Public and Institutional Performance Contracting
Program Guidebook
Issued July 6, 2010

I. Program History

On July 29, 2009, Governor Jack Markell signed SB 106, the Energy Conservation and Efficiency Act of 2009, into law. The legislation designates energy efficiency as a priority energy resource in the state and encourages cost effective reductions in energy consumption and peak demand by establishing some of the most progressive energy use reduction targets in the country. The goals are a ten percent (10%) natural gas consumption savings and fifteen percent (15%) electricity consumption and peak demand savings by 2015. A one percent (1%) natural gas savings and a two percent (2%) reduction in electricity consumption and peak demand and are also required by 2011.

The Delaware Sustainable Energy Utility (SEU) has established a portfolio of programs aimed at meeting these requirements. The Energize Delaware Performance Contracting Program was developed to provide a mechanism through which energy conservation measures (ECMs) can be implemented in publicly owned facilities. The financing for this program is expected to be funded primarily through tax-exempt bonds. Because of this funding source, participants must be eligible to access this type of financing. For this program, publicly owned facilities include any state agency, authority, any political subdivisions of the State or local government, including, counties, cities, local school districts, institutions of higher education, any state-supported institution, or a joint action agency composed of political subdivisions. Some larger non-profit institutional energy users may also be eligible, although further analysis of eligibility may be necessary.

Taxable bond financing may be used in the future for potential participants who are not eligible for tax-exempt funding.

II. Energy Service Company Pre-qualification

As the initial step in the Performance Contracting process, the SEU issued a Request for Qualifications to a group of Energy Services Companies (ESCOs). An ESCO is a firm that identifies and oversees the installation of energy saving projects. In addition, the ESCO guarantees that the project’s energy cost savings will be adequate to pay the project debt. The ESCOs responded to the RFQ by submitting a summary of their qualifications and experience, client references, examples of investment grade audits and their guaranteed energy savings portfolios. Review of the submissions has been conducted by the SEU and ESCOs which met the qualifications have been included in an ESCO pool. Currently, ten (10) ESCOs have been pre-qualified to participation in energy related projects at publicly owned facilities through December 2012. The RFQ process is ongoing, and additional ESCOs are encouraged to respond. The ESCO listing is available on the

Energize Delaware website (http://www.energizedelaware.org/institutions-non-profit/performance-contracting).

In accordance with Delaware Code Title 29, Chapter 80, Subchapter II, Section 8059(k), the State or other publicly owned facilities (Agencies) may enter into performance contracts directly with SEU-qualified ESCOs. Also, performance contracts through the SEU's tax exempt financing do not constitute a public debt or tax supported obligation. The relevant Delaware Code citation is cited below:

> (k) Contracts with the State or agencies. -- The State or any agency may enter into contracts with the SEU or a qualified provider (as defined in § 6972(5) of this title) for the purpose of acquiring, constructing, operating, or providing a project undertaken by an implementation contractor or qualified provider, including arrangements for paying the costs of such project, which costs may include debt service requirements of the SEU relating to that project. If the SEU procures an implementation contract in accordance with subsection (g) of this section, a contract between the SEU and the State or an agency that provides the benefit of the implementation contract to the State or agency may be entered into by the State or agency without additional competitive procurement.
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> No obligation of the State or an agency under an installment payment agreement, a guaranteed energy performance contract or any other agreement entered into in connection with a project under this Chapter 80 or Chapter 69 of this title shall constitute or create a debt of the State or agency. No such obligation of the State or an agency shall constitute a tax supported obligation or a bond or a note of the State as provided in Chapter 74 of this title.

III. SEU Notification and Letter of Intent

Agencies must notify the SEU of their interest in the Performance Contracting Program. The SEU will provide information and guidance on the process. The Agency will be required to sign a Letter of Intent, which defines the responsibilities of the SEU, Agency and ESCO. The Letter of Intent also contains the listing of pre-qualified ESCOs, Investment Grade Audit Agreement and SEU Fee Schedule.

IV. SEU and Agency ESCO Procurement Process

Typically, the selection of an ESCO can be accomplished through an interview process with the assistance of the SEU. In some cases, ESCOs can be selected directly. An example would be where an established relationship or experience with a particular ESCO exists. In accordance with State law, a formal procurement process is not required since ESCOs have been pre-qualified by the SEU. However, in cases where an agency may not have sufficient information, the SEU is prepared to execute a more formal process as described below:

- SEU and Agency Issue Letter of Interest (LOI): The SEU maintains a listing of executive summaries from each ESCO's statement of qualifications. The LOI is issued to two or more ESCOs to determine their interest in the proposed project. Based on response, ESCOs are short-listed for the RFP process (described below).

