



# Arkansas Energy Performance Contracting Program Policies and Procedures

**2014**



900 West Capitol Avenue  
Little Rock, Arkansas 72113  
501-682-6103  
[www.arkansasenergy.com](http://www.arkansasenergy.com)

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### **Appendix A: Energy Performance Contract Form**

## INTRODUCTION

In 2013, the 89th General Assembly of the State of Arkansas amended the Guaranteed Energy Cost Savings Act, A.C.A. § 19-11-1201, with Act 554. Act 554 requires the Arkansas Economic Development Commission-Energy Office (AEO) to establish rules that set the standards and govern the process in which state agencies engage Energy Service Companies (ESCOs) who pursue guaranteed energy cost savings contracts, also known as energy performance contracts (EPCs).

As specified in Act 554, the AEO is responsible for:

- Administration of this subchapter (19-11-1207).
- Certifying companies that meet the required qualifications to provide these services to the State.
- Developing a standard Energy Performance Contract for use by State Agencies when contracting with qualified companies to perform the work and services.
- Determining the standards for the measurement and verification of energy cost savings measures; including the adoption of the IPMVP, as it existed on a certain date.
- The Arkansas Energy Office may establish and collect a reasonable fee to cover the costs of administering this subchapter.

## ARKANSAS ENERGY PERFORMANCE CONTRACTING PROGRAM

The Arkansas Energy Office (AEO) has developed the **Arkansas Energy Performance Contracting (AEPC) Program** to meet the intent of the law, as amended. The intent of the AEPC program is to provide an effective, efficient, and user-friendly process for Arkansas State Agencies to utilize energy performance contracting as a means to improve the energy and operational efficiency of state owned and operated facilities without the need for upfront capital.

## DEFINITIONS

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| <p><b>(AEO)<br/>Arkansas Economic<br/>Development Commission<br/>- Energy Office</b></p> | <p>A division of the Arkansas Economic Development Commission and administrator of the Arkansas Energy Performance Contracting Program.</p>  |
| <p><b>ABA<br/>Arkansas Building<br/>Authority</b></p>                                    | <p>Arkansas Building Authority (ABA) has the responsibility for the review of design plans, bidding and awarding of capital improvement contracts for state agencies and some higher education institutions, as well as accessibility review of new construction for K-12 schools. ABA is the leasing agency for state agency, boards and commissions and reviews several state agency transfers of properties. ABA owns several facilities located in Pulaski and Sebastian counties.</p> |
| <p><b>Office of State<br/>Procurement (OSP)</b></p>                                      | <p>A division of the Arkansas Department of Finance and Administration has the primary responsibility and oversight for the state wide procurement of commodities, technical and professional services for all agencies, boards and commissions and colleges and universities.</p>   |
| <p><b>Agency</b></p>   | <p>Means any agency, institution, authority, department, board, commission, bureau, council, or other agency of the state supported by appropriation of state or federal funds, except an exempt agency pursuant to subdivision (13) of ACA 19-11-203. This includes institutions of higher education. "Agency" includes an exempt agency when any agency or exempt agency procures any item subject to Arkansas Constitution, Amendment 54.</p>   |
| <p><b>AEPC<br/>Arkansas Energy<br/>Performance Contracting<br/>Program</b></p>           | <p>The rules that set the standards and govern the process in which state agencies engage AEO and Energy Service Companies (ESCOs) who pursue guaranteed energy cost savings contracts, also known as energy performance contracts (EPCs).</p>   |

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| <p><b>ECM</b><br/><b>Energy Cost Savings Measure</b></p>                                | <ol style="list-style-type: none"> <li>1. A new facility that is designed to reduce the consumption of energy or natural resources or operating costs as a result of changes that; <ol style="list-style-type: none"> <li>a) Do not degrade the level of service or working conditions</li> <li>b) Are measurable and verifiable under the International Performance and Verification Protocol, as adopted by the Arkansas Energy Office in the rules required under 19-11-1207; and</li> <li>c) Are measured and verified by an audit performed by a qualified provider.</li> </ol> </li> <br/> <li>2. An existing facility alteration that is designed to reduce the consumption of energy or natural resources or operating costs as a result of changes that conform with subdivision 1(A)(i)(a) and (b) of 19-11-1202.</li> </ol>  |
| <p><b>RFQ</b><br/><b>Request for Qualifications</b></p>                                 | <p>The process by which the AEO shall solicit statements of qualifications from firms interested in being pre-qualified and certified by the AEO to provide energy performance contracting services to Arkansas State Agencies.</p>   |
| <p><b>Qualified Provider (herein referred to as ESCO - Energy Services Company)</b></p> | <p>As pre-qualified and certified by the AEO; meeting the requirements set forth in Act 554 and the AEPC program guidelines.</p> <p>Defined in Act 554 as: A person or business, including all subcontractors and employees of that person or business and third party financing company that:</p> <ul style="list-style-type: none"> <li>Is properly licensed in the State of Arkansas;</li> <li>Has been reviewed and certified by the Arkansas Energy Office as a qualified provider (ESCO) under this subchapter;</li> <li>Is experienced in the design, implementation, measurement, verification, and installation of energy cost savings measures;</li> <li>Has at least 5 years of experience in the analysis, design, implementation, installation, measurement, and verification of energy efficiency and facility improvements; and</li> <li>Has the ability to arrange or provide the necessary financing to support a guaranteed energy cost savings contract; and</li> <li>Has the ability to perform under a contract that requires the person or business to guarantee the work performed by one (1) or more subcontractors.</li> </ul> |
| <p><b>EPC</b><br/><b>Energy Performance Contract</b></p>                                | <p>Also known as Guaranteed Energy Cost Savings Contract. A contract for the implementation of one (1) or more energy cost savings measures and services provided by a qualified provider in which the energy and cost savings achieved by the installed energy project cover all project costs, including financing, over a specified contract term.</p> <p>Key Provisions EPC for Arkansas State Agencies (Act 554):<br/>Before entering into an EPC, the Agency shall require the ESCO to file with the Agency a payment and performance bond, or similar assurance as provided</p>  |

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|  | <p>under 19-11-235.</p> <p>A guarantee by the ESCO that the energy cost savings and operational cost savings to be realized over the term of the EPC meet or exceed the costs of the project.</p> <p>A guarantee from the ESCO that if the annual energy or operational cost savings fail to meet or exceed the annual costs of the energy cost savings measures as required by the EPC, the ESCO shall reimburse the Agency for any shortfall of guaranteed savings over the contract term of the EPC.</p> <p>A statement that the Agency shall maintain and operate the energy cost savings measures as defined in the EPC.</p> |
| <b>SOQ<br/>Statement of<br/>Qualifications</b>   | To be provided by an ESCO in response to the AEO's RFQ for companies interested in pre-qualifying and certification by AEO to provide EPC services for Arkansas State Agencies.   |
| <b>Short-List</b>  | The process by which the Agency shall choose no less than three (3) AEO-certified ESCOs for an oral interview for EPC services for the Agency prior to making a formal ESCO selection.  |
| <b>Secondary Selection<br/>Process</b>   | The process by which the Agency shall conduct oral interviews, evaluate, and select an ESCO from the Short-List.  |
| <b>IGA and Project<br/>Development Contract</b>  | A contract between the selected ESCO and the Agency for the audit, analysis, and development of a package of ECMs for the Agency to consider implementing under an EPC with the ESCO.   |
| <b>IGA<br/>Investment Grade Audit<br/>or Energy Audit (also<br/>known as an "energy<br/>audit" )</b> | The process by which an ESCO evaluates, analyzes, develops and recommends various ECMs for an Agency's facilities. The IGA provides the financial and technical basis for an EPC between the Agency and the ESCO.   |
| <b>M&amp;V<br/>Measurement and<br/>Verification</b>  | The methodology and mathematical calculations used to determine pre-ECM/Project baseline energy consumption and post-ECM/Project installation energy consumption of an ECM; partial and/or whole facility energy conservation project.  |

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| <p><b>IPMVP<br/>International Performance<br/>Measurement and<br/>Verification Protocol</b></p> | <p>The Energy Efficiency industry’s standard guidelines for the periodic measurement and verification (M&amp;V) of energy savings resulting from the installation of energy conservation measures.</p>  |
| <p><b>EPC Contract Term</b></p>   | <p>An EPC contract may not exceed 20 years from the completion date of the installed project.</p>   |
| <p><b>Debt Service</b></p>  | <p>The financing instrument(s), (i.e. bond, lease-purchase, capital lease, state revolving loan fund, or combination thereof, etc.) that is used to finance the costs associated with the development and installation of the energy efficiency project through the use of an EPC. State legislation allows up to a 20 year finance period.</p> |
| <p><b>O&amp;M Appropriations</b></p>  | <p>Agency may utilize operations and maintenance appropriations for the payment (debt service) of equipment and energy cost savings measures required by an EPC.</p>  |

## **ARKANSAS ENERGY PERFORMANCE CONTRACTING PROGRAM**

### **Program Rules & Guidelines**

The AEPC Program includes:

- AEPC Rules
- AEPC Program Documents: This includes, but is not limited to the ESCO RFQ, Invitation to Interview, and standard EPC contracts, etc.
- AEPC List of Pre-Qualified Companies
- AEPC Manual: This document will establish the standards, guidelines and processes for State Agencies and ESCOs to follow. It will make it easy for state agencies and ESCOs to navigate the program.

These documents will be posted on the AEO website. Program materials will be updated periodically, as needed or as required. All forms and documents shall clearly identify the current version.

### **AEO Oversight & Administration**

The AEO will oversee the AEPC Program and its administration. The AEO will ensure a fair and successful program for Arkansas State Agencies and Energy Services Companies.

The AEO's responsibilities include:

- Developing the Rules, Guidelines, Standard Contracts and other Program Documents for the AEPC; updating the program as needed or as required.
- Coordinating with the Arkansas Office of State Procurement, the Arkansas Building Authority and other State Agencies, as required.
- Providing assistance to the Agency and the ESCO throughout the project for education, assistance, and quality control.
- Ensuring adherence to AEPC Program Rules by the Energy Services Companies and State Agencies.



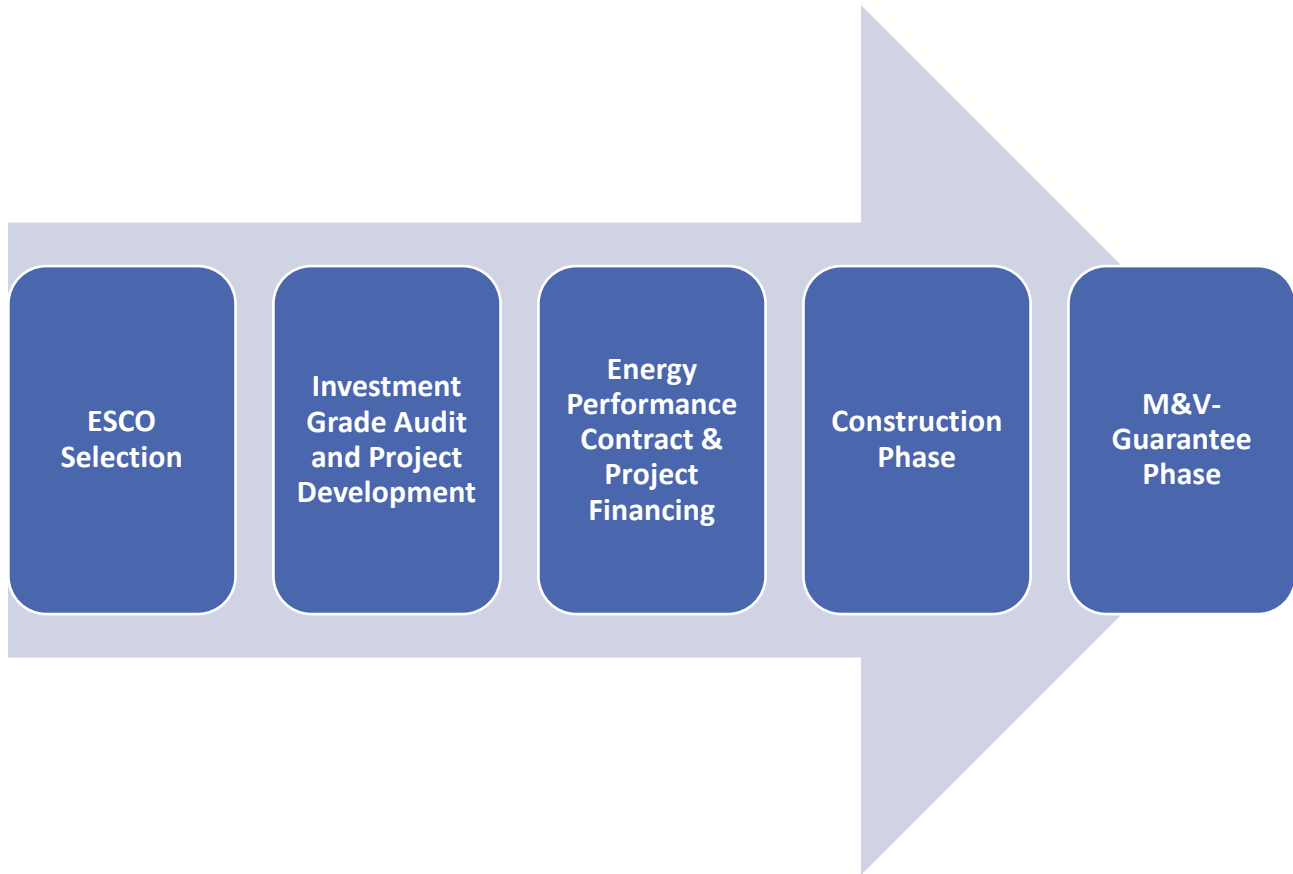
# ARKANSAS ENERGY PERFORMANCE CONTRACTING PROGRAM PROCESS

## AEPC Program Overview – Milestones

AEO has developed the AEPC to provide the framework for Agencies to successfully complete comprehensive upgrades using EPC. The program includes Program Rules and standard documents and maintains a list of Pre-Qualified ESCOs.

