be financed including available interest rates and financing terms, based on interest rates likely available to Agency at this time, and based on a 60-day and 90-day lock option.
- (9) Explanation of how the savings will be calculated and adjusted due to weather (such as heating and cooling degree days), occupancy or other factors. Monitoring and verification methods must be consistent with the International Performance Monitoring and Verification Protocol 2000.
- (10) Analysis of annual cash flow for Agency during the contract term.
- (11) Contractor agrees to meet with Agency to present results and negotiate final terms.

(b) Services will be performed (AT) (WITHIN) (LOCATION).

2. **Compensation.**

A. Except as provided for in subparagraphs 2D and 2E below, the Agency shall pay to the Contractor in full payment for services satisfactorily performed pursuant to the Scope of Work at the rate of \_\_\_\_\_ dollars (\$ \_\_\_\_\_) in FYXX (USE FISCAL YEAR

NUMBER TO DESCRIBE YEAR; DO NOT USE FY1, FY2, ETC.). The New Mexico gross receipts tax levied on the amounts payable under this Agreement in FYXX totaling \_\_\_\_\_ dollars (\$ \_\_\_\_\_) shall be paid by the Agency to the Contractor. **The total amount payable to the Contractor under this Agreement, including gross receipts tax and expenses, shall not exceed \_\_\_\_\_ dollars (\$ \_\_\_\_\_) in FYXX.**

(REPEAT LANGUAGE FOR EACH FISCAL YEAR COVERED BY THE AGREEMENT – USE FISCAL YEAR NUMBER TO DESCRIBE EACH YEAR, DO NOT USE FY1, FY2, ETC.).

Payment in FYXX, FYXX, FYXX, and FYXX is subject to availability of funds pursuant to the Appropriations Paragraph set forth below and to any negotiations between the parties from year to year pursuant to Paragraph 1, Scope of Work, and to approval by the DFA. All invoices MUST BE received by the Agency no later than fifteen (15) days after the termination of the Fiscal Year in which the services were delivered. Invoices received after such date WILL NOT BE PAID.

B. The total amount payable to the Contractor under this Agreement, including gross receipts tax and expenses, shall not exceed \_\_\_\_\_ dollars (\$ \_\_\_\_\_). This amount is a maximum and not a guarantee that the work assigned to the Contractor under this Agreement to be performed shall equal the amount stated herein. This amount is based on a maximum of *[facility floor area to be audited]* gross square feet at *[unit dollar amount in words]* US dollars (\$ *[unit dollar amount]* ) per square foot of audited facility floor area, as per Exhibit B, Cost and Pricing. Agency shall only pay for facility floor area actually audited. Areas not audited Contractor will not be charged to Agency.

C. Contractor must submit a detailed statement accounting for all services performed and expenses incurred. If the Agency finds that the services are not acceptable, within thirty days after the date of receipt of written notice from the Contractor that payment is requested, it shall provide the Contractor a letter of exception explaining the defect or objection to the services, and outlining steps the Contractor may take to provide remedial action. Upon certification by the Agency that the services have been received and accepted, payment shall be tendered to the Contractor within thirty days after the date of acceptance. If payment is made by mail, the payment shall be deemed tendered on the date it is postmarked. However, the agency shall not incur late charges, interest, or penalties for failure to make payment within the time specified herein.

D. Agency shall have no payment obligations under this contract, provided that Contractor and Agency execute a Guaranteed Utility Savings Contract within 120 days *[allows sufficient time for contract negotiation, attorney review, and Agency processing days]*, after issuance of the Notice of Acceptance (Exhibit A) of the final Investment-Grade Energy Audit and Project Proposal, but the fee indicated above shall be incorporated into Contractor's project costs in the Guaranteed Utility Savings Contract and paid through the Guaranteed Utility Savings Contract funding mechanisms.

E. Agency shall have no payment obligations under this Contract in the event that Contractor's final Investment-Grade Energy Audit and Project Proposal does not contain a package of energy and water conservation measures which, if implemented and as meeting terms of Scope of Work, will provide the Agency with utility cost savings sufficient to fund Agency's payments of all costs and fees associated with the Guaranteed Utility Savings Contract, including: 1) the fee associated with the Investment-Grade Energy Audit; 2) all monthly payments on a lease purchase agreement to finance the measures; and 3) any annual fees for monitoring and maintenance incurred by the Contractor. Should the Contractor determine at any time during the Investment-Grade Energy Audit that savings cannot be attained to meet these terms, the Investment-Grade Energy Audit will be terminated by written notice by Contractor to Agency. In this event, this Agreement shall be terminated and Agency shall have no obligation to pay, in whole or in part, the amounts specified in subparagraphs 2A or 2B.

**3. Term.**

A. THIS AGREEMENT SHALL NOT BECOME EFFECTIVE UNTIL APPROVED BY THE DFA. This Agreement shall terminate on **DATE** unless terminated pursuant to paragraph 4, infra, or paragraph 5. In accordance with Section 13-1-150 NMSA 1978, no contract term for a professional services contract, including extensions and renewals, shall exceed four years, except as set forth in Section 13-1-150 NMSA 1978. An exception is that for contracts entered into pursuant to the Public Facility Energy Efficiency and Water Conservation Act (6-23 NMSA 1978), the term shall not exceed twenty-five years, including all extensions and renewals.

**4. Termination.**

A. Termination. This Agreement may be terminated by either of the parties hereto upon written notice delivered to the other party at least ten (10) days prior to the intended date of termination. By such termination, neither party may nullify obligations already incurred for performance or failure to perform prior to the date of termination. Notwithstanding the foregoing, this Agreement may be terminated immediately upon written notice to the Contractor if the Contractor becomes unable to perform the services contracted for, as determined by the Agency or if, during the term of this Agreement, the Contractor or any of its officers, employees or agents is indicted for fraud, embezzlement or other crime due to misuse of state funds or due to the Appropriations paragraph herein. THIS PROVISION IS NOT EXCLUSIVE AND DOES NOT WAIVE THE STATE'S OTHER LEGAL RIGHTS AND REMEDIES CAUSED BY THE CONTRACTOR'S DEFAULT/BREACH OF THIS AGREEMENT.

B. Termination Management. Immediately upon receipt by either the Agency or the Contractor of notice of termination of this Agreement, the Contractor shall: 1) not incur any further obligations for salaries, services or any other expenditure of funds under this Agreement without written approval of the Agency; 2) comply with all directives issued by the Agency in the notice of termination as to the performance of work under this Agreement; and 3) take such action as the Agency shall direct for the protection, preservation, retention or transfer of all

property titled to the Agency and records generated under this Agreement. Any non-expendable personal property or equipment provided to or purchased by the Contractor with contract funds shall become property of the Agency upon termination and shall be submitted to the agency as soon as practicable.

**5. Performance Measures.**

Contractor shall substantially perform the following Agency Performance Measures:

- A. *[Insert Agency Performance Measure involving facility capital upgrades, if applicable.]*
- B. *[Insert Agency Performance Measure involving operational cost reduction, if applicable.]*
- C. *[Insert other Agency Performance Measure, if applicable]*

Agency Performance Measures documentation is provided as Exhibit D.

**6. Appropriations.**

The terms of this Agreement are contingent upon sufficient appropriations and authorization being made by the Legislature of New Mexico for the performance of this Agreement. If sufficient appropriations and authorization are not made by the Legislature, this Agreement shall terminate immediately upon written notice being given by the Agency to the Contractor. The Agency's decision as to whether sufficient appropriations are available shall be accepted by the Contractor and shall be final. If the Agency proposes an amendment to the Agreement to unilaterally reduce funding, the Contractor shall have the option to terminate the Agreement or to agree to the reduced funding, within thirty (30) days of receipt of the proposed amendment.

**7. Status of Contractor.**

The Contractor and its agents and employees are independent contractors performing professional services for the Agency and are not employees of the State of New Mexico. The Contractor and its agents and employees shall not accrue leave, retirement, insurance, bonding, use of state vehicles, or any other benefits afforded to employees of the State of New Mexico as a result of this Agreement. The Contractor acknowledges that all sums received hereunder are reportable by the Contractor for tax purposes, including without limitation, self-employment and business income tax. The Contractor agrees not to purport to bind the State of New Mexico unless the Contractor has express written authority to do so, and then only within the strict limits of that authority.

**8. Assignment.**

The Contractor shall not assign or transfer any interest in this Agreement or assign any claims for money due or to become due under this Agreement without the prior written approval of the Agency.

**9. Subcontracting.**

The Contractor shall not subcontract any portion of the services to be performed under this Agreement without the prior written approval of the Agency.

**10. Release.**

Final payment of the amounts due under this Agreement shall operate as a release of the Agency, its officers and employees, and the State of New Mexico from all liabilities, claims and obligations whatsoever arising from or under this Agreement.

**11. Confidentiality.**

Any confidential information provided to or developed by the Contractor in the performance of this Agreement shall be kept confidential and shall not be made available to any individual or organization by the Contractor without the prior written approval of the Agency.

**12. Product of Service -- Copyright.**

All materials developed or acquired by the Contractor under this Agreement shall become the property of the State of New Mexico and shall be delivered to the Agency no later than the termination date of this Agreement. Nothing developed or produced, in whole or in part, by the Contractor under this Agreement shall be the subject of an application for copyright or other claim of ownership by or on behalf of the Contractor.

**13. Conflict of Interest; Governmental Conduct Act.**

The Contractor warrants that it presently has no interest and shall not acquire any interest, direct or indirect, which would conflict in any manner or degree with the performance or services required under the Agreement. The Contractor certifies that the requirements of the Governmental Conduct Act, Sections 10-16-1 through 10-16-18, NMSA 1978, regarding contracting with a public officer or state employee or former state employee have been followed.

**14. Amendment.**

This Agreement shall not be altered, changed or amended except by instrument in writing executed by the parties hereto.

**15. Merger.**

This Agreement incorporates all the Agreements, covenants and understandings between the parties hereto concerning the subject matter hereof, and all such covenants, Agreements and understandings have been merged into this written Agreement. No prior Agreement or understanding, oral or otherwise, of the parties or their agents shall be valid or enforceable unless embodied in this Agreement.

**16. Penalties for violation of law.**

The Procurement Code, Sections 13-1-28 through 13-1-199, NMSA 1978, imposes civil and criminal penalties for its violation. In addition, the New Mexico criminal statutes impose felony penalties for illegal bribes, gratuities and kickbacks.

**17. Equal Opportunity Compliance.**

The Contractor agrees to abide by all federal and state laws and rules and regulations, and executive orders of the Governor of the State of New Mexico, pertaining to equal employment opportunity. In accordance with all such laws of the State of New Mexico, the Contractor assures that no person in the United States shall, on the grounds of race, religion, color, national origin, ancestry, sex, age, physical or mental handicap, or serious medical condition, spousal affiliation, sexual orientation or gender identity, be excluded from employment with or participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity performed under this Agreement. If Contractor is found not to be in compliance with these requirements during the life of this Agreement, Contractor agrees to take appropriate steps to correct these deficiencies.

**18. Applicable Law.**

The laws of the State of New Mexico shall govern this Agreement, without giving effect to its choice of law provisions. Venue shall be proper only in a New Mexico court of competent jurisdiction in accordance with Section 38-3-1 (G) NMSA 1978. By execution of this Agreement, Contractor acknowledges and agrees to the jurisdiction of the courts of the State of New Mexico over any and all lawsuits arising under or out of any term of this Agreement.

**19. Workers Compensation.**

The Contractor agrees to comply with state laws and rules applicable to workers compensation benefits for its employees. If the Contractor fails to comply with the Workers Compensation Act and applicable rules when required to do so, this Agreement may be terminated by the Agency.

**20. Records and Financial Audit.**

The Contractor shall maintain detailed time and expenditure records that indicate the date; time, nature and cost of services rendered during the Agreement's term and effect and retain them for a period of three (3) years from the date of final payment under this Agreement. The records shall be subject to inspection by the Agency, the Department of Finance and Administration and the State Auditor. The Agency shall have the right to audit billings both before and after payment. Payment under this Agreement shall not foreclose the right of the Agency to recover excessive or illegal payments

**21. Indemnification.**

The Contractor shall defend, indemnify and hold harmless the Agency and the State of New Mexico from all actions, proceeding, claims, demands, costs, damages, attorneys' fees and all other liabilities and expenses of any kind from any source which may arise out of the performance of this Agreement, caused by the negligent act or failure to act of the Contractor, its officers, employees, servants, subcontractors or agents, or if caused by the actions of any client of the Contractor resulting in injury or damage to persons or property during the time when the Contractor or any officer, agent, employee, servant or subcontractor thereof has or is performing services pursuant to this Agreement. In the event that any action, suit or proceeding related to the services performed by the Contractor or any officer, agent, employee, servant or

subcontractor under this Agreement is brought against the Contractor, the Contractor shall, as soon as practicable but no later than two (2) days after it receives notice thereof, notify the legal counsel of the Agency and the Risk Management Division of the New Mexico General Services Department by certified mail.

**22. Invalid Term or Condition.**

If any term or condition of this Agreement shall be held invalid or unenforceable, the remainder of this Agreement shall not be affected and shall be valid and enforceable.

**23. Enforcement of Agreement.**

A party's failure to require strict performance of any provision of this Agreement shall not waive or diminish that party's right thereafter to demand strict compliance with that or any other provision. No waiver by a party of any of its rights under this Agreement shall be effective unless express and in writing, and no effective waiver by a party of any of its rights shall be effective to waive any other rights.

**24. Notices.**

Any notice required to be given to either party by this Agreement shall be in writing and shall be delivered in person, by courier service or by U.S. mail, either first class or certified, return receipt requested, postage prepaid, as follows:

To the Agency: [insert name, address and email]. To the Contractor: [insert name, address and email].

**25. Authority.**

If Contractor is other than a natural person, the individual(s) signing this Agreement on behalf of Contractor represent and warrant that he or she has the power and authority to bind Contractor, and that no further action, resolution, or approval from Contractor is necessary to enter into a binding contract. (I've encountered some situations where there was a question whether the person signing had authority; having the contractor assure the agency the person signing has authority creates an argument the agency has no obligation to check.)

**IN WITNESS WHEREOF, the parties have executed this Agreement as of the date of signature by the DFA Contracts Review Bureau below.**

By: \_\_\_\_\_ Date: \_\_\_\_\_  
Agency

By: \_\_\_\_\_ Date: \_\_\_\_\_  
Agency's Legal Counsel –Certifying legal sufficiency

By: \_\_\_\_\_  
Contract

Date: \_\_\_\_\_

The records of the Taxation and Revenue Department reflect that the Contractor is registered with the Taxation and Revenue Department of the State of New Mexico to pay gross receipts and compensating taxes.

ID Number: 00-000000-00-0

By: \_\_\_\_\_  
Taxation and Revenue Department

Date: \_\_\_\_\_

This Agreement has been approved by the DFA Contracts Review Bureau:

By: \_\_\_\_\_  
DFA Contracts Review Bureau

Date: \_\_\_\_\_

Exhibit A

Notice of Acceptance

**Exhibit B**

**Cost and Pricing**

**Exhibit C**

**Guidelines for Draft Measurement and Verification Plan**

## Exhibit D

### Performance Measures

*(Performance Measures should be based on the Scope of Work and must be tied to the Agency's Strategic Plan. The Plan should be referenced in the Measures and the applicable part of the Strategic Plan copied below or in an attachment. To the extent possible based on the nature of the work to be performed, the Measures should be "Output" oriented and specify an "Outcome.")*

Performance Measures in Scope of Work shall contain measurable goals and objectives that are linked to the performance measures of the Agency's Strategic Plan.

**Example:** Goal: Reduce or Increase or Other Service [insert blank].<sup>1</sup>

Objective: To reduce or increase or Other Service [insert blank] by [blank] percent or by a certain time.<sup>2</sup>

Activities: [Insert what services the Contractor is expected to perform to accomplish goals and objectives including an evaluation of the process and the outcome as well as provides efficiency measures that relate efforts to outputs of services].

**OR:** Through satisfactory completion of the Scope of Work set forth above and submission of acceptable Deliverables, the Contractor will assist the Agency to meet the portions of its Strategic Plan set forth below *(insert additional language if necessary to describe how Contractor's work will assist the Agency to fulfill its duties)*.

---

<sup>1</sup> A goal is an "output" measure. It measures the quantity of a service provided. For example, the number of students graduated or promoted; the number of two-lane highways repaired; or the number of crimes investigated. It also can measure the quantity of a service provided that meets a certain quality requirement. For example, the number of students graduated or promoted who meet a minimum preset level of achievement; the number of miles of roads repaired to a minimum safety standard; or the number of criminal investigations performed that result in identification of a prime suspect.

<sup>2</sup> An accomplishment is an "outcome" measure. These indicators measure accomplishments or results that occur (at least partially) because the services were provided. For example, the percentage of students achieving a specified skill level in reading, the percentage of miles of roads in excellent, good or fair condition; or the percent reduction in serious crimes or the percent of residents who perceive their neighborhoods as safe.

