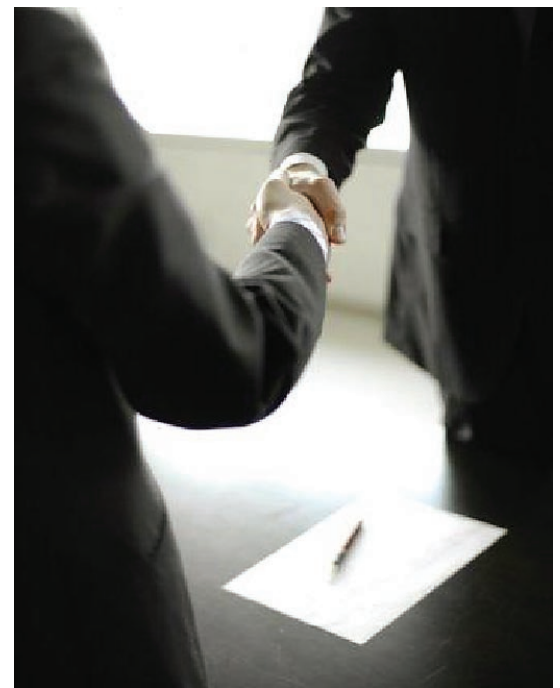


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Performance Assurance for Multi-Year Contracts Under the Utility Incentive Program

Section 152(f) of the Energy Policy Act of 1992 (EPACT) Public Law 102-486 authorized and encouraged Federal agencies to participate in programs to increase energy efficiency and for water conservation or the management of electricity demand conducted by gas, water, or electric utilities. Additionally Title 10 Section 2913 and 10 USC 2866 (a) authorizes and encourages Defense facilities to participate in utility programs for the management of electricity demand, and energy and water conservation.

Since these contracts are for utility services under section 201 of the Federal Property and Administrative Services Act of 1949, the only financial requirement on Federal agencies is the obligation of the annual costs for such contracts during each year that the contract is in effect. There is no statutory requirement for annual measurement and verification of the energy, water, or cost savings, or a contractual guarantee of those savings as there is for energy savings performance contracts in Section 801 of the EPACT. However, prudent Federal energy program management requires that the continuing performance of the equipment secured and techniques applied under these contracts be assured to



accomplish the expected energy and/or water usage and cost reductions.

An action plan to assure the specified performance and efficiency of the equipment installed, and the expected level of operations and maintenance necessary to assure achievement of the annual estimated savings throughout the contract period, is a reasonable expectation. This is considered the recommended level of prudent program management for these contracts.



U.S. Department of Energy

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Federal Energy Management Program

Fact Sheet

Background

- Need — The energy reduction goals set forth in the Energy Policy Act and *Executive Order 13423: Strengthening Federal Environmental, Energy, and Transportation Management* necessitates that agencies have the ability to develop alternatively financed projects and implement contracts that achieve energy and water efficiency. The need for prudent Federal program management through assurance of specified performance of these contracts must be balanced against the cost of such efforts so that optimal savings are achieved.
- Goal Objective — A definitive statement on this issue contained in one memorandum is needed to provide clarification to agency field personnel so they can more readily take advantage of the opportunities to implement alternatively financed energy-efficiency and water-conservation utility contracts.
- Relevant Authorities — Section 152 of EPACT which amends Section 546 (c) of the National Energy Conservation Policy Act (NECPA) 42 U.S.C. 8256, Section 201 of the Federal Property and Administrative Services Act of 1949, 40 USC Section 481 (a)(3), and 10 U.S.C. 2913, are the relative statutes in question. Additional relevant authorities are listed under “Related Documents” at the end of this memorandum.

- Agency Specific Requirements — Individual agencies may have specific programmatic requirements for the implementation of these contracts and any such requirements would supersede any general guidance.

Findings

Through the Federal Property Act, Congress provided contract authority to the General Services Administration (GSA) (and those agencies to which the GSA has re-delegated that authority) to enter into contracts for utility services, for a term of ten years, without obligating funds for the total cost of the contract. The intent of the statute is to allow agencies to enter into a cost-effective, long-term contract for public utility services while only having sufficient budget authority to obligate its first year’s annual cost under the agreement.