Figure 1 presents an overview of the steps in an EPC project, which are described in more detail in the following sections. This occurs after an initial list of approved ESCOs has been determined by AEO.

**Figure 1.** The Steps in an AEPC Project



## AEO - ESCO Qualification & Certification Process

Under Act 554, the AEO is responsible for reviewing and certifying ESCOs to provide EPC services for State Agencies.

The following is an overview of the process that AEO will use for qualifying and selecting a pool of ESCOs to provide these services to State Agencies in the AEPC. AEO will re-qualify providers at a minimum of every five (5) years from date of the initial RFQ is issued.

**Figure 2 – ESCO – Pre-Qualification & Certification Process**



### Annual ESCO Review Process

AEPC Pre-Qualified ESCOs shall be reviewed annually by the AEO for compliance with the AEPC Program Rules, as well as adherence to ABA’s policies and procedures as they relate to State EPC work. Any ESCOs failure to comply with the AEPC Program Rules, including the procedures and use of standard AEPC contract documents, may result in removing the ESCO from the AEPC Pre-Qualified ESCO List.

### Associated AEPC Program Documents:

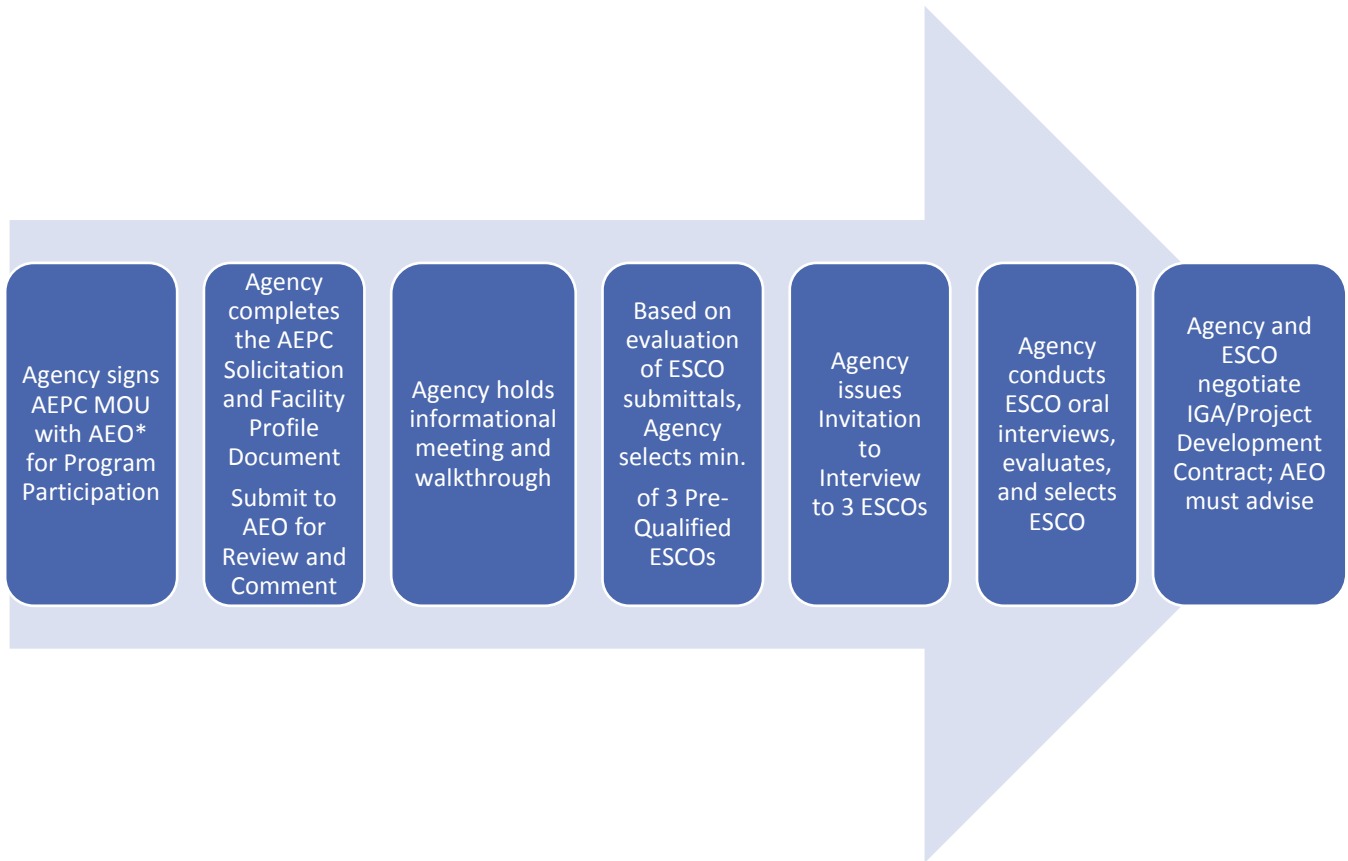
- AEO – AEPC Request for Pre-Qualifications (RFQ)
- AEPC ESCO Acceptance Letter

## Secondary Selection Process: How an Agency Selects a Pre-Qualified ESCO

### Solicitation by Agency for an ESCO

The AEO will post the pool of Pre-Qualified ESCOs and their Statements of Qualifications (SOQs) to the AEO website and will be made available to state agencies by other means, if necessary. Before making a final ESCO selection, State Agencies shall review ESCO's qualifications and shortlist a minimum of three (3) Pre-Qualified ESCOs from the AEPC Pre-Qualified ESCO list. The Agency shall interview the Short-Listed ESCOs and make a final ESCO selection.

**Figure 3** – Overview of Agency's Secondary Selection Process for ESCO Services.



\* AEO forwards applicable MOUs to ABA to provide notice to ABA of future plans and specification submittals. Agencies under ABA's capital improvement oversight shall submit all plans and specifications for review.

### Associated AEPC Standard Program Documents:

AEPC – Memorandum of Understanding (MOU) - Agency and AEO

AEPC – Facility Profile Document

AEPC – Invitation to Interview - Agency to Short-Listed Pre-Qualified ESCOs

## **Investment Grade Audit and Project Development Contract (IGA)**

The IGA Contract is an agreement between the selected ESCO and the Agency for the evaluation, identification, analysis; and recommendation of energy and operational efficiency measures that the Agency may consider for installation under an EPC with the ESCO. The Agency will consider the technical and the financial aspects of the ECM, and/or a compendium of various ECMs.

### **Key Elements:**

- The Agency and the ESCO must use the most current AEPC IGA and Project Development Contract document.
- The Agency and the ESCO agree on project scope; including buildings to be audited, total square footage, audit fee and timeline.
- The AEPC IGA and Project Development Contract will include negotiated pricing using AEPC's predefined \$/sq foot and other relevant project-specific variables. The ESCO and Agency must use the most current AEPC IGA contract.
- The IGA must be submitted to the AEO for review and review prior to the Agency executing the IGA and Project Development Contract with the ESCO.
- The IGA must be executed by an employee of the Agency with the authority to contractually bind the Agency and by an employee of the ESCO with the authority to contractually bind the ESCO.
- The pre-defined cost of the IGA and Project Development may be incorporated into the final EPC project cost. This cost must be listed as a separate line item in the ESCOs project cost summary. This cost is eligible to be paid through the EPC project financing should the Agency move forward with an EPC Contract with the ESCO.
- If an agency chooses not to execute an EPC, the IGA fee is due and payable to the ESCO within 120 days of delivering the IGA report to the Agency. The ESCO must have met the financial and technical criteria established and detailed in the IGA and Project Development Contract to be paid.

### **Associated AEPC Program Documents:**

AEPC – Investment Grade Audit (IGA) and Project Development Contract

## Energy Performance Contract (EPC)

The Energy Performance Contract (EPC) is the contract between the Agency and the ESCO for the implementation of the work related to the ECMs that will be installed at the Agency's facilities. The EPC also details the M&V plan and services, and the ESCO's guarantee of savings. The Agency and the ESCO negotiate final scope and final pricing of the project and services to be included under the EPC.

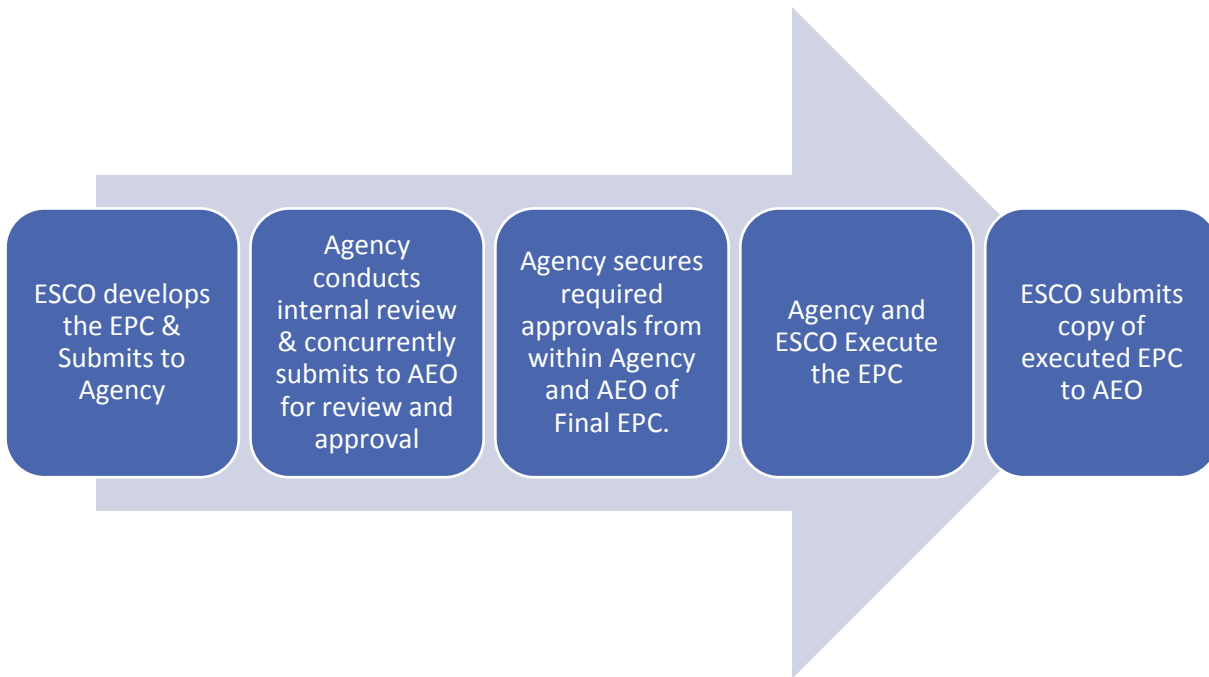
### Key Elements of the standard AEPC Energy Performance Contract

The ESCO and the Agency must use the most current AEPC Energy Performance Contract when developing an EPC. The standard AEPC Contract includes, but is not limited to, detailed provisions of the following:

- The names and addresses of the parties to the EPC (Agency and ESCO).
- Clearly defined, in detail, the final energy conservation measures that will be installed in the Agency's facilities.
- The contract price.
- The amount of guaranteed savings (in energy and dollars) over the total term.
- The total term of the contract (stated in years or months).
- Baseline calculations of the ECMs, including all relevant variables used in the baseline calculations.
- Detailed Measurement and Verification Plan adhering to the IPMVP guidelines; the frequency and method the ESCO shall use for reporting the savings to the Agency.
- The responsibilities of the Agency and the ESCO under the EPC.
- The annual price to be paid to the ESCO for the Measurement and Verification of the ECMs each year over the contract term.
- Payment terms for the construction period, M&V services, and any other project support services provided to the Agency by the ESCO under the EPC.
- As Exhibits: The final IGA Report; the IGA and Project Development Contract.
- Standard terms and conditions.
- The EPC must be executed by an employee of the ESCO with the authority to contractually bind the ESCO; the EPC must be executed by an employee of the Agency with the authority to contractually bind the Agency.
- Per Act 554, the AEO may collect a reasonable fee for administration of the AEPC Program. This amount will be paid directly by the ESCO. This pre-determined cost will be determined by AEO and outlined in appropriate documents such as the RFQ and Program Manual. This fee is a cost to the project and is eligible to be financed as part of the total project costs. The ESCO will provide the fee to the AEO within 30 days of receipt of the ESCO's initial or mobilization fee from the Agency.