## **APPENDIX M - Model Financing RFP for Issuance by Qualified Provider**

### **Request for Proposal**

**RFP Reference:** Institution Name

**RFP Date:** Date

**RFP Closing Date:** Date

**ESCO - Contact:** Name, Address, Phone, Fax, E-mail

### **Notice to Firms**

Invitations are extended for proposals using the attached proposal format

**Scope of Request:** Provide pursuant to a tax-exempt lease purchase agreement with Institution financing for energy and water savings measures for those certain facilities located at the Institution's campus.

Properly Completed Responses will include:

1. a signed and dated proposal letter in the format included
2. a redlined copy of the Model Lease Contract With Explanation of Any Changes proposed thereto
3. a signed and completed signature sheet
4. a schedule of payments and amortization schedule including any purchase options
5. escrow information (contact, Escrow Agreement and List of All Fees)

Proposal Information

Specific Terms

Lessee:	Board of Institution
Lessor:	The Provider of the Financing or a Mutually Agreeable Nominal Lessor
Contract:	A Model Lease Contract between Lessor and the Institution. Each firm is required to review and comment on the Model Lease Contract, attached hereto as Attachment A. The extent and content of those comments will be important to the evaluation of the proposals. If any changes in the Model Lease Contract are proposed, such changes must be specifically identified in the proposal and alternate language set forth in the proposal. Also, any changes should be accompanied with an explanation clarifying the proposed change.
Security:	The Lessor will be secured by the Institution's obligation to pay the lease payments, which are subject to annual appropriations and by a security interest in the equipment purchased for the energy and water savings measures to be installed by ESCO, which can be salvaged without damage to the facility to which such equipment is attached.
Interest Rate:	A fixed rate of interest for the term of the financing. The proposal should include the relevant index and spread along with the period of time the proposed fixed interest is committed
Prepayment:	The final tax-exempt lease purchase agreement shall include certain prepayment provisions pursuant to a schedule to be agreed to by the parties
Assignment:	The Lessor may assign its rights to receive lease payments and its security interest in the equipment installed pursuant to the Energy Savings Performance Contract but only with the advance written consent of the Institution. Each assignment must specifically mention the Institution's rights regarding prepayment.
Amendment:	The Institution reserves the right to amend the Model Lease Contract that is entered into pursuant to this Request for Proposal. Any such amendment will be in writing and subject to the mutual consent of both parties.
Cost:	The proposal should identify specifically all costs associated with the transaction, if any, that would be an obligation of the Institution as either a direct payment or as additional project costs for purpose of determining the funded lease amount and/or ongoing lease payment obligation. These costs must be all-inclusive and may include commitment fees, legal counsel, trustee fees and any other costs. The Model Lease Agreement does not require the Institution to pay any supplemental financing costs, either direct (upfront) or as an addition to the project cost.

Requirement of ESCO: The proposal shall identify specifically any requirements to be imposed upon ESCO as a result of this financing.

Requirement of Lender: The Lessee will agree that Lessor will bear the risk of loss if the equipment is damaged or destroyed, and to pay lease payments from funds available for that purpose, when and if appropriated by the State Legislature.

#### **Condition to Proposal**

Cost of Preparing Proposal: The cost of developing and submitting the proposal is entirely the responsibility of the firms submitting a response to this Request for Proposal. This includes, but is not limited to, costs to determine the nature of the engagement, preparation of the proposal, submitting the proposal, negotiating for the contract and other costs associated with this Request for Proposal.

No Oral or Implied Contracts: There shall be no oral or implied contracts relating this Request for Proposal.

Acceptance or Rejection: The Institution reserves the right to select, accept or reject any or all proposals or part of a proposal; to waive any informalities or technicalities; clarify any ambiguities in proposals; modify any criteria in this Request for Proposal; and establish financing at any time.

Contract: The successful firm will be required to enter into a tax-exempt lease purchase agreement with the Institution.

The tax-exempt lease purchase agreement shall be substantially in the form set forth on Attachment A (Model Lease Contract). Each firm is required to provide comments and specific alternate language for those items in the Model Lease Contract from which the firm wishes to deviate.

Contract Documents: This Request for Proposal and any amendments and the response and any amendments of the successful firm shall become a part of the written contract, which shall compose of the complete understanding of the parties.

In the event a conflict in terms of language among the documents, the following order of precedence shall govern:

1. written modifications to the executed contract;
2. ax-exempt lease purchase agreement signed by the parties;
3. this Request for Proposal, including any and all addenda

Contract Formation: No contract shall be considered to have been entered into by the Institution until all statutorily required signatures and certifications have been rendered and a written contract has been signed by the successful firm.

Open Records Act:	All proposals become the property of the Institution. State statute requires all information contained the proposals become open for public review once a contract is signed or all proposals are rejected.
Submission of Proposals:	<p>A copy of the firm's proposal shall be received on or before Time, Date, addressed as follows:  Name, Address</p> <p>Responses via email or facsimile will be accepted provided that such response includes all of the requisite information.</p> <p>Proposals received prior to the closing date shall be kept secured until closing. The Institution shall not be responsible for the premature opening of a proposal or for the rejection of a proposal that was not received prior to the closing date.</p>
Signature of Proposals:	Each proposal shall give the complete mailing address of the firm and be signed by an authorized representative with his or her name and legal title typed below the signature line.
Acknowledgement of Addenda:	All firms shall acknowledge receipt of any addenda to this Request for Proposal by original signature with his or her name and legal title typed below the signature line. Each proposal shall include the firm's social security number or Federal Employer Identification Number.
Modification of Proposal:	A firm may modify a proposal by written notification at any time prior to the closing date. Any modifications received after the closing date shall not be accepted.
Withdrawal of Proposal:	A proposal may be withdrawn on written request from the firm to the representative designed above.
Proposal Disclosures:	At the time of closing, only the names of the firms who submitted proposals shall be made available to the public. No interest rate information will be released until there is an award and contract.
Notice of Award:	An award is made on the execution of the written contract by the all parties. Only the Institution is authorized to issue news releases relating to this Request for Proposal, its evaluation, award and/or performance of the tax-exempt lease financing.
Prohibition of Gratuities:	Neither the successful firm nor any person, firm or corporation employed by the successful firm in the performance of this contract shall offer or give any gift, money or anything of value or any promise of future award or compensation to any Institution employee at any time.
Third Party Beneficiaries:	This Request for Proposal and resulting tax-exempt lease purchase agreement shall not be construed as providing an enforceable obligation to any third party.
No Liability:	The Institution shall have no liability, obligation nor shall it be compelled to enter into any tax-exempt lease purchase agreement or any other financing arrangement as a result of issuing this Request for Proposal

**FINANCING PROPOSAL LETTER**

PROPOSING FINANCING FIRMS: SUBMIT ON FIRM LETTERHEAD

Date

RE: Institution

Lender is pleased to submit the following financing proposal for Institution energy and water savings conservation project. This proposal is being submitted in response to your request for proposals dated:

\_\_\_\_\_ Date

**I. Lender Information**

Lender Name:

Address:

Contact:

Telephone:

Fax:

Email:

Background: Discuss experience in financing state project and/or performance contracts, with attention given to experience in the state, and what advantages your firm offers.

**II. Financing Structure**

Purpose: Finance the energy and water savings conservation projects to be engineered, designed, constructed and commissioned by ESCO for Institution.

Structure: Tax-exempt Lease Purchase arrangement using the Model Lease Contract distributed with this request for proposal.

Security: First lien on the equipment  
Lessee appropriations

Proceeds: Approximately \$ \_\_\_\_\_ plus capitalized interest for the \_\_\_\_\_ month construction period.

Term: \_\_\_\_\_ months ( \_\_\_\_\_ months of construction plus \_\_\_\_\_ months of amortization period)

Payments: Presented in the following options. Quarterly, bi-yearly, and monthly Options – in arrears.

Prepayment: List prepayment terms / conditions / penalty

Interest Rate: \_\_\_\_\_ % (This is a non-bank qualified financing)

Rate will be held until \_\_\_\_\_. After that date, the rate will be adjusted as follows: \_\_\_\_\_ (name and source of index).

*Example: This rate will be held until \_\_\_\_\_. After that date, the rate will float at 75 basis points over the 10 year treasury, constant maturity, as published daily in the Federal Reserve Bulletin Statistical Release H-15.*

Closing Costs: \$ \_\_\_\_\_ (if any)

Escrow Account Terms: Agent name and all costs associated with opening and maintaining the escrow, including any investment management fees, if any. Include a copy of the escrow agreement as part of the response documents.

Documents: A Model Lease Contract is included with this response and is customized for the state and the institution type, meeting all legislative requirements, and/or it contains the edits to a Model Lease Contract that we require in order to execute the agreement.

Payment and Performance Bonds: We do / do not require to be named as dual obligee on the payment and performance bonds.

Other conditions of ESCO:

Credit Approval: The transaction is / is not subject to credit approval of the lender. If the financing is not approved, please list requirements and time frame required for approval.

Estimated Closing Date: Within 60 days of the award of the financing.

Other Requirement or Conditions:

### III. Other Information

Please provide any other information that you would like to share regarding your firm's qualifications, references, contacts, etc.

Thank you for the opportunity to provide this proposal. If you have any questions or would like to discuss this proposal in further detail, please let us know.

Sincerely,

By: \_\_\_\_\_ Title: \_\_\_\_\_

Date: \_\_\_\_\_

**Signature Sheet**

Item: Tax-exempt lease financing for institution energy and water conservation projects.

Entity: Board of Institution

We submit a proposal to furnish the financing for the term of the contract in accordance with the specifications and schedule of supplies. I hereby certify that I (we) do not have any substantial conflict of interest sufficient to influence the bidding process on this bid. A conflict of substantial interest is one, which a reasonable person would think would compromise the open competitive bid process.

Addenda: The undersigned acknowledges receipt of the following addenda:

1. Proposal letter dated \_\_\_\_\_;
2. Model Lease Contract – Attachment A;
3. List of energy and water savings measures and the associated capital cost – Attachment B.

Legal Name of Person, Firm or Corporation: \_\_\_\_\_

Telephone: \_\_\_\_\_ Fax: \_\_\_\_\_

Email: \_\_\_\_\_

Mailing Address: \_\_\_\_\_

City & State: \_\_\_\_\_ Zip: \_\_\_\_\_

FEIN Number: \_\_\_\_\_

Please indicate taxes currently registered for in the State:

Corporate Income Tax [ ]      Sales Tax [ ]      Withholding Tax [ ]  
Compensating Use Tax [ ]      None [ ]

The undersigned attests this bidder is not in arrears in taxes due the State.

Signature: \_\_\_\_\_ Date: \_\_\_\_\_

Typed Name of Signature: \_\_\_\_\_ Title: \_\_\_\_\_

If awarded a contract and purchase orders are to be directed to an address other than above, indicate mailing address and telephone number below.

Address: \_\_\_\_\_

City & State: \_\_\_\_\_ Zip: \_\_\_\_\_

Telephone: \_\_\_\_\_ Fax: \_\_\_\_\_

Email: \_\_\_\_\_

**Overview of Facility Improvement Projects**

ESCO:

Contractual Arrangement: Energy Savings Performance Contract by and between ESCO and Board of Institution

Total Installed Costs: \$\_\_\_\_\_, subject to adjustment based upon final analysis by ESCO.

Financed Capital: Approximately \$\_\_\_\_\_, which is the Total Installed Costs plus capitalized interest for the \_\_\_\_\_ month construction period)

Term: \_\_\_\_\_ months (\_\_\_\_\_ months of construction plus \_\_\_\_\_ months of amortization period)

Payments: No more frequent than quarterly and such payment shall be in arrears

Projects: Energy and Water Savings Measures including but not limited to:

- Item 1
- Item 2

A more detailed description of these measures is included with this Request for Proposal along with an estimate of the capital cost associated with each.

Anticipated Draw Schedule:

**APPENDIX N - Model Guaranteed Utility Savings Contract**

STATE OF NEW MEXICO  
NAME OF AGENCY

PROFESSIONAL SERVICES CONTRACT # \_\_\_\_\_  
For Energy Performance Contracting

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STATE OF NEW MEXICO

NAME OF AGENCY

PROFESSIONAL SERVICES CONTRACT # \_\_\_\_\_  
For Energy Performance Contracting

THIS AGREEMENT is made and entered into by and between the State of New Mexico, **NAME OF AGENCY**, hereinafter referred to as the "Agency," and **NAME OF CONTRACTOR**, hereinafter referred to as the "Contractor," and is effective as of the date set forth below upon which it is executed by the Department of Finance and Administration ("DFA").

RECITALS

WHEREAS, Agency owns and operates the Project Site(s), and is in need of energy and water cost saving equipment and services designed to save energy and associated energy costs at said Project Sites; and

WHEREAS, Agency has been authorized to enter into a third party financing agreement for all professional services, equipment and construction for the purchase and installation of energy and water cost savings measures, collectively referred to as the "Work" (as hereinafter defined); and

WHEREAS, Contractor has developed or become knowledgeable about certain procedures for controlling energy and water consumption through services provided and equipment installed and maintained at project sites similar in scope and scale of Agency; and

WHEREAS, Contractor was selected after a determination that its proposal was the most advantageous to Agency pursuant to a Request for Proposal and contract for the Investment Grade Audit and Project Development Proposal (as hereinafter defined); and

WHEREAS, Contractor has made an assessment of the utility consumption characteristics of the Project Site(s) and existing Equipment described in Schedule Q (Description of Project Site(s)), which was delivered to Agency as an Investment-Grade Energy Audit Report which Agency has approved and is attached as Appendix D; and

WHEREAS, Agency desires to retain Contractor to purchase, install and service certain energy and water cost savings equipment and to provide other services and strategies described in the attached Schedules, for the purpose of achieving energy and water cost reductions within Project Site(s), as more fully described herein; and

WHEREAS, Agency is authorized under the New Mexico Constitution and state law, Chapter 6, Article 23, New Mexico Statutes Annotated (NMSA) 1978, 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 Contractor hereto covenant and agree that the following Schedules, Exhibits and Appendices are attached hereto (or will be, as provided in this Contract) and are made a part of this Contract by reference.

IT IS AGREED BETWEEN THE PARTIES:

**1. Definitions**

- A. "Commencement Date" means the date described in Section 6 (Commencement Date);
- B. "Contract" means this Energy Performance Contract and all Schedules, Exhibits, and Appendices attached hereto;
- C. "Contract Sum" means the sum of all materials, labor, auditing, design, engineering, project construction management fees, overhead, profit, contingency, subcontracted services related to the project;
- D. "Energy and Cost Savings Guarantee" means the guarantee of Schedule A (Savings Guarantee) that is achieved as a result of the installation and operation of the Equipment and provision of services provided for in this Contract as specified in Schedule J (Compensation to Contractor for Annual Services) and in accordance with the Savings Calculation Formula as set forth in Schedule C (Savings Measurement and Verification (M&V) Plan; Post-Retrofit M&V Plan; Annual M&V Reporting Requirements);
- E. "Energy and Water Cost Savings" means the savings as provided in Schedule A (Savings Guarantee);
- F. "Equipment" means the material goods enumerated in Schedule R (Equipment to be Installed by Contractor) that is now, or hereafter from time to time, attached hereto and incorporated herein by reference, together and with any and all additions, modifications, attachments, replacements and parts thereof;
- G. "Event of Default" means those events described in Sections 65 (Events of Default by Contractor) and 64 (Events of Default by Agency) hereof;
- H. "Interim Period" means the period from contract execution until the Commencement Date;
- I. "Investment Grade Audit" means a study by the Contractor selected for a particular energy performance contracting project, which includes detailed descriptions of the

improvements recommended for the project, the estimated costs of the improvements and the utility and operations and maintenance cost savings projected to result from the recommended improvements;

J. "Project Site(s)" means the facilities of the Agency in need of energy and water saving equipment and services designed to reduce consumption and associated costs at said Project Site(s);

K. "Qualified Provider" means the Contractor, who is a person experienced in the design, implementation and installation of energy or water conservation measures and who meets the experience qualifications developed by the Energy, Minerals and Natural Resources Department (EMNRD) for energy conservation measures or the Office of the State Engineer for water conservation measures;

L. "Substantial Completion" means the stage in the progress of the Work where the Work is sufficiently complete in accordance with the Contract Documents so that the Agency can utilize and take beneficial use of the Work for its intended use or purpose.

M. "Work" means the Equipment, materials, professional services and construction services for the project at Agency's Project Site, as described by this Agreement and attachments.

## **2. Scope of Work**

Contractor shall:

A. perform and complete the Work at the Agency's Project Site, as defined and described in this Agreement and the attached Schedules, Exhibits, and Appendices;

B. provide the Equipment, together with installation, maintenance and other services as provided herein, as in Schedule R (Equipment to be Installed by Contractor) based upon the terms and conditions set forth in Schedule S (Construction and Installation Schedule);

C. provide the Work and all related services identified in Schedule R (Equipment to be Installed by Contractor) and the services detailed in Schedule BB (Contractor's Maintenance Responsibilities) and Schedule J (Compensation to Contractor for Annual Services);

D. supervise and direct the Work and shall be responsible for the engineering, design, and quality control; construction means, methods, techniques, sequences, and procedures; and for coordinating all portions of the Work under this Contract; and

E. comply with all federal, state, and local government laws, codes, and regulations in effect at the time the Agreement is fully executed.