Since the authority pertains specifically to public utility services, care must be taken to assure that the energy and water conservation projects entered into under these contracts be limited to actions that fall under the intent of the term “public utility services.” Research into relevant findings of the Comptroller General and the General Accounting Office indicate that the definition of “public utility services” is flexible and adaptive, and should be broadly interpreted. The Department of Energy Office of General Counsel has determined that the provision of

multi-year energy and water conservation management, and demand side management projects, including project financing and transferring title of equipment, falls under the definition of public utility services. In order to assure that the primary purpose of the contract is to reduce energy and water cost and use, the Counsel has provided conditions that such contracts must fulfill in order to be considered as “qualified” utility energy service contracts for DOE facilities. One of these provisions is that energy or water savings must be sufficient to pay all costs under the contract. This, in turn, leads to the need for some measurement and verification of the project’s performance and some level of assurance that the savings proposed are, in fact, realized.

Federal contracts contain provisions for unforeseen and uncontrollable acts that may affect the contract. Provisions in alternatively financed utility energy services contracts (UESC) should allow negotiated settlement in the event of uncontrollable actions such as severe weather, war, etc., and allow the parties to recognize the fact that the future is never predictable. Similarly, the performance assurance measures of these contracts should provide reasonable expectations that are within the power of the utility to achieve.

As the Overview of the Measurement and Verification for Federal Energy Projects Guidelines Version 2.2

states, “The challenge of M&V is to balance M&V costs and savings certainty with the value of the conservation measures.” Stated another way, the level of performance assurance and its associated costs must be worth the level of certainty of cost savings that the customer agency feels is necessary. Each alternatively financed UESC should have a performance assurance plan to accomplish this. Such plans should make sure that each energy conservation measure and combination of measures is separately evaluated to identify the appropriate level of needed performance assurance activity based on the technical complexity, potential savings magnitude, and specific situation. The following guidance is offered as a context in which each agency and facility manager can make the best judgment based on the specific facts and considerations.

FEMP Recommendations

This memorandum is being issued to recommend a prudent level of performance assurance for alternatively financed UESC entered into by Federal agencies.

In order to assure the necessary fiscal responsibility consistent with sound program management, alternatively financed UESCs should include some plan for continued action during the contract to assure continued accomplishment of expected performance.

The minimal performance assurance plan recommended by the Federal Energy Management Program for alternatively financed UESC energy conservation measures is:

- Start-up performance verification (based on measured data)
- Performance verification at the end of warranty period (based on measured data)
- Operations and maintenance training (required in the more common instance where the agency continues to operate and maintain installed equipment)
- Provision of continuing training throughout the contract period as specified in the contract as determined by the needs of the facility
- Periodic inspections and verification of appropriate O&M performance
- Performance discrepancy resolution

The performance assurance for more complex and/or significant projects should also include consideration of ongoing metering and continuous commissioning. The use of a periodic re-commissioning or continuous commissioning protocols can verify that the equipment operation and related services are being provided in a way to assure that the desired performance is maintained.

Obviously, agencies may choose to develop more rigorous performance

assurance plan requirements that fit their specific needs.

The performance assurance actions needed to validate expected performance should be reasonable and within the power of the utility to honor. Every effort, such as the use of representative sampling, should be made to minimize the extent and cost of performance assurance. Ultimately, the appropriate performance assurance and rigor of the M&V method necessary to cost effectively assure compliance with that specified in the contract must be at the discretion of the individual contracting officer.

Likely Uses of this Guidance

This guidance provides Federal agencies with a level of recommended performance assurance for alternatively financed, utility-company-provided energy and water services consistent with prudent fiscal management. As in all contract matters, the individual agencies and their contracting officers must make the final decision as to the specific contract requirements that they deem appropriate to their unique situation and are in compliance with agency specific guidelines.

Related Documents

Executive Order 13423

http://www1.eere.energy.gov/femp/about/eo_fedmgmt.html

Alternatively Financed Guidance Memorandum (AFGM) #0003 Relationship of Anti-Deficiency Act to Multi-Year Contracts

www.eere.energy.gov/femp/pdfs/schwartz.pdf

Procuring Energy Management Services with the GSA Utility Areawide Contract

www.gsa.gov/gsa/cm_attachments/GSA_DOCUMENT/procuring_energy_R2H915_OZ5RDZ-i34K-pR.pdf

M&V Guidelines: Measurement and Verification for Federal Energy Projects, Version 2.2

http://www1.eere.energy.gov/femp/financing/superespcs_measguide.html

A Strong Energy Portfolio for a Strong America

Energy efficiency and clean, renewable energy will mean a stronger economy, cleaner environment, and greater energy independence for America. Working with a wide array of state, community, industry, and university partners, the U.S. Department of Energy's Office of Energy Efficiency and Renewable Energy invests in a diverse portfolio of energy technologies.

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