

# Arkansas Energy Performance Contracting Program

## Investment Grade Audit Contract



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**Table of Contents**

Investment Grade Audit Contract ..... 1

- 1. Introduction..... 1
- 2. Compensation to ESCO ..... 2
  - 2a. Basis and Maximum Amount ..... 2
  - 2b. Payment through Energy Performance Contract..... 2
  - 2c. Project with Insufficient Savings..... 3
- 3. Scope of Work and Deliverables ..... 3
- 4. Termination..... 3
  - 4a. Termination for Default/Cause ..... 3
  - 4b. Termination for Convenience..... 4
  - 4c. Available Funds – Contingency - Remedies ..... 6
- 5. Insurance ..... 6
- 6. Energy Performance Contract (EPC)..... 7
- 7. Extent of Agreement ..... 7
- 8. Term ..... 7
- 9. Order of Precedence ..... 7
- 10. Owner’s Special Provisions..... 7

Exhibit A – Scope of Work and Deliverables..... 8

Exhibit B – Included Buildings/Facilities and Cost of IGA ..... 10

Exhibit C - Notice of Acceptance of Investment Grade Audit Report..... 12

## **Investment Grade Audit and Project Development Contract**

### **1. Introduction**

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

#### W I T N E S S E T H

WHEREAS, This Contract was created for use of Agencies to obtain an Investment Grade Audit for Owner's facilities from a private energy service company (ESCO).

WHEREAS, Authority exists in A.C.A. § 19-11-1201 Guaranteed Energy Cost Savings Act, for Owner to enter into this contract, and funds have been budgeted, appropriated and otherwise made available; a sufficient unencumbered balance thereof remains available for payment; and the required approval, clearance and coordination have been accomplished from and with appropriate agencies; and

WHEREAS, ESCO is a company, pre-qualified by the ARKANSAS DEPARTMENT OF ENVIRONMENTAL QUALITY – ARKANSAS ENERGY OFFICE ("AEO") for the Arkansas Energy Performance Contracting ("AEPC") Program to perform energy performance contracting for Agencies in Arkansas;

WHEREAS, AEO is authorized to collect a reasonable fee for administration of the AEPC Program; for AEPC projects that result in a fully executed Energy Performance Contract;

WHEREAS, ESCO has experience and technical and management capabilities to provide for the discovery, engineering, procurement, installation, financing, savings guarantee, maintenance and monitoring of energy and water saving measures at facilities similar in size, function and system type to Owner's facilities; and

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

WHEREAS, Owner desires to enter into a Contract to have ESCO perform an Investment Grade Audit and Project Proposal to determine the feasibility of entering into an Energy Performance Contract to provide for installation and implementation of energy and water saving measures at Owner's facilities; and

WHEREAS, if energy and water saving measures are determined to be feasible, and if the amount of savings can be reasonably sufficient to cover all costs, as defined by Owner, associated with an Energy Performance Contracting project, the parties intend to negotiate an Energy Performance Contract under which the ESCO will design, procure, install, implement, maintain and monitor such energy and water saving measures. However, this intent does not commit Owner to entering into such Energy Performance Contract.

THEREFORE, the parties agree as follows:

ESCO agrees to perform an Investment Grade Audit in accordance with the Scope of Work described in Exhibit B. ESCO agrees to complete the Investment Grade Audit and tender to Owner a final report within Number of Days on size and complexity of facilities and time needed to review the audit Number of Days from the execution of this Contract.

Owner agrees to assist the ESCO in performing the Investment Grade Audit in accordance with the Scope of Work described in Exhibit B. Owner agrees to work diligently to provide full and accurate information. ESCO agrees to work diligently to assess validity of information provided and to confirm or correct the information as needed. The parties contemplate that this will be an iterative process and that Owner will have a reasonable amount of time to review results and determine acceptance before issuing the Notice of Acceptance (Exhibit D: Notice of Acceptance of Investment Grade Audit Report).

ESCO agrees to offer an Energy Performance Contract Proposal with a package of energy and water saving measures and with details as specified in the Scope of Work in Exhibit B. If an EPC is executed, ESCO agrees to pay the AEO Administration Fee, as described in the AEPC Program Manual and the AEPC EPC Schedule U.