## **3. Compensation**

A. The Agency shall pay to the Contractor in full payment for services satisfactorily performed pursuant to the Scope of Work at the rate of \_\_\_\_\_ dollars (\$\_\_\_\_\_)

in FYXX (USE FISCAL YEAR NUMBER TO DESCRIBE YEAR; DO NOT USE FY1, FY2, ETC.). The New Mexico gross receipts tax levied on the amounts payable under this Agreement in FYXX totaling \_\_\_\_\_ dollars (\$ \_\_\_\_\_) shall be paid by the Agency to the Contractor. **The total amount payable to the Contractor under this Agreement, including gross receipts tax and expenses, shall not exceed \_\_\_\_\_ dollars (\$ \_\_\_\_\_) in FYXX.**

(REPEAT LANGUAGE FOR EACH FISCAL YEAR COVERED BY THE AGREEMENT -- USE FISCAL YEAR NUMBER TO DESCRIBE EACH YEAR; DO NOT USE FY1, FY2, ETC.).

Payment in FYXX, FYXX, FYXX, and FYXX is subject to availability of funds pursuant to the Appropriations Paragraph set forth below and to any negotiations between the parties from year to year pursuant to Paragraph 1, Scope of Work, and to approval by the DFA. All invoices MUST BE received by the Agency no later than fifteen (15) days after the termination of the Fiscal Year in which the services were delivered. Invoices received after such date WILL NOT BE PAID.

B. The total amount payable to the Contractor under this Agreement, including gross receipts tax and expenses, shall not exceed \_\_\_\_\_ dollars (\$ \_\_\_\_\_) as set forth in Schedule H (Final Project Cost & Project Cash Flow Analysis). This amount is a maximum and not a guarantee that the work assigned to the Contractor under this Agreement to be performed shall equal the amount stated herein. Payment terms are described in Schedule I (Financing Agreement and Payment Schedule).

C. Contractor must submit a detailed statement accounting for all services performed and expenses incurred. If the Agency finds that the services are not acceptable, within thirty days after the date of receipt of written notice from the Contractor that payment is requested, it shall provide the Contractor a letter of exception explaining the defect or objection to the services, and outlining steps the Contractor may take to provide remedial action. Upon certification by the Agency that the services have been received and accepted, payment shall be tendered to the Contractor within thirty days after the date of acceptance. If payment is made by mail, the payment shall be deemed tendered on the date it is postmarked. However, the agency shall not incur late charges, interest, or penalties for failure to make payment within the time specified herein.

#### 4. Term

*The Energy Performance Contract shall have a term no greater than 25 years and no greater than the cost-weighted average lifetime of the equipment, in compliance with Section 6-23-3 NMSA 1978. Agency's goal is for a term no greater than its desired financing term.*

D. THIS AGREEMENT SHALL NOT BECOME EFFECTIVE UNTIL APPROVED BY THE DFA. This Agreement shall terminate on **DATE** unless terminated

pursuant to paragraph 4, *infra*, or paragraph 5. In accordance with Section 13-1-150 NMSA 1978, no contract term for a professional services contract, including extensions and renewals, shall exceed four years, except as set forth in Section 13-1-150 NMSA 1978. An exception is that for contracts entered into pursuant to the Public Facility Energy Efficiency and Water Conservation Act (6-23 NMSA 1978), the term shall not exceed twenty-five years, including all extensions and renewals.

*Prior to the Commencement Date the final contract and technical schedules are negotiated and executed by signature. At that point in time the Contractor typically begins the final design of the project and finalizes the construction schedule with the Agency. The "Interim Period" refers to the construction period, during which some amount of energy savings will start to accrue. The treatment of those energy savings can be negotiated to either be credited to the Contractor's guarantee or credited to the Agency. If such savings are credited to the Contractor's guarantee, it is recommended that such credit be extended for a specified period of time (e.g. 1-2 years). If the Contractor is credited with the interim period savings, the Agency and Contractor will need to agree to develop an approach to the measurement of those savings.*

E. Subject to the following sentence, the term of this Contract shall be \_\_\_\_\_ years measured beginning with the Commencement Date. Nonetheless, the Contract shall be effective and binding upon the parties immediately upon its execution, and the period from contract execution until the Commencement Date shall be known as the "Interim Period". All energy savings achieved during the interim period will be fully credited to the Agency.

## 5. Termination

*The Agency has an option to terminate the contract but the Contractor does not. Contractor's termination is considered a default as described in the default clause.*

F. Termination. This Agreement may be terminated by the Agency upon written notice delivered to the Contractor at least ten (10) days prior to the intended date of termination. By such termination, the Contractor may not nullify obligations already incurred for performance or failure to perform prior to the date of termination. Notwithstanding the foregoing, this Agreement may be terminated immediately upon written notice to the Contractor if the Contractor becomes unable to perform the services contracted for, as determined by the Agency or if, during the term of this Agreement, the Contractor or any of its officers, employees or agents is indicted for fraud, embezzlement or other crime due to misuse of state funds or due to the Appropriations paragraph herein. THIS PROVISION IS NOT EXCLUSIVE AND DOES NOT WAIVE THE STATE'S OTHER LEGAL RIGHTS AND REMEDIES CAUSED BY THE CONTRACTOR'S DEFAULT/BREACH OF THIS AGREEMENT.

G. Termination Management. Immediately upon receipt by the Contractor of notice of termination of this Agreement, the Contractor shall: 1) not incur any further obligations for salaries, services or any other expenditure of funds under this Agreement without written approval of the Agency; 2) comply with all directives issued by the Agency in the notice of

termination as to the performance of work under this Agreement; and 3) take such action as the Agency shall direct for the protection, preservation, retention or transfer of all property titled to the Agency and records generated under this Agreement. Any non-expendable personal property or equipment provided to or purchased by the Contractor with contract funds shall become property of the Agency upon termination and shall be submitted to the agency as soon as practicable.

## **6. Commencement Date**

*This section defines the Commencement Date which is the actual beginning date for the savings guarantee period. It is standard for this date to be the first month AFTER the Contractor has completed construction and delivered a notice that all equipment is installed and operating. In addition, the Agency will have accepted the installation by signing a Certificate of Acceptance which should be attached to the contract. It also clearly states that no payment for any of the Contractor's on-going services (e.g. measurement and verification, project monitoring, maintenance, training etc.) will be made prior to the Commencement Date. It is recommended that the repayment obligation of project financing be arranged to coincide with the Commencement Date. The timing of the Commencement Date may also need to be arranged to accommodate the Agency's fiscal year for the purpose of appropriations and budgeting. This date alignment should not prevent the Contractor from timely remuneration for training and other services performed prior to Commencement Date.*

H. 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 and Contractor shall have delivered a Notice to Agency that it has installed and commenced operating all of the Equipment specified in **Schedule R (Equipment to be Installed by Contractor)** and in accordance with the provisions of **Schedule S (Construction and Installation Schedule)** and **Schedule T (Systems Start-Up and Commissioning; Operating Parameters of Installed Equipment)**; and Agency has inspected and accepted said installation and operation as evidenced by the Certificate of Acceptance as set forth in **Exhibit VI (Agency Certificate of Acceptance—Installed Equipment)**.

I. Notwithstanding anything to the contrary in **Sections herein (Purchase and Sale; Commencement Date and Terms; Interim Period)**, the Commencement Date shall not occur and the Agency shall not be required to accept the work under this Contract unless and until all Equipment installation for the Project Site(s) is completed by Contractor in accordance with the terms and conditions of this Contract. Agency shall have \_\_\_\_\_ days after notification by the Contractor to inspect and accept the Equipment. Agency reserves the right to reject the Equipment if installation fails to meet reasonable standards of workmanship, does not comply with applicable building codes, or is otherwise not in compliance with this Contract. Contractor shall not be paid in full, including retainage, until after the punch list is completed and Contractor has satisfied any and all claims for labor and materials and the Certificate of Acceptance has been signed. The Certificate of Acceptance will not be unreasonably withheld by the Agency.

J. Compensation payments due to Contractor for on-going services and maintenance under this Contract as set forth in **Schedule J (Compensation to Contractor for Annual Services)** shall begin no earlier than \_\_\_\_\_ from the Commencement Date as defined herein.

**7. Performance Measures**

Contractor shall substantially perform the following Agency Performance Measures:

K. *[Insert Agency Performance Measure involving facility capital upgrades, if applicable.]*

L. *[Insert Agency Performance Measure involving operational cost reduction, if applicable.]*

M. *[Insert other Agency Performance Measure, if applicable]*

Agency Performance Measures documentation is provided as Attachment I.

**8. Contractor is Qualified Provider**

*This section records the certification by EMNRD of the Contractor as a Qualified Provider, pursuant to Sections 6-23-2E and 6-23-5 NMSA 1978, which must be completed prior to the execution of this contract. An EMNRD Certification of Contractor as Qualified Provider must be signed by EMNRD and attached to the contract (Exhibit III).*

Contractor is certified as a Qualified Provider by EMNRD to perform the Work, pursuant to Sections 6-23-2E and 6-23-5 NMSA 1978 and as shown by Exhibit III (EMNRD Certification of Contractor as Qualified Provider).

**9. Investment-Grade Energy Audit Report and Project Development Proposal**

*This section records the certification by EMNRD of the Investment-Grade Energy Audit Report which must be completed prior to the execution of this contract. An EMNRD Certification of Guaranteed Energy Savings must be signed by EMNRD and attached to the contract - Exhibit IV(Agency Certificate of Acceptance – Installed Equipment). If the list of measures is not completely finalized prior to the signing of this contract, then language to that effect should be included.*

Contractor has provided the complete Investment-Grade Energy Audit Report and Project Development Proposal of the Project Site(s), as set forth in Appendix D (Investment-Grade Energy Audit and Project Proposal Contract) and dated \_\_\_\_\_. The Investment-Grade Energy Audit Report includes all energy conservation measures agreed upon by Agency and Contractor for implementation in the Work. The guaranteed energy savings of energy conservation measures stated in the Investment-Grade Energy Audit Report appear to be

accurately estimated and reasonable and are certified by EMNRD, as shown in Exhibit IV (EMNRD Certification of Guaranteed Energy Savings).

#### 10. Schedules, Exhibits and Appendices

Contractor has provided and Agency has approved the following Schedules, Exhibits and Appendices, copies of which are attached hereto (or will be as provided for in the Contract), set forth in their entirety as Attachment II and made a part of this Contract by reference.

N. Schedules Savings Guarantee  
Schedule A Energy and Cost Savings Guarantee  
Schedule B Baseline Energy Consumption; Methodology to Adjust Baseline Schedule C  
Savings Measurement and Verification Plan; Post-Retrofit M&V Plan;  
Annual M&V Reporting Requirements Schedules D-G *[optional schedules]*

#### Payments and Schedule

Schedule H Final Project Cost & Project Cash Flow Analysis Schedule I Financing  
Agreement and Payment Schedule Schedule J Compensation to Contractor for Annual  
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#### Design and Construction Phase

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#### Administration

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Current and Known Capital Projects at Facility

O. Exhibits

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- Exhibit II Labor and Material Payment Bond
- Exhibit III EMNRD Certification of Contractor as Qualified Provider Exhibit IV EMNRD Certification of Guaranteed Energy Savings Exhibit V Agency Approval of Contracts and Agreements
- Exhibit VI Agency Certificate of Acceptance—Installed Equipment Exhibit VII Equipment Warranties

Optional Exhibits

Manifest of Ownership

Minority and Woman-Owned Business Certification

Certification that Financing Term is no Longer than the Aggregated Equipment Lifetime Notice to Proceed with Construction Phase

Record of Reviews by Agency

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- Appendix B Contractor Proposal (Pre-qualification Phase; Final Selection Phase)
- Appendix C Investment-Grade Energy Audit and Project Development Contract Appendix D Investment-Grade Energy Audit Report

**11. Purchase and Sale**

*When using a third-party lease-purchase structure the Contractor will receive 100% of the Contract Sum from the Agency once the Exhibit VI (Agency Certificate of Acceptance—Installed Equipment) is signed. The payments to the Contractor during the construction period (Interim Period) can be drawn down by the Contractor from the proceeds of the lease through an escrow account set up by the leasing Contractor. Payments will be made based upon the percentage of work completed and approved by the Agency. The Agency should require a percentage retainage be withheld from the Contractor until the Exhibit VI (Agency Certificate of Acceptance— Installed Equipment) is executed, at which time final payment can be made.*

Q. Agency agrees to lease Equipment through a third-party financier, **NAME OF LENDER**, as provided for in a separate lease document, Schedule I (Financing Agreement and Payment Schedule).

R. Contractor shall be responsible to pay for all labor, materials, equipment, tools, construction equipment and machinery, transportation and other facilities and services necessary for the proper execution and completion of the Work.

**12. Energy Usage Records and Data**

*This section ensures that the Contractor has access to the historical energy consumption, facility operations and occupancy data in order to develop baseline utility consumption. At a minimum, there should be 24 months of data made available, however, 36 months is recommended. Existing facility conditions, operations and equipment needs to be carefully recorded to establish an accurate baseline. This will serve as a record of your buildings as they were configured prior to project installation and will be critical to the establishment and adjustment of baseline, and measurement of savings. As well, any prior technical studies and/or energy audits should also be made available for the Contractor's review and verification.*

Agency has furnished and shall continue to furnish (or authorize its energy suppliers to furnish) during the Term of this Contract to Contractor or its designee, upon its request, all of its records and complete data concerning energy and water usage and related maintenance for the Project Site(s).

**13. Location and Access**

*This states the Agency's responsibility for providing adequate space and protection for the installed equipment and authorizes the Contractor's access to the facility to perform routine and emergency operations.*

Contractor acknowledges that there exists sufficient space on the Project Site(s) for the installation and operation of the Equipment. Agency shall take reasonable steps to protect such Equipment from harm, theft and misuse during the term of this Contract. Agency shall provide access to the Project Site(s) for Contractor to perform any function related to this Contract during regular business hours, or such other reasonable hours as may be requested by Contractor and acceptable to the Agency. Contractor shall be granted immediate access to make emergency repairs or corrections as it may, in its discretion, determine are needed. The Contractor's access to Project Site(s) to make emergency repairs or corrections as it may determine are needed shall not be unreasonably restricted by the Agency. Contractor shall immediately notify the Agency when emergency action is taken and follow up with written notice within three (3) business days specifying the action taken, the reasons therefore, and the impact upon the Project Site(s), if any.

**14. Permits and Approvals**

*This standard construction provision requires the Contractor comply with all code requirements, pay all associated permit fees and provide the Agency with copies of each permit and license required to do the work. The Agency agrees to assist the Contractor to the best of its ability to obtain all required permits and approvals.*

Agency shall use its best efforts to assist Contractor in obtaining all necessary permits and approvals for installation of the Equipment. In no event shall Agency, however, be responsible for payment of any permit fees. The equipment and the operation of the equipment by Contractor

shall at all times conform to all federal, state and local code requirements. Contractor shall furnish copies of each permit or license which is required to perform the work to the Agency before the Contractor commences the portion of the work requiring such permit or license.

**15. Coordination During Installation**

*This standard provision directs the Agency and Contractor to coordinate the equipment installation activities to not interfere with the Agency's business activities. If an installation will require interference, the contractor must first obtain the Agency's written approval to proceed. If a facility generates revenue for the Agency (e.g. civic center, theater, arena, etc.) and scheduled revenue producing activities are interrupted due to the fault of the Contractor, either during project installation or operation, then a provision for the collection of damages may be negotiated.*

The Agency and Contractor shall coordinate the activities of Contractor's equipment installers with those of the Agency, its employees, and agents. Contractor 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.

**16. Construction Schedule, Equipment Installation**

Construction and equipment installation shall proceed in accordance with the construction schedule approved by Agency and attached as Schedule S (Construction and Equipment Installation Schedule).

**17. Systems Startup and Equipment Commissioning**

*This section requires the Contractor to conduct performance testing of the equipment as specified in its Commissioning Plan located in Schedule T (Systems Start-Up and Commissioning; Operating Parameters of Installed Equipment), and verify the specified operating parameters to make certain the system is working properly. In most instances this activity occurs prior to the Agency's final acceptance of the project as fully installed, however, if any testing is negotiated to occur after project acceptance, language to that effect should be included here. It also requires the Contractor notify the Agency of when the testing will take place and gives the Agency (or its designee) the right to be present during all tests. Make sure the commissioning plan includes manufacturer's startup and performance sheets.*

The Contractor 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 T (Systems Start-Up and Commissioning; Operating Parameters of Installed Equipment) and prior to acceptance of the project by the Agency as specified in Exhibit VI (Certificate of Acceptance—Installed Equipment). Testing shall be designed to determine if the Equipment is functioning in accordance with both its published specifications and the Schedules to this Contract, and to determine if modified building systems, subsystems or components are functioning properly within the new integrated environment. The Contractor 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 Contractor and/or manufacturers of the Equipment. The Contractor shall be responsible for correcting and/or adjusting all deficiencies in systems and Equipment operations that may be observed during system commissioning procedures as specified in Schedule T (Systems Start-Up and Commissioning; Operating Parameters of Installed Equipment). The Contractor shall be responsible for correcting and/or adjusting all deficiencies in Equipment operation that may be observed during system testing procedures. Prior to Agency acceptance Contractor shall also provide Agency with reasonably satisfactory documentary evidence that the Equipment installed is the Equipment specified in Schedule R (Equipment to be Installed by Contractor).

#### **18. Equipment Warranties**

*This warranty provision requires all installed equipment be new and protected by appropriate written manufacturers' warranties for a minimum of one year, covering parts and performance. It also requires warranties provide for the installation of only new parts (not used or reconditioned) during the warranty period. While equipment warranties will be transferred to the Agency after completed project installation, this provision makes the Contractor responsible for pursuing any necessary remedies during the warranty period. If the Contractor fails to exercise the warranty and damages occur, the Contractor is responsible for all costs of repair and any lost savings.*

S. Contractor warrants that all equipment sold and installed as part of this Contract is new, will be materially free from defects in materials or workmanship, will be installed properly in a good and workmanlike manner, and will function properly for a period of at least one (1) year from the date of the Substantial Completion for the particular energy conservation measure, if operated and maintained in accordance with the procedures established per building. Substantial Completion does not occur until the Equipment or system has been commissioned, accepted, and Exhibit V (Notice of Substantial Completion) is fully executed.

T. After the warranty period, Contractor shall have no responsibility for performing maintenance, repairs, or making manufacturer warranty claims relating to the Equipment, except as provided in Schedule BB (Contractor's Maintenance Responsibilities).

U. Contractor further agrees to assign to Agency all available manufacturer's warranties relating to the Equipment and to deliver such written warranties and which shall be

attached and set forth as Exhibit VII (Equipment Warranties); pursue rights and remedies against the manufacturers under the warranties in the event of Equipment malfunction or improper or defective function, and defects in parts, workmanship and performance. Contractor shall, during the warranty period, 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 Contractor. During this period, 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 Project Site(s), due to Contractor's failure to exercise its warranty rights, shall be borne solely by Contractor.

V. All warranties, to the extent transferable, shall be transferable and extend to the Agency. The warranties shall specify that only new, not reconditioned, parts may be used and installed when repair is necessitated by malfunction. All extended warranties shall be addressed as the property of the owner and appropriately documented and titled.

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

#### **19. Standards of Comfort**

*This section references the **Schedule U (Standards of Comfort)** which the Contractor is contractually liable to maintain throughout the term of the contract. These standards are negotiated between the Contractor and Agency to reflect realistic ranges of heating, cooling and hot water temperatures, lighting levels, chilled water requirements, and other specified comfort and operating parameters to be maintained.*

Contractor shall maintain and operate the Equipment in a manner which will provide the standards of heating, cooling, ventilation, hot water supply, and lighting quality and levels as described in Schedule U (Standards of Comfort). During the term of this Contract, Contractor and Agency will maintain, according to Schedule BB (Contractor's Maintenance Responsibilities) and Schedule CC (Agency's Maintenance Responsibilities), and operate the Equipment in a manner that will provide the standards of comfort and levels of operation as described in Schedule U (Standards of Comfort).

#### **20. Environmental Requirements, Excluded Material and Activities**

*This section addresses hazardous materials and establishes that the Contractor may encounter such materials but is not responsible for identification, handling or any work. The Agency will be responsible for such handling at its expense. In the event the Contractor discovers such materials, the Contractor will stop work and the Agency will handle it. Neither the Contractor's stoppage of work nor the Agency's discovery is grounds for default. If work can commence, any lost time will be added to the time schedule. The Contractor is responsible for any hazardous materials related to equipment it brings to the site.*

Agency recognizes that in connection with the installation and/or service or maintenance of Equipment at Agency's Project Site(s), Contractor may encounter, but is not responsible for, any work relating to (i) asbestos, materials containing asbestos, or the existence, use, detection, removal, containment or treatment thereof; (ii) fungus (any type of form of fungi, including mold or mildew, and myotoxins, spores, scents or by-products produced or released by fungi); (iii) incomplete or damaged work or systems or code violations that may be discovered during or prior to the work of this agreement; or (iv) pollutants, hazardous wastes, hazardous materials, contaminants other than those described in this Section below (collectively "Hazardous Materials"), or the storage, handling, use, transportation, treatment, or the disposal, discharge, leakage, detection, removal, or containment thereof. The materials and activities listed in the foregoing sentence are referred to as "Excluded Materials and Activities." Agency agrees that if performance of work involves any Excluded Materials and Activities, Agency will perform or arrange for the performance of such work and shall bear the sole risk and responsibility therefore. In the event Contractor discovers Hazardous or Excluded Materials, Contractor shall immediately cease work, remove all Contractor personnel or subcontractors from the site, and notify the Agency. The Agency shall be responsible to handle such Materials at its expense. Contractor shall undertake no further work on the Project Site(s) except as authorized by the Agency in writing. Notwithstanding anything in this Contract to the contrary, any such event of discovery or remediation by the Agency shall not constitute a default by the Agency. In the event of such stoppage of work by Contractor, the Time for Completion of Work will be automatically extended by the amount of time of the work stoppage and any additional costs incurred by Contractor as a result will be added by Change Order.

Contractor shall be responsible for any hazardous or other materials, including, without limitation, those listed in this section that it may bring to the Project Site(s).

**21. Polychlorinated Biphenyl (PCB) Ballasts, Mercury Lamps**

*The Contractor is required to have an agreement with an approved PCB ballast disposal company that will properly handle transport, recycling, and incineration, providing information for site handling and a Certificate of Destruction. Similarly the Contractor is required to have an agreement with an approved lamp disposal company. In both cases, the Agency will sign manifests of ownership.*

X. Contractor shall enter into an agreement with an approved PCB ballast disposal company that will provide an informational packet, packing receptacles and instructions, labels and shipping materials, transportation, and recycling or incineration services for PCB ballasts. All capacitors and asphalt potting compound materials removed from Agency's PCB ballasts will be incinerated in a federally approved facility. After proper disposal, a Certificate of Destruction will be provided by the approved facility to Agency. Contractor's responsibility shall be for the proper and legal management of any of Agency's PCB ballasts removed as a result of the installation of the Equipment and shall be limited only until said PCB ballasts are loaded onto an approved PCB ballast disposal Contractor's vehicle for transportation.

Y. Contractor shall enter into an agreement with an approved lamp disposal company, who will provide approved containers, materials required to label, transportation, recycling or incineration in accordance with EPA requirements, and a copy of the manifest.

Z. Agency agrees to sign manifests of ownership for all PCB ballasts and mercury lamps removed from the Project Site(s).

**22. Training by Contractor**

*In many performance contracts the training of facility personnel is often conducted prior to acceptance by the Agency of the completed installation. There are occasions, however, where it may be necessary to conduct training after project acceptance, which can be noted and included in the appropriate schedule. If there are charges for unscheduled training, such charges should be noted in this section.*

The Contractor shall conduct the training program described in Schedule V (Contractor's Training Responsibilities) hereto. The must be completed prior to acceptance of the Equipment installation. The Contractor shall provide ongoing training whenever needed with respect to updated or altered Equipment, including upgraded software. Such training shall be provided at no charge to the Agency and shall have no effect on prior acceptance of Equipment installation.

**23. Equipment Service, Actions by Contractor**

*This section refers to the maintenance and service responsibilities of each party as they are specified in Schedules CC (Agency's Maintenance Responsibilities) and BB (Contractor's Maintenance Responsibilities). It also states that if the Agency is at fault for causing additional maintenance or repair to the equipment, then the Agency will be charged by the Contractor for the cost of the required maintenance or repair.*

Contractor shall provide all service, repairs, and adjustments to the Equipment installed under terms of this Contract pursuant to Schedule BB (Contractor's Maintenance Responsibilities). Agency shall incur no cost for Equipment service, repairs, and adjustments, except as set forth in Schedule J (Compensation to Contractor for Annual Services), 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 Contractor can so demonstrate such causal connection, Contractor 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.

**24. Malfunctions and Emergencies**

*This section requires the Agency to notify the Contractor within a specified number of hours of actually knowing about any situation that impacts the performance of the equipment. As described here, the impacts cover both pre-existing energy related equipment and the newly*

*installed equipment. The impacts defined here include equipment malfunction or modification, interruption of power supply or any emergency situation which may affect the Energy and Cost Savings Guarantee. If such an impact is known by the Agency to have occurred and the Agency delays in notifying the Contractor and doesn't correct the situation, it will be treated as a Material Change and the baseline will be adjusted accordingly. If the Agency makes an effort to assess the situation and incorrectly determines it doesn't have an impact, then the Contractor will not fault the Agency, although an adjustment to the baseline may still be warranted.*

AA. Agency shall use its best efforts to notify the Contractor or its designated subcontractors 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 Project Site(s), or (iii) any alteration or modification in any energy-related equipment or its operation.

BB. 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 Contractor within twenty-four (24) hours upon its having actual knowledge of any emergency condition affecting the Equipment. Contractor 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 Contractor from Agency. If Agency unreasonably delays in so notifying Contractor of a malfunction or emergency, and the malfunction or emergency is not otherwise corrected or remedied, Contractor may charge Agency for its loss, due to the delay, associated with the guaranteed savings under this Contract for the particular time period, provided that Contractor is able to show the direct causal connection between the delay and the loss.

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

**25. Actions by Agency**

*This section states the Agency may not make any changes to the operation and maintenance of the equipment without the prior written approval of the Contractor unless otherwise indicated in Schedule CC (Agency's Maintenance Responsibilities) or if there is an emergency and the Contractor cannot be reasonably notified. In the case of such emergency, the Agency should follow instructions provided by the Contractor for emergency action.*

Agency shall not move, remove, modify, alter, or change in any way the Equipment or any part thereof without the prior written approval of Contractor except as set forth in Schedule CC (Agency's Maintenance Responsibilities). 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 Contractor 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 Contractor. Agency agrees to maintain the Project Site(s) in good repair and to protect and preserve all portions thereof which may in any way affect the operation or maintenance of the Equipment.

**26. Modification of Equipment**

During the Term of this Contract, Agency will not, without the prior written consent of Contractor, affix or install any accessory Equipment or device on any of the Equipment if such addition will change or impair the originally intended functions, value or use of the Equipment without Contractor's prior written approval, which shall not be unreasonably withheld.

**27. Upgrade or Alteration of Equipment**

*This section describes the terms and conditions under which the Contractor may make changes to the equipment, operating procedures or take other energy savings actions. If such changes are implemented during any time during the contract they must be described in a supplemental schedule and be approved by the Agency. Any equipment replaced is required to be new and have the potential to produce at least as much or more savings. If computer software is updated, the licensing provisions of Section 41 (Ownership of Certain Proprietary Property Rights) still apply.*

DD. Contractor 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 Project Site(s), provided that: (i) the Contractor complies with the standards of comfort and services set forth in Schedule U (Standards of Comfort) herein; (ii) such modifications or additions to, or replacement of the Equipment, and any operational changes, or new procedures are necessary to enable the Contractor to achieve the guaranteed energy and cost savings at the Project Site(s) 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 Contractor.

EE. 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, unless otherwise agreed, be new and have equal or better potential to reduce energy consumption at the Project Site(s) than the Equipment being replaced. The Contractor shall have the right to update any and all software to be used in connection with the Equipment in accordance with the provisions of Section 41 (Ownership of Certain Proprietary Rights) and Schedule BB (Contractor's Maintenance Responsibilities). All replacements of and alterations or additions to the Equipment shall become part the Equipment

described in Schedule R (Equipment to be Installed by Contractor) and shall be covered by the provisions and terms of **Section 16 (Construction Schedule; Equipment Installation)**.

**28. Material Change Defined**

*This section defines the term "Material Change" which covers any condition other than weather that affects building energy use by more than the negotiated percentage (see above discussion). It is typical for the percent of deviation to be negotiated as a value ranging between 2% and 5% based on aggregate consumption costs. The lower value (2%) may be appropriate for large facilities (over \$20,000/month utility bills) and the higher value (5%) may be appropriate for small facilities (less than \$5,000/month utility bills).*

FF. A Material Change shall include any change in or to the Project Site(s), whether structural, operational or otherwise in nature which reasonably could be expected, in the judgment of the Agency, to increase or decrease annual energy consumption in accordance with the provisions and procedures set forth in Schedule B (Baseline Energy Consumption; Methodology to Adjust Baseline) and Schedule C (Savings Measurement and Verification Plan; Post-Retrofit M&V Plan; Annual M&V Reporting Requirements) by at least \_\_\_% after adjustments for climatic variations.

GG. 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 Project Site(s) by the Agency; or
- ii) hours of operation for the Project Site(s) or for any equipment or energy using systems operating at the Project Site(s); or
- iii) Permanent changes in the comfort and service parameters set forth in Schedule U (Standards of Comfort); or
- iv) occupancy of the Project Site(s); or
- v) structure of the Project Site(s); or
- vi) types and quantities of equipment used at the Project Site(s) or
- vii) modification, renovation or construction at the Project Site(s); or
- viii) the Agency's failure to provide maintenance of and repairs to the Equipment in accordance with Schedule CC (Agency's Maintenance Responsibilities); or
- ix) any other conditions other than climate affecting energy use at the Project Site(s) including but not limited to the replacement, addition or removal of energy and water consuming devices whether plug in or fixed assets,
- x) casualty or condemnation of the Project Site(s) or Equipment, or
- xi) changes in utility provider or utility rate classification, or
- xii) any other conditions other than climate affecting energy or water use at the Project Site(s).
- xiii) Modifications, alterations or overrides of the energy management system schedules or hours of operation, set back/start up or holiday schedules.

**29. Reported Material Changes, Notice by Agency**

*This section requires the Agency to notify the Contractor in writing if there are any actual or planned changes to the facility which would affect energy consumption by more than the specified percentage. In the event of an emergency or situation that would prevent advance notification; the Agency fhas a specified number of hours to inform the contractor that a Material Change has occurred.*

The Agency shall use its best efforts to deliver to the Contractor a written notice describing all actual or proposed Material Changes in the Project Site(s) or in the operations of the Project Site(s) 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 Contractor of Material Changes which results 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.

**30. Other Adjustments**

*This section states that if all building conditions and operations stay the same, then energy consumption will not vary more than the negotiated percentage during any month when compared to the baseline use for that month and after adjustments for weather are made. See above discussion. In the event such a variation occurs, the Contractor will try to determine the cause of the deviation and report its findings to the Agency. The Contractor and Agency will then determine what adjustments will be made to the baseline as described in **Schedule B (Baseline Energy Consumption; Methodology to Adjust Baseline)**.*

As agreed in **Section 29 (Reported Material Changes; Notice by Agency)** Agency will alert Contractor of materials changes as known. Both parties have a vested interest in meeting the guaranteed savings of the Contract. As such, the Contractor shall work with Agency to investigate, identify and correct any changes that prevent the guaranteed savings from being realized. As a result of such investigation, Contractor and Agency shall determine what, if any, adjustments to the baseline will be made in accordance with the provisions set forth in **Schedule B (Baseline Energy Consumption; Methodology to Adjust Baseline)** and **Schedule C (Savings Measurement and Verification Plan; Post-Retrofit M&V Plan; Annual M&V Reporting Requirements)**. Any disputes between the Agency and the Contractor concerning any such adjustment shall be resolved in accordance with the provisions of **Schedule JJ (Alternative Dispute Resolution Procedures)** hereto.

**31. Corrective Action; Accuracy of the Services**

*This section directs the Contractor to protect the Project Site(s) and its contents, and to repair and restore to the original condition any damage caused by the Contractor in connection with this contract. Any costs incurred to correct such damage shall be paid by the Contractor. The Contractor is solely responsible for the technical professional accuracy of all work performed under the Contract, including work done by subcontractors or others.*

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

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

**32. Annual Reporting Requirements; Annual ENERGY STAR Rating**

At the end of each year during the guarantee period as specified in Schedule A (Savings Guarantee) and no later than ninety (90) days thereafter, the Contractor shall complete and submit the data required in Schedule C (Savings Measurement and Verification Plan; Post-Retrofit M&V Plan; Annual M&V Reporting Requirements). The Contractor shall provide an ENERGY STAR rating for each eligible facility for each year of the guarantee period if applicable.

**33. Other Documents**

*This section makes the original Request for Proposals (RFP) and the selected Contractor's proposal part of the contract. It also acknowledges the completion of the Contractor's Technical Energy Audit Report and its approval and acceptance by the Agency. It is recommended that the original Technical Energy Audit Report in its entirety be attached and/or referenced as an Exhibit to this contract. It is important to note the last sentence of this provision makes it clear that if there is any future discrepancy between the Technical Energy Audit Report and any technical schedule(s), the terms of this contract shall apply.*

This Contract incorporates herein and makes a part hereof the entire Request for Proposal and Project Development Proposal, labeled Appendix A and B, respectively. Notwithstanding, the provisions of this Contract and the attached Schedules, Exhibits and Appendices shall govern in the event of any inconsistencies between the Investment-Grade Energy Audit Report and the provisions of this Contract.

**34. Energy and Cost Savings Guarantee**

*This section establishes the term of the Energy and Cost Savings Guarantee to be on an annual basis and structured to cover any and all annual payments (debt service/lease payment and on-going Contractor fees) to be made by the Agency. It ensures that the Contractor's savings guarantee will at least cover annual project lease-purchase costs (principal and interest) and all annual Contractor service fees for maintenance.*

Contractor has formulated and, subject to the adjustments provided for in Sections 28, 29 and 30

(Material Changes), has guaranteed the annual level of energy and water cost savings to be achieved as a result of the installation and operation of the Equipment and provision of services provided for in this Contract in accordance with the methods of savings measurement and verification as set forth in Schedule C (Savings Measurement and Verification Plan; Post-Retrofit M&V Plan; Annual M&V Reporting Requirements). The Energy and Cost Savings Guarantee is set forth in annual increments for the term of the Contract as specified in Schedule A (Savings Guarantee) and has been structured by the Contractor to be sufficient to cover any and all annual payments required to be made by the Agency as set forth in Schedule J (Compensation to Contractor for Annual Services) and Schedule I (Financing Agreement and Payment Schedule).

**35. Annual Review and Reimbursement/Reconciliation**

*At the end of each year of this Contract and within a specified number of days, there will be a review and reconciliation of the actual achieved savings (subject to any adjustments made for weather, occupancy, operations etc.) with the Contractor's guaranteed savings. If there is a savings shortfall, the Contractor is contractually liable to reimburse the Agency for the difference between what was actually achieved and the amount guaranteed. Annual savings shall exceed annual payments each and every year while this Contract is in effect. This means that excess savings in other years and interim savings during the construction period will not be allocated to meet shortfalls in any year. Annual payments include debt service, ESCO fees, maintenance services, monitoring services, and other services. Agency may negotiate to receive cash, equipment or services equivalent to any deficiency in savings.*

JJ. Energy-related cost savings shall be measured and/or calculated as specified in Schedule C (Savings Measurement and Verification Plan; Post-Retrofit M&V Plan; Annual M&V Reporting Requirements) and a report provided within ninety (90) days of the end of the year for the previous year for each anniversary of the Commencement Date.

KK. Annual savings shall exceed annual payments each and every year while this Contract is in effect. In the event the Energy and Cost Savings achieved during such guarantee year are less than the Guaranteed Energy and Cost Savings as defined in Schedule A (Savings Guarantee), Contractor shall pay the Agency an amount equal to the deficiency.

LL. The Contractor shall remit such payments to the Agency within \_\_\_ days of written notice by the Agency of such monies due. Such excess savings will be retained by

Agency and will not be allocated to shortfalls in savings in other years. In no event shall credit for excess savings be used to satisfy saving guarantees in any other year(s) of the Contract.

**36. Contractor Compensation and Fees**

*This section ensures that the Contractor's savings guarantee will, at a minimum, cover annual project financing costs (principal and interest). In addition, it states that all annual Contractor service fees for maintenance will also be paid from savings.*

Contractor has structured the Energy and Cost Savings Guarantee referred to in Section 34 above, 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 Contractor under this Contract as set forth in Schedule I (Financing Agreement and Payment Schedule). Actual energy and operations savings achieved by Contractor through the operation of Equipment and performance of services by Contractor shall be sufficient to cover any and all annual fees to be paid by Agency to Contractor for the provision of services as set forth and in accordance with the provisions of Schedules J (Compensation to Contractor) and BB (Contractor's Maintenance Responsibilities).

**37. Billing Information Procedures**

A. Payments due to Contractor shall be calculated each \_\_\_\_\_ in the following manner.

i) By the \_\_\_\_\_ day after receipt, Agency shall provide Contractor with copies of all energy bills for the Project Site(s) which it shall have received for the preceding month;

ii) Upon receipt of the required information, Contractor shall calculate the savings in accordance with the agreed-upon calculation formulae in Schedule C (Savings Measurement and Verification Plan; Post-Retrofit M&V Plan; Annual M&V Reporting Requirements).

MM. Based upon paragraphs (i) and (ii) above, Contractor 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 C (Savings Measurement and Verification Plan; Post-Retrofit M&V Plan; Annual M&V Reporting Requirements) and for the services as provided for in Schedule J (Compensation to Contractor for Annual Services).

The invoice will set forth the total \_\_\_\_\_ payment due from Agency.  
NN.

**38. Payment**

Agency shall pay Contractor within \_\_\_\_\_ days of receipt of Contractor's invoice.

**39. Effective Date of Payment Obligation**

*This section states that no Contractor fees for ongoing maintenance, monitoring or other services shall be paid until all equipment is installed and operating in accordance with the agreed upon Construction Schedule and Agency has approved the completed installation and signed the Exhibit VI (Certificate of Acceptance—Installed Equipment).*

Notwithstanding the above provisions, Agency shall not be required to begin any payments to Contractor under this Contract unless and until all equipment installation is completed by Contractor in accordance with the provisions of Section 16 (Construction Schedule; Equipment Installation) and Schedule T (Systems Start-Up and Commissioning; Operating Parameters of Installed Equipment), and accepted by Agency as evidenced by the signed Certificate of Acceptance as set forth in Exhibit VI (Certificate of Acceptance—Installed Equipment), and unless and until said equipment is fully and properly functioning.

**40. Open Book Pricing**

*This section establishes that the Contractor will fully disclose all costs, providing access to records for all labor and material costs, making them available for three years beyond final payment.*

Open book pricing will be required, such that the Contractor shall fully disclose all costs of materials and labor purchased and subcontracted by the Contractor and a list of hourly rates and position descriptions for labor or services provided by the Contractor. Estimates for number of hours required for the project and deviations of these budgeted hours shall require prior written approval by the owner or shall not be paid. Contractor shall maintain cost accounting records on authorized work performed under actual costs for labor and material, or other basis requiring accounting records. Contractor shall afford Agency access to these records and preserve them for a period of three (3) years after final payment. Costs will be evaluated through price analysis to compare costs with reasonable criteria such as established catalog and market prices or historical prices. The pricing methodology and individual cost markups disclosed during preliminary contract negotiations will be expected to be applied, providing the scope and size of the project remain the same as assumed when markups were disclosed.

**41. Ownership of Certain Proprietary Property Rights**

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

Agency shall not, by virtue of this Contract, 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 Contractor 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 guaranteed utility consumption reductions for the specified contract term. Contractor shall not be liable for providing new versions of software or other enhancements if or unless such new versions or enhancements are necessary to achieve the guaranteed utility consumption reductions.

**42. Ownership of Existing Equipment**

*This provision states that the Agency has ownership of all existing equipment and that the Contractor shall notify the Agency in writing of what equipment and materials are to be replaced. If the Agency chooses to keep the equipment to be replaced, the Contractor will be notified and the Agency responsible for identifying the location of where the property is to be stored or relocated. The Contractor is responsible for all equipment and materials to be disposed. The exception to this is the treatment of any hazardous or environmentally sensitive materials.*

Ownership of the equipment and materials presently existing at the Project Site(s) at the time of execution of this Contract shall remain the property of the Agency even if it is replaced or its operation made unnecessary by work performed by Contractor pursuant to this Contract. If applicable, Contractor shall advise the Agency in writing of all equipment and materials to be replaced at the Project Site(s) and the Agency shall within \_\_\_\_\_ days designate in writing to the Contractor which equipment and materials that should not be disposed of off-site by the Contractor. 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 Contractor shall be responsible for the disposal of all equipment and materials designated by the Agency as disposable off-site in accordance with all applicable laws and regulations regarding such disposal.

**43. Damages to Equipment or Property**

*This section needs to reflect the individual Agency's standard requirements with regard to insurance and indemnification.*

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

**44. Liabilities**

Neither party shall be liable for any special, incidental, indirect, punitive or consequential damages, arising out of or in connection with this Contract. Further, the liability of either party under this Contract shall not exceed the Contract Sum in the aggregate.

**45. Appropriations**

*This section protects the Agency in the event no funds or insufficient funds are appropriated to cover the financial payments due to the Contractor under the terms of this Contract, in effect terminating the contract with no penalty to the Agency. This is a standard provision in public sector performance contracting and is generally accepted by the ESCO industry since it is unlikely that funding for utilities (source of funds) would be withheld.*

The terms of this Agreement are contingent upon sufficient appropriations and authorization being made by the Legislature of New Mexico for the performance of this Agreement. If sufficient appropriations and authorization are not made by the Legislature, this Agreement shall terminate on the last day of the fiscal year for which appropriations were made, without penalty or expense to the Agency of any kind whatsoever, except as to the portions of payments herein agreed upon for which Agency and/or other funds shall have been appropriated and budgeted or are otherwise available, and upon written notice being given by the Agency to the Contractor. The Agency's decision as to whether sufficient appropriations are available shall be accepted by the Contractor and shall be final. If the Agency proposes an amendment to the Agreement to unilaterally reduce funding, the Contractor shall have the option to terminate the Agreement or to agree to the reduced funding, within thirty (30) days of receipt of the proposed amendment.

**46. Status of Contractor**

The Contractor and its agents and employees are independent contractors performing professional services for the Agency and are not employees of the State of New Mexico. The Contractor and its agents and employees shall not accrue leave, retirement, insurance, bonding, use of state vehicles, or any other benefits afforded to employees of the State of New Mexico as a result of this Agreement. The Contractor acknowledges that all sums received hereunder are reportable by the Contractor for tax purposes, including without limitation, self-employment and business income tax. The Contractor agrees not to purport to bind the State of New Mexico unless the Contractor has express written authority to do so, and then only within the strict limits of that authority.

**47. Subcontracting**

The Contractor shall not subcontract any portion of the services to be performed under this Agreement without the prior written approval of the Agency.

**48. Release**

Final payment of the amounts due under this Agreement shall operate as a release of the Agency, its officers and employees, and the State of New Mexico from all liabilities, claims and obligations whatsoever arising from or under this Agreement.

**49. Confidentiality**

Any confidential information provided to or developed by the Contractor in the performance of this Agreement shall be kept confidential and shall not be made available to any individual or organization by the Contractor without the prior written approval of the Agency.

**50. Product of Service – Copyright**

All materials developed or acquired by the Contractor under this Agreement shall become the property of the State of New Mexico and shall be delivered to the Agency no later than the termination date of this Agreement. Nothing developed or produced, in whole or in part, by the Contractor under this Agreement shall be the subject of an application for copyright or other claim of ownership by or on behalf of the Contractor.

**51. Conflict of Interest; Governmental Conduct Act**

The Contractor warrants that it presently has no interest and shall not acquire any interest, direct or indirect, which would conflict in any manner or degree with the performance or services required under the Agreement. The Contractor certifies that the requirements of the Governmental Conduct Act, Sections 10-16-1 through 10-16-18, NMSA 1978, regarding contracting with a public officer or state employee or former state employee have been followed.

**52. Amendment**

This Agreement shall not be altered, changed or amended except by instrument in writing executed by the parties hereto.

**53. Merger**

This Agreement incorporates all the Agreements, covenants and understandings between the parties hereto concerning the subject matter hereof, and all such covenants, Agreements and understandings have been merged into this written Agreement. No prior Agreement or understanding, oral or otherwise, of the parties or their agents shall be valid or enforceable unless embodied in this Agreement.

**54. Penalties for Violation of Law**

The Procurement Code, Sections 13-1-28 through 13-1-199, NMSA 1978, imposes civil and criminal penalties for its violation. In addition, the New Mexico criminal statutes impose felony penalties for illegal bribes, gratuities and kickbacks.

**55. Equal Opportunity Compliance**

Contractor agrees to abide by all federal and state laws and rules and regulations, and executive orders of the Governor of the State of New Mexico, pertaining to equal employment opportunity. In accordance with all such laws of the State of New Mexico, the Contractor assures that no person in the United States shall, on the grounds of race, religion, color, national origin, ancestry, sex, age, physical or mental handicap, or serious medical condition, spousal

affiliation, sexual orientation or gender identity, be excluded from employment with or participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity performed under this Agreement. If Contractor is found not to be in compliance with these requirements during the life of this Agreement, Contractor agrees to take appropriate steps to correct these deficiencies.

**56. Applicable Law**

The laws of the State of New Mexico shall govern this Agreement, without giving effect to its choice of law provisions. Venue shall be proper only in a New Mexico court of competent jurisdiction in accordance with Section 38-3-1 (G) NMSA 1978. By execution of this Agreement, Contractor acknowledges and agrees to the jurisdiction of the courts of the State of New Mexico over any and all lawsuits arising under or out of any term of this Agreement.

**57. Insurance**

At all times during the term of this Contract, Contractor shall maintain in full force and effect, at its expense: (1) Workmen's Compensation Insurance sufficient to cover all of the employees of (Contractor) working to fulfill this Contract, and (2) Casualty and Liability Insurance on the Equipment and Liability Insurance for its employees and the possession, operation, and service of the Equipment. The limits of such insurance shall be not less than \$\_\_\_\_\_ for injury to or death of one person in a single occurrence and \$\_\_\_ for injury to or death of more than one person in a single occurrence and \$\_\_\_\_\_ for a single occurrence of property damage. Such policies shall name the Agency as an additional insured.

Prior to commencement of work under this Contract, Contractor 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.

**58. Workers Compensation**

The Contractor agrees to comply with state laws and rules applicable to workers compensation benefits for its employees. If the Contractor fails to comply with the Workers Compensation Act and applicable rules when required to do so, this Agreement may be terminated by the Agency.

**59. Records and Financial Audit**

The Contractor shall maintain detailed time and expenditure records that indicate the date; time, nature and cost of services rendered during the Agreement's term and effect and retain them for a period of three (3) years from the date of final payment under this Agreement. The records shall be subject to inspection by the Agency, the Department of Finance and Administration and the State Auditor. The Agency shall have the right to audit billings both before and after payment. Payment under this Agreement shall not foreclose the right of the Agency to recover excessive or illegal payments

**60. Indemnification**

The Contractor shall defend, indemnify and hold harmless the Agency and the State of New Mexico from all actions, proceeding, claims, demands, costs, damages, attorneys' fees and all other liabilities and expenses of any kind from any source which may arise out of the performance of this Agreement, caused by the negligent act or failure to act of the Contractor, its officers, employees, servants, subcontractors or agents, or if caused by the actions of any client of the Contractor resulting in injury or damage to persons or property during the time when the Contractor or any officer, agent, employee, servant or subcontractor thereof has or is performing services pursuant to this Agreement. In the event that any action, suit or proceeding related to the services performed by the Contractor or any officer, agent, employee, servant or subcontractor under this Agreement is brought against the Contractor, the Contractor shall, as soon as practicable but no later than two (2) days after it receives notice thereof, notify the legal counsel of the Agency and the Risk Management Division of the New Mexico General Services Department by certified mail.

**61. Invalid Term or Condition**

If any term or condition of this Agreement shall be held invalid or unenforceable, the remainder of this Agreement shall not be affected and shall be valid and enforceable.

**62. Enforcement of Agreement**

A party's failure to require strict performance of any provision of this Agreement shall not waive or diminish that party's right thereafter to demand strict compliance with that or any other provision. No waiver by a party of any of its rights under this Agreement shall be effective unless express and in writing, and no effective waiver by a party of any of its rights shall be effective to waive any other rights.

**63. Conditions Beyond Control of the Parties**

If a party ("performing party") shall be unable to reasonably perform any of its obligations under this Contract due to acts of God, insurrections or riots, or similar events, this Contract shall at the other party's option (i) remain in effect but said performing party's obligations shall be suspended

until the said events shall have ended; or, (ii) be terminated upon ten (10) days notice to the performing party, in which event neither party shall have any further liability to the other.

**64. Events of Default by Agency.**

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

**65. Events of Default by Contractor**

- A. Each of the following events or conditions shall constitute an "Event of Default" by Contractor.
- i) the standards of comfort and service set forth in Schedule U (Standards of Comfort) are not provided due to failure of Contractor to properly design, install, maintain, repair or adjust the Equipment except that such failure, if corrected or cured within days after written notice by Agency to Contractor demanding that such failure be cured, shall be deemed cured for purposes of this Contract.
  - ii) any representation or warranty furnished by Contractor in this Contract is false or misleading in any material respect when made;
  - iii) failure to furnish and install the Equipment and make it ready for use within the time specified by this Contract as set forth in Schedule R (Equipment to be Installed by Contractor) and Schedule S (Construction and Installation Schedule);
  - iv) provided that the operation of the facility is not adversely affected and provided that the standards of comfort in Schedule U (Standards of Comfort) are maintained, any failure by Contractor to perform or comply with the terms and conditions of this Contract, including breach of any covenant contained herein except that such failure, if corrected or cured within days after written notice by the Agency to Contractor demanding that such failure to perform be cured, shall be deemed cured for purposes of this Contract;
  - v) any lien or encumbrance upon the equipment by any subcontractor, laborer or material vendor of Contractor;
  - vi) the filing of a bankruptcy petition whether by Contractor or its creditors against Contractor which proceeding shall not have been dismissed within \_\_\_ days of its

filing, or an involuntary assignment for the benefit of all creditors or the liquidation of Contractor.

vii) failure by the Contractor to pay any amount due the Agency or perform any obligation under the terms of this Contract or the Energy and Cost Savings Guarantee as set forth in Schedule A (Savings Guarantee).

**66. Remedies Upon Default by Agency**

If an Event of Default by Agency occurs, Contractor may, without a waiver of other remedies which exist in law or equity, exercise any 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.

**67. Remedies Upon Default by Contractor**

In the Event of Default by Contractor, Agency may exercise any remedies at law or equity, or institute other proceedings, including, without limitation, bringing an action or actions from time to time for specific performance, and/or for the recovery of amounts due and unpaid and/or for damages, which shall include all costs and expenses reasonably incurred, including attorney's fees.

