



Department of Energy
Washington, DC 20585

June 22, 1999

MEMORANDUM FOR: Shelley N. Fidler
Acting Director
Federal Energy Management Program

FROM: Mark S. Schwartz
Deputy General Counsel for Energy Policy

SUBJECT: Relationship of the Anti-Deficiency Act to Multi-year Contracts Under the
Utility Incentive Program Authorized Under Section 152(f) of EPACK

I. BACKGROUND

The Department of Energy's (Department) Federal Energy Management Program (FEMP) is assisting federal agencies in improving energy and water efficiency to meet the goals of the Energy Policy Act of 1992 (EPACT), Pub. L. No. 102-486 (1992) (codified as amended in scattered sections of Title 42 of the U.S. Code) and Executive Order 13123. Because of the inability of Federal agencies to obtain appropriated funding for Federal building energy-efficiency and water conservation projects, one of the primary goals of FEMP is the implementation of the demand side management (DSM) and energy and water conservation and efficiency projects through utility services contracts and energy savings performance contracts. FEMP has requested our views as to whether and to what extent the authority provided to Federal agencies under section 152(f) of EPACT, which amends section 546 of the National Energy Conservation Policy Act, 42 U.S.C. 8256(c)(1997), is constrained by the Anti-Deficiency Act, 31 U.S.C. 1341 (1998) and whether contracts under section 152(f) also qualify as "public utility services" contracts under section 201 of the Federal Property and Administrative Services Act of 1949, as amended (Federal Property Act), 40 U.S.C. §481(a)(3) (1997), which are eligible for a ten-year term.

FEMP's inquiry is directed to whether Federal agencies are required to obligate the entire contract amount, or amounts for termination costs, under DSM and energy and water conservation and efficiency contracts. This sort of obligational requirement would in FEMP's view negate the purpose of section 152(f)¹, which is to make utility incentives available to federal agencies on the same basis as they are available to other customers. The up to ten-year contract term available for "contracts for public utility services" under section 201 of the Federal Property Act is needed to make these projects economically viable.

II. QUESTION

You have requested our views on whether DSM and energy and water conservation and efficiency contracts entered into with utilities under section 152(f) of EPACT are "contracts for public utility services" under section 201 of the Federal Property Act, and thus can have both a ten-year contract term and an exemption from the full funding requirements of the Anti-Deficiency Act, 31 U.S.C. §1341 (1998).

III. CONCLUSION

DSM and energy and water conservation and efficiency contracts authorized by section 152(f) of EPACT can qualify as "contracts for public utility services" under section 201 of the Federal Property Act, if the services and goods provided meet the requirements for "utility services." As public utility service contracts they are not subject to the requirement that funds must be obligated for expenses (including potential termination costs) beyond the first year, and the contracts can have up to a ten-year term. In order to facilitate your implementation of this conclusion, we have prepared model agreements that reflect the kinds of energy conservation measures that we conclude are properly categorized as "public utility services."

IV. DISCUSSION

Section 201(a)(3) of the Federal Property Act authorizes the General Services Administration (GSA) to enter into contracts for public utility services for periods not exceeding 10 years. It was enacted to effect economies in the procurement of such services². Use of section 201 presupposes the availability of a fiscal year appropriation for the first year and that the services to be rendered are merely incidental to the conduct

¹ Contracts under section 152(f) of EPACT are contracts with utilities under utility incentive programs (UIPs) offered by utilities. Each agency may accept any financial incentives, goods, or services "generally available to customers of such utility." *Id.* An agency, therefore, must satisfy "the criteria which generally apply to other customers" under a UIP. Finally, an amount equal to fifty percent of the agency's savings may be retained by the agency for additional energy efficiency measures. *Id.*

² GSA has delegated to DOE certain authority to enter into contracts for utility services for periods not to exceed ten-years. Delegation of Authority to the Secretary of Energy, signed by Brian K. Polly, Assistant Commissioner, Office of Procurement, Public Buildings Service, General Services Administration, dated February 12, 1987. See FAR §41.103(a)(3), 48 C.F.R. §41.103(b)(1998) (referencing the delegation).

of authorized government business. Section 201(a) of the Federal Property Act provides, in part, as follows:

The Administrator shall (3) procure and supply personal property and nonpersonal services for the use of executive agencies in the proper discharge of their responsibilities, and perform functions related to procurement and supply such as those mentioned above in subparagraph (1) of this subsection: Provided, That contracts for public utility services may be made for periods not exceeding ten years... .

Federal Property Act, §201(a)(3) (emphasis added).

A. What are “public utility services”?

DSM and energy and water conservation and efficiency services are measures implemented or accomplished through specific projects intended and designed to achieve savings in the cost of energy and water, reduce demand for energy and water, and achieve energy efficiency improvements and water conservation. These measures are called Energy Conservation Measures (ECMs). The construction or installation of ECMs and other energy savings measures in government, commercial, industrial or residential dwellings is an important and integral part of planning and predicting power capacity needs in the future. While these contracts often involve the installation of equipment or refurbishing existing equipment, with a strong service component, these ECMs and similar efforts are extremely important to the modern utility as a valuable means of reducing or slowing the growth of demand for water, gas and electric services. These measures affect how much new capacity must be constructed or acquired and ultimately the cost of utility services to the rate payer. State public utility commissions have been encouraging utilities to reduce demand through energy conservation in order to reduce the cost involved in the construction or acquisition of new power capacity³.

The Federal Property Act does not provide a definition of “public utility services.” The phrase is used in various states’ laws, in the context of comprehensive regulation of the provision of public utility services. However, the term does not have a common definitive meaning:

³ States, through statutes, regulations, and the actions of their public utility commissions, have been encouraging utilities to reduce demand through energy conservation in order to reduce the cost involved in the construction or acquisition of new power capacity. E.g., Indiana Admin. Code, Title 170. Indiana Utility Regulatory Comm., Art. 4, Rule 7, 6(b) (describing demand side management as a new source of utility supply); Texas Admin. Code, Title 16. Part II, chap. 23, subchapter D. §23.31(a)(5) (requiring electric utilities to attempt to reduce total demand before applying for a certificate for a new generating unit). EPACT included amendments to the Public Utility Regulatory Policies Act to ensure that utilities could regard investments in demand side management and energy conservation as equally profitable with investments in increased generating capacity. EPACT §111(a), amending 16 U.S.C. §2621; EPACT §115, amending 15 U.S.C. §§3202-03. These developments both demonstrate that engaging in energy conservation and demand management have become viewed as a means of providing utility services to the public.

“A ‘public utility’ has been described as a business organization which regularly supplies the public with some commodity or service, such as electricity, gas, water, transportation, or telephone or telegraph service. While the term has not been exactly defined, and as has been said, it would be difficult to construct a definition that would fit every conceivable case, the distinguishing characteristic of a public utility is the devotion of private property by the owner or person in control thereof to such a use that the public generally, or that part of the public which has been served and has accepted the service, has the right to demand that the use or services, as long as it is continued, shall be conducted with reasonable efficiency and under proper charges.”

73B C.J.S. Public Utilities §2 (1997); see also 64 AM. Jur. 2 Public Utilities §1 (1997).

The General Accounting Office (GAO) has had few occasions to address the parameters of this phrase in the context of the Federal Property Act. GAO has declined to limit the definition of public utility to that used by a particular state:

The status of the Pipeline Company as a public utility under Title 42 of the Alaska Statutes is, in our opinion, doubtful. We are of this view because the company is not subject to regulatory control and because it has not served the public generally with natural gas. But the Congress has authorized long-term contracting in the case of services having public utility aspects. In doing so the Congress did not require that these public utility services be procured only from those firms which clearly come within the strict legal definition of a public utility. Perhaps in recognition of the legal imponderable involved in the application and enforcement of State laws regulating public utilities, and in view of the diversity of opinions between various jurisdictions respecting the legal character of public utilities, the Congress in its judgment determined to categorize the service rather than the contractor....

45 Comp Gen. 59, 64 (1965). “Thus, it is the nature of the product or service provided and not the nature of the provider of the product or services that may determine what are ‘public utility services.’” Moreover, GAO has indicated its view that the phrase “public utility services” should be interpreted broadly: “[T]he concept of what product or service constitutes a public utility service is not static for the purpose of statutory construction, but instead is flexible and adaptive, permitting statutes to be construed in light of the changes in technologies and methodologies for providing the product or service.” 62 Comp. Gen. 569, 575 (1983).

We have concluded that the fact that ECM and DSM services involve transferring title to equipment does not defeat their character as “public utility services.” 62 Comp. Gen. 569, 574 (1983). Where a contract was for the procurement of telephone equipment as well as telephone services, the Comptroller General decided that it was a contract for public utility services under section 201 of the Federal Property Act. The Comptroller General stated the following views on what are “public utility services”:

Further, while public utilities are generally described as providing services, we think that the concept of utility services can include the sale of a product or equipment as well as providing services in the literal sense.

Id. The Comptroller General concluded as follows:

On the basis of these fundamental premises, we think that the sale of telephone equipment or facilities with related services is a public utility type service just as much as leasing the equipment to the Government at a rental designed to recover the cost of the contractor's investment in facilities and equipment over the life of the rental agreement would be. The only difference between the two is that in the former case the Government acquires title to the system while in the latter, title remains with the utility. Thus the nature of service is virtually identical, and in any case, the difference is not so fundamental as to warrant its exclusion from the scope of transactions to which the authority of [section 201] applies.