- Agency Facility Profile: The Energy Service Companies (ESCOs) will need a description of the facilities to evaluate the opportunity to implement a successful energy performance contract. The template, which is included in the RFP, includes five sections (1) General Facility Data, (2) Energy Systems Data, (3) Energy Initiatives, (4) Improvement Opportunities, (5) Energy and Water Consumption Data, which should be filled out to the greatest extent possible.
- SEU and Agency Issue Request for Proposal (RFP): An RFP is issued to the short-listed ESCOs. The purpose of the RFP is to solicit proposals for an Investment Grade Audit (IGA). A pre-proposal conference and site visit are generally incorporated into the process. The ESCOs' written proposal will include information on their how their firm approaches projects, their specific experience, client references, scope of similar projects completed and cost associated with performing the IGA. This information will be used to evaluate and rank the responses.
- SEU and Agency Conduct Oral Interviews: Although not required, oral interviews can provide additional information from the ESCOs and allow direct response and interaction between the ESCO and Agency.
- Agency Selects ESCO: Selection of the ESCO best qualified for the Agency's project is based on the evaluations of the RFP and oral interview process.

V. Investment Grade Energy Audit Agreement

After the ESCO procurement process, an Investment Grade Audit Agreement will be executed between the Agency and ESCO. This agreement authorizes the ESCO to conduct an IGA, provides audit scope and report requirements, termination and compensation provisions, timeline for ESCO report submission, timeline for Agency start of Guaranteed Energy Savings Agreement (GESA) negotiation, and responsibilities of each party. A minimum of 15% savings in energy costs is expected for the project to proceed.

The SEU is compensated for its' involvement in the process based on a pre-determined fee schedule (incorporated into the Letter of Intent previously signed). The SEU's fees are generally based on the total project value and the level of SEU involvement. Fees are payable at the time a GESA is signed, or when a decision is made to not proceed further.

VI. Investment Grade Audit and Technical Audit Report

After signing the Investment Grade Audit Agreement, the ESCO will conduct the detailed audit of the facility. The IGA is conducted to analyze cost-effective Energy Conservation Measures (ECMs) for facility systems including, but not limited to, envelope, lighting, HVAC equipment, central steam, hot water and chilled water systems, domestic hot water and other water using systems and building automation controls. Current utility rates will be used for the purpose of calculating energy and utility cost savings, and energy and utility cost inflation factors shall be agreed upon by the Agency and ESCO at the onset of the

IGA. The IGA results in a two-volume Technical Audit Report, the contents of which are detailed in the IGA Agreement. This includes (but is not limited to) basic information below as well as the required schedules and information listed in the Investment Grade Energy Audit Agreement.

- General Information: Facility name, description, baseline information (energy use indices, square footage, utility use/costs, Energy Star Target Finder score, existing equipment, sequences of equipment operation, hours of operation, etc.);
- Project Summary: energy and energy cost savings expected from the ECMs and O&M recommendations, maximum guaranteed project cost (including engineering and design, permits, materials, construction, commissioning, ESCO fees, SEU fees, financing fees, measurement and verification fees, etc.), savings guarantee, project cash flow over the term of the project financing, including any capital infusion, financing expenses, commissioning and M&V costs;
- For each ECM proposed for installation: baseline conditions, proposed conditions, energy savings calculations, environmental costs/benefits, quantities, specifications, warranties, commissioning requirements and method of M&V;
- For ECMs analyzed but not proposed for installation: baseline conditions, proposed conditions and reasons why not recommended;
- ECMs proposed/analyzed but not chosen by the Agency;
- Improvements to operations and maintenance (O&M) practices for existing equipment;
- An overall estimated Energy Performance Rating using EPA's Energy Star Delta Score Estimator and a completed Cash Flow Opportunity spreadsheet generated using EPA's Cash Flow Opportunity Calculator
- Detailed project completion schedule
- Verification that comfort conditions will be maintained at the facility;
- Identification of the services and associated costs for the ESCO during the course of the project, including but not limited to; engineering, construction management, preparation of O&M procedures, training of facility personnel, commissioning, functional testing, HVAC testing, adjusting and balancing, start-up/stop, warranty services, and equipment maintenance; and
- The nature and extent of work and equipment that the ESCO will receive from other firms under subcontract.