Figure 4, below, illustrates the steps associated with the required activities to develop, review, and advise the Agency on the EPC with the ESCO.

**Figure 4 - EPC Contract – Review Process**



**ACT 554 – Required provision of the Energy Performance Contract:**

- A statement that the Agency shall maintain and operate the energy cost savings measures as defined in the EPC (guaranteed cost savings contract).
- Energy and operational cost savings to be realized over the term of the contract meet or exceed the costs of the energy cost savings measures.
- If annual energy or operational cost savings fail to meet or exceed the annual costs of the EPC, the ESCO shall reimburse the Agency for any shortfall of guaranteed energy cost savings over the term of the guaranteed energy cost savings contract.
- The maximum term of an EPC is 20 years after the implementation of the energy cost savings measures.
- A performance and payment bond, or similar assurance (under 19-11-235) must be provided by the ESCO prior to an Agency entering into an EPC with an ESCO.
- AEO may collect a reasonable fee for services provided.

**Associated AEPC Documents:**

AEPC - Energy Performance Contract (EPC) – Standard Document for use by Arkansas State Agencies.

## Project Financing

Financing for the Energy Performance Contracting project – both type and the company -- are to be evaluated and selected during the Investment Grade Audit and Project Development Phase. The ESCO, Agency and Finance company work in concert to ensure that the annual savings derived from the project will be sufficient to cover the annual debt service.

An Energy Performance Contract between Agency and an ESCO primarily consists of two parts:

- Project Development and Installation – Construction Phase
- Measurement & Verification – Guarantee Phase

The project costs of the construction phase contract services are generally financed through a 3<sup>rd</sup> party financial institution. The support services provided after the construction phase for the Measurement and Verification and the Guarantee of project savings by the ESCO to the Agency are an annual service cost, and are not financed.

### **Act 554 – Required provision for the financing of an EPC:**

- Debt service on equipment or measures required by a guaranteed energy cost savings contract executed under the Guaranteed Energy Cost Savings Act.
- Energy and cost savings achieved by the installed energy project cover all project costs, including financing.
- Third-Party financing companies must be properly licensed in the State of Arkansas.
- Agency may utilize maintenance and operations appropriations for the payment of equipment and energy cost savings measures required by a guaranteed energy cost savings contract.

The process to approve the project financing will be concurrent with the review process for the EPC (Figure 4).

## Project Installation

Project Installation is the period that begins after the Energy Performance Contract is executed. It includes mobilization, final engineering, and design of the ECMs including final energy modeling, equipment specifications and procurement, and subcontractor qualification and procurement; installation of the equipment, performance of services, including commissioning of new equipment, for a complete installation of the ECMs included in the scope of work to be performed under the Energy Performance Contract.

### PRE-INSTALLATION REQUIREMENTS

- ESCO obtains approval from ABA for final design of ECMs, if required.
- ESCO obtains Notice to Proceed from Agency, if required.
- ESCO provides Performance and Payment Bond, as per state procurement law.
- ESCO provides Certificate of Insurance to Agency, at levels and amounts required by the Agency.

### POST-INSTALLATION REQUIREMENTS

Agency requests post-construction review from AEO-

**\*Note:** Agency must have AEO = review and approval prior to accepting project completion from the ESCO.

Agency Signs Certificate of Completion (COC)

**Note:** Specific individual ECMs and or Single Facilities may be completed, reviewed, and accepted as partial project completion during the total project installation term.

- Copies of COCs must be submitted by Agency to AEO.
- Applications for payment may be made according to the terms in the ECP between the Agency and the ESCO.
- Upon substantial completion, Agency and ESCO develop the project punch-list. ESCO will be paid EPC contract retainage upon punch list completion and 100% acceptance by the Agency.
- ESCO submits project construction close out documents to the Agency; Agency submits a copy to AEO.
- Upon completion, ESCO shall develop and provide a Post-Installation Report (PIR) which describes and reports all changes in the scope of work, costs, and savings, relative to those in the EPC contract. The PIR may include non-guaranteed estimated construction period savings, if any.

### Associated AEPC Documents

AEPC - EPC executed between the Agency and the ESCO



## Measurement and Verification

Measurement and verification is the periodic monitoring and measurement of the project performance. The M&V plan is project/ECM specific and will follow the guidelines of the International Performance Measurement and Verification Protocol (IPMVP). The IPMVP is continuously evolving. The M&V plan shall follow the guidelines of the most current version of the IPMVP in place at the time of the execution of an Investment Grade Audit contract. The AEO will establish a standard M&V reporting format to ensure appropriate M&V information is provided.

### Key Elements of the M&V Plan for the EPC:

- ESCO shall provide annual M&V reports as required by state statute and the EPC M&V plan.
- A detailed M&V Plan, including the IPMVP option or options used
- The baseline calculations and relevant variables used in the baseline calculations and the method for adjusting the baseline are to be included in the EPC
- The M&V plan will clearly establish the responsibilities of the ESCO, including, but not limited to: frequency and method of reporting, and annual savings reconciliation.
- The M&V Plan will define the responsibilities of the ESCO and the Agency during the M&V-Guarantee Phase.
- ESCOs will provide required periodic M&V reports following recommended reporting guidelines.

### Associated AEPC Documents

AEPC – EPC – Executed between the Agency and the ESCO  
Periodic M&V Reports following recommended reporting guidelines.

# Arkansas Energy Performance Contract Program Energy Performance Contract Form

Version 1  
2014



900 West Capitol Avenue  
Little Rock, Arkansas 72113  
501-682-6103  
[www.arkansasenergy.com](http://www.arkansasenergy.com)

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## ENERGY PERFORMANCE CONTRACT

This Energy Performance Contract (the "Contract") is made and entered into as of this [Day of Month day of Month, Year], by and between [Formal Name of Agency such as "City of..." "County of..." etc.], (" Agency") and [Contractor name ]("Contractor"), [Contractor Address], a [State of Contractor Headquarters] corporation doing business in Arkansas (the "State").

Editing Note: Search and replace on "Agency" to change to abbreviated Agency name.

### WITNESSETH:

**WHEREAS**, Agency is authorized to enter into this Contract as provided for in A.C.A. § 19-11-120 for the purpose of the sale and installation of certain energy and water saving equipment, and provision of other services designed to save energy and reduce related costs as per the guarantee described herein for certain property and buildings owned by the Agency; and

**WHEREAS**, authority exists in the Arkansas law and sufficient funds have been budgeted, appropriated and otherwise made available and a sufficient unencumbered balance thereof remains available for encumbering and subsequent payment of this Contract; and

**WHEREAS**, Agency has been authorized to enter into a lease-purchase agreement for all professional services, construction/improvements, Project contingencies, reimbursable expenses and miscellaneous expenses for the purchase and installation of energy and water conservation measures, collectively referred to as the Work(as herein after defined); and

**WHEREAS**, required approval, clearance, and coordination has been accomplished from and with appropriate agencies; and

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

**WHEREAS**, Contractor was selected after a determination that it was the most advantageous to Agency for the Project pursuant to Agency's selection process; and

**WHEREAS**, Contractor has made an assessment of the utility consumption characteristics of facilities, which was delivered to Agency as an Investment Grade Audit which Agency has approved and elected to implement the ECM set forth in Schedule A.

**WHEREAS**, Agency owns and operates the Premises (as hereinafter defined); and

**WHEREAS**, Agency desires to retain Contractor to sell to it, install and service certain energy efficiency equipment of the type or class described herein and to provide other services for the purpose of achieving utility cost reductions within Premises; and

**WHEREAS**, Contractor has selected the Equipment (as hereinafter defined) on the basis of competitive quality, compliance with Contractor's specifications, and price; and

**WHEREAS**, Agency may utilize maintenance and operations appropriations for the payment and energy cost savings measures required to enter into a guaranteed energy cost savings contract as stated in A.C.A. § 19-11-1208; and

**WHEREAS**, AEO may establish and collect a reasonable fee to cover the costs of administering the AEPC Program (Arkansas Code 19-11-1207.2),

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



## **ARTICLE 1: DEFINITIONS, SCHEDULES, EXHIBITS AND APPENDICES**

### **Section 1.1. Definitions.**

Certificate of Acceptance:

The certificate substantially in the form provided in **Exhibit III(i) – Notice of Acceptance**.

Contract:

This Energy Performance Contract and all Schedules, Exhibits, and Appendices attached hereto.

Contract Sum:

The sum of all materials, labor, auditing, design, engineering, Project construction management fees, overhead, profit, contingency, outside services, and bidding and construction contingencies related to the Project.

Savings:

Energy cost savings and operation and maintenance cost savings as allowed by A.C.A. § 19-11-1208 The Guaranteed Energy Cost Savings Act as revised by Act 554 dated 7/15/2013. The savings as provided in **Schedule C** and in accordance with the Savings Calculation Formula set forth in **Schedule E**.

Equipment:

The goods enumerated on **Schedule A** that is now or hereafter from time to time become attached hereto and incorporated herein by reference, together and with any and all additions, modifications, attachments, replacements and parts thereof.

Event of Default:

Those events described in **Section 17.1** and **Section 17.2** hereof .

Guarantee:

The savings achieved as a result of the installation and operation of the Equipment and provision of services provided for in this Contract as specified in **Schedule D** and in accordance with the Savings Calculation Formula as set forth in **Schedule E**.

Interim Period:

The period from contract execution until the Performance Commencement Date.

Maximum Contract Price:

The maximum amount of total allowable costs under this Contract, as set forth in **Section 2.1**, which shall be the total amount paid by the Agency, or Third-Party Lessor on behalf of the Agency, to Contractor.

**Measurement and Verification (M&V):**

The standards and definitions in the most current version of the International Performance Measurement and Verification Protocol (IPMVP) or if not applicable to a specific measure, the latest version of measurement and verification process of the Federal Energy Management Program (FEMP).

**M&V Services:**

Services relating to the measurement and verification by Contractor of the efficiency and effectiveness of the Project, pursuant to this Contract and the most current IPMVP or FEMP document.

**M&V Fee:**

The annual fee according to **Schedule D** for M&V Services.

**AEO Administration Fee:**

The fee paid to AEO for administration of the AEPC Program, as authorized per Act 554, according to **Schedule Q**.

**Performance Commencement Date:**

The date described in Section 4.2.

**Performance Term:**

The timeframe as defined in Section 4.3.

**Premises:**

The certain properties set forth in the Scope of Work as was identified in the IGA.

**Professional Services:**

Architecture, engineering, Project/construction management related to the Contract.

**Project:**

Contractor's design, acquisition, construction, and installation of the ECMs, and all Equipment and Services related thereto, as set forth in **Schedule A** and the Contract Documents, but does not include M&V Services.

**Project Acceptance**

The stage in the progress of the Project where the Project is sufficiently complete in accordance with this Contract that the Agency can utilize and take beneficial use of the Project for its intended use or purpose. Final Acceptance of the Project does not occur until after a Notice of Final Acceptance, Exhibit III (iii), is fully executed, in accordance with Section 4.2.

**Substantial Completion**

The stage in the progress of the Project where an ECM is sufficiently complete in accordance with this Contract. Substantial Completion does not occur until after a Notice of Substantial Completion, Exhibit III (ii), is fully executed, in accordance with Section 4.2.

## Investment Grade Audit (IGA)

A detailed energy audit of the Premises, conducted by Contractor or another party pursuant to the IGA Contract.

### Work:

Collectively, the Equipment installed and/or upgraded, Professional Services and Project construction related to the Project.

## **ARTICLE 2: PAYMENTS**

### **Section 2.1: Purchase and Sale**

The agreed to Contract Sum for the Work is a Maximum Contract Price of \$[ Dollar Amount] as set forth in **Schedule Q** . Payment terms are described in **Schedule N**.

Contractor will provide the Work and all related services identified on **Schedule A** and the services detailed on **Schedule D, Schedule G, Schedule I, and Schedule L**. Contractor shall supervise and direct the Work and shall be solely responsible for all construction means, methods, techniques, sequences, and procedures and for coordinating all portions of the Work under this Contract. Contractor shall be responsible to pay for all labor, materials, equipment, tools, construction equipment and machinery, transportation and other facilities and services necessary for the proper execution and completion of the Work.

The Contract Price includes the AEO Administration Fee, according to **Schedule Q**.

### **Section 2.2. Contractor Compensation – Construction Period.**

Agency shall pay Contractor the Contract Sum in accordance with **Schedule N**. Payments will be made on a progress basis in accordance with **Schedule N**, for Work completed and authorized by Agency during the Construction Period. 5% Retainage will be withheld from each payment until the Notice of Final Acceptance has been executed by the Agency. Notice of Final Acceptance shall be executed by Agency upon written request by the Contractor unless Agency disputes in writing within 30 days of request. Professional Services shall not be subject to retainage. Upon Agency approval, Contractor may furnish a retention bond issued to the Agency at no cost to the Agency in lieu of retainage held.

### **Section 2.3. Cost Savings Guarantee.**

Per the Arkansas Guaranteed Energy Cost Savings Act as revised by Act 554, Contractor hereby guarantees the level of energy cost savings and operations and maintenance costsavings as detailed in **Schedule C**. Contractor shall provide the M&V Services as defined in **Schedule D**, for every year of the contract term.