Id. Even, however, if it is concluded that "qualified" DSM and ECM contracts entered into under section 152(f) of EPACT, standing alone, are not contracts to provide public utility services, these contracts would be contracts incidental to "contracts for public utility services." For instance, it has consistently been GSA's view that equipment provided with telephone services is incidental to those services:

It has been the position of GSA that the contracts which we enter into for telephone services are public utility services contracts regardless of whether the successful offeror was a tariffed carrier or an interconnect company. GSA has viewed the equipment involved in telecommunications procurement as incidental to the services.

....

GSA has historically regarded the equipment provided with telephone services as an incidental but necessary element of the services. Thus, we have always considered the acquisition of equipment as falling within the meaning of contracts for public utility services.

....

Whether the service is provided by utility-owned equipment or Government-owned equipment does not change the nature of the services.

62 Comp. Gen. 569, 573-74 (1983).

Similarly, the equipment or products installed in federal buildings as DSMs or ECMs are necessary to reduce energy and water consumption, reduce the cost of energy and water and insure the adequate delivery of electric, gas, or water services and is incident to those services. The ability to plan, measure and reduce electric, gas and water consumption in the future is an important part of providing utility services. Moreover, reducing the long term cost of energy to the federal government was the specific reason why Congress

included section 201 in the Federal Property Act. Therefore, so long as the dominant or primary purpose of the project is to reduce energy and water use or demand, and there is a direct connection between any equipment (or services) to be provided and achievement of the dominant or primary purpose, it should not matter whether the ECM or DSM activities include the provision of equipment, title to which passes to the government. In summary, contracts entered into under section 152(f) of EPACT may also be contracts for public utility services” under section 201(a)(3) of the Federal Property Act.

B. GSA’s Views

While the Secretary of Energy has the authority to develop guidelines to implement section 152(f) of EPACT⁴, it is significant that GSA, the agency with primary responsibility and authority under section 201 of the Federal Property Act, has concluded in an opinion dated July 29, 1994 (“Exhibit A”), that certain DSM and ECM contracts entered into under section 152(f) of EPACT are contracts for “public utility services:”

In addition, GSA has authority under the Act to receive the goods and services contemplated under the proposed agreement with [the utility], including but not limited to, energy related equipment, its installation, and personnel training. 42 U.S.C. §8256(c)(2)-(4); 40 U.S.C. §490(f)(7)(B).

The expenditure of the funds as contemplated by the proposed agreement with {the utility} is necessary for and incidental to compliance with the energy conservation requirements of the Act, 42 U.S.C. §8253. Therefore, this constitutes a necessary and proper expense for utility services. ...

Likewise, in accordance with 42 U.S.C. §8256(c)[Section 152(f) of EPACT], Congress specifically has authorized agencies to participate in utility incentive programs conducted by utilities and generally available to customers of such utilities. Participation in such programs will provide one of the means for GSA to satisfy the energy performance requirements for Federal buildings mandated by Congress in 42 U.S.C. §8253. As explained above, the broad authority may be funded by GSA’s Real Property Operations (BA-61) appropriations as necessary and proper expenses for utility services. ...

GSA Op. Off. Real Property Division, 3-4, July 29, 1994 (emphasis added).

Finally, GSA has negotiated and entered into a series of “areawide” contracts with utilities to provide electric, gas and gas transportation services to Federal agencies.⁵ In

⁴ Section 152(c) of EPACT provides the Secretary of Energy with the authority to develop “guidelines for the implementation” of the “Federal Energy Management” provisions of EPACT. 42 U.S.C. §8253(d) (1998).

⁵ See, e.g., Areawide Public Utility Contract for Electric, Natural Gas, Gas Transportation and Energy Management Services, Contract No. GS-00P-95-BSD-0008, between the United States of American and Public Service Company of New Mexico, August 23, 1995.

order to use an areawide contract any Federal agency in the defined geographic area simply has to execute an “authorization” agreement with the utility. The “areawide” contracts are entered into pursuant to GSA’s “utility services” authority provided under section 201(a)(3) of the Federal Property Act. GSA now includes some DSM and ECM services under the areawide umbrella contracts. This is further evidence of GSA’s view that DSM and ECM services may be “utility services” under section 201(a)(3).

C. What are the funding requirements for contracts for public utility services under section 201 of the Federal Property Act?

The Anti-Deficiency Act provides, in part, as follows:

An officer or employee of the United States Government or of the District of Columbia government may not-

- (A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation;
- (B) involve either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law....

31 U.S.C. §1341 (emphasis added). The Anti-Deficiency Act prohibits an executive agency from making expenditures or incurring obligations in excess of available appropriations, and from making a contract or obligation for the payment of money in advance of appropriations. Thus, as a general rule, the cost of a contract must be fully funded at the time the Government enters into the contract. The Anti-Deficiency Act, however, provides that Congress can authorize Federal agencies to “contractually” obligate the Government without the availability of an existing appropriation. “Contract authority” is statutory authority specifically authorizing “an agency to enter into a contract in excess of, or prior to, enactment of the applicable appropriation.” See, G.A.O., Principles of Federal Appropriations Law, Vol. II, Ch. 6-51 (1992).

Section 201(a)(3) of the Federal Property Act has been interpreted to provide “contract authority.” This provision has been interpreted as providing authority to enter into contracts for a term of ten-years without obligating funds for the total cost of the contract at the time the contract is entered into:

The purpose of the proviso authorizing contracts for public utility services to be made for up to 10 years is to permit GSA to take advantage of discounts offered under long term contracts. If this provision is applicable, GSA need not have available to it budget authority to obligate the total estimated cost of the Centel contract but only sufficient budget authority to obligate its annual costs under the agreement.

As we have indicated above, GSA need not obligate the total estimated cost of the contract against the Fund, but only amounts necessary to cover it annual costs under the contract.

62 Comp. Gen. 569, 576 (1983) (emphasis added). Section 152(f) does not expressly provide authority to enter into ten-year contracts nor does it expressly provide an exception to the full funding requirements of the Anti-Deficiency Act. However, §152(f) contracts to the extent that they also constitute contracts for public utility services (under §201(a)(3) of the Federal Property Act) only require obligation of the annual costs under the contract during each year the contract is in effect.

D. Qualified DSM Contracts

Concerns have been raised that entering into DSMs, ECMs or other energy savings contracts with utilities of the type contemplated by §152(f) of EPACT may in some cases result in providing goods and services that are not “utility services” under section 201 of the Federal Property Act. In order to alleviate these concerns and provide protections against misuse of the authority provided in section 152(f), we have concluded that only “qualified” DSM and ECM contracts will be designated “contracts for public utility services” under section 201 of the Federal Property Act. These qualifications will insure that the primary purpose of a DSM or ECM contract for “public utility services” will be to reduce energy and water cost and use.

These requirements or qualifications are reflected in the attached GSA Areawide Agreement (Exhibit B) and the draft Civilian Model Utility Agreement (Exhibit C). Included in the requirements for “qualified” DSM or ECM contracts are the following requirements:

- (1) That the primary purpose of an ECM or DSM contract under section 152(f) must be to reduce the cost or use of energy and water and achieving greater energy efficiency [for example, DOE could not construct an entire new building to achieve or facilitate a programmatic objective under the guise of an ECM or DSM contract under section 152(f)];
- (2) That general construction, training courses, and the purchase of supplies or equipment not directly related to an ECM or DSM is not permissible under section 152(f) of EPACT;
- (3) That energy or water savings must be sufficient to pay all costs under a DSM or ECM contract; and
- (4) That ECMs or DSMs will not normally be used unless the net overall energy or water cost reduction can be demonstrated and verified.

Other restrictions and limitations on the use of ECM and DSM contracts are reflected in the attached model GSA Areawide contract and the Civilian Model Utility Agreement, which provide the necessary requirements and protections to “qualify” an ECM or DSM contract as a “contract for public utility services” under section 201 of the Federal Property Act. Proposed ECM or DSM contracts which contain terms or conditions that

are materially different from those provided in Exhibits C and D create circumstances which require legal review by the Office of General Counsel.

Concur:

Lawrence R. Oliver
GC-72

Maryann Shebek
GC-80

Gena E. Cadieux
GC-61

John A. Herrick
Chief Counsel
Golden Field Office

Exhibit A

General Services Administration
Office of General Counsel
Washington, DC 20405

MEMORANDUM FOR SHARON A. ROACH
ASSOCIATE GENERAL COUNSEL
REAL PROPERTY DIVISION (LR)

FROM: HARMON R. EGGERS
DEPUTY ASSOCIATE GENERAL COUNSEL
REAL PROPERTY DIVISION (LRA)

SUBJECT: Legal authority for Region 9 utility incentive program agreement with
Southern California Edison Company

ISSUE

The issue has been raised regarding the authority of the General Services Administration (GSA) to enter into agreements related to programs designed to increase the energy efficiency of Federal buildings. Region 9 is currently negotiating with Southern California Edison Company (SCEC) for the provision of energy conservation measures (ECMs) in the Chet Holifield Federal Building in Laguna Niguel, California. In addition, a question has been raised as to whether such ECMs are subject to the prospectus approval requirements of the Public Buildings Act.

