

Financial Grade Operational Audit and Project Proposal Contract

PURPOSE AND DISCLAIMER: This document is part of a collection of model procurement and contracting documents developed over decades by states and refined by the U.S. Department of Energy. They represent best practices for performance contracting projects. They can be easily customized to meet the needs of any project. These documents are provided as samples for adaptation to the laws and regulations of the user, not as legal advice or opinion, and do not attempt to identify or address all circumstances or conditions users may encounter or desire. Nevada statutes are referenced. Legal counsel is advised.

DESCRIPTION

This Contract for Financial Grade Operational Audit and Project Development is the first of two contracts with the selected ESCO. The ESCO will complete a Financial Grade Operational Audit that will include an analysis of each proposed project with projected savings and itemized project costs. The ESCO will present a project proposal that includes recommended measures, financing term and projected annual cash-flow analysis. These results form the basis for negotiating a subsequent Performance Contract for Operating Cost-Saving Measures.

FINANCIAL GRADE OPERATIONAL AUDIT AND PROJECT PROPOSAL CONTRACT

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- Exhibit B ESCO Proposal (Pre-qualification Phase; Final Selection Phase)

FINANCIAL GRADE OPERATIONAL AUDIT AND PROJECT PROPOSAL CONTRACT

This Financial Grade Operational Audit and Project Proposal Contract (the "Contract") is made and entered into as of [Date], between [ESCO Name] ("ESCO"), having its principal offices at [ESCO Address], and [Owner Name and/or name of authorizing Board] *hereinafter* referred to as ("Owner"), [Owner Address].

WITNESSETH

WHEREAS, This Contract was created for use by Owners to obtain a Financial Grade Operational Audit of a facility from an Energy Service Company (ESCO).

WHEREAS, Authority exists in the law for Owner 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, ESCO is a company with experience and technical and management capabilities to provide for the discovery, engineering, procurement, installation, financing assistance, savings guarantee, maintenance and measurement and verification of energy, water and operational saving measures at facilities similar in size, function and system type to Owner's facilities; and

WHEREAS, ESCO has submitted a response to Owner's Request for Proposals (RFP); and

WHEREAS, Owner has selected ESCO to provide the services described herein; and

WHEREAS, Owner desires to enter into a Contract to have ESCO perform a Financial Grade Operational Audit and Project Development Proposal to determine the feasibility of entering into a Performance Contract for Operating Cost-Saving Measures to provide for installation and implementation of energy, demand, water and operational saving measures at Owner's facilities.

WHEREAS, if energy, demand, water and operational saving measures are determined to be feasible, and if the amount of savings can be reasonably sufficient to cover all costs, associated with a Performance Contracting project, the parties intend to negotiate a Performance Contract for Operating Cost-Saving Measures under which the ESCO will design, procure, install, implement, maintain, and measure and verify savings from such measures. However, this intent does not commit Owner to entering into such Performance Contract for Operating Cost-Saving Measures.

THEREFORE, the parties agree as follows:

1. Financial Grade Operational Audit and Project Proposal Contract

ESCO agrees to perform a Financial Grade Operational Audit in accordance with the **Scope of Work (Attachment A)**. ESCO agrees to complete the Financial Grade Operational Audit and Project Development Proposal and tender to Owner a final report within [Number of Days –120 days recommended depending on size and complexity of facilities and time needed to review the audit] calendar days from the execution of this Contract.

Owner agrees to assist the ESCO in performing the Financial Grade Operational Audit in accordance with the **Scope of Work (Attachment A)**, and agrees to work diligently to provide full and accurate information. ESCO agrees to work diligently to assess the validity of information provided and to confirm or correct the information as needed. The parties contemplate that this will be an interactive process and that Owner will have a reasonable amount of

time to review and determine acceptance before issuing the **Notice of Acceptance of Financial Grade Operational Audit Report and Project Development Proposal (Attachment B)**.