This Guarantee is achieved as a result of the installation and operation of the Equipment and provision of services provided for in this Contract as specified in **Schedule D** and in accordance with the Savings Calculation Formula as set forth in **Schedule E**. The Guarantee per **Schedule C** shall not

be reduced even in the event of a Material Change per **Article 14**, except as the parties may mutually agree to such a reduction and act in good faith in determining such an agreement.

#### **Section 2.4. Allowable Payment Sources.**

Agency has pre-determined allowable cost repayment sources to be applied to annual payments, which shall include energy cost savings and operation and maintenance cost savings, water cost savings Allowable payment sources may also include material/commodity savings (including avoided cost from replacement lamps, ballasts, and scheduled replacement of parts). Future capital cost avoidance does not result in cost savings and is not allowed.

#### **Section 2.5. Capital Contribution from Agency.**

If applicable, in addition to the funds provided by the financing instrument described in **Appendix A**, Agency elects to make an capital contributions of \$ Dollar Amount to pay for part of the initial cost as described in **Schedule N**.

#### **Section 2.7. Annual Review and Reimbursement/Reconciliation.**

Energy-related cost savings shall be measured and/or calculated as specified in **Schedule D**, **Schedule E**, and **Schedule E** and a report provided within ninety (90) days of receipt of all data (as specified in **Schedule D** hereof) for the previous year for each anniversary of the Performance Commencement Date. Contractor agrees that Schedule E shall follow and use as a standard the procedures and protocol for Measurement and Verification identified in this document. ESCO shall supply all post installation M&V reports to agency and AEO for approval.

In the event the Savings achieved during such Contract Year is less than the Guaranteed Utility and cost Savings (as defined in **Schedule C** hereof), set forth for such year during the years the Guarantee is in effect, Contractor shall pay the Agency an amount equal to the deficiency.

If during each Contract Year the Savings achieved are greater than the Guaranteed Savings, such excess Savings shall be retained by the Agency.

#### **Section 2.8. Measurement Information Procedure.**

When applicable, Savings shall be calculated [monthly, quarterly, or annually] in the following manner:

- (i) Each month, by the [Number of Days – suggest 10] the day after receipt, Agency shall provide Contractor with copies of all relevant energy bills received for the preceding month;
- (ii) Reporting to Agency is outlined in **Schedule D**.

### **Section 2.9. M&V Fee.**

Throughout the Term of this Contract, Agency shall pay Contractor an annual M&V Fee according to **Schedule D** for measuring the Savings. Annual guaranteed Savings achieved shall be sufficient to cover any and all fees to be paid to Contractor pursuant to the provisions of **Schedule D**.

Notwithstanding the provisions in **Section(s) 4.1, 4.2 and 4.3** hereof, Agency shall not be required to begin any M&V Fee payments to Contractor under this Contract unless and until all equipment installation is completed by Contractor in accordance with the provisions of **Article 6** and **Article 9**, **Schedule G** and **Schedule L**, and accepted by Agency as evidenced by the signed Notice of Final Acceptance as set forth in **Exhibit III (iii)**, and unless and until said equipment is fully and properly functioning in accordance with **Schedule A** and related details and specifications.

### **Section 2.10. Late Payment.**

Payment during construction will be in accordance with **Schedule N**. Payment due during the Performance Period shall be due and payable within thirty (30) days of the invoice date. Interest shall accrue on payments not in dispute and rightfully owed for past due balance, owed to Agency hereunder at the rate of one percent (1%) per month (or the highest rate not prohibited by law, whichever is lower).

## **ARTICLE 3: UTILITY AND OTHER AWARD PAYMENTS**

### **Section 3.1. Award Payments**

ESCO shall engage all appropriate utility companies and reasonably apply all available rebates and incentives available from the utility to reduce the overall cost of the project. ESCO shall include a list and an estimate of all applicable utility rebates, local, state and federal rebates or tax incentives that will be sought to reduce the cost of the overall project. ESCO must show documentation with reasons stating why any incentives listed in the estimates are no longer available. Agency understands that amount might differ upon project completion based on availability.

## **ARTICLE 4: TIME FOR COMPLETION; COMMENCEMENT DATE; TERM OF CONTRACT**

### **Section 4.1. Construction Commencement Date and Time for Completion of Work.**

Work must commence within thirty (30) days of execution of this Contract and shall be completed as set forth in **Schedule F**. The Time for Completion of Work is of the essence of this Contract. By executing this Contract, the parties hereto confirm the Time of Completion of Work is a reasonable period for performing the Work. Contractor shall not be responsible for any failure to fulfill, or any delay in fulfilling, its obligations hereunder, if such failure or delay is beyond the reasonable ability of such party to control, avoid or mitigate and is due to storm, flood, or other Act of Nature, or to fire, war, rebellion, scarcity of water, insurrection, riots, strikes (other than strikes directed at subcontractor), or is the result of some order, rule or regulation of any federal, state, municipal, or other governmental agency that could not have been reasonably anticipated or that was not scheduled to take effect. Time for Completion of the Work and the costs related thereto shall be

extended and modified by Change Order, for such reasonable time and amount as the parties hereto may determine. In the event the delay exceeds sixty (60) calendar days, either party may terminate this agreement upon written notice.

#### **Section 4.2. Performance Commencement Date.**

The Performance Commencement Date shall be the first day of the month after the month in which all schedules are in final form and accepted by Agency and when Contractor shall have delivered a Notice to Agency that it has installed and commenced operating all of the Equipment specified in **Schedule A** and in accordance with the provisions of **Article 6** and **Schedule G**, Agency has inspected and accepted said installation and operation as evidenced by the execution of the Notice of Final Acceptance as set forth in **Exhibit III (iii)** . Notwithstanding anything to the contrary in **Article 2** and **Article 4** the Performance Commencement Date shall not occur and the Agency shall not be required to accept the work under this Contract unless and until: all Equipment installation for the subject Premises is completed by Contractor in accordance with the terms and conditions of this Contract. Agency shall have thirty (30) days after notification by the Contractor to inspect and accept the Equipment, file, in writing, any disputed issues, and execute Notice of Final Acceptance. Agency reserves the right to reject the Equipment if installation fails to comply with applicable building codes, or is otherwise not in compliance with this Contract.

#### **Section 4.3. Performance Term of Contract.**

The Performance Term of this Contract shall begin with the Performance Commencement Date and continue for the length of the financed term up to a maximum of 20 years, but may not exceed the cost-weighted average lifetime of the Equipment as calculated in Exhibit VI. Upon termination, Contractor shall be released from all obligations under the utility and cost Savings Guarantee. This Contract shall be effective and binding upon the parties immediately upon its execution. Savings achieved during the Construction Period shall not be applicable to the Guaranteed Savings.

### **ARTICLE 5: ENERGY USAGE RECORDS AND DATA**

#### **Section 5.1. Energy Usage Records and Data**

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

### **ARTICLE 6: CONSTRUCTION AND INSTALLATION BY CONTRACTOR**

#### **Section 6.1. Permits and Approvals.**

Agency shall use its best efforts to assist Contractor in obtaining all necessary permits and approvals for installation of the Equipment. In no event shall Agency, however, be responsible for direct payment of any permit or license fee or the delay of any such permit or license fee.

As directed by Agency, design documentation will be submitted to Agency for review. Agency agrees that the Agency review process will not be longer than 14 calendar days. As deemed necessary by Agency, design documentation will be forwarded by Agency to the appropriate code review Contractor for review. These costs of code review will be borne by Agency.

### **Section 6.2. Contractor's Duty of Proper Installation.**

All services called for by this Contract which constitute the "practice of architecture" or the "practice of engineering", as those terms are defined in Arkansas Revised Statutes shall be performed by properly qualified and licensed professionals employed by Contractor and shall be performed in accordance with applicable law. Contractor shall perform all tasks/phases under this Contract, including construction, and shall install the Equipment in such a manner so as not to harm the structural integrity of the buildings or their operating systems and so as to conform to the standards set forth in **Schedule G** and **Schedule I**.

### **Section 6.3. Use of Stated Project Percentages.**

In establishing the Contract Sum the Contractor has used predetermined percentages of project price for overhead and profit as disclosed in the Contractor Proposal (**Appendix C**), as negotiated in the Contract for Investment Grade Audit and applied to the labor and material costs as shown in **Schedule N**. It has also provided a contingency equal to a percentage of the project budget. The Contract Sum shall be adjusted based on the actual direct costs to the Contractor, but in no event shall the Contract Sum be increased. In the event it is possible to reduce the Contract Sum because the actual labor and material costs are less than budgeted, the Agency can, at its sole option, increase the Work to include additional equipment such that the original Contract Sum is reached. If the Agency declines to increase the Work, at its sole option, the Contract Sum shall be reduced to an amount consistent with the pricing using the stated project percentages and the balance shall be applied to the lease financing amount.

### **Section 6.4. Open Book Pricing.**

Open book pricing will be required, such that the Contractor will fully disclose all costs. Contractor will maintain cost accounting records on authorized work performed under actual costs for labor and material, or other basis requiring accounting records. Contractor will afford Agency access to these records and preserve them for a period of three (3) years after final payment. Costs will be evaluated through price analysis to compare costs with reasonable criteria such as established catalog and market prices or historical prices. Any evaluation of costs shall be the sole responsibility of the Agency. The pricing methodology and individual project percentage costing disclosed during preliminary contract negotiations will be expected to be applied, providing the scope and size of the Project remain the same as assumed when project percentage costing was disclosed.

**Section 6.5. Administration.**

The Contractor’s contact person (Project Manager) shall forward all communications in writing and all documents to the Agency’s contact person and the Program Manager’s contact person simultaneously as listed below:

For the Agency:

For the Program Manager:

For the Contractor Project Manager:

For the Contractor Superintendent:

**ARTICLE 7: ENVIRONMENTAL REQUIREMENTS**

**Section 7.1. Excluded Material and Activities.**

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

Contractor shall be responsible for any hazardous or other materials, including, without limitation, those listed in this **Section 7.1** that it may bring to the Premises.

**Section 7.2. Polychlorinated Biphenyl (PCB) Ballasts; Mercury Lamps.**

Contractor will enter into an agreement with an approved PCB ballast disposal Contractor who will provide an informational packet, packing receptacles and instructions, labels and shipping materials, transportation, and recycling or incineration services for PCB ballasts. All capacitors and asphalt potting compound materials removed from Agency’s PCB ballasts will be incinerated in a federally approved facility. After proper disposal, a Certificate of Destruction will be provided by the approved



facility to Agency. Contractor's responsibility shall be for the proper and legal management of any of Agency's PCB ballasts removed as a result of the installation of the Equipment and shall be limited only until said PCB ballasts are loaded onto an approved PCB ballast disposal Contractor's vehicle for transportation.

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

Agency agrees to sign manifests of ownership for all PCB ballasts and mercury lamps removed from the Premises.

## **ARTICLE 8: ACCEPTANCE TESTING**

### **Section 8.1. Modification of Schedules.**

To ensure this Contract properly accounts for as-installed conditions, which conditions may vary from the pre-installation analyses, the Contractor shall re-validate or modify **Schedule A** and **Schedule G** prior to System Start-Up.

### **Section 8.2. Systems Startup and Equipment Commissioning.**

The Contractor shall conduct a thorough and systematic performance test of each element and total system of the installed Equipment in accordance with the procedures specified in **Schedule G** and prior to acceptance of the ECM by Agency as specified in **Exhibit III (ii)**. Contractor agrees that **Schedule G** shall follow and use as a standard the procedures and protocol for Commissioning located in the document *Commissioning Guidelines for the Arkansas Energy Performance Contracting Program*. Testing shall be designed to determine if the Equipment is functioning in accordance with both its published specifications and the Schedules to this Contract, and to determine if modified building systems, subsystems or components are functioning properly within the new integrated environment. The Contractor shall provide notice to the Agency of the scheduled test(s) and the Agency and/or its designees shall have the right to be present at any or all such tests conducted by Contractor and/or manufacturers of the Equipment. The Contractor shall be responsible for correcting and/or adjusting all deficiencies in the Equipment operation that may be observed during system commissioning procedures of **Schedule G**. Prior to Agency acceptance, Contractor shall also provide Agency with reasonably satisfactory documentary evidence that the Equipment installed is the Equipment specified in **Schedule A**.

## **ARTICLE 9: OWNERSHIP**

### **Section 9.1. Ownership of Certain Proprietary Property Rights.**

Agency shall not, by virtue of this Contract, acquire any ownership interest in any formulas, patterns, devices, secret inventions or processes, copyrights, patents, other intellectual or proprietary rights, or similar items of property which are or may be used in connection with the Equipment. Agency shall,

however, have a nonexclusive license to utilize all such intellectual or proprietary rights obtained by Contractor related to Equipment in connection with its use of the Equipment under this Contract. The Contractor hereby grants to the Agency a perpetual, royalty-free license to any and all software, plans, specifications or other intellectual property or proprietary rights it obtains from Equipment manufacturers necessary for the Agency to continue to operate, maintain, and repair the Equipment in a manner that will yield maximal energy consumption reductions. This license shall continue subsequent to any termination or expiration of this Contract other than termination due to breach by Agency.

