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# Utility Energy Services Contracts: Enabling Documents

## 2008 Interim Update: Final Draft

Prepared for the  
U.S. Department of Energy  
Office of Energy Efficiency and Renewable Energy  
Federal Energy Management Program

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**Energy Efficiency  
and Renewable Energy**

Bringing you a prosperous future where energy  
is clean, abundant, reliable, and affordable



**Department of Energy  
Washington, D.C.**

Dear Colleagues,

The U.S. Department of Energy's (DOE) Federal Energy Management Program (FEMP) is pleased to present this third edition of *Utility Energy Services Contracts: Enabling Documents*. These documents provide a selected set of background information materials that clarify the authority for federal agencies to enter into utility energy services contracts (UESCs).

Since the first edition, UESCs have been used successfully to implement nearly \$2 billion in energy and water efficiency and renewable energy projects. UESCs are now strongly established as a standard federal practice for achieving energy management improvements. This document is designed to assist federal agency and utility staff involved in administering utility energy service projects.

In accordance with directives from the White House, Congress, and Senior Energy Officials, federal energy managers have been directed to use UESCs whenever feasible to achieve their program goals. An increasing number of utilities are offering UESC programs to support their federal customers and to meet their own energy efficiency requirements and renewable portfolio standards. The documents in this book clearly show that federal agencies have the authority to enter into UESCs.

Reducing the Federal impact on the environment, increasing energy security, and promoting successful partnerships between federal agencies and utilities are among FEMP's highest priorities. For more information about and support with implementing UESC projects, please see the contacts section of this book.

We at FEMP hope this information will be useful in building support for and implementing your energy service projects.

With best regards,

A handwritten signature in black ink, appearing to read "David McAndrew".

David McAndrew  
Utility Program Lead  
DOE/FEMP

# UTILITY ENERGY SERVICES CONTRACTS: ENABLING DOCUMENTS

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# Overview

## Overview

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### The Federal Energy Management Program

The Federal Energy Management Program (FEMP) is pleased to offer you this book as a valuable resource designed to assist you in making informed decisions concerning financing for energy projects within the federal government. Legislation from Congress and orders from the President require and enable federal agencies to implement energy efficiency, water conservation, and renewable energy projects. FEMP's mission — to reduce the use and cost of energy in the federal sector by advancing energy efficiency, water conservation, and renewable energy — is accomplished by leveraging both federal and private resources.

*FEMP is your partner for making projects happen.* Tremendous opportunities exist for reducing energy consumption through improved energy-management practices both at the initial design and construction stage or later when energy-consuming equipment replacement is required. Implemented energy projects save taxpayer dollars and contribute to a cleaner and safer environment. FEMP is a resource for federal agencies and the private sector to facilitate the achievement of aggressive federal energy-management goals by creating partnerships, leveraging resources, transferring technology, and providing training and project support.

### Utility Incentive Programs

Federal agencies are eligible to use utility incentive programs to procure financing for comprehensive energy projects. These programs range from simple rebate programs to full, turnkey project implementation programs that include financing, project management, and performance assurance. A utility energy services contract (UESC) is one vehicle that a federal agency and its utility can use to implement energy efficiency, water conservation, and renewable energy projects.

This resource book and additional information about UESCs can be found at the FEMP Web site: <http://www1.eere.energy.gov/femp/financing/uescs.html>.

## Requirements

As the largest energy consumer in the United States, the federal government has both a tremendous opportunity and a clear responsibility to lead by example with smart energy management. A series of Congressional enactments, executive orders, and other directives (see sidebar) mandate specific energy efficiency, renewable energy use, and water conservation goals for federal agencies and facilities. Among the more important of these are:

- Reduce agency energy consumption on a per-square-foot of building space by prescribed percentages increasing to 30% in 2015 compared to 2003 [this is in EISA Sec. 431]
- Procure prescribed percentages increasing to 7.5% or more of federal government electricity use in 2013 and thereafter from renewable energy sources [42 USC 15852 (a)]; obtain half of that renewable energy from new sources and using facilities on agency property where feasible [Executive Order 13423, Section 2 (b)]
- Reduce agency water consumption intensity by prescribed percentages increasing to 16% in 2015 compared to 2007 [Executive Order 13423, Section 2 (c)]
- Reduce fossil fuel use at new buildings or major renovations of buildings at federal facilities by prescribed percentages increasing from 55% for 2010 building projects to 100% for 2030 building projects, compared to 2003 use by similar buildings [EISA Sec.433]
- Install meters for energy use in all federal buildings by October 2012 [42 USC 8253 (e)] Metering < October 1, 2015: Agencies shall provide equivalent metering of natural gas and steam [EISA Sec.434]

### Legislative History of Federal Agency Energy Conservation Requirements and Utility Energy Service Contracts Authority

The first major legislation regarding energy conservation for federal facilities was the National Energy Conservation Policy Act, Public Law 95-619, enacted in 1978. The Energy Policy Act of 1992, Public Law 102-486, and the Energy Policy Act of 2005, Public Law 109-58, both substantially amended and expanded provisions relating to federal facility energy use. The United States Code excerpt, 42 USC 1851-1862 reflects those laws and other relevant amendments through January 2006 (courtesy of Cornell University Legal Information Institute Web site).

The Energy Independence and Security Act of 2007(EISA), Public Law 110-140, further amended and expanded law on federal facility energy use. Its provisions are not yet reflected in the U.S. Code compilation. Notes are inserted for some, but not all, of its pertinent provisions within the Code excerpt.

The most recent Executive Order 13423, "Enhancing Government Performance through Effective Environmental, Energy, and Fleet Management," issued in January 2007, rescinds previous Executive Orders pertaining to energy, environment and transportation. Some of E.O.'s 13423 directives were subsequently adopted into law by EISA.

Policy is augmented by agency rulemaking, executive directives other than executive orders, and legal opinions interpreting the law. Some of these important to the authority for using utility energy service contracts are also included in this enabling document compilation.

The official on-line source for the U.S. Code is the Government Printing Office. Unfortunately, it is several years behind. Alternative sites include the Cornell University Legal Information Institute Web site, from which excerpts were drawn for this booklet.

The official on-line source for the Code of Federal Regulations is the Government Printing Office, and it is up-to-date.



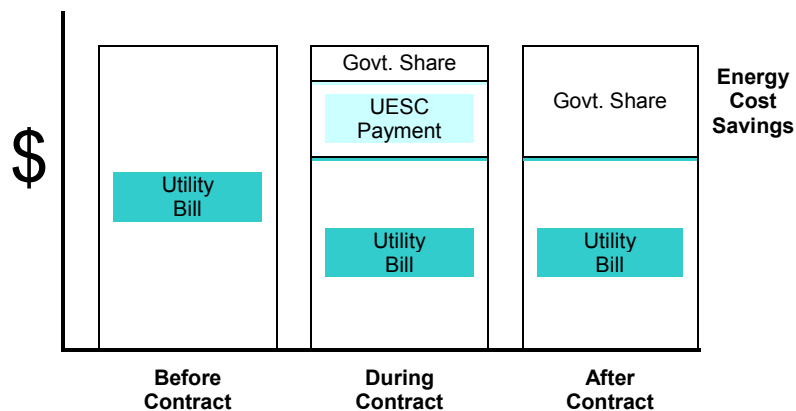
- Energy & Water Evaluations: Evaluate 25% of facilities every year; implement the identified measures within two years; and authorizes agencies to use appropriations, private financing, or appropriations and private financing to comply with this section [EISA Sec.432]
- Buildings shall be equipped with energy efficient lighting fixtures and bulbs; Effective Date: January 28, 2009 [DOD Authorization Act 2008 Signed January 28, 2008 Sec. 2863 Use of Energy Efficient Lighting Fixtures and Bulbs in DOD]

### Utility Energy Services Contracts

In a UESC, a serving or franchised utility company agrees to provide a federal agency with services or products (or both) designed to make that agency’s facilities more energy efficient. Federal facilities can also obtain project financing from a utility company through a UESC. During the contract period, the facility pays for the cost of the UESC from the “avoided-costs-savings” resulting from the energy efficiency improvements. Experienced agency-utility teams use “excess avoided-costs-savings” to cover the costs of a feasibility study for follow-on UESCs at their facilities. After the term of the contract, the energy and water efficiency improvements continue to realize the avoided-cost-savings for the life of the improvements and the savings can be used to do more projects.

### Utility Energy Services Contracts Reallocate the Government's Utility Bill

- Avoid costs
- Lower demand
- Pay for equipment
- Achieve cost savings for the government



UESCs offer many benefits to a federal agency, including:

- Streamlined procurement process
- Flexible contracts
- Relationship with a long-standing entity
- Flexibility in performance assurance
- One-stop-shopping for a turnkey project

- Low finance rates

Agencies can capitalize on the many advantages of a UESC. One of the primary benefits is the ability to implement energy efficiency projects without using direct appropriations (UESCs can, however, be used in conjunction with appropriations). Vehicles such as areawide contracts, basic ordering agreements, and other agreements used in UESCs save time in implementing projects.

### **Contract Options**

Utility energy service contracts can be executed under any of three types of umbrella contracts or agreements, including areawide contracts (AWCs), basic ordering agreements (BOAs), and separate contracts.

#### ***Areawide Contracts***

The GSA has established more than 150 utility AWCs to procure utility services for federal facilities around the country. AWCs are essentially indefinite-quantity, indefinite-delivery (IDIQ) contracts for public utility services. The AWC spells out general terms and conditions and authorizes any agency in the utility's service territory to place delivery orders for services offered under the contract. A delivery order describes the details and technical specifications of energy efficiency projects or other services to be delivered.

More information about the use of the GSA public utility areawide contracts is available online at <http://www.gsa.gov/>. The Web site contains a list of AWCs, an overview of their energy and water conservation activities, and their guidance materials for areawide users.

#### ***Basic Ordering Agreements***

Any agency can establish a BOA with its utility. BOAs are not contracts, but like areawide contracts, they establish general terms and conditions. A delivery order placed under a BOA constitutes the contract and details the services to be delivered.

#### ***Separate Contracts***

The third option available for UESCs is establishing a separate contract between an agency and a serving utility. Separate contracts, also known as standalone or site-specific contracts, can be used to cover any UESC project at any facility of a federal agency served by a particular utility. And, as the name implies, indefinite-term contracts can be made open-ended, so they need not be reissued if changed circumstances do not require.

### ***Model Agreement (Template)***

The model agreement template, on page 148, was developed through a collaboration of Edison Electric Institute (EEI), the Department of Defense (DOD), the Department of Energy (DOE), and the General Services Administration (GSA), and included federal and utility technical, legal, and contracting experts. Written as a template for agencies to use in establishing their own UESCs, there is one template for DOD agencies and a second template for civilian agencies. These model agreement templates contain the essential “must-include” clauses for federal contracts and are the most comprehensive compilation of contractual language for UESCs available. Clauses from the model agreements can be added to an areawide contract or a basic ordering agreement.

### **LEGISLATIVE AND EXECUTIVE ACTIONS**

This section outlines the legislative and executive authorities that support contracting for utility services, along with regulations associated with procuring these services. Also provided is information on various policy memoranda prepared to assist both technical and contracting staff in the clarification of procurement requirements to secure available utility services.

The procurement of both utility commodities (electric, gas, and water) and utility services, which include installation of energy efficiency, water conservation, and renewable energy measures, has a significant history of legislative backing.

### ***The Energy Policy Act of 1992 (EPAct), Public Law 102-486***

EPAct contains provisions regarding energy-management requirements, budget treatment for energy conservation measures, incentives for federal agencies, reporting requirements, new technology demonstrations, and agency surveys of energy-saving potential.

Prior to amendments enacted as part of EPAct, the National Energy Conservation Policy Act (NECPA) was the primary legislative authority directing federal agencies to improve energy management in their facilities and operation. NECPA was passed in 1978 in response to the energy crises of the 1970s. In 1992, EPAct amended NECPA, requiring that each federal agency achieve targeted reductions in energy consumption within a specific time period. Measured on a British Thermal Unit per gross-square-foot (BTU/GSF) basis and compared to a fiscal year (FY) 1985 baseline, federal buildings were required to achieve a 10% reduction in energy consumption by FY 1995. In addition, EPAct amended Section 543 of NECPA to require a 20% reduction in BTU/GSF energy consumption by FY 2000, measured against the FY 1985 baseline.

EPAct also amended NECPA to include an additional energy-management requirement for federal agencies. Section 543(b) of NECPA, as amended by EPAct, requires that "not later than January 1, 2005, each agency shall, to the maximum extent practicable, install in federal buildings owned by the United States, energy and water conservation measures with payback periods of less than 10 years," as determined by using federal life-cycle costing methods and procedures. However, this does not preclude the implementation of projects with payback periods of greater than 10 years.

EPAct Section 152 Subtitle F, Federal Agency Energy Management, amends Sections 542 to 550, Part 3, of the NECPA. These sections have been codified as *42 USC 8256*. Section 546, part (c), provides specific information as it relates to utility incentive programs. The five key elements of this section are highlighted below.

1. Agencies are authorized and encouraged to participate in programs to increase energy efficiency and water conservation or manage electricity demand conducted by gas, water, or electric utilities and generally available to customers of such utilities.
2. Each agency may accept any financial incentive, goods, or services generally available from any such utility, to increase energy efficiency or to conserve water or manage electricity demand.
3. Each agency is encouraged to enter into negotiations with electric, water, and gas utilities to design cost-effective demand management and conservation incentive programs to address the unique needs of facilities utilized by such agency.
4. If an agency satisfies the criteria that generally apply to other customers of a utility incentive program, such agency may not be denied collection of rebates or other incentives.
5. Agencies (except the DOD) shall retain 50% of energy and water cost savings from appropriated funds for additional energy projects, including employee incentive programs.

Section 546, parts (a)–(c) are included in this book. The full text of EPAct (Public Law 102-486) may be found on the Library of Congress *THOMAS* Web site, <http://thomas.loc.gov/>.

### ***Energy Savings and Water Conservation at Military Installations***

The legislation codified as 10 USC Sections 2911, 2913 and 2866 is part of a larger military construction and military family-housing bill. It applies to DOD facilities and is concerned with energy-saving and water conservation goals and plans at military facilities. The code stipulates that DOD facilities:

1. May enter into sole source procurement from gas or electric utilities to design and implement cost-effective demand management and conservation services.
2. Demonstrate an economic return on investment and will achieve energy savings over the life-cycle of the equipment or system being repaired or replaced.
3. Shall retain two-thirds of energy and water cost savings from appropriated energy projects and projects as determined by the commanding officer at the site.

### ***Federal Acquisition Regulation, Part 41***

Section 201 of the Federal Property and Administrative Services Act of 1949 (*40 USC Section 481*) provides the statutory authority for the General Services Administration to acquire utility services. This act has been codified in the Code of Federal Regulations, Title 48, Part 41 of the Federal Acquisition Regulations (FAR Part 41). GSA has delegated to both DOD and the DOE the authority to acquire utility services.

FAR Part 41 covers the use of AWCs for the purchase of all types of utility services. An AWC is between GSA and a utility-service supplier to cover utility-service needs of federal agencies within the franchised territory of the supplier. The basic scope of utility services includes electricity, natural or manufactured gas, water, sewerage, thermal energy, chilled water, steam, hot water, and high-temperature hot water.

Several key provisions in FAR Part 41 related to AWCs should be noted:

1. AWCs generally provide for ordering utility service at rates approved of and established by a regulatory body and published in a tariff or rate schedule. However, agencies are permitted to negotiate other rates and terms and conditions of service, but these may require the approval of the regulatory body.
2. Acquired services are for facilities located in a utility's franchised territory or service area.
3. Specific services at specific facilities are requested and executed through delivery orders.

The Public Utilities Organization within the GSA has responsibility for maintaining and negotiating new or modified AWCs. For a current listing on the Internet, go to <http://www.gsa.gov/pbs/xu/contracts1.htm>.

Specific questions regarding AWCs should be directed to either

Lindsey Lee  
202-401-0174  
[lindsey.lee@gsa.gov](mailto:lindsey.lee@gsa.gov)

Linda L. Collins  
202-708-9881  
[lindal.collins@gsa.gov](mailto:lindal.collins@gsa.gov)

The Energy Center of Expertise within the GSA has issued the *Utility Areawide User's Manual* and the *Procuring Energy Management Services with the Utility Areawide Contract* to assist agencies using AWCs to procure utility services. These guides may be viewed and downloaded from the Internet at <http://www.gsa.gov>. See page 97 for excerpts from these documents.

***Executive Order 13423, Strengthening Federal Environmental, Energy, and Transportation Management, January 24, 2007***

Executive Order (EO) 13423 strengthens key goals in the areas of energy efficiency, acquisition, renewable energy, toxics reductions, recycling, renewable energy, sustainable buildings, electronics stewardship, fleets, and water conservation. This executive order supersedes EO 13123 and its associated guidance and Amended Section 502(e). Instructions for implementing EO 13423 have been issued defining the requirements as well as strategies for meeting those requirements. DOE has also issued water and renewable energy guidance.

Instructions and guidance documents can be found at <http://www1.eere.energy.gov/femp>. See page 58 for full text of Executive Order 13423)

## Legal Opinions

The legislation and executive actions that enable agencies to enter into UESCs can be interpreted in many ways. As a result, legal opinions from varying federal agencies have been issued on this subject. Several legal opinions considered most pertinent to UESCs are included in this book.

## Agency Guidance

As a result of the vast array of legislation and associated regulations regarding UESCs, barriers have developed regarding interpretation of the intent of the legislation and the implementation of various regulations.

### *Alternative Financing Guidance Memoranda (AFGM)*

The Interagency Energy Management Task Force publishes AFGM. Through FEMP, DOE develops AFGM, which are then submitted to the task force for review and revision by a subcommittee. Final approval comes from the task force before the AFGM are made available for use by all agencies. These memoranda are patterned after Defense Energy Program Policy Memoranda (DEPPM) and focus on issues related to alternative financing. One aspect of developing these memoranda is to include, by reference, any legal opinions that might exist regarding the individual memorandum topic. Included in this book are:

- AFGM #001, which provides guidance on the issue of sole source
- AFGM #002, which provides guidance on the issue of Congressional notification for utility projects
- AFGM #003, which provides guidance on the relationship of the anti-deficiency act to multi-year contracts
- AFGM #004, which provides guidance on federal fund sources for multi-year contracts.

Additional memoranda that impact energy efficiency projects will continue to be developed.

These documents can be found online at <http://www1.eere.energy.gov/femp>.

## Next Steps

Because it provides information about the authorities that enable agencies to enter into UESCs, this book empowers federal agencies to reduce the use and cost of energy in the federal sector. The *Next Steps* section of this book contains contacts, places to find more information, sample model agreements, and information about utility-related groups within FEMP. This information will assist you in initiating an energy and water efficiency project at your facility. Reading this book is the first step; the next step is up to you.

# Legislation and Executive Action

## **Energy Policy Act of 1992 (P.L.102-486)**

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Following are relevant excerpts of the National Energy Conservation Policy Act (NECPA) as Amended by EPAct.

Sections 151, 152, and 541–544 are omitted from this document.

### **NECPA Title III, Section 546**

#### **Incentives for Agencies**

(a) **CONTRACTS.** (1) Each agency shall establish a program of incentives for conserving, and otherwise making more efficient use of, energy as a result of entering into contracts under Title VIII [42 USC 8287 et seq.] of this Act.

(2) **Implementation.** The Secretary shall, no later than 18 months after the date of the enactment of the Energy Policy Act of 1992 and after consultation with Director of the Office of Management and Budget, the Secretary of Defense, and the administrator of General Services, develop appropriate procedures and methods for use by agencies to implement the incentives referred to in paragraph (1).

Item (b) **FEDERAL ENERGY EFFICIENCY FUND** is omitted from this document.

(c) **UTILITY INCENTIVE PROGRAMS.** (1) Agencies are authorized and encouraged 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 and generally available to customers of such utilities.

(2) Each agency may accept financial incentive, goods, or services generally available from any such utility, to increase energy efficiency or to conserve water or manage electricity demand.



(3) Each agency is encouraged to enter into negotiations with electric, water, and gas utilities to design cost-effective demand management and conservation incentive programs to address the unique needs of facilities utilized by each agency.

(4) If an agency satisfies the criteria which generally apply to other customers of a utility incentive program, such agency may not be denied collection of rebates or other incentives.

(5)(A) An amount equal to fifty percent of the energy and water cost savings realized by an agency (other than the Department of Defense) with respect to funds appropriated for any fiscal year beginning after fiscal year 1992 (including financial benefits resulting from energy savings performance contracts under Title VIII and utility energy efficiency rebates) shall, subject to appropriation, remain available for expenditure by such agency for additional energy efficiency measures which may include related employee incentive programs, particularly at those facilities at which energy savings were achieved. ***(NOTE: Item 5(A) has since been stricken)***

(B) Agencies shall establish a fund and maintain strict financial accounting and controls for savings realized and expenditures made under this subsection. Records maintained pursuant to this subparagraph shall be made available for public inspection upon request.

Item (d) FINANCIAL INCENTIVE PROGRAM FOR FACILITY ENERGY MANAGERS and sections 549-551, 153-155, and Title VIII are omitted from this document.

*EISA Section 431*

## **Energy Independence and Security Act (EISA) of 2007 (P.L.110-140)**

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### *Section 431: Energy Reduction Goals for Federal Buildings*

Section 543(a)(1) of the National Energy Conservation Policy Act (42 U.S.C. 8253(a)(1)) is amended by striking the table and inserting the following:

<b>Fiscal Year</b>	<b>Percentage Reduction</b>
2006	2%
2007	4%
2008	9%
2009	12%
2010	15%
2011	18%
2012	21%
2013	24%
2014	27%
2015	30%

## Energy Independence and Security Act (EISA) of 2007 (P.L.110-140)

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### *Section 432: Management of Energy and Water Efficiency in Federal Buildings*

Section 543 of the National Energy Conservation Policy Act (42 U.S.C. 8253) is amended by adding at the end the following:

`(f) Use of Energy and Water Efficiency Measures in Federal Buildings-

`(1) DEFINITIONS- In this subsection:

`(A) COMMISSIONING- The term `commissioning', with respect to a facility, means a systematic process--

`(i) of ensuring, using appropriate verification and documentation, during the period beginning on the initial day of the design phase of the facility and ending not earlier than 1 year after the date of completion of construction of the facility, that all facility systems perform interactively in accordance with--

`(I) the design documentation and intent of the facility; and

`(II) the operational needs of the owner of the facility, including preparation of operation personnel; and

`(ii) the primary goal of which is to ensure fully functional systems that can be properly operated and maintained during the useful life of the facility.

`(B) ENERGY MANAGER-

`(i) IN GENERAL- The term `energy manager', with respect to a facility, means the individual who is responsible for--

`(I) ensuring compliance with this subsection by the facility; and

`(II) reducing energy use at the facility.

`(ii) INCLUSIONS- The term `energy manager' may include--

`(I) a contractor of a facility;

`(II) a part-time employee of a facility; and

`(III) an individual who is responsible for multiple facilities.

`(C) FACILITY-

`(i) IN GENERAL- The term `facility' means any building, installation, structure, or other property (including any applicable fixtures) owned or operated by, or constructed or manufactured and leased to, the Federal Government.

`(ii) INCLUSIONS- The term `facility' includes--

`(I) a group of facilities at a single location or multiple locations managed as an integrated operation; and

`(II) contractor-operated facilities owned by the Federal Government.

`(iii) EXCLUSIONS- The term `facility' does not include any land or site for which the cost of utilities is not paid by the Federal Government.

`(D) LIFE CYCLE COST-EFFECTIVE- The term `life cycle cost-effective', with respect to a measure, means a measure, the estimated savings of which exceed the estimated costs over the lifespan of the measure, as determined in accordance with section 544.

`(E) PAYBACK PERIOD-

`(i) IN GENERAL- Subject to clause (ii), the term `payback period', with respect to a measure, means a value equal to the quotient obtained by dividing--

`(I) the estimated initial implementation cost of the measure (other than financing costs); by

`(II) the annual cost savings resulting from the measure, including--

`(aa) net savings in estimated energy and water costs; and

`(bb) operations, maintenance, repair, replacement, and other direct costs.

`(ii) MODIFICATIONS AND EXCEPTIONS- The Secretary, in guidelines issued pursuant to paragraph (6), may make such modifications and provide such exceptions to the calculation of the payback period of a measure as the Secretary determines to be appropriate to achieve the purposes of this Act.

`(F) RECOMMISSIONING- The term `recommissioning' means a process--

`(i) of commissioning a facility or system beyond the project development and warranty phases of the facility or system; and

`(ii) the primary goal of which is to ensure optimum performance of a facility, in accordance with design or current operating needs, over the useful life of the facility, while meeting building occupancy requirements.

`(G) RETROCOMMISSIONING- The term `retrocommissioning' means a process of commissioning a facility or system that was not commissioned at the time of construction of the facility or system.

`(2) FACILITY ENERGY MANAGERS-

`(A) IN GENERAL- Each Federal agency shall designate an energy manager responsible for implementing this subsection and reducing energy use at each facility that meets criteria under subparagraph (B).

`(B) COVERED FACILITIES- The Secretary shall develop criteria, after consultation with affected agencies, energy efficiency advocates, and energy and utility service providers, that cover, at a minimum, Federal facilities, including central utility plants and distribution systems and other energy intensive operations, that constitute at least 75 percent of facility energy use at each agency.

`(3) ENERGY AND WATER EVALUATIONS-

`(A) EVALUATIONS- Effective beginning on the date that is 180 days after the date of enactment of this subsection and annually thereafter, energy managers shall complete, for each calendar year, a comprehensive energy and water evaluation for approximately 25 percent of the facilities of each agency that meet the criteria under paragraph (2)(B) in a manner that ensures that an evaluation of each such facility is completed at least once every 4 years.

`(B) RECOMMISSIONING AND RETROCOMMISSIONING- As part of the evaluation under subparagraph (A), the energy manager shall identify and assess recommissioning

measures (or, if the facility has never been commissioned, retrocommissioning measures) for each such facility.

`(4) IMPLEMENTATION OF IDENTIFIED ENERGY AND WATER EFFICIENCY MEASURES- Not later than 2 years after the completion of each evaluation under paragraph (3), each energy manager may--

`(A) implement any energy- or water-saving measure that the Federal agency identified in the evaluation conducted under paragraph (3) that is life cycle cost-effective; and

`(B) bundle individual measures of varying paybacks together into combined projects.

`(5) FOLLOW-UP ON IMPLEMENTED MEASURES- For each measure implemented under paragraph (4), each energy manager shall ensure that--

`(A) equipment, including building and equipment controls, is fully commissioned at acceptance to be operating at design specifications;

`(B) a plan for appropriate operations, maintenance, and repair of the equipment is in place at acceptance and is followed;

`(C) equipment and system performance is measured during its entire life to ensure proper operations, maintenance, and repair; and

`(D) energy and water savings are measured and verified.

`(6) GUIDELINES-

`(A) IN GENERAL- The Secretary shall issue guidelines and necessary criteria that each Federal agency shall follow for implementation of--

`(i) paragraphs (2) and (3) not later than 180 days after the date of enactment of this subsection; and

`(ii) paragraphs (4) and (5) not later than 1 year after the date of enactment of this subsection.

`(B) RELATIONSHIP TO FUNDING SOURCE- The guidelines issued by the Secretary under subparagraph (A) shall be appropriate and uniform for measures funded with each type of funding made available under paragraph (10), but may distinguish between different types of measures project size, and other criteria the Secretary determines are relevant.

`(7) WEB-BASED CERTIFICATION-

`(A) IN GENERAL- For each facility that meets the criteria established by the Secretary under paragraph (2)(B), the energy manager shall use the web-based tracking system under subparagraph (B) to certify compliance with the requirements for--

`(i) energy and water evaluations under paragraph (3);

`(ii) implementation of identified energy and water measures under paragraph (4); and

`(iii) follow-up on implemented measures under paragraph (5).

`(B) DEPLOYMENT-

`(i) IN GENERAL- Not later than 1 year after the date of enactment of this subsection, the Secretary shall develop and deploy a web-based tracking system required under this paragraph in a manner that tracks, at a minimum--

`(I) the covered facilities;

`(II) the status of meeting the requirements specified in subparagraph (A);

`(III) the estimated cost and savings for measures required to be implemented in a facility;

`(IV) the measured savings and persistence of savings for implemented measures; and

`(V) the benchmarking information disclosed under paragraph (8)(C).

`(ii) EASE OF COMPLIANCE- The Secretary shall ensure that energy manager compliance with the requirements in this paragraph, to the maximum extent practicable--

`(I) can be accomplished with the use of streamlined procedures and templates that minimize the time demands on Federal employees; and

`(II) is coordinated with other applicable energy reporting requirements.

`(C) AVAILABILITY-

`(i) IN GENERAL- Subject to clause (ii), the Secretary shall make the web-based tracking system required under this paragraph available to Congress, other Federal agencies, and the public through the Internet.

`(ii) EXEMPTIONS- At the request of a Federal agency, the Secretary may exempt specific data for specific facilities from disclosure under clause (i) for national security purposes.

`(8) BENCHMARKING OF FEDERAL FACILITIES-

`(A) IN GENERAL- The energy manager shall enter energy use data for each metered building that is (or is a part of) a facility that meets the criteria established by the Secretary under paragraph (2)(B) into a building energy use benchmarking system, such as the Energy Star Portfolio Manager.

`(B) SYSTEM AND GUIDANCE- Not later than 1 year after the date of enactment of this subsection, the Secretary shall--

`(i) select or develop the building energy use benchmarking system required under this paragraph for each type of building; and

`(ii) issue guidance for use of the system.

`(C) PUBLIC DISCLOSURE- Each energy manager shall post the information entered into, or generated by, a benchmarking system under this subsection, on the web-based tracking system under paragraph (7)(B). The energy manager shall update such information each year, and shall include in such reporting previous years' information to allow changes in building performance to be tracked over time.

`(9) FEDERAL AGENCY SCORECARDS-

`(A) IN GENERAL- The Director of the Office of Management and Budget shall issue semiannual scorecards for energy management activities carried out by each Federal agency that includes--

`(i) summaries of the status of implementing the various requirements of the agency and its energy managers under this subsection; and

`(ii) any other means of measuring performance that the Director considers appropriate.

`(B) AVAILABILITY- The Director shall make the scorecards required under this paragraph available to Congress, other Federal agencies, and the public through the Internet.

`(10) FUNDING AND IMPLEMENTATION-

`(A) AUTHORIZATION OF APPROPRIATIONS- There are authorized to be appropriated such sums as are necessary to carry out this subsection.

`(B) FUNDING OPTIONS-

`(i) IN GENERAL- To carry out this subsection, a Federal agency may use any combination of--

`(I) appropriated funds made available under subparagraph (A); and

`(II) private financing otherwise authorized under Federal law, including financing available through energy savings performance contracts or utility energy service contracts.

`(ii) COMBINED FUNDING FOR SAME MEASURE- A Federal agency may use any combination of appropriated funds and private financing described in clause (i) to carry out the same measure under this subsection.

`(C) IMPLEMENTATION- Each Federal agency may implement the requirements under this subsection itself or may contract out performance of some or all of the requirements.

`(11) RULE OF CONSTRUCTION- This subsection shall not be construed to require or to obviate any contractor savings guarantees.!

## Energy Independence and Security Act (EISA) of 2007 (P.L.110-140)

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### Section 433: Federal Building Energy Efficiency Performance Standards

(a) Standards- Section 305(a)(3) of the Energy Conservation and Production Act (42 U.S.C. 6834(a)(3)) is amended by adding at the end the following new subparagraph:

`(D) Not later than 1 year after the date of enactment of the Energy Independence and Security Act of 2007, the Secretary shall establish, by rule, revised Federal building energy efficiency performance standards that require that:

`(i) For new Federal buildings and Federal buildings undergoing major renovations, with respect to which the Administrator of General Services is required to transmit a prospectus to Congress under section 3307 of title 40, United States Code, in the case of public buildings (as defined in section 3301 of title 40, United States Code), or of at least \$2,500,000 in costs adjusted annually for inflation for other buildings:

`(I) The buildings shall be designed so that the fossil fuel-generated energy consumption of the buildings is reduced, as compared with such energy consumption by a similar building in fiscal year 2003 (as measured by Commercial Buildings Energy Consumption Survey or Residential Energy Consumption Survey data from the Energy Information Agency), by the percentage specified in the following table:

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<b>`Fiscal Year</b>	<b>Percentage Reduction</b>
2010	55
2015	65
2020	80
2025	90
2030	100

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`(II) Upon petition by an agency subject to this subparagraph, the Secretary may adjust the applicable numeric requirement under subclause (I) downward with respect to a specific building, if the head of the agency designing the building certifies in writing that meeting such requirement would be technically impracticable in light of the agency's specified



functional needs for that building and the Secretary concurs with the agency's conclusion. This subclause shall not apply to the General Services Administration.

`(III) Sustainable design principles shall be applied to the siting, design, and construction of such buildings. Not later than 90 days after the date of enactment of the Energy Independence and Security Act of 2007, the Secretary, after reviewing the findings of the Federal Director under section 436(h) of that Act, in consultation with the Administrator of General Services, and in consultation with the Secretary of Defense for considerations relating to those facilities under the custody and control of the Department of Defense, shall identify a certification system and level for green buildings that the Secretary determines to be the most likely to encourage a comprehensive and environmentally-sound approach to certification of green buildings. The identification of the certification system and level shall be based on a review of the Federal Director's findings under section 436(h) of the Energy Independence and Security Act of 2007 and the criteria specified in clause (iii), shall identify the highest level the Secretary determines is appropriate above the minimum level required for certification under the system selected, and shall achieve results at least comparable to the system used by and highest level referenced by the General Services Administration as of the date of enactment of the Energy Independence and Security Act of 2007. Within 90 days of the completion of each study required by clause (iv), the Secretary, in consultation with the Administrator of General Services, and in consultation with the Secretary of Defense for considerations relating to those facilities under the custody and control of the Department of Defense, shall review and update the certification system and level, taking into account the conclusions of such study.

`(ii) In establishing criteria for identifying major renovations that are subject to the requirements of this subparagraph, the Secretary shall take into account the scope, degree, and types of renovations that are likely to provide significant opportunities for substantial improvements in energy efficiency.

`(iii) In identifying the green building certification system and level, the Secretary shall take into consideration--

`(I) the ability and availability of assessors and auditors to independently verify the criteria and measurement of metrics at the scale necessary to implement this subparagraph;

`(II) the ability of the applicable certification organization to collect and reflect public comment;

`(III) the ability of the standard to be developed and revised through a consensus-based process;

`(IV) an evaluation of the robustness of the criteria for a high-performance green building, which shall give credit for promoting--

`(aa) efficient and sustainable use of water, energy, and other natural resources;

`(bb) use of renewable energy sources;

`(cc) improved indoor environmental quality through enhanced indoor air quality, thermal comfort, acoustics, day lighting, pollutant source control, and use of low-emission materials and building system controls; and

`(dd) such other criteria as the Secretary determines to be appropriate; and

`(V) national recognition within the building industry.

`(iv) At least once every 5 years, and in accordance with section 436 of the Energy Independence and Security Act of 2007, the Administrator of General Services shall conduct

a study to evaluate and compare available third-party green building certification systems and levels, taking into account the criteria listed in clause (iii).

`(v) The Secretary may by rule allow Federal agencies to develop internal certification processes, using certified professionals, in lieu of certification by the certification entity identified under clause (i)(III). The Secretary shall include in any such rule guidelines to ensure that the certification process results in buildings meeting the applicable certification system and level identified under clause (i)(III). An agency employing an internal certification process must continue to obtain external certification by the certification entity identified under clause (i)(III) for at least 5 percent of the total number of buildings certified annually by the agency.

`(vi) With respect to privatized military housing, the Secretary of Defense, after consultation with the Secretary may, through rulemaking, develop alternative criteria to those established by subclauses (I) and (III) of clause (i) that achieve an equivalent result in terms of energy savings, sustainable design, and green building performance.

`(vii) In addition to any use of water conservation technologies otherwise required by this section, water conservation technologies shall be applied to the extent that the technologies are life-cycle cost-effective.'

(b) Definitions- Section 303(6) of the Energy Conservation and Production Act (42 U.S.C. 6832(6)) is amended by striking `which is not legally subject to State or local building codes or similar requirements.' and inserting ` . Such term shall include buildings built for the purpose of being leased by a Federal agency, and privatized military housing.'

(c) Revision of Federal Acquisition Regulation- Not later than 2 years after the date of the enactment of this Act, the Federal Acquisition Regulation shall be revised to require Federal officers and employees to comply with this section and the amendments made by this section in the acquisition, construction, or major renovation of any facility. The members of the Federal Acquisition Regulatory Council (established under section 25 of the Office of Federal Procurement Policy Act (41 U.S.C. 421)) shall consult with the Federal Director and the Commercial Director before promulgating regulations to carry out this subsection.

(d) Guidance- Not later than 90 days after the date of promulgation of the revised regulations under subsection (c), the Administrator for Federal Procurement Policy shall issue guidance to all Federal procurement executives providing direction and instructions to renegotiate the design of proposed facilities and major renovations for existing facilities to incorporate improvements that are consistent with this section.

## Energy Independence and Security Act (EISA) of 2007 (P.L.110-140)

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### *Section 434: Management of Federal building Efficiency*

(a) Large Capital Energy Investments- Section 543 of the National Energy Conservation Policy Act (42 U.S.C. 8253) is amended by adding at the end the following:

`(f) Large Capital Energy Investments-

`(1) IN GENERAL- Each Federal agency shall ensure that any large capital energy investment in an existing building that is not a major renovation but involves replacement of installed equipment (such as heating and cooling systems), or involves renovation, rehabilitation, expansion, or remodeling of existing space, employs the most energy efficient designs, systems, equipment, and controls that are life-cycle cost effective.

`(2) PROCESS FOR REVIEW OF INVESTMENT DECISIONS- Not later than 180 days after the date of enactment of this subsection, each Federal agency shall--

`(A) develop a process for reviewing each decision made on a large capital energy investment described in paragraph (1) to ensure that the requirements of this subsection are met; and

`(B) report to the Director of the Office of Management and Budget on the process established.

`(3) COMPLIANCE REPORT- Not later than 1 year after the date of enactment of this subsection, the Director of the Office of Management and Budget shall evaluate and report to Congress on the compliance of each agency with this subsection.'

(b) Metering- Section 543(e)(1) of the National Energy Conservation Policy Act (42 U.S.C. 8253(e)(1)) is amended by inserting after the second sentence the following: 'Not later than October 1, 2016, each agency shall provide for equivalent metering of natural gas and steam, in accordance with guidelines established by the Secretary under paragraph (2).'

*EISA Section 441*

## **Energy Independence and Security Act (EISA) of 2007 (P.L.110-140)**

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### *Section 441: Public Building Life-Cycle Cost*

(For the purpose of conducting life-cycle cost calculations, Section 441 increases the time period from 25 years, in prior law, to 40 years.)

Section 544(a)(1) of the National Energy Conservation Policy Act (42 U.S.C. 8254(a)(1)) is amended by striking `25' and inserting `40'.

*EISA Section 512*

## **Energy Independence and Security Act (EISA) of 2007 (P.L.110-140)**

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### *Section 512: Financing Flexibility*

Section 801(a)(2) of the National Energy Conservation Policy Act (42 U.S.C. 8287(a)(2)) is amended by adding at the end the following:

`(E) FUNDING OPTIONS- In carrying out a contract under this title, a Federal agency may use any combination of--

`(i) appropriated funds; and

`(ii) private financing under an energy savings performance contract.'. [applicable to UESC as well]

## Energy Independence and Security Act (EISA) of 2007 (P.L.110-140)

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### *Section 513: Promoting Long-Term Energy Savings Performance contracts and Verifying Savings*

Section 801(a)(2) of the National Energy Conservation Policy Act (42 U.S.C. 8287(a)(2)) (as amended by section 512) is amended--

(1) in subparagraph (D), by inserting 'beginning on the date of the delivery order' after '25 years'; and

(2) by adding at the end the following:

`(F) PROMOTION OF CONTRACTS- In carrying out this section, a Federal agency shall not--

`(i) establish a Federal agency policy that limits the maximum contract term under subparagraph (D) to a period shorter than 25 years; or

`(ii) limit the total amount of obligations under energy savings performance contracts or other private financing of energy savings measures.

`(G) MEASUREMENT AND VERIFICATION REQUIREMENTS FOR PRIVATE FINANCING-

`(i) IN GENERAL- In the case of energy savings performance contracts, the evaluations and savings measurement and verification required under paragraphs (2) and (4) of section 543(f) shall be used by a Federal agency to meet the requirements for the need for energy audits, calculation of energy savings, and any other evaluation of costs and savings needed to implement the guarantee of savings under this section.

`(ii) MODIFICATION OF EXISTING CONTRACTS- Not later than 18 months after the date of enactment of this subparagraph, each Federal agency shall, to the maximum extent practicable, modify any indefinite delivery and indefinite quantity energy savings performance contracts, and other indefinite delivery and indefinite quantity contracts using private financing, to conform to the amendments made by subtitle B of title V of the Energy Independence and Security Act of 2007.'.

*EISA Section 515*

## **Energy Independence and Security Act (EISA) of 2007 (P.L.110-140)**

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*Section 515: Definition of Energy Savings*

Section 804(2) of the National Energy Conservation Policy Act (42 U.S.C. 8287c(2)) is amended--

(1) by redesignating subparagraphs (A), (B), and (C) as clauses (i), (ii), and (iii), respectively, and indenting appropriately;

(2) by striking 'means a reduction' and inserting 'means--

'(A) a reduction';

(3) by striking the period at the end and inserting a semicolon; and

(4) by adding at the end the following:

'(B) the increased efficient use of an existing energy source by cogeneration or heat recovery;

'(C) if otherwise authorized by Federal or State law (including regulations), the sale or transfer of electrical or thermal energy generated on-site from renewable energy sources or cogeneration, but in excess of Federal needs, to utilities or non-Federal energy users; and

'(D) the increased efficient use of existing water sources in interior or exterior applications.'

[Section 515 extends the definition of energy savings reduction to include increased use of an existing energy source by cogeneration or heat recovery, use of excess electrical or thermal energy generated from onsite renewable sources or cogeneration, and increased energy-efficient use of water resources]

*EISA Section 516*

## **Energy Independence and Security Act (EISA) of 2007 (P.L.110-140)**

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*Section: 516: Retention of Savings*

Section 546(c) of the National Energy Conservation Policy Act (42 U.S.C. 8256(c)) is amended by striking paragraph (5).

[Section 516 permits agencies to retain the full amount of energy and water cost savings obtained from utility incentive programs.]



*EISA Section 523*

## **Energy Independence and Security Act (EISA) of 2007 (P.L.110-140)**

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### *Section 523: Standard Relating to Solar Hot Water Heaters*

Section 305(a)(3)(A) of the Energy Conservation and Production Act (42 U.S.C. 6834(a)(3)(A)) is amended--

(1) in clause (i)(II), by striking 'and' at the end;

(2) in clause (ii), by striking the period at the end and inserting '; and'; and

(3) by adding at the end the following:

'(iii) if lifecycle cost-effective, as compared to other reasonably available technologies, not less than 30 percent of the hot water demand for each new Federal building or Federal building undergoing a major renovation be met through the installation and use of solar hot water heaters.'

## National Defense Authorization Act of 2007 (P.L.110-3)

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### § 2866. Water conservation at military installations

(a) Water conservation activities.

(1) The Secretary of Defense shall permit and encourage each military department, Defense Agency, and other instrumentality of the Department of Defense to participate in programs conducted by a utility for the management of water demand or for water conservation.

(2) The Secretary of Defense may authorize a military installation to accept a financial incentive (including an agreement to reduce the amount of a future water bill), goods, or services generally available from a utility, for the purpose of adopting technologies and practices that--

(A) relate to the management of water demand or to water conservation; and

(B) as determined by the Secretary, are cost effective for the Federal Government.

(3) Subject to paragraph (4), the Secretary of Defense may authorize the Secretary of a military department having jurisdiction over a military installation to enter into an agreement with a utility to design and implement a cost-effective program that provides incentives for the management of water demand and for water conservation and that addresses the requirements and circumstances of the installation. Activities under the program may include the provision of water management services, the alteration of a facility, and the installation and maintenance by the utility of a water-saving device or technology.

(4) (A) If an agreement under paragraph (3) provides for a utility to pay in advance the financing costs for the design or implementation of a program referred to in that paragraph and for such advance payment to be repaid by the United States, the cost of such advance payment may be recovered by the utility under terms that are not less favorable than the terms applicable to the most favored customer of the utility.

(B) Subject to the availability of appropriations, a repayment of an advance payment under subparagraph (A) shall be made from funds available to a military department for the purchase of utility services.

(C) An agreement under paragraph (3) shall provide that title to a water-saving device or technology installed at a military installation pursuant to the agreement shall vest in the United States. Such title may vest at such time during the term of the agreement, or upon expiration of the agreement, as determined to be in the best interests of the United States.

(b) Use of financial incentives and water cost savings.

(1) Financial incentives received from utilities for management of water demand or water conservation under subsection (a)(2) shall be credited to an appropriation designated by the Secretary of Defense. Amounts so credited shall be merged with the appropriation to which credited and shall be available for the same purposes and the same period as the appropriation with which merged.

(2) Water cost savings realized under subsection (a)(3) shall be used as follows:

(A) One-half of the amount shall be used for water conservation activities at such buildings, facilities, or installations of the Department of Defense as may be designated (in accordance with regulations prescribed by the Secretary of Defense) by the head of the department, agency, or instrumentality that realized the water cost savings.

(B) One-half of the amount shall be used at the installation at which the savings were realized, as determined by the commanding officer of such installation consistent with applicable law and regulations, for--

(i) improvements to existing military family housing units;

(ii) any unspecified minor construction project that will enhance the quality of life of personnel; or

(iii) any morale, welfare, or recreation facility or service.

(3) The Secretary of Defense shall include in the budget material submitted to Congress in connection with the submission of the budget for a fiscal year pursuant to section 1105 of title 31 [*31 USCS § 1105*] a separate statement of the amounts available for obligation under this subsection in that fiscal year.

(c) Water conservation construction projects.

(1) The Secretary of Defense may carry out a military construction project for water conservation, not previously authorized, using funds appropriated or otherwise made available to the Secretary for water conservation.

(2) When a decision is made to carry out a project under paragraph (1), the Secretary of Defense shall notify the appropriate committees of Congress of that decision. Such project may be carried out only after the end of the 21-day period beginning on the date the notification is received by such committees or, if earlier, the end of the 14-day period beginning on the date on which a copy of the notification is provided in an electronic medium pursuant to section 480 of this *title* [*10 USCS § 480*].

## National Defense Authorization Act of 2007 (P.L.110-3)

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### § 2911. Energy performance goals and plan for Department of Defense

(a) Energy performance goals.

(1) The Secretary of Defense shall submit to the congressional defense committees the energy performance goals for the Department of Defense regarding transportation systems, support systems, utilities, and infrastructure and facilities.

(2) The energy performance goals shall be submitted annually not later than the date on which the President submits to Congress the budget for the next fiscal year under section 1105 of title 31 [*31 USCS § 1105*] and cover that fiscal year as well as the next five, 10, and 20 years. The Secretary shall identify changes to the energy performance goals since the previous submission.

(b) Energy performance plan. The Secretary of Defense shall develop, and update as necessary, a comprehensive plan to help achieve the energy performance goals for the Department of Defense.

(c) Special considerations. For the purpose of developing and implementing the energy performance goals and energy performance plan, the Secretary of Defense shall consider at a minimum the following:

- (1) Opportunities to reduce the current rate of consumption of energy.
- (2) Opportunities to reduce the future demand and the requirements for the use of energy.
- (3) Opportunities to implement conservation measures to improve the efficient use of energy.
- (4) Opportunities to pursue alternative energy initiatives, including the use of alternative fuels in military vehicles and equipment.
- (5) Cost effectiveness, cost savings, and net present value of alternatives.
- (6) The value of diversification of types and sources of energy used.
- (7) The value of economies-of-scale associated with fewer energy types used.
- (8) The value of the use of renewable energy sources.

(9) The potential for an action to serve as an incentive for members of the armed forces and civilian personnel to reduce energy consumption or adopt an improved energy performance measure.

(d) Selection of energy conservation measures.

(1) For the purpose of implementing the energy performance plan, the Secretary of Defense shall provide that the selection of energy conservation measures, including energy efficient maintenance, shall be limited to those measures that--

(A) are readily available;

(B) demonstrate an economic return on the investment;

(C) are consistent with the energy performance goals and energy performance plan for the Department; and

(D) are supported by the special considerations specified in subsection (c).

(2) In this subsection, the term "energy efficient maintenance" includes--

(A) the repair of military vehicles, equipment, or facility and infrastructure systems, such as lighting, heating, or cooling equipment or systems, or industrial processes, by replacement with technology that--

(i) will achieve energy savings over the life-cycle of the equipment or system being repaired; and

(ii) will meet the same end needs as the equipment or system being repaired; and

(B) improvements in an operation or maintenance process, such as improved training or improved controls, that result in energy savings.

(e) Goal regarding use of renewable energy to meet electricity needs. It shall be the goal of the Department of Defense--

(1) to produce or procure not less than 25 percent of the total quantity of electric energy it consumes within its facilities and in its activities during fiscal year 2025 and each fiscal year thereafter from renewable energy sources (as defined in section 203(b) of the Energy Policy Act of 2005 (*42 U.S.C. 15852(b)*)); and

(2) to produce or procure electric energy from renewable energy sources whenever the use of such renewable energy sources is consistent with the energy performance goals and energy performance plan for the Department and supported by the special considerations specified in subsection (c).

## National Defense Authorization Act of 2007 (P.L.110-3)

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### § 2912. Availability and use of energy cost savings

(a) Availability. An amount of the funds appropriated to the Department of Defense for a fiscal year that is equal to the amount of energy cost savings realized by the Department, including financial benefits resulting from shared energy savings contracts entered into under section 2913 of this title [10 USCS § 2913], shall remain available for obligation under subsection (b) until expended, without additional authorization or appropriation.

(b) Use. The Secretary of Defense shall provide that the amount that remains available for obligation under subsection (a) and the funds made available under section 2916(b)(2) of this title [10 USCS § 2916(b)(2)] shall be used as follows:

(1) One-half of the amount shall be used for the implementation of additional energy conservation measures at buildings, facilities, or installations of the Department of Defense or related to vehicles and equipment of the Department, which are designated, in accordance with regulations prescribed by the Secretary of Defense, by the head of the department, agency, or instrumentality that realized the savings referred to in subsection (a).

(2) One-half of the amount shall be used at the installation at which the savings were realized, as determined by the commanding officer of such installation consistent with applicable law and regulations, for--

- (A) improvements to existing military family housing units;
- (B) any unspecified minor construction project that will enhance the quality of life of personnel; or
- (C) any morale, welfare, or recreation facility or service.

(c) Treatment of certain financial incentives. Financial incentives received from gas or electric utilities under section 2913 of this title [10 USCS § 2913] shall be credited to an appropriation designated by the Secretary of Defense. Amounts so credited shall be merged with the appropriation to which credited and shall be available for the same purposes and the same period as the appropriation with which merged.

(d) Congressional notification. The Secretary of Defense shall include in the budget material submitted to Congress in connection with the submission of the budget for a fiscal year pursuant to section 1105 of title 31 [*31 USCS § 1105*] a separate statement of the amounts available for obligation under this section in that fiscal year.

## National Defense Authorization Act of 2007 (P.L.110-3)

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### § 2913. Energy savings contracts and activities

(a) Shared energy savings contracts.

(1) The Secretary of Defense shall develop a simplified method of contracting for shared energy savings contract services that will accelerate the use of these contracts with respect to military installations and will reduce the administrative effort and cost on the part of the Department of Defense as well as the private sector.

(2) In carrying out paragraph (1), the Secretary of Defense may--

(A) request statements of qualifications (as prescribed by the Secretary of Defense), including financial and performance information, from firms engaged in providing shared energy savings contracting;

(B) designate from the statements received, with an update at least annually, those firms that are presumptively qualified to provide shared energy savings services;

(C) select at least three firms from the qualifying list to conduct discussions concerning a particular proposed project, including requesting a technical and price proposal from such selected firms for such project; and

(D) select from such firms the most qualified firm to provide shared energy savings services pursuant to a contractual arrangement that the Secretary determines is fair and reasonable, taking into account the estimated value of the services to be rendered and the scope and nature of the project.

(3) In carrying out paragraph (1), the Secretary may also provide for the direct negotiation, by departments, agencies, and instrumentalities of the Department of Defense, of contracts with shared energy savings contractors that have been selected competitively and approved by any gas or electric utility serving the department, agency, or instrumentality concerned.

(b) Participation in gas or electric utility programs. The Secretary of Defense shall permit and encourage each military department, Defense Agency, and other instrumentality of the Department of Defense to participate in programs conducted by any gas or electric utility for the management of energy demand or for energy conservation.



(c) Acceptance of financial incentive, goods, or services. The Secretary of Defense may authorize any military installation to accept any financial incentive, goods, or services generally available from a gas or electric utility, to adopt technologies and practices that the Secretary determines are in the interests of the United States and consistent with the energy performance goals for the Department of Defense.

(d) Agreements with gas or electric utilities.

(1) The Secretary of Defense may authorize the Secretary of a military department having jurisdiction over a military installation to enter into agreements with gas or electric utilities to design and implement cost-effective demand and conservation incentive programs (including energy management services, facilities alterations, and the installation and maintenance of energy saving devices and technologies by the utilities) to address the requirements and circumstances of the installation.

(2) If an agreement under this subsection provides for a utility to advance financing costs for the design or implementation of a program referred to in that paragraph to be repaid by the United States, the cost of such advance may be recovered by the utility under terms no less favorable than those applicable to its most favored customer.

(3) Subject to the availability of appropriations, repayment of costs advanced under paragraph (2) shall be made from funds available to a military department for the purchase of utility services.

(4) An agreement under this subsection shall provide that title to any energy-saving device or technology installed at a military installation pursuant to the agreement vest in the United States. Such title may vest at such time during the term of the agreement, or upon expiration of the agreement, as determined to be in the best interests of the United States.

(e) Congressional notification of cancellation ceiling for energy savings performance contracts. When a decision is made to award an energy savings performance contract that contains a clause setting forth a cancellation ceiling in excess of \$ 7,000,000, the Secretary of Defense shall submit to the appropriate committees of Congress written notification of the proposed contract and of the proposed cancellation ceiling for the contract. The notification shall include the justification for the proposed cancellation ceiling. The contract may then be awarded only after the end of the 30-day period beginning on the date the notification is received by such committees or, if earlier, the end of the 15-day period beginning on the date on which a copy of the notification is provided in an electronic medium pursuant to section 480 of this *title* [10 USCS § 480].

## National Defense Authorization Act of 2007 (P.L.110-3)

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### § 2914. Energy conservation construction projects

(a) Projects authorized. The Secretary of Defense may carry out a military construction project for energy conservation, not previously authorized, using funds appropriated or otherwise made available for that purpose.

(b) Congressional notification. When a decision is made to carry out a project under this section, the Secretary of Defense shall notify in writing the appropriate committees of Congress of that decision. The project may then be carried out only after the end of the 21-day period beginning on the date the notification is received by such committees or, if earlier, the end of the 14-day period beginning on the date on which a copy of the notification is provided in an electronic medium pursuant to section 480 of this *title* [10 USCS § 480].

## National Defense Authorization Act of 2007 (P.L.110-3)

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### § 2915. New construction: Use of renewable forms of energy and energy efficient products

(a) Use of renewable forms of energy encouraged. The Secretary of Defense shall encourage the use of energy systems using solar energy or other renewable forms of energy as a source of energy for military construction projects (including military family housing projects) where use of such form of energy is consistent with the energy performance goals and energy performance plan for the Department of Defense developed under section 2911 of this title [10 USCS § 2911] and supported by the special considerations specified in subsection (c) of such section.

(b) Consideration during design phase of projects.

(1) The Secretary concerned shall require that the design of all new facilities (including family housing) shall include consideration of such form of energy systems using solar energy or other renewable forms of energy.

(2) The Secretary concerned shall require that contracts for construction resulting from such design include a requirement that energy systems using solar energy or other renewable forms of energy be installed if such systems can be shown to be cost effective.

(c) Determination of cost effectiveness.

(1) For the purposes of this section, an energy system using solar energy or other renewable forms of energy for a facility shall be considered to be cost effective if the difference between (A) the original investment cost of the energy system for the facility with such a system, and (B) the original investment cost of the energy system for the facility without such a energy system can be recovered over the expected life of the facility.

(2) A determination under paragraph (1) concerning whether a cost-differential can be recovered over the expected life of a facility shall be made using the life-cycle cost methods and procedures established pursuant to section 544(a) of the National Energy Conservation Policy Act (42 U.S.C. 8254(a)).

(d) Exception to square feet and cost per square foot limitations. In order to equip a military construction project (including a military family housing project) with heating equipment,

cooling equipment, or both heating and cooling equipment using solar energy or other renewable forms of energy or with a passive energy system using solar energy or other renewable forms of energy, the Secretary concerned may authorize an increase in any otherwise applicable limitation with respect to the number of square feet or the cost per square foot of the project by such amount as may be necessary for such purpose. Any such increase under this subsection shall be in addition to any other administrative increase in cost per square foot or variation in floor area authorized by law.

(e) Use of energy efficiency products in new construction.

(1) The Secretary of Defense shall ensure, to the maximum extent practicable, that energy efficient products meeting the requirements of the Department of Defense are used in new facility construction by or for the Department carried out under chapter 169 of this *title* [10 *USCS* §§ 2801 et seq.] if such products are readily available and their use is consistent with the energy performance goals and energy performance plan for the Department developed under section 2911 of this title [10 *USCS* § 2911] and supported by the special considerations specified in subsection (c) of such section.

(2) In determining the energy efficiency of products, the Secretary shall consider products that--

(A) meet or exceed Energy Star specifications; or

(B) are listed on the Federal Energy Management Program Product Energy Efficiency Recommendations product list of the Department of Energy.

10 USC Section 2922a

## **National Defense Authorization Act of 2007 (P.L.110-3)**

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§ 2922a. Contracts for energy or fuel for military installations

(a) Subject to subsection (b), the Secretary of a military department may enter into contracts for periods of up to 30 years--

- (1) under section 2917 of this *title* [10 USCS § 2917]; and
- (2) for the provision and operation of energy production facilities on real property under the Secretary's jurisdiction or on private property and the purchase of energy produced from such facilities.

(b) A contract may be made under subsection (a) only after the approval of the proposed contract by the Secretary of Defense.

(c) The costs of contracts under this section for any year may be paid from annual appropriations for that year.

## National Defense Authorization Act of 2007 (P.L.110-3)

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### § 2922b. Procurement of energy systems using renewable forms of energy

(a) In procuring energy systems the Secretary of a military department shall procure systems that use solar energy or other renewable forms of energy whenever the Secretary determines that such procurement is possible, suited to supplying the energy needs of the military department under the jurisdiction of the Secretary, consistent with the energy performance goals and energy performance plan for the Department of Defense developed under section 2911 of this *title* [10 USCS § 2911], and supported by the special considerations specified in subsection (c) of such section.

(b) The Secretary of Defense shall from time to time study uses for solar energy and other renewable forms of energy to determine what uses of such forms of energy may be reliable in supplying the energy needs of the Department of Defense. The Secretary of Defense, based upon the results of such studies, shall from time to time issue policy guidelines to be followed by the Secretaries of the military departments in carrying out subsection (a) and section 2915 of this *title* [10 USCS § 2915].

## National Defense Authorization Act of 2007 (P.L.110-3)

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### § 2922f. Preference for energy efficient electric equipment

(a) In establishing a new requirement for electric equipment referred to in subsection (b) and in procuring electric equipment referred to in that subsection, the Secretary of a military department or the head of a Defense Agency, as the case may be, shall provide a preference for the procurement of the most energy efficient electric equipment available that meets the requirement or the need for the procurement, if providing such a preference is consistent with the energy performance goals and energy performance plan for the Department of Defense developed under section 2911 of this *title* [10 USCS § 2911] and supported by the special considerations specified in subsection (c) of such section.

(b) Subsection (a) applies to the following electric equipment:

- (1) Electric lamps.
- (2) Electric ballasts.
- (3) Electric motors.
- (4) Electric refrigeration equipment.

## Federal Acquisition Regulations, Part 41

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### Acquisition of Utility Services

#### Subpart 41.1—General

##### 41.100 Scope of part.

This part prescribes policies, procedures, and contract format for the acquisition of utility services. (See 41.102(6) for services that are excluded from this part.)

##### 41.101 Definitions.

As used in this part,

"Areawide contract" means a contract entered into between the General Services Administration (GSA) and a utility service supplier to cover utility service needs of Federal agencies within the franchise territory of the supplier. Each areawide contract includes an "Authorization" form for requesting service, connection, disconnection, or change in service.

"Authorization" means the document executed by the ordering agency and the utility supplier to order service under an areawide contract.

"Connection charge" means all nonrecurring costs, whether, refundable or nonrefundable, to be paid by the Government to the utility supplier for the required connecting facilities, which are installed, owned, operated, and maintained by the utility, supplier (see Termination liability).

"Delegated agency" means an agency that has received a written delegation of authority from GSA to contract for utility services for periods not exceeding ten years (see 41.103(6)).

"Federal Power and Water Marketing Agency" means a Government entity that produces, manages, transports, controls, and sells electrical and water supply service to customers.

"Franchise territory" means a geographical area that a utility supplier has a right to serve based upon a franchise, a certificate of public convenience and necessity, or other legal means.

"Intervention" means action by GSA or a delegated agency to formally participate in a utility regulatory proceeding on behalf of all Federal executive agencies.

"Multiple service locations" means the various locations or delivery points in the utility supplier's service area to which it provides service under a single contract.



"Rates" may include rate schedules, riders, rules, terms and conditions of service, and other tariff and service charges, e.g., facilities use charges.

"Separate contract" means a utility services contract (other than a GSA areawide contract, an Authorization under an areawide contract, or an interagency agreement), to cover the acquisition of utility services.

"Termination liability" means a contingent Government obligation to pay a utility supplier the unamortized portion of a connection charge and any other applicable nonrefundable service charge as defined in the contract in the event the Government terminates the contract before the cost of connection facilities has been recovered by the utility supplier (see "Connection charge").

"Utility service" means a service such as furnishing electricity, natural or manufactured gas, water, sewerage, thermal energy, chilled water, steam, hot water, or high temperature hot water. The application of Part 41 to other services (e.g., rubbish removal, snow removal) may be appropriate when the acquisition is not subject to the Service Contract Act of 1965 (see 37.107).

#### **41.102 Applicability.**

(a) Except as provided in paragraph (b) of this section, this part applies to the acquisition of utility services for the Government, including connection charges and termination liabilities.

(b) This part does not apply to

(1) Utility services produced, distributed, or sold by another Federal agency. In those cases, agencies shall use interagency agreements (see 41.206);

(2) Utility services obtained by purchase, exchange, or otherwise by a Federal power or water marketing agency incident to that agency's marketing or distribution program;

(3) Cable television (CATV) and telecommunications services;

(4) Acquisition of natural or manufactured gas when purchased as a commodity;

(5) Acquisition of utilities services in foreign countries;

(6) Acquisition of rights in real property, acquisition of public utility facilities, and on-site equipment needed for the facility's own distribution system, or construction/maintenance of Government-owned facilities; or

(7) Third party financed shared-savings projects authorized by 42 USC 8287.

However, agencies may utilize Part 41 for any energy savings or purchased utility service directly resulting from implementation of a third party financed shared-savings project under 42 U.S.C. 8287 for periods not to exceed 25 years.

#### **41.103 Statutory and delegated authority.**

(a) *Statutory authority.* (1) The General Services Administration (GSA) is authorized by section 201 of the Federal Property and Administrative Services Act of 1949, as amended (40 U.S.C. 481), to prescribe policies and methods governing the acquisition and supply of utility services for Federal agencies. This authority includes related functions such as managing public utility services and representing Federal agencies in proceedings before Federal and state regulatory bodies. GSA is authorized by section 201 of the Act to contract for utility services for periods not exceeding ten years.

(2) The Department of Defense (DOD) is authorized by 10 U.S.C. 2304 and 40 U.S.C. 474(d)(3) to acquire utility services for military facilities.

(3) The Department of Energy (DOE) is authorized by the Department of Energy Organization Act (42 U.S.C. 7251, et seq.) to acquire utility services. DOE is authorized by the Atomic Energy Act of 1954, as amended (42 U.S.C. 2204), to enter into new contracts or modify existing contracts for electric services for periods not exceeding 25 years for uranium enrichment installations.

(b) *Delegated authority.* GSA has delegated its authority to enter into utility service contracts for periods not exceeding ten years to DOD and DOE, and for connection charges only to the Department of Veteran affairs. Contracting pursuant to this delegated authority shall be consistent with the requirements of this part. Other agencies requiring utility service contracts for periods over one year, but not exceeding ten years, may, request a delegation of authority from GSA at the address specified in 41.301(a) In keeping with its statutory authority, GSA will, as necessary, conduct reviews of delegated agencies' acquisitions of utility services to ensure compliance with the terms of the delegation and applicable laws and regulations.

(c) Requests for delegations of contracting authority from GSA shall include a certification from the acquiring agency's Senior Procurement Executive that the agency has—

- (1) An established acquisition program;
- (2) Personnel technically qualified to deal with specialized utilities problems; and
- (3) The ability to accomplish its own pre-award contract review.

## **Subpart 41.2 — Acquiring Utility Services**

### **41.201 Policy.**

(a) Subject to paragraph (d) of this section, it is the policy of the Federal Government that agencies obtain required utility services from sources of supply which are most advantageous to the Government in terms of economy, efficiency, reliability, or service.

(b) Except for acquisitions at or below the simplified acquisition threshold, agencies shall acquire utility services by a bilateral written contract, which must include the clauses required by 41.501, regardless of whether rates or terms and conditions of service are fixed or adjusted by a regulatory body. Agencies may not use the utility supplier's forms and clauses to avoid the inclusion of provisions and clauses required by 41.501 or by statute. (See 41.202(c) for procedures to be used when the supplier refuses to execute a written contract.)

(c) Specific operating and management details, such as procedures for internal agency contract assistance and review, delegations of authority, and approval thresholds, may be prescribed by an individual agency subject to compliance with applicable statutes and regulations.

(d)(1) Section 8093 of the Department of Defense Appropriations Act of 1988, Public Law 100–202, provides that none of the funds appropriated by that Act or any other Act with respect to any fiscal year by any department, agency, or instrumentality of the United States, may be used for the purchase of electricity by the Government in any manner that is inconsistent with state law governing the providing of electric utility service, including state utility commission rulings and electric utility franchises or service territories established pursuant to state statute, state regulation, or state-approved territorial agreements.

(2) The Act does not preclude—

(i) The head of a Federal agency from entering into a contract pursuant to 42 U.S.C. 8287, (which pertains to the subject of shared energy savings including cogeneration):

(ii) The Secretary of a military department from entering into a contract pursuant to 10 U.S.C. 2394 (which pertains to contracts for energy or fuel for military installations including the provision and operation of energy production facilities); or

(iii) The Secretary of a military department from purchasing electricity from any provider when the utility or utilities having applicable state-approved franchise or other service authorizations are found by the Secretary to be unwilling or unable to meet unusual standards for service reliability that are necessary for purposes of national defense.

(3) Additionally, the head of a Federal agency may (i) Consistent with applicable state law, enter into contracts for the purchase or transfer of electricity to the agency by a non-utility, including a qualifying facility under the Public Utility Regulatory Policies Act of 1978;

(ii) Enter into an interagency agreement, pursuant to 41.206 and 17.5, with a Federal power marketing agency or the Tennessee Valley Authority for the transfer of electric power to the agency; and

(iii) Enter into a contract with an electric utility under the authority or tariffs of the Federal Energy Regulatory Commission.

(e) Prior to acquiring electric utility services on a competitive basis, the contracting officer shall determine, with the advice of legal counsel, by a market survey or any other appropriate means, e.g., consultation with the state agency responsible for regulating public utilities, that such competition would not be inconsistent with state law governing the provision of electric utility service, including state utility commission rulings and electric utility franchises or service territories established pursuant to state statute, state regulation, or state-approved territorial agreements. Proposals from alternative electric suppliers shall provide a representation that service can be provided in a manner consistent with section 8093 of Public Law 100-202 (see 41.201(d)).

#### **41.202 Procedures.**

(a) Prior to executing a utility service contract, the contracting officer shall comply with Parts 6 and 7 and subsections 41.201(d) and (e) of this part. In accordance with Parts 6 and 7, agencies shall conduct market surveys and perform acquisition planning in order to promote and provide for full and open competition provided that the contracting officer determines that any resultant contract would not be inconsistent with applicable state law governing the provision of electric utility services. If competition for an entire utility service is not available, the market survey may be used to determine the availability of competitive sources for certain portions of the requirement. The scope of the term "entire utility service" includes the provision of the utility service capacity, energy, water, sewage, transportation, standby or back-up, service, transmission and/or distribution service, quality assurance, system reliability, system operation and maintenance, metering, and billing

(b) In performing a market survey (see 7.101), the contracting officer shall consider, in addition to alternative competitive sources, use of the following:

(1) GSA areawide contracts (see 41:204):

(2) Separate contracts (see 41.205).

(3) Interagency agreements (see 41.206).

(c) When a utility supplier refuses to execute a tendered contract as outlined in 41.201(b), the agency shall obtain a written definite and final refusal signed by a corporate officer or other responsible official of the supplier (or if unobtainable, document any unwritten refusal) and transmit this document, along with statements of the reasons for the refusal and the record of negotiations, to GSA at the address specified at 41.301(a). Unless urgent and compelling circumstances exist, the contracting officer shall notify GSA prior to acquiring utility services without executing a tendered contract. After such notification, the agency may proceed with the acquisition and pay for the utility service under the provisions of 31 U.S.C. 1501(a)(8)

(1) By issuing a purchase order in accordance with 13.302; or

(2) By ordering the necessary utility service and paying for it upon the presentation of an invoice, provided that a determination is approved by the head of the contracting activity that a written contract cannot be obtained and that the issuance of a purchase order is not feasible.

(d) When obtaining service without a bilateral written contract, the contracting officer shall establish a utility history file on each acquisition of utility service provided by a contractor. This utility history file shall contain, in addition to applicable documents in 4.803, the following information:

(1) The unsigned, tendered contract and any related letter of transmittal.

(2) The reasons stated by the utility supplier for not executing the tendered contract, the record of negotiations, and a written definite and final refusal by a corporate officer or other responsible official of the supplier (or if unobtainable, documentation of unwritten refusal).

(3) Services to be furnished and the estimated annual cost.

(4) Historical record of any applicable connection charges.

(5) Historical record of any applicable ongoing capital credits.

(6) A copy of the applicable rate schedule.

(e) If the Government obtains utility service pursuant to paragraph (c) of this section, the contracting officer shall, on an annual basis beginning from the date of final refusal, take action to execute a bilateral written contract. The contracting officer shall document the utility history file with the efforts made and the agency shall notify GSA, in writing, if the utility continues to refuse to execute a bilateral, contract.

#### **41.203 GSA assistance.**

(a) GSA will, upon request, provide technical and acquisition assistance, or will delegate its contracting authority for the furnishing of the services described in this part for any Federal agency, mixed-ownership Government corporation, the District of Columbia, the Senate, the House of Representatives, or the Architect of the Capitol and any activity under the Architect's direction.

(b) Agencies, seeking assistance shall provide upon request by GSA the information listed in 41.301.

#### **41.204 GSA areawide contracts.**

(a) *Purpose.* GSA enters into areawide contracts (see 41.101) for use by Federal agencies. Areawide contracts provide a pre-established contractual vehicle for ordering utility services under the conditions in paragraph (c)(1) of this section.

(b) *Features.* (1) Areawide contracts generally provide for ordering utility service at rates approved and/or established by a regulatory body and published in a tariff or rate schedule. However, agencies are permitted to negotiate other rates and terms and conditions of service with the supplier (see paragraph (c) of this section). Rates other than those published may require the approval of the regulatory body.

(2) Areawide contracts are negotiated with utility service suppliers for the provision of service within the supplier's franchise territory or service area.

(3) Due to the regulated nature of the utility industry, as well as statutory restrictions associated with the procurement of electricity (see 41.201(d)), competition is typically not available within the entire geographical area covered by an areawide contract, although it may be available at specific locations within the utility's service area. When competing suppliers are available, the provisions of subparagraph (c)(1) of this section apply.

(c) *Procedures for obtaining service.* (1) Any Federal agency having a requirement for utility services within an area covered by an areawide contract shall acquire services under that areawide contract unless—

(i) Service is available from more than one supplier or

(ii) The head of the contracting activity or designee otherwise determines that use of the areawide contract is not advantageous to the Government.

If service is available from more than one supplier, service shall be acquired using competitive acquisition procedures (see 41.202(a)). The determination required by subparagraph (c)(1)(ii) of this section shall be documented in the contract file with an information copy furnished to GSA at the address in 41.301(a).

(2) Each areawide contract includes an authorization form for ordering service, connection, disconnection, or change in service. Upon execution of an authorization by the contracting officer and utility supplier, the utility supplier is required to furnish services, without further negotiation, at the current, applicable published or unpublished rates, unless other rates, and/or terms and conditions are separately negotiated by the Federal agency with the supplier.

(3) The contracting officer shall execute the Authorization, and attach it to a Standard Form (SF) 26, Award/Contract, along with any modifications such as connection charges, special facilities, or service arrangements. The contracting officer shall also attach any specific fiscal, operational, and administrative requirements of the agency, applicable rate schedules, technical information and detailed maps or drawings of delivery points, details on Government ownership, maintenance, or repair of facilities, and other information deemed necessary to fully define the service conditions in the Authorization/contract.

(d) *List of areawide contracts.* A list of current GSA areawide contracts is available from the GSA office specified at 41.301(a). The list identifies the types of services and the geographic area served. A copy of the contract may also be obtained from this office.

(e) *Notification.* Agencies shall provide GSA at the address specified at 41.301(a) a copy of each SF 26 and executed Authorization issued under an areawide contract within 30 days after execution.

#### **41.205 Separate contracts.**

(a) In the absence of an areawide contract or interagency agreement (see 41.206), agencies shall acquire utility services by separate contract subject to this part, and subject to agency contracting authority.

(b) If an agency enters into a separate contract, the contracting officer shall document the contract file with the following information:

(1) The number of available suppliers.

(2) Any special equipment, service reliability, or facility requirements and related costs.

(3) The utility supplier's rates, connection charges, and termination liability.

(4) Total estimated contract value (including costs in subparagraphs (b)(2) and (3) of this subsection).

(5) Any technical or special contract terms required:

(6) Any unusual characteristics of services required.

(7) The utility's wheeling, or transportation policy, for utility service.

(c) If requesting GSA assistance with a separate contract, the requesting agency shall furnish the technical and acquisition data specified in 41.205(b), 41.301, and such other data as GSA may deem necessary.

(d) A contract exceeding a 1-year period, but not exceeding ten years (except pursuant to 41.103), may be justified, and is usually required, where any of the following circumstances exist:

(1) The Government will obtain lower rates, larger discounts, or more favorable terms and conditions of service.

(2) A proposed connection charge, termination liability, or any other facilities charge to be paid by the Federal Government will be reduced or eliminated;

(3) The utility service supplier refuses to render the desired service except under a contract exceeding a 1-year period.

#### **41.206 Interagency agreements.**

Agencies shall use interagency agreements (e.g., consolidated purchase, joint use, or cross-service agreements) when acquiring utility service or facilities from other Government agencies and shall comply with the policies and procedures at Subpart 17.5, Interagency Acquisitions under the Economy Act.

### **Subpart 41.3—Requests for Assistance**

#### **41.301 Requirements.**

(a) Requests for delegations of GSA contracting authority assistance with a proposed contract as provided in 41.203, and the submission of other information required by this part, shall be sent or submitted to the General Services Administration (GSA) region in which service is required. The names and locations of GSA regional offices are available from the:

Public Utilities Division (PPU)  
Public Buildings Service  
Washington DC 20405

(b) Requests for contracting assistance for utility services shall be sent not later than 120 days prior to the date new services are required to commence or an existing contract will expire. Requests for assistance shall contain the following information:

(1) A technical description or specification of the type, quantity, and quality of service required, and a delivery schedule.

(2) A copy of any service proposal or proposed contract.

(3) Copies of all current published or unpublished rates of the utility supplier.

(4) Identification of any unusual factors affecting the acquisition.

(5) Identification of all available sources or methods of supply, an analysis of the cost-effectiveness of each, and a statement of the ability of each source to provide the required service, including the location and a description of each, available supplier's facilities at the nearest point of service, and the cost of providing or obtaining necessary backup and other ancillary services.

(c) For new utility service requirements, the agency shall furnish the information in paragraph (a) of this section and the following as applicable:

(1) The date initial service is required.

(2) For the first 12 months of full service, estimated maximum demand, monthly consumption, other pertinent information (e.g., demand side management, load or energy management, peak shaving, on site generation, load shaping), and annual cost of the service.

(3) Known or estimated time schedule for growth to ultimate requirements.

(4) Estimated ultimate maximum demand and ultimate monthly consumption.

(5) A simple schematic diagram or line drawing showing the meter locations, the location of the new utility facilities to be constructed on Federal property by the Federal agency, and any required new connection facilities on either side of the delivery point to be constructed by the utility supplier to provide the new services.

(6) Accounting and appropriation data to cover the required utility services and any connection charges required to be paid by the agency receiving such utility services.

(7) The following data concerning proposed facilities and related charges or costs:

(i) Proposed refundable or nonrefundable connection charge, termination liability, or other facilities charge to be paid by the agency, together with a description of the supplier's proposed facilities and estimated construction costs, and its rationale for the charge, e.g., tariff provisions or policies.

(ii) A copy of the acquiring agency's estimate to make its own connection to the supplier's facilities through use of its own resources or by separate contract. When feasible, the acquiring agency shall provide its estimates to construct and operate its own utility facilities in lieu of participating in a cost-sharing construction program with the proposed utility supplier.

(d) For existing utility service, the agency shall furnish GSA the information in paragraph (b) of this section and the following, as applicable:

(1) A copy of the most recent 12-months' service invoices.

(2) A tabulation, by month, for the most recent 12 months, showing the actual utility demands, consumption, connection charges, fuel adjustment charges, and the average monthly cost per unit of consumption.

(3) An estimate, by month, for the next 12 months, showing the estimated maximum demands, monthly consumption, other pertinent information (e.g., demand side management,

load or energy management, peak shaving, on site generation, load shaping), and annual cost of the service.

(4) Accounting and appropriation data to cover the costs for the continuation of utility services.

(5) A statement noting whether the transformer, or other system components, on either side of the delivery point are owned by the Federal agency or the utility supplier, and if the metering is on the primary or secondary side of the transformer.

#### **Subpart 41.4—Administration**

##### **41.401 Monthly and annual review.**

Agencies shall review utility service invoices on a monthly basis and all utility accounts with annual values exceeding the simplified acquisition threshold on an annual basis. Annual reviews of accounts with annual values at or below the simplified acquisition threshold shall be conducted when deemed advantageous to the Government. The purpose of the monthly review is to ensure the accuracy of utility service invoices. The purpose of the annual review is to ensure that the utility supplier is furnishing the services to each facility under the utility's most economical, applicable rate and to examine competitive markets for more advantageous service offerings. The annual review shall be based upon the facility's usage, conditions and characteristics of service at each individual delivery point for the most recent 12 months. If a more advantageous rate is appropriate, the Federal agency shall request the supplier to make such rate change immediately.

##### **41.402 Rate changes and regulatory intervention.**

(a) When a change is proposed to rates or terms and conditions of service to the Government, the agency shall promptly determine whether the proposed change is reasonable, justified, and not discriminatory.

(b) If a change is proposed to rates or terms and conditions of service that may be of interest to other Federal agencies, and intervention before a regulatory body is considered justified, the matter shall be referred to GSA. The agency may request from GSA a delegation of authority for the agency to intervene on behalf of the consumer interests of the Federal executive agencies (see 41.301).

(c) Pursuant to 52.241-7, Change in Rates or Terms and Conditions of Service for Regulated Services, if a regulatory body approves a rate change, any rate change shall be made a part of the contract by unilateral contract modification or otherwise documented in accordance with agency procedures. The approved applicable rate shall be effective on the date determined by the regulatory body and resulting rates and charges shall be paid promptly to avoid late payment provisions. Copies of the modification containing the approved rate change shall be sent to the agency's paying office or office responsible for verifying billed amounts (see 41.401).

(d) If the utility supplier is not regulated and the rates, terms, and conditions of service are subject to negotiation pursuant to the clause at 52.241-8, Change in Rates or Terms and Conditions of Service for Unregulated Services, any rate change shall be made a part of the contract by contract modification, with copies sent to the agency's paying office or office responsible for verifying billed amounts.



## **Subpart 41.5—Solicitation Provision and Contract Clauses**

### **41.501 Solicitation provision and contract clauses.**

(a) Because the terms and conditions under which utility suppliers furnish service may vary from area to area, the differences may influence the terms and conditions appropriate to a particular utility's contracting situation. To accommodate requirements that are peculiar to the contracting situation, this section prescribes provisions and clauses on a "substantially the same as" basis (see 52.101) which permits the contracting officer to prepare and utilize variations of the prescribed provision and clauses in accordance with agency procedures.

(b) The contracting officer shall insert in solicitations for utility services a provision substantially the same as the provision at 52.241-1, Electric Service Territory Compliance Representation, when proposals from alternative electric suppliers are sought.

(c) The contracting officer shall insert in solicitations and contracts for utility services clauses substantially the same as the clauses at—

- (1) 52.241-2, Order of Precedence-Utilities;
- (2) 52.241-3, Scope and Duration of Contract;
- (3) 52.241-4, Change in Class of Service;
- (4) 52.241-5, Contractor's Facilities; and
- (5) 52.241-6, Service Provisions.

(d) The contracting officer shall insert clauses substantially the same as the clauses listed below in solicitations and contracts under the prescribed conditions

(1) 52.241-7, Change in Rates or Terms and Conditions of Service for Regulated Services, when the utility services are subject to a regulatory body. (Except for GSA areawide contracts, the contracting officer shall insert in the blank space provided in the clause the name of the contracting officer. For GSA areawide contracts, the contracting officer shall insert the following: "GSA and each areawide customer with annual billings that exceed \$250,000").

(2) 52.241-8, Change in Rates or Terms and Conditions of Service for Unregulated Services, when the utility services are not subject to a regulatory body.

(3) 52.241-9, Connection Charge, when a refundable connection charge is required to be paid by the Government to compensate the contractor for furnishing additional facilities necessary to supply service. (Use Alternate I to the clause if a nonrefundable charge is to be paid. When conditions require the incorporation of a nonrecurring, nonrefundable service charge or a termination liability, see paragraphs (d)(6) and (d)(4) of this section).

(4) 52.241-10, Termination Liability, when payment is to be made to the contractor upon termination of service in conjunction with or in lieu of a connection charge upon completion of the facilities.

(5) 52.241-11, Multiple Service Locations (as defined in 41.101), when providing for possible alternative service locations, except under areawide contracts, is required.

(6) 52.241-12, Nonrefundable, Nonrecurring Service Charge, when the Government is required to pay a nonrefundable, nonrecurring membership fee, a charge for initiation of service, or a contribution for the cost of facilities construction. The Government may provide for inclusion of such agreed amount or fee as a part of the connection charge, a part of the initial payment for services, or as periodic payments to fulfill the Government's obligation.

(7) 52.241-13, Capital Credits, when the Federal Government is a member of a cooperative and is entitled to capital credits, consistent with the bylaws and governing documents of the cooperative.

- (e) Depending on the conditions that are appropriate for each acquisition, the contracting officer shall also insert in solicitations and contracts for utility services the provisions and clauses prescribed elsewhere in the FAR.

## **Subpart 41.6—Forms**

### **41.601 Utility services forms.**

(a) If acquiring utility services under other than an areawide contract, a purchase order or an interagency agreement, the Standard Form (SF) 33, Solicitation, Offer and Award; SF 26, Award/Contract; or SF 1447, Solicitation/Contract, shall be used.

(b) The contracting officer shall incorporate the applicable rate schedule. in each contract, purchase order or modification.

## **Subpart 41.7—Formats**

### **41.701 Formats for utility service specifications:**

(a) The following specification formats for use in acquiring utility services are available from the address specified at 41.301(a) and may be used and modified at the agency's discretion:

- (1) Electric service.
- (2) Water service.
- (3) Steam service.
- (4) Sewage service.
- (5) Natural gas service.

(b) Contracting officers may modify the specification format referenced in paragraph (a) of this section and attach technical items, details on Government ownership of facilities and maintenance or repair obligations, maps or drawings of delivery points, and other information deemed necessary to fully define the service conditions.

(c) The specifications and attachments (see paragraph (b) of this section) shall be inserted in Section C of the utility service solicitation and contract.

### **41.702 Formats for annual utility service review.**

(a) Formats for use in conducting annual reviews of the following utility services are available from the address specified at 41.301 (a) and may be used at the agency's discretion:

- (1) Electric service.
- (2) Gas service.
- (3) Water and sewage service.

(b) Contracting officers may modify the annual utility service review format as necessary to fully cover the service used.

## ***Executive Order 13423: Strengthening Federal Environmental, Energy, and Transportation Management***

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Signed January 24, 2007

By the authority vested in me as President by the Constitution and the laws of the United States of America, and to strengthen the environmental, energy, and transportation management of Federal agencies, it is hereby ordered as follows:

Section 1. Policy. It is the policy of the United States that Federal agencies conduct their environmental, transportation, and energy-related activities under the law in support of their respective missions in an environmentally, economically and fiscally sound, integrated, continuously improving, efficient, and sustainable manner.

Sec. 2. Goals for Agencies. In implementing the policy set forth in section 1 of this order, the head of each agency shall:

(a) improve energy efficiency and reduce greenhouse gas emissions of the agency, through reduction of energy intensity by (i) 3 percent annually through the end of fiscal year 2015, or (ii) 30 percent by the end of fiscal year 2015, relative to the baseline of the agency's energy use in fiscal year 2003;

(b) ensure that (i) at least half of the statutorily required renewable energy consumed by the agency in a fiscal year comes from new renewable sources, and (ii) to the extent feasible, the agency implements renewable energy generation projects on agency property for agency use;

(c) beginning in FY 2008, reduce water consumption intensity, relative to the baseline of the agency's water consumption in fiscal year 2007, through life-cycle cost-effective measures by 2 percent annually through the end of fiscal year 2015 or 16 percent by the end of fiscal year 2015;

(d) require in agency acquisitions of goods and services (i) use of sustainable environmental practices, including acquisition of biobased, environmentally preferable, energy-efficient, water-efficient, and recycled-content products, and (ii) use of paper of at least 30 percent post-consumer fiber content;

(e) ensure that the agency (i) reduces the quantity of toxic and hazardous chemicals and materials acquired, used, or disposed of by the agency, (ii) increases diversion of solid waste as appropriate, and (iii) maintains cost-effective waste prevention and recycling programs in its facilities;

f) ensure that (i) new construction and major renovation of agency buildings comply with the Guiding Principles for Federal Leadership in High Performance and Sustainable Buildings set forth in the Federal Leadership in High Performance and Sustainable Buildings Memorandum of Understanding (2006), and (ii) 15 percent of the existing Federal capital asset building inventory of the agency as of the end of fiscal year 2015 incorporates the sustainable practices in the Guiding Principles;

(g) ensure that, if the agency operates a fleet of at least 20 motor vehicles, the agency, relative to agency baselines for fiscal year 2005, (i) reduces the fleet's total consumption of petroleum products by 2 percent annually through the end of fiscal year 2015, (ii) increases the total fuel consumption that is non-petroleum-based by 10 percent annually, and (iii) uses plug-in hybrid (PIH) vehicles when PIH vehicles are commercially available at a cost reasonably comparable, on the basis of life-cycle cost, to non-PIH vehicles; and

(h) ensure that the agency (i) when acquiring an electronic product to meet its requirements, meets at least 95 percent of those requirements with an Electronic Product Environmental Assessment Tool (EPEAT)-registered electronic product, unless there is no EPEAT standard for such product, (ii) enables the Energy Star feature on agency computers and monitors, (iii) establishes and implements policies to extend the useful life of agency electronic equipment, and (iv) uses environmentally sound practices with respect to disposition of agency electronic equipment that has reached the end of its useful life.

Sec. 3. Duties of Heads of Agencies. In implementing the policy set forth in section 1 of this order, the head of each agency shall:

(a) implement within the agency sustainable practices for (i) energy efficiency, greenhouse gas emissions avoidance or reduction, and petroleum products use reduction, (ii) renewable energy, including bioenergy, (iii) water conservation, (iv) acquisition, (v) pollution and waste prevention and recycling, (vi) reduction or elimination of acquisition and use of toxic or hazardous chemicals, (vii) high performance construction, lease, operation, and maintenance of buildings, (viii) vehicle fleet management, and (ix) electronic equipment management;

(b) implement within the agency environmental management systems (EMS) at all appropriate organizational levels to ensure (i) use of EMS as the primary management approach for addressing environmental aspects of internal agency operation and activities, including environmental aspects of energy and transportation functions, (ii) establishment of agency objectives and targets to ensure implementation of this order, and (iii) collection, analysis, and reporting of information to measure performance in the implementation of this order;

(c) establish within the agency programs for (i) environmental management training, (ii) environmental compliance review and audit, and (iii) leadership awards to recognize outstanding environmental, energy, or transportation management performance in the agency;

(d) within 30 days after the date of this order (i) designate a senior civilian officer of the United States, compensated annually in an amount at or above the amount payable at level IV of the Executive Schedule, to be responsible for implementation of this order within the agency, (ii) report such designation to the Director of the Office of Management and Budget and the Chairman of the Council on Environmental Quality, and (iii) assign the designated official the authority and duty to (A) monitor and report to the head of the agency on agency

activities to carry out subsections (a) and (b) of this section, and (B) perform such other duties relating to the implementation of this order within the agency as the head of the agency deems appropriate;

(e) ensure that contracts entered into after the date of this order for contractor operation of government-owned facilities or vehicles require the contractor to comply with the provisions of this order with respect to such facilities or vehicles to the same extent as the agency would be required to comply if the agency operated the facilities or vehicles;

(f) ensure that agreements, permits, leases, licenses, or other legally-binding obligations between the agency and a tenant or concessionaire entered into after the date of this order require, to the extent the head of the agency determines appropriate, that the tenant or concessionaire take actions relating to matters within the scope of the contract that facilitate the agency's compliance with this order;

(g) provide reports on agency implementation of this order to the Chairman of the Council on such schedule and in such format as the Chairman of the Council may require; and

(h) provide information and assistance to the Director of the Office of Management and Budget, the Chairman of the Council, and the Federal Environmental Executive.

Sec. 4. Additional Duties of the Chairman of the Council on Environmental Quality. In implementing the policy set forth in section 1 of this order, the Chairman of the Council on Environmental Quality:

(a) (i) shall establish a Steering Committee on Strengthening Federal Environmental, Energy, and Transportation Management to advise the Director of the Office of Management and Budget and the Chairman of the Council on the performance of their functions under this order that shall consist exclusively of (A) the Federal Environmental Executive, who shall chair, convene and preside at meetings of, determine the agenda of, and direct the work of, the Steering Committee, and (B) the senior officials designated under section 3(d)(i) of this order, and (ii) may establish subcommittees of the Steering Committee, to assist the Steering Committee in developing the advice of the Steering Committee on particular subjects;

(b) may, after consultation with the Director of the Office of Management and Budget and the Steering Committee, issue instructions to implement this order, other than instructions within the authority of the Director to issue under section 5 of this order; and

(c) shall administer a presidential leadership award program to recognize exceptional and outstanding environmental, energy, or transportation management performance and excellence in agency efforts to implement this order.

Sec. 5. Duties of the Director of the Office of Management and Budget. In implementing the policy set forth in section 1 of this order, the Director of the Office of Management and Budget shall, after consultation with the Chairman of the Council and the Steering Committee, issue instructions to the heads of agencies concerning:

(a) periodic evaluation of agency implementation of this order;

(b) budget and appropriations matters relating to implementation of this order;

(c) implementation of section 2(d) of this order; and

(d) amendments of the Federal Acquisition Regulation as necessary to implement this order.

Sec. 6. Duties of the Federal Environmental Executive. A Federal Environmental Executive designated by the President shall head the Office of the Federal Environmental Executive, which shall be maintained in the Environmental Protection Agency for funding and administrative purposes. In implementing the policy set forth in section 1 of this order, the Federal Environmental Executive shall:

- (a) monitor, and advise the Chairman of the Council on, performance by agencies of functions assigned by sections 2 and 3 of this order;
- (b) submit a report to the President, through the Chairman of the Council, not less often than once every 2 years, on the activities of agencies to implement this order; and
- (c) advise the Chairman of the Council on the Chairman's exercise of authority granted by subsection 4(c) of this order.

Sec. 7. Limitations. (a) This order shall apply to an agency with respect to the activities, personnel, resources, and facilities of the agency that are located within the United States. The head of an agency may provide that this order shall apply in whole or in part with respect to the activities, personnel, resources, and facilities of the agency that are not located within the United States, if the head of the agency determines that such application is in the interest of the United States.

(b) The head of an agency shall manage activities, personnel, resources, and facilities of the agency that are not located within the United States, and with respect to which the head of the agency has not made a determination under subsection (a) of this section, in a manner consistent with the policy set forth in section 1 of this order to the extent the head of the agency determines practicable.

Sec. 8. Exemption Authority. (a) The Director of National Intelligence may exempt an intelligence activity of the United States, and related personnel, resources, and facilities, from the provisions of this order, other than this subsection and section 10, to the extent the Director determines necessary to protect intelligence sources and methods from unauthorized disclosure.

(b) The head of an agency may exempt law enforcement activities of that agency, and related personnel, resources, and facilities, from the provisions of this order, other than this subsection and section 10, to the extent the head of an agency determines necessary to protect undercover operation from unauthorized disclosure.

(c) (i) The head of an agency may exempt law enforcement, protective, emergency response, or military tactical vehicle fleets of that agency from the provisions of this order, other than this subsection and section 10.

(ii) Heads of agencies shall manage fleets to which paragraph (i) of this subsection refers in a manner consistent with the policy set forth in section 1 of this order to the extent they determine practicable.

(d) The head of an agency may submit to the President, through the Chairman of the Council, a request for an exemption of an agency activity, and related personnel, resources, and facilities, from this order.

Sec. 9. Definitions. As used in this order:

- (a) "agency" means an executive agency as defined in section 105 of title 5, United States Code, excluding the Government Accountability Office;
- (b) "Chairman of the Council" means the Chairman of the Council on Environmental Quality, including in the Chairman's capacity as Director of the Office of Environmental Quality;
- (c) "Council" means the Council on Environmental Quality;
- (d) "environmental" means environmental aspects of internal agency operation and activities, including those environmental aspects related to energy and transportation functions;
- (e) "greenhouse gases" means carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride;
- (f) "life-cycle cost-effective" means the life-cycle costs of a product, project, or measure are estimated to be equal to or less than the base case (i.e., current or standard practice or product);
- (g) "new renewable sources" means sources of renewable energy placed into service after January 1, 1999;
- (h) "renewable energy" means energy produced by solar, wind, biomass, landfill gas, ocean (including tidal, wave, current and thermal), geothermal, municipal solid waste, or new hydroelectric generation capacity achieved from increased efficiency or additions of new capacity at an existing hydroelectric project;
- (i) "energy intensity" means energy consumption per square foot of building space, including industrial or laboratory facilities;
- (j) "Steering Committee" means the Steering Committee on Strengthening Federal Environmental, Energy, and Transportation Management established under subsection 4(b) of this order;
- (k) "sustainable" means to create and maintain conditions, under which humans and nature can exist in productive harmony, that permit fulfilling the social, economic, and other requirements of present and future generations of Americans; and
- (l) "United States" when used in a geographical sense, means the fifty states, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the United States Virgin Islands, and the Northern Mariana Islands, and associated territorial waters and airspace.

Sec. 10. General Provisions. (a) This order shall be implemented in a manner consistent with applicable law and subject to the availability of appropriations.

(b) Nothing in this order shall be construed to impair or otherwise affect the functions of the Director of the Office of Management and Budget relating to budget, administrative, or legislative proposals.

(c) This order is intended only to improve the internal management of the Federal Government and is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by a party against the United States, its departments, agencies, instrumentalities, entities, officers, employees or agents, or any other person.

Sec. 11. Revocations; Conforming Provisions. (a) The following are revoked:

- (i) Executive Order 13101 of September 14, 1998;
- (ii) Executive Order 13123 of June 3, 1999;
- (iii) Executive Order 13134 of August 12, 1999, as amended;
- (iv) Executive Order 13148 of April 21, 2000; and
- (v) Executive Order 13149 of April 21, 2000.

(b) In light of subsection 317(e) of the National Defense Authorization Act for Fiscal Year 2002 (Public Law 107), not later than January 1 of each year through and including 2010, the Secretary of Defense shall submit to the Senate and the House of Representatives a report regarding progress made toward achieving the energy efficiency goals of the Department of Defense.

(c) Section 3(b)(vi) of Executive Order 13327 of February 4, 2004, is amended by striking "Executive Order 13148 of April 21, 2000" and inserting in lieu thereof "other executive orders".

GEORGE W. BUSH  
THE WHITE HOUSE,  
January 24, 2007



## Energy Improvement and Extension Act of 2008

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*Allows public utilities to use investment tax credits (ITCs) extended through December 31, 2016 (effective February 12, 2008); Applicable to energy efficiency, combined heat and power systems, and solar systems*

### **SEC. 103. ENERGY CREDIT.**

#### **(a) EXTENSION OF CREDIT.—**

(1) **SOLAR ENERGY PROPERTY.**—Paragraphs (2)(A)(i)(II) and (3)(A)(ii) of section 48(a) are each amended by striking “January 1, 2009” and inserting “January 1, 2017”.

(2) **FUEL CELL PROPERTY.**—Subparagraph (E) of section 48(c)(1) is amended by striking “December 31, 2008” and inserting “December 31, 2016”.

(3) **MICROTURBINE PROPERTY.**—Subparagraph (E) of section 48(c)(2) is amended by striking “December 31, 2008” and inserting “December 31, 2016”.

#### **(b) ALLOWANCE OF ENERGY CREDIT AGAINST ALTERNATIVE MINIMUM TAX.—**

(1) **IN GENERAL.**—Subparagraph (B) of section 38(c)(4), as amended by the Housing Assistance Tax Act of 2008, is amended by redesignating clause (vi) as clause (vi) and (vii), respectively, and by inserting after clause (iv) the following new clause:

“(v) the credit determined under section 46 to the extent that such credit is attributable to the energy credit determined under section 48.”

(2) **TECHNICAL AMENDMENT.**—Clause (vi) of section 38(c)(4)(B), as redesignated by paragraph (1), is amended by striking “section 47 to the extent attributable to” and inserting “section 46 to the extent that such credit is attributable to the rehabilitation credit under section 47, but only with respect to”.

#### **(c) ENERGY CREDIT FOR COMBINED HEAT AND POWER SYSTEM PROPERTY.—**

(1) IN GENERAL.—Section 48(a)(3)(A) is amended by striking “or” at the end of clause (iii), by inserting “or” at the end of clause (iv), and by adding at the end the following new clause:

“(v) combined heat and power system property,”.

(2) COMBINED HEAT AND POWER SYSTEM PROPERTY.—Subsection (c) of section 48 is amended—

(A) by striking “QUALIFIED FUEL CELL PROPERTY; QUALIFIED MICROTURBINE PROPERTY” in the heading and inserting “DEFINITIONS”, and

(B) by adding at the end the following new paragraph:

“(3) COMBINED HEAT AND POWER SYSTEM PROPERTY.—

“(A) COMBINED HEAT AND POWER SYSTEM PROPERTY.— The term ‘combined heat and power system property’ means property comprising a system—

“(i) which uses the same energy source for the simultaneous or sequential generation of electrical power, mechanical shaft power, or both, in combination with the generation of steam or other forms of useful thermal energy (including heating and cooling applications),

“(ii) which produces—

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“(I) at least 20 percent of its total useful energy in the form of thermal energy which is not used to produce electrical or mechanical power (or combination thereof), and

“(II) at least 20 percent of its total useful energy in the form of electrical or mechanical power (or combination thereof),

“(iii) the energy efficiency percentage of which exceeds 60 percent,

and

“(iv) which is placed in service before January 1, 2017.

“(B) LIMITATION.—

“(i) IN GENERAL.—In the case of combined heat and power system property with an electrical capacity in excess of the applicable capacity placed in service during the taxable year, the credit under subsection (a)(1) (determined without regard to this paragraph) for such year shall be equal to the amount which bears the same ratio to such credit as the applicable capacity bears to the capacity of such property.

“(ii) APPLICABLE CAPACITY.—For purposes of clause (i), the term ‘applicable capacity’ means 15 megawatts or a mechanical energy capacity of more than 20,000 horsepower or an equivalent combination of electrical and mechanical energy capacities.

“(iii) MAXIMUM CAPACITY.—The term ‘combined heat and power system property’ shall not include any property comprising a system if such system has a capacity in excess of 50 megawatts or a mechanical energy capacity in excess of 67,000 horsepower or an equivalent combination of electrical and mechanical energy capacities.

“(C) SPECIAL RULES.—

“(i) ENERGY EFFICIENCY PERCENTAGE.—For purposes of this paragraph, the energy efficiency percentage of a system is the fraction—

“(I) the numerator of which is the total useful electrical, thermal, and mechanical power produced by the system at normal operating rates, and expected to be consumed in its normal application, and

“(II) the denominator of which is the lower heating value of the fuel sources for the system.

“(ii) DETERMINATIONS MADE ON BTU BASIS.—The energy efficiency percentage and the percentages under subparagraph (A)(ii) shall be determined on a Btu basis.

“(iii) INPUT AND OUTPUT PROPERTY NOT INCLUDED.—The term ‘combined heat and power system property’ does not include property used to transport the energy source to the facility or to distribute energy produced by the facility.

“(D) SYSTEMS USING BIOMASS.—If a system is designed to use biomass (within the meaning of paragraphs (2) and (3) of section 45(c) without regard to the last sentence of paragraph (3)(A)) for at least 90 percent of the energy source—

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“(i) subparagraph (A)(iii) shall not apply, but

“(ii) the amount of credit determined under subsection (a) with respect to such system shall not exceed the amount which bears the same ratio to such amount of credit (determined without regard to this subparagraph) as the energy efficiency percentage of such system bears to 60 percent.”.

(3) CONFORMING AMENDMENT.—Section 48(a)(1) is amended by striking “paragraphs (1)(B) and (2)(B)” and inserting “paragraphs (1)(B), (2)(B), and (3)(B)”.

(d) INCREASE OF CREDIT LIMITATION FOR FUEL CELL PROPERTY.—

Subparagraph (B) of section 48(c)(1) is amended by striking “\$500” and inserting “\$1,500”.

(e) PUBLIC UTILITY PROPERTY TAKEN INTO ACCOUNT.—

(1) IN GENERAL.—Paragraph (3) of section 48(a) is amended by striking the second sentence thereof.

(2) CONFORMING AMENDMENTS.—

(A) Paragraph (1) of section 48(c) is amended by striking subparagraph (D) and redesignating subparagraph (E) as subparagraph (D).

(B) Paragraph (2) of section 48(c) is amended by striking subparagraph (D) and redesignating subparagraph (E) as subparagraph (D).

(f) EFFECTIVE DATE.—

(1) IN GENERAL.—Except as otherwise provided in this subsection, the amendments made by this section shall take effect on the date of the enactment of this Act.

(2) ALLOWANCE AGAINST ALTERNATIVE MINIMUM TAX.—The amendments made by subsection (b) shall apply to credits determined under section 46 of the Internal Revenue Code of 1986 in taxable years beginning after the date of the enactment of this Act and to carrybacks of such credits.

(3) COMBINED HEAT AND POWER AND FUEL CELL PROPERTY.—The amendments made by subsections (c) and (d) shall apply to periods after the date of the enactment of this Act, in taxable years ending after such date, under rules similar to the rules of section 48(m) of the Internal Revenue Code of 1986 (as in effect on the day before the date of the enactment of the Revenue Reconciliation Act of 1990).

(4) PUBLIC UTILITY PROPERTY.—The amendments made by subsection (e) shall apply to periods after February 13, 2008, in taxable years ending after such date, under rules similar to the rules of section 48(m) of the Internal Revenue Code of 1986 (as in effect on the day before the date of the enactment of the Revenue Reconciliation Act of 1990).

# Legal Opinions

## **Authority for Extended Utility Agreements**

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*May 9, 2000, Memorandum from Richard Butterworth, General Services Administration*



**U.S. General Services Administration  
Office of General Counsel**

*May 9, 2000*

**MEMORANDUM FOR:**

Mark V. Ewing  
Director  
Energy Center Of Expertise

Virgil W. Ostrander  
*Director*  
Public Utilities

**FROM:**

Richard R. Butterworth, Jr.  
Senior Assistant General Counsel  
Real Property Division (Lr)

**SUBJECT:**

Authority for Extended Utility Agreements

The General Services Administration (GSA) is making a concerted effort to reduce its energy consumption. In order to reach its energy conservation goals, GSA has been evaluating a number of contracting options for energy management and demand-side management. Some of the measures being contemplated have payback periods over ten (10) years. It is clear that GSA has ten-year contracting authority for utility services under the Federal Property and Administrative Services Act of 1949, as amended, 40 U.S.C. Sec. 481(a)(3). You have asked, however, if GSA has the authority to enter into energy management contracts that extend beyond ten years. I believe GSA does have this authority.

The Office of General Counsel has issued a number of opinions that deal with this matter. Most recently, I issued an opinion to Ed Loeb, Director, Federal Acquisition Policy Division. In that memorandum, I stated that FAR Part 41 was not limited to regulated monopolistic utility services and could be applied to any company that provided services within the broad definition of "utility services." Further, I concluded that demand-side management or energy management services could be acquired as utility services under FAR Part 41. See Attachment A, Memorandum of Richard Butterworth, April 21, 1999.

As part of that opinion, I reference an earlier opinion issued by this office on the application of the Anti-Deficiency Act. Obviously, contracts entered into under the authority of 40 U.S.C. Sec. 481 (i.e., ten-year contracts) do not need to be funded up front, and contracts under 42 U.S.C. Sec. 8287 are specifically exempted from the requirement to fund cancellation charges. Therefore, contracts under these two authorities do not violate the Anti-Deficiency Act where there is only year-to-year funding.

The final area of concern is contracts that are entered under the authority of 42 U.S.C. Sec. 8256. This provision authorizes Federal agencies to enter contracts with utilities for energy

conservation, accepting “financial incentives, goods, or services,” 41 U.S.C. Sec. 8256(c)(2). According to the legislative history of this provision, Congress contemplated that agencies would be permitted to participate in utility incentive programs “to the same extent permitted other customers of the utility,” H.R. Rep. No. 474(V), 102d Cong., 2d Sess. 42 (1992), reprinted in 1992 U.S.C.C.A.N. 2224. Therefore, to the extent a utility offers financing and multi-year contracting to its other customers, GSA may avail itself of these programs. Such agreements must be pursuant to a utility incentive program, must increase energy efficiency, and must be generally available to other customers of the utility. However, this provision does not indicate any limitation on the term of such agreements or contracts.

In a memorandum dated July 24, 1994, Harmon Eggers of this office reviewed the authority granted in 42 U.S.C. Sec. 8256. In reviewing this authority, he determined that the broad authority contained therein constitutes “contract authority,” which is “a form of budget authority that permits contracts and other obligations to be entered into in advance of an appropriate or in excess of amounts otherwise available in a revolving fund.” U.S. General Accounting Office, Principles of Federal Appropriations Law 2-4 to 2-6 (2d Ed. 1991). Therefore, 42 U.S.C. Sec. 8256 operates much the same as 40 U.S.C. Sec. 481 by granting multi-year authority; however, unlike 40 U.S.C. Sec. 481, 42 U.S.C. Sec. 8256 contracts are not limited to a certain number of years. In fact, the contract under review in the 1994 memorandum had a 14-year term. See Attachment B.

In conclusion, I believe 42 U.S.C. Sec. 8256 grants GSA multi-year contracting authority separate and apart from the ten-year authority in the Property Act. Therefore, I believe GSA is authorized to enter contracts as part of utility incentive programs for terms greater than ten years. For the same reasons that contracts entered under 40 U.S.C. Sec. 481 are not subject to the Anti-Deficiency Act, agreements reach under 42 U.S.C. Sec. 8256 are also not subject to the Act.



## **Relationship of the Anti-Deficiency Act to Multi-Year Contracts**

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*June 22, 1999, Memorandum from Mark S. Schwartz, Department of Energy*



**Department of Energy  
Washington, D.C.**

June 22, 1999

MEMORANDUM FOR: Shelley N. Fidler  
*Acting Director  
Federal Energy Management Program*

FROM: Mark S. Schwartz  
Deputy General Counsel for Energy Policy

SUBJECT: Relationship of the Anti-Deficiency Act to Multi-year  
Contracts Under the Utility Incentive Program Authorized  
Under Section 152(f) of EPAct

**I. BACKGROUND**

The Department of Energy's (Department) Federal Energy Management Program (FEMP) is assisting federal agencies in improving energy and water efficiency to meet the goals of the Energy Policy Act of 1992 (EPAct), Pub. L. No. 102-486 (1992) (codified as amended in scattered sections of Title 42 of the U.S. Code) and Executive Order 13123. Because of the inability of Federal agencies to obtain appropriated funding for Federal building energy-efficiency and water conservation projects, one of the primary goals of FEMP is the implementation of the demand side management (DSM) and energy and water conservation and efficiency projects through utility services contracts and energy savings performance contracts. FEMP has requested our views as to whether and to what extent the authority provided to Federal agencies under section 152(f) of EPAct, which amends section 546 of the National Energy Conservation Policy Act, 42 U.S.C. 8256(c)(1997), is constrained by the Anti-Deficiency Act, 31 U.S.C. 1341 (1998) and whether contracts under section 152(f) also qualify as "public utility services" contracts under section 201 of the Federal Property and Administrative Services Act of 1949, as amended (Federal Property Act), 40 U.S.C. §481(a)(3) (1997), which are eligible for a ten-year term.

FEMP's inquiry is directed to whether Federal agencies are required to obligate the entire contract amount, or amounts for termination costs, under DSM and energy and water conservation and efficiency contracts. This sort of obligational requirement would in FEMP's

view negate the purpose of section 152(f)<sup>1</sup>, which is to make utility incentives available to federal agencies on the same basis as they are available to other customers. The up to ten-year contract term available for “contracts for public utility services” under section 201 of the Federal Property Act is needed to make these projects economically viable.

## II. QUESTION

You have requested our views on whether DSM and energy and water conservation and efficiency contracts entered into with utilities under section 152(f) of EPAct are “contracts for public utility services” under section 201 of the Federal Property Act, and thus can have both a ten-year contract term and an exemption from the full funding requirements of the Anti-Deficiency Act, 31 U.S.C. §1341 (1998).

## III. CONCLUSION

DSM and energy and water conservation and efficiency contracts authorized by section 152(f) of EPAct can qualify as “contracts for public utility services” under section 201 of the Federal Property Act, if the services and goods provided meet the requirements for “utility services.” As public utility service contracts they are not subject to the requirement that funds must be obligated for expenses (including potential termination costs) beyond the first year, and the contracts can have up to a ten-year term. In order to facilitate your implementation of this conclusion, we have prepared model agreements that reflect the kinds of energy conservation measures that we conclude are properly categorized as “public utility services.”

## IV. DISCUSSION

Section 201(a)(3) of the Federal Property Act authorizes the General Services Administration (GSA) to enter into contracts for public utility services for periods not exceeding 10 years. It was enacted to effect economies in the procurement of such services<sup>2</sup>. Use of section 201 presupposes the availability of a fiscal year appropriation for the first year and that the services to be rendered are merely incidental to the conduct of authorized government business. Section 201(a) of the Federal Property Act provides, in part, as follows:

The Administrator shall .... (3) procure and supply personal property and nonpersonal services for the use of executive agencies in the proper discharge of their responsibilities, and perform functions related to procurement and supply such as those mentioned above in subparagraph (1) of this subsection:

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<sup>1</sup> Contracts under section 152(f) of EPACT are contracts with utilities under utility incentive programs (UIPs) offered by utilities. Each agency may accept any financial incentives, goods, or services “generally available to customers of such utility.” *Id.* An agency, therefore, must satisfy “the criteria which generally apply to other customers” under a UIP. Finally, an amount equal to fifty percent of the agency’s savings may be retained by the agency for additional energy efficiency measures. *Id.*

<sup>2</sup> GSA has delegated to DOE certain authority to enter into contracts for utility services 2 for periods not to exceed ten-years. Delegation of Authority to the Secretary of Energy, signed by Brian K. Polly, Assistant Commissioner, Office of Procurement, Public Buildings Service, General Services Administration, dated February 12, 1987. See FAR §41.103(a)(3), 48 C.F.R. §41.103(b)(1998) (referencing the delegation).

Provided, That contracts for public utility services may be made for periods not exceeding ten years... .

Federal Property Act, §201(a)(3) (emphasis added).

A. What are “public utility services”?

DSM and energy and water conservation and efficiency services are measures implemented or accomplished through specific projects intended and designed to achieve savings in the cost of energy and water, reduce demand for energy and water, and achieve energy efficiency improvements and water conservation. These measures are called Energy Conservation Measures (ECMs). The construction or installation of ECMs and other energy savings measures in government, commercial, industrial or residential dwellings is an important and integral part of planning and predicting power capacity needs in the future. While these contracts often involve the installation of equipment or refurbishing existing equipment, with a strong service component, these ECMs and similar efforts are extremely important to the modern utility as a valuable means of reducing or slowing the growth of demand for water, gas and electric services. These measures affect how much new capacity must be constructed or acquired and ultimately the cost of utility services to the rate payer. State public utility commissions have been encouraging utilities to reduce demand through energy conservation in order to reduce the cost involved in the construction or acquisition of new power capacity<sup>3</sup>.

The Federal Property Act does not provide a definition of “public utility services.” The phrase is used in various states’ laws, in the context of comprehensive regulation of the provision of public utility services. However, the term does not have a common definitive meaning:

“A ‘public utility’ has been described as a business organization which regularly supplies the public with some commodity or service, such as electricity, gas, water, transportation, or telephone or telegraph service. While the term has not been exactly defined, and as has been said, it would be difficult to construct a definition that would fit every conceivable case, the distinguishing characteristic of a public utility is the devotion of private property by the owner or person in control thereof to such a use that the public generally, or that part of the public which has been served and has accepted the service, has the right to demand that the use or services, as long as it is continued, shall be conducted with reasonable efficiency and under proper charges.”

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<sup>3</sup> States, through statutes, regulations, and the actions of their public utility commissions, have been encouraging utilities to reduce demand through energy conservation in order to reduce the cost involved in the construction or acquisition of new power capacity. E.g., Indiana Admin. Code, Title 170. Indiana Utility Regulatory Comm., Art. 4, Rule 7, 6(b) (describing demand side management as a new source of utility supply); Texas Admin. Code, Title 16. Part II, chap. 23, subchapter D. §23.31(a)(5) (requiring electric utilities to attempt to reduce total demand before applying for a certificate for a new generating unit). EPACT included amendments to the Public Utility Regulatory Policies Act to ensure that utilities could regard investments in demand side management and energy conservation as equally profitable with investments in increased generating capacity. EPACT §111(a), amending 16 U.S.C. §2621; EPACT §115, amending 15 U.S.C. §§3202-03. These developments both demonstrate that engaging in energy conservation and demand management have become viewed as a means of providing utility services to the public.

73B C.J.S. Public Utilities §2 (1997); see also 64 AM. Jur. 2 Public Utilities §1 (1997).<sup>nd</sup>

The General Accounting Office (GAO) has had few occasions to address the parameters of this phrase in the context of the Federal Property Act. GAO has declined to limit the definition of public utility to that used by a particular state:

The status of the Pipeline Company as a public utility under Title 42 of the Alaska Statutes is, in our opinion, doubtful. We are of this view because the company is

not subject to regulatory control and because it has not served the public generally with natural gas. But the Congress has authorized long-term contracting in the case of services having public utility aspects. In doing so the Congress did not require that these public utility services be procured only from those firms which clearly come within the strict legal definition of a public utility. Perhaps in recognition of the legal imponderable involved in the application and enforcement of State laws regulating public utilities, and in view of the diversity of opinions between various jurisdictions respecting the legal character of public utilities, the Congress in its judgment determined to categorize the service rather than the contractor.

45 Comp Gen. 59, 64 (1965). “Thus, it is the nature of the product or service provided and not the nature of the provider of the product or services that may determine what are “public utility services.” Moreover, GAO has indicated its view that the phrase “public utility services” should be interpreted broadly: “[T]he concept of what product or service constitutes a public utility service is not static for the purpose of statutory construction, but instead is flexible and adaptive, permitting statutes to be construed in light of the changes in technologies and methodologies for providing the product or service.” 62 Comp. Gen. 569, 575 (1983).

We have concluded that the fact that ECM and DSM services involve transferring title to equipment does not defeat their character as “public utility services.” 62 Comp. Gen. 569, 574 (1983). Where a contract was for the procurement of telephone equipment as well as telephone services, the Comptroller General decided that it was a contract for public utility services under section 201 of the Federal Property Act. The Comptroller General stated the following views on what are “public utility services”:

Further, while public utilities are generally described as providing services, we think that the concept of utility services can include the sale of a product or equipment as well as providing services in the literal sense.

Id. The Comptroller General concluded as follows:

On the basis of these fundamental premises, we think that the sale of telephone equipment or facilities with related services is a public utility type service just as much as leasing the equipment to the Government at a rental designed to recover the cost of the contractor’s investment in facilities and equipment over the life of the rental agreement would be. The only difference between the two is that in the former case the Government acquires title to

the system while in the latter, title remains with the utility. Thus the nature of service is virtually identical, and in any case, the difference is not so fundamental as to warrant its exclusion from the scope of transactions to which the authority of [section 201] applies.

Id. Even, however, if it is concluded that “qualified” DSM and ECM contracts entered into under section 152(f) of EPAct, standing alone, are not contracts to provide public utility services, these contracts would be contracts incidental to “contracts for public utility services.” For instance, it has consistently been GSA’s view that equipment provided with telephone services is incidental to those services:

It has been the position of GSA that the contracts which we enter into for telephone services are public utility services contracts regardless of whether the successful offeror was a tariffed carrier or an interconnect company. GSA has viewed the equipment involved in telecommunications procurement as incidental to the services. ....

....

GSA has historically regarded the equipment provided with telephone services as an incidental but necessary element of the services. Thus, we have always considered the acquisition of equipment as falling within the meaning of contracts for public utility services.

....

Whether the service is provided by utility-owned equipment or Government-owned equipment does not change the nature of the services.

62 Comp. Gen. 569, 573-74 (1983).

Similarly, the equipment or products installed in federal buildings as DSMs or ECMs are necessary to reduce energy and water consumption, reduce the cost of energy and water and insure the adequate delivery of electric, gas, or water services and is incidental to those services. The ability to plan, measure and reduce electric, gas and water consumption in the future is an important part of providing utility services. Moreover, reducing the long term cost of energy to the federal government was the specific reason why Congress included section 201 in the Federal Property Act. Therefore, so long as the dominant or primary purpose of the project is to reduce energy and water use or demand, and there is a direct connection between any equipment (or services) to be provided and achievement of the dominant or primary purpose, it should not matter whether the ECM or DSM activities include the provision of equipment, title to which passes to the government.

In summary, contracts entered into under section 152(f) of EPAct may also be contracts for public utility services” under section 201(a)(3) of the Federal Property Act.

## B. GSA’s Views

While the Secretary of Energy has the authority to develop guidelines to implement section 152(f) of EPAct<sup>4</sup>, it is significant that GSA, the agency with primary responsibility and authority under section 201 of the Federal Property Act, has concluded in an opinion dated July 29, 1994 (“Exhibit A”), that certain DSM and ECM contracts entered into under section 152(f) of EPAct are contracts for “public utility services:”

In addition, GSA has authority under the Act to receive the goods and services contemplated under the proposed agreement with [the utility], including but not limited to, energy related equipment, its installation, and personnel training. 42 U.S.C. §8256(c)(2)-(4); 40 U.S.C. §490(f)(7)(B).

The expenditure of the funds as contemplated by the proposed agreement with {the utility} is necessary for and incidental to compliance with the energy conservation requirements of the Act, 42 U.S.C. §8253. Therefore, this constitutes a necessary and proper expense for utility services. ...

Likewise, in accordance with 42 U.S.C. §8256(c)[Section 152(f) of EPAct], Congress specifically has authorized agencies to participate in utility incentive programs conducted by utilities and generally available to customers of such utilities. Participation in such programs will provide one of the means for GSA to satisfy the energy performance requirements for Federal buildings mandated by Congress in 42 U.S.C. §8253. As explained above, the broad authority may be funded by GSA’s Real Property Operation (BA-61) appropriations as necessary and proper expenses for utility services. ...

GSA Op. Off. Real Property Division, 3-4, July 29, 1994 (emphasis added).

Finally, GSA has negotiated and entered into a series of “areawide” contracts with utilities to provide electric, gas and gas transportation services to Federal agencies<sup>5</sup>. In order to use an areawide contract any Federal agency in the defined geographic area simply has to execute an “authorization” agreement with the utility. The “areawide” contracts are entered into pursuant to GSA’s “utility services” authority provided under section 201(a)(3) of the Federal Property Act. GSA now includes some DSM and ECM services under the areawide umbrella contracts. This is further evidence of GSA’s view that DSM and ECM services may be “utility services” under section 201(a)(3).

### C. What are the funding requirements for contracts for public utility services under section 201 of the Federal Property Act?

The Anti-Deficiency Act provides, in part, as follows:

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<sup>4</sup> Section 152(c) of EPACT provides the Secretary of Energy with the authority to 4 develop “guidelines for the implementation” of the “Federal Energy Management” provisions of EPACT. 42 U.S.C. §8253(d) (1998).

<sup>5</sup> See, e.g., Areawide Public Utility Contract for Electric, Natural Gas, Gas 5 Transportation and Energy Management Services, Contract No. GS-00P-95-BSD-0008, between the United States of American and Public Service Company of New Mexico, August 23, 1995.

An officer or employee of the United States Government or of the District of Columbia government may not-

- (A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation;
- (B) involve either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law....

31 U.S.C. §1341 (emphasis added). The Anti-Deficiency Act prohibits an executive agency from making expenditures or incurring obligations in excess of available appropriations, and from making a contract or obligation for the payment of money in advance of appropriations. Thus, as a general rule, the cost of a contract must be fully funded at the time the Government enters into the contract. The Anti-Deficiency Act, however, provides that Congress can authorize Federal agencies to “contractually” obligate the Government without the availability of an existing appropriation. “Contract authority” is statutory authority specifically authorizing “an agency to enter into a contract in excess of, or prior to, enactment of the applicable appropriation.” See, G.A.O., Principles of Federal Appropriations Law, Vol. II, Ch. 6-51 (1992).

Section 201(a)(3) of the Federal Property Act has been interpreted to provide “contract authority.” This provision has been interpreted as providing authority to enter into contracts for a term of ten-years without obligating funds for the total cost of the contract at the time the contract is entered into:

The purpose of the proviso authorizing contracts for public utility services to be made for up to 10 years is to permit GSA to take advantage of discounts offered under long term contracts. If this provision is applicable, GSA need not have available to it budget authority to obligate the total estimated cost of the Centel contract but only sufficient budget authority to obligate its annual costs under the agreement.

As we have indicated above, GSA need not obligate the total estimated cost of the contract against the Fund, but only amounts necessary to cover it annual costs under the contract.

62 Comp. Gen. 569, 576 (1983) (emphasis added). Section 152(f) does not expressly provide authority to enter into ten-year contracts nor does it expressly provide an exception to the full funding requirements of the Anti-Deficiency Act. However, §152(f) contracts to the extent that they also constitute contracts for public utility services (under §201(a)(3) of the Federal Property Act) only require obligation of the annual costs under the contract during each year the contract is in effect.

#### D. Qualified DSM Contracts

Concerns have been raised that entering into DSMs, ECMs or other energy savings contracts with utilities of the type contemplated by §152(f) of EPAct may in some cases result in providing goods and services that are not “utility services” under section 201 of the Federal



Property Act. In order to alleviate these concerns and provide protections against misuse of the authority provided in section 152(f), we have concluded that only “qualified” DSM and ECM contracts will be designated “contracts for public utility services” under section 201 of the Federal Property Act. These qualifications will insure that the primary purpose of a DSM or ECM contract for “public utility services” will be to reduce energy and water cost and use. These requirements or qualifications are reflected in the attached GSA Areawide Agreement (Exhibit B) and the draft Civilian Model Utility Agreement (Exhibit C). Included in the requirements for “qualified” DSM or ECM contracts are the following requirements:

- (1) That the primary purpose of an ECM or DSM contract under section 152(f) must be to reduce the cost or use of energy and water and achieving greater energy efficiency [for example, DOE could not construct an entire new building to achieve or facilitate a programmatic objective under the guise of an ECM or DSM contract under section 152(f)];
- (2) That general construction, training courses, and the purchase of supplies or equipment not directly related to an ECM or DSM is not permissible under section 152(f) of EPA Act;
- (3) That energy or water savings must be sufficient to pay all costs under a DSM or ECM contract; and
- (4) That ECMs or DSMs will not normally be used unless the net overall energy or water cost reduction can be demonstrated and verified.

Other restrictions and limitations on the use of ECM and DSM contracts are reflected in the attached model GSA Areawide contract and the Civilian Model Utility Agreement, which provide the necessary requirements and protections to “qualify” an ECM or DSM contract as a “contract for public utility services” under section 201 of the Federal Property Act. Proposed ECM or DSM contracts which contain terms or conditions that are materially different from those provided in Exhibits C and D create circumstances which require legal review by the Office of General Counsel.

Concur:

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Lawrence R. Oliver  
GC-72

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Maryann Shebek  
GC-80

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Gena E. Cadieux  
GC-61

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John A. Herrick  
Chief Counsel  
Golden Field Office

## **Definition of Demand Side Management Services**

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*December 17, 1998, Memorandum from Larry Olive, Department of Energy*



**Department of Energy  
Washington, D.C.**

December 17, 1998

MEMORANDUM TO: Mary Anne Sullivan  
FROM: Larry Oliver  
SUBJECT: Definition for Demand Side Management Services

In consultation with the Director of the Federal Energy Management Program (FEMP), DOE lawyers at the Golden Field Office and FEMP utility and ESPC experts at NREL, it was determined that Demand Side Management (DSM) is a concept that is no longer current. A more inclusive concept that is more consistent with section 152(f) of EPAct is "Utilities Incentives." In that regard FEMP proposes that the following definition be used:

Utility incentives are any financial incentives, goods, or services offered by the utility that achieve energy or water goals or utility and related cost savings at Federal building and facilities, including, but not limited to, rebates or incentives, advanced financing of project costs, design and implementation of utility related projects, energy management services, facilities alterations, installation of technologies and energy savings devices, water conservation devices, and renewables by the utilities, and operation and maintenance of utility, water, energy efficiency and demand management projects.

Not all types of utility incentives are included under DSM services. For instance, some homeowners may want energy efficiency equipment or products installed because of efficiencies important to the owners, as opposed to the utilities to reduce demand. Government agencies will not be able to enjoy a utility incentive unless there is a measured performance that achieves energy, water, utility cost and related cost savings at Federal buildings or facilities.

For comparison purposes, listed below are examples of other definitions of DSM services.

1. Definition found in several Security and Exchange Commission Rulemakings:

[A] broad range of activities relating to the business of energy management and demand-side management, including the following: Energy audits, facility design and process enhancements, construction, maintenance and installation of, and training client personnel to operate, energy conservation equipment; design, implementation, monitoring and evaluation of energy conservation programs, development and review of architectural, structural and engineering drawings for energy efficiencies, design and

specification of energy consuming equipment, and general advice on programs. [Upon additional consideration, the commission has concluded that “energy conservation services” may not be broad enough to cover the types of activities intended to be exempted under this category. The term “energy management services” more accurately reflects the scope of the exempted activity.] (brackets added).

These rulemaking involve the exemption of acquisition by registered public-utility holding companies of securities of non-utility companies engaged in energy-related and gas-related activities under the Public Utility Holding company Act of 1935.

2. Executive Order 12902 dated March 10, 1994, Energy Efficiency and Water Conservation at Federal facilities.

Sec. 104. The term “demand side management” refers to utility-sponsored programs that increase energy efficiency and water conservation or the management of demand. The term includes load management techniques.

At our December 14 meeting an issue was raised regarding employee training or “conservation seminars” as being possible areas for “fraud, waste and abuse”. Our office, along with attorneys from the Golden Field Office, FEMP and the NREL contractors had substantial discussions today and yesterday to identify what the concern is. For instance, we don’t know if the concern is whether a certain percentage of a “Utility Incentive” program will involve training as it may, or whether the concern is that DOE employees will attend training seminars and the cost of the training will be treated as costs under “Public Utility Services Contracts.” The only written explanation of the concerns is provided in an updated memorandum written by GC-61:

The E.E. program will not benefit if it uses a broad definition of demand side management services that clearly should be considered “public utility services” such as utility conservation seminars, which nonetheless may be viewed as demand side management services. (emphasis added).

If the concern is “utility conservation seminars” or other employee training, we do not believe that this could happen unless there is deliberate fraud. The way the process works is that a utility offers a financial incentive to its customers. Federal agencies are encouraged to participate in the financial incentive offered on the same basis as other customers of the utility. The relevant provision of section 152(f) provides as follows:

“(c) UTILITY INCENTIVE PROGRAMS. – (1) Agencies are authorized and encouraged 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 and generally available to customers of such utilities.

This provision is essentially composed of five elements. There must be a utility incentive program that: (1) provides utility service applicable to Federal buildings or facilities and (2) is available to other customers of the utility, and (3) increases energy efficiency or (4)

increases water conservation, or (5) reduces the demand for gas, water or electricity. Use of the conjunctive “and” between elements 1 and 2 means that these elements must always be present in conjunction with elements 3, 4, and 5, singularly, in combination, or in the aggregate, before a Federal agency may participate in the utility incentive program. A conservation seminar, “or other training vehicle,” standing alone, will not qualify as a utility incentive.

Services provided at a “utility seminar” or other training vehicle would not qualify as public utility services under Section 152(f) of EPA Act. Those concerns are not appropriate for section 152(f) contracts.

Finally, we are concerned about substantive changes in the application and scope of section 152(f) to cover only DSM services. The application of incentives under section 152(f) is clearly not limited to DSM services. Federal agencies may also negotiate with utilities “to design cost-effective conservation incentive programs to address the unique needs of facilities utilized by such agency.”

## **Statutory Exception from Competition in DSM Utility Contracts**

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*July 7, 1994, Memorandum from Anne Troy, Department of Energy*



**Department of Energy  
Washington, D.C.**

July 7, 1994

MEMORANDUM TO: Mr. Philip Winter  
General Services Administration (GSA)

THROUGH: Mary Ann Masterson  
Deputy Assistant General Counsel for Procurement and  
Financial Assistance

FROM: Anne Troy  
Office of Procurement and Financial Assistance  
GS 61

SUBJECT: Statutory Exception From The Competition In Contracting  
Act's Full and Open Competition Requirement In Demand  
Side Management Utility Contracts

You asked for assistance in determining whether the language in § 152 of the Energy Policy Act, Public Law 102-458, (EPAAct) provides this agency with the authority to “sole source” utility service contracts to obtain demand side management (DSM) services. We conclude that the language contained in § 152 does meet the criteria of one exception to the Competition in Contracting Act of 1984 (CICA). CICA requires, with certain limited exceptions, full and open competition in government contracting. One of the exceptions to that requirement is contained in 41 U.S. C. § 253 (c) (5), which provides that a civilian agency may use other than competitive procedures when “a statute expressly authorizes or requires that the procurement be made . . . from a specified source.” See also the Federal Acquisition Regulation, FAR 6.302-5 (a) (2).<sup>6</sup>

Section 152 of EPAAct provides as follows:

- (c) UTILITY INCENTIVE PROGRAMS – Agencies are authorized and encouraged to participate in programs to increase energy efficiency and for water conservation or the management of electricity demand conducted by
- (d) gas, water, or electric utilities and generally available to customers of such utilities.

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<sup>6</sup> The Federal Acquisition Regulation requires that contracts awarded using this authority will be supported by a written Justification and Approval (J&A).

- (2) Each agency may accept any financial incentive, goods, or services generally available from any such utility, to increase energy efficiency or to conserve water or manage electricity demand.
- (3) Each agency is encouraged to enter into negotiations with electric, water, and gas utilities to design cost-effective demand management and conservation incentive programs to address the unique needs of facilities utilized by such agency.

Plain Language. In our opinion, § 152's plain language contains an express authorization for an agency to participate in DSM contracts and permits them to accept any financial incentive or to enter into negotiations regarding these incentive programs. This language appears to provide express authority for an agency to directly approach a utility concerning DSM services, including the capability to award a noncompetitive contract to that utility without the use of full and open competition.

Navy Concurrence. Moreover, of some significance, our opinion is shared by the Naval Facilities Engineering Command (NAVFAC) which, with the other military service departments, relies upon virtually identical language in the FY 93 Defense Authorization Act<sup>7</sup> (attachment 1) to obtain DSM services directly from gas or electric utilities. In a legal opinion (attachment 2) discussing this issue, the counsel from NAVFAC states, “. . . [c]hanges made to 10 U.S.C. 2865 by the FY 93 Defense Authorization Act . . . clearly authorize military departments to obtain DSM services directly from gas or electric utilities. . . We need only execute a J&A citing 10 U.S.C. 2865 (d) (3) as authority. FAR 6.302-5 provides that full and open competition is not required where a statute expressly provides that an acquisition be made from a specified source, i.e., the servicing gas or electric utility.”

Statutory Intent. In a recent telephone conversation with the NAVFAC counsel who authored the attached opinion, he stated that NAVFAC continued to adhere to the above stated position and that a NAVFAC field office, SOUTHWESTDIV, had used the statutory exception to sole source a contract for DSM services from a San Diego utility. The counsel also reminded me that the language contained in EAct had been purposefully adopted from

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<sup>7</sup> Public Law 102-484 at section 2801, states:

- (d) The Secretary of Defense shall permit and encourage each military department . . . to participate in programs conducted by any gas or electric utility for the management of electricity demand or for energy conservation.
- (2) The Secretary may authorize any military installation to accept any financial incentive, goods, or service generally available from gas or electric utility, to adopt technologies and practices that the Secretary determines are cost effective for the Federal Government.
- (3) The Secretary of Defense may authorize the Secretary of a military department having jurisdiction over a military installation to enter into agreements with gas or electric utilities to design and implement cost-effective demand and conservation incentive programs (including energy management services, facilities alterations, and the installation and maintenance of energy saving devices and technologies by the utilities) to address the requirements and circumstances of the installation.



the language in the Defense Authorization Act for the same reasons that the military services had earlier advocated, *i.e.*, they wanted broad authority to obtain DSM services from utilities without using time-consuming and complex competitive procurement procedures. As the counsel stated to me, the purpose of the language was to facilitate and ease the process. If read any other way, the provisions would serve no purpose since agencies are compelled to use competitive procedures in any case.

General Accounting Office Opinions. Lastly, we rely upon certain General Accounting Office (GAO) opinions which have interpreted the specified source exceptions and permitted agencies to use other than competitive procedures. For instance, in Monterey City Disposal Service, Inc., 85-2 CPD ¶ 261, aff'd, B-218624-2, B-218880.2, 85-2 DPD ¶ 306,<sup>8</sup> the Comptroller General concluded that the specified source exception to CICA was applicable where, under the Solid Waste Disposal Act, 42. U.S.C. § 6961, federal agencies were required to comply with local requirements respecting the control and abatement of solid waste “in the same manner, and to the same extent, as any person is subject to such requirements.” In that case, the city of Monterey required that all inhabitants of the city have their solid waste collected by the city’s franchise. The Navy argued that there was no express congressional intent in section 6961 of the Solid Waste Disposal Act to permit sole source contracting. The Comptroller General rejected this argument and appeared to rely primarily on interpreting the plain language of the Solid Waste Disposal Act.

If you have any further questions on this matter, please contact this office at 202-586-1900.

Attachments

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<sup>8</sup> The GAO opinion was affirmed in Parola V. Weinberger, 848 F.2d 956 (1988).

## **Rebates**

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*October 18, 1991, Memorandum from Kathy D. Izell, Department of Energy*



**Department of Energy  
Washington, D.C.**

October 18, 1991

MEMORANDUM FOR: Robert Brockman, Branch Chief (AD-151)  
Public Utilities Branch  
Office of Organization, Resources and Facilities Management

FROM: Kathy D. Izell, Attorney-Advisor (GC-34)  
Office of the Assistant General Counsel for Procurement and  
Finance

SUBJECT: Rebates

Utility companies are increasingly issuing rebates to their customers who purchase and utilize energy efficient equipment that help the utility companies to control the rate of demand growth and defer the building of costly power plants and the attendant transmission and distribution facilities. In the past DOE has accepted credits to its bills from utility companies in instances when energy rebates were being offered. However, currently utility companies wish to send a check to DOE as it does to its other customers rather than issue a credit to DOE on the DOE bill.

Your office has requested that this office provide a legal opinion concerning the ability of the Department of Energy (DOE) to accept such rebates from utilities and the proper mechanism for recording such rebates. This legal opinion does not address the instances where DOE utilizes its authority under Title VIII of the National Energy Conservation Policy Act entitled "Shared Energy Savings" to enter into arrangements.

In accordance with 31 U.S.C. 3302, all funds received for the use of the United States must be deposited into the general fund of the Treasury as miscellaneous receipts. Violation of this statute constitutes an augmentation of appropriations.

However, there are two exceptions to this general legal proposition. One of the exceptions is a revolving fund. When establishing a revolving fund, Congress authorizes an initial capital contribution to the fund, the continuous provision of a service, and the financing of future services by the income generated by the activity itself. Thus, payments to a revolving fund are recredited to the fund account and available for obligation for the same activity.

The second exception to the general legal proposition involves repayments to appropriations account that represent either reimbursements or refunds. Reimbursements are sums received by the Federal Government as a repayment for commodities sold or services furnished either to the public or to another Government account, which are authorized by law

to be credited directly to a specific appropriation and fund account. General Accounting Office, Glossary of Terms Used in the Federal Budget Process, p. 74 (March 1981).

Refunds are defined in the General Accounting Office, Glossary of Terms Used in the Federal Budget Process, page 73 (March 1981) as “returns of advances or recoveries of erroneous disbursements from appropriation or fund accounts that are directly related to, and reductions of, previously recorded payments from the account.” Refunds in Title VII, Section 12.2(2) of the General Accounting Office Policy and Procedures Manual for the Guidance of Federal Agencies are defined as: “repayments for excess payments and are to be credited to the appropriation or fund accounts from which the excess payments were made. ... [R]efunds must be directly related to previously recorded expenditures and are reductions of such expenditures.” Further, the Treasury Department-General Accounting office Joint Regulation No.1 set forth as Appendix B To Title VII of the General Accounting Office Policy and Procedures Manual for the Guidance of Federal Agencies explain the concept of refunds as “Refunds to appropriations ... represent amount collected from outside sources made in error, overpayments, or adjustments for previous amounts disbursed...”

DOE Order 2200.6, Change 2, adopts the same approach by utilizing the following description. “Refunds to appropriations are amounts received that represent the return to DOE of excess payments made to others. Refunds result from overpayments, payments made in error, or adjustments for previous amounts disbursed, including returns of authorized advances and rebates. Unlike reimbursements, refunds are directly related to previously recorded disbursements. Thus, the recovery of an erroneous payment or overpayment qualifies as a refund to the specific appropriation originally charged and is deposited therein, rather than to the General Fund of the Department of the Treasury.”

Given the forgoing, the issue becomes whether or not these utility rebates would constitute “refunds to appropriations”. There are a number of Comptroller General decisions relevant to this issue. The Comptroller has held that the moneys paid to the Federal Government under a guarantee-warranty clause as an adjustment in the contract price constituted a “refund” (34 Comp. Gen 145 (1954)), and the Comptroller General has held that moneys credited to the agency account under a price redetermination clause constituted a “refund” (33 Comp. Gen. 176 (1954)). Most recently in Matter of: Rebates from Travel Management Center Contractors, the Comptroller General examined numerous General Services Administration (GSA) contracts with Travel Management Centers (TMC) wherein the TMCs were to give to GSA rebates or credits in the commissions the TMCs received from transportation or lodging establishments with whom they book reservations. Three methods were used to effect payment to TMCs for Federal employee travel: (1) TMC is paid by contractor (Diners Club) that had issued a credit card to a Government employee pursuant to a contract with GSA; (2) TMC is paid by Diners club on behalf of GSA under GSA’s Government Travel Systems accounts; or (3) TMC is paid directly pursuant to Government Transportation Requests. The Comptroller General found that in all three cases these rebates or credits constituted a “refund” regardless of which of the costs were ultimately paid by the Federal Government. Therefore, the payments or credits paid by the TMC to GSA could be deposited to the credit of the appropriation against which the employee travel was initially charged. (65 Comp. Gen. 601, May 30, 1986).

In the case of these utility rebates, the rebates are essentially discounted prices for utility service and constitute refunds to the federal Government. DOE Order 2200.6, Change 2, states that refunds should be deposited into the same appropriation account as that from which the previously recorded disbursements were made. Then the refunds become immediately available for expenditure. The Order further states that when preparing the SF-133, "Report on Budget Execution", refunds should be netted against the obligations and outlays of the appropriation account.

In summary, the check from the utility company can be issued directly to the DOE. The rebate should be deposited to the specific appropriation originally charged, and the accounting procedures of DOE Order 2200.6, Change 2 should be followed.

# Agency Guidance

## **Promoting ESPCs and UESCs in the Federal Government**

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*August 3, 2007, Executive Office of the President, Council on Environmental Quality*

**EXECUTIVE OFFICE OF THE PRESIDENT  
COUNCIL ON ENVIRONMENTAL QUALITY  
Washington, D.C. 20503**

August 3, 2007

**MEMORANDUM**

TO: HEADS OF EXECUTIVE BRANCH DEPARTMENTS AND AGENCIES

FROM: JAMES L. CONNAUGHTON, CHAIRMAN

SUBJECT: SUBSTANTIALLY INCREASING FEDERAL AGENCY USE OF ENERGY SAVINGS PERFORMANCE CONTRACTING

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Keeping America competitive requires investment in more affordable, efficient, clean, and lower carbon use of energy. In the Federal government, one of our best opportunities to retrofit the energy systems needed to achieve Executive Order and legal requirements is through greater use of private government-wide Energy Savings Performance Contracting (ESPC) and Utility Energy Savings Contracting (UESC) programs administered by the Department of Energy's Federal Energy Management Program (FEMP). Therefore, the heads of executive departments and agencies are directed to take appropriate actions to significantly increase their use of the ESPC/UESC tool to accomplish their energy related goals. Executive departments and agencies already have the contracting flexibility to use ESPCs and UESCs to complete projects, particularly in cases where direct funding is not available or sufficient, and agency procurement and contracting officials should be assessing every opportunity to use these tools.

Agencies shall inform the Assistant Secretary for Energy Efficiency Renewable Energy at the Department of Energy ([akarsner@ee.doe.gov](mailto:akarsner@ee.doe.gov)) within 45 days from the date of this memorandum, on their initial assessment of opportunities for use of ESPCs and UESCs at their facilities to achieve results. Based on this feedback, FEMP will assist each agency in establishing energy efficiency investment targets, a percentage of which shall be through ESPCs and UESCs. Your target and the percentage that is ESPC or UESC will be a function of size and actual opportunity. It is projected that agencies must invest an amount equivalent to 20 percent of their annual energy costs on efficiency enhancements in order to meet our goals. ESPCs/UESCs shall account for at least half of this total, or at least 10% of annual energy costs. Agencies already investing more than 10% shall continue. Exemptions to these requirements shall be addressed on a case by case basis.

**Background**

Since 1985, Federal agencies have invested almost \$7 billion in energy efficiency improvements from all sources. Half, or \$3.5 billion, of this investment has come from ESPCs and UESCs. Total investments to date are estimated to have saved between \$800 million and \$1.16 billion just last year. Cumulative savings to date could be as high as \$8.5 billion, saving 4.5 trillion Btu. Despite these successes, ESPCs and UESCs are not as widely



used in the Federal community as they should be. Contracts are typically too small and take too long to implement. With an industry investment capacity capable of meeting our demand, there is much room for growth in use of this tool.

With the passage of the Energy Policy Act of 2005 last August, President Bush committed America to reducing our dependence on foreign energy supplies, to setting aggressive energy conservation goals and to increase our share of cleaner, more efficient, and lower carbon use of energy. On January 24, 2007, President Bush signed Executive Order 13423, Strengthening Federal Environmental, Energy, and Transportation Management. This order sets a series of aggressive goals, including goals for improved energy efficiency, reduced greenhouse gas emissions, increased alternative energy purchases, and improved water conservation.

To help accomplish Presidential and legal requirements, it is incumbent upon each Federal agency to lead the way – and to lead by example in the wise use of our energy resources and elimination of inefficient energy practices. Achieving these goals requires that Federal agencies look beyond appropriated funds to further accomplish their energy objectives and by using market-based solutions found through the use of innovative performance contracting programs that fund the investments upfront allowing the government to pay for improvements through the guaranteed savings obtained.

Congress established the ESPC program in 1992, and reauthorized it through 2016 with EPAct 2005, as a way to improve the Government's energy efficiency projects that can yield guaranteed savings. ESPCs and UESCs are tools to help agencies achieve our goals. They provide a flexible, cost effective, market based way for agencies to reduce consumption of conventional fossil fuels – and to do so without incurring the up front capital costs normally associated with projects of this nature.

Agencies have long been using the ESPC and UESC programs to implement energy efficiency, water reduction, and renewable energy improvements. During FY 2005, 20 orders awarded through the DOE/FEMP Super ESPC programs as well as projects awarded by DoD. Project investment from these projects totaled approximately \$96.8 million, providing the Federal government with an opportunity to save more than 726.4 billion Btu each year. Through a decentralized approach, DoD awarded the largest number of contracts/delivery orders with 15 ESPC projects in FY 2005. Of the 40 UESCs awarded in FY 2005, 32 were implemented by DoD. Contracts were put in place to perform infrastructure upgrades and purchase new equipment to help installations reduce energy and water consumption.

According to preliminary data for FY 2006, investment in energy efficiency is increasing, totaling \$668 million from all sources. ESPCs were the primary contributor to an overall increase of \$163 million from FY 2005, or a 32 percent increase.

**Excerpts from:**

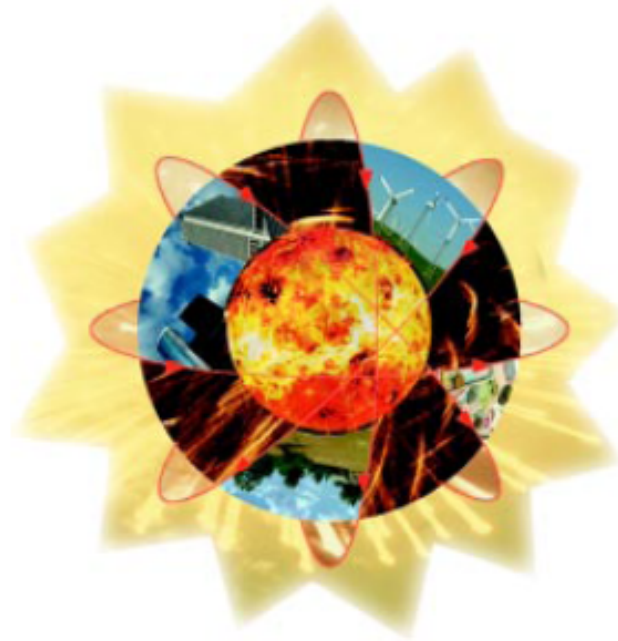
**Procuring Energy Management Services with the GSA Utility Areawide Contract**

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*General Services Administration*

This section contains only the first 11 pages of the document to serve as a summary. The full text of the document can be found at:

- [http://www.gsa.gov/gsa/cm\\_attachments/GSA\\_DOCUMENT/procuring\\_energy\\_R2H915\\_0Z5RDZ-i34K-pR.pdf](http://www.gsa.gov/gsa/cm_attachments/GSA_DOCUMENT/procuring_energy_R2H915_0Z5RDZ-i34K-pR.pdf)



# Procuring Energy Management Services

with  
the GSA Utility  
Areawide Contract

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The U.S. General Services Administration and Enviro-Management & Research, Inc. wish to extend their gratitude to the following for their assistance in developing this guidebook:

From the General Services Administration: Mark Ewing, Linda Collins, Lindsey Lee, and Brian McDevitt. From the Department of Energy, Federal Energy Management Program: Beth Shearer. From EMR: Naresh Khosla, Kate Kelly, and Jayoung Choi.

# GSA Makes Energy Management Simple

Contracting and financing energy management projects is a snap when using the General Services Administration's Utility Areawide Contract and its associated Authorization form. The Areawide Contract can be used to procure any type of service that a utility has to offer, from straightforward electric, gas, and steam service to water management, energy management, and demand-side management projects. The Areawide Contract can be used to finance energy efficiency projects with guaranteed savings derived from the energy savings projects. In short, if your local utility services provider offers it and the item is subject to regulatory oversight, your Agency can procure it quickly and easily using the GSA Areawide Contract.

The Areawide Contract has the flexibility to cover many types of energy, water, and demand-side management projects, provided the energy conservation measure meets the following criteria:

- 1) The measure must produce measurable energy or water reductions or measurable amounts of demand reduction;
- 2) The measure must be directly related to the use of energy or water, or demand reduction;
- 3) The preponderance of work covered by the measure (measured in dollars) must be for items 1 and 2 above; and
- 4) The measure must be an improvement to real property.

Once you determine that the Areawide Contract will provide the best value to the government in response to the need for energy management services, you must document your decision through the justification and approval process, Federal Acquisition Regulation, Subpart 6.303, for the use of other than full and open competition (a simplified example of justification and approval documentation is

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[www.gsa.gov/energy](http://www.gsa.gov/energy)  
for more info.

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### Why Use the GSA Areawide Contract?

- Quick and easy method for procuring energy and DSM services
- Well-established, long and successful track record
- Easy way to accelerate project schedules
- Help in using the contract is readily available from GSA

provided in the last section of this guide). If more than one utility company (gas or electric) can offer energy management services to your facility, it is necessary for you to competitively evaluate the capabilities of each company and select the one that provides the best value to your agency.

The Areawide Contract is administered by the GSA Energy Center of Expertise in Washington, DC. The Energy Center of Expertise provides support to the Federal government in administering contracts that enable agencies to procure energy management services at the lowest cost and the greatest value.

The Public Utilities Team, part of GSA's Energy Center of Expertise, is another valuable resource for assistance in procuring energy management services. This office works to reduce utility costs by promoting optimal energy use and providing guidance to agencies on energy and water conservation projects and the purchase of cost-effective utilities.

For more information on procuring energy management services using the Areawide Contract, contact the GSA Energy Center of Expertise at (202) 205-3588; or on the Internet at <http://www.gsa.gov/energy>.



# A World of Energy Management Options

The Energy Management Services Authorization (EMSA) is part of the GSA Areawide Contract, a contract between GSA and a utility for a range of services for periods up to 10 years. Federal Agencies use the Areawide Contract by signing an Authorization that details the service to be provided to the Ordering Agency. The Areawide Contract sets up the general agreement for ordering utility services, while the EMSA is the vehicle to specify energy management projects.

The EMSA allows a facility to procure a variety of energy management services, including energy audits, feasibility studies, engineering and design studies, installation of energy conservation project, and demand-side management (DSM) projects. A sample Energy Management Services Authorization form can be found on page 5, and a list of potential energy management projects is included on page 11.



In order to ensure that the issues of regulatory authority and established source procurement are adequately addressed, we suggest that you insert the following phrase in the “Remarks” section of the EMSA to demonstrate that the appropriate Regulatory Body is aware that the Utility provides energy management services in accordance with the Energy Policy Act of 1992:

All services to be provided by the Utility Company under this agreement are subject to the authority of the State Regulatory Commission.

Because the EMSA form is only one page long, GSA has developed the Energy Services Agreement (ESA) as a way for the Ordering Agency and the Contractor to specify in detail the

scope of the requested energy management services. The ESA provides further information on payment, termination, and project schedules that are so important in projects that involve savings guarantees.

The ESA is an attachment to the Energy Management Services Authorization, and the EMSA is in turn an attachment to the Areawide Contract. The ESA consists of appendices and exhibits that allow the Ordering Agency and Contractor to proceed through an energy management project from preliminary survey of the facility to design and construction and operations and maintenance.

## Benefits of the Energy Management Services Agreement

There are many benefits to utilizing the GSA Areawide Contract to fulfill your facility's energy management services needs:



*Utility rates and charges are those already in effect or as negotiated; and as amended and supplemented by the Utility based on approval by the PUC.*

1. **Flexibility** - Most types of energy management service is available through the GSA Areawide Contract. The Energy Management Services Authorization takes a facility from preliminary feasibility study, through construction and operations and maintenance.
2. **Established track record** - The Energy Center of Expertise has currently in place over 100 Areawide Contracts with utilities across the nation, and many Agencies already have a history of working this procurement tool. The GSA Areawide Contract has a proven track record, having facilitated successful partnerships between Agencies and utilities for years.
3. **Financing** - The GSA Areawide Contract provides an alternative method for financing energy management projects, similar to an energy savings performance contract.
4. **Help is just a phone call away...or a fax, or a mouse click.** The Energy Center of Expertise is available to provide technical and contract management and administration information and assistance whenever you require it.



**EXHIBIT "C"**

Contractor's ID NO. \_\_\_\_\_ (Optional)  
 Ordering Agency's ID NO. \_\_\_\_\_ (Optional)

**AUTHORIZATION FOR ENERGY MANAGEMENT SERVICES  
 CONTRACT NO. \_\_\_\_\_**

Ordering Agency: \_\_\_\_\_

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

Pursuant to Contract No. \_\_\_\_\_ between the Contractor and the United States Government and subject to all the provisions thereof, service to the United States Government under such contract shall be rendered or modified as hereinafter stated. Contract Articles 2 and 4 shall be followed for the initiation of service under this contract.

PREMISES TO BE SERVED: \_\_\_\_\_

SERVICE ADDRESS: \_\_\_\_\_

**NATURE OF SERVICE:**

- |   |   |
|---|---|
| <input type="checkbox"/> Preliminary Energy Audit                       | <input type="checkbox"/> ECP Engineering & Design Study       |
| <input type="checkbox"/> Energy Conservation Project (ECP) Installation | <input type="checkbox"/> Demand Side Management (DSM) Project |
| <input type="checkbox"/> ECP Feasibility Study                          | <input type="checkbox"/> Special Facilities                   |
| <input type="checkbox"/> Other (See Remarks Below)                      |   |

SERVICE HEREUNDER shall be provided consistent with the Contractor's applicable tariffs, rates, rules, regulations, riders, practices, and/or terms and conditions of service, as modified, amended or supplemented by the Contractor and approved, to the extent required, by the Commission. (See Article 5 of this contract.)

ESTIMATED PROJECT COST: \$ \_\_\_\_\_ CAPITAL COST: \$ \_\_\_\_\_ % OF COST FINANCED: \_\_\_\_\_ %

REBATE AMOUNT (IF APPLICABLE): \$ \_\_\_\_\_ SIMPLE PAYBACK \_\_\_\_\_ YEARS

ACCOUNTING AND APPROPRIATION DATA: \_\_\_\_\_

**ENERGY CONSERVATION MEASURES:**

- |   |  |                                       |
|---|--|---------------------------------------|
| <input type="checkbox"/> Mechanical System Upgrades | <input type="checkbox"/> Controls      | <input type="checkbox"/> Lighting     |
| <input type="checkbox"/> Steam System Upgrades      | <input type="checkbox"/> Renewables    | <input type="checkbox"/> Cogeneration |
| <input type="checkbox"/> Water Conservation         | <input type="checkbox"/> Others: _____ |                                       |

**LIST OF ATTACHMENTS:**

- |  |  |  |  |
|--|--|--|--|
| <input type="checkbox"/> General Conditions  | <input type="checkbox"/> Payment Provisions    | <input type="checkbox"/> Special Requirements  | <input type="checkbox"/> Economic Analysis     |
| <input type="checkbox"/> Facility/Site Plans | <input type="checkbox"/> Historical Data       | <input type="checkbox"/> Utility Usage History | <input type="checkbox"/> ECP Feasibility Study |
| <input type="checkbox"/> Design Drawings     | <input type="checkbox"/> Design Specifications | <input type="checkbox"/> Certifications        | <input type="checkbox"/> Commission Schedules  |

REMARKS:

ACCEPTED:

\_\_\_\_\_  
 (Ordering Agency)

\_\_\_\_\_  
 (Contractor)

By: \_\_\_\_\_  
 Authorized Signature

By: \_\_\_\_\_  
 Authorized Signature

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

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

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

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

NOTE: A fully executed copy of this Authorization shall be transmitted by the Contractor to the General Services Administration, WPE, Washington, DC 20407.

# Using the Energy Services Agreement

An Energy Services Agreement (ESA) is a document that is attached to the Energy Management Services Authorization form to help the Ordering Agency and Contracting Utility easily move through an energy management project, setting up the process with appropriate terms and conditions.

The ESA guides the Ordering Agency and Contracting Utility through an energy management project, from preliminary study, through design, construction, and operations and maintenance. The main body of the ESA contains the Ordering Agency's requirements related to the contracting process, payments, termination, special requirements, etc.

The ESA also includes three appendices that contain the schedules and exhibits that are used to actually contract for energy management services, including preliminary and detailed studies, engineering and design services, construction and installation work, etc. The appropriate ESA appendices should be used as attachments to the Areawide Contract Authorization.

## Appendix I - Preliminary Survey Request

Appendix I provides the mechanism to order a Preliminary Survey, or an overview of the energy consumption of a facility, system, or component. The resulting Preliminary Survey report provides details on energy consumption of the facility or system, and may suggest possible energy savings opportunities.



The cost of the Preliminary Survey is defined on a specific project basis for those services not normally provided free of charge by the Contracting Utility.

To use Appendix I of the ESA, the following statement should be included in the remarks section of the Authorization for Energy Management Services:

This Authorization for Energy Management Services [or other services as appropriate] under Contract XXX shall be subject to bilateral terms and conditions of the ESA Attachment to Authorization for Energy Management Services [or other services as appropriate] under Contract XXX (Attachment 1).

In addition, any subsequent Authorization(s) signed by the Ordering Agency and the Contracting Utility as part of the same project should make reference to the prior ESA executed by including the following in the remarks section:

This Authorization for Energy Management Services [or other services as appropriate] under Contract XXX shall be subject to bilateral terms and conditions of the ESA Attachment to Authorization for Energy Management Services [or other services as appropriate] under Contract XXX (Attachment 1), executed on \_\_\_\_\_ by \_\_\_\_\_. This reference should eliminate concerns regarding unilateral changes to the ESA Attachment.

These statements negate the need to review the terms of the ESA attached to the original Authorization each time a new Exhibit is used.

## Appendix II - Energy Conservation Project Contract Schedules

There are four Contract Schedules that move the energy management project beyond the preliminary feasibility study to detailed study, design, construction, and operation and maintenance. These schedules are described below.



**Use of the Utility  
Areawide Contract  
is encouraged and  
authorized by the Energy  
Policy Act of 1992 (P.L.  
102-486), 10 U.S.C. 2865,  
and 42 U.S.C. 8256.**

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## Schedule A: Agreement for Detailed Feasibility Study

Schedule A is used to request a detailed feasibility study based on the findings of the preliminary feasibility study. The Ordering Agency selects the energy conservation measures recommended in the preliminary study to be included in the detailed study. The Contracting Utility then performs in-depth analysis of the selected measures, to include the following:

- Audits of energy consumption of existing equipment and facilities, including estimated demand reduction and energy savings, and proposed retrofit costs and financial incentives
- Estimated annual energy savings and demand reduction
- Estimated equipment life
- Determination that proposed measure has been recommended without regard to fuel source
- Determination that the proposed measure qualifies as an energy conservation measure (ECM). In order to qualify as an ECM, the proposed measure must meet the following criteria:
  - 1) The measure must produce measurable energy or water reductions or measurable amounts of demand reduction
  - 2) The measure must be directly related to the use of energy or water, or demand reduction
  - 3) The preponderance of work covered by the measure (measured in dollars) must be for items 1 and 2 above
  - 4) The measure must be an improvement to real property
- Estimated annual operation costs
- Project costs broken down by recommended measure
- Unit costs for major components and systems
- Life cycle cost analysis
- Implementation costs and estimated annual energy savings for each system, e.g. lighting, motors, controls, etc.

## Schedule B: Engineering and Design Order

After evaluation and acceptance of the Detailed Feasibility Study, the Ordering Agency may proceed with the Engineering and Design Phase. Schedule B sets forth a statement of work, the specifications, a negotiated price, and a deadline for completion for engineering and design work.

Upon completion of the design and engineering work, the Contracting Utility submits the following documents:

- List of existing equipment or components to be replaced
- List of new equipment or components to be installed
- Specifications and/or catalog cuts for new equipment, including (as appropriate) power rating, estimated energy consumption, input/output, power ratio, lighting level, estimated equipment life, and/or maintenance requirements
- Operation and maintenance procedures required after project implementation
- Description of related training to be provided for Government personnel
- Electrical and mechanical drawings for all measures that involve changes to existing systems
- Description of Ordering Agency support required (e.g., interruptions or temporary changes to operations, movement of equipment, etc.)
- Environmental compliance requirements
- Construction schedule estimate
- Proposed method for measuring and verifying energy savings after installation
- Cost of money rate (percent)
- Abstract of offers from subcontractors
- Copy of selected subcontractor(s) bid
- Analysis of the energy, water, and cost savings to be accomplished by each ECM
- Method and procedures to be used to verify that performance of each ECM is in conformance with those agreed to in the direction or notice to proceed

The Ordering Agency shall evaluate these documents, presented as the Implementation Proposal, for technical soundness and price. If the Ordering Agency opts not to implement the recommendations, it is still liable to the Contracting Utility for the negotiated prices for the Detailed Feasibility Study and the Engineering and Design Order.

### Schedule C: Construction and Installation Order

If the Ordering Agency decides to proceed with the Implementation Proposal, Schedule C is completed by the agency and the Contracting Utility. This schedule includes the Statement of Work, termination amount and schedule, negotiated price and payment schedule, and installation schedule.



**The GSA  
Areawide Con-  
tract can be used  
by any Federal depart-  
ment or agency, by any  
independent establish-  
ment in any branch of  
government, and by any  
quasi-government  
organization.**

## Schedule D: Operations and Maintenance Training and Emergency Response Services Order

Unless provided in the Energy Conservation Project contract, the Ordering Agency is responsible for operation and maintenance (O&M) of the installed retrofits following acceptance. However, the Ordering Agency can request the Contracting Utility to provide O&M training and/or emergency response services for installed or related equipment and systems. This schedule includes the Statement of Work, specifications, negotiated price or fee, and a project schedule.

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*Payment term for energy conservation measures*

*cannot exceed 80% of the useful life of equipment and/or material installed.*

## Appendix III - Life Cycle Cost Analysis

The life cycle cost analysis should include the cost of construction, supervision, inspection, and design; salvage value; available incentives; unit costs of energy; and all other costs (one-time or recurring) the Ordering Agency will pay upon Energy Conservation Project implementation. The analysis should be performed using the current year version of the National Institute of Standards and Technology (NIST) Building Life Cycle Cost (BLCC) software program or a mutually acceptable equivalent.

### GSA-specific Requirements

Utility Areawide Contracts financed energy projects are negotiated and approved within each GSA region by the regional portfolio manager, regional energy coordinator, project manager, and other project personnel. Projects at or above the prospectus level must be approved by the Central Office portfolio management. A project team consisting of representatives from the required approval offices should be responsible for developing these projects.

Regions must submit the ESPC/Utility Contract Financial Information Sheet and Project Energy Conservation Summary to the Energy Center of Expertise for all alternatively financed projects that have been approved by the region. In addition, regions must submit an annual summary report that includes all alternatively financed projects to the Financial Analysis and Reporting Division (PHF). This report should be routed through the Energy Center Director. The annual report should be submitted in conjunction with the annual energy report provided to OMB and the Department of Energy.

### Potential Energy Management Projects

- Interior and exterior lighting replacement
- Lighting control improvements
- Motor replacement with high efficiency motor
- Construction of alternative generation or co-generation facilities
- Boiler control improvements
- Packaged air conditioning unit replacement
- Cooling tower retrofit
- Economizer installation
- Energy management control system (EMCS) replacement/alteration
- Occupancy sensors
- LED exit sign installation
- Fans and pump replacement or impeller trimming
- Chiller retrofit
- Upgrade of natural gas-fired boilers with new controls
- Solar domestic hot water system
- Solar air preheating system
- Steam trap maintenance and replacement
- Insulation installation
- Variable speed drive utilization
- Weatherization
- Window replacement
- Window coverings and awnings
- Reflective solar window tinting
- Fuel cell installation
- Photovoltaic system installation
- Faucet replacement (infrared sensor)
- Replacement of air conditioning & heating unit with a heat pump
- Addition of liquid refrigerant pump to a reciprocating air conditioning unit
- High efficiency refrigerator replacement
- High efficiency window air conditioner replacement
- Water conservation device installation (e.g., flow restrictors, low flow flush valves, waterless urinals, horizontal axis washing machines)
- Installation of UPS systems, back-up generators, and emergency generators
- Fuel switching technology
- Infrared heating system
- Heat pipe dehumidification
- Flash bake commercial cooking
- Thermal energy storage system
- Operation and/or maintenance of ECMs necessary to ensure the efficient operation of equipment during the ESA term
- Training necessary to operate equipment installed as a result of an energy conservation project
- Installation of standby propane and/or fuel facility
- Water distribution system leak detection, and cost effective repair
- Any other energy management that is cost effective and which encourages the use of renewable energy, reduces the Government's energy consumption, or energy demand

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The full text of the document can be found at:

- [http://www.gsa.gov/gsa/cm\\_attachments/GSA\\_DOCUMENT/procuring\\_energy\\_R2H915\\_0Z5RDZ-i34K-pR.pdf](http://www.gsa.gov/gsa/cm_attachments/GSA_DOCUMENT/procuring_energy_R2H915_0Z5RDZ-i34K-pR.pdf)



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

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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.

### 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 EPAAct, 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 10 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 Office of General 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 [measurement and verification] 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 (FEMP) 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 operation and maintenance 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](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

- <http://www.eere.energy.gov/femp/pdfs/schwartz.pdf>

Procuring Energy Management Services with the GSA Utility Areawide Contract

- [http://www.gsa.gov/gsa/cm\\_attachments/GSA\\_DOCUMENT/procuring\\_energy\\_R2H915\\_0Z5RDZ-i34K-pR.pdf](http://www.gsa.gov/gsa/cm_attachments/GSA_DOCUMENT/procuring_energy_R2H915_0Z5RDZ-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](http://www1.eere.energy.gov/femp/financing/superespcs_measguide.html)



## Sole Source Justification

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### Alternative Financing Guidance Memorandum (AFGM) #001

**Authority to Sole Source Utility Service Contracts as referenced in section 152 of the Energy Policy Act (EPAcT) of 1992.**

#### Issue

Clarification on whether section 152 of EPAcT provides the statutory exception from the Competition in Contracting Act's full and open competition requirement for demand-side-management utility contracts.

#### Policy in Brief

Section 152(f) of Public Law 102-468, the Energy Policy Act of 1992 (EPAcT), which amends section 546 of the National Energy Conservation Policy Act, states the following:

- (c) Utility Incentive Programs
  - (1) Agencies are authorized and encouraged 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 and generally available to customers of such utilities.
  - (2) Each agency may accept any financial incentive, goods, or services generally available from any such utility, to increase energy efficiency or to conserve water or manage electricity demand.
  - (3) Each agency is encouraged to enter into negotiations with electric, water, and gas utilities to design cost-effective demand management and conservation incentive programs to address the unique needs of facilities utilized by such agency.

## Background

**Need:** As agencies strive to meet the energy reduction goals set forth in EAct and Executive Order 12902, Energy Efficiency and Water Conservation at Federal Facilities, the ability to quickly develop projects and implement contracts is crucial. Agencies have been unclear concerning their authority to establish sole source contracts with their franchised and/or serving utility for demand-side management services, and this lack of clarity can result in significant delays. Field personnel have requested clarification from their agencies' headquarters several times on this issue and many memoranda have been issued in response to these requests over the past four years (see Related Documents below).

**Goal/Objective:** A definitive statement on this issue contained in one memorandum provides clarification to agency field personnel so they can quickly take advantage of opportunities to implement energy-efficiency and water conservation utility contracts of this nature.

**Relevant Authorities:** Section 152 of EAct is the language in question. Additional relevant authorities are listed under "Related Documents" at the end of this memorandum. As stated earlier, memoranda requesting clarification on this issue have been issued by several agencies including the Department of Energy (DOE), the General Services Administration (GSA), and the Department of Defense (DOD); these are also cited under "Related Documents."

## Findings

The number of utilities offering incentive programs to the federal government has significantly increased over the past few years. Deregulatory changes occurring in the electric utility industry, the likelihood of competition among utilities in the near future, and the increase in customer service offered by all utilities make these programs more attractive than ever before. It is in the government's best interest to take advantage of these incentives while they are available.

These programs provide the government with a means to accomplish many significant goals: (1) to increase energy efficiency and to conserve water and manage electricity demand, (2) to reduce the utility funds needed to operate and maintain federal facilities, and (3) to provide agencies with another avenue for achieving the 30% energy-reduction goal set in Executive Order 12902.

## Guidance Statement

This memorandum is being issued to clarify the existing language in Section 152 of EAct with regard to whether agencies have the legal authority to enter into sole-source contracts with their franchised and/or serving utility for utility incentive programs.

In the DOE memorandum dated July 7, 1994, from Anne Troy through Mary Ann Masterson to Mr. Philip Winter with the subject "Statutory Exception from the Competition in Contracting Act's Full and Open Competition Requirement in Demand Side Management

Utility Contracts,” DOE’s General Counsel found that Section 152 of Public Law 102-468, Energy Policy Act of 1992, provides the authority to “sole-source” utility service contracts to obtain demand-side management services. It concluded that the language contained in Section 152 does meet the criteria of one exception to the Competition in Contracting Act of 1984 (CICA). That exception is contained in 41 USC (253(c)(5), which provides that a civilian agency may use other than competitive procedures when “a statute expressly authorizes or requires that the procurement be made . . . from a specified source.”

As recently as December 13, 1996, a memorandum was issued by the DOE from Lawrence Oliver to John Archibald reiterating the statement that the language in section 152 of EPAct does provide sufficient legal authority for agencies to established sole-source contracts with their utility for utility incentive program service contracts. This DOE memorandum responded to a request for a legal opinion in order to gain approval for a specific utility project.

Since DOE is tasked with promulgating regulations under the Energy Policy Act, the memoranda referenced above clearly provide the guidance and legal interpretation needed to allow representatives in all civilian agencies to act in accordance with EPAct.

Likewise, the language in 10 USC 2865 and in the DOD Defense Energy Program Policy Memorandum 94-1 of December 20, 1993, provides the military departments and defense agencies with clear authorization to “sole source” with their franchised and/or serving utilities for these types of services.

In summary, ample justification exists for federal agencies, both civilian and military to enter into sole-source agreements with their franchised and/or serving utilities for any financial incentives, goods, and services provided under their incentive programs.

### **Likely Uses of This Guidance**

This guidance allows federal agencies to use existing or new utility contract authority for energy services where competition is not required but may be used when desired. This allows agencies to participate in energy efficiency and water conservation programs conducted by gas, water, or electric utilities that are generally available to customers of such utilities.

### **Related Documents**

1. Executive Order 12902, L&AP Book, p. 45–56
2. 42 USC 8256 (also NECPA, Title VIII, Section 546), L&AP Book p. 73–74
3. 10 USC 2865, L&AP Book p. 81-83
4. DOD memo for 021A from 09CB1, dated 29 Jan 93, L&AP Book p. 13-14
5. GSA memo for Ida Ustad from Edward Broyles, dated 29 Apr 93, L&AP Book p. 5-7
6. DOD – DEPPM 94-1, 20 Dec 93, L&AP Book p. 85-92
7. DOE memo for Philip Winter, GSA, from Anne Troy through Mary Anne Masterson, dated 7 July 94, L&AP Book, p. 10-12
8. GSA memo for Ida Ustad from Edward Broyles, dated 7 Nov 94, L&AP Book p. 9

9. GSA memo for Eric Dunham from Amy Brow, dated 11 Apr 95, L&AP Book p. 15-17
10. DOE memo for Larry Oliver from Ralph Oser, dated 12 Dec 96
11. DOE memo for John Archibald from Lawrence Oliver, dated 13 Dec 96

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## Congressional Notification for Utility Projects

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### **Alternative Financing Guidance Memorandum (AFGM) #002**

*Alternative Financing Guidance Working Group*

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### **Congressional Notification for Utility Projects Under the Authority of Section 152 of the Energy Policy Act (EPAcT) of 1992.**

#### **Issue**

Clarification on whether utility projects entered into under the authority of section 152 of EPAcT require notification to Congress prior to contract award.

#### **Policy in Brief**

Section 152 of the Energy Policy Act, Public Law 102-468, provides the authorization for Federal agencies to enter into contracts with their franchised and/or serving utility for utility incentive programs. It does not specify whether Congressional notification is required before the contract can be awarded.

These utility contracts are similar in nature to ESPCs (energy savings performance contracts), which are also allowed through EPAcT and, consequently, are commonly mistaken as one and the same. The ESPC Procedures and Methods (10 CFR 436) do require Congressional notification as follows:



10 CFR 436.34 (a)(3) states:

Thirty days before the award of any multiyear energy savings performance contract that contains a clause setting forth a cancellation ceiling in excess of \$750,000, the head of the awarding Federal agency gives written notification of the proposed contract and the proposed cancellation ceiling for the contract to the appropriate Congressional authorizing and appropriating committees.

### ***Background***

***Need:*** Often the regulations that apply to Energy Savings Performance Contracts are confused with the regulations applied to utility contracts. In title 10 of the Code of Federal Regulations, part 436, the rules for ESPCs clearly indicate a need for Congressional notification prior to contract award for projects totaling \$750,000 or greater. Congress must receive notification of the project and be given a minimum of 30 days to respond. If Congress does not respond within the 30-day period, the agency may proceed with awarding the contract.

The utility contracting guidelines do not address the need for Congressional notification. Because the authorities for utility contracting of this nature are silent on this issue, many agencies feel the need to notify Congress as a "just in case" measure.

***Goal/Objective:*** Clarifying this issue once and for all in one memorandum that applies to all Federal agencies will eliminate the need for continuous clarification on this issue. Eliminating this issue could reduce by several months the time it takes to receive approval to implement utility contracts of this nature.

***Relevant Authorities:*** Section 152 of EPCA is the utility contracting language that does not address Congressional notification while 10 CFR 436 is the ESPC rule that does require notification to Congress.

### ***Findings***

Preparing a Congressional notification can take many months. Receiving upper management approval on the notification can be a time-consuming process of explaining the project, reiterating the authorities behind the ability to do the project, and explaining the Congressional notification process. After approval has been received and the notification has been sent, the 30-day waiting period begins. All in all, this entire process could take more than six months to complete.

It is in the best interest of the government to reduce the time and resources required to enter into these contracts. Stipulating that notifying Congress is not a requirement of utility contracts can make the contracting process faster and more efficient.

Utility contracting provides the government with a means to accomplish many significant goals to: (1) increase energy efficiency and to conserve water and manage electricity demand, (2) reduce the utility funds needed to operate and maintain Federal facilities, and (3) provide agencies with another avenue to obtain the 30 percent energy reduction goal set forth in Executive Order 12902.

### ***Guidance Statement***

This memorandum is to clarify the issue of whether or not Congressional notification is necessary for utility contracts as allowed under Section 152 of EPAct.

There is no indication in any of the laws, regulations, or policies that Congressional notification is required in utility contracting (as discussed in this statement). Therefore, this statement clarifies that any Federal agency may enter into a utility contract as allowed under section 152 of EPAct without congressional notification.

### ***Likely Uses of this Guidance***

This guidance simply clarifies a procedural issue in the process of contracting with a utility to participate in utility incentive programs as allowed through EPAct.

### ***Related Documents***

1. Energy Policy Act of 1992 (P.L. 102-486), L&AP Book p. 19-44
2. Executive Order 12902, L&AP Book p. 45-56
3. ESPC Rule (10 CFR 436), L&AP Book p.57-72
4. 42 USC 8256 (also NECPA Title VIII, Section 546), L&AP Book p. 73-74
5. 42 USC 8287 (also NECPA Title VIII, Sections 801-804), L&AP Book p.75-80
6. 10 USC 2865, L&AP Book p. 81-83
7. DOD - DEPPM 94-1, 20 Dec 93, L&AP Book p. 85-92

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## Relationship of Anti-Deficiency Act to Multi-Year Contracts under the Utility Incentive Program

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### Alternative Financing Guidance Memorandum (AFGM) #003

#### Issue

Are multi-year contracts for utility services subject to the requirement that funds must be obligated beyond the first year?

#### Policy in Brief

Section 152(f) of the Energy Policy Act of 1992 (EPAct) 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.

Since these contracts are for utility services under section 201 of the Federal Property Act, the only requirement on federal agencies is the obligation of the annual costs for such contracts during each year that the contract is in effect. Therefore there is no conflict with the Anti-Deficiency Act for these multi-year contracts.

The following requirements must be met by such contracts in order that the services provided be considered “qualified” contracts for public utility services:

- (1) The primary purpose of the contract must be for the reduction of cost or use of energy and water and achieving greater efficiency;
- (2) The provision of general construction, training courses, and the purchase of supplies or equipment not directly related to an energy conservation measure or demand side management action is not permissible;
- (3) Energy or water savings must be sufficient to pay all costs under the contract; and
- (4) These contracts will not normally be used unless the net overall energy or water cost reduction can be demonstrated and verified.

## Background

**Need:** As agencies strive to meet the energy reduction goals set forth in the Energy Policy Act and Executive Order 13123, *Greening the Government through Efficient Energy Management*, the ability to quickly develop projects and implement contracts is crucial. The Anti-Deficiency Act generally restricts agencies from entering into contracts without having the entire cost of the contract obligated. Agencies have been unclear concerning the ability to utilize long term, alternatively financed energy and water efficiency contracts offered by their franchised and/or serving utility companies and the possible conflict with the constraint of the Anti-Deficiency Act.

**Goal/Objective:** Provide a definitive statement on this issue contained in one memorandum to supply clarification to agency field personnel so they can quickly take advantage of the opportunities to implement energy efficiency and water conservation utility contracts.

**Relevant Authorities:** Section 152 of EPA Act, the Anti-Deficiency Act, *31 USC Section 1341*, and Section 201 of the Federal Property and Administrative Services Act of 1949, *40 USC Section 481 (a)(3)*, is the language in question. Additional relevant authorities are listed under “Related Documents” at the end of this memorandum.

## Findings

The Anti-Deficiency Act provides, in part, that “an officer or employee of the United States Government or of the District of Columbia may not ... involve either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law ...” (emphasis added.) As a general rule, the cost of a contract must be fully funded at the time the government enters into the contract. The Anti-Deficiency Act does, however, provide that Congress can specifically provide federal agencies with contract authority to enter into a contract in excess of, or prior to, enactment of the applicable appropriations.

Section 203(a)(3) of the Federal Property Act is such a specific statute. Through it, 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 10 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 of Section 203(a)(3) 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 Office of General Counsel has provided requirements that such contracts must fulfill in order to be considered as “qualified” utility energy service contracts.

### **Guidance Statement**

This memorandum is being issued to clarify the question of if there is any constraint of utility energy service contracts imposed by the Anti-Deficiency Act.

In the DOE memorandum dated June 22, 1999, from Mark Schwartz to Shelly Fidler with the subject, “Relationship of the Anti-Deficiency Act to Multi-Year Contracts Under the Utility Incentive Program Authorized Under Section 152(f) of EPAct,” DOE’s Deputy General Counsel stated the results of deliberate and extensive review of the issue. He found that “the DSM and energy and water conservation and efficiency contracts authorized by section 152(f) of EPAct can qualify as “contracts for public utility services” under section 201 of the Federal Property Act. As such they are not subject to the requirement that funds must be obligated for expenses (including potential termination costs) beyond the first year, and that the contracts can have up to a ten year term.”

Since DOE is tasked with promulgating regulations under EPAct, the memoranda referenced above clearly provides the guidance and legal interpretation needed to allow representatives of all federal agencies to act in accordance with EPAct.

In summary, ample justification exists for federal agencies to enter into contracts for energy and water conservation with utility companies without having to obligate any costs for such a contract beyond that necessary to cover the costs of the first year of the contract. The only obligation that agencies have prior to entering into such contracts is to assure that they meet the qualifying requirements specified by the DOE Counsel.

### **Likely Uses of this Guidance**

This guidance allows federal agencies to use existing or new utility contract authority for energy and water services without concern that the Anti-Deficiency Act requires total contract cost appropriation.

### **Related Documents**

1. Executive Order 13123
2. DOE memo for Shelly Fidler from Mark Schwartz, dated June 22, 1999
3. GSA memo for Sharon Roach from Harmon Eggers, dated July 29, 1994

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## Source of Funds

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### Alternative Financing Guidance Memorandum (AFGM) #004

#### Federal Fund Sources to be Used to Pay for Multi-Year Contracts under the Utility Incentive Program

##### Issue

Where must funds for payments of multi-year contracts for utility services come from?

##### Policy in Brief

Section 152(f) of the Energy Policy Act of 1992 (EPAct) authorized and encouraged federal agencies to participate in utility incentive programs to increase energy efficiency and for water conservation or the management of electricity demand conducted by gas, water or electric utilities.

Since these contracts are for utility services under Section 201 of the Federal Property Act, the only requirement on federal agencies is the obligation of the annual costs for such contracts during each year that the contract is in effect. The payment of the costs associated with those contracts can come from whatever fund sources the agency determines it can use for utility services under their utility contract authority.

##### Background

**Need:** As agencies strive to meet the energy reduction goals set forth in Public Law 102-486, the Energy Policy Act of 1992, and *Executive Order 13123, Greening the Government Through Efficient Energy Management*, the ability to quickly develop projects and implement contracts is crucial. Agencies have been unclear concerning the fund sources that can be used to pay for long term, alternatively financed energy and water efficiency contracts offered by their franchised and/or serving utility companies.

**Goal/Objective:** A definitive statement on this issue contained in one memorandum to provide clarification to agency field personnel so they can more quickly take advantage of the opportunities to implement energy-efficiency and water conservation utility contracts.

**Relevant Authorities:** Section 152f of EAct is the statute that authorizes and encourages federal agencies to use utility incentive programs; Section 201 of the Federal Property Act is the statutory authority for the purchase of utility services; and Title 10 Section 2865 provides additional guidance to the Department of Defense for entering into agreements with utility companies for cost effective demand and conservation incentive programs.

Section 155 of EAct as implemented by regulation provides strict guidance on the payment of costs incurred in the implementation of energy savings performance contracts (ESPC). Specifically the annual payment for such a contract may not exceed the cost savings for that year, and payment must be made from energy or energy related cost savings.

While there is no similar restriction in statute concerning the payment of costs under utility incentive programs, many agencies have followed the guidance for ESPC payment for utility contracts. In some cases use of the flexibility of utility services contract payment from funds not directly associated with energy or energy related cost savings and/or in excess of annual savings could reduce the contract term and financing costs, and be in the best financial interest of the federal government.

## **Findings**

Section 203(a)(3) of the Federal Property Act is such a specific statute. Through it, 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 10 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.

Section 2865 (d)(4)(B) of Title 10 of the United States Code states that "subject to the availability of funds, repayment of costs advanced under subparagraph (A) {financing costs} shall be made from funds available to a military department for the purchase of utility services."

## **Guidance Statement**

This memorandum is being issued to clarify the question of which fund sources can be used by an agency to pay for utility incentive programs.

In summary, there is no statutory restriction on the type of funds to be used to pay for utility incentive programs or that the amount be equal to or less than the annual savings. Agencies can use any fund sources that the agency determines it can use to pay for utility services. These funds can include those that are used to pay for the elements of associated cost savings generated from the contract, such as personnel and capital cost savings.



## **Likely Uses of this Guidance**

This guidance clarifies the fact that the choice of fund sources is not constrained by statute. The contracting officers of each agency have the discretion to use any funds, deemed appropriate for use by that agency to pay for utility services, to pay for multi-year contracts under the utility incentive program.

## **Related Documents**

- 1) Public Law 102-486,
- 2) Executive Order 13123

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## Solar Investment Tax Credit

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### Frequently Asked Questions

On October 3, 2008, the President signed the Emergency Economic Stabilization Act of 2008 into law (P.L. 110-343). This legislation contains a number of tax incentives designed to encourage both individuals and businesses to make investments in solar energy, including 8-year extensions of the section 48 business solar investment tax credit (ITC) and the section 25D residential solar ITC. The following is a brief summary of the provisions directly and indirectly benefiting the solar industry, and answers to frequently asked questions about how the provisions operate.

### Provisions Directly Benefiting the Solar Industry:

Business Solar Investment Tax Credit (IR Code §48). The bill extends the 30% ITC for solar energy property for eight years through December 31, 2016. The bill allows the ITC to be used to offset both regular and alternative minimum tax (AMT) and waives the public utility exception of current law (i.e., permits utilities to directly invest in solar facilities and claim the ITC). The five-year accelerated depreciation allowance for solar property is permanent and unaffected by passage of the eight-year extension of the solar ITC.

Residential Solar Investment Tax Credit (IR Code §25D). The bill extends the 30% ITC for residential solar property for eight years through December 31, 2016. It also removes the cap on qualified solar electric property expenditures (currently \$2,000), effective for property placed in service after December 31, 2008. The bill allows individual taxpayers to use the credit to offset AMT liability, and to carry unused credits forward to the next succeeding taxable year. The \$2,000 monetary cap on solar water heating property was not lifted and remains in effect.

New Clean Renewable Energy Bonds (“CREBs”). The bill authorizes \$800 million of new clean renewable energy bonds to finance facilities that generate electricity from renewable resources, including: solar, wind, closed-loop biomass, open-loop biomass, geothermal, small irrigation, qualified hydropower, landfill gas, marine renewables and trash combustion facilities. This \$800 million authorization will be allocated as follows: 1/3 will be used for

qualifying projects of State/local/tribal governments; 1/3 for qualifying projects of public power providers; and 1/3 for qualifying projects of electric cooperatives. The bill also extends the termination date for existing CREBs by one year. Thus, State and local governments, public power providers and electric cooperatives will be allowed to issue CREBs to finance new renewable electric power facilities, including solar installations, through December 31, 2009.

### **Provisions Indirectly Benefiting the Solar Industry:**

Extension of Energy-Efficient Buildings Deduction. Current law allows taxpayers to deduct the cost of energy-efficient property installed in commercial buildings. The amount deductible is up to \$1.80 per square foot of building floor area for property installed in commercial buildings as part of: (i) interior lighting systems, (ii) heating, cooling, ventilation, and hot water systems, or (iii) the building envelope. Expenditures must be certified as being installed as part of a plan designed to reduce the total annual energy and power costs with respect to the interior lighting systems, heating, cooling, ventilation, and hot water systems of the building by 50 percent or more in comparison to certain established standards. The bill extends the energy efficient commercial buildings deduction for five years, through December 31, 2013.

Qualified Energy Conservation Bonds. The bill creates a new category of tax credit bonds, "Qualified Energy Conservation Bonds" (QECBs) to finance State and local government initiatives designed to reduce greenhouse emissions. QECBs can be issued to finance capital expenditures incurred for: (1) reducing energy consumption by at least 20%; (2) implementing green community programs; and (3) rural development involving the production of electricity from renewable resources. The bonds can also be used to finance research facilities and provide research grants for, among other things, technologies to reduce peak use of electricity. There is a national limitation of \$800 million, allocated to States, municipalities and tribal governments.

Research and Development Tax Credit. The bill would extend the research and development tax credit equal to 20 percent of the amount by which a taxpayer's qualified research expenditures for a taxable year exceed its base amount for that year. The R&D tax credit expired December 31, 2007. The provision would be extended retroactively to January 1, 2008 and through the end of 2009. In addition, the proposal would increase the alternative simplified credit from 12% to 14% for the 2009 tax year, and repeal the alternative incremental research credit for the 2009 tax year. The proposal is effective for amounts paid or incurred after December 31, 2007. Thus, research expenditures incurred by the solar energy industry would qualify for the credit.

### **Frequently Asked Questions:**

1. When is the extension of the ITC effective for commercial property?

Answer: The extension of the ITC for commercial solar property is effective on the date of enactment, October 3, 2008. Since the existing credit was not scheduled to

expire until December 31, 2008, this means that the credit has been seamlessly extended through 12/31/2016.

2. What is the effective date for the allowance of the sec. 48 commercial ITC against AMT liability?

Answer: The allowance of the sec. 48 ITC against AMT liability is effective for taxable years beginning after the date of enactment. For most taxpayers, this will mean that the credit against AMT is effective beginning on January 1, 2009. However, business taxpayers have flexibility in choosing their fiscal year for tax purposes. If a taxpayer uses a fiscal year that runs from November 1 - October 31st, it would mean that they can begin using the credit against AMT beginning November 1, 2008, rather than having to wait until January 1, 2009.

3. What is the effective date for waiver of the public utility exception?

Answer: This provision is effective for periods after February 12, 2008, in taxable years ending after such date.

4. When is the ITC effective for residential solar energy efficiency property?

Answer: The extension of the ITC for residential solar energy efficiency property is effective on the date of enactment, October 3, 2008. Since the existing section 25D credit was not scheduled to expire until December 31, 2008, this means that the credit has been seamlessly extended through 12/31/2016.

5. What property qualifies for the section 25D residential ITC?

Answer: The credit applies to "qualified solar water heating property," (defined as "property to heat water for use in a dwelling unit located in the U.S. and used as a residence by the taxpayer if at least half of the energy used by such property is derived from the sun), and to "qualified solar electric property" (defined as property which uses solar energy to generate electricity for use in a dwelling unit located in the U.S. and used as a residence by the taxpayer).

6. Does the elimination of the \$2,000 cap on the section 25D residential credit apply to solar thermal property?

Answer: No. The elimination of the \$2,000 cap applies only for qualified solar electric property expenditures.

7. What is the effective date of the elimination of the \$2,000 cap for solar electric property expenditures?

Answer: The elimination of the \$2,000 cap for solar electric property expenditures is effective for property placed in service after December 31, 2008. State laws dictate when in-state property is placed-in-service.

8. If I begin a residential installation now, can the lifted cap apply to this project?

Answer: That depends on whether the installation is completed after December 31, 2008. Section 25D(e)(8)(A) provides in general that an expenditure with respect to an item shall be treated as made when the original installation of the item is completed. In other words, the taxpayer may claim the credit as of the date that the installation of the residential solar electric property is completed and the property is placed into service. If an installation is begun in 2008, but the property is not placed into service until after December 31, 2008, the taxpayer may claim the credit for 30% of the expenditures made with regard to the installation.

9. Why was the \$2,000 cap not lifted for residential solar water heating projects?

Answer: Although House and Senate staff agreed to lift the \$2,000 cap for solar water heating projects, members of the Solar Thermal Division of SEIA voted overwhelming to maintain the cap.

10. What is the effective date for allowance of the solar ITC against the AMT?

Answer: The provision allowing individual taxpayers to use the solar ITC against AMT liability is effective for taxable years beginning after December 31, 2007. Thus, individual taxpayers who are required to pay alternative minimum tax liability (rather than regular tax liability) for the 2008 tax year may take a credit of up to \$2,000 (the maximum credit amount for solar residential property placed in service during 2008) against the AMT liability. For the 2009 tax year, filers will be eligible to apply the full 30% ITC against the AMT liability.

11. Were the bonus depreciation provisions enacted as part of the Economic Stimulus Package earlier this year that are currently set to expire on 12/31/08 extended as part of the Emergency Economic Stabilization Act?

Answer: No, the bonus depreciation rules were not extended. Bonus depreciation should not be confused with the five-year accelerated depreciation of solar property under Section 48.

# Utility Energy Services Contracts

## Utility Energy Service Contracts

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### UESC Model Agreement

#### GSA Model Areawide Contract

GSA model areawide contract

List of areawide contracts and where to get current list *(Pending)*

Components of UESC using areawide contracts *(Pending)*

1. Areawide contract *(Pending)*
2. Master agreement (includes site specific terms and conditions) *(Pending)*
3. Exhibit A, C or D per areawide contracts *(Pending)*
4. Attachments *(Pending)*
  - a. Negotiated SOW *(Pending)*
  - b. Davis Bacon *(Pending)*
  - c. Termination schedule *(Pending)*
  - d. Amortization *(Pending)*

#### Basic Ordering Agreement (BOA)

1. Basic ordering agreement (includes general terms and conditions)
2. Task or delivery order (includes site specific terms and conditions) *(Pending)*
3. Attachments *(Pending)*
  - a. Negotiated SOW *(Pending)*
  - b. Davis Bacon *(Pending)*
  - c. Termination schedule *(Pending)*
  - d. Amortization *(Pending)*

#### Site-Specific Contract

1. Model agreement (includes site specific terms and conditions)
2. Attachments *(Pending)*
  - a. Negotiated SOW *(Pending)*
  - b. Davis Bacon *(Pending)*
  - c. Termination schedule *(Pending)*
  - d. Amortization *(Pending)*

#### Components of UESC using Areawide *(Pending)*

1. Areawide contract *(Pending)*
2. Master agreement (includes site specific terms and conditions) *(Pending)*

#### Negotiated SOW *(Pending)*

## UESC Model Agreement

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In the early days of implementation of the authority for federal facilities to enter into utility energy services contracts, each federal facility met with their local providing utility company and through negotiation developed their own contract documents. This was time consuming for the facility managers and led to delays while higher authorities reviewed the documents for legal and contract administration conformity. The process was also time consuming for the utility companies since they typically deal with the facilities of more than one federal agency. This often led to significant differences in contract language between facilities – which made it difficult for the utilities to get approval within their organization.

Recognizing the benefit of a uniform, approved set of standard contract terms and conditions, representatives of the Edison Electric Institute (representing the investor-owned utility companies) and technical, legal, and contract officers of the Department of Defense, the Department of Energy, and other agencies, met to develop such language. The resulting model agreements, reviewed and approved by authorities from both the public and private sectors, include approximately 80% of the necessary terms and conditions for a utility energy services contract. Most of the additional information that is needed includes site specific scope of work direction. Of course each individual contract must be developed by a federal contract officer and mutually agreed to by the providing utility. The value of using the model agreement is that it provides federal and utility personnel an assurance that the language has been used successfully many times since its development.



**AGREEMENT FOR ENERGY CONSERVATION AND DEMAND  
SIDE MANAGEMENT SERVICES**

**BETWEEN**

**THE UNITED STATES OF AMERICA**

**AND**

\_\_\_\_\_ **UTILITY COMPANY**

This Agreement for implementation of Energy Conservation Measures (ECMs) is entered into this \_\_\_\_\_ day of \_\_\_\_\_, 200\_, by and between \_\_\_\_\_ Utility Company (Utility) and the United States of America (Government), represented by the Contracting Officer executing this Agreement. The signatories to this Agreement will be sometimes collectively referred to as the "Parties" and individually as a "Party." This Agreement (when signed by the Parties), any Task Orders (T.O.) executed pursuant to this Agreement, and any other associated agreements shall constitute the entire Contract between the Parties with respect to a particular ECM. A term or condition contained in this Agreement may be amended at any time by mutual written agreement of the Parties. However, termination, modification, or expiration of a term or condition shall not retroactively affect T.O.s previously entered into under this Agreement.

The Parties agree to the following principals, concepts and procedures::

*GENERAL CONDITIONS*

**GC.1 Purpose.** The Government desires assistance in accomplishing ECMs at \_\_\_\_\_ Installation ("Installation") (may substitute "at all Installations within the Utility Company's service area, to include [list the installations by name] ("hereinafter, "Installations)"). The purpose of this Agreement is to facilitate the implementation of ECMs through T.O.s. This Agreement sets forth the terms and conditions under which subsequent T.O.s may be entered into between the Parties.

**GC.2 Definitions.** Terms used in this Agreement shall have the following definitions:

**Acceptance** - Written acceptance by the authorized representative of the Government of an individual Phase or completed ECM pursuant to a T.O.

**Carrying Charge** - For the purpose of this Agreement, Carrying Charge shall be an interest rate applied to all ECM Costs incurred by the Utility until permanent financing is put in place or the Government pays the ECM Cost. Accrued interest shall be considered an ECM Cost.

**Contracting Officer** - A Government official authorized to enter into, administer, and/or terminate a contract on behalf of the Government, and who is authorized to make related determinations and findings within the limits established pursuant to Government regulations.

**Contracting Officer's Representative (COR) or Contracting Officer's Technical Representative (COTR) -** A local or project site representative of the Contracting Officer delegated specific limited authority, as set forth in a formal delegation letter signed by the Contracting Officer, for a given T.O.

**Energy Conservation Measure (ECM) -** One or more ECPs completed, or to be completed, under a T.O. including the feasibility study, engineering and design, operation and maintenance, and/or implementation of one or more ECPs, which include, but are not limited to, energy and water conservation, energy efficient maintenance, energy management services, facilities alterations, and installation and maintenance of energy saving devices and technologies. ECMs should have a positive net present value OVER A PERIOD of 10 years or less, as required by Title 10 U.S.C., Section 2865.

**Energy Conservation Measure Cost (ECM Cost) -** The total cost may include, but is not limited to the Work, finance charges and overhead and profit, for the feasibility study, engineering and design, implementation and operation and maintenance of an ECM, less any financial incentive or rebates, if provided by the Utility. Payment for completed ECMs shall be calculated based upon the ECM Cost.

**Energy Conservation Project (ECP) -** A specific project intended and designed to provide any of the following: energy savings, demand reduction, efficiency improvements and water conservation. ECPs are described in more detail in Section GC 17.

**Occupied Period -** Hours during which a facility or building is occupied or used in the normal course of business.

**Quality Assurance Evaluator (QAE) -** A functionally qualified person who evaluates or inspects the **contractor's** performance of service in accordance with the quality assurance surveillance plan written specifically for the contracted service to be evaluated. The QAE performs technical monitoring of contractor actions, is responsible for requesting products and services through a government contract, and manages the day-to-day tasks of the contract.

**Quality Control -** A management function whereby control of quality of raw or produced material is exercised for the purpose of preventing production of defective material. For purposes of this Agreement, quality control is those actions taken by a **contractor** to control the production of outputs to ensure that they conform to the **contract** requirements.

**Possession -** When the Government takes **beneficial** occupancy of an ECP ("Possession of an ECP") or an ECM ("Possession of an ECM").

**Subcontractor -** Any corporation, partnership or individual hired directly by the Utility to perform a service or provide a product under this Agreement and T.O.s resulting from this Agreement.

**Task Order (T.O.) -** A binding contractual action entered into under this Agreement for the feasibility study, engineering and design, implementation, and/or operation and maintenance of, or any activity related to an ECM. (A T.O. can also be identified as a Delivery Order (D.O.).)

**Termination Schedule -** A schedule developed for each financed ECM specifying the lump sum payment necessary, at any time during the contract period following the initial Government payment, for the complete repayment of the ECM Costs, including any finance costs accrued to that point.

**Work -** All labor, materials, tools, equipment, services, transportation and/or other items required for the completion of the ECM.

**GC.3 Term.** This Agreement shall have a term of \_\_\_\_ years. The term may not exceed ten (10) years. This Agreement may be terminated in its entirety by either Party upon thirty (30) days written notice to the other Party. Thereafter, no new T.O.s shall be entered into under this Agreement. Termination, modification or expiration of this Agreement shall not affect in any way T.O.s previously entered into under this Agreement.

This Agreement shall be effective from the date it is signed by both Parties. In the event the Parties sign this Agreement on different dates, then the effective date shall be the latter of the two dates.

**GC.4 Services to be Provided by the Utility.** The Utility shall provide preliminary audits, feasibility studies, engineering and design studies, and all initial capital, labor, material, supplies and equipment to identify, implement, operate or maintain ECMs in accordance with T.O.s entered into pursuant to this Agreement. These services may be ordered individually, as a group or in any combination under a single T.O.

**GC.5 Information.** Subject to national security constraints and unless otherwise prohibited by law, the Government shall provide the Utility with any information requested by the Utility to comply with regulatory commission requirements.