ESCO agrees to offer a project development proposal, for a Performance Contract for Operating Cost-Saving Measures, with a package of energy, water and operating savings measures and with details as specified in the **Scope of Work (Attachment A)**.

2. Compensation to ESCO

ESCO shall be compensated as follows:

2.1 Payment through Performance Contract.

Owner shall have no payment obligations under this Contract provided that ESCO and Owner execute a Performance Contract for Operating Cost-Saving Measures within [Number of Days – 120 days suggested, allowing sufficient time for contract negotiation, attorney review, and Owner processing] days, after issuance of the **Notice of Acceptance of Financial Grade Operational Audit Report and Project Development Proposal (Attachment B)**, except that the fee indicated in **Compensation to ESCO – Basis and Maximum Amount (Section 2.3)** shall be incorporated into ESCO's project costs and paid through the Performance Contract for Operating Cost-Saving Measures.

2.2 Project with Insufficient Savings.

Owner shall have no payment obligations under this Contract in the event that ESCO's final **Financial Grade Operational Audit and Project Development Proposal (Attachment B)** does not contain a package of energy, water and operating savings measures which, if implemented and as meeting terms of the **Scope of Work (Attachment A), Guidelines and Requirements**, will provide the Owner with cash savings (in conformance with legislation) sufficient to fund Owner's payments of all costs and fees associated with the Performance Contract for Operating Cost-Saving Measures, including 1) the fee associated with the Financial Grade Operational Audit, 2) all payments to finance the measures, 3) fees for Third-Party Consulting and 4) any annual fees for measurement and verification and maintenance incurred by the ESCO.

Should the ESCO determine at any time during the Financial Grade Operational Audit that savings cannot be attained to meet these terms, the Financial Grade Operational Audit will be terminated by written notice by ESCO to Owner. In this event this Contract shall be cancelled and Owner shall have no obligation to pay, in whole or in part, the amount specified in this section, **Compensation to ESCO – Basis and Maximum Amount (Section 2.3)**.

2.3 Basis and Maximum Amount.

Except as provided for in **Subsections 2.1 or 2.2** above, within [Number of Days: 120 days recommended] days after Owner's **Notice of Acceptance of Financial Grade Operational Audit and Project Development Proposal (Attachment B)**, Owner shall pay to ESCO a sum not to exceed [Dollar Amount in Words] (\$ [dollar amount]) based on a maximum of [square footage to be audited] gross square feet at [cost per square foot] per square foot of audited square-footage, as per **Cost and Pricing (Attachment D)**.

Owner shall only pay for square-footage actually audited. The cost will be adjusted in the event that audited square footage is changed by either the ESCO or Owner. ESCO compensation is subject to acceptance of the audit report after issuance of the **Notice of Acceptance of Financial Grade Operational Audit Report and Project Development Proposal (Attachment D)** and after verification that the project can be financed.

3. Scope of Work

The Financial Grade Operational Audit and Project Proposal Contract shall be performed as described in the **Scope of Work (Attachment A)**.

4. Termination

This Contract may be terminated at any time as described below by:

4.1 Termination for Default/Cause

4.1.1 Default.

If the ESCO refuses or fails to timely perform any of the provisions of this contract, with such diligence as will ensure its completion within the time specified in this contract, the Owner may notify the ESCO in writing of the non-performance, and if not promptly corrected within the time specified, Owner may terminate the ESCO's right to proceed with the contract or such part of the contract as to which there has been delay or a failure to properly perform. The ESCO shall continue performance of the contract to the extent it is not terminated and shall be liable for excess costs incurred.

4.1.2 Excuse for Nonperformance or Delayed Performance

The ESCO shall not be in default by reason of any failure in performance of this contract in accordance with its terms if such failure arises out of acts of God; acts of the public enemy; acts of the State and any entity in its sovereign or contractual capacity; fires; floods; epidemics; quarantine restrictions; strikes or other labor disputes; freight embargoes; or unusually severe weather. Upon request of the ESCO, the Owner shall ascertain the facts and extent of such failure, and, if Owner determines that any failure to perform was occasioned by any one or more of the excusable causes, and that, but for the excusable cause, the ESCO's progress and performance would have met the terms of the contract, the delivery schedule shall be revised accordingly, subject to the rights of the purchasing Owner.