**68. Assignment**

The Contractor shall not assign or transfer any interest in this Agreement or assign any claims for money due or to become due under this Agreement without the prior written approval of the Agency.

**69. Assignment by Contractor**

*This assignment provision first acknowledges that the Agency selected the Contractor for its unique expertise and qualifications to perform the services specified in the contract. The Contractor may not assign this contract to another Contractor without the written approval of the Agency and any Contractor assigned this contract must fully comply with all terms and conditions. In addition, the Contractor and any assignee remain contractually liable to the Agency for fulfilling all of the Contractor's obligations as specified in the contract.*

The Contractor may, with prior written approval of the Agency, which consent shall not be unreasonably withheld, delegate its duties and performance under this Contract, and/or utilize Contractors, provided that any assignee(s), delegee(s), or Contractor(s) shall fully comply with the terms of this Contract. Notwithstanding the provisions of this paragraph, the Contractor shall remain jointly and severally liable with its assignees(s), or transferee(s) to the Agency for all of its obligations under this Contract.

**70. Assignment by Agency**

*In turn, this provision allows the Agency to transfer or assign this contract to a new building owner or occupant. the Agency and its assignee; however, still remain responsible to the Contractor for the Agency's obligations as specified in the contract.*

Agency may transfer or assign this Contract 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 Contractor for all of its obligations under this Contract.

**71. Representations and Warranties**

*This boilerplate provision states that each party has the requisite authority and ability to enter into this contract.*

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

**72. Additional Representations of the Parties**

*These additional representations address several areas specific to the performance contract. The Agency certifies it has or will provide the Contractor will all energy and energy-related records and all future records to be provided will be truthful and accurate. The Agency also declares it has not entered into any leases or service contracts relating to energy equipment or servicing of pre-existing equipment and will notify the Contractor within a specified period of time if it does so.*

- A. Agency hereby warrants, represents and promises that:

i) it has provided or shall provide timely to Contractor, all records relating to energy usage and energy-related maintenance of Project Site(s) requested by Contractor and the information set forth therein is, and all information in other records to be subsequently provided pursuant to this Contract 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 Project Site(s) or with regard to servicing any of the energy related equipment located in the Project Site(s). Agency shall provide Contractor with copies of any successor or additional leases of energy efficiency equipment and contracts for management or servicing of preexisting equipment at Project Site(s) which may be executed from time to time hereafter within \_\_\_\_\_ days after execution thereof.

B. Contractor hereby warrants, represents and promises that before commencing performance of this Contract:

i) it shall have become licensed or otherwise permitted to do business in the State of New Mexico.

ii) it shall have provided proof and documentation of required insurance and bonds pursuant to this Contract;

iii) it shall make available, upon reasonable request, all documents relating to its performance under this Contract, including all contracts and subcontracts entered into;

iv) it shall use qualified subcontractors who are qualified, licensed and bonded in this state to perform the work so subcontracted pursuant to the terms hereof;

v) the Equipment will meet or exceed the provisions set forth in Section 17 (Systems Start Up and Equipment Commissioning) and in Schedule T (Systems Start-Up and Commissioning; Operating Parameters of Installed Equipment).

vi) the Equipment is or will be compatible with all other Project Site(s) mechanical and electrical systems, subsystems, or components with which the Equipment interacts, and that, as installed, neither the Equipment nor such other systems, subsystems, or components will materially adversely affect each other as a direct or indirect result of Equipment installation or operation;

vii) 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 Contract.

**73. Construction Performance and Payment Bonds, Labor and Material Payment Bonds**

Such executed bonds are incorporated herein by reference as Exhibit I (Performance Bond) and Exhibit II (Labor and Material Payment Bond, if applicable).

**74. Further Documents**

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

**75. Methods of Operation by Agency**

The parties acknowledge and agree that said Energy and Cost Savings would not likely be obtained unless certain procedures and methods of operation designed for energy and water conservation shall be implemented, and followed by Agency on a regular and continuous basis.

**76. Agency's Maintenance Responsibilities**

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

Agency agrees that it shall adhere to, follow and implement the energy conservation procedures and methods of operation to be set forth on Schedule CC (Agency Maintenance Responsibilities), to be attached hereto and made a part hereof after Agency's approval, such approval not to be unreasonably withheld, conditioned or delayed.

**77. Inspection of Project Site(s)**

Agency agrees that Contractor shall have the right once a month, with prior notice, to inspect Project Site(s) to determine if Agency is complying, and shall have complied with its obligations as set forth in **Section 76 (Agency's Maintenance Responsibilities)**. For the purpose of determining Agency's said compliance, the checklist to be set forth at **Schedule DD (Facility Maintenance Checklist)** as completed and recorded by Contractor during its monthly inspections, shall be used to measure and record Agency's said compliance. Agency shall make the Project Site(s) available to Contractor for and during each monthly inspection, and shall have the right to witness each inspection and Contractor's recordation on the checklist. Agency may complete its own checklist at the same time. Contractor agrees to not interfere with the Agency operations during any monthly inspection.

**78. Waiver of Liens**

Contractor shall 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.

**79. Conflicts of Interest**

Conflicts of interest relating to this Contract are strictly prohibited. Except as otherwise expressly provided herein, neither party hereto nor any director, employee or agent of any party hereto shall give to or receive from any director, employee or agent of any other party hereto any gift, entertainment or other favor of significant value, or any commission, fee or rebate in connection with this Contract. Likewise, neither party hereto nor any director, employee or agent of either party hereto, shall without prior notification thereof to the other party enter into any business relationship with any director, employee or agent of the other party or of any affiliate of the other party, unless such person is acting for and on behalf of the other party or any such affiliate. A party shall promptly notify the other party of any violation of this section and any consideration received as a result of such violation shall be paid over or credited to the party against whom it was charged. Any representative of any party, authorized by that party, may audit the records of the other party related to this Contract, upon reasonable notice and during regular business hours

including the expense records of the party's employees involved in this Contract, upon reasonable notice and during regular business hours, for the sole purpose of determining whether there has been compliance with this section.

**80. Notices**

Any notice required to be given to either party by this Agreement shall be in writing and shall be delivered in person, by courier service or by U.S. mail, either first class or certified, return receipt requested, postage prepaid, as follows:

To the Agency [insert name, address and email]

To the Contractor [insert name, address and email]

**81. Non-Substitutions**

*In the rare event that funds were not appropriated or the Agency is in default, and to protect the Contractor, this provision prevents the Agency from securing funding for the same purposes for a period of one year following the termination of the contract.*

In the event of a termination of this contract due to the non-appropriation of funds or in the event this Contract is terminated by Contractor due to a default by the Agency, the Agency agrees, to the extent permitted by state law, not to purchase, lease, rent, borrow, seek appropriations for, acquire or otherwise receive the benefits of any of the same and unique services performed by Contractor under the terms of this Contract for a period of three-hundred sixty five (365) calendar days following such default by Agency, or termination of this Contract due to non-appropriations.

**82. Authority**

If Contractor is other than a natural person, the individual(s) signing this Agreement on behalf of Contractor represent and warrant that he or she has the power and authority to bind Contractor, and that no further action, resolution, or approval from Contractor is necessary to enter into a binding contract. (I've encountered some situations where there was a question whether the person signing had authority; having the contractor assure the agency the person signing has authority creates an argument the agency has no obligation to check.)

IN WITNESS WHEREOF, the parties have executed this Agreement as of the date of signature by the DFA Contracts Review Bureau below.

By: \_\_\_\_\_ Date: \_\_\_\_\_  
Agency

By: \_\_\_\_\_ Date: \_\_\_\_\_  
Agency's Legal Counsel-Certifying legal sufficiency

By: \_\_\_\_\_ Date: \_\_\_\_\_  
Contractor

The records of the Taxation and Revenue Department reflect that the Contractor is registered with the Taxation and Revenue Department of the State of New Mexico to pay gross receipts and compensating taxes.

ID Number: 00-000000-00-0

By: \_\_\_\_\_ Date: \_\_\_\_\_  
Taxation and Revenue Department

This Agreement has been approved by the DFA Contracts Review Bureau:

By: \_\_\_\_\_ Date: \_\_\_\_\_  
DFA Contracts Review Bureau

## Performance Measures

(Performance Measures should be based on the Scope of Work and must be tied to the Agency's Strategic Plan. the Strategic Plan should be referenced in the Performance Measures and the applicable part of the Strategic Plan copied below or in an attachment. to the extent possible based on the nature of the work to be performed, the Performance Measures should be "Output" oriented and specify an "Outcome."

Performance Measures in the Scope of Work shall contain measurable goals and objectives that are linked to the Performance Measures of the Agency's Strategic Plan.

**Example:** Goal: Reduce or Increase or Other Service [insert blank].<sup>1</sup>

Objective: To reduce or increase or Other Service [insert blank] by [blank] percent or by a certain time.<sup>2</sup>

Activities: [Insert what services the Contractor is expected to perform to accomplish goals and objectives including an evaluation of the process and the outcome as well as provides efficiency measures that relate efforts to outputs of services].

**OR:** Through satisfactory completion of the Scope of Work set forth above and submission of acceptable Deliverables, the Contractor will assist the Agency to meet the portions of its Strategic Plan set forth below *(insert additional language if necessary to describe how Contractor's work will assist the Agency to fulfill its duties)*.

**APPENDIX P – Guidelines for Guaranteed Energy Efficiency Projects**

**PUBLIC FACILITY ENERGY EFFICIENCY AND WATER CONSERVATION ACT**

**GUIDELINES  
FOR  
GUARANTEED ENERGY EFFICIENCY PROJECTS**

**January 5, 2011**

**NEW MEXICO ENERGY, MINERALS AND NATURAL RESOURCES DEPARTMENT**

**ENERGY CONSERVATION AND MANAGEMENT DIVISION**

**1220 SOUTH ST. FRANCIS DRIVE**

**SANTA FE, NEW MEXICO 87505**

**PHONE (505) 476-3310**

**FAX (505) 476-3322**

**[www.CleanEnergyNM.org](http://www.CleanEnergyNM.org)**

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## Guidelines for Guaranteed Energy Efficiency Projects

### Definitions

"Approved Project Savings" are those savings allowed by the Energy, Minerals and Natural Resources Department (EMNRD) and the Public Education Department (PED). For example, the Public Education Department does not allow savings of certain funds in a project. Savings are not allowed from future upgrades, planned equipment upgrades, equipment life extension, engineering fee reduction, or improved learning environment.

"Coordinating Agency" means a state entity legally constituted to provide either administrative control or services for a group of institutions and which acts on their behalf with respect to their participation in the program.

"Energy Conservation Measure" (ECM) means an energy efficiency, renewable energy, clean fuels, efficient transportation, or energy management measure that reduces energy consumption or energy costs.

"Maintenance and Operating Cost Savings" may be Included in a guaranteed energy savings contract only when they are the direct result of ECMs, represent a reduction in actual costs, or result from the normal operation of the equipment or buildings.

"Operating costs" means the costs directly attributable to operating energy using equipment in a building to achieve or maintain specified environmental comfort levels. Examples of these costs include labor costs to repair equipment and replace filters and belts. In addition, costs of repair parts and materials are also eligible.

"Qualified Energy Savings Projects" means projects largely comprised of energy efficiency or conservation measures installed to reduce energy costs. Information must be submitted to document the energy cost savings.

"Qualified Provider" means a person or Energy services company (ESCO) experienced in the design, implementation, and installation of energy or water conservation measures and who meets the experience qualifications developed by EMNRD for ECMs or Office of the State Engineer for WCMs.

### Guidelines Summary

1. The person or ESCO applicant must provide sufficient information to allow EMNRD to consider certification of Qualified Energy Savings Projects, including completion of the ESCO Application in Section I and technical information in Section II.
2. It is requested that the ESCO Application form in Section I be used to provide background information and project team members, but technical information requested in Section II may be provided by either using the format shown or the ESCO's own format, as long as the information shown is provided.

3. Implementation of Guaranteed Energy Efficiency Projects are for State of New Mexico facilities of eligible governmental units and are governed by the Public Facility Energy Efficiency and Water Conservation Act [6-23 NMSA 1978].
4. Eligible governmental units are state government agencies, municipalities, K-12 public schools, and higher educational institutions.
5. Only Approved Project Savings shall be used to justify the project.
6. The entire project cost shall be guaranteed.
7. A maximum savings of 50% of total savings can come from maintenance and operations savings. A project may be carried out that only has energy or water conservation savings. Maximum maintenance savings from transportation measures or water conservation measures (WCMs) shall be considered on a case-by-case basis.
8. Savings of certain public school funding or bond funds are not allowed. Confirm these funds with PED.
9. Savings from future upgrades or planned equipment upgrades, equipment life extension, engineering fee reduction, improved learning environment and training costs are not allowed.
10. Savings listed in the proposal shall match line items in the public school or agency budgets. Identify budget line items that are affected by each ECM or WCM.
11. The Qualified Provider may use the latest U.S. Department of Energy projections developed by the Energy Information Administration for the Southwest region of the U.S., using a time horizon matching the term of the contract.
12. The baseline shall be supported with actual utility bills and shall be incorporated into the contract.
13. The schedule of payments shall be incorporated into the contract.
14. The Qualified Provider shall request or arrange for the wage rate determination for the project. The wage rate determination shall be posted on the site before the project starts.
15. The Qualified Provider shall incorporate gross receipts taxes in their proposal.
16. The Qualified Provider shall provide the Owner and EMNRD with sets of as-built drawings for projects that change the design or operation of a facility. The contractor may mark-up existing drawings and provide copies. The drawings shall be provided within 3 months of completion.

17. The Qualified Provider shall provide the Guarantee Bonds to the Owner at completion of the work.
18. The term of the contract shall not exceed the expected useful life of the most durable ECM or WCM of the proposal. Expected useful life shall be based on standards of the American Society of Heating, Refrigerating and Air-Conditioning Engineers (ASHRAE).
19. Replacement of equipment in ECMs or WCMs shall be included in the cost of the proposal if the useful life is less than the contract term.
20. The energy project shall meet state and federal regulations; funding source requirements, building energy code requirements, and government agency requirements that are in effect.



## I. QUALIFICATION CRITERIA

### Certification of Qualified Providers

The Public Facility Energy Efficiency and Water Conservation Act allows governmental units such as school districts, municipalities, counties, state agencies, higher education institutions, and other instrumentalities of the state to enter into guaranteed energy savings contracts to improve the energy efficiency of public buildings, water systems, and transportation systems. The Act permits governmental units to enter into long-term installment payment contracts and lease-purchase agreements of up to 25 years for the evaluation, recommendation, purchase, and installation of ECMs and WCMs. The contract term shall not exceed the useful life of the most durable ECM or WCM in the proposal. The Act requires certification by EMNRD that the ESCO applicant is a Qualified Provider that meets the experience requirements set by EMNRD and that the guaranteed energy savings from the ECMs proposed appear to be accurately estimated and reasonable. Water conservation projects are reviewed and approved by the Office of the State Engineer on a case-by-case basis.

The checklist for Qualified Providers shown below is a summary of the qualification criteria used by EMNRD in evaluating the ESCO applicant. EMNRD's evaluation will be based on the application form titled "Energy services company Application" and the form for references titled "Questionnaire for References."

#### Checklist for Qualified Providers (EMNRD use only)

1. Minimum 3 years experience in performing qualified energy projects that reduce energy consumption or costs. \_\_\_\_\_(Y/N)
2. Licensed construction contractors in New Mexico \_\_\_\_\_(Y/N)
3. Project references for all qualified energy projects of relevant type and size in the last 3 years. \_\_\_\_\_(Y/N)
4. State total number of successful projects. \_\_\_\_\_
5. A list of all agreements or contracts, including those which have been subject to early termination for any reason by either party in the previous 3 years, or that are in litigation. \_\_\_\_\_(Y/N)
6. At least 3 project references provided, which EMNRD may opt to contact. Overall rating of 39 points or greater out of a possible 65 total. Reference questions 1, 2, and 3 must receive an "Acceptable" or better rating. EMNRD will contact references to determine the rating and overall satisfaction. \_\_\_\_\_(Y/N)
7. Minimum 3 years experience of the supporting team, such as an energy auditor, designer, or contractor, in conducting energy audits of qualified energy projects. \_\_\_\_\_(Y/N)
8. Project certification by a registered professional engineer. \_\_\_\_\_(Y/N)

## Eligible Guaranteed Energy Efficiency Measures

According to the Public Facility Energy Efficiency and Water Conservation Act, the following qualify as energy conservation measures:

- A. "conservation-related cost savings" means cost savings, other than utility cost savings, in the operating budget of a governmental unit that are a direct result of energy or water conservation measures implemented pursuant to a guaranteed utility savings contract.
- B. "energy conservation measure" means a training program or modifications to a facility including systems or vehicles that is designed to reduce energy consumption or conservation related operating costs and may include:
  - (1) insulation of the building structure or systems within the building;
  - (2) storm windows or doors, caulking or weatherstripping, 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 the applicable state or local building code or nationally accepted standards for the lighting system after the proposed modifications are made;
  - (6) energy recovery systems;
  - (7) solar heating and cooling systems or other renewable energy systems;
  - (8) cogeneration or combined heat and power systems that produce steam, chilled water or forms of energy such as heat, as well as electricity, for use primarily within a building or complex of buildings;
  - (9) energy conservation measures that provide long-term operating cost reductions.
  - (10) Maintenance and operation management systems that provide long-term operating cost reductions;
  - (11) Traffic control systems; or
  - (12) Alternative fuel options or accessories for vehicles.

