

**SUPPLEMENTAL GENERAL CONDITIONS  
FOR ENERGY SERVICE COMPANY (ESCO) CONTRACTS  
UNDER THE CO-9ESCO**

The existing sections of the Commonwealth of Virginia General Conditions of the Design-Build Contract, Form DGS-30-056 (CO-7DB), are hereby appended with additional conditions described below.

**8. CONTRACT SECURITY**

- (e) Prior to substantial completion of the construction and acceptance by the owner, the ESCO shall provide a separate surety bond in accordance with the Code of Virginia for the duration of the Guarantee Period for the guaranteed energy savings in the amount of actual energy savings, not inclusive of Owner operational savings.

The performance bond and labor and material payment bond required under Section 8(a) of the General Conditions shall not apply to the requirement for an energy performance guarantee.

**14. PATENTS**

Ownership of Certain Proprietary Property Rights. Owner shall not, by virtue of this Contract, acquire any interest in any formulas, patterns, devices, inventions or processes, copyrights, patents, other intellectual or proprietary rights, or similar items of property related to the equipment and controls software. Nothing in this section shall negate the rights of the Owner to the ownership of the project documents described in Section 23 of the General Conditions. The ESCO shall grant to the Owner a perpetual, irrevocable royalty-free license for any and all software or other intellectual property rights necessary for the Owner to continue to operate, maintain, and repair the equipment in a manner that will yield maximal energy consumption reductions.

**31. USE OF SITE AND REMOVAL OF DEBRIS**

- (f) Ownership of the equipment and materials presently existing at the premises at the time of execution of this Contract shall remain the property of the Owner even if it is replaced or its operation made unnecessary by work performed by ESCO pursuant to this Contract. If applicable, ESCO shall advise the Owner in writing of all equipment and materials to be replaced at the Site and the Owner shall within fifteen (15) days designate in writing to the ESCO which equipment and materials that should not be disposed of off-site by the ESCO. It is understood and agreed to by both parties that the Owner shall be responsible for and designate the location and storage for any equipment and materials that should not be disposed of off-site. The ESCO shall be responsible for the disposal of all equipment and materials designated by the Owner as disposable off-site in accordance with all applicable laws and regulations regarding such disposal. Owner shall be responsible for the removal and disposal of all hazardous waste, such as asbestos and lead containing materials. ESCO will stop work and notify Owner immediately if it discovers or suspects the presence of hazardous materials at the work-site. Adjustment to the project schedule and/or the project cost resulting from the remediation of such hazardous material shall be addressed by Change Order in accordance with Section 38 of the General Conditions (CO-7 DB).

- (g) No existing equipment, pipes, wires, duct, or other materials shall be abandoned in place or on site without the written consent of the Owner. Such materials, after consultation with the Owner in accordance with 31(f), shall be removed from the site and properly disposed of in a licensed landfill or otherwise as required by law.

#### **49. TRAINING, OPERATION AND MAINTENANCE OF EQUIPMENT**

- (c) As long as this Contract is in effect, the ESCO shall provide ongoing training whenever needed with respect to updated or altered Work as defined in Exhibit A including upgraded software. Such training shall be provided at no additional charge to the Owner.
- (d) Owner shall provide all service, repairs, and adjustments to all other equipment installed under terms of this Contract. Owner shall incur all costs for such equipment service, repairs, and adjustments, except when the need for maintenance or repairs principally arises due to an ESCO warranty obligation.
- (e) Owner shall use its best efforts to notify the ESCO or its designee(s) within 24 hours after the Owner's actual knowledge and occurrence of: (i) any malfunction in the operation of the equipment or any preexisting energy related equipment that might materially impact upon the guaranteed energy savings, (ii) any interruption or alteration to the energy supply to the premises, or (iii) any alteration or modification in any energy-related equipment or its operation.

Where Owner exercises due diligence in attempting to assess the existence of a malfunction, interruption, or alteration it shall be deemed not at fault in failing to correctly identify such conditions as having a material impact upon the guaranteed energy savings. Owner shall notify ESCO within twenty-four (24) hours upon its having actual knowledge of any emergency condition affecting the Work. ESCO shall respond or cause its designee(s) to respond within 2-4 hours and shall promptly proceed with corrective measures. Any telephonic notice of such conditions by Owner shall be followed within three business days by written notice to ESCO from Owner. If Owner unreasonably delays in so notifying ESCO of a malfunction or emergency, and the malfunction or emergency is not otherwise corrected or remedied, such conditions will be treated as an Energy Performance Change and the applicable provisions of Section 55 shall be applied.