4.2 Termination for Convenience

4.2.1 Termination

The Owner may, when the interests of the Owner so require, terminate this contract in whole or in part, for the convenience of the Owner. The Owner shall give written notice of the termination to the ESCO specifying the part of the contract terminated and when termination becomes effective. This in no way implies that the Owner has breached the contract by exercise of the Termination for Convenience Clause.

4.2.2 ESCO's Obligations

The ESCO shall incur no further obligations in connection with the terminated work and on the date set in the notice of termination the ESCO will stop work to the extent specified. The ESCO shall also terminate outstanding orders and subcontracts as they relate to the terminated work. The ESCO shall settle the liabilities and claims arising out of the termination of subcontracts and orders connected with the terminated work. The Owner may direct the ESCO to assign the ESCO's right, title, and interest under terminated orders or subcontracts to the Owner. The ESCO must still complete and deliver to the Owner the work not terminated by the Notice of Termination and may incur obligations as are necessary to do so.

4.2.3 Compensation

4.2.3a Termination Claim

The ESCO shall submit a termination claim specifying the amounts due because of the termination for convenience together with cost or pricing data bearing on such claim. If the ESCO fails to file a termination claim within 90 days from the effective date of termination, the Owner may pay the ESCO, if at all, an amount set in accordance with subparagraph C of this Section.

4.2.3b Settlement

The Owner and the ESCO may agree to a settlement provided the ESCO has filed a termination claim supported by cost or pricing data and that the settlement does not exceed the total contract price plus settlement costs, reduced by payments previously made by the purchasing Owner, the

proceeds of any sales of supplies and manufactured materials made under agreement, and the contract price of the work not terminated.

4.2.3c Payments

Absent complete agreement, under subparagraph B of this Section, the Owner shall pay the ESCO the following amounts, provided the payments agreed to under subparagraph B shall not duplicate payments under this subparagraph:

1. Contract prices for supplies or services accepted under the contract;
2. Costs incurred in preparing to perform the terminated portion of the work plus a fair and reasonable profit on such portion of the work (such profit shall not include anticipatory profit or consequential damages) less amounts paid to or to be paid for accepted supplies or services; provided, however, that if it appears that the ESCO would have been sustained a loss if the entire contract would have been completed, no profit shall be allowed or included and the amount of compensation shall be reduced to reflect the anticipated rate of loss.
3. Costs of settling and paying claims arising out of the termination of subcontracts or orders pursuant to the ESCO's obligations paragraph of this clause. These costs must not include costs paid in accordance with subparagraph B of this Section. [Optional]
4. The reasonable settlement costs of the ESCO including accounting, legal, clerical, and other expenses reasonably necessary for the preparation of settlement claims and supporting data with respect to the terminated portion of the contract and for the termination and settlement of subcontracts thereunder, together with reasonable storage, transportation, and other costs incurred in connection with the terminated portion of this contract. [Optional]
5. The total sum to be paid the ESCO under this subparagraph C shall not exceed the total contract price plus settlement costs, reduced by the amount of payments otherwise made, the proceeds of any sales of supplies and manufacturing materials under subparagraph B, and the contract price of work not terminated.

Cost claimed or agreed to under this section shall be in accordance with applicable sections of the State Procurement Code.

4.3 Available Funds – Contingency - Remedies

The Owner is prohibited by law from making fiscal commitments beyond the term of its current fiscal period. Therefore, ESCO's compensation is contingent upon the continuing availability of Owner appropriations. Payments pursuant to this contract shall only be made from available funds encumbered for this Contract, and the Owner's liability for such payments shall be limited to the amount remaining of such encumbered funds. If Owner or federal funds are not appropriated, or otherwise become unavailable to fund this Contract, the Owner may immediately terminate the Contract in whole or in part without further liability in accordance with the Termination for Cause subsection of the Remedies section of this Contract. All payments are subject to the general Remedies section of this Contract.