## **2. Compensation to ESCO**

ESCO shall be compensated as follows:

### **2a. Basis and Maximum Amount**

Except as provided for in Subsections 2b, 2c, or 2d below, within Number of Days: 120 days recommended days after Owner's acceptance of the final Investment Grade Audit and Project Proposal Contract, Owner shall pay to ESCO a sum not to exceed Dollar Amount in Words (\$ dollar amount) based on a maximum of square footage to be audited gross square feet at cost per square foot per square foot of audited square-footage, and based on other facilities as per AEPC Cost & Pricing Tool. Owner shall only pay for square-footage and other facilities actually audited. Areas deemed by Owner or ESCO not to be audited will not be charged to Owner.

### **2b. Payment through Energy Performance Contract**

Owner shall have no direct payment obligations under this contract provided that ESCO and Owner execute an Energy Performance Contract within Number of Days – 120 days suggested, allowing sufficient time for contract negotiation, attorney review, and Owner processing days, after issuance of the Notice of Acceptance (Exhibit D: Notice of Acceptance of Investment Grade Audit Report) of the final Investment Grade Audit and Project Proposal Contract, but the fee indicated above shall be incorporated into ESCO's

project costs in the Energy Performance Contract and paid through the Energy Performance Contract funding mechanisms.

### **2c. Project with Insufficient Savings**

Owner shall have no payment obligations under this Contract in the event that ESCO's final Investment Grade Audit and Project Proposal Contract does not contain a package of energy and water saving measures which, if implemented and as meeting terms of Exhibit B: Scope of Work and Deliverable, will provide the Owner with cost savings sufficient to fund Owner's payments of all costs and fees associated with the Energy Performance Contract, including 1) the fee associated with the Investment Grade Audit, 2) all payments for all project funding and/or financing contracts, 3) any annual fees for monitoring and maintenance incurred by the ESCO. Should the ESCO determine at any time during the Investment Grade Audit that savings cannot be attained to meet these terms, the Investment Grade Audit will be terminated by written notice by the ESCO to Owner. In this event this Contract shall be cancelled and Owner shall have no obligation to pay, in whole or in part, the amount specified in this Section 2a.

### **3. Scope of Work and Deliverables**

The Investment Grade Audit and Energy Performance Proposal Contract will include the following Scope of Work and Deliverables as delineated in Exhibit A and will include the buildings and infrastructure as provided in Exhibit B – Included Buildings/Facilities and Cost of IGA:

### **4. Termination**

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

#### **4a. Termination for Default/Cause**

##### **1. Default**

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

##### **2. ESCO's Duties**

Notwithstanding termination of the contract and subject to any directions from the procurement officer, the ESCO shall take timely, reasonable and necessary action to protect and preserve property in the possession of the ESCO in which the purchasing Owner has an interest.

### 3. Compensation

Payment for completed services delivered and accepted by Owner shall be at the contract price. The purchasing Owner may withhold amounts due to the ESCO as the procurement officer deems to be necessary to protect the purchasing Owner against loss because of outstanding liens or claims of former lien holders and to reimburse the purchasing Owner for the excess costs incurred in procuring similar goods and services.

### 4. Excuse for Nonperformance or Delayed Performance

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

### 5. Erroneous Termination for Default

If after notice of termination of the ESCO's right to proceed under the provisions of this clause, it is determined for any reason that the ESCO was not in default under the provisions of this clause, or that the delay was excusable, the rights and obligations of the parties shall be the same as if the notice of termination had been issued pursuant to the termination for convenience clause.

## **4b. Termination for Convenience**

### 1. Termination

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

### 2. ESCO's Obligations

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

3. Compensation
  - a. The ESCO shall submit a termination claim specifying the amounts due because of the termination for convenience together with cost or pricing data bearing on such claim. If the ESCO fails to file a termination claim within 90 days from the effective date of termination, the Owner may pay the ESCO, if at all, an amount set in accordance with subparagraph c of this Section.
  - b. The Owner and the ESCO may agree to a settlement provided the ESCO has filed a termination claim supported by cost or pricing data and that the settlement does not exceed the total contract price plus settlement costs, reduced by payments previously made by the purchasing Owner, the proceeds of any sales of supplies and manufactured materials made under agreement, and the contract price of the work not terminated.
  - c. Absent complete agreement, under subparagraph b of this Section, the Owner shall pay the ESCO the following amounts, provided the payments agreed to under subparagraph b shall not duplicate payments under this subparagraph:
    - i. Contract prices for supplies or services accepted under the contract;
    - ii. Costs incurred in preparing to perform the terminated portion of the work plus a fair and reasonable profit on such portion of the work (such profit shall not include anticipatory profit or consequential damages) less amounts paid to or to be paid for accepted supplies or services; provided, however, that if it appears that the ESCO would have been sustained a loss if the entire contract would have been completed, no profit shall be allowed or included and the amount of compensation shall be reduced to reflect the anticipated rate of loss.
    - iii. Costs of settling and paying claims arising out of the termination of subcontracts or orders pursuant to the ESCO's obligations paragraph of this clause. These costs must not include costs paid in accordance with subparagraph b of this Section.
    - iv. The reasonable settlement costs of the ESCO including accounting, legal, clerical, and other expenses reasonably necessary for the preparation of settlement claims and supporting data with respect to the terminated portion of the contract and for the termination and settlement of subcontracts thereunder, together with reasonable storage, transportation, and other costs incurred in connection with the terminated portion of this contract.
    - v. The total sum to be paid the ESCO under this subparagraph c shall not exceed the total contract price plus settlement costs, reduced by the amount of payments otherwise made, the proceeds of any sales of supplies and manufacturing materials under subparagraph b, and the contract price of work not terminated.
  - d. Cost claimed or agreed to under this section shall be in accordance with applicable sections of the State Procurement Code.

#### **4c. Available Funds – Contingency - Remedies**

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

#### **5. Insurance**

Coordinate insurance requirements and amounts of coverage with existing policy amounts and coverages and modify below as needed.

Before commencing any Work under this Contract, ESCO shall file with Owner certificates of insurance evidencing the coverages as specified below:

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



## **6. Energy Performance Contract (EPC)**

The Parties intend to negotiate an Energy Performance Contract under which the ESCO will design, install and implement energy and water saving measures which the Parties have agreed to, and provide certain maintenance and monitoring services. However, nothing in this Contract should be construed as an obligation on any of the Parties to execute such a contract. The terms and provisions of such an Energy Performance Contract will be set forth in a separate contract.

## **7. Extent of Agreement**

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

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

## **8. Term**

The term of this Contract will become effective upon approval by the appropriate authority. The term shall end number of days plus 15 days to allow for processing of check (suggest 135 days) after signing of the Notice of Acceptance (Exhibit B: Notice of Acceptance of Investment Grade Audit Report) of the Final Investment Grade Audit Report by the Principal Representative.

## **9. Order of Precedence**

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

- State Special Provisions These Special Provisions are required for State Owner/Owner projects.
- Contract - general terms and conditions
- Other exhibits or attachments

## **10. Owner's Special Provisions**

Insert as required or as available.

## **Exhibit A – Scope of Work and Deliverables**

### **Process Overview Summary**

This will be an interactive approach in working with Owner, following these steps:

#### **Preliminary Assessment of Needs and Opportunities**

1. Meet with Owner to establish interests, plans, problems, etc. related to facilities and operation of facilities.
2. Collect data and background information on buildings, equipment and facilities operation
3. Perform a preliminary walk-through of facilities and interview staff and occupants to identify potential measures
4. Meet with Owner to present preliminary findings and establish agreement on measures to analyze

#### **Preliminary Analysis of Measures**

1. Establish base year consumption and reconcile with end-use consumption estimates
2. Conduct a preliminary analysis of potential measures
3. Meet with Owner to present preliminary findings and establish agreement on measures to further analyze

#### **Further Analysis and Audit Report**

1. Further analyze measures
2. Develop a preliminary Investment Grade Audit Report
3. Meet with Owner to present results
4. Prepare final Investment Grade Audit Report

#### **Energy Performance Contract Proposal**

1. Develop Energy Performance Contract proposal
2. Provide EPC Proposal & final IGA Report to AEO for review
3. Meet with Owner to present results and negotiate final terms

## **Guidelines and Requirements**

**Energy Performance Contract Term:** The Energy Performance Contract Term shall have a term no greater than 20 years after installation unless statutorily allowable and no greater than the cost-weighted average lifetime of the equipment. Owner's goal is for a term no greater than desired financing term years.