New Mexico Energy, Minerals and Natural Resources Department (EMNRD)  
 1220 S. St. Francis Dr., Santa Fe, NM 87505 [www.CleanEnergyNM.org](http://www.CleanEnergyNM.org)  
 (505) 476-3310

Application No. \_\_\_\_\_

For EMNRD use only  
 Form version date: 1/5/11

## Energy Services Company Application

*The following information must be provided to the EMNRD Energy Conservation and Management Division to certify that an Energy Services Company (ESCO) meets the required criteria for a qualified provider as required by the Public Facility Energy Efficiency and Water Conservation Act (6-23 NMSA 1978).*

### Contact Information

Name of Firm		Principal Contact	
Mailing Address <i>(Address, City, Zip Code)</i>			
Telephone Numbers		Email	
NM Registered Professional Engineer		Project Manager	

### Experience

Years experience as energy efficiency contractor	Number of qualified energy savings contracts undertaken by firm in past three years	
Summarize type and size of qualified energy savings projects implemented by ESCO or primary energy management contractor		

### Project Personnel

Name of Firm		Principal Contact	
Mailing Address <i>(Address, City, Zip Code)</i>			
Telephone Numbers		Email	
Project Responsibilities			
Experience, Licenses, and Certificates			

**Project Personnel (continued)**

Provide additional key personnel who will work on the project. Duplicate this page as necessary.

Name of Firm		Principal Contact	
Mailing Address <i>(Address, City, Zip Code)</i>			
Telephone Numbers		Email	
Project Responsibilities			
Experience, Licenses, and Certificates			

Name of Firm		Principal Contact	
Mailing Address <i>(Address, City, Zip Code)</i>			
Telephone Numbers		Email	
Project Responsibilities			
Experience, Licenses, and Certificates			

Name of Firm		Principal Contact	
Mailing Address <i>(Address, City, Zip Code)</i>			
Telephone Numbers		Email	
Project Responsibilities			
Experience, Licenses, and Certificates			

**References**

Provide a reference for each qualified energy savings project undertaken by firm in last three years.

Name of Client		Principal Contact	
Mailing Address <i>(Address, City, Zip Code)</i>			
Telephone Numbers	Email		
Project Description			
Name of Client		Principal Contact	
Mailing Address <i>(Address, City, Zip Code)</i>			
Telephone Numbers	Email		
Project Description			
Name of Client		Principal Contact	
Mailing Address <i>(Address, City, Zip Code)</i>			
Telephone Numbers	Email		
Project Description			

**References (continued)**

Provide a reference for each qualified energy savings project undertaken by firm in last three years. Duplicate this page as necessary.

Name of Client		Principal Contact	
Mailing Address <i>(Address, City, Zip Code)</i>			
Telephone Numbers	Email		
Project Description			
Name of Client		Principal Contact	
Mailing Address <i>(Address, City, Zip Code)</i>			
Telephone Numbers	Email		
Project Description			
Name of Client		Principal Contact	
Mailing Address <i>(Address, City, Zip Code)</i>			
Telephone Numbers	Email		
Project Description			

**Agreement**

The ESCO applicant named above and signing this statement through the authorized representative below agrees that all information provided in this application package is true and correct to the best of the authorized representative's knowledge. The applicant has read 6-23 NMSA 1978. The applicant understands that the purpose of this application is to evaluate ESCO qualifications and maintain a pool of qualified providers that may propose guaranteed utility savings contracts for governmental units under the Public Facilities Energy Efficiency and Water Conservation Act. The applicant is experienced in the design, implementation, and installation of energy conservation measures and meets EMNRD experience qualifications.

Printed Name of Authorized Representative	Title
Signature of Authorized Representative	Date



New Mexico Energy, Minerals and Natural Resources Department (EMNRD)  
 1220 S. St. Francis Dr., Santa Fe, NM 87505 [www.CleanEnergyNM.org](http://www.CleanEnergyNM.org)  
 (505) 476-3310

Application No. \_\_\_\_\_

For EMNRD use only  
 Form version date: 1/5/11

## Questionnaire for References

*ESCO References will be asked the following questions by EMNRD Energy Conservation and Management Division. The responses will be evaluated and will contribute to the ESCO's score. The evaluation is needed to certify that an Energy services company (ESCO) meets the required criteria for a qualified provider as required by the Public Facility Energy Efficiency and Water Conservation Act (6-23 NMSA 1978).*

### Question Scoring

Superior = 5 points  
 Acceptable = 3 points  
 Not Acceptable = 1 point

Project Name:

Reference:

ESCO:

### Experience

#### 1. Satisfaction with methods of measuring energy savings

Superior  Acceptable  Not Acceptable

Discussion

#### 2. Overall satisfaction with the project

Superior  Acceptable  Not Acceptable

Discussion

#### 3. Energy savings achieved to date (actual and/or avoided costs)

Superior  Acceptable  Not Acceptable

Discussion

### Management

#### 4. Frequency/clarity of ESCO communication with client representatives

Superior  Acceptable  Not Acceptable

Discussion

#### 5. ESCO responsiveness to specific user requests to resolve problems

Superior  Acceptable  Not Acceptable

Discussion

<b>6. ESCO's coordination of construction scheduling with building staff</b>		Superior <input type="checkbox"/>	Acceptable <input type="checkbox"/>	Not Acceptable <input type="checkbox"/>
Discussion				

<b>7. Ability of contractor to complete project on schedule</b>		Superior <input type="checkbox"/>	Acceptable <input type="checkbox"/>	Not Acceptable <input type="checkbox"/>
Discussion				

<b>8. Quality of training for facility personnel provided by ESCO</b>		Superior <input type="checkbox"/>	Acceptable <input type="checkbox"/>	Not Acceptable <input type="checkbox"/>
Discussion				

<b>Technical</b>				
------------------	--	--	--	--

<b>9. ESCO understanding of your facility systems</b>		Superior <input type="checkbox"/>	Acceptable <input type="checkbox"/>	Not Acceptable <input type="checkbox"/>
Discussion				

<b>10. Comprehensiveness of overall assessment of the facility by ESCO</b>		Superior <input type="checkbox"/>	Acceptable <input type="checkbox"/>	Not Acceptable <input type="checkbox"/>
Discussion				

<b>11. Completeness of installed retrofits</b>		Superior <input type="checkbox"/>	Acceptable <input type="checkbox"/>	Not Acceptable <input type="checkbox"/>
Discussion				

## II. CALCULATION PROCEDURES AND METHODOLOGIES

### Acceptable Evaluation Procedures for Guaranteed Energy Efficiency Measures

The Public Facility Energy Efficiency and Water Conservation Act requires certification by the Energy, Minerals and Natural Resources Department (EMNRD) that the guaranteed energy savings from the energy conservation measures (ECMs) proposed appear to be accurately estimated and reasonable. The following information must be provided to the EMNRD Energy Conservation and Management Division.

1. The minimum acceptable methodologies for evaluating ECMs shall be those established by the Federal Energy Management Program of the U.S. Department of Energy (DOE). Each measure proposed shall be presented in a manner that clearly lists the assumptions, energy savings, operational savings, construction, material costs, equipment, construction labor costs and administrative costs. EMNRD will not certify software methodologies and will not translate computer output.
2. Utility energy costs will be allowed to escalate by the amount documented by the local utility companies, New Mexico Public Service Commission, or as most recently published by the DOE Energy Information Administration for the Southwest region. Backup documentation for the escalation rate shall be submitted with the application. A discount factor shall not be applied to the results.
3. The energy cost savings of a project shall be no less than 50% of the cumulative amount of utility cost savings and conservation-related cost savings of the whole project. Energy savings are limited to metered, utility-supplied energy to the subject facility and do not include other incidental energy, such as that inherent in off-site material production or transportation to the site. Total project savings may include other operational cost savings, such as reduced labor and use of materials, provided such savings are clearly attributable to the project. For example, the installation of long-life lamps may reduce the labor required for lamp replacement. On the other hand, training in the use of an energy management system cannot be credited with labor or materials savings in any clear, predictable manner.
4. The Registered Professional Engineer hereby attests to the following by signing this form: "I am a licensed New Mexico professional engineer. I have experience with building energy systems, such as architectural elements; heating, ventilating and air conditioning systems; and water systems. I have experience in conducting energy audits, writing and presenting final energy audit reports, and design and construction of ECMs for buildings.

---

Signature of Registered Professional Engineer

Date

## Executive Summary of Proposed Project

A narrative providing an overview of the energy project must be provided. Include: building description and use, energy use characteristics, recommended operations and maintenance changes, selected ECMs or WCMs, conversion to renewable resources, and summary tables and graphs. Use additional pages or a separate document as necessary.

Summary Table of  
Guaranteed Energy Efficiency Measures (GEEMs)

BUILDING NAME:

GEEM CODE	TOTAL GEEM COST (\$)	OPERATIONS AND MAINTENANCE COSTS*		ENERGY COSTS*		USEFUL LIFE (YEARS)	PAYBACK (YEARS)
		BEFORE (\$)	AFTER (\$)	BEFORE (\$)	AFTER (\$)		
#1							
Brief Description:							
#2							
Brief Description:							
#3							
Brief Description							
#4							
Brief Description							
#5							
Brief Description							
#6							
Brief Description							
NET TOTAL SAVINGS							

Negative savings or net increase in cost should be in parenthesis ( ).

Proposed Schedule of  
Energy Efficiency Program Activities

(Revise milestones as appropriate for individual programs)

\_\_\_\_\_ Building Name

	Year	Year
Request for Proposals	J F M A M J J A S O N D	J F M A M J J A S O N D
Receive Proposals		
Evaluate Proposals		
Submit to Coordinating Agencies		
Certification by Energy, Minerals and Natural Resources Department		
Approved by Coordinating Agency		
Approved by Legislature		
Notice of Award to Contractor		
Design		
Construction		
Final Completion		
Monitoring		
Evaluation and Verification of Results		



Instructions for Baseline Energy Consumption

ENERGY CONSUMPTION & EXPENDITURE REPORT

1. Indicate Department/Agency, Division, School District, Local Government, University and Bureau designations.
2. Indicate building name(s) and inventory number(s) from "Inventory or Utilities for State Owned General Government Buildings." Identify location(s) with street address and contact telephone number. Use additional sheets to identify all buildings, if necessary. Describe prorating or utility bills among multiple buildings and /or users, if applicable.
3. Gross floor area (square feet) of building(s); indicate individual floor area by building number and total floor area of all buildings. See "Inventory of Utility for State-Owned General Government Buildings" for floor areas established by the General Services Department, Property Control Division.
4. Month corresponds to the calendar month in which majority of the utility billing period occurs.
5. Identify the Qualified Provider of electricity, the applicable account number, the number of the vendor's meter are the building and utility rate number. For additional meters use additional pages.
6. Specify the starting date of the billing period, as reported by the vendor on the monthly utility bill.
7. Electricity consumption, in units of kilowatt-hours (kWh), during the specified billing period, as reported by the vendor on the monthly utility bill.
8. Peak demand, in units of kilowatts (kW) and sometimes called "demand," during the specified billing period, as reported by the vendor on the monthly utility bill. If no peak demand is reported, then the building is not measured for demand and there are no charges; put "NA" for not applicable for each entry.
9. Total cost of electricity, as reported by the vendor in the monthly bill. The bill indicates costs for consumption, demand, fuel adjustment, basic service and applicable taxes.
10. Indicate heating fuel type used (i.e., natural gas, LP gas, wood).
11. Identify the Qualified Provider of the natural gas or other heating fuel, the applicable account number and the number of the vendor's meter at the building.
12. Specify the starting date of the billing period, as reported by the vendor on the monthly utility bill.
13. Heating fuel consumption, preferably in units of Therms (1 Therm = 100,000 British thermal units (Btu), during the specified billing period, as reported by the vendor on the monthly utility bill. Indicate other consumption units, if used (i.e., CCF, gallons, cords).
14. Total cost of natural gas or other heating fuel, as reported by the vendor in the monthly bill. The bill included costs for consumption, basic service, and applicable taxes.
15. Demand costs as reported by the vendor on the monthly utility bill. If no demand charge appears, put "N/A" for not applicable for each entity.
16. Sum the monthly values of the indicated columns: electricity consumption, electricity total cost, natural gas consumption, natural gas total cost and electric demand costs.
17. Submit the completed report, showing a full year of monthly data. This information establishes the baseline year for building(s) on energy consumption and cost.
18. Only indicate electrical energy consumption costs in dollars (\$) as a result of kilowatts hours (kWh) consumed.
19. The base for heating degree days shall be 65° F. The base for cooling degree days shall be 75° F as referenced in the New Mexico Climate Manual, Solar and Weather Data, New Mexico Energy Research and Development Institute.
20. Power factor adjustment changes are additional charges a utility company imposes if the power factor is usually less than 90%. Power factor is a ratio of Real Power divided by apparent power. A utility company provides apparent power. However, a customer is charged for real power. A poor power factor causes a utility to provide more power than is needed to do the work in the building electrical system.

## General Building Description

(Complete one form per building)

Agency or School Name: \_\_\_\_\_

<b>Building Profile Information</b>		Building Function / Use:	
Building Name and/or No.:			
Age of Building:		Total Gross Square Feet:	
Type of Wall Construction:		No. of Floors:	
Insulation in walls?		Yes	
Insulation in Ceiling?		No	
Type of Primary or Central Heating System: (e.g. gas-fired steam boiler, oil hot air furnace etc.)			
Type of Terminal Heating, i.e., How heat is delivered to most spaces: (e.g. radiator, fan coil unit, etc.)			
Type of Primary or Central Cooling System: (e.g. central swamp cooler, chiller, etc.)			
Type of Terminal Cooling: (e.g. unit ventilator, swamp cooler, etc.)			
Source of Domestic Hot Water (e.g. electric, natural gas, etc.)			
Predominant Type of Lighting:		Fluorescent	
Type of Special Systems: (e.g., food, services, laundry, etc.)			
Number of Desk Top Computers		Printers	
Number of Copying Machines		Typewriters	
<b>Building Occupancy and Use</b>			
Regular Session		Summer Session	
Weekdays		Saturday, Sunday, Holidays	
Average No. Of Occupants		Average No. of Occupants	
Hours of Occupancy		Hours of Occupancy	
Average No. of Occupants		Average No. of Occupants	
Hours of Occupancy		Hours of Occupancy	
Average No. of Occupants		Average No. of Occupants	
Hours of Occupancy		Hours of Occupancy	
Average No. of Occupants		Average No. of Occupants	
Hours of Occupancy		Hours of Occupancy	

Qualified Provider Representative filling out the form: \_\_\_\_\_ Agency Representative / Title: \_\_\_\_\_

## Description of Building Characteristics and Energy Data

Description of Building Characteristics: (Provide a complete building description including the dimensions, orientation, usage areas, usage patterns, building materials, and general state of maintenance. Include a sketch (floor plan) of the building showing its principal dimensions. List year the building and additions were made. (Use additional pages for more detailed description of any item in this application.)

Estimated remaining useful life of building: \_\_\_\_\_ years

### Operating Characteristics of Energy Using Systems

Provide a description of operating characteristics of building energy using systems, including the physical condition, present operating and maintenance practices, and approximation of system contribution to total energy consumption. Use additional space as needed.

#### Heating Systems -

#### Cooling Systems -

#### Domestic Hot Water Systems -

#### HVAC Auxiliaries (Ventilating and Air & Water Distribution Systems) -

Operating Characteristics of Energy Using Systems (continued)

Lighting Systems - (Describe current fixture lamp and ballast configuration.)

Laundry Systems -

Kitchen Systems -

Other Systems - (Laboratory fume hoods and equipment.)

Significant Energy Using Equipment or Appliances - (Examples - copying machines, vending machines, central computers, and hospital equipment.)

## Description and Analysis of All Guaranteed Energy Efficiency Measures Recommended

For each Guaranteed Energy Efficiency Measure (GEEM) recommended, complete one set of forms on the following pages. Proposed actions should be clear and specific. Complete backup calculations must be shown and supporting data for a GEEM must directly follow the page. The analyst should describe existing equipment, etc., and outline proposed changes in light of the current situation. Use only standard abbreviations and symbols.

The descriptions of each GEEM and supporting calculations should have a logical flow from beginning to end. Use explanatory phrases together with equations to show the logic of the calculation procedure.

The escalation rate for energy costs must be documented by a local utility company, New Mexico Public Service Commission, or in the latest publications issued by the U.S. DOE Energy Information Administration office. Document any escalation rates used for operations and maintenance costs.

The majority (more than half) of the total savings must come from energy savings.

The applicant may use the forms provided or may choose to have a similar outline using more space for any items requiring more explanation.

**Note: Demand charges are to be included in current energy prices and in calculating cost savings. (Use additional pages if necessary.)**

Date:

GEEM No:

I. GEEM Title:

II. Description of Guaranteed Energy Efficiency Measure: (Provide a complete narrative description of the GEEM. Include clarifying sketches if necessary. Use additional space if needed.)