5. Insurance

[**Note to Owner:** Incorporate insurance requirements and amounts of coverage with existing policy amounts and coverages and modify below as needed. Below is an example. Before commencing any Work under this Contract, ESCO shall file with Owner certificates of insurance evidencing the coverage's as specified below.]

5.1

It is agreed and understood ESCO shall maintain in full force and effect adequate commercial general liability insurance and property damage insurance, as well as workmen's compensation and employer's liability insurance pursuant to the State insurance requirements as defined below.

5.2

The ESCO shall obtain, and maintain at all times during the term of this Agreement, insurance in the following kinds and amounts.

1. Standard Workers' Compensation and Employer's Liability as required by State statute, including occupational disease, covering all employees at the work site.
2. General Liability (minimum coverage)
 - a) Combined single limit of \$600,000 written on an occurrence basis.
 - b) Any aggregate limit will not be less than \$1,000,000.
 - c) The ESCO must purchase additional insurance if claims reduce the annual aggregate below \$600,000.
3. Automobile Liability (minimum coverage) in the amount of \$600,000 combined single limit
4. The Owner shall be named as an additional insured on each commercial general liability policy.
5. The insurance shall include provisions preventing cancellation without 30 calendar days prior written notice, by certified mail to the Principal Representative
6. ESCO shall be responsible for all claims, damages, losses or expenses, including attorney's fees, arising out of or resulting from the performance of the Services contemplated in this Contract, provided that any such claim, damage, loss or expense is caused by any negligent act, error or omission of ESCO, any Consultant or associate thereof, or anyone directly or indirectly employed by ESCO. ESCO shall submit a Certificate of Insurance at the signing of this Contract and also any notices of Renewal of said Policy as they occur.

6. Performance Contract for Operating Cost-Saving Measures

The Parties intend to negotiate a Performance Contract for Operating Cost-Saving Measures under which the ESCO will design, install and implement energy, water and operating savings measures which the Parties have agreed to, and provide certain maintenance and monitoring services.

However, nothing in this Contract should be construed as an obligation on any of the Parties to execute such a contract. The terms and provisions of such a performance Contract for Operating Cost-Saving Measures will be set forth in a separate contract.

7. Extent of Agreement

7.1

This Contract represents the entire and integrated agreement between Owner and ESCO and supersedes all prior negotiations, representations or agreement, either written or oral. This Contract may be amended only by written instrument signed by the Owner.

7.2

The Owner and ESCO understand and agree the attachments and exhibits hereto are and shall be an integral part of this Contract and the terms and provisions thereof are hereby incorporated, made a part of and shall supplement those recited herein. In the event of any conflict, or variance, the terms and provisions of this printed Agreement shall supersede, govern and control.

8. Term

The term of this Contract will become effective upon approval by the [Controller] and acceptance by the Owner. The term shall end [number of days plus 15 days to allow for processing of check (suggest 135 days)] after signing of the **Notice of Acceptance of Financial Grade Operational Audit Report and Project Development Proposal (Attachment B)** by the Owner.

9. Order of Precedence

In the event of conflict or inconsistency between this contract and its exhibits or attachments, such conflicts or inconsistencies shall be resolved by reference to the documents in the following order of priority:

1. Special Provisions.
2. Contract - general terms and conditions
3. Other exhibits or attachments

10. Owner's Special Provisions

[Insert as required or as available.]

THE PARTIES HERETO HAVE EXECUTED THIS CONTRACT

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

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

[Owner]

By _____
Principal Representative

(Corporate Seal)

ATTEST

Secretary

ESCO

By: _____
Name Title

Signature

Address

City, State, Zip

Social Security Number or Federal ID

APPROVED: