

Exercise 6: Negotiating the Energy and Water Services Contract

Student Instructions for Exercise 6:

In this exercise, you will play the role of a member of US PHA's negotiation team. Your objective will be to include provisions in the performance contract that will go a long way toward ensuring that:

- 1) it will be possible to accurately measure and verify the savings you have been promised,
- 2) any disputes that arise regarding the contract will be resolved through a process that does not disadvantage US PHA, and
- 3) the ESCO will be cognizant of your goals for the economic and social well-being of your residents, and will be a willing and cooperative partner with you in achieving those goals.

In this exercise, you will obtain practice in negotiating for contract provisions which the ESCOs can be expected to resist because they may add costs, because they shift certain elements of the project risk from US PHA to the ESCO, or simply because they are different from business-as-usual. Specifically, you will seek to gain their agreement to commissioning, stringent and thorough measurement and verification of savings, dispute resolution terms that are favorable to US PHA, and to their active participation in your Project Area Resident employment program, which hires and trains US PHA residents in the skilled trades.

Please review the attached pages, which synopsise the contract provisions to which you will try to get the ESCO to agree. Read these materials, meet with your small groups, and discuss and agree upon a negotiating strategy. Assign negotiation roles to group members, then proceed to negotiate for these contract elements with one of the course instructors, who will be playing the role of ESCO representatives that are reluctant to agree.

Commissioning Language

6.0 Commissioning, Measure Acceptance, Project Acceptance

6.1 The Contractor shall deliver to US PHA a written report (the “Commissioning Report”) as each Measure covered by the Agreement is completed. In the Commissioning Report(s), the Contractor shall provide measurement and verification documentation that verifies that the specified equipment or systems have been properly installed, are functioning properly, and have the potential to generate the Guaranteed Savings (or that Measure’s share of the Guaranteed Savings).

6.2 The Commissioning Report(s) shall include the results of performance tests to verify that the installed Measure(s) will operate as designed, consistent with the standards set forth in the design documents, which shall minimally conform to all applicable codes. The Commissioning Report(s) shall be accompanied by complete reproducible as-built record drawings conforming to generally accepted engineering standards of all modified or newly installed equipment including, but not limited to, architectural, mechanical, electrical, and controls. Manufacturer’s warranties shall accompany the Commissioning Report(s) and shall be assigned to US PHA upon completion and Measure Acceptance.

6.3 Within 30 days of receiving a Commissioning Report from Contractor, US PHA shall notify Contractor of the Measure(s) Acceptance or whether the Measure(s) have been rejected. If Measure(s) are rejected, US PHA will set forth the reasons for such rejection. In the event the Measure(s) are rejected by US PHA, Contractor shall remedy the deficiencies and the applicable procedures set forth in this Section for notice and Measure Acceptance shall apply again.

6.4 Within 30 days of submission of the final Commissioning Report, Contractor shall deliver to US PHA notice that the Project is completed and a request for Project Acceptance. In this notice, the Contractor shall warrant that the completed Project will produce the Guaranteed Savings.

6.5 Within 30 days of receipt of the request for Project Acceptance, US PHA shall either deliver to Contractor: a) a written Certificate of Project Acceptance or b), if good cause exists, a written punch list of the corrective actions it deems necessary. In the event the US PHA delivers a punch list, Contractor shall promptly remedy the deficiencies and the applicable procedures set forth in this Section for notice and Project Acceptance shall apply again.

M&V Language

9. Measurement of Energy Savings

9.1 The monitoring and measurement of the Energy Savings that result from the Measure(s) shall be as set forth in the Measurement and Verification Plan (M&V Plan) attached as Exhibit 4.

9.2 The M&V Plan shall be in accordance with concepts and definitions provided in the International Performance Measurement and Verification Protocol (IPMVP).

- a) In the event that the M&V Plan requires the use of Contractor-owned measurement equipment, Contractor shall test such meters, metering devices, and equipment in the manner and frequency described in the M&V Plan and such testing shall be at Contractor's expense. Contractor shall give US PHA reasonable advance notice of all metering tests and US PHA shall have the right to observe such tests.
- b) If, upon testing, any measurement equipment is found to be inaccurate by more than the agreed upon level of accuracy as specified in the M&V Plan, then previous recordings of or by such equipment shall be considered inaccurate and will be corrected to zero error. If the period of inaccuracy cannot be accurately determined as a basis for adjustment, then retroactive billing adjustments for errors shall be made for a period equal to one-half of the time elapsed since the previous test, but in no event more than six months. Contractor shall promptly adjust such equipment to record correctly.

Exhibit 4

Measurement and Verification Plan

The Measurement and Verification Plan incorporated in this Agreement, through this Exhibit, shall be in accordance with concepts and definitions provided in the International Performance Measurement and Verification Protocol (IPMVP). The following issues shall be discussed:

- How energy loads which constitute the baseline will be identified.
- How the following types of existing energy loads will be addressed in the M&V plan:
 - Constant - having little or no variation in energy usage.
 - Predictable - Variation in energy usage varies in a way that can be explained by identifying a cause (driver) and the driver can be measured. Examples of predictable loads include weather-driven energy usage (heating, cooling) and occupancy-driven energy usage (lights).
 - Random - The variation of energy usage follows no discernable or predictable pattern.
- The proposed approach to define the performance of each measure and how that performance will be measured during the baseline period, and in the post installation period.
- The proposed approach to define the relevant operating variables that drive energy usage and the related plan for distributing responsibility for operation between the Contractor and US PHA for the term of the contract.
- The proposed approach to verify, at defined intervals during the term of the contract, that the installed equipment and systems have been properly maintained, continue to operate correctly, and continue to have the potential to generate the predicted savings.
- For each of the three types of existing energy loads (constant, predictable and random):
 - The M&V Option to be applied
 - Why that Option was selected
 - Measured quantities to be used in the adjusted baseline.
 - Measured quantities to be used to determine post-installation energy use.
 - Stipulated quantities that will affect energy savings calculations.
- The identification of operating and savings assumption parameters having the highest sensitivities (greatest possible variation which will affect related energy savings)
- The identification of relevant energy use drivers and the documentation of how the drivers will be used to adjust the baseline and calculate savings.
- The proposed approach to develop an electronic Site Data Package (SDP) that contains all of the relevant technical and financial information that can be used to verify energy and costs savings quantities.

Dispute Resolution Language

11. Dispute Resolution

If a dispute arises under this Agreement, the parties shall promptly attempt in good faith to resolve the dispute by negotiation. Negotiation shall be conducted under the voluntary Construction Mediation Rules of the American Arbitration Association. If negotiation fails to settle the controversy or claim, it shall be settled by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association in effect at the time, except as modified herein. If the negotiators cannot agree on an arbitrator, he or she shall be chosen by the Director of Procurement of the US Public Housing Authority.

Judgment upon the award rendered by the arbitrator may be entered in accordance with Section __. The prevailing party shall recover all costs, including attorney's fees, incurred as a result of the dispute.

Resident Employment Language

14. Project Area Resident Employment Plan

14.1 A minimum of twenty per cent (20%) of the skilled trades labor utilized under this Agreement shall be performed by US Public Housing Authority residents enrolled in the Step-Up Resident Employment Program. Participating residents shall be certified as eligible by the US Public Housing Authority, shall be apprenticed to a journeyman tradesman, and shall be participating in a training program, recognized by local unions, to qualify for journeyman status.

14.2 A minimum of fifty per cent (50%) of unskilled labor under this agreement shall be performed by US Public Housing Authority residents. Participants shall be certified as eligible and qualified by the US Public Housing Authority.