Agency in-house labor, deferred maintenance cost or offset of future capital cost shall not be included in energy cost savings for the purpose of determining cost-effectiveness, unless specifically approved by the Agency. These will typically represent costs for purchased parts and service contracts, not internal labor costs. The maximum guaranteed construction cost represents project design; construction; ESCO's construction and project administration; system commissioning; bidding; bonding;

overhead and profit; permits; taxes; training; cost and saving guarantees; SEU fees; and other costs that may be agreed to by the ESCO and the Agency.

The Agency's cash flow including savings, cost of measurement and verification services, cost of ECMs, and loan repayments shall be neutral or positive with respect to the baseline cash flow and based on guaranteed savings.

VII. Technical Audit Report Review

The Agency and the SEU (possibly with the assistance of third-party engineers) thoroughly review the proposed ECM technical scopes, energy savings calculations and supporting documentation, and verify the information contained within the Technical Audit Report. The finalized Technical Audit Report is the basis for negotiation of the scope of work and ESCO services under the Guaranteed Energy Savings Agreement.

If the Agency is unable or chooses not to proceed with the GESA, the Agency is responsible for the cost of the IGA and applicable SEU termination fees. If the agency decides to proceed with the project, the cost of the IGA and the applicable SEU fees may be included in the project financing and amortized over the project term.

VIII. Guaranteed Energy Savings, Installment Payment, Construction Funding and Consent to Assignment Agreements

The Agency executes the Guaranteed Energy Savings and Installment Payment Agreements with the ESCO. The Guaranteed Energy Savings Agreement includes all terms and conditions required to execute the project between the Agency and ESCO. The Installment Payment Agreement represents payments to be made by the Agency to the ESCO for performance of the construction work.

The SEU executes the Construction Funding Agreement with the ESCO. The Construction Funding Agreement requires the SEU to make construction progress payments based on the construction price to the ESCO, and requires the ESCO to assign payments received under the Installment Payment Agreement to the SEU.

The SEU executes the Consent to Assignment Agreement with the Agency. The Consent to Assignment Agreement represents the Agency's consent to the assignment of payment from the ESCO to the SEU under the Construction Funding Agreement, and acknowledges that remedy for non-performance by the ESCO lies against the ESCO and does not constitute a defense to payments assigned to the SEU.

IX. Bond Issue

Projects from various Agencies will be grouped together for the bond issuance. Once sufficient project dollar volume has been aggregated, the bond issuance process will begin. Since the tax exempt financing is secured through the GESAs, signed agreements will be necessary in order for an Agency to participate in bond financing.

X. Project Construction

When the project design is completed and approved by the Agency, the ESCO will select sub-contractors and vendors with the assistance of the Agency and SEU as needed. Agencies may establish preferences with the ESCO for contractors and vendors. ESCOs are expected to manage the selection process to insure appropriate quality and pricing.

When project construction is complete the ESCO will issue a Completion Certification. This document is the formal written notification to the SEU and the Agency that the ESCO has substantially completed installation of ESCO equipment and/or provided ESCO services as outlined in the GESA. This also verifies that such equipment or services are now providing sufficient energy savings for the Agency to begin making payments, as set forth in the Installment Payment Agreement. Acceptance of the Completion Certification by the SEU and the Agency constitutes the date of substantial completion for the project. The SEU and the Agency will have inspected the project and accepted it prior to this notice.
The ESCO confirms through the Completion Certification that they have inspected the project and that it is complete, that all previously identified “incomplete work items” have been fulfilled and that the project is providing cost savings sufficient to repay the investment.

XI. Measurement & Verification

The ESCO will provide measurement and verification services for those ECMs requiring such as described in the IGA. M&V services are used to verify that energy or other utility savings are indeed being achieved. The recommended time period for M&V services will depend on the nature of the installed measures, but a minimum of three years is recommended. The SEU and the Agency may determine that additional M&V is required or beneficial in order to ensure savings continue to accrue.

XII. Annual Statements

For each savings year, the ESCO is responsible for providing an Annual Energy Savings Statement for the project, complete with relevant calculations and supporting documentation. The Agency is required to either accept the statement (and request guaranteed savings payment, if any is due) or reject the statement noting objections. If the statement is rejected, the ESCO shall re-compute the Savings to satisfy the Agency, or give notice of dispute, which will be resolved based on GESA terms and conditions.