BACKGROUND

It is the understanding of this office that SCEC is currently the provider of utility services to this facility under an areawide utility contract. We further understand that the provision of the ECMs being proposed by SCEC is a tariffed service offered under a program authorized by the California Public Utilities Commission and that participation in this program is not restricted to the Federal Government and is generally available to customers of SCEC.

The agreement being negotiated sets forth the parameters for the provision of this service to GSA and provides for a subsidy from SCEC to GSA offsetting the total cost of the ECMs. The proposed agreement contemplates that SCEC shall perform feasibility studies, engineering services, and other ancillary services associated with the implementation of the proposed ECMs, including provision and installation of energy-saving equipment and the training of Government personnel. The proposed agreement also contemplates that the proposed ECMs will be paid for through a monthly service charge on the agency's electric bill. Payment for the services rendered by SCEC will be determined in accordance with the ENVEST equipment services tariff approved by the California Public Utilities Commission. It is anticipated that Real Property Operations (BA-61) funds will be used for these payments. The term of the proposed agreement is 14 years. See ENVEST Pilot Agreement dated March 8, 1994; Draft ENVEST Integrated Solutions Proposal dated June 1994; and Draft ENVEST Customer agreement dated July 15, 1994 (hereafter collectively referred to as "SCEC's ENVEST Proposal").

DISCUSSION

Pursuant to the Energy Policy and Conservation Act, Pub. L. 94-163, 89 Stat. 871, 42 U.S.C. § 6201 et seq., as amended by the Energy Policy Act of 1992, Pub. L. 102-486, 106 Stat. 2776 (hereinafter collectively referred to as “the Act”), GSA and other Federal agencies are directed to implement programs which reduce energy consumption in Federal facilities. The Act establishes specific requirements for reduced energy consumption through increased efficiency and conservation. 42 U.S.C. § 8253.

In order to enable agencies to comply with these requirements, the Act authorizes participation in various programs, broadly defined in the Act at subchapters III and VII. 42 U.S.C. §§ 8253, 8256, 8287. GSA was granted additional authority to receive and expend, in addition to amounts appropriated for Federal energy management improvement programs, rebates, other cash incentives, or other income related to energy savings. 40 U.S.C. §§ 490(f)(7) and 490g.¹

Subchapter VII

Subchapter VII of the Act, 42 U.S.C. § 8287, authorizes Federal agencies to enter into Energy Savings Performance Contracts. The terms of these contracts are outlined in the subchapter. Implementation of subchapter VII, however, requires the promulgation of regulations by the Department of Energy (DOE). 42 U.S.C. § 8287(b)(1)(B). Although published in the Federal Register for comment, DOE has yet to issue these regulations in final form.² In the absence of the DOE implementing regulations, it is impossible for Federal agencies to enter into Energy Savings performance Contracts under Subchapter VII. For this reason, this subchapter cannot provide legal authority for the agreement contemplated by Region 9.

Subchapter III

Subchapter III of the Act authorizes Federal agencies to participate in “utility incentive programs” (UIPs) in order “to increase energy efficiency and for water conservation or the management of electricity demand conducted by gas, water, or electric utilities and generally available to customers of such utilities.” 42 U.S.C. § 8256(c)(3). According to the legislative history of the Act, Congress contemplated that Federal agencies would be allowed to participate in UIPs “to the same extent permitted other customers of the utility.” H.R. Rep. No. 474(V), 102d Cong., 2d Sess. 42 (1992), reprinted in 1992 U.S.C.C.A.N 2224.

The energy conservation measures proposed, as well as the other terms of the agreement being negotiated with SCEC, fall within a UIP as described by the Act. See 42 U.S.C. §§ 8256(c) and 8253(d); SCEC’s ENVEST Proposal.

As discussed above, Congress has authorized agency participation in UIPs generally available to customers of utilities to the same extent as other customers of the offering utility. 42 U.S.C. § 8256(c)(1). The broad authority contained in 42 U.S.C. § 8256(c)(1)-(4) constitutes “contract authority,” which is “a form of budget authority that permits contracts and other obligations to be entered into in advance of an appropriation or in excess of amounts otherwise available in a revolving fund.” Contract authority “provides the authority to enter into binding contracts but not the funds to make payments under them. Therefore, contract authority must be funded .. By a

subsequent appropriation (called a ‘liquidating appropriation’) or by the use of receipts or offsetting collections authorized for that purpose.” U.S. General Accounting Office, Principles of Federal Appropriations Law 2-4 to 2-6 (2d. Ed. 1991).

In the present case, Real Property Operations (BA-61) funds provided under current and future GSA appropriation acts will be used to liquidate GSA’s obligations under the SCEC UIP. Further, the provision of the Act codified at 40 U.S.C. § 490(f)(7) which allows GSA to “receive amounts from rebates or other cash incentives related to energy savings,” to deposit such amounts in the Federal Buildings Fund, and to obligate such monies for energy management improvement programs, provides authority for the receipt and utilization of the subsidy contemplated by the proposed agreement with SCEC. In addition, GSA has authority under the Act to receive the goods and services contemplated under the proposed agreement, including, but not limited to, energy-related equipment, its installation, and personnel training. 42 U.S.C. § 8256(c)(2)-(4); 40 U.S.C. § 490(f)(7)(B).

The expenditure of the funds as contemplated by the proposed agreement with SCEC is necessary for and incidental to compliance with the energy conservation requirements of the Act, 42 U.S.C. § 8253. Therefore, this constitutes a necessary and proper expense for utility services which properly may be funded with GSA’s Real Property Operations (BA-61) appropriations.

Applicability of Prospectus Requirements

The authority to participate in utility incentive programs and to accept rebates, cash, or other financial incentives, goods, and services in accordance with 42 U.S.C. §§ 8256(c) and 40 U.S.C. § 490(f)(7) and g is not subject to the prospectus requirements in section 7 of the Public Buildings Act of 1959, 40 U.S.C. § 606(a).³ In accordance with 40 U.S.C. §§ 490(f)(7)(D) and g, any rebates or other cash incentives received and deposited into the Federal Buildings Fund are available for obligation in addition to amounts appropriated for energy management improvement programs and without regard to the requirement in 40 U.S.C. § 490(f)(2) that such obligations be authorized in GSA’s annual appropriations acts. Accordingly, the approval of a prospectus is not a prerequisite to the appropriation or obligation of rebates and other cash or financial incentives received by GSA for energy management improvement programs. Such funds constitute an unauthorized and legal augmentation of GSA’s Federal Buildings Fund appropriations.

Likewise, in accordance with 42 U.S.C. § 8256(c), Congress specifically has authorized agencies to participate in utility incentive programs conducted by utilities and generally available to customers of such utilities. Participation in such programs will provide one of the means for GSA to satisfy the energy performance requirements for Federal buildings mandated by Congress in 42 U.S.C. § 8253. As explained above, the broad authority contained in 42 U.S.C. § 8256(c)(1)-(4) constitutes “contract authority” which properly may be funded by GSA’s Real Property Operations (BA-61) appropriations as a necessary and proper expense for utility services. Therefore, we do not believe that the prospectus requirements of the Public Buildings Act are applicable to contracts entered into under 42 U.S.C. § 8256(c). The mere fact that ECMs accomplished under the foregoing statutory authorities may involve alterations to a Federal building does not transform them into a repairs and alterations project that is subject to the

prospectus approval requirements of the Public Buildings Act.

In any event, we believe that if GSA proposes to incorporate energy conservation measures into a building that will result in the obligation of GSA appropriated funds in excess of the applicable prospectus threshold, it would be prudent for GSA to provide notice to the appropriate Congressional committees.

CONCLUSION

For the reasons stated above, GSA is authorized to enter into the agreement currently being negotiated by Region 9 for energy conservation measures at the Chet Holifield Federal Building in Laguna Niguel, California.

- ¹ Although codified in the Federal Property and Administrative Services Act of 1949, as amended, 40 U.S.C. § 490(f)(7) originated in the Energy Policy Act of 1992, Pub.L. 102-486, Title I, §153, 106 Stat. 2851. In accordance with 40 U.S.C. §§ 490(f)(7) and g, GSA is authorized to receive and expend the full amount of any rebates or other cash incentives related to energy savings.
- ² At a meeting with representatives of DOE on June 6, 1994, GSA was informed that the regulations were unlikely to be issued in the near future. In fact, a time line of one to two years from that date was considered realistic by the DOE representatives.
- ³ 40 U.S.C. § 606(a) is essentially a restriction on the appropriation of funds by Congress for projects within the scope of that section; it does not prohibit expenditures for such projects if appropriations are made available by Congress notwithstanding the restrictive language in § 606(a). Furthermore, it does not restrict GSA's authority to enter into contracts.
- ⁴ In addition, subchapter III provides authority for such audits and preliminary agreements as have already been performed or entered into as a precursor to the agreement with SCEC currently being negotiated. 42 U.S.C. 8256(c) and 8253(d).

