



# **Negotiating Energy and Water Services Agreements**

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## What are the Key Provisions of an ESA that Differ from Typical Construction Contracts?

- Agreement will typically be 12 years in duration
- Execution of the agreement will be contingent upon arranging financing
- Performance standards for project results will be carefully defined and guaranteed
- Essence of the agreement will be contained in several technical appendices
- May require special HUD approvals or waivers





# Financing

- HAs are Tax Exempt, Therefore Eligible for Tax Exempt Leasing
  - Most common financing vehicle today
  - Low rates
- Other Options
  - Bonds
  - Conventional Loans
  - ESCO Financed
  - Utility Financing





## Rates Depend on:

- Size of Project
- Financing Vehicle
- “Credit Worthiness” of HA
- Length of Loan
- Smart shopping!





## Bottom Line

- High rate = less work
- Low rate = more work





# HUD Waivers

- Waivers Needed for Anything Outside of the Specific Provisions of the 24 CFR:
  - Floor and Ceiling Rates
  - Fuel Conversions
  - Tenant Paid Utilities





# What Are the Key Parts of the Contract That Define the Performance Guarantee?

- Contract language defining the savings guarantee
- Appendix defining energy and water baselines
- Appendix defining utility savings measurement and calculation procedures
- Contract language on material changes that permit adjustments to the guaranteed savings





## What Are the Key Parts of the Contract That Define the Performance Guarantee? (Cont.)

- Contract language governing annual guarantee reconciliation procedures
- Does the appendix showing the project cashflow summary, measurement and verification procedures, and fairly and accurately account for savings?





# Key Questions to Evaluate the Savings Guarantee

- Is the utility consumption and cost baseline data well defined and representative?
- Have the project measures been commissioned properly?
- Does contract language call for an annual stand-alone savings guarantee or a cumulative contract term savings guarantee?
- Do the measurement and verification procedures fairly and accurately account for savings?
- Does the contract require a reasonable review and approval process for material changes to the savings guarantee?
- What percent of projected savings is guaranteed?





## What Are Some Key Factors That Affect the Savings Guarantee?

- Escalation factors used to calculate utility savings and future labor costs
- HUD approval of utility savings valuation rates
- Division of savings in excess of debt service between the PHA and the ESCO
- Quality of the measurement and verification of savings
- Calculation of annual maintenance, monitoring, and training fees
- Payment provisions for any guarantee shortfall
- Maintenance savings treatment





# Strategies for Managing Project Costs

- Be sure project scope and specifications are adequately detailed to provide realistic cost estimates
- Clearly define all the services covered by contract fees you will pay
- Require the cost of calculating material changes to be part of the annual monitoring fee
- Require not to exceed pricing without a formal amendment to the scope of the project
- Use savings during construction to pay for change orders or as part of a contingency budget
- Require the ESCO to provide a detailed accounting of services provided for their annual fee





## More Strategies for Cost Control

- Inertia in the review and approval process can drive up transaction costs
- Hold your administrative staff accountable for their performance with the same rigor you apply to the ESCO
- Pay careful attention to the durability of measures and the allocation of maintenance responsibilities in your contract
- Timely feedback and corrective action to remedy project performance problems should be required





# Six Risks That an ESCO Performance Contract Can Manage for You

- Comprehensive, turnkey, single-point-performance responsibility compresses the project implementation schedule and reduces the *cost of delay* (i.e., lost savings opportunities)
- Guaranteed measured savings reduce the risk of savings erosion over time
- Specified environmental standards of service in the contract reduce the risk of comfort problems
- Integration of analysis, design, and construction reduces the risk of lost design synergies
- Utility savings and performance monitoring reduce the risk of under funding key maintenance requirements
- Financial guarantee of savings reduces the risk of being unable to finance the project





# Contract Innovations to Achieve a Quality Project

- Part of the ESCO design fee should be based on measured savings
- Clear communication of minimizing the LCC design criteria should be reflected in subcontractor agreements
- Include quantitative performance standards in equipment bid specifications
- Provide detailed specifications on types and sizes of equipment and eliminate the words “or equal” from specs





# What if You Don't Agree about Performance of Mutual Duties?

- Do not breach the contract because you are dissatisfied with performance; instead, follow contract dispute resolution procedures
- Alternative dispute resolution provides the most economical and fair approach in most cases
- Objective, well-defined project performance standards in the contract are the best way to prevent disputes
- Standards should be fair, efficient, technically accurate, measurable, transparent to a third party, and consistent with good industry practices
- Maintain open communication with the ESCO as a performance partner





# Training

- Residents, Maintenance and Other Staff
- Fees Should be Paid Annually Out of Savings
- Training Should Continue Through Life of Contract
  - Turn over





# Resident Training

- Remember — Residents *Live* Here
- Let Them Know What to Expect
  - Before, during and after construction
- Resident Buy-in Helps Project Success
- Peer Training is Useful Tool





# Guidelines for Company Training Responsibilities — Schedule J

1. Training should provide an adequate technical understanding of the value of specific maintenance tasks
2. Periodic reviews of key techniques should be scheduled
3. Train new staff to ensure the continuity of quality maintenance
4. Learning by doing, with hands-on demonstrations of methods that provide opportunity for immediate feedback, should be a prominent feature of proposed training
5. Training should comprehensively cover all operations, maintenance, and monitoring tasks that impact project performance





# Maintenance Responsibilities

- Contract Should Outline Duties of Each Party
- Performance (and Guarantee) Will Depend on Proper Maintenance
- Some ESCOs Will Require Certain Areas Be Covered by their Staff





## Be Specific!

- Who Does What?
- Frequency of Upkeep
- What are You Buying in a Maintenance/Service Contract?
- What Portion of Savings is Going to the ESCO for Maintenance/Service?





# Resident Employees

- Many HAs Require Residents to be Employed by the Project
- Options Include:
  - Peer Trainers
  - Maintenance/Service
  - Provide Notice of Need for Apartment Access
  - Reading Meters
  - Measures Installation





# Legalities and Boiler Plate

- Sample Contracts Have Suggested Values/Wording for:
  - Insurance
  - Federal Contracting Provisions
  - Invoicing, etc.
- Be Sure Your Legal and Financial Teams Review and Insert Language Specific to Your HA





# Contract Appendices

- Schedule A      ECMs to be Installed
- Schedule B      Energy Savings Guaranty & Savings  
Calculation Methodology
- Schedule C      Compensation to Company
- Schedule D      Premises
- Schedule E      Calculation of Baseline
- Schedule F      Financing Schedule
- Schedule G      Company Maintenance and Monitoring  
Responsibilities





## Contract Appendices (Cont.)

Schedule H	PHA Maintenance Responsibilities
Schedule I	Standards of Comfort & Service
Schedule J	Company Training Responsibilities
Schedule K	Project Installation Schedule
Schedule L	Current and Known Future Capital Project
Schedule M	Pre-Installation Equipment Inventory
Schedule N	Pre-Existing Service Agreements





## Contract Appendices (Cont.)

- Schedule O Subcontractor/Vendor Disclosure
- Schedule P Systems Startup and Commissioning of ECMs
- Schedule R Working Conditions
- Schedule S Insurance and Bonds
- Schedule T Disposition of Interim Savings
- Schedule U Warranties
- Additional Schedules as warranted