- (f) Owner shall not move, remove, modify, alter, or change in any way the Work or any part thereof without written notification to the ESCO. Notwithstanding the foregoing, Owner may take reasonable steps to protect the Work if, due to an emergency, it is not possible or reasonable to notify ESCO before taking any such actions. In the event of such an emergency, Owner shall take reasonable steps to protect the Work from damage or injury and shall follow instructions for emergency action provided in advance by ESCO. Owner 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 Work.
- (g) Owner's compliance with facilities maintenance checklist:
  1. The parties acknowledge and agree that ESCO has entered into this Contract in reliance upon the prospect of earning compensation based on guaranteed energy savings in energy used at premises, as set forth Exhibits B & C, attached hereto and made a part hereof.
  2. The parties further acknowledge and agree that the said guaranteed energy savings would not likely be obtained unless certain procedures and methods of operation designed for

energy conservation shall be implemented, and followed by Owner on a regular and continuous basis.

3. Owner agrees that it shall adhere to, follow and implement the energy conservation procedures and methods of operation to be set forth on Exhibit C, to be attached hereto and made a part hereof after Owner's approval.
4. Owner agrees that ESCO shall have the right once a month, with prior notice, to inspect premises to determine if Owner is complying. Owner shall make the premises available to ESCO for and during each monthly inspection, and shall have the right to witness each inspection and the recordations on the checklist.

The Commonwealth of Virginia General Conditions of the Design-Build Contract, Form DGS-30-056 (CO-7DB), is hereby appended with additional sections described below.

## **52. ENERGY SAVINGS GUARANTEE**

- (a) **Energy Savings Guarantee.** ESCO has formulated and, subject to the adjustments provided for, has guaranteed the annual level of energy and operations savings to be achieved as a result of the installation and operation of the Work and provision of services provided for in this Contract as specified in Exhibit A and in accordance with the savings calculation formula as set forth in Exhibit C. The Energy Savings Guarantee is set forth in annual increments for the term of the Contract as specified in Exhibit C and has been structured by the ESCO so as to be sufficient to cover any and all annual payments required to be made by the Owner as set forth in Exhibit B.
- (b) **Annual Review and Reimbursement/Reconciliation.** If at the end of any year during the guarantee period as specified in Exhibit C, the ESCO has failed to achieve the annual Energy Savings Guarantee specified in Exhibit C, upon written request by the Owner, which shall be given no earlier than the end of such year and no later than forty-five (45) days thereafter, the ESCO will pay the Owner the difference between the annual amount guaranteed and the amount of actual energy and operations savings achieved at the premises in accordance with the provisions of Exhibit C. The ESCO shall remit such payments to the Owner within thirty (30) days of written notice by the Owner of such monies due. When the total energy savings in any one year during the guarantee period exceeds the Energy Savings Guarantee as set forth in Exhibit C and are in addition to those monies due the ESCO for compensation for services as set forth in Exhibit C, such excess savings shall first be applied to reimburse ESCO for any payment ESCO made to Owner to meet ESCO's guarantee for previous years in which the energy savings fell short of ESCO's Energy Savings Guarantee under the terms as set forth in Exhibit C. In no event shall credit for excess savings be used to satisfy performance guarantees in future years of the contract. The Owner may terminate on the anniversary if the savings are not generated.
- (c) **ESCO Compensation and Fees.** ESCO has structured the Energy Savings Guarantee referred to in Section 52(a) above, so as to be sufficient to include any and all annual payments required to be made by the Owner in connection with financing/purchasing the Work to be installed by ESCO under this Contract as set forth in Exhibit B and any the annual fees to be paid by Owner to ESCO for the provision of services as set forth and in accordance with the provisions of Section 4 of the CO-9ESCO.

**53. UPGRADING OR ALTERING THE WORK**

ESCO shall at all times have the right, subject to Owner's prior written approval, which approval shall not be unreasonably withheld, to change the Work, revise any procedures for the operation of the Work or implement other energy saving actions in the premises, provided that:

1. the ESCO complies with the Standards of Comfort and Services set forth in Exhibit D herein;
2. such modifications or additions to, or replacement of the Work, and any operational changes, or new procedures are necessary to enable the ESCO to achieve the energy savings at the premises and;
3. any cost incurred relative to such modifications, additions or replacement of the Work, or operational changes or new procedures shall be the responsibility of the ESCO.

All modifications, additions or replacements of the Work or revisions to operating or other procedures shall be described in a supplemental Schedule(s) to be provided to the Owner for approval, which shall not be unreasonably withheld, provided that any replacement of the Work shall be new and have equal or better potential to reduce energy consumption at the premises than the Work being replaced. The ESCO shall update any and all software to be used in connection with the Work. All replacements of and alterations or additions to the Work shall become part of the Work described in Exhibit A and shall be covered by the provisions and terms of Section General Conditions.

**54. STANDARDS OF COMFORT AND SERVICES**

ESCO will install the Work in a manner which will provide the standards of heating, cooling, hot water, and lighting as described in Exhibit D. These Standards of Comfort and Services shall comply with nationally recognized standards unless further clarified by the Owner.

**55. ENERGY PERFORMANCE CHANGES**

- (a) Energy Performance Change Defined: A Energy Performance Change shall include any change in or to the premises, whether structural, operational or otherwise in nature which reasonably could be expected, in the judgment of the Owner or as identified by the ESCO, to increase or decrease annual energy consumption in accordance with the provisions and procedures set forth in Exhibit C by at least 5% after adjustments for climatic variations. Actions by the Owner which may result in an Energy Performance Change include but are not limited to the following:

1. manner of use of the premises by the Owner; or
2. hours of operation for the premises or for any equipment or energy using systems operating at the Premises; or
3. permanent changes in the Standards of Comfort and Services parameters set forth in Exhibit D; or

4. occupancy of the premises; or
  5. structure of the premises; or
  6. types and quantities of equipment used at the premises or
  7. modification, renovation or construction at the premises; or
  8. the Owner's failure to provide maintenance of and repairs to the Work; or
  9. any other conditions other than climate affecting energy use at the premises.
- (b) **Reported Energy Performance Changes; Notice by Owner:** The Owner shall use its best efforts to deliver to the ESCO a written notice describing all actual or proposed Energy Performance Changes in the premises or in the operations of the premises at least 10 days before any actual or proposed Energy Performance Change is implemented or as soon as is practicable after an emergency or other unplanned event. Notice to the ESCO of Energy Performance Changes which result because of an emergency or other situation which precludes advance notification shall be deemed sufficient if given by the Owner within 4 hours after having actual knowledge that the event constituting the Energy Performance Change occurred or was discovered by the Owner to have occurred.
- (c) **Unreported Energy Performance Change.** In the absence of any Energy Performance Changes in the premises or in their operations, the baseline energy consumption as set forth in Exhibit C should not change more than 5% during any month from the projected energy usage for that month, after adjustments for changes in climatic conditions. Therefore, if energy consumption for any month as set forth in Exhibit C deviates by more than 5 percent (5%) from the energy consumption for the same month of the preceding contract year after adjustments for changes to climatic conditions, then such deviation shall be timely reviewed by the ESCO to ascertain the cause of deviation. The ESCO shall report its findings to the Owner in a timely manner.
- (d) Upon notice in accordance with 55(b) or 55(c) above, the ESCO shall determine and request adjustments, if any, to the baseline set forth in Exhibit C. Such adjustments shall be calculated utilizing the same methodology and assumptions utilized in the original calculations unless the action or actions of the Owner identified in 55(a) above have materially changed those assumptions or the methodology required to complete such calculations. The proposed adjustment shall be submitted with supporting documentation including all assumptions and calculations that the Owner deems necessary to allow evaluation of the request. A Change Order shall be issued and executed for all approved change requests.

## **56. ADDITIONAL REPRESENTATIONS OF THE PARTIES**

Owner hereby warrants, represents and promises that it has provided or shall provide timely to ESCO, all records relating to energy usage and energy-related maintenance of premises requested by ESCO 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.

**59. MEASUREMENT AND VERIFICATION**

Measurement and Verification defined. Measurement and Verification is the systematic measurement of actual consumption and comparison to the anticipated results outlined in the Energy Savings Guarantee.

Measurement and Verification shall be performed in accordance with the most current version of the Federal Energy Management Program (FEMP) International Performance Measurement and Verification Protocol (IPMVP) guidelines as of the signing of this contract.