**Annual Guaranteed Energy and Cost Savings:** The annual guarantee is recommended for at least years, or one year minimum with a mandatory option to renew. The guarantee is based on cost savings attributable to all energy saving measures, and must equal or exceed all project costs each year during the finance period. Annual project costs include debt service, ESCO fees, maintenance services, measurement and verification services, and other services as applicable.

**Excess Savings:** Annual cost savings beyond the guaranteed minimum savings will be retained by Owner, and will not be allocated to shortfalls in other years.

**Annual Savings Estimates:** The annual savings estimates for all measures must be estimated for each year during the contract period.

**Allowable** cost and savings factors approved for consideration:

Payment sources that may be incorporated at the discretion of the Owner:

- Energy and water cost savings (including renewable energy sources)
- Material/commodity savings, including scheduled replacement of parts (only for years that these cost savings are applicable)
- Outside labor cost savings, including maintenance contracts
- In-house labor costs
- Deferred maintenance cost
- Outside incentive funds (utility incentives, grants, etc.)
- Any savings related to maintenance and operation of the facilities will be limited to those that can be thoroughly documented.
- Payment sources that may also be considered and negotiated:(list)
- Additional factors related to establishing savings that cover all costs:
- Utility escalation rates that apply to each payment source. These are rates to be used in cash flow projections for project development purposes and will be openly discussed and approved by Owner.
- Interest rates (municipal tax-exempt rates or other rates for public Agencies)
- Owner cash outlay (Owner's sole discretion)

Project costs and pricing elements are presented in the **AEPC Cost & Pricing Tool, which should be included in the EPC Proposal and also in the final contract as Schedule R**. This document is available online at the following link: **INSERT**

**Exhibit B – Included Buildings/Facilities and Cost of IGA**

Costs of the IGA are determined by AEO based on a prescribed formula that factors square footage of the buildings included in the scope of work. All ESCOs are required to use the AEO-developed IGA costs in their proposals to Counties but may choose to reduce IGA costs after selection and upon mutual agreement between all parties. Using the tables below, calculate maximum IGA cost based on the GSF cost/SF according to the following table.

IGA Pricing per SF	Under 250 k SF	250 - 500 k SF	501 k + SF
	\$0.20	\$0.18	\$0.15

Using the second table, indicate the estimated cost for other facilities (building or infrastructure) where the GSF audit fee may not be appropriate, e.g., water treatment plants, wastewater treatment plants, warehouses, arenas, and others. (Consult with AEO for appropriateness of fees). The final additional costs for performing the IGA on these buildings should be negotiated after ESCO selection has taken place. The cost per SF for this audit per the AEO determination is \_\_\_\_\_ ft<sup>2</sup>

The following tables lists the buildings included in the Investment Grade Audit (IGA) Scope of Work. (Add additional rows as necessary to list all buildings and non-typical infrastructure as necessary.)

Building	Building Type	Building Age	Building Gross Square Feet- GSF	Bldg. Audit \$/SF	Bldg. Tot Audit \$
TOTAL					



**Exhibit C - Notice of Acceptance of Investment Grade Audit Report**

Notice of Acceptance

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

Notice is hereby given that ***Owner*** accepts the Investment Grade Audit and Project Development Proposal by ESCO, as contemplated in **Section 2 of the Investment Grade Audit and Project Proposal Contract** dated \_\_\_\_\_.

From:

\_\_\_\_\_  
Owner Name (print)

\_\_\_\_\_  
Owner Representative - Name (print)

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date

Submitted to:

\_\_\_\_\_  
ESCO Name (print)

\_\_\_\_\_  
ESCO Representative - Name (print)