Exhibit B

NEGOTIATED AREAWIDE CONTRACT

No. GS-00P-99-BSD-XXXX

BETWEEN THE

UNITED STATES OF AMERICA

AND

XX

THIS AREAWIDE CONTRACT FOR ELECTRIC, ELECTRIC TRANSMISSION, NATURAL GAS, GAS TRANSPORTATION, STEAM, AND ENERGY MANAGEMENT SERVICES is executed this XX day of XX, 1999, between the UNITED STATES OF AMERICA, acting through the Administrator of General Services (hereinafter referred to as the "Government"), pursuant to the authority contained in Section 201(a) of the Federal Property and Administrative Services Act of 1949, as amended, 40 U.S.C. 481(a), and the XX, a corporation organized and existing under the laws of the State of XX, and having its principal office and place of business at XX, XX, XX (hereinafter referred to as the "Contractor"):

WHEREAS, the Contractor now has on file with the XX Public Service Commission and/or with such other regulatory bodies as may have jurisdiction over the Contractor (hereinafter referred to collectively as the "Commission") all of its effective tariffs, rate schedules, riders, rules and terms and conditions of service, as applicable;

WHEREAS, with some exceptions, the Government is generally required by Chapter 1 of Title 48 of the Federal Acquisition Regulation (FAR), 48 CFR 41.204, to enter into a bilateral contract for utility service at each Federal facility where the value of the utility service provided is expected to exceed \$50,000 per year;

WHEREAS, where the Government has an areawide contract in effect with a particular utility then such utility service is normally to be procured thereunder;

WHEREAS, the Government is now purchasing such electric, gas, gas transportation and steam services from the Contractor under some other service arrangement;

WHEREAS, the Contractor and the Government mutually desire to enter into an areawide contract to be used by the agencies of the Government in obtaining electric, electric transmission, gas, gas transportation, steam and energy management services from the Contractor and to facilitate partnering arrangements as encouraged and authorized by P.L. 102-486 (Energy Policy Act of 1992) 10 U.S.C. 2865 and 42 U.S.C. 8256;

NOW, THEREFORE, in consideration of the premises and mutual covenants herein contained, the parties hereby agree as follows:

ARTICLE 1. DEFINITIONS.

1.1. As used in this contract,

(a) the term "areawide contract" means a master contract entered into between the Government and a utility service supplier to cover the utility service acquisitions of all Federal agencies in the franchised certificated service territory from the particular utility service supplier for a period not to exceed ten (10) years;

(b) the term "Agency" means any Federal department, agency, or independent establishment in the executive branch of the Government, any establishment in the legislative or judicial branches of the Federal Government, or any wholly/mixed ownership Government corporation, as defined in the Government Corporation Control Act;

(c) the term "Ordering Agency" means any Agency that enters into a bilaterally executed Authorization for procurement of electric, gas, gas transportation and steam services under this areawide contract;

(d) the term "Authorization" means an order form used to acquire services under this areawide contract (see Exhibit "A" "Authorization for Electric Service", Exhibit "B" "Authorization for Electric Transmission", Exhibit "C" "Authorization for Natural Gas Service", Exhibit "D", "Authorization for Gas Transportation Service", Exhibit "E", Authorization for Steam Service, and Exhibit "F" "Authorization for Energy Management Service" annexed hereto);

(e) the term "service" means any commodities, financial incentives, goods, and/or services generally available from the Contractor pursuant to its tariffs, rates, rules, regulations, riders, practices, or terms and conditions of service, as may be modified, amended, or supplemented by the Contractor and approved from time to time by the Commission, and the rules and regulations adopted by the Commission;

(f) the term "energy conservation measure" means any specific electric or gas service intended to provide energy savings and/or demand reduction in Federal facilities (Reference Articles 18.2 & 18.3 herein); and

(g) the term "connection charge" means a Contractor's charge for facilities on either one or both sides of the Government's delivery point which facilities (1) are required to make connections with the nearest point of supply and (2) are, in accordance with the Contractor's tariffs and the Commission's rules and regulations, installed, owned, maintained and operated by the Contractor.

1.2. This Article is hereby expanded to include the additional definitions contained in FAR Clause 52.202-1, Definitions (OCT 1995), 48 C.F.R. 52.202-1, which are incorporated herein by reference.

ARTICLE 2. SCOPE AND DURATION OF CONTRACT.

2.1. This areawide contract shall be in effect upon the date of execution and shall continue for a period of ten (10) years, except that the Government, pursuant to the clause contained in FAR 52.249-2 (48C.F.R.52.249-2), incorporated into this areawide contract under Article 14.1-25, or the Contractor, upon 60 days written notice to the Government, and without liability to the Government or any ordering agency, may terminate this areawide contract, in whole or in part, when it is in their respective interest to do so, provided, however, that neither the stated duration of this areawide contract nor any other termination of it, in whole or in part, pursuant to such incorporated clause, this Article 2.1, or otherwise, shall be construed to affect any obligation for any payment, charge, rate, or other matter that may be imposed pursuant to the Contractor's tariffs, rates, rules, regulations, riders, practices, or terms and conditions of service as may be modified, amended, or supplemented by the Contractor and approved from time to time by the Commission.

2.2. The provisions of this areawide contract shall not apply to the Contractor's service to any Agency until both the ordering Agency and the Contractor execute a written Authorization for electric, gas, gas transportation and/or steam services. Upon bilateral execution of an Authorization, the Contractor agrees to furnish to the ordering Agency, and the ordering Agency agrees to purchase from the Contractor, the above noted services for the installation(s) or facilities named in the Authorization pursuant to the terms of this areawide contract.

2.3. Nothing in this areawide contract shall be construed as precluding the ordering Agency and the Contractor from entering into an Authorization for negotiated rates or service of a special nature, provided such negotiated rates or service is in accordance with the rules and regulations of the Commission.

ARTICLE 3. EXISTING CONTRACTS.

3.1. The parties agree that an Agency currently acquiring service from the Contractor under a separate written contract may continue to do so until that contract expires or until such time as the Agency and the Contractor mutually agree to terminate that separate written contract and have such service provided pursuant to this areawide contract by executing an appropriate Authorization or Authorizations.

3.2. Existing special rates and services of a special nature, if any, shall be continued under the Authorizations described in Article 3.1 if requested by the ordering Agency and if in accordance with the rules and regulations of the Commission.

ARTICLE 4. AUTHORIZATION PROCEDURE AND SERVICE DISCONNECTION.

4.1. To obtain or change service under this areawide contract, the ordering Agency shall complete the appropriate Authorization and forward it to the Contractor. Upon the request of the ordering Agency, the Contractor shall endeavor to provide reasonable assistance to the ordering Agency in selecting the service classification which may be most favorable to the ordering Agency. Upon execution of an Authorization by both the Contractor and the ordering Agency, the date of initiation or change in service shall be effective as of the date specified in the Authorization. An executed copy of the Authorization (cover page only) shall be transmitted by the ordering Agency to GSA at the address provided in Article 16.1.

4.2. During the term of this areawide contract, effective Authorizations need not be amended, modified, or changed by an ordering Agency to reflect changes in: accounting and appropriation data, rates or other terms applicable to the service classification under which the ordering Agency receives service, terms of the Contractor's tariff, the Contractor's cost of purchased fuel, or the estimated annual cost of service. Such changes are considered internal to the party involved. Where changes are required in effective Authorizations because of a change in the service requirements of an ordering Agency, an amended Authorization shall be mutually agreed upon and executed.

4.3. An ordering Agency or the contractor may discontinue service provided pursuant to this areawide contract to a particular Federal facility or installation by delivering a written Termination Authorization to the other. Such discontinuance of service by an ordering Agency or the Contractor shall be in accordance with the terms of this areawide contract and the Contractor's tariffs, rates, rules, regulations, riders, practices, and terms and conditions of service as may be modified, amended, or supplemented by the Contractor and approved from time to time by the Commission.

4.4 Within the authorities of the Ordering Agency, the term of any individual Authorization is independent of the expiration date of this areawide contract and the conditions and articles of this areawide contract shall apply throughout the term of any Authorization placed against it in accordance with Article 18.5 herein.

ARTICLE 5. RATES, CHARGES, AND PUBLIC REGULATION.

5.1. Subject to the provisions of Article 2.3, all electric, gas, gas transportation and steam purchases under this areawide contract as well as any other action under this areawide contract shall be in accordance with, and subject to, the Contractor's rates, tariffs, rules, regulations, riders, practices, or terms and conditions of service, as may be modified, amended, or supplemented by the Contractor and approved from time to time by the Commission, except to the extent that same are preempted by Federal law. The Contractor shall furnish the Government, at the address provided in Article 16.1, one complete set of its tariffs in effect as of the date of this areawide contract and, upon request of an ordering Agency, the Contractor shall provide a copy of any newly effective or amended tariff in accordance with the Contractor's tariff distribution practices

and policies applicable to all customers. The failure of the Contractor to furnish any or all of its tariffs in accordance with this Article 5.1 shall not be grounds for with-holding or denying payment at the effective rates stated therein for any electric, gas, gas transportation and steam services provided.

5.2. If, during the term of this areawide contract, the Commission approves a change in rates for services specified in Authorizations in effect hereunder, the Contractor agrees to continue to furnish, and the ordering Agency agrees to continue to pay for, those services at the newly approved rates from and after the date such rates are made effective. As provided in Article 4.2, modification of any Authorization hereunder is not necessary to implement higher or lower rates.

5.3. The Contractor hereby represents and warrants to the Government that the service rates available to any ordering Agencies hereunder shall at all times not exceed those available to any other customer served under the same service classification for the same or comparable service, under like conditions of use. Nothing herein shall require the Contractor to apply service rates that are inapplicable to the ordering Agency.

5.4. To the extent required by the Commission rule or regulation, the Contractor agrees to notify each ordering Agency of all new service classifications for which the ordering Agency may qualify. If requested in an Authorization by the ordering Agency, the Contractor shall provide service in accordance with the new service classification and commence billing under the new service classification beginning with the next applicable billing cycle following receipt by the Contractor of the request, or upon the installation of any additional facilities necessary to accomplish the billing.

5.5. Reasonable written notice via an Authorization shall be given by the ordering Agency to the Contractor, at the address provided in Article 16.2, of any material changes proposed in the volume or characteristic of electric, gas, gas transportation and steam services required by the ordering Agency.

5.6 To the extent required by the Contractor's tariffs, the Commission's rules and regulations, or the Contractor's policies and practices applicable to all customers, and in accordance therewith, any necessary extension, alteration, relocation, or reinforcement of the Contractor's transmission or distribution lines, related special facilities, service arrangements, demand side management services (including any rebates to which the ordering Agency may be entitled), energy audit services, or other services required or requested by an ordering Agency shall be provided and, as applicable, billed for, by the Contractor. To the extent available from the Contractor, the Contractor shall provide and, as applicable, bill for such technical assistance on or concerning an ordering Agency's equipment (such as the inspection or repair of such equipment) as may be requested by such ordering Agency. The charges for such technical assistance shall be calculated in accordance with the Contractor's applicable billing schedule in effect at the time the technical assistance is rendered. The Authorization or any other agreement used to obtain and provide the matters, services, or technical assistance described in this Article 5.6 shall contain information descriptive of the matters, services, or technical assistance required or requested, including the

amount of (or method to determine) any payment to be made by the ordering Agency to the Contractor for the provision of said matters, services, or technical assistance.

5.7 Any charges for matters or services referenced in Article 5.6 hereof which are not established in the Contractor's tariff or in the Commission's rules or regulations shall be subject to audit by the ordering Agency prior to payment; provided, however, that notwithstanding such right to audit, payment for the matters and services referenced in Article 5.6 thereof shall not be unreasonably withheld or denied. The Contractor further warrants and represents to the Government that charges for the matters or services referenced in Article 5.6 hereof will not exceed the charges billed to other customers of the Contractor served under the same service classification for like matters or services provided under similar circumstances.

ARTICLE 6. BILLS AND BILLING DATA.

6.1 The electric, gas, gas transportation and steam services supplied hereunder shall be billed to the ordering Agency at the address specified in each Authorization. Bills shall be submitted in an original only, unless otherwise specified in the Authorization. All bills shall contain such data as is required by the Commission to substantiate the billing, and such other reasonable and available data as may be requested by the ordering Agency, provided that such other data are contained in bills provided to other customers of the Contractor served under the same service classification as the ordering Agency.

ARTICLE 7. PAYMENTS FOR SERVICES.

7.1. All bills for services rendered (which term includes utility services provided and any other payment, charge, rate, or other matter that may be imposed pursuant to the Contractor's tariffs, rates, rules, regulations, riders, practices, or terms and conditions or service as may be modified, amended, or supplemented by the Contractor and approved from time to time by the Commission) under Authorizations pursuant to this areawide contract shall be paid by the ordering Agency in accordance with such tariffs, rates, rules, regulations, riders, practices, or terms and conditions of service.

7.2. Currently, a late payment charge of one and one-half percent (1-1/2%) per monthly billing period will be assessed upon the unpaid balance of any utility bill twenty-five (25) calendar days after the date the bill is rendered by the Contractor. Changes in such tariffs, rates, rules, regulations, riders, practices, or terms and conditions or service shall supersede the provisions of this Article 7.2, as applicable.

7.3. The ordering Agency shall be entitled to any billing discounts, financial incentives or rebates available from the Contractor to other customers of the same service classification under like conditions of use and service. Nothing herein shall require the Contractor to apply rates that are inapplicable to the ordering Agency.

7.4. Payments hereunder shall not normally be made in advance of services rendered in accordance with 48 C.F.R. Subpart 32.4 unless required by the Contractor's tariff.

7.5. Each payment made by Treasury check to the Contractor shall include the Contractor's billing stub(s), or a Government or ordering Agency payment document, that clearly and correctly lists all of the Contractor's account numbers to which the payment applies and the dollar amount applicable to each account. If payment is by Electronic Funds Transfer either through the Automated Clearing House (ACH) or the Federal Reserve Wire Transfer System, the provisions of FAR Subpart 52.232-34 shall apply (See Article 14).

7.6. Unless otherwise provided by law or in an Authorization, the following provisions shall apply:

(a) Payment for energy conservation measures, when authorized as Energy Management Service (EMS), shall be equal to the direct cost of capital or financing amortized over a negotiated payment term commencing on the date of acceptance of the completed installation;

(b) The payment term for Authorizations involving energy conservation measures shall be calculated to enable the ordering Agency's monthly payment to be lower than the estimated cost savings to be realized from its implementation. In no event, however, shall this term exceed 80% of the useful life of the equipment/material to be installed.

ARTICLE 8. METERS.

8.1. Metering equipment of standard manufacture suitable to measure all electric, gas, gas transportation and steam services supplied by the Contractor hereunder shall be furnished, installed, calibrated and maintained by the Contractor at its expense. In the event any meter fails to register or registers incorrectly, as determined by the regulations of the Commission, billing adjustments shall be made in accordance with such regulations.

8.2. The Contractor, so far as possible, shall read all meters monthly in accordance with the Contractor's tariff and the Commission's regulations.

8.3. Meters shall be inspected upon installation at no direct charge to the ordering Agency. Subsequent inspection, periodic testing, repair, and replacement of meters shall be done in such place and manner as provided by the Commission's regulations. Upon notice that a meter is failing to register correctly, the Contractor shall take immediate steps to effect replacement or repair. Ordering Agencies shall have the right to request a meter test in accordance with the procedures prescribed in the Commission's regulations. The tests and applicable meter accuracy standards are those set forth in the Commission's regulations. The expense of meter tests shall be borne by the party designated as responsible therefore in the Commission's regulations.

ARTICLE 9. EQUIPMENT AND FACILITIES.

9.1. Subject to the provisions of Article 5.6 hereof, the responsibility for owning, furnishing, installing, and maintaining all equipment and facilities (other than meters) required to supply service at the delivery point(s) specified in an Authorization shall be determined in accordance with the Contractor's tariffs, its policies and practices, and the Commission's rules and regulations. The ordering Agency shall provide, free of charge to the Contractor, mutually agreeable locations on its premises for the installation of meters and such other equipment furnished and owned by the Contractor and necessary to supply service hereunder. The Contractor shall, at all times during the life of this areawide contract, operate and maintain at its expense such equipment or facilities as for which it has responsibility in accordance with this Article 9.1, and shall assume all taxes and other charges in connection therewith. To the extent required by the Contractor's tariffs and the Commission's rules and regulations, and in accordance thereof, such equipment and facilities as for which the Contractor has responsibility in accordance with this Article 9.1 shall be removed, and the Agency's premises restored, by the Contractor at its expense, within a reasonable time after discontinuance of service to the ordering Agency.

9.2. All necessary rights-of-way, easements and such other rights necessary to permit the Contractor to perform under this contract shall be obtained and the expense for same borne in accordance with the Contractor's tariffs and the Commission's rules and regulations.

ARTICLE 10. LIABILITY.

10.1. When the Government and/or an ordering Agency has limited or restricted the Contractor's right of access under Article 11 and thereby interfered with the Contractor's ability to supply service or to correct dangerous situations which are a threat to public safety, the Government shall indemnify and hold the Contractor harmless from any liability resulting from such restricted or limited access to the extent permitted by law and authorized by appropriations. This Article (10.1) shall not be construed to limit the Government's liability under applicable law.

10.2. The Contractor's liability to the Government and to any ordering Agency for any failure to supply service, for any interruptions in service, and for any irregular or defective service shall be determined in accordance with the Contractor's tariffs.

ARTICLE 11. ACCESS TO PREMISES.

11.1. The Contractor shall have access to the premises served at all reasonable times during the term of this areawide contract and at its expiration or termination for the purpose of reading meters, making installations, repairs, or removals of the Contractor's equipment, or for any other proper purposes hereunder; provided, however, that proper military or other governmental authority may limit or restrict such right of access in any manner considered by such authority to be reasonably necessary or advisable.

ARTICLE 12. PARTIES OF INTEREST.

12.1. This areawide contract shall be binding upon and inure to the benefit of the successors, legal representatives, and assignees of the respective parties hereto.

ARTICLE 13. REPRESENTATIONS AND CERTIFICATIONS.

13.1. This areawide contract incorporates by reference the representations and certifications made by the Contractor on Form PBS3503 which is on file with the Government.

ARTICLE 14. SUPPLEMENTAL CLAUSES.

14.1. Clauses Incorporated by Reference (FAR 52.252-2) (JUN 1988).

This contract incorporates the following clauses by reference, with the same force and effect as if they were given in full text. Upon request, the Contracting Officer will make their full text available.