III. Engineering Analysis:  
(Use additional space if needed.)

- Provide all energy savings calculations necessary to justify this GEEM and to allow an independent verification of the engineering analysis method used.
- List energy savings formulas used in the calculations.
- List all assumptions: existing energy usage; existing operating hours; existing conditioned area; existing number of occupants, changes to existing conditions; and existing weather data.
- List all costs: energy audit; design; construction; materials or equipment; construction or labor; and administrative costs including monitoring and financing costs.
- List type of weather data used.
- List computer software, if used.

Note: Use additional pages if necessary.

GEEM Title:

Detailed cost estimates, including unit costs, should be included in each GEEM. Itemize by major pieces of equipment.

1. Equipment

Item a.

---

Item b.

---

Item c.

---

2. Materials

Item a.

---

Item b.

---

3. Labor

Item a.

---

Item b.

---

4. Project Management or Monitoring Costs

Item a.

---

Item b.

---

Item c.

---

Item d.

---

5. Financing Costs

Item a.

---

Item b.

---

## Guaranteed Energy Efficiency Measure Development Sheet

GEEM Title _____	Useful Life _____	Years _____
<b>Net Annual Energy Savings:</b>		
Electricity	_____	kWh/YR
Electric Demand	_____	kW
Natural Gas	_____	Therms/YR
Other	_____	Gallons/YR
<b>Net Annual Energy Cost Savings:</b>		
Electricity	\$ _____	/YR
Electric Demand	\$ _____	/YR
Natural Gas	\$ _____	/YR
Oil	\$ _____	/YR
Other	\$ _____	/YR
<b>(1) Net Energy Cost Savings</b>	<b>\$ _____</b>	<b>/YR</b>

GEEM Title:

**(A) GEEM Implementation Costs:**

Equipment and Materials	\$	_____
Energy Audit Costs	\$	_____
Professional Service for Design	\$	_____
Construction Costs	\$	_____
Bonding Costs	\$	_____
Administrative Costs	\$	_____
Disposal Costs	\$	_____
Other Costs	\$	_____
<b>TOTAL IMPLEMENTATION COSTS</b>	<b>\$</b>	<b>_____</b>

**Comments:**

It may be difficult to break down the cost for each individual GEEM as shown above. Items such as Audit Costs, Bonding, Admin, etc. may be determined as a percentage of the total. When an audit is performed, numerous items are evaluated and time is spent on the total and not broken down by individual GEEM.

GEEM Title:

(B) GEEM Annual Operation and Maintenance Costs or Savings

	<b>COSTS</b>		<b>SAVINGS</b>	
GEEM O&M Costs	\$ _____	/Year	\$ _____	Year
a. Labor	/Year \$ _____	Year	\$ _____	
b. Parts	/Year \$ _____	Year	\$ _____	
c. Materials	/Year \$ _____	Year	\$ _____	
d. Contracts	/Year \$ _____	Year	\$ _____	
e. Admin/Monitoring	\$ _____	/Year	\$ _____	Year
f. Other	/Year \$ _____	Year	\$ _____	
TOTAL GEEM Operations and Maintenance Costs	/Year \$ _____			
TOTAL GEEM Operations and Maintenance Savings	/Year \$ _____			
NET OPERATIONS AND MAINTENANCE SAVINGS	\$ _____	/Year		

## Guaranteed Savings vs. Implementation Costs

**Project Title and Summary:**

Year	Net Energy Cost Savings (\$/Yr)	Net Operations & Maintenance Savings (\$/Yr)	Total Implementation Cost (\$/Yr)
1			
2			
3			
4			
5			
6			
7			
8			
9			
10			
11			
12			
13			
14			
15			
16			
17			
18			
19			
20			
21			
22			
23			
24			
25			

**TOTAL GUARANTEED SAVINGS \$ \_\_\_\_\_**

**TOTAL IMPLEMENTATION COST \$ \_\_\_\_\_**

**Note: Total savings cost must exceed total implementation cost as required by Section 6-23-3.A(1) NMSA 1978**

## APPENDIX Q – Public Facility Energy Efficiency and Water Conservation Act

6-23-1. Short title.

Chapter 6, Article 23 NMSA 1978 may be cited as the "Public Facility Energy Efficiency and Water Conservation Act".

**History:** Laws 1993, ch. 231, § 1; 1997, ch. 42, § 1; 2001, ch. 247, § 1.

6-23-2. Definitions. (2009)

As used in the Public Facility Energy Efficiency and Water Conservation Act :

A. "conservation-related cost savings" means cost savings, other than utility cost savings, in the operating budget of a governmental unit that are a direct result of energy or water conservation measures implemented pursuant to a guaranteed utility savings contract;

B. "energy conservation measure" means a training program or a modification to a facility, including buildings , systems or vehicles, that is designed to reduce energy consumption or conservation-related operating costs and may include:

- (1) insulation of the building structure or systems within the building;
- (2) storm windows or doors, caulking or weather stripping, multi-glazed 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 the applicable state or local building code or nationally accepted standards for the lighting system after the proposed modifications are made;
- (6) energy recovery systems;
- (7) solar energy generating or heating and cooling systems or other renewable energy systems;
- (8) cogeneration or combined heat and power systems that produce steam, chilled water or forms of energy such as heat, as well as electricity, for use primarily within a building or complex of buildings;
- (9) energy conservation measures that provide long-term operating cost reductions;
- (10) maintenance and operation management systems that provide long-term operating cost reductions;
- (11) traffic control systems; or
- (12) alternative fuel options or accessories for vehicles;

C. "governmental unit" means an agency, political subdivision, institution or instrumentality of the state, including two- and four-year institutions of higher education, a municipality, a county or a school district;

D. "guaranteed utility savings contract" means a contract for the evaluation and recommendation of energy or water conservation measures and for the implementation of one or more of those measures, and which contract provides that all payments, except obligations on termination of the contract before its expiration, are to be made over time and the savings are guaranteed to the extent necessary to make the payments for the conservation measures;

E. "qualified provider" means a person experienced in the design, implementation and installation of energy or water conservation measures and who meets the experience

qualifications developed by the energy , minerals and natural resources department for energy conservation measures or the office of the state engineer for water conservation measures;

F. "utility cost savings" means the amounts saved by a governmental unit in the purchase of energy or water that are a direct result of energy or water conservation measures implemented pursuant to a guaranteed utility savings contract; and

G. "water conservation measures" means a training program, change in maintenance practices or facility or landscape alteration designed to reduce water consumption or conservation-related operating costs.

History: Laws 1993, ch. 231, § 2; 1997, ch. 42, § 2; 2001, ch. 247, § 2; 2009, ch. 138, § 1.

6-23-3. Guaranteed utility savings contracts authorized; energy or water savings guarantee required.

A. A governmental unit may enter into a guaranteed utility savings contract with a qualified provider to reduce energy, water or conservation-related operating costs if, after review of the utility efficiency proposal from the qualified provider, the governmental unit finds that:

(1) the amount the governmental unit would spend on the energy or water conservation measures recommended in the proposal is not likely to exceed the cumulative amount of utility cost savings and conservation-related cost savings of all energy or water conservation measures in the proposal over twenty-five years or over a period not to exceed the expected useful life of the most durable measure in the proposal, whichever period of time is less, from the date of installation if the recommendations in the proposal were followed. The normal periodic repair and replacement of components of an energy or water conservation measure that are required after the measure is installed or completed shall not be considered in the amount a governmental unit would spend on the energy or water conservation measure for purposes of this paragraph; and

(2) the qualified provider can provide a written guarantee that the utility cost savings and conservation-related cost savings will meet or exceed the costs of the conservation measures.

B. A guaranteed utility savings contract shall include:

(1) a written guarantee from the qualified provider that annual utility cost savings and conservation-related cost savings shall meet or exceed the cost of the conservation measures; and

(2) a requirement that the qualified provider maintain a direct financial relationship with the governmental unit, irrespective of the source of financing for the energy or water conservation measures to be implemented.

C. A guaranteed utility savings contract may extend beyond the fiscal year in which it becomes effective and may provide for payments over a period of time not to exceed twenty-five years or the expected useful life of the most durable energy or water conservation measure in the contract, whichever period of time is less; provided, however, only utility cost savings, conservation-related cost savings and special funds authorized pursuant to the Public Facility Energy Efficiency and Water Conservation Act or other law shall be pledged for the payments.

D. A governmental unit may enter into an installment payment contract or lease-purchase agreement for the purchase and installation of energy or water conservation measures pursuant to a guaranteed utility savings contract, but only in accordance with the provisions of the Public Facility Energy Efficiency and Water Conservation Act and Section 13-1-150 NMSA 1978.

E. A governmental unit may enter into a guaranteed utility savings contract pursuant to Section 13-1-129 NMSA 1978 in accordance with the provisions of the Public Facility Energy Efficiency and Water Conservation Act.

History: Laws 1993, ch. 231, § 3; 1997, ch. 42, § 3; 1999, ch. 257, § 1; 2001, ch. 247, § 3; 2009, ch. 138, § 2.

6-23-4. Guaranteed utility savings contract; performance guarantee required.

A governmental unit shall not enter into a guaranteed utility savings contract unless a performance guarantee that meets the requirements of this section is delivered by the qualified provider to the governmental unit and that guarantee becomes binding on the parties upon the execution of the guaranteed utility savings contract. The qualified provider shall provide a performance guarantee in the form of a performance bond, a cash bond, a letter of credit issued by a bank with a Moody's or Standard and Poor's rating of "A" or better or any other surety, including insurance, satisfactory to the governmental unit and its approving agency. The guarantee for each year shall be in an amount equal to the amount of the annual guarantee given by the qualified provider in the guaranteed utility savings contract.

History: Laws 1993, ch. 231, § 4; 1997, ch. 42, § 4; 2005, ch. 178, § 1.

6-23-5. Contract approval required.

A. A governmental unit shall not enter into a guaranteed utility savings contract with a qualified provider or any installment payment contract or lease-purchase agreement pursuant to that contract unless the contracts and agreements are reviewed and approved as follows:

- (1) for school districts, by the superintendent of public instruction;
- (2) for state agencies:
  - (a) if the facilities, systems or vehicles are owned, leased or otherwise controlled by the general services department, by the secretary of general services; and
  - (b) if the facilities, systems or vehicles are not owned, leased or otherwise controlled by the general services department, by the executive head of the state agency;
- (3) for municipalities and counties, by the governing body of the municipality or county; and
- (4) for all post-secondary educational institutions and the state educational institutions confirmed in Article 12, Section 11 of the constitution of New Mexico, by the commission on higher education.

B. The approval required under this section shall be given upon:

- (1) a determination that the contracts and agreements comply with the provisions of the Public Facility Energy Efficiency and Water Conservation Act and other applicable law;
- (2) certification by the energy, minerals and natural resources department that the qualified provider of energy conservation measures meets the experience requirements set by the department and the guaranteed energy savings from the energy conservation measures proposed appear to be accurately estimated and reasonable; and
- (3) certification by the office of the state engineer that the qualified provider of water conservation measures meets the experience requirements set by that office and the guaranteed water savings from the water conservation measures proposed appear to be accurately estimated and reasonable.

History: Laws 1993, ch. 231, § 5; 1997, ch. 42, § 5; 1999, ch. 257, § 2; 2001, ch. 247, § 4.

6-23-6. Contracts and agreements not a general obligation of the governmental unit.

Payment obligations of a governmental unit pursuant to a guaranteed utility savings contract with a qualified provider and any installment payment contract or lease-purchase agreement pursuant to a guaranteed utility savings contract are not general obligations of the governmental unit and are collectible only from utility cost savings and conservation-related cost savings appropriated by the legislature and other revenues pledged for that purpose in accordance with the Public Facility Energy Efficiency and Water Conservation Act.

**History:** Laws 1993, ch. 231, § 6; 1997, ch. 42, § 6; 2001, ch. 247, § 5.

6-23-6.1. Reporting and retention of utility cost savings for state agencies.

A. A state agency entering into a guaranteed utility savings contract with a qualified provider shall, no later than thirty days after the close of the fiscal year, furnish the energy, minerals and natural resources department a consumption and savings report, in a format established jointly by that department and the department of finance and administration, that estimates any cost savings resulting from the implementation of the guaranteed utility savings contract during the fiscal year. The report shall include:

- (1) the name or description of each facility or major utility system covered by the report;
- (2) utility account numbers;
- (3) a record of monthly consumption of water or energy by fuel type; and
- (4) a record of monthly per-unit cost of water or energy by fuel type.

B. If the consumption and savings report for a state agency shows a utility cost savings or conservation-related cost savings at the end of the fiscal year that resulted from implementation of a guaranteed utility savings contract and causes an unexpended and unencumbered balance in the agency's utility line item, and if the utility cost savings or conservation-related cost savings has not been pledged for payments pursuant to the guaranteed utility savings contract, the dollar amount of the utility cost savings or conservation-related cost savings shall be carried over as a reserved designated fund balance to the subsequent fiscal year.

C. Beginning the year after the energy or water conservation measures are implemented, and until any alternative financing for a guaranteed utility savings contract is repaid, or for a period of no more than twenty-five years, whichever is less, all utility budgets and appropriations for the state agency shall be based on:

- (1) the energy or water consumption levels, or both, before the energy or water conservation measures were implemented;
- (2) the same allowance for escalation or decrease of utility costs given state agencies that did not participate in a guaranteed utility savings contract; and
- (3) any adjustments for acquisitions, expansions, sale or disposition of state agency facilities.

D. At the end of the repayment period for the guaranteed utility savings contract, or twenty-five years, whichever is less, new budgets or appropriations for utilities shall again be based upon actual utility consumption.

E. Upon carryover of the dollar amount of utility cost savings or conservation-related cost savings as a reserved designated fund balance to the subsequent fiscal year, state agencies may submit a budget adjustment request to use those funds for the following purposes:

- (1) up to one hundred percent of the funds may be used for additional energy or water conservation measures or for payment of guaranteed utility savings contracts; and

(2) after encumbrances for additional energy or water conservation measures or for payment of guaranteed utility savings contracts have been made, up to fifty percent of the remaining funds may be used for purposes consistent with the duties and responsibilities assigned to the state agency, while the remaining funds shall revert to the appropriate fund.

F. For the purposes of this section, "state agency" means an agency, institution or instrumentality of the state of New Mexico. "State agency" does not include a municipality, county or school district.

History: 1978 Comp., § 6-23-6.1, enacted by Laws 1997, ch. 42, § 7; 1999, ch. 257, § 3; 2001, ch. 247, § 6; 2009, ch. 138, § 3.

6-23-7 Public Schools

6-23-8 Municipalities

6-23-9 Counties

6-23-10. State institutions and buildings; use of certain revenues authorized.

Resulting utility cost savings and conservation-related cost savings, income from lands granted for the use of certain institutions and public buildings and deposited in income funds for such institutions and buildings pursuant to Section 19-1-17 NMSA 1978 or special funds of institutions may be appropriated and pledged for payments pursuant to a guaranteed utility savings contract or related lease-purchase agreement or installment payment contract pursuant to the Public Facility Energy Efficiency and Water Conservation Act. Money appropriated for that purpose shall be deposited in a special fund or account of the institution or fund and that revenue and no other revenue shall be pledged for payments pursuant to the Public Facility Energy Efficiency and Water Conservation Act.

History: Laws 1993, ch. 231, § 10; 1997, ch. 42, § 11; 1999, ch. 257, § 4; 2001, ch. 247, § 10; 2009, ch. 138, § 4.

**APPENDIX R – Energy Efficiency Standards for Public Buildings**

State of New Mexico  
***Energy Efficiency Standards for  
Public Buildings***  
Effective March 8, 2010

**15-3-36. Energy efficiency standards for public buildings.**

A. As used in this section:

- (1) "department" means the energy, minerals and natural resources department;
- (2) "new building" means a building to be constructed that is designed with a square footage of three thousand or more square feet;
- (3) "selected building addition" means an addition to a building that increases the square footage of the building by three thousand or more square feet; and
- (4) "selected building renovation" means a renovation of a building that includes upgrade or replacement of at least two of the following:
  - (a) heating, ventilation and air conditioning systems;
  - (b) electrical systems, including lighting systems; and
  - (c) the components that separate the interior and the exterior environments of a building and serve to protect the indoor environment and facilitate climate control.

B. Except as provided in Subsection C of this section, a new building, selected building addition or selected building renovation that is financed to any extent with legislative appropriations of state general fund revenues, severance tax bond proceeds, supplemental severance tax bond proceeds or state general obligation bond proceeds shall be designed and constructed to attain the energy star qualification of the United States environmental protection agency, or an alternative, equivalent standard specified by rule of the department.

C. The requirements of this section do not apply to:

- (1) a new building, a selected building addition or a selected building renovation for which the initial legislative appropriation is made prior to January 1, 2011;
- (2) a new building, a selected building addition or a selected building renovation for which, in the department's opinion, substantial design expenditures have been made prior to July 1, 2010;
- (3) a selected building addition to an existing building or a selected building renovation to an existing building if the existing building is listed in the state register of cultural properties of the national register of historic places; or
- (4) a new building, selected building addition or selected building renovation if the department determines that the costs of compliance with the requirements of this section would exceed the estimated life-cycle savings of the building, addition or renovation.