**GC.6 Relationship of Parties.** The Government acknowledges that the Utility and/or its Subcontractors shall each perform their work as independent contractors and the Government shall have no direct control and supervision of Utility or Subcontractor employees, who shall not be considered employees or agents of the Government for any purpose. The Utility, in negotiations with its Subcontractors, will ensure that the Government will be the direct beneficiary of any and all product and service guarantees and warranties.

**GC.7 Subcontractor Selection.** The Utility may perform some or all of the Work under a Task Order itself or through Subcontractors. When practical, the Utility shall competitively select Subcontractors for the purpose of determining the reasonableness of Subcontractor prices. When competition is not practical, price reasonableness may be determined by comparing proposed prices with those obtained for the same or similar work, prices published in independent cost guides, published in competitive price lists or developed by independent sources.

Subcontractor selection shall be based on cost, experience, past performance, reliability, and such other factors as the Utility may deem appropriate, as long as such factors are practicably related to the Government's *minimum needs*. In no event may such services be provided by Subcontractors listed as excluded from Federal Procurement Programs, which list is maintained by GSA pursuant to 48 C.F.R. 9.404. For any T.O., the Utility may submit the names of proposed Subcontractors to the Government Contracting Officer to ensure they are not excluded pursuant to 48 C.F.R. 9.404.

**GC.8 Authority of Contracting Officer.** The Government's Contracting Officer shall be the only Government official authorized to enter into and/or modify a T.O. entered into under this Agreement.

**GC.9 Ownership of Work Product.** The Government may elect not to use the Utility to implement the ECM. If the Government so elects, it will pay for any accepted work, including any equipment, completed studies, and engineering and design work. Title to any work done by the Utility for the Government under a T.O. shall become the property of the Government at the time of Acceptance of the Work.

**GC.10 Responsibility for Operation and Maintenance.** The operation and maintenance of the equipment installed pursuant to any T.O. executed under this Agreement shall be the responsibility of the Utility during the payment term unless otherwise provided in the T.O.

**GC.11 Government Projects.** The Government shall not be restricted from implementing equipment installation, construction projects and ECMs independent of work performed under this Agreement, including installing new energy conservation equipment, removing existing energy consuming equipment, or adding new energy consuming equipment. The Government will notify the Utility prior to implementing projects that may affect ECMs under this Agreement.

**GC.12 ECM Performance Verification.** Each T.O. shall include procedures that are mutually agreeable to the parties to verify ECM performance following installation.

**GC.13 Emission Credits.** All on site Government emission credits earned by virtue of T.O.s entered into hereunder shall be the property of the Government.

**GC.14 Order of Precedence.** The Government and Utility shall determine in this Agreement or subsequent T.O.s the precedence given to the T.O., this Agreement or other documents, exhibits and attachments in the event an inconsistency arises among these documents.

**GC.15 Preliminary Audits.** At the request of the Government or the Utility and upon the mutual consent of both parties, the Utility will conduct, at no cost to the Government, an audit consisting of an on-site building investigation and evaluation for a mutually agreeable facility to determine if any significant energy conservation opportunities exist and whether further detailed energy analysis is warranted. Government buildings/facilities plans will be made available upon request. Requests for plans shall be made to the COR at least fifteen (15) calendar days in advance of the audit start date. The Utility will provide a written report of the audit to the Government, **normally at no cost.** The Utility will utilize historical building data, utility data, and information obtained by the Utility to identify ECPs. Using this information, the Utility will generate a prioritized list of recommendations, in sequence of implementation, that are life-cycle cost effective and can be implemented in the facility being audited. The preliminary audit, to the extent applicable, shall include but not be limited to the following information:

- (a) Preliminary estimated energy and water savings,
- (b) Preliminary estimated cost savings, including reduced maintenance costs,
- (c) Current utility rates,
- (d) Preliminary retrofit cost,
- (e) Utility financial incentive/rebate, if any,
- (f) Description of existing equipment,
- (g) Description of the proposed retrofit equipment,
- (h) Overview of the general environmental impact and potential hazardous wastes identified through existing facility records, if any.

**GC.16 ECM Proposal.** After reviewing the preliminary audit, the Government may request a proposal from the Utility, for the evaluation of an ECM. The Utility shall submit an ECM proposal setting forth a prioritized list of the recommended ECPs within the ECM, a preliminary estimate of the cost to implement each ECP, the total costs for implementing the ECM (including estimated feasibility study, engineering and design, and implementation costs), and estimated cost savings.

**GC.17 Energy Conservation Projects.** The Utility may propose ECMs which include one or more ECPs. ECPs that substitute one energy type for another (e.g., natural gas in lieu of electricity) will not be considered for implementation unless a net overall energy or cost reduction can be demonstrated, based on current market energy prices. Potential ECPs include, but are not limited to:

- (a) Interior and exterior lighting replacement,
- (b) Transformer replacement,
- (c) Lighting control improvements,
- (d) Motor replacement with high efficiency motor,
- (e) Construction of alternative generation or cogeneration facilities,
- (f) Boiler control improvements,
- (g) Packaged air conditioning unit replacement,
- (h) Cooling tower retrofit,
- (i) Economizer installation,
- (j) Energy management control system (EMCS) replacement/alteration,
- (k) Occupancy sensors,
- (l) LED exit sign installation,
- (m) Fans and pump replacement or impeller trimming,
- (n) Chiller retrofit,
- (o) Upgrade of natural gas-fired boilers with new controls (low NOX burners),
- (p) Solar domestic hot water system,
- (q) Solar air preheating system,
- (r) Steam trap maintenance and replacement,
- (s) Insulation installation,

- (t) Variable speed drive utilization,
- (u) Weatherization,
- (v) Window replacement,
- (w) Window coverings and awnings,
- (y) Reflective solar window tinting,
- (z) Fuel cell installation,
- (aa) Photovoltaic system installation,
- (bb) Faucet replacement (infrared sensor),
- (cc) Replacement of air conditioning & heating unit with a heat pump,
- (dd) Addition of liquid refrigerant pump to a reciprocating air conditioning unit,
- (ee) High efficiency refrigerator replacement,
- (ff) High efficiency window air conditioner replacement,
- (gg) Water conservation device installation (e.g., flow restrictors, low flow flush valves, waterless urinals, horizontal axis washing machines),
- (hh) Installation, maintenance and operation of power quality and reliability measures including UPS systems, back-up generators, emergency generators, etc.,
- (ii) Fuel switching technology,
- (jj) Infrared heating system,
- (kk) Heat pipe dehumidification,
- (ll) Flash bake commercial cooking,
- (mm) Thermal energy storage system,
- (nn) Operation, maintenance, modification and/or extension of utility distribution and collection system,
- (oo) Training that will result in reduced energy costs,
- (pp) Power factor correction measures and equipment,
- (qq) Installation, maintenance and operation of standby propane facility,
- (rr) Installation, maintenance and operation of gas distribution system and associated equipment,
- (ss) Water distribution system leak detection, and cost effective repair,
- (tt) Any other ECP that is cost effective using the then current DoD prescribed procedures and standards, and which encourages the use of renewable energy, reduces the Government's energy consumption or energy demand or results in other energy infrastructure improvements.

**GC.17.1 ECM Restrictions.** The Government shall not consider ECMs which include:

- (a) Measures which could jeopardize existing agency missions,
- (b) Measures which could jeopardize the operation of, or environmental conditions of, computers or computer rooms,
- (c) Unless waived by the Contracting Officer, measures that would result in increased water consumption (e.g., once-through fresh water cooling systems),
- (d) Measures which would violate any federal, state, or local laws or regulations,
- (e) Measures which degrade performance or reliability of existing Government equipment,
- (f) Unless waived by the Contracting Officer, measures that would reduce energy capacity currently reserved for future growth, mobilization needs, safety, emergency back-up, etc.,
- (g) Measures that violate the then current versions of the National Electric Code, the National Electric Safety Code, the Uniform Building Code or the Uniform Mechanical Code,
- (h) Utility financed measures that do not result in savings in the base utility expenditures sufficient to cover the project costs.

**GC.17.2 Facility Performance Requirements of ECMs.** ECMs proposed by the Utility shall conform to the following facility performance standards:

- (a) Lighting levels shall meet the minimum requirements of the then current Illuminating Engineering Society (IES) Lighting Handbook,
- (b) Heating and cooling temperature levels shall meet Government design standards,
- (c) ECMs shall permit flexible operation of energy systems for changes in occupancy levels and scheduling of facilities. In proposing an ECM, the Utility may assume the building function will remain constant unless otherwise indicated by the Government.

**GC.18 Task Orders.** Following the evaluation of the ECM proposal, the Government may elect to execute a T.O. with the Utility for the evaluation, implementation or operation and maintenance of the ECM. If requested by the Government, the Utility will provide or obtain financing on terms at least as good as those available to customers in a comparable service class, or with a comparable risk profile, considering the nature of the security interests to be granted, if any, and other conditions affecting the cost of financing.

The T.O. may have five phases; Audit (when applicable), Feasibility Study Phase, Engineering and Design Phase, Implementation Phase and Operation and Maintenance Phase. Because the extent of all the work is unlikely to be known at the time the T.O. is entered into, these phases shall be line items under the T.O., and shall be issued with an estimated Termination Schedule at the time the T.O. is executed. However, work will not commence on a particular phase unless and until a *statement of work and a price for that phase have been agreed* upon.

Following completion and Acceptance of the Feasibility or Engineering and Design Phases, the Government may elect to (i) pay the ECM Cost for each completed Phase within thirty (30) calendar days of being invoiced, or (ii) defer payments for that Phase until the end of the next Phase at which time the Government shall pay the ECM Cost for each completed Phase within thirty (30) calendar days of invoice, or (iii) include such amounts in the ECM Cost, if the Government elects to proceed with the Implementation Phase. If the Government elects not to proceed with the next Phase, it shall pay the Utility the ECM Cost for the prior completed Phases, plus a Carrying Charge as negotiated by the parties in the T.O. A decision to proceed or not to proceed with the next Phase must be made within sixty (60) days of receipt of a written request from the Utility. Only the Contracting Officer shall be authorized to exercise the Government's option to proceed to the next Phase, and such exercise shall be provided in writing within sixty (60) days of receipt of a statement of work and price.

Government finance payments for the Implementation Phase shall begin on the date of the first Utility bill following the 30 day period after the Government takes possession of all or part of the ECM as provided in FAR, Part 36, Subpart 36.511, and a satisfactory ECM Performance Verification as defined in the T.O. and pursuant to Section GC.12 of this Agreement.

The timing and amount of Government payments of appropriated funds for the Operation and Maintenance Phase shall be determined in the T.O.

The T.O. shall be subject to any legally required Federal Acquisition Regulations. Because services may vary widely from one T.O. to another, the Contracting Officer will insure that the appropriate FAR clauses from the FAR matrix found at FAR, Part 52, Subpart 52.301, are incorporated into any contract entered into by the parties for services provided by the Utility under the T.O.

**GC.19 ECM Feasibility Study Phase.** The Task Order shall set forth a scope of work for a detailed study to determine whether particular ECMs proposed by the Utility are feasible (the "Feasibility Study"). The Task Order shall specify the terms for the completion of the Feasibility Study and establish a price for the Feasibility Study. The Government will pay the Utility the agreed-upon price for the Feasibility Study in accordance with the T.O. If the Government elects to proceed with the Engineering and Design Phase as set forth below in Paragraph GC.20, the cost of the Feasibility Study shall be rolled into the Engineering and Design Phase ECM Cost. The Feasibility Study will provide, at a minimum, the following information:

Technical Factors:

- (a) Audits of energy consumption of existing equipment and facilities, including estimated energy and cost savings, and proposed retrofit costs and financial incentives/rebates,
- (b) Water audits of supply and utilization facilities, if specified by the Government,
- (c) Equipment to be removed or replaced, and new equipment to be installed,
- (d) Specifications, including catalog cuts, for new equipment. Specifications should include (as applicable): power rating, estimated energy consumption, input/output, power ratio, lighting level and estimated equipment life,

- (e) Operation and maintenance procedures required after ECM implementation (if significantly altered by the ECM),
- (f) Training that will be provided for the proper operation and maintenance of ECPs, including details on how many hours of training will be provided and how many people will be trained,
- (g) Electrical and mechanical sketches for all ECPs that involve changes to existing systems, (sketches will not be required for ECPs involving only component replacement),
- (h) Government support (e.g. minor changes in Government operation, movement of equipment, etc.) required during implementation of the ECM,
- (i) Utility interruptions needed for implementation of each ECP by type (gas, electricity, water, etc.), extent (room number, entire building, etc.) and duration,
- (j) Identification of potential adverse environmental effects,
- (k) Any documentation required to comply with applicable environmental laws,
- (l) The estimated construction time in calendar days, showing significant milestones,
- (m) The estimated annual energy savings in kilowatt-hour and kilowatt demand of electricity, decatherms of natural gas and cubic feet of water for the life of each ECP, including all assumptions and detailed calculations showing how savings were determined,
- (n) The estimated equipment life for each ECP,
- (o) A proposed method to verify energy savings at the time of ECM Acceptance which shall be subject to Government approval,
- (p) Documentation that each proposed ECP has been recommended and selected without regard to fuel source;

Cost Factors:

- (q) Estimated annual operation costs (e.g. increased use of alternate fuel sources, replacement filters) and increased maintenance costs (e.g. relamping with a higher cost product, etc.),
- (r) Total estimated ECM Cost to the Government,
- (s) Estimated breakdown of financial incentives/rebates for each ECM (if any) in a format mutually agreeable to the Parties,
- (t) Estimated Cost-of-Money Rate (percent),
- (u) Estimated annual energy and operation and maintenance cost savings including details on estimated annual savings for each area of savings, such as lighting, controls, motors and transformers,
- (v) Estimated breakdown of implementation costs for each area of energy savings, such as lighting, controls, motors and transformers,
- (w) Estimated costs for replacing existing components and installing new components/systems shall be listed separately,
- (x) Estimated unit costs for major components and systems,
- (y) Estimated Life Cycle Cost Analysis prepared in accordance with the then current edition of the Energy Prices and Discount Factors for Life-Cycle-Cost Analysis, published as the annual supplement to the National Institute of Standards and Technology (NIST) Handbook 135.

**GC.20 ECM Engineering and Design Phase.** After evaluation and Acceptance of the feasibility study, the Government may elect to proceed with the Engineering and Design Phase. Prior to proceeding, the Parties shall agree upon a statement of work for all engineering and design services necessary for the implementation of a particular ECM, a time frame for completion of the work, and a price or cost cap for engineering and design work for the ECM. If the Government elects to proceed with the Implementation Phase as set forth below, the cost of the engineering and design work shall be rolled into the total ECM Cost. This T.O. shall include an estimated amortization schedule for the ECM.

**GC.20.1 Verification of Floor Plans.** The Utility will verify the accuracy of any floor plans provided by the Government.

**GC.20.2 Government Design Review.** Task Orders shall permit adequate time for Government review of engineering and design work at 35% and 95% design completion, or at any other stage, as negotiated in the T.O.

**GC.20.3 Site Plans.** If proposed ECMs require installation outside existing buildings or structures, a site plan showing recommended siting of ECMs shall be prepared for Government review and approval. Site plans shall be submitted as part of the Utility's proposal. It is recommended that the Utility propose alternate sites for review in case the primary site is unavailable.

**GC.20.4 ECM Implementation Proposal.** Upon completion and Acceptance of the Engineering and Design Phase, the Utility will submit to the Government an ECM implementation proposal (the "Proposal"). If requested by the Contracting Officer, the Utility will be required to present a briefing to the Government explaining the Proposal. At a minimum, the Proposal shall include all pertinent technical and cost factors listed in Paragraph GC.19 of this Agreement plus a copy of subcontractor(s) bid(s). The Proposal shall also set forth negotiated pricing criteria that describes the method for determining the prices to be paid to the Utility for supplies or services. The Government shall evaluate the Proposal for technical soundness and price reasonableness. If the Government elects to proceed with the ECM, the Utility and Government shall agree upon a complete scope of work with specifications, time for performance, ECM Cost, source and cost of capital or financing, payment terms, amortization schedule and final Termination Schedule. If the Contracting Officer deems it appropriate, the Utility will provide acceptable performance and payment bonds.

**GC.21 ECM Implementation Phase.** The Utility shall perform work in accordance with the T.O. The following provisions shall apply to ECM implementation work performed pursuant to T.O.s executed under this Agreement, unless exceptions are provided in the T.O.

**GC.21.1 Pre-Work Requirements.** Prior to commencing ECM implementation Work on a T.O., the Utility shall meet with the Contracting Officer or COR at a time mutually agreeable to the Utility and the Contracting Officer, to discuss and develop mutual understandings relative to safety, scheduling, performance, obtaining necessary permits, and administration of the Implementation Phase. Prior to commencement of on-site work, written approval of the following shall be obtained from the Contracting Officer by the Utility:

- (a) Utility's proposed implementation schedule indicating the installation period and time required for delivery of equipment,
- (b) Evidence that the required insurance has been obtained.

**GC.21.2 Interruptions.** The Utility shall arrange on-site work to minimize interference with normal Government operation. All interruptions shall be made outside occupied periods whenever possible and coordinated with the Contracting Officer or COR. The Utility shall endeavor to keep the duration of utility interruptions to a minimum. Requests for utility outages shall be submitted for approval, in writing, as specified in the T.O. The request shall include the approximate duration, date, time and reason for the interruption. Utility interruptions include, but are not necessarily limited to, the following systems:

- (a) Electrical,
- (b) Natural Gas,
- (c) Sewer,
- (d) Steam,
- (e) Water,
- (f) Telephone,
- (g) Computer cables.

**GC.21.3 Construction Documentation.** The Utility shall provide construction drawings and specifications, certified by a registered engineer or architect, as applicable, to ensure compliance with all applicable federal, state and local codes and regulations as required by individual T.O.s.

**GC.21.4 Standardization of Materials.** All materials proposed to be installed pursuant to this Agreement shall be readily, commercially available, and as similar in form, fit and function to each other as is practicable to allow efficient provisioning of replacement parts.



**GC.21.5 Water Conservation Measures.** The Utility will consider water conservation in all ECMs. The Utility will obtain rebates from the local water utility if available. Rebates, if any, shall be applied to the cost of the project.

**GC.21.6 Operation and Maintenance Manuals.** At the time of Government Acceptance of a completed ECM, the Utility shall furnish, for the equipment specified, operation and maintenance manuals and recommended spare parts lists identifying components adequate for competitive supply procurement for operation and maintenance of ECM equipment. The operation and maintenance manuals shall include maintenance schedules for all equipment. The scope of each manual shall be agreed upon in the T.O.

**GC.21.7 Government Personnel Training for ECPs.** The Utility shall train Government personnel, as required, to operate, maintain, and repair ECM equipment and systems. The date and time of training shall normally be coordinated with the Contracting Officer or COR prior to Acceptance of the ECM. The cost for such training shall be included in the ECM Cost.

**GC.21.8 As-Built Drawings.** Within forty-five (45) calendar days after Government Acceptance of each installed ECM, the Utility shall submit as-built drawings to the Contracting Officer or COR. Drawings will not be required for component replacement. Drawings shall include at a minimum:

- (a) The installation (i.e., form, fit, and attachment details) of the interface between ECM equipment and existing Government equipment,
- (b) The location and rating of installed equipment on building floor plans.

**GC.21.9 Installation.** The Utility will arrange for the installation of approved ECMs and construction oversight and verify that the designed and specified energy efficiency equipment and/or system modifications are properly supplied or installed in a manner that will give the intended long term demand and energy reductions. The Utility will select Subcontractors in accordance with Paragraph GC.7 above.

**GC.22 Operation and Maintenance Phase.** The Government may elect to have the Utility perform the operation and maintenance on part or all of the ECM. Before exercising its option for this Phase, the Government and Utility shall agree upon a complete scope of work with specifications, schedules, warranties and cost.

**GC.23 Required FAR Clauses.** The following FAR clauses are required to be included in any contract with the Government:

52.203-3 Gratuities,  
52.203-5 Covenant Against Contingent Fees,  
52.203-7 Anti-Kickback Procedures,  
52.222-3 Convict Labor,  
52.222-25 Affirmative Action Compliance,  
52.222-26 Equal Opportunity,  
52.223-6 Drug Free Workplace,  
52.233-1 Disputes.

## **WARRANTIES AND REMEDIES**

**WR.1 Warranties.** The Utility shall pass through to the Government all warranties on equipment installed pursuant to a T.O. In addition, the Utility will provide, from the date of Acceptance or Government Possession of an ECP, whichever is earlier, a one year comprehensive wrap-around warranty guaranteeing that the equipment installed shall perform in accordance with the specifications agreed upon between Government and Utility, as set forth in the applicable T.O.

In the event the Utility provides O&M services, a separate warranty will be negotiated for such services, in accordance with FAR Part 52, Subpart 52.246-20.

**WR.2 No Other Warranties.** The warranties set forth in WR.1 are exclusive and in lieu of all other warranties. The Utility makes no other representations or warranties of any kind with respect to the services and products it provides pursuant to this Agreement and subsequent T.O.s., The Utility does not guarantee any level of energy or water savings or cost reductions.

**WR.3 Utility Limitation of Liability.** The Utility shall not be liable for any special, incidental, indirect, or consequential damages, connected with or resulting from the performance or non-performance of work under this Agreement or subsequent T.O.s. In addition, the Utility shall not be liable under its warranty to the extent that damages are caused by Government negligence.

**WR.4 Utility Default.** The Government and Utility agree that Utility default provisions will be governed by those FAR clauses applicable to specific circumstances. A determination of applicable FAR default clauses will be made by the Contracting Officer for a specific T.O.

**WR.5 Prompt Payment.** As required in FAR, Part 32, Subpart 32.903, the Government shall promptly pay ECM utility bills. Late payments shall accrue interest as provided in FAR, Part 32, Subpart 32.907.

**WR.6 Disputes.** Disputes that arise under this Agreement and subsequent T.O.s shall be governed by the applicable dispute provisions found at FAR, Part 33, Subpart 33.2.

**WR.7 Differing Site Conditions.** In the event site conditions differ materially from those contained in the T.O. additional costs incurred by the Utility due to the differing conditions shall be negotiated prior to work, and the ECM Cost shall be increased to reflect an equitable adjustment as permitted in FAR, Part 36, Subpart 36.502.

**WR.8 Suspension of Work.** In the event Work is delayed, suspended or stopped by the Government, FAR, Part 42, Subpart 42.13 shall apply.

## FINANCING AND PAYMENT PROVISIONS

**FP.1 Energy Savings and Financing.** It is intended that the annual energy savings achieved from the implementation of a Utility financed ECM under this Agreement will produce financial savings to the Government which are greater than the cost of implementing the ECM, including the cost of financing provided under this Agreement. The payment term cannot exceed ten years.

**FP.2 Financial Incentives, Rebates, and Design Assistance:** The Utility will provide to the Government the same financial incentives, rebates, design review, goods, services, and/or any other assistance provided without charge, that is generally available to customers of a similar rate class or size. Incentives that may be available are to be identified in the preliminary audit report provided according to Paragraph GC.15 and the ECM implementation proposal provided according to Paragraph GC.20.4.

If rebates are available and have been applied for by the government and such funds have been set aside, then the Utility shall provide a separate Letter of agreement clarifying timelines and responsibilities of both parties and guaranteeing rebates and other incentives from the Utility to the Government.

The Utility shall also be responsible for determining the source, value, and availability of any applicable financial incentives to the project offered by the state and others in which the facility is located, and if the value of the incentives exceeds the administrative costs to be incurred by the Utility or the Government in acquiring such incentives.

The Utility shall be responsible for coordinating with the Agency Contracting Officer as to the preparation of any and all documentation required to apply for any such applicable financial incentives and to effectively apply such incentives to the capital cost of the project.

Rebate disbursement options:

Option 1: Utility shall apply rebate to the next payment due to reduce capital cost of the project

Option 2: Where allowable by the Public Utility Commission, Government may assign rebate to a third party to reduce the construction costs and thereby reducing the total amount financed.

Option 3: Rebate may be accepted as a credit on the utility bill

**FP.3 Calculation of Payment.** Payment for accepted ECMs shall be equal to the ECM Cost amortized over a negotiated term. In accordance with 10 U.S.C. Section 2865, the cost of financing, if any, for any completed ECM shall be recovered under terms and conditions no less favorable than those for others in the same customer class. Monthly payments will commence on the date of the first Utility bill following the 30 day period after the date the Government takes Possession of the ECM and ECM Performance Verification Testing, as required by GC.12 and negotiated in the T.O., is satisfactorily completed.

**FP.4 Buydown.** The Government reserves the right; at any time following Acceptance, but prior to final payment, to buydown the outstanding T.O. payments without penalty by giving thirty (30) days written notice to the Utility. Upon such buydown, the Government shall pay to the Utility a negotiated amount to include an additional finance charge based on an indexed formula, which reduces the financiers risk and reduces the cost of buydown to the agency, or a termination schedule. Monthly payments will continue at the same level but the term of ECM financing will be shortened to reflect the amount of the buydown payments.

**FP.5 Pre-Acceptance Buyout.** In the event the Government desires to terminate a Task Order for any reason (including, without limitation, for convenience) prior to Acceptance, the Government may do so by giving written notice to the Utility thirty (30) days prior to the effective date of such termination. The Government shall pay to the Utility a negotiated amount to include an additional finance charge based on an indexed formula, which reduces the financiers risk and reduces the cost of buyout to the agency, or a termination schedule which will be described in Attachment A of the Task Order. If a termination occurs for the convenience of the Government, the amount payable pursuant to this paragraph shall be deemed as an allowable cost under FAR. (See Part 17 and Part 52, Subpart 52.249-2.)

**FP.6 Post-Acceptance Buyout.** In the event the Government desires to terminate a Task Order for any reason (including, without limitation, for convenience) after Acceptance, the Government may do so by giving written notice to the Utility thirty (30) days prior to the effective date of such termination. The Government shall pay to the Utility a negotiated amount to include an additional finance charge based on an indexed formula, which reduces the financiers risk and reduces the cost of buyout to the agency, or a termination schedule which will be described in Attachment B of the Task Order. If a termination occurs for the convenience of the Government, the amount payable pursuant to this paragraph shall be deemed as an allowable cost under FAR. (See Part 17 and Part 52, Subpart 52.249-2.)

**FP.7 Assignment of Claims.** Government payments under each T.O. executed pursuant to this Agreement may be assigned pursuant to FAR, Part 52, Subpart 52.232.23 "Assignment of Claims." Any bank, trust company or other financing institution that participates in financing an ECM shall not be considered a Subcontractor of the Utility. Any "Assignment of Claims" must comply with the provisions of FAR, Part 32, Subpart 32.8.

**FP.8 Novation.** The Parties agree that if, subsequent to the execution of this Agreement, it should become necessary, or desirable, to execute a "Novation Agreement," said Novation Agreement will comply with the provisions of FAR, Part 42, Subpart 42.12 and will be in the form as provided at FAR, Part 42, Subpart 42.1204.

## SPECIAL REQUIREMENTS

**SR.1 Environmental Protection.** The Utility shall comply with all applicable federal, state and local laws, regulations and standards regarding environmental protection ("Environmental Laws"). All environmental protection matters shall be coordinated with the Contracting Officer or designated representative. The Utility shall immediately notify the Contracting Officer of, and immediately clean up, in accordance with all federal, state and local laws and regulations, all oil spills, hazardous wastes, (as defined at 42 U.S.C. §9601), and hazardous materials (as defined at 49 C.F.R. Pt. 172) collectively referred to as "Hazardous Materials,"

resulting from its operation on Government property in connection with the implementation of ECMs. The Utility shall comply with the instructions of the Government with respect to avoidance of conditions that create a nuisance or create conditions that may be hazardous to the health of military or civilian personnel.

**SR.2 Environmental Permits.** Unless otherwise specified, the Utility shall provide, at its expense, all required environmental permits and/or permit applications necessary to comply with all applicable federal, state and local requirements prior to implementing any ECM in the performance of a T.O. executed pursuant to this Agreement. If any such permit or permit application requires the signature or other cooperation of the Government as owner/operator of the property, the Government agrees to cooperate with the Utility in obtaining the necessary permit or permit application.

**SR.3 Handling and Disposal of Hazardous Materials.** Notwithstanding the provisions of the FAR, Part 52, Subparts 52.236-2 "Differing Site Conditions" and 52.236-3 "Site Investigations and Conditions Affecting Work", the Government understands and agrees that (i) the Utility has not inspected, and will not inspect, the project site in connection with a proposed ECM for the purpose of detecting the presence of pre-existing Hazardous Materials that relate to an ECM or any project site, and (ii) the Government shall retain sole responsibility for the proper identification, removal, transport and disposal of any fixtures, components thereof, or other equipment or substances incidentally containing pre-existing Hazardous Materials, except as specifically agreed to by the Utility pursuant to Paragraphs SR.4 and SR.5 (below).

If the Utility, during performance of the work under a T.O. executed pursuant to this Agreement, has reason to believe that it has encountered or detected the presence of pre-existing Hazardous Materials, the Utility shall stop work and shall notify the Government. The Government will evaluate the site conditions and notify the contractor of the results of this evaluation. The Utility shall not be required to recommence work until this situation has been resolved. Any delay resulting there from shall be grounds to request an increase in the ECM Cost to the extent that such delay increases ECM Costs.

**SR.4 Asbestos and Lead-Based Paint.** To the extent provided for in a T.O. executed pursuant to this Agreement, in connection with the implementation of any ECM, the Utility may agree to remove pre-existing asbestos containing material or lead-based paint, incidental to implementation of an ECM. However, unless the Utility explicitly agrees in said T.O. to perform any portion of the testing, removal or abatement of the pre-existing asbestos or lead-based paint as part of the scope of work for any ECM, and unless the T.O. specifically references this Paragraph SR.4, the Government shall be deemed to be solely responsible as provided for in Paragraph SR.3.

If the Utility in the course of ECM implementation disturbs suspected lead-based paint or asbestos containing material, the Utility may propose to the Government that the Utility will perform any portion of the testing, removal, or abatement of the lead-based paint or asbestos containing material. Said proposal will include the requested increase in the ECM Cost on account of such additional work. The Utility will not commence work involving additional cost without approval of the Contracting Officer. In the absence of an agreement to the contrary, the provisions of Paragraph SR.3. (above) shall apply.

In the event the Utility agrees to include any portion of the testing, removal or abatement of the asbestos within the scope of work for an ECM implemented as described above in this Paragraph, the hazardous waste manifests or other shipping papers shall identify the Government as the sole generator of the Hazardous Materials.

**SR.5 Refrigerants, Fluorescent Tubes and Ballasts.** To the extent provided for in a T.O. executed pursuant to this Agreement in connection with the implementation of any ECM, the Utility shall remove and/or dispose of all ozone depleting refrigerants, fluorescent tubes and fluorescent magnetic core and coil ballasts incidental to an ECM to the Hazardous Materials Disposal site (HAZMAT) on the installation. If there is no HAZMAT on the installation, the above Hazardous Materials will be disposed in accordance with all applicable federal, state and local laws and regulations, provided however, that the hazardous waste manifests or other shipping papers shall identify the Government as the sole generator of the Hazardous Materials.

## **GSA Model Areawide Contract**

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00.09.0207

**NEGOTIATED AREAWIDE CONTRACT  
No. GS-00P-00-BSD-XXXX  
BETWEEN THE  
UNITED STATES OF AMERICA  
AND  
XX**

THIS AREAWIDE CONTRACT FOR ELECTRIC, ELECTRIC TRANSMISSION, NATURAL GAS, GAS TRANSPORTATION, STEAM, AND ENERGY MANAGEMENT SERVICES is executed this XX day of XX, 2000, between the UNITED STATES OF AMERICA, acting through the Administrator of General Services (hereinafter referred to as the "Government"), pursuant to the authority contained in Section 201(a) of the Federal Property and Administrative Services Act of 1949, as amended, 40 U.S.C. 481(a), and the XX, a corporation organized and existing under the laws of the State of XX, and having its principal office and place of business at XX, XX, XX (hereinafter referred to as the "Contractor"):

WHEREAS, the Contractor now has on file with the XX Public Service Commission and/or with such other regulatory bodies as may have jurisdiction over the Contractor (hereinafter referred to collectively as the "Commission") all of its effective tariffs, rate schedules, riders, rules and terms and conditions of service, as applicable;

WHEREAS, with some exceptions, the Government is generally required by Chapter 1 of Title 48 of the Federal Acquisition Regulation (FAR), 48 CFR 41.204, to enter into a bilateral contract for utility service at each Federal facility where the value of the utility service provided is expected to exceed \$50,000 per year;

WHEREAS, where the Government has an areawide contract in effect with a particular utility then such utility service is normally to be procured thereunder;

WHEREAS, the Government is now purchasing such electric, gas, gas transportation and steam services from the Contractor under some other service arrangement;

WHEREAS, the Contractor and the Government mutually desire to enter into an areawide contract to be used by the agencies of the Government in obtaining electric, electric transmission, gas, gas transportation, steam and energy management services from the Contractor and to facilitate partnering arrangements as encouraged and authorized by P.L. 102-486 (Energy Policy Act of 1992) 10 U.S.C. 2865 and 42 U.S.C. 8256;

NOW, THEREFORE, in consideration of the premises and mutual covenants herein contained, the parties hereby agree as follows:

**ARTICLE 1. DEFINITIONS.**

**1.1.** As used in this contract,

(a) the term "areawide contract" means a master contract entered into between the Government and a utility service supplier to cover the utility service acquisitions of all Federal agencies in the franchised certificated service territory from the particular utility service supplier for a period not to exceed ten (10) years;

(b) the term "Agency" means any Federal department, agency, or independent establishment in the executive branch of the Government, any establishment in the legislative or judicial branches of the Federal Government, or any wholly/mixed ownership Government corporation, as defined in the Government Corporation Control Act;

(c) the term "Ordering Agency" means any Agency that enters into a bilaterally executed Authorization for procurement of electric, gas, gas transportation and steam services under this areawide contract;

(d) the term "Authorization" means an order form used to acquire services under this areawide contract (see **Exhibit "A"** "Authorization for Electric Service", **Exhibit "B"** "Authorization for Electric Transmission", **Exhibit "C"** "Authorization for Natural Gas Service", **Exhibit "D"**, "Authorization for Gas Transportation Service", **Exhibit "E"**, Authorization for Steam Service, and **Exhibit "F"** "Authorization for Energy Management Service" annexed hereto);

(e) the term "service" means any commodities, financial incentives, goods, and/or services generally available from the Contractor pursuant to its tariffs, rates, rules, regulations, riders, practices, or terms and conditions of service, as may be modified, amended, or supplemented by the Contractor and approved from time to time by the Commission, and the rules and regulations adopted by the Commission;

(f) the term "energy conservation measure" means any specific electric or gas service intended to provide energy savings and/or demand reduction in Federal facilities (Reference Articles 18.2 & 18.3 herein); and

(g) the term "connection charge" means a Contractor's charge for facilities on either one or both sides of the Government's delivery point which facilities (1) are required to make connections with the nearest point of supply and (2) are, in accordance with the Contractor's tariffs and the Commission's rules and regulations, installed, owned, maintained and operated by the Contractor.

**1.2.** This Article is hereby expanded to include the additional definitions contained in FAR Clause 52.202-1, Definitions (OCT 1995), 48 C.F.R. 52.202-1, which are incorporated herein by reference.

## **ARTICLE 2. SCOPE AND DURATION OF CONTRACT.**

**2.1.** This areawide contract shall be in effect upon the date of execution and shall continue for a period of ten (10) years, except that the Government, pursuant to the clause contained in FAR 52.249-2 (48C.F.R.52.249-2), incorporated into this areawide contract under Article 14.1-25, or the Contractor, upon 60 days written notice to the Government, and without liability to the Government or any ordering agency, may terminate this areawide contract, in whole or in part, when it is in their respective interest to do so, provided, however, that neither the stated duration of this areawide contract nor any other termination of it, in whole or in part, pursuant to such incorporated clause, this Article 2.1, or otherwise, shall be construed to affect any obligation for any payment, charge, rate, or other matter that may be imposed pursuant to the Contractor's tariffs, rates, rules, regulations, riders, practices, or terms and conditions of service as may be modified, amended, or supplemented by the Contractor and approved from time to time by the Commission.

**2.2.** The provisions of this areawide contract shall not apply to the Contractor's service to any Agency until both the ordering Agency and the Contractor execute a written Authorization for electric, gas, gas transportation and/or steam services. Upon bilateral execution of an Authorization, the Contractor agrees to furnish to the ordering Agency, and the ordering Agency agrees to purchase from the Contractor, the above noted services for the installation(s) or facilities named in the Authorization pursuant to the terms of this areawide contract.

**2.3.** Nothing in this areawide contract shall be construed as precluding the ordering Agency and the Contractor from entering into an Authorization for negotiated rates or service of a special nature, provided such negotiated rates or service is in accordance with the rules and regulations of the Commission.

### **ARTICLE 3. EXISTING CONTRACTS.**

**3.1.** The parties agree that an Agency currently acquiring service from the Contractor under a separate written contract may continue to do so until that contract expires or until such time as the Agency and the Contractor mutually agree to terminate that separate written contract and have such service provided pursuant to this areawide contract by executing an appropriate Authorization or Authorizations.

**3.2.** Existing special rates and services of a special nature, if any, shall be continued under the Authorizations described in Article 3.1 if requested by the ordering Agency and if in accordance with the rules and regulations of the Commission.

### **ARTICLE 4. AUTHORIZATION PROCEDURE AND SERVICE DISCONNECTION.**

**4.1.** To obtain or change service under this areawide contract, the ordering Agency shall complete the appropriate Authorization and forward it to the Contractor. Upon the request of the ordering Agency, the Contractor shall endeavor to provide reasonable assistance to the ordering Agency in selecting the service classification which may be most favorable to the ordering Agency. Upon execution of an Authorization by both the Contractor and the ordering Agency, the date of initiation or change in service shall be effective as of the date specified in the Authorization. An executed copy of the Authorization (cover page only) shall be transmitted by the ordering Agency to GSA at the address provided in Article 16.1.

**4.2.** During the term of this areawide contract, effective Authorizations need not be amended, modified, or changed by an ordering Agency to reflect changes in: accounting and appropriation data, rates or other terms applicable to the service classification under which the ordering Agency receives service, terms of the Contractor's tariff, the Contractor's cost of purchased fuel, or the estimated annual cost of service. Such changes are considered internal to the party involved. Where changes are required in effective Authorizations because of a change in the service requirements of an ordering Agency, an amended Authorization shall be mutually agreed upon and executed.

**4.3.** An ordering Agency or the contractor may discontinue service provided pursuant to this areawide contract to a particular Federal facility or installation by delivering a written Termination Authorization to the other. Such discontinuance of service by an ordering Agency or the Contractor shall be in accordance with the terms of this areawide contract and the Contractor's tariffs, rates, rules, regulations, riders, practices, and terms and conditions of service as may be modified, amended, or supplemented by the Contractor and approved from time to time by the Commission.

**4.4** Within the authorities of the Ordering Agency, the term of any individual Authorization is independent of the expiration date of this areawide contract and the conditions and articles of this areawide contract shall apply throughout the term of any Authorization placed against it in accordance with Article 18.5 herein.

### **ARTICLE 5. RATES, CHARGES, AND PUBLIC REGULATION.**

**5.1.** Subject to the provisions of Article 2.3, all electric, gas, gas transportation and steam purchases under this areawide contract as well as any other action under this areawide contract shall be in accordance with, and subject to, the Contractor's rates, tariffs, rules, regulations, riders, practices, or terms and conditions of service, as may be modified, amended, or supplemented by the Contractor and approved from time to time by the Commission, except to the extent that same are preempted by Federal law. The Contractor shall furnish the Government, at the address provided in Article 16.1, one complete set of its tariffs in effect as of the date of this areawide contract and, upon request of an ordering Agency, the Contractor shall provide a copy of any newly effective or amended tariff in accordance with the Contractor's tariff distribution practices and policies applicable to all customers. The failure of the Contractor to furnish any or all of its tariffs in accordance with this Article 5.1 shall not be grounds for with-holding or denying payment at the effective rates stated therein for any electric, gas, gas transportation and steam services provided.



**5.2.** If, during the term of this areawide contract, the Commission approves a change in rates for services specified in Authorizations in effect hereunder, the Contractor agrees to continue to furnish, and the ordering Agency agrees to continue to pay for, those services at the newly approved rates from and after the date such rates are made effective. As provided in Article 4.2, modification of any Authorization hereunder is not necessary to implement higher or lower rates.