## **Section 9.2. Ownership of Documents.**

### **(A) Instruments of Service**

Drawings, specifications and other documents, including those in electronic form, prepared by the Contractor and the Contractor's consultants are Instruments of Service for use solely with respect to this Project. The Contractor and the Contractor's consultants shall be deemed the authors and owners of their respective instruments of service and shall retain all common law, statutory and other reserved rights, including copyrights.

Upon execution of this Contract, the Contractor hereby grants to the Agency a perpetual nonexclusive license to reproduce and use, and permit others to reproduce and use for the Agency, the Contractor's Instruments of Service solely for purposes of constructing, using and maintaining the Project or for future alterations, or additions to the Project. The Contractor shall obtain similar nonexclusive licenses from the Contractor's consultants consistent with this Contract. If, and upon the date the Contractor is adjudged in default of this Contract, the foregoing license shall be deemed terminated and replaced by a second, nonexclusive license permitting the Agency to authorize other similarly credentialed design professionals to reproduce and, where permitted by law, to make changes, corrections or additions to the Instruments of Service solely for purposes of completing, using and maintaining the Project, or for future alterations, or additions to the Project.

Any unilateral use by the Agency of the Instruments of Service for completing, using, maintaining, adding to or altering the Project or facilities shall be at the Agency's sole risk and without liability to the Contractor and the Contractor's consultants; provided, however, that if the Agency's unilateral use occurs for completing, using or maintaining the Project as a result of the Contractor's breach of this Contract, nothing in this Article shall be deemed to relieve the Contractor of liability for its own acts or omissions or breach of this Contract.

### **(B) As-Built Drawings/Record Drawings**

The Agency and its consultants shall, upon completion of the Construction Phase receive redline As-Built Drawings from the Contractor. These redline changes shall describe the built condition of the Project. This information and all of the incorporated changes directed by Bidding Addenda, Change Order/Amendment or Contractor's Supplementary Instructions shall be incorporated by the Contractor and its consultants into a Record Drawings document provided to the Agency in the form of an electro-media format and a reproducible format as agreed between the parties. The Contractor shall also provide the Agency with the As-Built Drawings.

### **Section 9.3. Ownership of Existing Equipment.**

Ownership of the equipment and materials existing at the Premises at the time of execution of this Contract shall remain the property of Agency even if it is replaced or its operation made unnecessary by work performed by Contractor pursuant to this Contract. If applicable, Contractor shall advise the Agency in writing of all equipment and materials to be replaced at the Premises and the Agency shall within days designate in writing to the Contractor which equipment and materials should not be disposed of off-site by the Contractor. It is understood and agreed to by both Parties that the Agency shall be responsible for and designate the location and storage for any equipment and materials that should not be disposed of off-site. Except as may be otherwise provided in this Contract, the Contractor shall be responsible for the disposal of all equipment and materials designated by the Agency as disposable off-site in accordance with all applicable laws and regulations regarding such disposal. Except as indicated in **Section 7.1** and **Section 7.2**, under no circumstance shall Contractor be obligated to dispose of or take responsibility for any materials identified in **Section 7.1** or **Section 7.2** of this Contract.

### **Section 9.4. Ownership of Measurement and Verification Equipment.**

To the extent applicable, Agency agrees to provide and own the equipment required to provide the ongoing measurement of energy and water Savings which equipment shall comply with Contractor's specifications (the "Metering Equipment"). Upon mutual agreement between Contractor and Agency, Agency shall provide and maintain any necessary communication equipment to facilitate remote monitoring of the Equipment.

## **ARTICLE 10: STANDARDS OF COMFORT**

### **Section 10.1 Standards of Comfort.**

Contractor will design and install the Equipment so that it is able to provide the standards of heating, cooling, ventilation, hot water supply, lighting quality and levels described in **Schedule I**. During the term of this Contract, Contractor and Agency will maintain, according to **Schedule D**, **Schedule I** and **Schedule K**, and operate the Equipment in a manner that will provide the standards of comfort and levels of operation as described in **Schedule I**.

## **ARTICLE 11: EQUIPMENT WARRANTIES**

### **Section 11.1 Actions by Contractor.**

Contractor warrants that all equipment sold and installed as part of this Contract is new, unless otherwise agreed, will be materially free from defects in materials or workmanship, will be installed properly in a good and workmanlike manner, and will function properly for a period of one (1) year from the date of the Substantial Completion for the particular energy conservation measure if operated and maintained and kept free from damage in accordance with the procedures established per building. Substantial Completion shall be defined as the stage in the progress of the Work where the Work is sufficiently complete in accordance with the Contract Documents so that the Agency can utilize and take beneficial use of the Work for its intended use or purpose. Substantial Completion

does not occur until the Equipment or system has been commissioned, accepted, and Exhibit III(ii) - Notice of Substantial Completion” is fully executed.

After the warranty period, Contractor shall have no responsibility for performing maintenance, repairs, or making manufacturer warranty claims relating to the Equipment, except as provided in **Schedule D, Schedule I, and Schedule M.**

Contractor further agrees to assign to Agency all available manufacturer’s warranties relating to the Equipment and to deliver such written warranties and which shall be attached and set forth as **Exhibit IV**; reasonably assist Agency in its pursuit of its rights and remedies against the manufacturers under the warranties in the event of Equipment malfunction or improper or defective function, and defects in parts, workmanship and performance. Contractor shall, during the warranty period, notify the Agency whenever defects in Equipment parts or performance occur, which give rise to such rights and remedies and those rights and remedies are exercised by Contractor. During this period, the cost of any risk of damage or damage to the Equipment and its performance, including damage to property and equipment of the Agency or the Premises, due to Contractor’s failure to exercise its warranty rights shall be borne solely by Contractor. However, these warranties do not extend to any damage as a result of Agency or third party neglect, modification, abuse or alteration.

All warranties, to the extent transferable, shall be transferable and extend to the Agency. The warranties shall specify that only new, not reconditioned, parts may be used and installed when repair is necessitated by malfunction.

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

### **Section 11.2. Malfunctions and Emergencies.**

Agency shall use its best efforts to notify the Contractor or its designated subcontractor within forty-eight (48) hours after the Agency's actual knowledge and occurrence of: (i) any malfunction in the operation of the Equipment or any preexisting energy related equipment that might materially impact upon the Savings or Savings Guarantee, (ii) any interruption or alteration to the energy supply to the Premises, or (iii) any alteration or modification in any energy-related equipment or its operation.

Where Agency exercises due diligence in attempting to assess the existence of a malfunction, interruption, or alteration it shall be deemed not at fault in failing to correctly identify any such conditions as having a material impact upon the Savings. Agency shall notify Contractor within forty-eight (48) hours upon its having actual knowledge of any emergency condition affecting the Equipment. If such malfunction, interruption, or alteration occurs during the Warranty Period, Contractor shall respond to any such notice within twenty-four (24) hours for non-critical equipment, and eight (8) hours for critical equipment, and shall promptly thereafter proceed with corrective measures. Any telephonic notice of such conditions by Agency shall be followed within three business days by written notice to Contractor from Agency. If Agency unreasonably delays in so

notifying Contractor of a malfunction or emergency, and the malfunction or emergency is not otherwise corrected or remedied, Contractor may charge Agency for its loss, due to the delay, associated with the Guarantee under this Contract for the particular time period, provided that Contractor is able to show the direct causal connection between the delay and the loss.

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

### **Section 11.3 Actions by Agency.**

During the term of this Contract, Agency shall not move, remove, modify, alter, or change in any way the Equipment or any part thereof without the prior written approval of Contractor except as set forth in **Schedule K**. Notwithstanding the foregoing, Agency may take reasonable steps to protect the Equipment if, due to an emergency, it is not possible or reasonable to notify Contractor before taking any such actions. In the event of such an emergency, Agency shall take reasonable steps to protect the Equipment from damage or injury. Agency agrees to maintain the Premises in good repair and to protect and preserve all portions thereof, which may in any way affect the operation or maintenance of the Equipment, all in accordance with the same standard of care the Agency applies to the Premises generally, that of a reasonably prudent government owner.

## **ARTICLE 12: MODIFICATION, UPGRADE OR ALTERATION OF EQUIPMENT**

### **Section 12.1. Modification of Equipment.**

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

### **Section 12.2. Upgrade or Alteration of Equipment.**

Contractor shall at all times have the right, subject to Agency's prior written approval, which approval shall not be unreasonably withheld, to change the Equipment, revise any procedures for the operation of the Equipment or implement other energy saving actions in the Premises, provided that: (i) the Contractor complies with the standards of comfort and services set forth in **Schedule I** herein; (ii) such modifications or additions to, or replacement of the Equipment, and any operational changes, or new procedures are necessary to enable the Contractor to achieve greater Savings at the Premises and; (iii) any cost incurred relative to such modifications, additions or replacement of the Equipment, or operational changes or new procedures shall be the responsibility of the Contractor.

All modifications, additions or replacements of the Equipment or revisions to operating or other procedures shall be described in a supplemental Schedule(s) to be provided to the Agency for approval, which shall not be unreasonably withheld, provided that any replacement of the Equipment shall, unless otherwise agreed, be new and have equal or better potential to reduce energy consumption at the Premises than the Equipment being replaced. The Contractor shall update any

and all software necessary for the operation of the Equipment in accordance with the provisions of **Section 9.1 and Schedule I**. All replacements of and alterations or additions to the Equipment shall become part of the Equipment described in **Schedule A** and shall be covered by the provisions and terms of Article **6** and **Article 8**.

## **ARTICLE 13: LOCATION AND ACCESS**

### **Section 13.1. Contractor Access.**

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

### **Section 13.2. Utility Access.**

If a Utility Award Payment is made as described in **Section 3 (Utility Award Payments)**, the following applies. Upon request by the Utility (or its agent) and with prior consent of the Agency which consent shall not be unreasonably withheld, the Agency shall agree to allow Utility to interview the Agency and to enter the Premises at reasonable times throughout the life of the installed equipment to install metering equipment, perform energy audits or inspect the facilities and any equipment installed. The Agency also agrees to cooperate with the Utility or its agent upon request and with prior consent of the Agency, in conducting such activities and/or in analyzing Savings. At all times a representative of the Agency (or its agent) shall be present during such inspections.

## **ARTICLE 14: MATERIAL CHANGES**

### **Section 14.1. Material Change Defined.**

A Material Change shall include any change or cumulative changes in or to the Premises, whether structural, operational or otherwise in nature which reasonably could be expected, in the judgment of the Agency, AEO and ESCO, to increase or decrease annual energy consumption in accordance with the provisions and procedures set forth in **Schedule E** and **Schedule E** after adjustments for climatic variations and provided a correlation exists between usage and Material Change.

Actions by the Agency that may result in a Material Change include but are not limited to the following: (i) manner of use of the Premises by the Agency; or (ii) hours of operation for the Premises or for any equipment or energy using systems operating at the Premises; or (iii) permanent changes

in the comfort and service parameters set forth in **Schedule I**; or (iv) occupancy of the Premises; or (v) structure of the Premises; or (vi) types and quantities of equipment used at the Premises or (vii) modification, renovation or construction at the Premises; or (viii) the Agency's failure to provide maintenance of and repairs to the Equipment in accordance with **Schedule K**; or (ix) casualty or condemnation of the Premises or Equipment, or (x) changes in utility provider or utility rate classification, or (xi) any other conditions other than climate affecting energy or water use at the Premises.

#### **Section 14.2. Reported Material Changes; Notice by Agency**

The Agency shall use its best efforts to deliver to the Contractor a written notice describing all actual or proposed Material Changes in the Premises or in the operations of the Premises at least 14 days before any actual or proposed Material Change is implemented or as soon as is practicable after an emergency or other unplanned event. Notice to the Contractor of Material Changes which result because of a bona fide emergency or other situation which precludes advance notification shall be deemed sufficient if given by the Agency within five (5) business days after having actual knowledge that the event constituting the Material Change occurred or was discovered by the Agency to have occurred.

#### **Section 14.3. Other Adjustments.**

As agreed in **Section 16.1** Agency will alert Contractor of materials changes as known. Both parties have a vested interest in meeting the Guaranteed Savings of the Contract. As such, the Contractor will work with Agency to investigate, identify and correct any changes that prevent the Guaranteed Savings from being realized. As a result of such investigation, Contractor and Agency shall determine what, if any, adjustments to the baseline will be made in accordance with the provisions set forth in **Schedule E** and **Schedule E**.

### **ARTICLE 15: TRAINING AND FOLLOW-UP ACTIVITIES BY CONTRACTOR**

#### **Section 15.1. Training.**

The Contractor shall conduct the training program described in **Schedule L**. Appropriate training must be completed prior to acceptance of the Equipment installation. The Contractor shall provide ongoing training as defined in **Schedule L**.

#### **Section 15.2. Application for Energy Star or LEED.**

Upon request by Agency, the Contractor shall conduct investigation into any applicable certification program such as Collaborative for High Performance Schools, Energy Star Benchmark, US Green Building Council's Leadership in Energy and Environmental Design (LEED), etc. and facilitate requested certification process on behalf of Agency. Costs of such certifications will be borne by the Agency.

### **Section 15.3. Emissions Reductions Documentation and Reporting.**

The Contractor shall include emissions reductions quantities in each annual report and advise the Agency on opportunities to achieve monetary benefit from such credits.