No. FAR REF Federal Acquisition Regulation Clause

(1) 52.202-1 Definitions (OCT 1995)

(2) 52.203-3 Gratuities (APR 1984)

(3) 52.203-5 Covenant Against Contingent Fees (APR 1984)

(4) 52.203-6 Restrictions on Subcontractor Sales to the Government (JUL 1995)

(5) 52.203-7 Anti-Kickback Procedures (JUL 1995)

(6) 52.203-8 Cancellation, Rescission, and Recovery of Funds for Illegal or Improper Activity (JAN 1997)

(7) 52.204-4 Printing/Copying Double-Sided on Recycled Paper

(8) 52.209-6 Protecting the Government's Interest When Subcontracting With Contractors Debarred, Suspended, or Proposed for Debarment (JUL 1995)

(9) 52.219-8 Utilization of Small Business Concerns (JAN 1999)

(10) 52.219-9 Small Business Subcontracting Plan (JAN 1999)

- (11) 52.222-26 Equal Opportunity (APR 1984)
 - (12) 52.223-2 Clean Air and Water (APR 1984)
 - (13) 52.223-14 Toxic Chemical Release Reporting
 - (14) 52.232-23 Assignment of Claims (JAN 1986)
 - (15) 52.232-34 Electronic Funds Transfer Payment
 - (16) 52.233-1 Disputes (OCT 1995) (Alternate I)(DEC 1991)
 - (17) 52.237-2 Protection of Government Buildings, Equipment, and Vegetation (APR 1984)
 - (18) 52.241-2 Order of Precedence - Utilities
 - (19) 52.241-4 Change in Class of Service
 - (20) 52.241-5 Contractor's Facilities
 - (21) 52.241-11 Multiple Service Locations
 - (22) 52.242-13 Bankruptcy (JUL 1995)
 - (23) 52.243-1 Changes-Fixed Price(AUG 1987) (Alt.I)(APR 1984)
 - (24) 52.244-5 Competition in Subcontracting (Dec 1996)
 - (25) 52.249-2 Termination for Convenience of the Government (Fixed Price) (SEP 1996)
Alternate I(SEP 1996)
 - (26) 52.253-1 Computer Generated Forms (JAN 1991)
- 14.2. 552.233-70 Disputes (Utility Contracts) (APR 1984)

The requirements of the Disputes clause at FAR 52.233-1 are supplemented to provide that matters involving the interpretation of retail rates, rate schedules, tariffs, riders, and tariff related terms provided under this contract and conditions of service are subject to the jurisdiction and regulation of the utility rate commission having jurisdiction.

14.3 Unregulated Services

Pursuant to this areawide contract, the Contractor may provide energy related services that are not subject to rate and tariff regulation by the Commission under a pre-approved alternative (FAR 52.241-8 below) that demonstrates the Contractor will provide these services under terms and conditions that are competitive and otherwise in the best interests of the ordering Agency. If, as determined by the ordering Agency, the conditions for use of this pre-approved alternative cannot be satisfied, then the ordering Agency should consider the extent to which a competitive acquisition process is required to select and award a Contract for these unregulated services. If an Authorization under this areawide contract is utilized, the prices and terms and conditions for unregulated services offered by the Contractor shall be negotiated subject to the requirements of FAR 41.5, subject to the following general requirements.

52.241-8 Change in Rates or Terms and Conditions of Service

For Unregulated Services (FEB 1995)- Modified

- (a) This clause applies to the extent that services furnished hereunder are not subject to tariff and/or regulation of the Commission.
- (b) Either party may request a change in rates or terms and conditions of service, unless otherwise provided in this areawide contract. Both parties agree to enter in negotiations concerning such changes upon receipt of a request, in the form of an Authorization, which specifies the terms and conditions of the proposed change in service.
- (c) The Contractor agrees that throughout the life of any Authorization, the terms and conditions so negotiated will not be priced at rates in excess of published and unpublished rates charged to any other customer of the same class under similar terms and conditions of use and service.
- (d) The failure of the parties to resolve any dispute arising from the conduct of services under this clause shall be subject to the Disputes clause, FAR 52.233-1 (Article 14.1-16)
- (e) Any changes, rates, and/or services as a result of such negotiations shall be made a part of this contract by the issuance of a fully executed Authorization.

14.4 Repeal of Clauses During Term of Contract.

If, during the term of this areawide contract, any of the clauses contained in this Article are repealed, revoked, or dissolved by the Government, then such clauses shall no longer be part of this contract as of the date of such repeal, revocation, or dissolution. The elimination of these clauses by reason of such repeal, revocation, or dissolution shall not affect the continuing validity and effectiveness of the remainder of the contract or other clauses referenced in this Article.

ARTICLE 15. SMALL BUSINESS SUBCONTRACTING PLAN

Attached hereto and made a part hereof by reference is a SUBCONTRACTING PLAN FOR SMALL BUSINESS CONCERNS, SMALL BUSINESS CONCERNS OWNED AND CONTROLLED BY SOCIALLY & ECONOMICALLY DISADVANTAGED INDIVIDUALS AND WOMAN OWNED SMALL BUSINESS CONCERNS negotiated between the Contractor and the Government, which is applicable on a company wide basis pursuant to the requirements of Section 211 of P.L. 95-507 (15 U.S.C. 637d). The Contractor expressly understands that this subcontracting plan is an annual plan and hereby agrees to submit a new subcontracting plan each fiscal year hereafter during the life of this Contract.

ARTICLE 16. NOTICES

16.1. Unless specially provided otherwise, all notices required to be provided to the Government under this areawide contract shall be mailed to: Public Utilities Division - (PNEU), General Services Administration, Washington, DC 20405.

16.2. All inquiries and notices to the Contractor regarding this areawide contract shall be mailed to: XX (telephone number XX/XX-XX), or to such other person as the Contractor may hereafter designate in writing.

ARTICLE 17. REPORTING

17.1 The Contractor shall provide, as prescribed and directed by the contracting officer, an annual report on performance in accordance with the approved subcontracting plan for small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals as required by Article 15.

17.2 The Contractor shall provide, no later than the end of February the contracting officer at the address indicated in Article 16.1 an annual report for the preceding calendar year which will provide a summary listing of all Federal customers requiring service or change in service under this areawide contract. This summary report will include: (a) name of Ordering Agency, (b) service address, (c) nature of service, and (d) annual dollar value and quantity of service (if applicable).

ARTICLE 18. MISCELLANEOUS.

18.1. Contract administration: The ordering Agency shall assist in the day-to-day administration of the utility service being provided to it under an Authorization.

18.2. Measurement and verification: Energy Conservation Measures(ECM) will not be normally considered unless a net overall energy usage or cost reduction can be demonstrated and verified. Verification standards for energy projects are established in the North-American Energy

Measurement and Verification Protocol (NEMVP), published by the Department of Energy's Federal Energy Management Program (FEMP).

18.3. Subcontracting: The Contractor may perform any or all of its requested services through subcontractors, including its unregulated affiliates. ECM subcontractors shall be competitively selected in accordance with FAR 52.244-5 (Article 14.1-24 herein). Subcontractor selection shall be based on cost, experience, past performance and other such factors as the Contractor and the Ordering Agency may mutually deem appropriate and reasonably related to the Government's minimum requirements. Upon request by the Government, the Contractor shall make available to the contracting officer all documents related to the selection of a subcontractor. In no event shall the service be provided by subcontractors listed as excluded from Federal Procurement Programs maintained by GSA pursuant to 48 C.F.R. 9.404 (Article 14.1-8 herein).

18.4. Warranties: The Company shall pass through to the Agency all warranties on equipment installed or provided by it or its subcontractors on Government property with the following representation:

(Name of Contractor) ACNOWLEDGES THAT THE UNITED STATES OF AMERICA WILL OWN OR LEASE THE EQUIPMENT AND/OR MATERIALS BEING INSTALLED OR SUPPLIED HEREUNDER, AND, ACCORDINGLY, AGREES THAT ALL WARRANTIES SET FORTH HEREIN, OR OTHERWISE PROVIDED BY LAW IN FAVOR OF COMPANY SHALL INURE ALSO TO THE BENEFIT OF THE UNITED STATES AND THAT ALL CLAIMS ARISING FROM ANY BREACH OF SUCH WARRANTIES OR AS A RESULT OF DEFECTS IN OR REPAIRS TO SUCH EQUIPMENT OR SUPPLIES MAY BE ASSERTED AGAINST (Name of Contractor) OR MANUFACTURER DIRECTLY BY THE UNITED STATES.

18.5. Term of Authorizations: It is recognized that during the life of this contract, situations and/or requirements may arise where it may be desirable that the term of service to an ordering Agency's facility extend beyond the term of this contract. In such event, the particular Authorization involved may specify a term extending beyond the term of this contract, provided that is within the contracting authority of the ordering agency.

18.6. Succeeding contract: Although it is expressly understood that neither the Contractor nor the Government is under any obligation to continue any service under this areawide contract beyond the term hereof, it is contemplated and anticipated that, upon expiration of this contract, a similar successor contract will be agreed upon by the Government and the Contractor. However, in the event a successor contract becomes effective at the expiration of this contract, the terms and conditions of the successor contract shall apply to any Authorization extending beyond the term of this contract. In any event, the maximum term of any Authorization, whether under this contract or extending into a successor contract, is limited to 10 years unless otherwise authorized by Public Law or regulation.