**5.3.** The Contractor hereby represents and warrants to the Government that the service rates available to any ordering Agencies hereunder shall at all times not exceed those available to any other customer served under the same service classification for the same or comparable service, under like conditions of use. Nothing herein shall require the Contractor to apply service rates that are inapplicable to the ordering Agency.

**5.4.** To the extent required by the Commission rule or regulation, the Contractor agrees to notify each ordering Agency of all new service classifications for which the ordering Agency may qualify. If requested in an Authorization by the ordering Agency, the Contractor shall provide service in accordance with the new service classification and commence billing under the new service classification beginning with the next applicable billing cycle following receipt by the Contractor of the request, or upon the installation of any additional facilities necessary to accomplish the billing.

**5.5.** Reasonable written notice via an Authorization shall be given by the ordering Agency to the Contractor, at the address provided in Article 16.2, of any material changes proposed in the volume or characteristic of electric, gas, gas transportation and steam services required by the ordering Agency.

**5.6** To the extent required by the Contractor's tariffs, the Commission's rules and regulations, or the Contractor's policies and practices applicable to all customers, and in accordance therewith, any necessary extension, alteration, relocation, or reinforcement of the Contractor's transmission or distribution lines, related special facilities, service arrangements, demand side management services (including any rebates to which the ordering Agency may be entitled), energy audit services, or other services required or requested by an ordering Agency shall be provided and, as applicable, billed for, by the Contractor. To the extent available from the Contractor, the Contractor shall provide and, as applicable, bill for such technical assistance on or concerning an ordering Agency's equipment (such as the inspection or repair of such equipment) as may be requested by such ordering Agency. The charges for such technical assistance shall be calculated in accordance with the Contractor's applicable billing schedule in effect at the time the technical assistance is rendered. The Authorization or any other agreement used to obtain and provide the matters, services, or technical assistance described in this Article 5.6 shall contain information descriptive of the matters, services, or technical assistance required or requested, including the amount of (or method to determine) any payment to be made by the ordering Agency to the Contractor for the provision of said matters, services, or technical assistance.

**5.7** Any charges for matters or services referenced in Article 5.6 hereof which are not established in the Contractor's tariff or in the Commission's rules or regulations shall be subject to audit by the ordering Agency prior to payment; provided, however, that notwithstanding such right to audit, payment for the matters and services referenced in Article 5.6 thereof shall not be unreasonably withheld or denied. The Contractor further warrants and represents to the Government that charges for the matters or services referenced in Article 5.6 hereof will not exceed the charges billed to other customers of the Contractor served under the same service classification for like matters or services provided under similar circumstances.

## **ARTICLE 6. BILLS AND BILLING DATA.**

**6.1** The electric, gas, gas transportation and steam services supplied hereunder shall be billed to the ordering Agency at the address specified in each Authorization. Bills shall be submitted in an original only, unless otherwise specified in the Authorization. All bills shall contain such data as is required by the Commission to substantiate the billing, and such other reasonable and available data as may be requested by the ordering Agency, provided that such other data are contained in bills provided to other customers of the Contractor served under the same service classification as the ordering Agency.

## **ARTICLE 7. PAYMENTS FOR SERVICES.**

**7.1.** All bills for services rendered (which term includes utility services provided and any other payment, charge, rate, or other matter that may be imposed pursuant to the Contractor's tariffs, rates, rules, regulations, riders, practices, or terms and conditions of service as may be modified, amended, or supplemented by the Contractor and approved from time to time by the Commission) under Authorizations pursuant to this areawide contract shall be paid by the ordering Agency in accordance with such tariffs, rates, rules, regulations, riders, practices, or terms and conditions of service.

**7.2.** Currently, a late payment charge of one and one-half percent (1-1/2%) per monthly billing period will be assessed upon the unpaid balance of any utility bill twenty-five (25) calendar days after the date the bill is rendered by the Contractor. Changes in such tariffs, rates, rules, regulations, riders, practices, or terms and conditions of service shall supersede the provisions of this Article 7.2, as applicable.

**7.3.** The ordering Agency shall be entitled to any billing discounts, financial incentives or rebates available from the Contractor to other customers of the same service classification under like conditions of use and service. Nothing herein shall require the Contractor to apply rates that are inapplicable to the ordering Agency.

**7.4.** Payments hereunder shall not normally be made in advance of services rendered in accordance with 48 C.F.R. Subpart 32.4 unless required by the Contractor's tariff.

**7.5.** Each payment made by Treasury check to the Contractor shall include the Contractor's billing stub(s), or a Government or ordering Agency payment document, that clearly and correctly lists all of the Contractor's account numbers to which the payment applies and the dollar amount applicable to each account. If payment is by Electronic Funds Transfer either through the Automated Clearing House (ACH) or the Federal Reserve Wire Transfer System, the provisions of FAR Subpart 52.232-34 shall apply (See Article 14).

**7.6.** Unless otherwise provided by law or in an Authorization, the following provisions shall apply:

**(a)** Payment for energy conservation measures, when authorized as Energy Management Service (EMS), shall be equal to the direct cost of capital or financing amortized over a negotiated payment term commencing on the date of acceptance of the completed installation;

**(b)** The payment term for Authorizations involving energy conservation measures shall be calculated to enable the ordering Agency's monthly payment to be lower than the estimated cost savings to be realized from its implementation. In no event, however, shall this term exceed 80% of the useful life of the equipment/material to be installed.

## **ARTICLE 8. METERS.**

**8.1.** Metering equipment of standard manufacture suitable to measure all electric, gas, gas transportation and steam services supplied by the Contractor hereunder shall be furnished, installed, calibrated and maintained by the Contractor at its expense. In the event any meter fails to register or registers incorrectly, as determined by the regulations of the Commission, billing adjustments shall be made in accordance with such regulations.

**8.2.** The Contractor, so far as possible, shall read all meters monthly in accordance with the Contractor's tariff and the Commission's regulations.

**8.3.** Meters shall be inspected upon installation at no direct charge to the ordering Agency. Subsequent inspection, periodic testing, repair, and replacement of meters shall be done in such place and manner as provided by the Commission's regulations. Upon notice that a meter is failing to register correctly, the Contractor shall take immediate steps to effect replacement or repair. Ordering Agencies shall have the right to request a meter test in accordance with the procedures prescribed in the Commission's regulations. The tests and applicable meter accuracy standards are those set forth in the Commission's regulations. The expense of meter tests shall be borne by the party designated as responsible therefore in the Commission's regulations.

## **ARTICLE 9. EQUIPMENT AND FACILITIES.**

**9.1.** Subject to the provisions of Article 5.6 hereof, the responsibility for owning, furnishing, installing, and maintaining all equipment and facilities (other than meters) required to supply service at the delivery point(s) specified in an Authorization shall be determined in accordance with the Contractor's tariffs, its policies and practices, and the Commission's rules and regulations. The ordering Agency shall provide, free of charge to the Contractor, mutually agreeable locations on its premises for the installation of meters and such other equipment furnished and owned by the Contractor and necessary to supply service hereunder. The Contractor shall, at all times during the life of this areawide contract, operate and maintain at its expense such equipment or facilities as for which it has responsibility in accordance with this Article 9.1, and shall assume all taxes and other charges in connection therewith. To the extent required by the Contractor's tariffs and the Commission's rules and regulations, and in accordance thereof, such equipment and facilities as for which the Contractor has responsibility in accordance with this Article 9.1 shall be removed, and the Agency's premises restored, by the Contractor at its expense, within a reasonable time after discontinuance of service to the ordering Agency.

**9.2.** All necessary rights-of-way, easements and such other rights necessary to permit the Contractor to perform under this contract shall be obtained and the expense for same borne in accordance with the Contractor's tariffs and the Commission's rules and regulations.

## **ARTICLE 10. LIABILITY.**

**10.1.** When the Government and/or an ordering Agency has limited or restricted the Contractor's right of access under Article 11 and thereby interfered with the Contractor's ability to supply service or to correct dangerous situations which are a threat to public safety, the Government shall indemnify and hold the Contractor harmless from any liability resulting from such restricted or limited access to the extent permitted by law and authorized by appropriations. This Article (10.1) shall not be construed to limit the Government's liability under applicable law.

**10.2.** The Contractor's liability to the Government and to any ordering Agency for any failure to supply service, for any interruptions in service, and for any irregular or defective service shall be determined in accordance with the Contractor's tariffs.

## **ARTICLE 11. ACCESS TO PREMISES.**

**11.1.** The Contractor shall have access to the premises served at all reasonable times during the term of this areawide contract and at its expiration or termination for the purpose of reading meters, making installations, repairs, or removals of the Contractor's equipment, or for any other proper purposes hereunder; provided, however, that proper military or other governmental authority may limit or restrict such right of access in any manner considered by such authority to be reasonably necessary or advisable.

## **ARTICLE 12. PARTIES OF INTEREST.**

**12.1.** This areawide contract shall be binding upon and inure to the benefit of the successors, legal representatives, and assignees of the respective parties hereto.

## **ARTICLE 13. REPRESENTATIONS AND CERTIFICATIONS.**

**13.1.** This areawide contract incorporates by reference the representations and certifications made by the Contractor on Form PBS3503 which is on file with the Government.

## **ARTICLE 14. SUPPLEMENTAL CLAUSES.**

**14.1.** Clauses Incorporated by Reference (FAR 52.252-2) (JUN 1988).

This contract incorporates the following clauses by reference, with the same force and effect as if they were given in full text. Upon request, the Contracting Officer will make their full text available.

No. FAR REF Federal Acquisition Regulation Clause

(1)	52.202-1	Definitions (OCT 1995)
(2)	52.203-3	Gratuities (APR 1984)
(3)	52.203-5	Covenant Against Contingent Fees (APR 1984)
(4)	52.203-6	Restrictions on Subcontractor Sales to the Government (JUL 1995)
(5)	52.203-7	Anti-Kickback Procedures (JUL 1995)
(6)	52.203-8	Cancellation, Rescission, and Recovery of Funds for Illegal or Improper Activity (JAN 1997)
(7)	52.204-4	Printing/Copying Double-Sided on Recycled Paper (JUN 1996)
(8)	52.209-6	Protecting the Government's Interest When Subcontracting With Contractors Debarred, Suspended, or Proposed for Debarment (JUL 1995)
(9)	52.219-8	Utilization of Small Business Concerns (OCT 1999)
(10)	52.219-9	Small Business Subcontracting Plan (OCT 1999)
(11)	52.222-26	Equal Opportunity (APR 1984)
(12)	52.223-2	Clean Air and Water (APR 1984)
(13)	52.223-14	Toxic Chemical Release Reporting
(14)	52.232-23	Assignment of Claims (JAN 1986)
(15)	52.232-34	Electronic Funds Transfer Payment
(16)	52.233-1	Disputes (OCT 1995) (Alternate I)(DEC 1991)
(17)	52.237-2	Protection of Government Buildings, Equipment, and Vegetation (APR 1984)
(18)	52.241-2	Order of Precedence - Utilities
(19)	52.241-4	Change in Class of Service
(20)	52.241-5	Contractor's Facilities
(21)	52.241-11	Multiple Service Locations
(22)	52.242-13	Bankruptcy (JUL 1995)
(23)	52.243-1	Changes-Fixed Price(AUG 1987) (Alt.I)(APR 1984)
(24)	52.244-5	Competition in Subcontracting (Dec 1996)
(25)	52.249-2	Termination for Convenience of the Government (Fixed Price) (SEP 1996) Alternate I(SEP 1996)
(26)	52.253-1	Computer Generated Forms (JAN 1991)

**14.2. 552.233-70 Disputes (Utility Contracts) (APR 1984)**

The requirements of the Disputes clause at FAR 52.233-1 are supplemented to provide that matters involving the interpretation of retail rates, rate schedules, tariffs, riders, and tariff related terms provided under this contract and conditions of service are subject to the jurisdiction and regulation of the utility rate commission having jurisdiction.

**14.3 Unregulated Services**

Pursuant to this areawide contract, the Contractor may provide energy related services that are not subject to rate and tariff regulation by the Commission under a pre-approved alternative (FAR 52.241-8 below) that demonstrates the Contractor will provide these services under terms and conditions that are competitive and otherwise in the best interests of the ordering Agency. If, as determined by the ordering Agency, the conditions for use of this pre-approved alternative cannot be satisfied, then the ordering Agency should consider the extent to which a competitive acquisition process is required to select and award a Contract for these unregulated services. If an Authorization under this areawide contract is utilized, the prices and terms and conditions for unregulated services offered by the Contractor shall be negotiated subject to the requirements of FAR 41.5, subject to the following general requirements.

**52.241-8** Change in Rates or Terms and Conditions of Service  
For Unregulated Services (FEB 1995)- Modified

- (a) This clause applies to the extent that services furnished hereunder are not subject to tariff and/or regulation of the Commission.
- (b) Either party may request a change in rates or terms and conditions of service, unless otherwise provided in this areawide contract. Both parties agree to enter in negotiations concerning such changes upon receipt of a request, in the form of an Authorization, which specifies the terms and conditions of the proposed change in service.
- (c) The Contractor agrees that throughout the life of any Authorization, the terms and conditions so negotiated will not be priced at rates in excess of published and unpublished rates charged to any other customer of the same class under similar terms and conditions of use and service.
- (d) The failure of the parties to resolve any dispute arising from the conduct of services under this clause shall be subject to the Disputes clause, FAR 52.233-1 (Article 14.1-16)
- (e) Any changes, rates, and/or services as a result of such negotiations shall be made a part of this contract by the issuance of a fully executed Authorization.

**14.4** Repeal of Clauses During Term of Contract.

If, during the term of this areawide contract, any of the clauses contained in this Article are repealed, revoked, or dissolved by the Government, then such clauses shall no longer be part of this contract as of the date of such repeal, revocation, or dissolution. The elimination of these clauses by reason of such repeal, revocation, or dissolution shall not affect the continuing validity and effectiveness of the remainder of the contract or other clauses referenced in this Article.

**ARTICLE 15. SMALL BUSINESS SUBCONTRACTING PLAN**

Attached hereto and made a part hereof by reference is a SUBCONTRACTING PLAN FOR SMALL BUSINESS CONCERNS, SMALL BUSINESS CONCERNS OWNED AND CONTROLLED BY SOCIALLY & ECONOMICALLY DISADVANTAGED INDIVIDUALS AND WOMAN OWNED SMALL BUSINESS CONCERNS negotiated between the Contractor and the Government, which is applicable on a company wide basis pursuant to the requirements of Section 211 of P.L. 95-507 (15 U.S.C. 637d). The Contractor expressly understands that this subcontracting plan is an annual plan and hereby agrees to submit a new subcontracting plan by May 15<sup>th</sup> of each year during the life of this Contract.

**ARTICLE 16. NOTICES**

**16.1.** Unless specially provided otherwise, all notices required to be provided to the Government under this areawide contract shall be mailed to: Public Utilities Division - (PNEU), General Services Administration, Washington, DC 20405.

**16.2.** All inquiries and notices to the Contractor regarding this areawide contract shall be mailed to: **XX** (telephone number **XX/XX-XX**), or to such other person as the Contractor may hereafter designate in writing.

**ARTICLE 17. REPORTING**

**17.1** The Contractor shall provide, as prescribed and directed by the contracting officer, an annual report on performance in accordance with the approved subcontracting plan for small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals as required by Article 15.

**17.2** The Contractor shall provide, no later than the end of February the contracting officer at the address indicated in Article 16.1 an annual report for the preceding calendar year which will provide a summary listing of all Federal customers requiring service or change in service under this areawide contract. This summary report will include: (a) name of Ordering Agency, (b) service address, (c) nature of service, and (d) annual dollar value and quantity of service (if applicable).

## **ARTICLE 18. MISCELLANEOUS.**

**18.1.** Contract administration: The ordering Agency shall assist in the day-to-day administration of the utility service being provided to it under an Authorization.

**18.2.** Measurement and verification: Energy Conservation Measures(ECM) will not be normally considered unless a net overall energy usage or cost reduction can be demonstrated and verified. Verification standards for energy projects are established in the North-American Energy Measurement and Verification Protocol (NEMVP), published by the Department of Energy's Federal Energy Management Program (FEMP).

**18.3.** Subcontracting: The Contractor may perform any or all of its requested services through subcontractors, including its unregulated affiliates. ECM subcontractors shall be competitively selected in accordance with FAR 52.244-5 (Article 14.1-24 herein). Subcontractor selection shall be based on cost, experience, past performance and other such factors as the Contractor and the Ordering Agency may mutually deem appropriate and reasonably related to the Government's minimum requirements. Upon request by the Government, the Contractor shall make available to the contracting officer all documents related to the selection of a subcontractor. In no event shall the service be provided by subcontractors listed as excluded from Federal Procurement Programs maintained by GSA pursuant to 48 C.F.R. 9.404 (Article 14.1-8 herein).

**18.4.** Warranties: The Company shall pass through to the Agency all warranties on equipment installed or provided by it or its subcontractors on Government property with the following representation:

(Name of Contractor) ACNOWLEDGES THAT THE UNITED STATES OF AMERICA WILL OWN OR LEASE THE EQUIPMENT AND/OR MATERIALS BEING INSTALLED OR SUPPLIED HEREUNDER, AND, ACCORDINGLY, AGREES THAT ALL WARRANTIES SET FORTH HEREIN, OR OTHERWISE PROVIDED BY LAW IN FAVOR OF COMPANY SHALL INURE ALSO TO THE BENEFIT OF THE UNITED STATES AND THAT ALL CLAIMS ARISING FROM ANY BREACH OF SUCH WARRANTIES OR AS A RESULT OF DEFECTS IN OR REPAIRS TO SUCH EQUIPMENT OR SUPPLIES MAY BE ASSERTED AGAINST (Name of Contractor) OR MANUFACTURER DIRECTLY BY THE UNITED STATES.

**18.5.** Term of Authorizations: It is recognized that during the life of this contract, situations and/or requirements may arise where it may be desirable that the term of service to an ordering Agency's facility extend beyond the term of this contract. In such event, the particular Authorization involved may specify a term extending beyond the term of this contract, provided that is within the contracting authority of the ordering agency.

**18.6.** Succeeding contract: Although it is expressly understood that neither the Contractor nor the Government is under any obligation to continue any service under this areawide contract beyond the term hereof, it is contemplated and anticipated that, upon expiration of this contract, a similar successor contract will be agreed upon by the Government and the Contractor. However, in the event a successor contract becomes effective at the expiration of this contract, the terms and conditions of the successor contract shall apply to any Authorization extending beyond the term of this contract. In any event, the maximum term of any Authorization, whether under this contract or extending into a successor contract, is limited to 10 years unless otherwise authorized by Public Law or regulation.

**18.7.** Anti-Deficiency: Unless otherwise authorized by Public Law or Federal Regulation, nothing contained herein shall be construed as binding the Government to expend, in any one fiscal year, any sum in excess of the

appropriation made by Congress for that fiscal year in furtherance of the matter of the contract or to involve the Government in an obligation for the future expenditure of monies before an appropriation is made (Anti-Deficiency Act, 31 U.S.C. 1341.A.1).

**18.8. Obligation to Serve:** Nothing contained in this contract shall obligate the Contractor to take any action which it may consider to be detrimental to its obligations as a public utility.

IN WITNESS WHEREOF, the parties have executed this contract as of the day and the year first above written.

**UNITED STATES OF AMERICA**  
Acting through the Administrator  
of General Services

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

Public Utilities Division  
Contracting Officer

ATTEST:

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

Public Utilities Division

**XX**

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

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

ATTEST:

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

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

**CERTIFICATE**

I, \_\_\_\_\_, certify that I am \_\_\_\_\_ of **XX**, INC., a corporation, named as Contractor in the negotiated areawide public utility contract No. GS-OOP-00-BSD-**XX**; that \_\_\_\_\_, who signed said contract on behalf of the Contractor, was then \_\_\_\_\_ of said Corporation; and that said contract was duly signed for and on behalf of said Corporation and is within the scope of its corporate powers.

/s/ \_\_\_\_\_

(Corporate Seal)



## Basic Ordering Agreement

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**BASIC ORDERING AGREEMENT  
BETWEEN  
THE UNITED STATES OF AMERICA AND**

**AT, \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_**

This Basic Ordering Agreement (BOA) is entered into by the United States of America, hereinafter called the "Government", represented by the Contracting Officer, \_\_\_\_\_ and the **Utility Company, hereinafter** called the "Contractor". The terms "order" and "contract" are considered to be interchangeable. The effective date of this agreement is the date of execution by the Government, as shown below. This document is not a contract.

The terms and conditions hereinafter set forth are hereby agreed upon by the parties hereto for incorporation into negotiated firm-fixed price type contracts, between the parties, entered into on or after the date of this document, and prior to its expiration.

This BOA may be terminated in its entirety by either party upon thirty (30) calendar days written notice to the other party. This BOA, including the clauses hereof, may be amended only by mutual agreement of the parties, and shall be revised as necessary to conform to the requirements of the Federal Acquisition Regulation, Defense Acquisition Regulation and Navy Acquisition Procedures Supplement. Modification of this BOA shall not retroactively affect orders previously issued.

The period during which orders may be placed against this BOA may not exceed ten years. The basic term is three years and the Contracting Officer may grant extensions for up to two years, with no single extension exceeding one year.

In WITNESS WHEREOF, the parties hereto, hereby execute this agreement.

**Utility Company**

By:  
(signature)

Title

Date

UNITED STATES OF AMERICA

By:  
(signature)

Title

Date

## Site-Specific Contract

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**MODIFICATION  
TO  
AGENCY LOCATION ELECTRIC SERVICE CONTRACT  
FOR  
DEMAND SIDE MANAGEMENT AND ENERGY EFFICIENCY SERVICES  
WITH  
UTILITY NAME**

This Modification for Demand Side Management and Energy Efficiency Services to Contract No. \_\_\_\_\_ is entered into this \_\_\_\_\_ day of \_\_\_\_\_, 200\_, by and between Utility Name and the United States of America (the Government), represented by the contracting officer executing this Modification. The signatories of this Modification will be sometimes collectively referred to as the “Parties” and individually as a “Party”.

**WHEREAS**, Agency Location is a Agency Name installation within City, State, and Utility Name is a type of utility that provides type of service utility service to portions of Agency Location;

**WHEREAS**, Agency Location has been mandated to reduce its energy consumption by 2 percent per year from FY2005 through FY2015, as compared to a year 2003 baseline;

**WHEREAS**, changing geopolitical conditions have constrained Federal agency budgets, thereby limiting funds available to fulfill assigned missions, have led to a series of base closure and realignment initiatives, that affect both the preservation of an installation’s existing missions and an installation’s ability to secure new missions, and have engendered increasing competition among Defense installations for new missions;

**WHEREAS**, Agency Location’s ability to effectively compete with other Defense installations will be based, in part, on the cost, availability, and reliability of utility services and on progress in meeting its energy conservation goals, and Agency Location’s ability to remain competitive will directly affect the local economy in terms of the employment levels of military, civilian, and contractor personnel, the purchase of goods and services and the related multiplier affect; and

**WHEREAS**, Agency Location is desirous of establishing, under the authority of 10 U.S.C. 2865 and 42 U.S.C. 8256, a process through which Utility Name will assist Agency Location in implementing programs and mechanisms that will help Agency Location meet its energy conservation goals and maintain its mission competitiveness by installing new and/or upgrading existing facilities and systems with energy efficient equipment and systems and by paying for such activities on its energy bill.

Accordingly, the Parties agree to the following principles, concepts, and procedures:

## **I. SCOPE AND TERM**

**1.1 Energy Efficiency Services.** Subject to the terms and conditions hereinafter set forth, Utility Name shall furnish and the Government shall receive, demand side management and energy efficiency services (the Services) requested by the Government from Utility Name for specific Agency Location facilities (the Service Locations) and Energy Conservation Opportunities (ECOs). Services tasking for specific facilities and ECOs will be executed through subsequent task orders.

**1.2 Energy Conservation Opportunities (ECOs).** The purpose of an ECO is to directly or indirectly reduce the peak period demand for natural gas, electric power, water or waste water or to reduce total natural gas, electric power, water or waste water requirements or energy related operations, maintenance and repair savings. Indirect measures may include, but are not limited to, metering and other monitoring measures that facilitate in the identification, assessment and validation of ECOs. Examples of work that may be proposed as part of an ECO are as follows:

- (a) Interior and exterior lighting replacement;
- (b) Lighting control improvements;
- (c) Motor replacement with high efficient motors;
- (d) Boiler control improvements;
- (e) Packaged air conditioning unit in replacement;
- (f) Cooling tower retrofit;
- (g) Economizer installation;
- (h) Energy management control system installation, replacement, or alteration;
- (i) Occupancy sensor and LED exit sign installation;
- (j) Infrared heating for work zones within large open bays or warehouses;
- (k) Fans and pump replacement or impeller trimming;
- (l) Chiller retrofit;
- (m) Upgrade of natural gas-fired boilers with new controls;
- (n) Steam trap maintenance and replacement;
- (o) Steam system leak identification and repair;
- (p) Insulation and daylighting control installation;
- (q) Programmable thermostat installation;
- (r) Variable speed drive utilization;
- (s) Reflective solar window treatment;
- (t) Replacement of air conditioning and heating units with heat pumps;
- (u) Addition of liquid refrigerant pumps to reciprocating air conditioning units;
- (v) Window air conditioning replacement with high efficiency units;
- (w) Installation of energy-efficient appliances;
- (x) Power factor correction;
- (y) Individual meter and automatic meter reading system installation; and
- (z) Periodic repair and maintenance and Operations of energy using and monitoring equipment as needed to maintain and/or improve equipment energy efficiency, such as cleaning fluorescent light ballasts, changing air handling filters, checking cooling system refrigerant levels, meter checks and compressed air system leak detection and repair.

**1.3 Term.** This Modification shall continue to be in force for the duration of the Contract unless sooner terminated by Utility Name upon six months written notice to the Government.

## II. IDENTIFICATION, DEVELOPMENT AND IMPLEMENTATION OF TASKS

**2.1 Identification, Development and Implementation of Tasks.** The Parties agree to proceed with the identification, development, and implementation of demand side management and energy efficiency service tasks as provided in this article. The Parties shall further meet as necessary to: obtain information on historical and projected energy requirements; coordinate Services tasking with related energy conservation or facility modification projects; identify and prioritize facilities that will be included in energy audits, design, and implementation tasks; and establish metering requirements. Utility Name personnel and contractors shall comply with all applicable security requirements, including but not limited to appropriate badging.

### **2.2 Energy Audit.**

(a) Upon the Government's written request, Utility Name shall submit to the Government an energy services audit proposal (Audit Proposal) to evaluate demand side management and energy conservation opportunities at specified Service Locations. The Audit Proposal shall include an audit scope, estimated cost, and completion schedule.

(b) In the event the Parties mutually agree to conduct an energy conservation audit (Energy Audit), the Government shall provide written authorization for Utility Name to proceed with such audit.

(c) After authorization to proceed with an Energy Audit, and consistent with the Audit Proposal completion schedule, Utility Name shall submit an energy audit report (Audit Report) to the Government. Each Audit Report should, as appropriate, contain the following information:

1. Identification of Service locations;
2. Description of ECOs;
3. Prioritized list of ECOs recommended for further design study or implementation;
4. Description of existing equipment proposed for removal, replacement, or alteration, including relevant ratings and a general condition assessment;
5. Estimated peak period and annual energy and/or fuel reduction and energy related operations, maintenance and repair savings for each ECO;
6. Estimated ECO installation cost; and
7. Preliminary investment analysis, including projected yearly purchased utility and/or fuel cost savings, energy related operations, maintenance and repair savings, contract rate of interest, and simple payback period.

### **2.3 Engineering and Design.**

(a) In the event the Parties mutually recommend the conduct of an engineering and design study (Design Study) for one or more ECOs recommended in an Audit Report or recommended by mutual agreement of the Parties, Utility Name shall submit to the Government an energy design proposal (Design Proposal) for engineering and design services necessary for the implementation of agreed-upon ECOs. The Design Proposal shall include a study scope, estimated cost, and completion schedule.

(b) In the event the Parties mutually agree to conduct a Design Study, the Government shall provide written authorization for Utility Name to proceed with such study.

(c) It is agreed that ECO designs will be fully coordinated and a joint technical review will be performed by the Government, Utility Name, and pertinent contractor personnel when the design documents are approximately 35 percent and 95 percent complete. Designs will comply with all appropriate codes, standards, and regulations to provide a safe, state-of-the-art, life cycle cost effective system that is efficient to operate and maintain.

(d) Utility Name shall submit an energy design report (Design Report) to the Government upon the completion of the Design Study. Each Design Report will contain final designs for each ECO.

### **2.4 ECO Implementation.**

(a) In the event the Parties mutually agree to implement one or more ECOs recommended in an Audit Report, in a Design Study, or by mutual agreement of the Parties, Utility Name shall submit to the Government an ECO implementation proposal (Implementation Proposal) for the installation of approved ECOs and for construction oversight to verify the designed and specific energy efficient equipment and/or system modifications are properly supplied and installed in a manner that will provide the intended long term peak period and annual energy and fuel reductions and energy related operations, maintenance and repair savings.\

(b) Each Implementation Proposal shall include the following information:

1. General description of the ECO;
2. Estimated peak period and annual energy and/or fuel reduction and energy related operations, maintenance and repair savings for each ECO; and
3. Updated investment analysis, to include the ECO implementation cost, estimated yearly purchased utility and/or fuel cost savings; current contract rate of interest and estimated monthly incremental ECO repayment charge. Utility Name may include a management fee of up to 7 percent in its proposed ECO implementation cost.

(c) Each Implementation Proposal may further include the following information as shall be relevant to support the Government's determination whether to authorize the implementation of an ECO:

1. Existing equipment or components to be removed or replaced;
2. Specifications and/or catalog cuts for new equipment, including as appropriate, power rating, estimated energy consumption, input/output, power ratio, lighting level, estimated equipment life and/or maintenance requirements;
3. Electric and mechanical drawings for ECOs that involve changes to existing systems (drawings will not be required for ECOs involving only component replacement or minor equipment enhancements);
4. Government support required for ECO implementation, such as interruptions or temporary changes to operations and movement of equipment;
5. Utility interruptions required for ECO implementation including type, location, and estimated duration;
6. Environmental compliance requirements; and
7. If a proposed ECO requires the installation of equipment outside of existing buildings or structures, a site plan showing recommended siting and any feasible alternatives.

(d) In the event the Parties mutually agree to proceed with an ECO Implementation, the Government shall provide written authorization for Utility Name to proceed with such implementation. Such authorization shall include a not-to-exceed amount.

**2.5 Performance of Work.** Utility Name hereby undertakes all work necessary to perform its obligations under this Modification. All or any portion of the work or any other obligations of Utility Name hereunder may be provided by subcontractors; provided that in no event may any work be performed by subcontractors listed as Parties Excluded from Federal Procurement Programs maintained by the Government pursuant to FAR 9.404. If the estimated cost for a Design Study or ECO Implementation exceeds dollar amount, Utility Name shall select its subcontractors on the basis of adequate competition, taking into account price, expertise, quality of work, and other factors.

#### **2.6 Limitation of Cost.**

(a) Each authorization for an Energy Audit, Design Study, or ECO Implementation (which hereafter may be collectively referred to as "ECO Activities" or individually referred to as an "ECO Activity") shall contain a mutually-agreed upon not-to-exceed cost amount. Utility Name shall notify the Contracting Officer in writing whenever it has reason to believe that:

1. The costs Utility Name expects to incur in the next sixty (60) days, when added to all costs previously incurred, will cause the ceiling cost to be exceeded; or
2. The total cost for the performance of any ECO Activity may be greater or substantially less than the not-to-exceed amount.

(b) As part of the notification, Utility Name shall provide a revised not-to-exceed estimate for the ECO Activity. The Government is not obligated to accept ECO Activity costs that are in excess of the applicable ceiling cost. Utility Name is not obligated to continue performance under a task order or otherwise incur costs in exceed of the ceiling amount until the Contracting officer:

1. Notifies Utility Name in writing that the not-to-exceed amount has been increased; and
2. Provides a revised not-to-exceed amount.

### **III. SERVICE CHARGE PAYMENTS AND RELATED MATTERS**

**3.1 Energy Conservation Surcharge.** Utility Name shall be reimbursed for all costs incurred for the performance of an authorized ECO Activity by the Government's payment of a monthly energy conservation surcharge (Energy Conservation Surcharge) that shall be included in monthly electric service bills submitted by Utility Name to the Government. Utility Name may include the cost of an ECO Activity in an Energy Conservation Surcharge beginning with the first electric service bill following the month in which said

activity is authorized. The cost of any ECO Activity shall initially be the Government's authorized not-to-exceed cost; provided that such cost shall be adjusted to reflect the actual cost incurred by Utility Name upon the completion of an ECO Activity. The Energy Conservation Surcharge shall be calculated as follows and as illustrated in the example Energy Conservation Surcharge Worksheet provided as Attachment A to this Modification:

(a) Monthly Principal Payment, dependent upon useful life of equipment and or systems provided, equal to no greater than one-one hundred and eightieth (1/180) and no less than one-one hundred and twentieth (1/120) of the Total ECO Activity Cost for all in-progress and completed task orders ; plus

(b) Monthly Interest Payment, equal to the unpaid, Remaining ECO Activity Cost Balance times the current contract rate of interest, with said interest equal to 1.05 times the monthly interest rate for variable rate long-term economic and business development loans issued by the Finance Company Name to members of the CFC. For reference purposes only, the November 1995 CFC variable interest rate was 6.40 percent. Utility Name shall be entitled to the 1.05 percent surcharge regardless of the funding source used by Utility Name.

**3.2 Operations and Maintenance, Manuals and Training.** Unless otherwise provided in a task order, the Government shall be responsible for the operation and maintenance of an implemented ECO following acceptance. At the time of acceptance of an implemented ECO, Utility Names shall furnish to the Government all manuals and other material made available to Utility Name for the effective operation and maintenance of such ECO. Any training of Government personnel necessary for the successful implementation of an ECO shall be undertaken by Utility Name as may be agreed upon in a task order. A task order may require Utility Name to measure and document ECO performance following acceptance of the ECO.

**3.3 Government Prepayment Option.** Notwithstanding any other provision of this Modification, the Government shall have the right to prepay, in whole or in part, the unpaid remaining ECO Activity cost balance or any or all pending or completed ECO Activities. Such prepayment shall include a prepayment penalty that is equal to the prepayment amount times the applicable fee that the CFC charges for prepayments of variable interest rate loans. For reference purposes only, the November 1995 CFC prepayment fee was 0.035 percent.

**3.4 Termination Payments.** Upon written notice to Utility Name, the Government may terminate any ECO activity or terminate this Modification at any time and for any reason. If a termination occurs, the Government shall reimburse Utility Name for 100 percent of ECO Activity costs incurred up to the date of the termination notice, or reasonably incurred as a result of a termination. A surcharge shall be applied to all termination payments based on the CFC charge as identified in Section 3.3, above.

**3.5 Waiver of Patronage Capital.** The Government hereby waives all rights to any patronage capital allocated by the finance company to Utility Name that is derived from finance company financing of an ECO Activity.

## IV. OBLIGATIONS AND LIMITATIONS

### 4.1 Environmental Matters.

(a) The Government understands and agrees that Utility Name has not inspected and will not inspect any Service Locations or other task sites for the purpose of detecting the presence of hazardous materials or for the purpose of identifying or evaluating any environmental claims, environmental laws, or Excluded Activity. Neither Utility Name nor any of its representatives, agents, or subcontractors will be responsible for the conduct of or compliance with any Excluded Activity, as defined below in Section 4.1(b).

(b) The Government may, for a particular ECO, conduct a study or other review of an Excluded Activity. Upon the completion of such study or review, the Government shall submit to Utility Name a proposal describing the proposed Excluded Activity, including the cost thereof, and identifying the persons to perform the Excluded Activity on behalf of the Government. In the event that Utility Name agrees that all or a portion of the cost of the Excluded Activity may be paid by Utility Name and repaid by the Government, as provided for in Article 3.1, an authorization for ECO Implementation shall explicitly state that:



1. The cost of the Excluded Activity is included in the estimated cost;
2. Utility Name shall pay the cost of the Excluded Activity upon the presentation by the Government of appropriate invoices or other evidence that such costs have been properly incurred; and
3. Utility Name shall not be required to enter into any agreement or incur any obligation to the Government or any other person conducting or providing an Excluded Activity.

(c) Excluded Activity means the containment, detection, disposal, discharge, handling, removal, storage, transportation, treatment, or use of Hazardous Materials.

(d) The Parties shall cooperate in obtaining all required environmental permits necessary for compliance with applicable environmental laws prior to implementing any ECO.

(e) All emission credits attributable to reductions in emissions at Agency Location incidental to an ECO Implementation shall be the property of the Government.

#### **4.2 Warranties.**

(a) The Government and Utility Name shall mutually agree on the cost and the extent of warranty protection for each implemented ECO. If a standard commercial warranty exists for an item of installed equipment, Utility Name will assist in the enforcement of that warranty; provided that any litigation under such warranty shall be the responsibility of the Government.

(b) The Government acknowledges that: Utility Name is not a manufacturer of ECOs; and neither the vendor(s) named in any schedule or invoice, or any representative of such vendor nor any manufacturer or subcontractor of any ECO is an agent of Utility Name or is authorized to waive or alter any term or condition of the Modification.

(c) The Government acknowledges and agrees that any savings, estimated savings, load reduction, or estimated load reduction does not constitute a warranty or guaranty of any such savings, estimated savings, load reduction, or estimated load reduction by Utility Name. Such savings, estimated savings, load reduction, or estimated load reduction, whether or not provided to the Government by Utility Name, are solely for the planning convenience of both Parties.

#### **4.3 Limitation of Liability of Utility Name.**

(a) Except as provided in Section 4.3(b) below, Utility Name shall not be responsible for any damages, claims, losses, costs, or expenses including, without limitation, incidental, indirect or consequential damages, connection with or resulting from the performance or non-performance under this Modification or anything done in connection therewith.

(b) Unless otherwise agreed, Utility Name's sole and exclusive liability under this Modification shall be for payments to any contractor for the purposes of identifying, analyzing, designing, and implementing an ECO.

(c) Utility Name shall have no responsibility for the proper functioning of an implemented ECO or for its proper operation or utilization. All maintenance and operating risks associated with an implemented ECO shall be borne by the Government.

**4.4 Access to Facility and Information.** Upon advance request, the Government shall provide Utility Name, its agents, and its contractors with reasonable access to Service Locations and other areas within Agency Location to enable Utility Name to prepare for and conduct ECO Activities. The Government shall further provide Utility Name with any information and other assistance reasonably required by Utility Name to comply with the terms of this Modification. The Government acknowledges and agrees that Utility Name may disclose

information obtained by Utility Name or provided by the Government pursuant to this Modification to the state regulatory body or to other public authorities having jurisdiction.

**4.5 Insurance.** The Government represents that it is self-insured and is not required to obtain commercial insurance of any type. Utility Name shall require all contractors, affiliates, or subsidiaries it retains to fulfill its obligations under this Modification to carry insurance comparable to that required by Utility Name when it hires contractors to perform similar work for Utility Name.

**4.6 No Third-Party Beneficiaries.** This Modification is for the benefit of the Parties hereto and the Parties, by execution of this Modification, do not intend to create any rights in, or to grant any remedies to, any third party.

**4.7 Nonwaiver.** The failure of either Party to require compliance with any term, condition, or provisions of the Modification and subsequent task orders shall not affect that Party's right to later enforce the same. It is agreed that the waiver by either Party of performance of any of the terms of this Modification or any breach thereof shall not be held or deemed to be a waiver by that Party of any subsequent failure to perform the same or any other term or condition of this Modification or subsequent task order or any breach thereof.

**IN WITNESS WHEREOF**, the Parties hereto have executed this Modification by and through their duly authorized representative as of the date first above written.