## **ARTICLE 16: GENERAL CONTRACTUAL PROVISIONS**

### **Section 16.1 Additional Insurance Requirements- Professional Liability Insurance.**

Contractor promises and agrees to maintain in full force and effect a professional liability insurance policy that covers errors and omissions as is required for compliance with the Agency. The policy, including claims made forms, shall remain in effect for the duration of the Construction Period and for at least three one year beyond the completion and acceptance of the Equipment. The Contractor shall be responsible for all claims, damages, losses or expenses, including attorney fees, arising out of or resulting from the performance of professional services contemplated in this Contract, provided that any such claim, damage, loss or expense is caused by any negligent act, error or omission of the Contractor, any consultant or associate thereof, or anyone directly or indirectly employed by the Contractor. The Contractor shall submit a Certificate of Insurance verifying said coverage at the signing of this Contract and also any notices of renewals of Renewals of the said policy as they occur.

## **ARTICLE 17: EVENTS OF DEFAULT**

### **Section 17.1. Events of Default by Agency.**

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

- (i) any failure by Agency to pay Contractor any sum due that is not in dispute, hereunder for a service and maintenance period of more than thirty (30) days after written notification by Contractor that Agency is delinquent in making payment;
- (ii) any other mutually determined material failure by Agency to perform or comply with the terms and conditions of this Contract, including breach of any covenant contained herein, provided that such failure continues for thirty (30) days after notice to Agency demanding that such mutually determined failures to perform be cured or if such cure cannot be effected in such forty-five (45) days; Agency shall be deemed to have cured default upon the commencement of a cure within such forty-five (45) days and diligent subsequent completion thereof;
- (iii) any representation or warranty furnished by Agency in this Contract that was false or misleading in any material respect when made.

### **Section 17.2. Events of Default by Contractor.**

Each of the following events or conditions shall constitute an "Event of Default" by Contractor:



- (i) the standards of comfort and service set forth in **Schedule I** are not provided due to failure of Contractor to properly design, install, maintain, repair or adjust the Equipment except that such failure, if corrected or cured within twenty-one (21) days after written notice by Agency to Contractor demanding that such failure be cured, shall be deemed cured for purposes of this Contract.
- (ii) any representation or warranty furnished by Contractor in this Contract is false or misleading in any material respect when made;
- (iii) provided that the operation of the facility is not adversely affected and provided that the Standards of Comfort in **Schedule I** are maintained, any material failure by Contractor to perform or comply with the terms and conditions of this Contract, including breach of any covenant contained herein except that such failure, if corrected or cured within thirty (30) days after written notice to Contractor demanding that such failure to perform be cured, shall be deemed cured for purposes of this Contract;
- (iv) any lien or encumbrance upon the equipment by any subcontractor, laborer or material man of Contractor which is not released in thirty (30) days after notice of said filing;
- (v) the filing of a bankruptcy petition whether by Contractor or its creditors against Contractor which proceeding shall not have been dismissed within ninety (90) days of its filing, or an involuntary assignment for the benefit of all creditors or the liquidation of Contractor.
- (vi) failure by the Contractor to pay any amount due that is not in dispute, or perform any material obligation under the terms of this Contract, unless such amount due or failure to perform is excused pursuant to the provisions of this Contract.

### **Section 17.3. Dispute Resolution**

#### **(A) Notice of Cure Period**

In the event of any breach that is not an Event of Default, notice of such shall be given in writing by the aggrieved Party to the other Party. If such breach is not cured, cannot be cured, or if due diligence to cure the breach has not begun within 30 days of receipt of written notice, unless otherwise stated herein, or if an Event of Default has occurred, the aggrieved Party may exercise any of the remedies set forth in **Section 17.3B**. Notwithstanding anything to the contrary herein, the Agency, in its sole discretion, need not provide advance notice or a cure period and may immediately terminate this Contract in whole or in part if reasonably necessary to preserve public safety or to prevent immediate public crisis.

## **(B) Remedies**

If Contractor is in breach under any provision of this Contract or commits an Event of Default, the Agency shall have all of the remedies listed in this Section 17(B)(i) and (ii) in addition to all other remedies set forth in other sections of this Contract following the notice and cure period set forth in Section 17.3(A). The Agency may exercise any or all of the remedies available to it, in its sole discretion, concurrently or consecutively.

If Agency is in breach under any provision of this Contract or commits an Event of Default, the Contractor shall have all of the remedies listed in Section 17(B)(iii) in addition to all other remedies set forth in other sections of this Contract following the notice of cure period set forth in Section 17.3(A).

### **i. Termination for Cause and/or Breach**

The Agency may terminate this entire Contract or any part of this Contract as provided herein or pursuant to the General Conditions. Exercise by the Agency of this right shall not be a breach of its obligations hereunder. Contractor shall continue performance of this Contract to the extent not terminated, if any.

#### **a. Obligations and Rights**

To the extent specified in any termination notice, Contractor shall not incur further obligations or render further performance hereunder past the effective date of such notice, and shall terminate outstanding orders and subcontracts with third parties. However, Contractor shall complete and deliver to the Agency all Work not cancelled by the termination notice and may incur obligations as are necessary to do so within this Contract's terms. At the sole discretion of the Agency, Contractor shall assign to the Agency all of Contractor's right, title, and interest under such terminated orders or subcontracts. Upon termination, Contractor shall take timely, reasonable and necessary action to protect and preserve property in the possession of Contractor in which the Agency has an interest. All materials owned by the Agency in the possession of Contractor shall be immediately returned to the Agency. All Work Product, at the option of the Agency, shall be delivered by Contractor to the Agency and shall become the Agency's property.

#### **b. Payments**

The Agency shall reimburse Contractor only for accepted performance up to the date of termination or as provided in the General Conditions, in the Agency's sole discretion. If, after termination by the Agency, it is determined that Contractor was not in breach or that Contractor's action or inaction was excusable, such termination shall be treated as a termination in the public interest and the rights and obligations of the Parties shall be the same as if this Contract had been terminated in the public interest, as described in General Conditions.

**c. Damages and Withholding**

Notwithstanding any other remedial action by the Agency, Contractor shall remain liable to the Agency for any damages sustained by the Agency by virtue of any breach under this Contract by Contractor and the Agency may withhold any payment to Contractor for the purpose of mitigating the Agency’s damages, until such time as the exact amount of damages due to the Agency from Contractor is determined. The Agency may withhold any amount that may be due Contractor as the Agency deems necessary to protect the Agency against loss, including loss as a result of outstanding liens, claims of former lien holders, or for the excess costs incurred in procuring similar goods or services. Contractor shall be liable for excess costs incurred by the Agency in procuring from third parties replacement Work as cover. Liability may alternatively be assessed per the General Conditions, in the Agency’s discretion.

The State will demonstrate reasonable care but shall not be liable in the event of loss, destruction, or theft of contractor-owned items to be delivered or to be used in the installation of deliverables. The vendor is required to retain total liability until the deliverables have been accepted by the “authorized agency official.” At no time will the State be responsible for or accept liability for any vendor-owned items.

**ii. Remedies Not Involving Termination**

The Agency, its sole discretion may exercise one or more of the following remedies in addition to other remedies available to it:

**a. Suspend Performance**

Suspend Contractor’s performance with respect to all or any portion of this Contract pending necessary corrective action as specified by the Agency without entitling Contractor to an adjustment in price/cost or performance schedule. Contractor shall promptly cease performance and incurring costs in accordance with the Agency’s directive and the Agency shall not be liable for costs incurred by Contractor after the suspension of performance under this provision. In the event suspension exceeds sixty (60) calendar days, the Contract shall be deemed terminated.

**b. Withhold Payment**

Withhold payment to Contractor until corrections in Contractor’s performance are satisfactorily made and completed.

**c. Deny Payment**

Deny payment for those obligations not performed, that due to Contractor’s actions or inactions, cannot be performed or, if performed, would be of no value to the Agency; provided, that any denial of payment shall be reasonably related to the value to the Agency of the obligations not performed.

**d. Removal**

Notwithstanding any other provision herein, the Agency may demand immediate removal of any of Contractor's employees, agents, or Subcontractors whom the Agency deems incompetent, careless, insubordinate, unsuitable, or otherwise unacceptable, or whose continued relation to this Contract is deemed to be contrary to the public interest or the Agency's best interest.

**e. Intellectual Property**

If Contractor infringes on a patent, copyright, trademark, trade secret or other intellectual property right while performing its obligations under this Contract, Contractor shall, at the Agency's option (a) obtain for the Agency or Contractor the right to use such products and services; (b) replace any Goods, Services, or other product involved with non-infringing products or modify them so that they become non-infringing; or, (c) if neither of the foregoing alternatives are reasonably available, remove any infringing Goods, Services, or products and refund the price paid therefore to the Agency.

**iii. Remedies and Termination by Contractor**

The Contractor, upon Agency being held in Default in this Contract, in its sole discretion, may exercise one or more of the following remedies in addition to other remedies available to it:

**a. Agency Payment**

Upon failure by Agency to pay Contractor as stated in section 17.1(i), Contractor may suspend further Work on Project until payment is made; if no payment or cure is made after thirty (30) days of Agency being found in default of this Contract, Contractor shall have no further obligation to Agency under the terms of this Contract.

**b. Agency Material Failure**

Upon material failure by Agency as stated in section 17.1(ii), Contractor may in its sole discretion, suspend further Work on Project until default is resolved or if no cure is made after thirty (30) days of Agency being found in default of this Contract Contractor shall have no further obligation to Agency under the terms of this Contract.

**c. Agency Warranty Misrepresentation**

Upon warranty misrepresentation by Agency to pay Contractor as stated in section 17.1(iii), Contractor may suspend further work on Project until cure is made or may cancel this Contract and Contractor shall have no further obligation to Agency under the terms of this Contract.

## **ARTICLE 18: ASSIGNMENT**

### **Section 18.1. Assignment by Contractor.**

The Contractor acknowledges that the Agency is induced to enter into this Contract by, among other things, the professional qualifications of the Contractor. The Contractor agrees that neither this Contract nor any right of obligations hereunder may be assigned in whole or in part to another firm, without the prior written approval of the Agency except in the event that any third party acquires substantially all of the assets and obligations of Contractor, except as otherwise provided herein.

### **Section 18.2. Assignment by Agency.**

Agency may transfer or assign this Contract and its rights and obligations herein to a successor government entity or agency with the consent of Contractor, which shall not be unreasonably withheld. The lack of financial qualification of the new owner shall be grounds for withholding such consent.

## **ARTICLE 19: REPRESENTATIONS AND WARRANTIES**

### **Section 19.1. General Representations and Warranties.**

Each party warrants and represents to the other that:

- (i) it has all requisite power, authority, licenses, permits, and franchises, corporate or otherwise, to execute and deliver this Contract and perform its obligations hereunder;
- (ii) its execution, delivery, and performance of this Contract will not result in a breach or violation of, or constitute a default under any Contract, lease or instrument to which it is a party or by which it or its properties may be bound or affected;

## **ARTICLE 20. ADDITIONAL REPRESENTATIONS OF THE PARTIES.**

### **Section 20.1. By Agency.**

Agency hereby warrants, represents and promises that:

- (i) Agency is authorized under the Constitution and laws of the State of Arkansas to enter into this Contract, each transaction contemplated hereby, and to perform all of its obligations under this Contract.
- (ii) Subject to the provisions contained herein, Agency has provided or shall provide timely to Contractor, all records relating to energy and water usage and energy-related maintenance of Premises requested by Contractor and the information set forth therein is, and all information in other records to be subsequently provided pursuant to this Contract will be true and accurate in all material respects and Contractor shall be entitled to rely thereon; and
- (iii) Agency has not entered into any prior leases, contracts or agreements with other persons or entities regarding the leasing or acquisition of water or energy efficiency equipment or the provision of energy management services for the Premises

or with regard to servicing any of the Equipment located in the Premises that would encroach upon the scope of this Contract. Agency shall provide Contractor with copies of any successor or additional leases of energy efficiency equipment and contracts for management or servicing of preexisting equipment at Premises that may be executed from time to time hereafter within seven days after execution thereof.

## **Section 20.2. By Contractor.**

Contractor hereby warrants, represents and promises that:

- (i) Before commencing performance of this Contract:
  - a. Contractor shall have become licensed or otherwise permitted to do business in the State of Arkansas
  - b. Contractor shall have provided proof and documentation of all required insurance and bonds pursuant to this Contract.
- (ii) Contractor shall make available, upon reasonable request, documents relating to its performance under this Contract, including contracts and subcontracts it shall enter into;
- (iii) Contractor shall use subcontractors who are qualified, licensed and bonded in this State to perform the work so subcontracted pursuant to the terms hereof;
- (iv) Contractor has all requisite authority to license the use of proprietary property, both tangible and intangible, contemplated by this Contract;
- (v) The Equipment will meet or exceed the Acceptance Testing procedures set forth in Article 8 of this Contract.
- (vi) The Equipment is or will be compatible with all other current Premises mechanical and electrical systems, subsystems, or components with which the Equipment interacts, and that, as installed, neither the Equipment nor such other systems, subsystems, or components will materially adversely affect each other as a direct or indirect result of Equipment installation or operation;

## **ARTICLE 21: MISCELLANEOUS DOCUMENTATION PROVISIONS.**

### **Section 21.1. Waiver of Liens, Performance Bonds, Labor and Material Payment Bonds.**

Such executed bonds are incorporated herein by reference as **Exhibit I (Performance Bond)** and **Exhibit II (Labor and Material Payment Bond)** per **Schedule M (General Conditions; Article 26)**.

