**Investment Grade Audit and**

**Project Proposal Contract**

This document is part of a collection of model procurement and contracting documents that represent best practices for state energy offices to launch and administer programs to increase energy efficiency through Energy Savings Performance Contracting. The documents draw from successful programs in various states and are continually updated to incorporate the latest strategies. They can be easily customized to meet the needs of any state energy office or similar Owner department. These documents are provided as samples for adaptation to the laws and regulations of the user, not as legal advice or opinion.

**DESCRIPTION – Investment Grade Audit and Project Proposal Contract:**

This Contract for Investment Grade Audit & Project Development is the first of two contracts with the selected ESCO. The ESCO will complete an investment grade Investment Grade Audit that will include an analysis of each proposed project with projected savings and itemized project costs. The ESCO will present a project proposal that includes recommended measures, financing term and projected annual cash-flow analysis. These results form the basis for negotiating a subsequent Energy Savings Performance Contract.

An Investment Grade Audit (IGA) and Project Proposal Contract directs the ESCO to identify, evaluate and present a recommended package of measures with associated efficiency savings and projected costs. Below is an overview of each element of the document.

This is a model document only and does not attempt to identify or address all circumstances or conditions you may encounter or desire. Consult with your legal counsel and procurement staff to adapt it to meet your needs.

| **AT-A-GLANCE –**  **INVESTMENT GRADE AUDIT AND PROJECT PROPOSAL CONTRACT** |
| --- |
| **Overview**  **The Big Picture –** What is an investment grade audit and Project Proposal Contract?   * A stand-alone contract to identify a package of measures that could be implemented through an energy performance contract in which efficiency savings pay for the cost of the entire project * Intended as the preliminary step that will be followed by a performance contract with the same provider to implement the projects as further negotiated in the performance contract   **Cost of Audit**   * The cost of the audit is based on the square footage to be audited as well as the type of facility and the complexity of the energy-using systems * The cost of the audit contract can be rolled-into the energy performance contract and paid through the guaranteed efficiency savings just like other measures * If the ESCO cannot identify projects that meet the Owner’s pre-established financial guidelines, typically, there will be no cost for the audit   **Setting the Guidelines**   * The audit contract finalizes guidelines for the project on what is acceptable to the Owner: maximum financing term, eligible revenue streams, guarantee requirements, etc. * A baseline of energy use is established as a benchmark for determining savings after the retrofits * Maximum markups and fees to be charged by the ESCO are itemized * Measurement and verification standards are presented and a measurement and verification plan is required at this stage as needed. Measurements are best taken at the audit stage * A commissioning plan is also developed.   **Identifying Potential Projects**   * The ESCO will identify potential projects based on opportunities to achieve efficiency and cost savings and meet the Owner’s needs * An iterative process between the ESCO and the Owner is critical to establishing the potential projects   **Scoping Out a Performance Contracting Project**   * A bundle of retrofit measures will be presented in terms of projected annual guaranteed efficiency savings that meet or exceed annual financing payments. |

# INVESTMENT GRADE AUDIT AND PROJECT PROPOSAL CONTRACT

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# INVESTMENT GRADE AUDIT AND PROJECT PROPOSAL CONTRACT

This Investment Grade Audit & Project Proposal 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 by Owners to obtain an Investment Grade Audit of a facility from an energy service company (ESCO).

WHEREAS, Authority exists in the law 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.

WHEREAS, ESCO is a company with experience and technical and management capabilities to provide for the discovery, engineering, procurement, installation, financing, savings guarantee, maintenance and measurement and verification of energy, water and operational saving measures at facilities similar in size, function and system type to Owner’s facilities; and

WHEREAS, ESCO has submitted a response to Owner’s Request for Proposals (RFP); 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 Development Proposal to determine the feasibility of entering into an **Energy Savings Performance Contract** to provide for installation and implementation of energy, demand, water and operational saving measures at Owner’s facilities.

WHEREAS, if energy, demand, water and operational 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 Savings Performance Contracting project, the parties intend to negotiate an Energy Savings Performance Contract under which the ESCO will design, procure, install, implement, maintain, and measure and verify savings from such energy, water and operating saving measures. However, this intent does not commit Owner to entering into such Energy Savings Performance Contract.

THEREFORE, the parties agree as follows:

# 1. Investment Grade Audit and Project Proposal Contract

ESCO agrees to perform an Investment Grade Audit in accordance with the **Scope of Work (Attachment A)**. ESCO agrees to complete the Investment Grade Audit and Project Development Proposal and tender to Owner a final report within [Number of Days –120 days recommended depending on size and complexity of facilities and time needed to review the audit] calendar 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 (Attachment A)**, and agrees to work diligently to provide full and accurate information. ESCO agrees to work diligently to assess the validity of information provided and to confirm or correct the information as needed. The parties contemplate that this will be an interactive process and that Owner will have a reasonable amount of time to review and determine acceptance at the 30%, 90% and 100% stage of completion, before issuing the **Notice of Acceptance of Investment Grade Audit Report and Project Development Proposal (Attachment B)**.

ESCO agrees to offer a project development proposal, for an Energy Savings Performance Contract, with a package of energy, water and operating savings measures and with details as specified in the **Scope of Work (Attachment A)**.

# 2. Compensation to ESCO

ESCO shall be compensated as follows:

## **Payment through Performance Contract.**

Owner shall have no payment obligations under this Contract provided that ESCO and Owner execute an Energy Savings 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 of Investment Grade Audit Report and Project Development Proposal (Attachment B)**, except that the fee indicated in **Compensation to ESCO – Basis and Maximum Amount** (**Section 2.3)** shall be incorporated into ESCO’s project costs and paid through the Energy Savings Performance Contract.

## **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 Development Proposal** does not contain a package of energy, water and operating savings measures which, if implemented and as meeting terms of the **Scope of Work (Attachment A), Guidelines and Requirements**, will provide the Owner with cash savings (in corformance with legislation) sufficient to fund Owner’s payments of all costs and fees associated with the Energy Savings Performance Contract, including 1) the fee associated with the Investment Grade Audit, 2) all monthly payments on a lease purchase agreement to finance the measures, 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 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, **Compensation to ESCO – Basis and Maximum Amount** (**Section 2.3)**.

## Basis and Maximum Amount.

Except as provided for in **Subsections 2.1 or 2.2** above, within [Number of Days: 120 days recommended] days after Owner’s **Notice of Acceptance of Investment Grade Audit and Project Development Proposal (Attachment B)**, 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, as per **Cost and Pricing (Attachment D)**.

Owner shall only pay for square-footage actually audited. The cost will be adjusted in the event that audited square footage is changed by either the ESCO or Owner. ESCO compensation is subject to acceptance of the audit report after issuance of the **Notice of Acceptance of Investment Grade Audit Report and Project Development Proposal (Attachment D)** and after verification that the project can be financed.

# 3. Scope of Work

The Investment Grade Audit and Energy Performance Proposal Contract shall be performed as described in **Attachment A: Scope of Work**.

# 4. Termination

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

## **4.1 Termination for Default/Cause**

#### 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 contract services.

#### 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.

#### 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 contract services.

#### 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 Owneral 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.

#### 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 not been issued pursuant to the termination for convenience clause.

## **Termination for Convenience**

**4.2.1** **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.

* + 1. **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.

* + 1. **Compensation**
    2. 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.
    3. 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.
    4. 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:

**1.** Contract prices for supplies or services accepted under the contract;

**2.** 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.

**3.** 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.

**4.** 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.

**5**. 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.

Cost claimed or agreed to under this section shall be in accordance with applicable sections of the State Procurement Code.

## **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

[**Note**: 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 coverage’s 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.

* 1. Standard Workers’ Compensation and Employer’s Liability as required by State statute, including occupational disease, covering all employees at the work site.
  2. General Liability (minimum coverage)

1. Combined single limit of $600,000 written on an occurrence basis.
2. Any aggregate limit will not be less than $1,000,000.
3. The ESCO must purchase additional insurance if claims reduce the annual aggregate below $600,000.
   1. Automobile Liability (minimum coverage) in the amount of $600,000 combined single limit
   2. The Owner shall be named as an additional insured on each commercial general liability policy.
   3. The insurance shall include provisions preventing cancellation without 30 calendar days prior written notice, by certified mail to the Principal Representative
   4. 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 Savings Performance Contract

The Parties intend to negotiate an Energy Savings Performance Contract under which the ESCO will design, install and implement energy, water and operating savings 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 Savings 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 attachments 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 theevent 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 [Controller] and acceptance by the Owner**.** 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 of Investment Grade Audit Report and Project Development Proposal (Attachment B)** by the Owner.

# 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:

1. Special Provisions.
2. Contract - general terms and conditions
3. Other exhibits or attachments

# 10. Owner’s Special Provisions

[Insert as required or as available. ]

THE PARTIES HERETO HAVE EXECUTED THIS CONTRACT

IN WITNESS WHEREOF, and intending to be legally bound, the parties hereto subscribe their names to this Contract on the date first written above.

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IN WITNESS WHEREOF, and intending to be legally bound, the parties hereto subscribe their names to this Contract on the date first written above.

[Owner]

By\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Principal Representative

(Corporate Seal)

ESCO

By: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

ATTEST Name Title

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Secretary Signature

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Address

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

City, State, Zip

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Social Security Number or Federal ID

**APPROVED:**