**UNITED STATES OF AMERICA**

**UTILITY NAME**

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

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

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

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

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

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

# UESC Sample Documents

## **Instrument of Assignments**

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## INSTRUMENT OF ASSIGNMENT

Re: Task Order \_\_\_\_\_ issued under Contract \_\_\_\_\_ dated \_\_\_\_\_ pursuant to Areawide Contract \_\_\_\_\_ dated \_\_\_\_\_ (as amended, modified, supplemented and renewed from time to time in accordance therewith, together with all exhibits, schedules, annexes and other attachments thereto, all of which together constitute the "Contract") (the "**Contract**"), between \_\_\_\_\_ and Federal Agency Name

Issued by: Federal Agency Name

\_\_\_\_\_  
\_\_\_\_\_

FOR VALUE RECEIVED, the undersigned, \_\_\_\_\_ ("**Assignor**") does hereby assign, set over and transfer to \_\_\_\_\_ ("**Assignee**") all rights, title and interest to all monies due, or to become due Seller from the United States of America, or from any agency or department thereof, accruing under the Contract.

Payment of all invoices should be made to:

By Wire:

By Mail:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Assignee shall not be responsible for the performance of any of the covenants or obligations in the Contract.

\_\_\_\_\_

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

Name: \_\_\_\_\_

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

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

I, \_\_\_\_\_, certify that I am (Assistant) Secretary of Seller and that \_\_\_\_\_ who signed this Instrument of Assignment on behalf of Seller was \_\_\_\_\_ of Seller; that this Instrument of Assignment was duly signed for and on behalf of Seller by authority of its governing body and is within the scope of its corporate powers.

IN WITNESS WHEREOF I have affixed my hand and the seal of Seller this \_\_\_ day of [insert month], 200\_.

\_\_\_\_\_  
Secretary  
(Seal)

**ACCEPTANCE OF ASSIGNMENT**

Assignment of monies due or to become due Seller from the United States of America, Department of the \_\_\_\_\_ under the Contract is hereby accepted.

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

Name: \_\_\_\_\_

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

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

## ESCO Utility Agreement

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# ENERGY CONSERVATION MEASURE UTILITY/ENERGY SERVICE COMPANY PROJECT DEVELOPMENT/DESIGN AGREEMENT

This Agreement is effective as of the date of the latest signature of the two parties, by and between utility (the "Company"), an name of State corporation, having its principal office at address of utility company and  
\_\_\_\_\_ (the "Contractor"), \_\_\_\_\_ with offices located at  
\_\_\_\_\_. Company and Contractor are hereinafter  
individually referred to as "Party" and collectively referred to as "Parties".

## 1. Purpose:

The purpose of this Agreement is to establish a "pre-contract" relationship between the Parties and to establish an advance agreement on certain terms, principles risk relationships, treatment of costs and sharing of project margin associated with developing energy conservation measures for the Company's customer(s). "Pre-contract" refers to Phase I and II project development activities that lead to and include proposal completion in accordance with the agreement in Exhibit A and utility Areawide Agreement. Once a Delivery/Task Order is issued by the Government, the terms and conditions of the subcontract between Company and Contractor will apply to the Parties.

## 2. Acknowledgement:

The Company is a state-regulated public utility whose service territory includes federal government facilities intended to be addressed in contracts and subcontracts resulting from this Agreement, and the Contractor is experienced in the business of providing products and services designed to reduce consumers' energy costs.

The Company is the named recipient of that certain Energy Conservation Measure ("ECM") Agreement referenced in Exhibit A, issued by the United States of America between the Company and the United States Government, relating to refurbishing and upgrading United States Government facilities located within the service territory of the Company.

## 3. Relationship of the Parties:

The Parties agree that the relationships between the Parties is non-exclusive and relates only to those projects listed in Exhibit A and any further projects resulting therefrom. The Parties agree that in addition to providing project development and design services, the Contractor will serve as general contractor for project execution to assist the Company in fulfilling its obligations under the agreement at Exhibit A and any resulting Delivery/Task Orders for energy conservation projects. The Parties agree that the Contractor may directly communicate with the Government for routine project development and design coordination in conjunction with the Company. The Contractor will not be allowed to provide written correspondence to the Government unless expressly permitted by the Company. All substantive agreements and commitments with the Government entered by the Contractor will only be permitted by express written permission of the Company. Activities and communication allowed by the Contractor with permission of Company include, but is not limited to developing projects, developing energy conservation proposals, making arrangements for, and negotiation of, the resulting Delivery/Task Orders, execution of any necessary agreements according to the terms set forth by applicable regulation and policy which are in the Contractor's judgment reasonable and necessary conditions, and managing projects on behalf of the Company. The Parties further agree that the Contractor will provide management and communication processes, to the satisfaction of the Company, to provide adequate project management controls for the Company.

Each party shall act as an independent contractor and not as an agent for, partner of, or joint venture with the other Party. No other relationship outside of that contemplated by the terms of this Agreement shall be created. Neither Party may obligate the other to any extent except as **explicitly set forth herein**.



#### **4. Margin Sharing:**

The Contractor agrees to present cost data as illustrated in Exhibit B, attached hereto. The term "Total Implementation Price" shall be the sum of: (A) direct costs such as professional fees which shall include costs for professional services such as detailed feasibility studies, design, training, commissioning, monitoring, and maintenance of installed ECMs; (B) direct costs associated with subcontractors, labor, equipment, and material in connection with the implementation of ECMs, as well as other miscellaneous costs; (C) indirect costs and turn-key overhead; and (D) profit, agreed as a percentage mark-up applied to the sum of (A), (B), and (C) above. Categories (C) and (D) compensate both the Company and Contractor for sharing the risks and rewards of implementing ECMs in a Delivery/Task Order.

"Contractor fees" such as professional services cost estimates will be based on the Contractor's Professional Service Rates, subject to negotiation and acceptance by the Government.

The Company will arrange, enter into and administer third-party financing agreements for projects developed under this Agreement. At the Company's request, the Contractor will assist in arranging such agreements on behalf of the Company.

Overhead and profit will be shared between Company and Contractor based on the relative risk-and-return preferences of each Party, for each proposal. The agreed sharing of overhead and profit between the Company and Contractor for each proposal and resulting Delivery/Task Order may vary based on the types of ECMs installed. The Contractor will prepare Exhibit B based upon the agreed sharing ratio for each given proposal.

Maintenance services will be priced by Contractor as outsourced or in-house services and added to the project price. Overhead and Profit will be applied to these costs and shared between Company and Contractor as defined in **Exhibit B**.

#### **5. Proprietary Information:**

All information furnished by the Parties (including, without limitation, drawings and specifications) relating to energy services shall be deemed confidential, and the Parties shall not disclose any such information to any other person or entity, other than the Federal Government, or use such information for any purpose other than performing energy services, unless such disclosure is pursuant to an order of a court or other tribunal of competent jurisdiction. All such information shall be returned to the originator upon completion of the work or termination or cancellation of this Agreement or resulting contract. These provisions shall be in addition to any confidentiality provisions contained in any Confidentiality and Nondisclosure Agreement entered into between the Parties. In the event of conflict, the provision of that separate Confidentiality and Nondisclosure Agreement shall control. Before such disclosure, the disclosing Party shall give prompt notice to the non-disclosing Party so that the non-disclosing Party can defend against such disclosure.

#### **6. Limitation on Liability:**

- 6.1 The Contractor will exercise due care in project development and design. In no event shall either the Contractor or the Company be liable to the other Party for any special, indirect, incidental, consequential, punitive, or similar damages or penalties whatsoever or for loss of profits or revenues, whether any action therefore is based in contract, in tort (including negligence and strict liability), in warranty, or otherwise.
- 6.2 The Contractor's total liability to the Company for damages or injury to persons or property that may be caused by or arise through developing and designing projects or performing any obligation under this Agreement shall be limited only to losses caused by Contractor's negligence or intentional misconduct and only to the extent of the Contractor's insurance coverage as defined in Exhibit C hereto. The Contractor shall indemnify and hold Company harmless from against all Third Party

Claims. This Agreement shall not deprive the Parties from rights they may have against any other entity or person.

6.3 The Contractor will comply with Federal Acquisition Regulation Clause 52.228-5, entitled, Insurance-Work on a Government Installation. In addition, Contractor shall furnish insurance certificate to Company in compliance with Exhibit C.

**7. General:**

7.4 7.1 In the event that any clause or provision of this Agreement or any part thereof shall be declared invalid, void or unreasonable by any court having jurisdiction, such invalidity shall not affect the validity or enforceability of the remaining portion of this Agreement unless the result would be manifestly inequitable or unconscionable.

7.2 The provisions of this Agreement shall be binding upon and inure to the benefit of Contractor and Company and their respective successors and permitted assigns.

7.3 The validity, construction and enforcement of, and the remedies under, this Agreement shall be governed by the law of the State of and, to the extent applicable the United States of America, provided any choice of law provision of the applicable state shall not apply if the choice of law provision would require the laws of another state or jurisdiction to govern the Agreement.

7.5 Either Party may, at its option, terminate this Agreement any time by 30-day written notice to the other Party.

IN WITNESS WHEREOF, and in order to express their agreement to be bound to the terms of this Agreement, Company and Contractor have executed this Agreement on the dates set forth below their signatures.

***Name of Utility Company***

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Printed Name

\_\_\_\_\_  
Printed Name

\_\_\_\_\_  
Title

\_\_\_\_\_  
Title

\_\_\_\_\_  
Date

\_\_\_\_\_  
Date

# Resources



## Reference Guide

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The Federal Energy Management Program (FEMP) helps federal personnel explore the possibilities of working with utilities by providing educational and informational tools.

FEMP helps federal agencies and their utility companies work together to save energy and dollars at federal facilities. FEMP supports agencies and their utilities by promoting federal/utility partnerships, supplying alternative financing information, sponsoring utility-related training, removing regulatory barriers, providing information on utility restructuring and its effects on federal agencies, and more.

FEMP's financing team provides policy guidance and technical and contracting assistance related to private-sector funding for federal energy efficiency, renewable energy, and water conservation projects.

### For More Information

David McAndrew  
FEMP Utility Program Lead  
202-586-7722

### FEMP Web Site

Check out the latest FEMP information at <http://www1.eere.energy.gov/femp>.

### EERE Information Center

The EERE Information Center provides a wide variety of publications. Energy managers can call to request publications and to get answers to questions about federal energy management. Call 1-877-337-3463 or visit <http://www1.eere.energy.gov/femp/information/index.html>.

## **Workshops**

FEMP offers UESC projects workshops targeted to federal facility and energy managers, procurement personnel, and management and legal staff.

For more information about these workshops, call the FEMP Workshop Hotline at 703-250-2862. Or, register online at <http://fempcentral.com/workshops/registration.ws>.

## **Federal Utility Partnership Working Group (FUPWG)**

FUPWG exists to establish partnerships and facilitate communication between federal agencies, utilities, and energy service companies. The group works to develop strategies to facilitate cost-effective energy efficiency, water conservation, and renewable energy projects at federal sites. FUPWG helps to identify how all utilities can work with federal agencies to meet the federal requirements.

FUPWG meets two times a year to exchange information on recent utility incentive program success stories, current FEMP programs and products, individual agency energy-management programs, and reports from various working groups. Both federal and utility representatives are welcome. For more information on FUPWG, visit the FEMP Web site at [http://www1.eere.energy.gov/femp/financing/uescs\\_fupwg.html](http://www1.eere.energy.gov/femp/financing/uescs_fupwg.html).

## Utility Services List

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### Utility Services List (Services Typically Available at No Cost)

- Rebates/incentives
- Rate analysis and load management assistance
- Technical assistance and/or design review
- Commissioning
- Electronic data transfer
- Metering peak shaving
- Real time pricing
- Interruptible programs
- Renewable energy
- Power quality and reliability assistance
- Web access to utility account data

## Lessons Learned

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This document is also available online at:

- [http://www1.eere.energy.gov/femp/pdfs/uescs\\_lessons\\_learned.pdf](http://www1.eere.energy.gov/femp/pdfs/uescs_lessons_learned.pdf)

# FEMP



Federal Energy Management Program

## Utility Energy Services Contracts

### Lessons Learned

#### Negotiating Financing



Lowering Finance Rates



Water Conservation



U.S. Department of Energy

**Energy Efficiency  
and Renewable Energy**

Bringing you a prosperous future where energy  
is clean, abundant, reliable, and affordable



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## Acknowledgments

The Federal Energy Management Program (FEMP) thanks Steve Allenby, Millard Carr, Mary Colvin, Laurie Cordell, Jeffrey Eckel, Bruce Gross, Brad Gustafson, Keith Kline, Kate McMordie, William Sandusky, Stephanie Tanner, Karen Thomas, and Philip Voss for sharing their experiences and lessons learned.

## Introduction

The use of Utility Energy Services Contracts (UESCs) has evolved over the past 10 years. The following recommended best practices were generated by a growing group of innovative energy managers in many successful projects. While each specific Federal facility and its relationship with its utility company is unique, considering the experience of these pioneers can make future UESCs easier to implement and more successful. Six sections of this document relate to project finance issues. The last two sections concern competition between franchised utility companies and best practices for water conservation.

## Financing UESCs

### Understanding Financing Factors

Financing is a significant part of the cost of undertaking a UESC project, and experience shows that there are several techniques the Federal government can utilize to reduce the financial transaction costs and interest. This section describes practices that some agencies have used to keep costs as low as possible.

Interest rates are based on the sum of an index rate on the date the transaction is signed and a “premium” or “adders,” usually measured in basis points, where 100 basis points is equal to 1%. The premium reflects the costs of obtaining the financing under prevailing market conditions, financial risk, transaction costs, and profit for the finance company. The utility company needs to recover

#### Factors that affect risk and finance rate

- Term of financing
- Amount of financing
- Utility bond rating/financial status of contractors
- Perceived performance risk
- Contractual provisions
- Pertinence to agency mission
- Type/complexity of project
- Lower perceived risk to the finance company

transaction costs as well (this may be included in overhead, as a separate finance charge, or more rarely in the premium). The final result is a premium that has typically added 100 to 250 basis points (1.0% to 2.5%) to the base index rate. Financial market fluctuations affect premiums as well as index rates. For example, the current trend includes falling index rates offset by higher premiums due to a more conservative and restricted corporate credit market. This may continue as long as current concerns about the economy persist.

Financial transaction costs (and the margin to cover them) have been decreasing as an increasing number of Federal agencies use the same basic contractual forms and clauses and as finance companies become more familiar with the constraints and uniqueness of financing Federal energy projects. All other things being equal, using standard, acceptable contract terms and conditions reduces the perception of risk, shortens approval time, and reduces transaction costs.

### Financial Market Fluctuations

Until recently, the base index for UESC finance rates was the U.S. Treasury bill (T-bill) rate for a time period approximating that of the loan. In 2001, the finance community indicated that the international “swap rate” was preferred because it best reflected the cost of money on the markets

where these projects must compete for financing. The financial market for UESC projects is very different from consumer loan markets (e.g., home mortgages). This is a very limited, structured market. If the finance company is required to use a T-bill rate and it is lower than the prevailing swap rate (which better reflects the market where the project will get financed), the difference will probably be erased by a larger spread. To track T-bill and swap rates (listed under “interest rate swaps”) for different maturity periods, see the Federal Reserve Web site at <http://www.federalreserve.gov/releases/h15/data.htm>.

You cannot influence the value of an index rate. But whatever the agreed-upon index rate, the best business practices discussed in this document could help you to reduce the incurred premium or adders as well as other financial transaction costs.

## Ten Ways to Lower Perceived Risk and Finance Rates

Federal agencies have used various methods to lower perceived project risk and finance rates. In an increasing number of cases, as credit tightens, several of these guidelines are prerequisites to obtain private financing. Individual finance companies have their own experience and perception of the importance of specific contract clauses. The following generalizations should be discussed during the negotiation of each project.

### 1. Time is money

You will save money anywhere you can reduce processing time and facilitate quick closure of your deal. First, a short turn-around reduces the administrative cost for your utility and the subcontractors’ project development teams. Delays also affect the interest rate. In the past, a finance company could hold a rate for a week or two without charge, but given current market volatility, you will need to consult with your finance company. Finally, and most importantly, the sooner the project is implemented, the sooner it begins saving energy and money for your facility. Every day of delay is an opportunity lost for cost savings. Chronic late payments can also result in compensating increased interest rates, so it is important to the entire program to make sure that payments are made on time.

#### Shopping for the best rates

At least one utility active in this market has conducted its own competitive process to establish a list of pre-qualified finance firms for Federal energy projects. Each time a new project is designed and ready to finance, a standard form is used to share project data with the pre-qualified firms, who can give a quick response to the utility looking for the best value for construction and term financing. A recent \$3 million project elicited quotes that varied by about 100 basis points, with final term financing at 7%. Savings compared to the highest interest rate quoted were approximately \$580,000 over a 10-year term.

### 2. Communicate with finance companies

As the contractor, it may be inappropriate to discuss the financing of a specific project with anyone other than the utility company. However, most finance companies are happy to discuss the rates, adders, and costs associated with financing projects. This provides an opportunity to explore ways to reduce risk and obtain the lowest possible rate for a specific project. Many agencies leave all communication up to the utility or contractor, but there is no prohibition against asking the utility to have its selected finance company attend project negotiation meetings to answer questions and

provide financing clarity. Most UESC payments flow directly to the finance company, and those finance costs often represent more than half the total project costs for the government. Consequently, it makes good business sense to get acquainted with the details of financing and ensure that you have done all you can to ensure the best possible rate for your project. Ask your finance company to identify financial costs separately and to clarify the specific rate impact of significant individual contract terms and conditions. You can then evaluate the importance of those clauses individually. Similarly, ask for a break-out of the net present value of the finance company's fee, both at closing and during the payment period, to enable you to compare it with similar projects.

### 3. Compare rates

Once the basic parameters of your project (size, type of equipment, expected annual savings) are known, it is possible to get rate comparisons by calling the firms active in this market. A relatively small number of reputable finance organizations specialize in energy projects at Federal facilities. Formal competition for financing (particularly for smaller projects) may result in administrative costs that exceed the value of the competition. Consider a comparison of rates rather than formal competition. Ask your utility for a comparison of rates for recent project financing of similar dollar amounts. The Federal Energy Management Program (FEMP) can provide guidance based on other projects and can help you to identify sources for comparison.

#### Why Bother?

What are a few basis points worth over the term of your loan? The amount depends on the capital investment financed and the length of the term, but it can be significant. For example, with a 10-year term, an increase of just 30 basis points from 7.0% to 7.3% has the following impacts:

Investment Value Increased Cost\* over the term for 30 basis points

\$1.5 million project \$ 83,780

\$4.5 million project \$251,340

\$6.0 million project \$363,100

\*These dollars could be better spent on facilities improvements.

### 4. Use standard terms and conditions

Contract clauses and formats that are unfamiliar to the finance company can increase risk because they are different from what has been tried and proven. They may also lead to significant increases in transaction costs and longer timetables for execution. To keep costs low, try to use the standard terms and conditions and contractual forms already established for UESCs in the area-wide energy services annex and model agreements with your utility and finance company.

### 5. Negotiate buy-down and prepayment formulas in advance

Standard language for buy-down, prepayment, and termination (for convenience or otherwise) with pre-negotiated terms and conditions can, in some cases, hold finance costs down. If these terms are not clearly set forth in the contract, it will significantly increase risk and could cause the government serious problems with future contract administration.

## 6. Structure appropriate measurement and verification

Cost-effective measurement and verification of energy efficiency improvement and savings, coupled with a performance guarantee, is strongly recommended and can be achieved through alternatives to a contractual cost-savings guarantee. Finance companies reportedly establish the interest rate primarily on the basis of the experience and expertise of the utility and its subcontractors, relying on their credibility to evaluate the risk of specific technologies. While the margin for specific technologies set by the utility can be reduced by negotiating reasonable measurement and verification criteria, interest rates should not be affected by the complexity of the energy conservation measures.

## 7. Include explicit language minimizing risk to the finance company

A payment structure that minimizes risk to the finance company is the central element of reducing perceived risk and obtaining a lower interest rate. To keep rates low, include clear terms for how and when payments will be made, demonstrated ability to comply with those terms, and standard clauses to protect the finance company from offsets and future claims related to performance (assignment of claims).

### Additional Savings

Savings may be possible by ensuring that the payment stream to the finance company will not be affected by performance guarantees.

### Example

In a Department of Defense project, contract language helped ensure that the payment stream to the finance company would not be interrupted even though the utility included an energy savings performance guarantee in the contract. This reportedly helped obtain a discount of nearly 100 basis points (1%) in financing. The project was signed in 1999 for \$15 million at 7.0% interest. The estimated benefit to the government of a 100 basis point reduction in interest, given the 10-year term and total investment, was near \$2 million.

## 8. Avoid unnecessary hedge costs: do not buy an interest rate “lock”

To keep government costs (and the long-term interest rate) low, it is not necessary to require a guaranteed or fixed interest rate long before the date of award. Instead, a formula based on an index rate (e.g., T-bill or swap rate) and adders should be negotiated and set forth in the contract, stating how the final rate will be established on or near the day the delivery order contract is signed. The finance company should set the interest rate as close to the actual contract date as possible, in order to reduce the risk of rising rates and eliminate the hedge cost.

## 9. Bundle energy conservation measures

Bundling many energy conservation measures (ECMs) together can result in lower rates and more conservation for each dollar invested. Bundling also offers the facility other benefits by reducing contract and administrative burdens and optimizing energy savings. More ECMs and greater facility improvements can be included when those with longer-term payback periods are bundled with and offset by those with quick payoff terms. Just as some finance companies are bundling projects to attract lower interest rates from a portfolio risk management perspective, facility managers can also spread out the perceived performance risk by combining many ECMs.

## 10. Show that the project is important for the facility and that the facility is expected to have a strong mission during the contract period

Most finance companies look on a Federal government contract as a secure investment. However, any uncertainty about the future operation of the facility can increase the perceived risk of premature contract termination and finance costs, or put the deal in jeopardy during negotiations. To decrease perceived risk, ensure that the finance company understands that this project is an important asset for the facility and that the facility is expected to have an ongoing mission that will outlive the project's contract period. Provide documentation, if necessary.

## Using Annual Payments to Decrease the Total Interest Paid

The annual payment option allows the government to pay for an entire fiscal year (12 months) of payments in advance. This method is attractive to finance companies and may also fit Federal budget and finance constraints, saving the government a substantial amount of interest expense. Savings are generated because the financing is amortized quicker, and less interest accrues over the term of the project financing. But note one important feature: the interest rate used for a monthly amortization is lower than that used for an annual amortization (mathematically known as the bond equivalent yield). However, even with the slightly increased interest rate, interest payments over the payment period are less than monthly payments. The net effect is that total interest payments decrease, depending on the term, by 8% to 14%.

In some cases, finance companies prefer that the annual payment be made on December 1 so they are assured that the agency will have received its annual appropriation. The two examples show approximate savings for different amounts and contract periods.

### Example 1

Finance term: 120 months (10 years)  
Project amount: \$10 million  
Monthly interest rate: 8%  
Monthly payment: \$121,327/month  
Annual interest rate: 8.3%  
Annual payment: \$1,394,758/year  
Total monthly payments: \$14,559,310  
Total annual payments: \$13,947,580  
Savings from annual payment: \$611,730  
Interest savings: 13.5%

### Example 2

Finance term: 240 months (20 years)  
Project amount: \$20 million  
Monthly interest rate: 8%  
Monthly payment: \$167,288/month  
Annual interest rate: 8.3%  
Annual payment: \$1,923,112/year  
Total monthly payments: \$40,149,122  
Total annual payments: \$38,462,252  
Savings from annual payment: \$1,686,870  
Interest savings: 8.3%

## Recommended Buy-Down/Buy-Out Prepayment Approaches

Most project contracts for energy services allow the government to prepay the financing obligation at any time during the term of the contract in accordance with a preestablished termination schedule. When underwriting a long-term debt obligation, an investor or lender is committing its assets to an investment that is expected to provide a fixed rate of return over the term of the contract. If the investment is prepaid, the investor or lender must take the prepayment proceeds and reinvest them in another financial instrument that will, hopefully, ensure the same rate of return, regardless of current market conditions.

Historically, the Federal finance marketplace has experienced few terminations for convenience or prepayments. Because of this, there should be little, if any, premium paid by the government for its right to prepay. However, to the extent that the government begins to consistently and systematically prepay, and particularly should prepayments be based on lower market interest rates, then it is likely that a premium of between 25 and 50 basis points would be charged for the prepayment right. The government can obviously reduce its costs associated with prepayments (such as the termination liability premium, interest rate premium, or make-whole penalties) by limiting prepayments to actual terminations for convenience.

### Minimizing Prepayment Costs

An alternative to paying a premium rate (thus having increased monthly payments over the entire term of the financing) provides a means of protecting against a possible prepayment shortfall. Customers and borrowers typically choose to use a formula that reflects the current interest rate at the time a prepayment is made. This ensures that prepayment is not paid for as an additional assessment to the monthly payment, but rather in the form of the actual cost at the time of the event. Thus, the government does not pay an increased interest rate for an option that may never be exercised.

The Federal finance marketplace has several other ways to minimize prepayment cost to the government. Some finance companies have substantially reduced the effective risk of prepayment, without charging the government an interest rate premium or the use of a make-whole formula by aggregating Federal transactions into portfolios. In this case, the number of projects financed spreads the potential of prepayment and the perceived financial risk over all projects. Another way that prepayments can be accepted without adding a premium or penalty is by allowing the finance company to reinvest the money for the benefit of the government and use the accrued interest and principal to shorten the term of the transaction.

Projects for single transactions that are not financed as part of a larger portfolio may indeed receive a lower interest rate if a make-whole formula is inserted into the contract. Some finance companies offer a lower financing rate if a make-whole clause is used, others do not. The make-whole premium will not compensate the government for the benefit enjoyed by the finance company should the prepaid funds be reinvested at a higher rate, but will cost the government money if rates have fallen. The make-whole clause may limit future flexibility because it does not allow refinancing if rates go down during the contract term. The formula, in contrast with a fixed amortization schedule, is designed to protect an investor should the government elect to prepay a finance obligation at a time when interest rates (treasuries or swap rates) are lower than when the financing was originally initiated. The formula offers investors or lenders protection for yield maintenance. At the same time, it allows the government to take advantage of a substantially lower interest rate. The impact of the make-whole provision should be evaluated in detail in order to decide on which prepayment strategy is the best.

## Recommended Prepayment Formula Clause

The following is a draft clause that could be considered a way to establish a mutually agreeable prepayment formula if that course of action is believed to be the best for the specific situation (if swap rate is used, the reference should replace that of Treasury bill).

*This task order provides that if the government prepays the task order at any time during the term, the government agrees to give the contractor thirty (30) days prior written notice and to pay a yield maintenance amount plus the un-amortized principal balance of the total funding amount plus accrued interest. The yield maintenance amount shall be equal to the difference, if positive, between (1) the net present value of the payments remaining to be paid through the term of the payment period, and (2) the un-amortized principal balance of the total funding amount. The calculation of the net present value shall assume that each remaining payment is made on the relevant payment due date and shall be discounted to the effective date of the prepayment at an interest rate equal to the sum of (i) the yield-to-maturity of a United States Treasury obligation having a term most closely approximating the average life of the un-amortized principal balance of the total funding amount, and (ii) one-half of one percent (1/2%). Such implied yield shall be determined, if necessary, by (a) converting U.S. Treasury bill quotations to bond-equivalent yields in accordance with accepted financial practice and (b) interpolating linearly between yields reported for various maturities.*

*In the event the government terminates or cancels the task order for any reason whatsoever after acceptance (including, without limitation, termination pursuant to the clause entitled “Termination for Convenience of the Government”), the Government agrees to pay the sum of (x) the yield maintenance amount calculated as described above and (y) the unamortized principal balance of the total funding amount plus accrued interest. The government acknowledges and agrees that the payment of such amounts are reasonable and allowable costs with respect to the task order.”*

## Competition between Franchised Utility Companies

There is no legal requirement to compete for utility incentive services provided by the “established source” utility company to a Federal facility in the utility’s franchised service territory. The Energy Policy Act of 1992 states that there should be no restriction on the Federal facilities directly availing themselves of the same service as any other customer. However, if there is more than one serving utility company offering utility energy services (for example, a gas company and an electric company), the Federal Acquisition Regulations and good fiscal management would require the government to evaluate each utility and select the one that provides the best value. This evaluation can be as simple as a discussion of the experience, expertise, and specific offer of each, to limit the administrative costs on both public and private sectors, or as rigorous as a formal competitive procurement process. The decision to compete and the level of competition are completely at the discretion of the Federal facility, based on the specific situation and unique constraints and opportunities. It is also strongly recommended that the utility company be required to competitively select the technical subcontractors to do the actual work and that the subcontracting plan comply with the Federal utility contract requirements (either General Services Administration [GSA] area-wide or other delegated authority contract).

## Water Conservation Best Practices

Federal sites across the country are incorporating water-efficiency measures as part of their overall comprehensive UESC projects. As it becomes more difficult to secure internal funding for efficiency



projects, working with your local utility can be a very effective way to implement a comprehensive program that incorporates water-efficiency measures.

## **Why Water Conservation?**

The rising cost of water and sewer services is one reason sites should include water-efficiency measures as part of their overall efficiency program. There's a reason that water has become a national priority. A recent government survey showed at least 36 states are anticipating local, regional, or statewide water shortages by 2013 (U.S. EPA). For the first time, water efficiency goals have been established through Executive Order 13423. Agencies are required to reduce water consumption intensity by 16 percent by the end of fiscal year 2015 based on 2007 consumption levels.

Water-efficiency technologies often have short payback periods of six years or less. Many water-conservation measures not only save water but save energy as well, used in both heating and pumping. Utilities and sites are discovering that incorporating water conservation as part of an energy program helps to buy down the overall cost of the project. In one case, a utility was able to include an additional 15% of mechanical work by implementing water-efficiency measures in comprehensive energy projects at Federal sites.

## **Water-Efficiency Improvement Best Management Practices**

FEMP developed "Water-Efficiency Improvement Best Management Practices" (BMPs) as part of the program established in Executive Order 13123. Although Executive Order 13123 has been superseded by Executive Order 13423, agencies are encouraged to continue striving to achieve the BMPs to reduce Federal water consumption.

Use these highly recommended BMPs as a guideline for incorporating water conservation in your comprehensive UESC projects:

- BMP # 1 - Public Information and Education Programs
- BMP # 2 - Distribution System Audits, Leak Detection, and Repair
- BMP # 3 - Water-Efficient Landscape
- BMP # 4 - Toilets and Urinals
- BMP # 5 - Faucets and Showerheads
- BMP # 6 - Boiler/Steam Systems
- BMP # 7 - Single-Pass Cooling Systems
- BMP # 8 - Cooling Tower Systems
- BMP # 9 - Miscellaneous High Water-Using Processes
- BMP #10 - Water Reuse and Recycling

These BMPs can be found on the FEMP Web site at [http://www1.eere.energy.gov/femp/water/water\\_fedrequire.html](http://www1.eere.energy.gov/femp/water/water_fedrequire.html)

## For More Information

FEMP Help Desk: 1-877-337-3463 (DOE-EERE Information Center)

FEMP Website: <http://www1.eere.energy.gov/femp/about/index.html>

UESC Website: <http://www1.eere.energy.gov/femp/financing/uescs.html>

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Available electronically at: [http://www1.eere.energy.gov/femp/pdfs/uescs\\_lessons\\_learned.pdf](http://www1.eere.energy.gov/femp/pdfs/uescs_lessons_learned.pdf)



U.S. Department of Energy  
**Energy Efficiency  
and Renewable Energy**  
Bringing you a prosperous future where energy  
is clean, abundant, reliable, and affordable

For More Information

EERE Information Center

1-877-EERE-INF or 1-877-337-3463

<http://www.eere.energy.gov>

## **Choosing a Financing Vehicle for Energy-Efficiency Projects for Federal Sites**

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*U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy  
Federal Energy Management Program*

This guidance is designed to help federal energy managers choose between financing vehicle options to implement energy and water efficiency projects. The full guidance document is available online at:

- [http://www1.eere.energy.gov/femp/docs/choosing\\_financing.doc](http://www1.eere.energy.gov/femp/docs/choosing_financing.doc)

## Definitions

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For the purposes of this order (Executive Order 13423):

Sec. 701. "Acquisition" means acquiring by contract supplies or services (including construction) by and for the use of the Federal Government through purchase or lease, whether the supplies or services are already in existence or must be created, developed, demonstrated, and evaluated. Acquisition begins at the point when agency needs are established and includes the description of requirements to satisfy agency needs, solicitation and selection of sources, award of contracts, contract financing, contract performance, contract administration, and those technical and management functions directly related to the process of fulfilling agency needs by contract.

Sec. 702. "Agency" means an Executive agency as defined in 5 U.S.C. 105. For the purpose of this order, military departments, as defined in 5 U.S.C. 102, are covered under the auspices of DOD.

Sec. 703. "Energy Savings Performance Contract" means a contract that provides for the performance of services for the design, acquisition, financing, installation, testing, operation, and where appropriate, maintenance and repair, of an identified energy or water conservation measure or series of measures at one or more locations. Such contracts shall provide that the contractor must incur costs of implementing energy savings measures, including at least the cost (if any) incurred in making energy audits, acquiring and installing equipment, and training personnel in exchange for a predetermined share of the value of the energy savings directly resulting from implementation of such measures during the term of the contract. Payment to the contractor is contingent upon realizing a guaranteed stream of future energy and cost savings. All additional savings will accrue to the Federal Government.

Sec. 704. "Exempt facility" or "Exempt mobile equipment" means a facility or a piece of mobile equipment for which an agency uses DOE-established criteria to determine that compliance with the Energy Policy Act of 1992 or this order is not practical.

Sec. 705. "Facility" means any individual building or collection of buildings, grounds, or structure, as well as any fixture or part thereof, including the associated energy- or water-

consuming support systems, which is constructed, renovated, or purchased in whole or in part for use by the Federal Government. It includes leased facilities where the Federal Government has a purchase option or facilities planned for purchase. In any provision of this order, the term "facility" also includes any building 100 percent leased for use by the Federal Government where the Federal Government pays directly or indirectly for the utility costs associated with its leased space. The term also includes Government-owned contractor-operated facilities.

Sec. 706. "Industrial facility" means any fixed equipment, building, or complex for production, manufacturing, or other processes that uses large amounts of capital equipment in connection with, or as part of, any process or system, and within which the majority of energy use is not devoted to the heating, cooling, lighting, ventilation, or to service the water heating energy load requirements of the facility.

Sec. 707. "Life-cycle costs" means the sum of the present values of investment costs, capital costs, installation costs, energy costs, operating costs, maintenance costs, and disposal costs, over the lifetime of the project, product, or measure. Additional guidance on measuring life-cycle costs is specified in 10 C.F.R. 436.19.

Sec. 708. "Life-cycle cost-effective" means the life-cycle costs of a product, project, or measure are estimated to be equal to or less than the base case (i.e., current or standard practice or product). Additional guidance on measuring cost-effectiveness is specified in 10 C.F.R. 436.18 (a), (b), and (c), 436.20, and 436.21.

Sec. 709. "Mobile equipment" means all Federally owned ships, aircraft, and nonroad vehicles.

Sec. 710. "Renewable energy" means energy produced by solar, wind, geothermal, and biomass power.

Sec. 711. "Renewable energy technology" means technologies that use renewable energy to provide light, heat, cooling, or mechanical or electrical energy for use in facilities or other activities. The term also means the use of integrated whole-building designs that rely upon renewable energy resources, including passive solar design.

Sec. 712. "Source energy" means the energy that is used at a site and consumed in producing and in delivering energy to a site, including, but not limited to, power generation, transmission, and distribution losses, and that is used to perform a specific function, such as space conditioning, lighting or water heating.

Sec. 713. "Utility" means public agencies and privately owned companies that market, generate, and/or distribute energy or water, including electricity, natural gas, manufactured gas, steam, hot water, and chilled water as commodities for public use and that provide the service under Federal, State, or local regulated authority to all authorized customers. Utilities include Federally owned nonprofit producers, municipal organizations, and investor or privately owned producers regulated by a State and/or the Federal Government; cooperatives

owned by members and providing services mostly to their members; and other nonprofit State and local government agencies serving in this capacity.

Sec. 714. "Utility energy-efficiency service" means demand-side management services provided by a utility to improve the efficiency of use of the commodity (electricity, gas, etc.) being distributed. Services can include, but are not limited to, energy efficiency and renewable energy project auditing, financing, design, installation, operation, maintenance, and monitoring.

## Links to Other Resource

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### UESC Case Studies

Case studies about the successful use of Utility Energy Service Contracts (UESCs) by federal agencies.

- [http://www1.eere.energy.gov/femp/financing/uesc\\_case\\_studies.html](http://www1.eere.energy.gov/femp/financing/uesc_case_studies.html)

### Life-Cycle Cost Analysis

To help facility managers make sound decisions, FEMP provides software, training, publications, and guidance on how to apply life-cycle cost analysis reporting to evaluate the cost-effectiveness of energy and water investments. The resource helps federal agencies determine whether projects are a wise investment.

- <http://www1.eere.energy.gov/femp/program/lifecycle.html>

### Measurement and Verification

While implementing measurement and verification (M&V) strategies in energy performance contracts is not required in UESCs as it is in the Super ESPCs, it is recommended that some level of M&V be included in these contracts. The contractor verifies that energy cost savings have been achieved. The challenge of M&V is to balance M&V costs with the value of increased certainty in the cost savings from the conservation measure.

- [http://www1.eere.energy.gov/femp/pdfs/mv\\_guidelines.pdf](http://www1.eere.energy.gov/femp/pdfs/mv_guidelines.pdf)

## **Metering Guidance**

The focus of this guide is to provide the federal energy managers with information and actions aimed at understanding metering and working to achieve potential energy savings and benefits.

- <http://www1.eere.energy.gov/femp/pdfs/mbpg.pdf>

## **Commissioning Guide**

The goals of commissioning are to provide a safe and healthy facility; improve energy performance and minimize energy consumption; reduce operating costs; ensure adequate operation and maintenance staff training; and improve systems documentation This guidebook demonstrates how different types of commissioning, such as retrocommissioning and continuous commissioning, can be incorporated into a variety of building types and applications:

- [http://www1.eere.energy.gov/femp/pdfs/commissioning\\_fed\\_facilities.pdf](http://www1.eere.energy.gov/femp/pdfs/commissioning_fed_facilities.pdf)

## **Operation and Maintenance Best Practices**

Effective operation and maintenance (O&M) is one of the most cost-effective methods for ensuring reliability, safety, and energy efficiency. This guide highlights O&M practices that save an estimated 5% to 20% on energy bills without a significant capital investment.

- [http://www1.eere.energy.gov/femp/operations\\_maintenance/om\\_bpguide.html](http://www1.eere.energy.gov/femp/operations_maintenance/om_bpguide.html)

## **Renewable Energy Guidance**

FEMP released these guidelines to help federal agencies meet energy management and renewable energy requirements for complying with the Energy Policy Act (EPA) of 2005 and Executive Order 13423.

- [http://www1.eere.energy.gov/femp/pdfs/epact05\\_fedrenewenergyguid.pdf](http://www1.eere.energy.gov/femp/pdfs/epact05_fedrenewenergyguid.pdf)

## **Navy Marine Corps Energy Project Execution Guide**

This guide contains the standardized NAVFAC procedures, recommendations, and guidelines for developing and implementing energy and water conservation projects.

- [https://navyenergy.navy.mil/publications/POLICY\\_GUIDANCE/Projects/energy\\_projects\\_execution\\_guide/Projects%20Execution%20Guide%20-%20DRAFT%2011-07.pdf](https://navyenergy.navy.mil/publications/POLICY_GUIDANCE/Projects/energy_projects_execution_guide/Projects%20Execution%20Guide%20-%20DRAFT%2011-07.pdf)



# Contacts

## U.S. Department of Energy Contacts

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A full list of current contacts is available online at:

- [http://www1.eere.energy.gov/femp/financing/uescs\\_contacts.html](http://www1.eere.energy.gov/femp/financing/uescs_contacts.html)

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The federal agency UESC contacts listed below represent individuals who have made significant contributions to the success of UESC programs nationwide. They have also availed themselves to serve in FEMP's Virtual Center of UESC Expertise to help others striving to implement UESC projects.

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# DRAFT



U.S. Department of Energy

## Energy Efficiency and Renewable Energy

Bringing you a prosperous future where energy  
is clean, abundant, reliable, and affordable

Produced for the  
**U.S. Department of Energy**  
by the **National Renewable Energy Laboratory**  
a DOE national laboratory.

DOE/GO-102008-2588  
November 2008

### 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.

#### For More Information:

EERE Information Center  
1-877-EERE-INF or 1-877-337-3463  
[www.eere.energy.gov/femp/](http://www.eere.energy.gov/femp/)