## **Section 21.2. Further Documents**

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

## **Section 21.3 Agency's Responsibilities.**

### **(A) Methods of Operation by Agency**

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

### **(B) Agency Maintenance Responsibilities**

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

### **(C) Inspection of Premises**

During the Performance Term of this Contract, Agency agrees that Contractor shall have the right once a month, with prior notice, to inspect Premises to determine if Agency is complying, and shall have complied with its obligations as set forth in **Section 21.3(b)**. For the purpose of determining Agency's said compliance, the checklist to be set forth at **Schedule K** as completed and recorded by Contractor during its monthly inspections, shall be used to measure and record Agency's said compliance. Agency shall make the Premises available to Contractor for and during each monthly inspection, and shall have the right to witness each inspection and Contractor's recordation on the checklist. Agency may complete its own checklist at the same time. Contractor agrees to not interfere with the Agency operations during any monthly inspection.

## **ARTICLE 22: CONFLICTS OF INTEREST**

### **Section 22.1 Conflicts of Interest.**

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

during regular business hours, for the sole purpose of determining whether there has been compliance with this section.

## **ARTICLE 23: CONTRACT DOCUMENTS**

### **Section 23.1. IGA**

Contractor prepared a complete Investment Grade Audit which has been approved and accepted by Agency as set forth in **Exhibit III** (i) - Notice of Acceptance – Investment Grade Audit and Measurement and Verification Plan.

### **Section 23.2. General Conditions.**

The Agency's General Conditions are attached hereto as **Schedule M** and are incorporated into this contract.

### **Section 23.3. Order of Precedence.**

Notwithstanding, the provisions of this Contract and the attached Schedules, Exhibits and Appendices shall govern in the event of any inconsistencies between the Investment Grade Audit and the provisions of this Contract.

In the event of conflicts or inconsistencies between this Contract and its Schedules, Exhibits or Appendices, such conflicts or inconsistencies shall be resolved by reference to the documents in the following order of priority: a) Contract body, b) **Schedule M** – General Conditions for Energy Performance Contracting, c) The remaining Schedules/Exhibits/Appendices, d) Agency RFP #Number, e) Contractor Proposal.

In the event of any conflicts between **Schedule C** and other parts of this Contract regarding calculation or measurement of the Guarantee, **Schedule C** shall govern.

### **Section 23.4. Signatures.**

Parties agree that facsimile or scanned signatures shall be accepted as originals.



THE PARTIES HERETO HAVE EXECUTED THIS CONTRACT

CONTRACTOR:

AGENCY:

\_\_\_\_\_  
AGENCY REPRESENTATIVE

\_\_\_\_\_  
Legal Name of Contracting Entity

By \_\_\_\_\_  
Executive Director

\_\_\_\_\_  
Social Security Number or FEIN

\_\_\_\_\_  
Signature of Authorized Officer  
\_\_\_\_\_

LEGAL REVIEW:

NO LEGAL REVIEW REQUIRED

\_\_\_\_\_  
Print Name & Title of Authorized Officer

By \_\_\_\_\_

CORPORATIONS:

**(A corporate attestation is required and seal, if available.)**

Attest (Seal) By \_\_\_\_\_  
**(Corporate Secretary or Equivalent, or Town/City/County Clerk)**

## **SCHEDULES**

### **SCHEDULE A.**

#### **EQUIPMENT TO BE INSTALLED BY CONTRACTOR**

*This schedule will be furnished by the Contractor based on the final Investment Grade Audit. The Investment Grade Audit is not the Scope of Work for this Contract, so all detail from the Investment Grade Audit as modified or amended in negotiations for this Contract should be included in this Schedule. It should specify all of the newly installed equipment including manufacturer, quantity, location and warranties (you can also have a separate schedule for warranties). The information should be provided in sufficient detail by building or area of building so that the Agency can verify the number of units installed under the contract. This is particularly important for a lighting retrofit and is used as the basis for making adjustments to the Contract Sum if the number of fixtures actually retrofit is different than the number estimated. Detailed specifications of major pieces of equipment such as boilers, chillers, motors should be provided. A detailed points list of any energy management control system should be provided along with the major control strategies being implemented. This schedule should also describe any modifications that may have to be made to existing equipment, if applicable.*

### **SCHEDULE B.**

#### **DESCRIPTION OF PREMISES; PRE-EXISTING EQUIPMENT INVENTORY**

*This schedule is based on the final Investment Grade Audit. It contains basic information about the condition of the premises at the time of contract execution. The Investment Grade Audit is not an Attachment to this Contract, so all detail from the Investment Grade Audit as modified or amended in negotiations for this Contract should be included in this Schedule. Such information would include facility square footage, building construction, use, occupancy, hours of operation etc., and any special conditions that may exist.*

*The inventory is important to include for the purpose of identifying what equipment was in place and how it was configured at the time of contract execution. This schedule is important to the accurate establishment of baseline, savings measurement and may need to be referred to in the later years of the contract. It is critical that if M&V option C of the Measurement and Verification Guidelines for the Arkansas Energy Performance Contracting Program is used for establishing the savings, then a detailed list of the existing energy consuming equipment of the facility be documented in great detail. If Option A or B is used, then the pre-existing equipment inventory can be eliminated.*

### **SCHEDULE C:**

#### **UTILITY AND COST SAVINGS GUARANTEE**

*This schedule should fully describe all provisions and conditions of the energy saving guarantee provided by the Contractor. The guarantee should be defined in units of energy to be saved for the duration of the contract term and dollar savings. Reference to the annual reconciliation of achieved vs. guaranteed savings should be included (there is also language in the body of the contract regarding annual reconciliation See Section 2.7 Annual Review and Reimbursement/Reconciliation).*

*This schedule should contain the projected energy savings in units for each year of the contract. Often these Projections are broken down on a measure-by-measure basis, although some measures may be aggregated into general categories such as lighting or HVAC. If there are several buildings involved in the Project, this schedule should contain Projections for each facility, even though they may all be covered under a single guarantee. ESCO shall use the standard reporting format developed by AEO.*

#### **SCHEDULE D:**

##### **CONTRACTOR M&V, MAINTENANCE AND SERVICE AGREEMENT**

*This should contain the amount and frequency of any payments that may be made to the Contractor for maintenance, M&V or other services negotiated as part of the contract. It should contain information about how the compensation is calculated (e.g. a percentage of savings above and beyond the guarantee, flat fee etc.), and if an annual inflation index is to be used to escalate fees over the duration of the contract term. An hourly fee structure can also be included to cover Contractor costs for any services provided beyond the scope agreed to at the time of contract execution.*

#### **SCHEDULE E:**

##### **MEASUREMENT AND VERIFICATION PLAN INCLUDING BASELINE ENERGY CONSUMPTION, SAVINGS MEASUREMENT AND CALCULATION FORMULAE, METHODOLOGY TO ADJUST BASELINE**

*The baseline energy consumption is the "yardstick" by which all savings achieved by the installed Project will be measured. The methodology and all supporting documentation used to calculate the baseline should be in this schedule including unit consumption and current utility rates for each fuel type. This schedule may also include baseline documentation regarding other cost savings such as material savings (e.g. bulbs, ballast, filters, chemicals etc.), and cost savings associated with the elimination of outside maintenance contracts. >*

*<For each site or Project, the baseline and post-installation energy use will usually be defined using metering, billing analysis and/or engineering calculations (including computer simulations) either individually or in combination. In addition, values for certain factors that affect energy use and savings that are beyond the Contractor's control may be stipulated using historical data, analyses and/or results of spot or short-term metering. The owner or the Contractor can define baseline conditions. If the owner defines the baseline, the Contractor will have the opportunity to verify it. If the baseline is defined by the Contractor, the owner will have the opportunity to verify.*

*Baseline physical conditions (equipment inventory and conditions, occupancy, nameplate data, energy consumption rate, control strategies, etc.) are typically determined through well-documented audits, surveys, inspections and/or spot or short-term metering. This documentation will define the baseline for calculating savings and document baseline conditions in case future changes require baseline energy use adjustments.*

*This schedule contains a description of the energy savings M&V plan and calculation procedures used to verify and compute the savings performance of the installed equipment will be contained in this*

*schedule. Contractor agrees to use as the standard, the procedures and protocol for the most current version if the International Performance Measurement and Verification Protocol (IPMVP) or if not applicable to a specific measure, the latest version of measurement and verification process of the Federal Energy Management Program (FEMP) as the basis of the savings calculation methodology, and to use the M&V report developed by AEO. This protocol provides four options for M&V and covers all possible energy and water efficiency measures and is based on the accepted international standard for M&V of performance contracts.*

*This calculation will include a method to compare the level of energy that would have been consumed without the Project (referred to as the "Baseline") with what amount of energy was actually consumed during a specific time period (monthly, quarterly, etc.). All methods of measuring savings including engineered calculations, metering, equipment run times, pre- and post-installation measurements, etc. should be explicitly described for all equipment is installed. A post-installation report is required.*

*A clear methodology for converting energy savings into energy cost savings should be provided. The utility rates to be used for the baseline and actual energy costs should be defined. How the calculations are affected by rising or lowering utility rates should be clearly described.*

*Periodically (typically on an annual basis), the baseline will be adjusted to account for the prevailing conditions (e.g., weather, billing days, occupancy, etc.) during the measurement period. All methodologies used to account for any adjustments to the baseline needs to be clearly defined in this schedule.*

*Examples of baseline adjustments include: change in the amount of space being air conditioned, changes in auxiliary systems (towers, pumps, etc.), and changes in occupancy or schedule. For example, if a chiller retrofit was completed in a building with 100,000 square feet of conditioned space and during the contract term the conditioned space is reduced to 75,000 square feet, post-installation energy use would be lower making savings higher. If there are no records of the amount of originally conditioned space, the baseline could not be adjusted. Baseline adjustments for issues such as changes in production shifts, facility closures, adding new wings or loads (such as computer labs) require a conceptual approach versus a method to cover each eventuality. Clearly predictable annual variations are usually handled through established procedures for each identified factor in the savings formulas. Permanent changes, such as changes in square footage, are handled through agreement clauses that allow predictable or expected changes and/or through a "re-open" clause that allows either party to renegotiate the baseline.*

*A Facility Changes Checklist or other method may be provided by the Contractor for the Agency to notify the Contractor of any changes in the facility that could have an impact on energy use (occupancy, new equipment, hours of use, etc.). This checklist is generally submitted on a monthly or quarterly basis.*

**SCHEDULE F:  
CONSTRUCTION AND INSTALLATION SCHEDULE**

*The timetables and milestones for Project construction and installation should be contained in this schedule. Any penalties for late installation should also be documented here. Documentation of required insurance, sub-Contractor lists and any MBE/WBE required subcontracts can be included in this schedule or broken out into a separate schedule. NOTE: It is important that the construction/installation phase of the Project (for example bonds and insurance) be treated in compliance with individual institutional requirements and the appropriate governing statutes. Since construction is just one component of the overall Project, a separate construction contract may be desirable and in some cases necessary. The construction contract would then be referred to in the body of the contract and attached as an exhibit, appendix or other type of attachment. Another approach would be to consolidate the appropriate construction language for inclusion in the body of the final contract. This will need to be decided as appropriate on a case-by-case basis.*

**SCHEDULE G:**

**SYSTEMS START-UP AND COMMISSIONING; OPERATING PARAMETERS OF INSTALLED EQUIPMENT**

*This section should specify the performance testing procedures that will be used to start-up and commission the installed equipment and total system. The schedule also provides for the Agency to be notified of and have the right to be present during all commissioning procedures. This schedule should contain a provision for the documentation of the client's attendance at the various tests and acceptance of the Contractor's certification that the tests followed the specified procedures and met or exceed the expected results. Use of manufacturer's start up and performance sheets are required. Contractor shall also use and adhere to the Commissioning Guidelines for the Arkansas Energy Performance Contracting Program, on the AEO website during all aspects of commissioning for this Contract.*

*The operating parameters should contain any specified parameters for the operation of the installed equipment such as temperature setbacks, equipment run times, load controlling specifications and other conditions for the operation of the equipment.*

**SCHEDULE H:  
STANDARDS OF COMFORT**

*The standards of comfort to be maintained for heating, cooling, lighting levels, hot water temperatures, humidity levels and/or any special conditions for occupied and unoccupied areas of the facility should be explicitly described in this schedule.*

**SCHEDULE I:  
CONTRACTOR'S MAINTENANCE RESPONSIBILITIES**

*A complete description of the Contractor's specific operations and maintenance responsibilities should be included in this schedule along with the time intervals for their performance of the stated O&M activities (through Acceptance, through Performance Term, etc.).*

**SCHEDULE J:  
AGENCY'S MAINTENANCE RESPONSIBILITIES**

*This schedule describes the operations and maintenance responsibilities that may be assigned to facility staff as agreed to by both parties. In some instances it will contain no more than a description of routine O&M currently being performed on existing energy consuming equipment in the facility. In other cases, facility staff may be used to provide some maintenance on the new equipment installed under the performance contract, with the Contractor providing any specialized services as needed.*

**SCHEDULE K:  
FACILITY MAINTENANCE CHECKLIST**

*This checklist is a method by which the Contractor may record and track compliance with operations and maintenance procedures performed by facility personnel. The checklist typically specifies simple list of tasks and the corresponding schedule for the performance of the prescribed procedures. Facility staff will complete the checklist and forward it to the Contractor, usually on a monthly basis. (This checklist is a very useful tool for both the Contractor and Agency to verify that the required maintenance activities are being performed at the scheduled intervals). It could be stated here that the checklist will be provided as a part of the Operation and Maintenance Manuals.*

**SCHEDULE L:  
CONTRACTOR'S TRAINING RESPONSIBILITIES**

*The description of the Contractor's training program or sessions for facility personnel should be contained in this schedule. The duration and frequency of the specified training should also be included. Any provisions for on-going training, commitments to train newly hired facility personnel, and training with respect to possible future equipment or software upgrades should also be described. Any fees associated with requests for training beyond what the Contractor is contractually bound to provide should also be specified.*

**SCHEDULE M:  
GENERAL CONDITIONS**

*These General Conditions required by Arkansas state government shall apply for all state agencies and institutions. Additional terms and conditions may be required by the Arkansas Office of State Procurement.*

- 1. MINORITY BUSINESS POLICY:** Minority participation is encouraged in this and in all other procurements by state agencies. Minority is defined by Arkansas Code Annotated § 15-4-303 as a lawful permanent resident of this state who is: African American, Hispanic American, American Indian, Asian American, Pacific Islander American or a Service Disabled Veteran as designated by the United States Department of Veterans Affairs. The Arkansas Economic Development Commission conducts a certification process for minority business. Bidders unable to include minority-owned business as subcontractors "may explain the circumstances preventing minority inclusion".

Check minority type:

African American\_\_\_ Hispanic American\_\_\_ American Indian\_\_\_ Asian American\_\_\_  
Pacific Islander American\_\_\_ Service Disabled Veteran\_\_\_  
Arkansas Minority Certification Number\_\_\_\_\_

1. **EQUAL EMPLOYMENT OPPORTUNITY POLICY:** In compliance with Arkansas Code Annotated § 19-11-104, the Office of State Procurement is required to have a copy of the vendor's Equal Opportunity Policy prior to issuing a contract award. EO Policies may be submitted in electronic format to the following email address: [eeopolicy.osp@dfa.arkansas.gov](mailto:eeopolicy.osp@dfa.arkansas.gov), or as a hard copy accompanying the solicitation response. The Office of State Procurement will maintain a file of all vendor EO policies submitted in response to solicitations issued by this office. The submission is a one- time requirement, but vendors are responsible for providing updates or changes to their respective policies, and for supplying EO policies upon request to other state agencies that must also comply with this statute. Vendors that do not have an established EO policy will not be prohibited from receiving a contract award, but are required to submit a written statement to that effect.
2. **VISA ACCEPTANCE:** Awarded contractors should have the capability of accepting the State's authorized VISA Procurement Card (p-card) as a method of payment. Price changes or additional fee(s) may not be assessed when accepting the p-card as a form of payment. The successful bidder may receive payment from the State by the p-card in the same manner as other VISA purchases. VISA acceptance is preferred but is not the exclusive method of payment.
3. **EO-98-04 GOVERNOR'S EXECUTIVE ORDER:** Bidders should complete the Disclosure Forms found on the Arkansas Office of State Procurement website:  
<http://www.dfa.arkansas.gov/offices/accounting/internalaudit/Pages/ExecutiveOrder98-04.aspx>
4. **CURRENCY:** All pricing must be United States dollars and cents.
5. **GUARANTY:** All items provided under the contract shall be newly manufactured, in first-class condition, latest model and design, including, where applicable, containers suitable for shipment and storage, unless otherwise indicated in the bid invitation. The contractor hereby guarantees that everything furnished hereunder will be free from defects in design, workmanship and material, that if sold by drawing, sample or specification, it will conform thereto and will serve the function for which it was furnished. The contractor further guarantees that if the items furnished hereunder are to be installed by the bidder, such items will function properly when installed. The contractor also guarantees that all applicable laws have been complied with relating to construction, packaging, labeling and registration. The contractor's obligations under this paragraph shall survive for a period of one year from the date of delivery, unless otherwise specified herein.

6. **STATE PROPERTY:** Any specifications, drawings, technical information, dies, cuts, negatives, positives, data or any other commodity furnished to the contractor hereunder or in contemplation hereof or developed by the contractor for use hereunder shall remain property of the state, be kept confidential, be used only as expressly authorized and returned at the contractor's expense to the F.O.B. point properly identifying what is being returned.
7. **PATENTS OR COPYRIGHTS:** The contractor agrees to indemnify and hold the State harmless from all claims, damages and costs including attorneys' fees, arising from infringement of patents or copyrights.
8. **ASSIGNMENT:** Any contract entered into pursuant to this invitation for bid is not assignable nor the duties thereunder delegable by either party without the written consent of the other party of the contract.
9. **LACK OF FUNDS:** The state may cancel this contract to the extent funds are no longer legally available for expenditures under this contract. Any delivered but unpaid for goods will be returned in normal condition to the contractor by the state. If the state is unable to return the commodities in normal condition and there are no funds legally available to pay for the goods, the contractor may file a claim with the Arkansas Claims Commission. If the contractor has provided services and there are no longer funds legally available to pay for the services, the contractor may file a claim.
10. **DISCRIMINATION:** In order to comply with the provision of Act 954 of 1977, relating to unfair employment practices, the bidder agrees that: (a) the bidder will not discriminate against any employee or applicant for employment because of race, sex, color, age, religion, handicap, or national origin; (b) in all solicitations or advertisements for employees, the bidder will state that all qualified applicants will receive consideration without regard to race, color, sex, age, religion, handicap, or national origin; (c) the bidder will furnish such relevant information and reports as requested by the Human Resources Commission for the purpose of determining compliance with the statute; (d) failure of the bidder to comply with the statute, the rules and regulations promulgated thereunder and this nondiscrimination clause shall be deemed a breach of contract and it may be cancelled, terminated or suspended in whole or in part; (e) the bidder will include the provisions of items (a) through (d) in every subcontract so that such provisions will be binding upon such subcontractor or vendor.
11. **ANTITRUST ASSIGNMENT:** As part of the consideration for entering into any contract pursuant to this invitation for bid, the bidder named on the front of this invitation for bid, acting herein by the authorized individual or its duly authorized agent, hereby assigns, sells and transfers to the State of Arkansas all rights, title and interest in and to all causes of action it may have under the antitrust laws of the United States or this state for price fixing, which causes of action have accrued prior to the date of this assignment and which relate solely to the particular goods or services purchased or produced by this State pursuant to this contract.



12. **DISCLOSURE:** Failure to make any disclosure required by Governor's Executive Order 98-04, or any violation of any rule, regulation, or policy adopted pursuant to that order, shall be a material breach of the terms of this contract. Any contractor, whether an individual or entity, who fails to make the required disclosure or who violates any rule, regulation, or policy shall be subject to all legal remedies available to the agency.

**SCHEDULE N:  
PAYMENT SCHEDULE AND SCHEDULE OF VALUES**

*This schedule contains the schedule of payments from the Agency to the Contractor based on the level of work completed. This can be structured on an overall % Project completion basis or on a ECM or Building by Building basis. A detailed Schedule of Values should be provided by ECM and by building so that the % completion can be established. The Schedule of Values should show a breakdown of the total cost to show labor, material, contingency, overhead, and profit of each ECM and related services (i.e. energy audit). The amount of Agency contribution should also be clearly indicated.*

**SCHEDULE O:  
PROJECTED UTILITY AND COST SAVINGS PERFORMANCE**

*This schedule should contain the Projected energy savings in units for each year of the contract. Oftentimes these Projections are broken down on a measure-by-measure basis although some measures may be aggregated into general categories such as lighting or HVAC. If there are several buildings involved in the Project, this schedule should contain Projections for each facility, even though they may all be covered under a single guarantee.*

*It should also include a spreadsheet depiction of expected financial performance of the Project for the entire contract term. It should clearly identify all financial components of the Project including interest rates and lease-purchase costs to the leasing company, current fuel prices, any escalation rates to be applied (if an escalation rate is going to be agreed upon with the Contractor then it should be clearly documented in **Schedule E**), guaranteed savings, Contractor compensation figures (upfront payment and M&V Fees), cash-flow Projections and Projected Net Present Value of any cumulative positive cash flow benefits to the building owner.*

**SCHEDULE P  
CERTIFICATE OF INSURANCE**

*To be provided by ESCO.*

**SCHEDULE Q  
AEO ADMINISTRATION FEE**

*Per Act 554, the AEO may collect a reasonable fee for administration of the AEPC Program. This amount will be paid directly by the ESCO. This fee is a cost to the project and is eligible to be financed as part of the total project costs. The ESCO will provide the fee to the AEO within 30 days of receipt of the ESCO's initial or mobilization fee from the Agency.*

| Total Project Phase Amount | Administration Fee Per Project Phase |              |
|----------------------------|--------------------------------------|--------------|
| <b>\$100,000</b>           | 7.00%                                | \$ 7,000.00  |
| <b>\$200,000</b>           | 4.00%                                | \$ 8,000.00  |
| <b>\$300,000</b>           | 3.00%                                | \$ 9,000.00  |
| <b>\$400,000</b>           | 2.50%                                | \$ 10,000.00 |
| <b>\$500,000</b>           | 2.20%                                | \$ 11,000.00 |
| <b>\$600,000</b>           | 2.00%                                | \$ 12,000.00 |
| <b>\$700,000</b>           | 1.86%                                | \$ 13,000.00 |
| <b>\$800,000</b>           | 1.75%                                | \$ 14,000.00 |
| <b>\$900,000</b>           | 1.67%                                | \$ 15,000.00 |
| <b>\$1,000,000</b>         | 1.60%                                | \$ 16,000.00 |
| <b>\$2,000,000</b>         | 0.85%                                | \$ 17,000.00 |
| <b>\$3,000,000</b>         | 0.60%                                | \$ 18,000.00 |
| <b>\$4,000,000</b>         | 0.48%                                | \$ 19,000.00 |
| <b>\$5,000,000</b>         | 0.40%                                | \$ 20,000.00 |
| <b>\$6,000,000</b>         | 0.33%                                | \$ 20,000.00 |
| <b>\$7,000,000</b>         | 0.29%                                | \$ 20,000.00 |
| <b>\$8,000,000</b>         | 0.25%                                | \$ 20,000.00 |
| <b>\$9,000,000</b>         | 0.22%                                | \$ 20,000.00 |
| <b>\$10,000,000</b>        | 0.20%                                | \$ 20,000.00 |
| <b>\$11,000,000</b>        | 0.18%                                | \$ 20,000.00 |
| <b>\$12,000,000</b>        | 0.17%                                | \$ 20,000.00 |
| <b>\$13,000,000</b>        | 0.15%                                | \$ 20,000.00 |
| <b>\$14,000,000</b>        | 0.14%                                | \$ 20,000.00 |
| <b>\$15,000,000</b>        | 0.13%                                | \$ 20,000.00 |
| <b>\$16,000,000</b>        | 0.13%                                | \$ 20,000.00 |
| <b>\$17,000,000</b>        | 0.12%                                | \$ 20,000.00 |

## **EXHIBITS**

### **EXHIBIT I PERFORMANCE BOND**

To be provided after execution of this Contract.

### **EXHIBIT II LABOR AND MATERIAL PAYMENT BOND**

To be provided after execution of this Contract.

### **EXHIBIT III (i) NOTICE OF ACCEPTANCE—MEASUREMENT AND VERIFICATION PLAN**

To be provided by the Agency.

**EXHIBIT III (ii)**  
**Notice of Substantial Completion**

**Notice of Substantial Completion (per ECM)**

Notice of Substantial Completion

Date of Notice \_\_\_\_\_

Notice is hereby given that Agency accepts the installed equipment for ECM \_\_\_\_\_ and establishes a warranty period start date of \_\_\_\_\_.

Agency Name

By \_\_\_\_\_

Date

When completely executed, this form is to be sent by certified mail to the Contractor by Agency Name.

**EXHIBIT III (iii)**  
**Notice of Final Acceptance**

**Notice of Final Acceptance**

Notice of Final Acceptance

Date of Notice \_\_\_\_\_

Notice is hereby given that Agency accepts the Project and establishes a Performance Commencement Date of \_\_\_\_\_.

Agency Name

By \_\_\_\_\_

Date

When completely executed, this form is to be sent by certified mail to the Contractor by Agency Name.

**EXHIBIT IV  
EQUIPMENT WARRANTIES**

*To be provided by ESCO.*

**EXHIBIT V  
CALCULATION THAT THE COST WEIGHTED AVERAGE LIFETIME OF EQUIPMENT DOES NOT EXCEED  
THE FINANCING TERM**

*To be provided by ESCO.*

**EXHIBIT VI  
RECORD OF REVIEWS**

*To be provided by ESCO.*