18.7. Anti-Deficiency: Unless otherwise authorized by Public Law or Federal Regulation, nothing contained herein shall be construed as binding the Government to expend, in any one fiscal year, any sum in excess of the appropriation made by Congress for that fiscal year in furtherance of the matter of the contract or to involve the Government in an obligation for the future expenditure of monies before an appropriation is made (Anti-Deficiency Act, 31 U.S.C. 1341.A.1).

18.8. Obligation to Serve: Nothing contained in this contract shall obligate the Contractor to take any action which it may consider to be detrimental to its obligations as a public utility.

Exhibit C

**AGREEMENT FOR ENERGY CONSERVATION AND DEMAND
SIDE MANAGEMENT SERVICES**

BETWEEN

THE UNITED STATES OF AMERICA

AND

_____ **UTILITY COMPANY**

This Agreement for implementation of Energy Conservation Measures (ECMs) is entered into this _____ day of _____, 199_, by and between _____ Utility Company (Utility) and the United States of America (Government), represented by the Contracting Officer executing this Agreement. The signatories to this Agreement will be sometimes collectively referred to as the “Parties” and individually as a “Party.” This Agreement (when signed by the Parties), any Task Orders (T.O.) executed pursuant to this Agreement, and any other associated agreements shall constitute the entire Contract between the Parties with respect to a particular ECM. A term or condition contained in this Agreement may be amended at any time by mutual written agreement of the Parties. However, termination, modification, or expiration of a term or condition shall not retroactively affect T.O.s previously entered into under this Agreement.

The Parties agree to the following principles, concepts and procedures:

GENERAL CONDITIONS

GC.1 Purpose. The Government desires assistance in accomplishing ECMs at _____ Installation (“Installation”) (may substitute “at all Installations within the Utility Company’s service area, to include [list the installations by name] (“hereinafter, “Installations”)”). The purpose of this Agreement is to facilitate the implementation of ECMs through T.O.s. This Agreement sets forth the terms and conditions under which subsequent T.O.s may be entered into between the Parties.

GC.2 Definitions. Terms used in this Agreement shall have the following definitions:

Acceptance - Written acceptance by the authorized representative of the Government of an individual Phase or completed ECM pursuant to a T.O.

Agency - Any civilian Agency or establishment in the legislative or judicial branches of the Federal Government, or any mixed ownership corporation, as defined in the Government Corporation Control Act.

Carrying Charge - For the purpose of this Agreement, Carrying Charge shall be an interest rate applied to all ECM Costs incurred by the Utility until permanent financing is put in place or the Government pays the ECM Cost. Accrued interest shall be considered an ECM Cost.

Contracting Officer - A Government official authorized to enter into, administer, and/or terminate a contract on behalf of the Government, and who is authorized to make related determinations and findings within the limits established pursuant to Government regulations.

Contracting Officer's Representative (COR) or Contracting Officer's Technical Representative (COTR) - A local or project site representative of the Contracting Officer delegated specific limited authority, as set forth in a formal delegation letter signed by the Contracting Officer, for a given T.O.

Energy Conservation Measure (ECM) - One or more ECPs completed, or to be completed, under a T.O. including the feasibility study, engineering and design, operation and maintenance, and/or implementation of one or more ECPs, which include, but are not limited to, energy and water conservation, energy efficient maintenance, energy management services, facilities alterations, and installation and maintenance of energy saving devices and technologies. ECMs should have a positive net present value over a period of 10 years or less, as required by the prevailing utility services contract term limitation per Federal Acquisition Regulation (FAR) Part 41.

Energy Conservation Measure Cost (ECM Cost) - The total cost may include, but is not limited to the Work, finance charges and overhead and profit, for the feasibility study, engineering and design, implementation and operation and maintenance of an ECM, less any financial incentive or rebates, if provided by the Utility. Payment for completed ECMs shall be calculated based upon the ECM Cost.

Energy Conservation Project (ECP) - A specific project intended and designed to provide any of the following: energy savings, demand reduction, efficiency improvements and water conservation. ECPs are described in more detail in Section GC 17.

Government - Same as Agency.

Occupied Period - Hours during which a facility or building is occupied or used in the normal course of business.

Quality Assurance Evaluator (QAE) - A functionally qualified person who evaluates or inspects the contractor's performance of service in accordance with the quality assurance surveillance plan written specifically for the contracted service to be evaluated. The QAE performs technical monitoring of contractor actions, is responsible for requesting products and services through a government contract, and manages the day-to-day tasks of the contract.

Quality Control - A management function whereby control of quality of raw or produced material is exercised for the purpose of preventing production of defective material. For purposes of this Agreement, quality control is those actions taken by a contractor to control the production of outputs to ensure that they conform to the contract requirements.

Possession - When the Government takes beneficial occupancy of an ECP ("Possession of an ECP") or an ECM ("Possession of an ECM").

Subcontractor - Any corporation, partnership or individual hired directly by the Utility to perform a service or provide a product under this Agreement and T.O.s resulting from this Agreement.

Task Order (T.O.) - A binding contractual action entered into under this Agreement for the feasibility study, engineering and design, implementation, and/or operation and maintenance of, or any activity related to an ECM. (A T.O. can also be identified as a Delivery Order (D.O.).)

Termination Schedule - A schedule developed for each financed ECM specifying the lump sum payment necessary, at any time during the contract period following the initial Government payment, for the complete repayment of the ECM Costs, including any finance costs accrued to that point.

Utility - "Utility" means public agencies and privately owned companies that market, generate, and/or distribute energy or water, including electricity, natural gas, manufactured gas, steam, hot water, and chilled water as commodities for public use and that provide the service under Federal, State, or local regulated authority to all authorized customers. Utilities include: Federally owned non-profit producers; municipal organizations; and investor or privately owned producers regulated by a State and/or the Federal Government; cooperatives owned by members and providing services mostly to their members; and other nonprofit State and local government agencies serving in this capacity.

Work - All labor, materials, tools, equipment, services, transportation and/or other items required for the completion of the ECM.

GC.3 Term. This Agreement shall have a term of ____ years. The term may not exceed ten (10) years. This Agreement may be terminated in its entirety by either Party upon thirty (30) days written notice to the other Party. Thereafter, no new T.O.s shall be entered into under this Agreement. Termination, modification or expiration of this Agreement shall not affect in any way T.O.s previously entered into under this Agreement. This Agreement shall be effective from the date it is signed by both Parties. In the event the Parties sign this Agreement on different dates, then the effective date shall be the latter of the two dates.

GC.4 Services to be Provided by the Utility. The Utility shall provide preliminary audits, feasibility studies, engineering and design studies, and all initial capital, labor, material, supplies and equipment to identify, implement, operate or maintain ECMs in accordance with T.O.s entered into pursuant to this Agreement. These services may be ordered individually, as a group or in any combination under a single T.O.

GC.5 Information. Subject to national security constraints and unless otherwise prohibited by law, the Government shall provide the Utility with any information requested by the Utility to comply with regulatory commission requirements.

GC.6 Relationship of Parties. The Government acknowledges that the Utility and/or its Subcontractors shall each perform their work as independent contractors and the Government shall have no direct control and supervision of Utility or Subcontractor employees, who shall not be considered employees or agents of the Government for any purpose. The Utility, in negotiations with its Subcontractors, will ensure that the Government will be the direct beneficiary of any and all product and service guarantees and warranties.

GC.7 Subcontractor Selection. The Utility may perform some or all of the Work under a Task Order itself or through Subcontractors. When practical, the Utility shall competitively select Subcontractors for the purpose of determining the reasonableness of Subcontractor prices. When competition is not practical, price reasonableness may be determined by comparing proposed prices with those obtained for the same or similar work, prices published in independent cost guides, published in competitive price lists or developed by independent sources.

Subcontractor selection shall be based on cost, experience, past performance, reliability, and such other factors as the Utility may deem appropriate, as long as such factors are practicably related to the Government's minimum needs. In no event may such services be provided by Subcontractors listed as excluded from Federal Procurement Programs, which list is maintained by GSA pursuant to 48 C.F.R. 9.404. For any T.O., the Utility may submit the names of proposed Subcontractors to the Government Contracting Officer to ensure they are not excluded pursuant to 48 C.F.R. 9.404.

GC.8 Authority of Contracting Officer. The Government 's Contracting Officer shall be the only Government official authorized to enter into and/or modify a T.O. entered into under this Agreement.

GC.9 Ownership of Work Product. The Government may elect not to use the Utility to implement the ECM. If the Government so elects, it will pay for any accepted work, including any equipment, completed studies, and engineering and design work. Title to any work done by the Utility for the Government under a T.O. shall become the property of the Government at the time of Acceptance of the Work.

GC.10 Responsibility for Operations and Maintenance. The operation and maintenance of the equipment installed pursuant to any T.O. executed under this Agreement shall be the responsibility of the Utility during the payment term unless otherwise provided in the T.O.

GC.11 Government Projects. The Government shall not be restricted from implementing equipment installation, construction projects and ECMs independent of work performed under this Agreement, including installing new energy conservation equipment, removing existing energy consuming equipment, or adding new energy consuming equipment. The Government will notify the Utility prior to implementing projects that may affect ECMs under this Agreement.

GC.12 ECM Performance Verification. Each T.O. shall include procedures that are mutually agreeable to the parties to verify ECM performance following installation.

GC.13 Emission Credits. All on site Government emission credits earned by virtue of T.O.s entered into hereunder shall be the property of the Government.

GC.14 Order of Precedence. The Government and Utility shall determine in this Agreement or subsequent T.O.s the precedence given to the T.O., this Agreement or other documents, exhibits and attachments in the event an inconsistency arises among these documents.

GC.15 Preliminary Audits. At the request of the Government or the Utility and upon the mutual consent of both parties, the Utility will conduct, at no cost to the Government, an audit consisting of an on-site building investigation and evaluation for a mutually agreeable facility to determine if any significant energy conservation opportunities exist and whether further detailed energy analysis is warranted. Government buildings/facilities plans will be made available upon request. Requests for plans shall be made to the COR at least fifteen (15) calendar days in advance of the audit start date. The Utility will provide a written report of the audit to the Government, normally at no cost. The Utility will utilize historical building data, utility data, and information obtained by the Utility to identify ECPs. Using this information, the Utility will generate a prioritized list of recommendations, in sequence of implementation, that are life-cycle cost effective and can be implemented in the facility being audited. The preliminary audit, to the extent applicable, shall include but not be limited to the following information:

- (a) Preliminary estimated energy and water savings,
- (b) Preliminary estimated cost savings, including reduced maintenance costs,
- (c) Current utility rates,
- (d) Preliminary retrofit cost,
- (e) Utility financial incentive/rebate, if any,
- (f) Description of existing equipment,
- (g) Description of the proposed retrofit equipment,
- (h) Overview of the general environmental impact and potential hazardous wastes identified through existing facility records, if any.

GC.16 ECM Proposal. After reviewing the preliminary audit, the Government may request a proposal from the Utility, for the evaluation of an ECM. The Utility shall submit an ECM proposal setting forth a prioritized list of the recommended ECPs within the ECM, a preliminary estimate of the cost to implement each ECP, the total costs for implementing the ECM (including estimated feasibility study, engineering and design, and implementation costs), and estimated cost savings.

GC.17 Energy Conservation Projects. The Utility may propose ECMs which include one or more ECPs. ECPs that substitute one energy type for another (e.g., natural gas in lieu of electricity) will not be considered for implementation unless a net overall energy or cost reduction can be demonstrated, based on current market energy prices. Potential ECPs include, but are not limited to:

- (a) Interior and exterior lighting replacement,
- (b) Transformer replacement,
- (c) Lighting control improvements,
- (d) Motor replacement with high efficiency motor,
- (e) Construction of alternative generation or cogeneration facilities,
- (f) Boiler control improvements,
- (g) Packaged air conditioning unit replacement,
- (h) Cooling tower retrofit,
- (i) Economizer installation,
- (j) Energy management control system (EMCS) replacement/alteration,
- (k) Occupancy sensors,
- (l) LED exit sign installation,
- (m) Fans and pump replacement or impeller trimming,
- (n) Chiller retrofit,
- (o) Upgrade of natural gas-fired boilers with new controls (low NOX burners),
- (p) Solar domestic hot water system,

- (q) Solar air preheating system,
- (r) Steam trap maintenance and replacement,
- (s) Insulation installation,
- (t) Variable speed drive utilization,
- (u) Weatherization,
- (v) Window replacement,
- (w) Window coverings and awnings,
- (y) Reflective solar window tinting,
- (z) Fuel cell installation,
- (aa) Photovoltaic system installation,
- (bb) Faucet replacement (infrared sensor),
- (cc) Replacement of air conditioning & heating unit with a heat pump,
- (dd) Addition of liquid refrigerant pump to a reciprocating air conditioning unit,
- (ee) High efficiency refrigerator replacement,
- (ff) High efficiency window air conditioner replacement,
- (gg) Water conservation device installation (e.g., flow restrictors, low flow flush valves, waterless urinals, horizontal axis washing machines),
- (hh) Installation, maintenance and operation of power quality and reliability measures including UPS systems, back-up generators, emergency generators, etc.,
- (ii) Fuel switching technology,
- (jj) Infrared heating system,
- (kk) Heat pipe dehumidification,
- (ll) Flash bake commercial cooking,
- (mm) Thermal energy storage system,
- (nn) Operation, maintenance, modification and/or extension of utility distribution and collection system,
- (oo) Training that will result in reduced energy costs,
- (pp) Power factor correction measures and equipment,
- (qq) Installation, maintenance and operation of standby propane facility,
- (rr) Installation, maintenance and operation of gas distribution system and associated equipment,
- (ss) Water distribution system leak detection, and cost effective repair,
- (tt) Any other ECP that is cost effective using the then current DoD prescribed procedures and standards, and which encourages the use of renewable energy, reduces the Government's energy consumption or energy demand or results in other energy infrastructure improvements.

GC.17.1 ECM Restrictions. The Government shall not consider ECMs which include:

- (a) Measures which could jeopardize existing Agency missions,
- (b) Measures which could jeopardize the operation of, or environmental conditions of, computers or computer rooms,

- (c) Unless waived by the Contracting Officer, measures that would result in increased water consumption (e.g., once-through fresh water cooling systems),
- (d) Measures which would violate any federal, state, or local laws or regulations,
- (e) Measures which degrade performance or reliability of existing Government equipment,
- (f) Unless waived by the Contracting Officer, measures that would reduce energy capacity currently reserved for future growth, mobilization needs, safety, emergency back-up, etc.,
- (g) Measures that violate the then current versions of the National Electric Code, the National Electric Safety Code, the Uniform Building Code or the Uniform Mechanical Code,
- (h) Utility financed measures that do not result in savings in the base utility expenditures sufficient to cover the project costs.
- (i) Measures that have a contract term extending beyond any current publicly stated closure date for that facility.
- (j) Measures that have a contract term extending beyond the intended term of government utilization of the building.

GC.17.2 Facility Performance Requirements of ECMs. ECMs proposed by the Utility shall conform to the following facility performance standards:

- (a) Lighting levels shall meet the minimum requirements of the then current Illuminating Engineering Society (IES) Lighting Handbook,
- (b) Heating and cooling temperature levels shall meet Government design standards,
- (c) ECMs shall permit flexible operation of energy systems for changes in occupancy levels and scheduling of facilities. In proposing an ECM, the Utility may assume the building function will remain constant unless otherwise indicated by the Government.

GC.18 Task Orders. Following the evaluation of the ECM proposal, the Government may elect to execute a T.O. with the Utility for the evaluation, implementation or operation and maintenance of the ECM. If requested by the Government, the Utility will provide or obtain financing on terms at least as good as those available to customers in a comparable service class, or with a comparable risk profile, considering the nature of the security interests to be granted, if any, and other conditions affecting the cost of financing.

The T.O. may have five phases; Audit (when applicable), Feasibility Study Phase, Engineering and Design Phase, Implementation Phase and Operation and Maintenance Phase. Because the extent of all the work is unlikely to be known at the time the T.O. is entered into, these phases shall be line items under the T.O., and shall be issued with an estimated Termination Schedule at the time

the T.O. is executed. However, work will not commence on a particular phase unless and until a statement of work and a price for that phase have been agreed upon.

Following completion and Acceptance of the Feasibility or Engineering and Design Phases, the Government may elect to (i) pay the ECM Cost for each completed Phase within thirty (30) calendar days of being invoiced, or (ii) defer payments for that Phase until the end of the next Phase at which time the Government shall pay the ECM Cost for each completed Phase within thirty (30) calendar days of invoice, or (iii) include such amounts in the ECM Cost, if the Government elects to proceed with the Implementation Phase. If the Government elects not to proceed with the next Phase, it shall pay the Utility the ECM Cost for the prior completed Phases, plus a Carrying Charge as negotiated by the parties in the T.O. A decision to proceed or not to proceed with the next Phase must be made within sixty (60) days of receipt of a written request from the Utility. Only the Contracting Officer shall be authorized to exercise the Government's option to proceed to the next Phase, and such exercise shall be provided in writing within sixty (60) days of receipt of a statement of work and price.

Government finance payments for the Implementation Phase shall begin on the date of the first Utility bill following the 30 day period after the Government takes possession of all or part of the ECM as provided in FAR, Part 36, Subpart 36.511, and a satisfactory ECM Performance Verification as defined in the T.O. and pursuant to Section GC.12 of this Agreement.

The timing and amount of Government payments of appropriated funds for the Operations and Maintenance Phase shall be determined in the T.O.

The T.O. shall be subject to any legally required Federal Acquisition Regulations. Because services may vary widely from one T.O. to another, the Contracting Officer will insure that the appropriate FAR clauses from the FAR matrix found at FAR, Part 52, Subpart 52.301, are incorporated into any contract entered into by the parties for services provided by the Utility under the T.O.

GC.19 ECM Feasibility Study Phase. The Task Order shall set forth a scope of work for a detailed study to determine whether particular ECMs proposed by the Utility are feasible (the "Feasibility Study"). The Task Order shall specify the terms for the completion of the Feasibility Study and establish a price for the Feasibility Study. The Government will pay the Utility the agreed-upon price for the Feasibility Study in accordance with the T.O. If the Government elects to proceed with the Engineering and Design Phase as set forth below in Paragraph GC.20, the cost of the Feasibility Study shall be rolled into the Engineering and Design Phase ECM Cost. The Feasibility Study will provide, at a minimum, the following information:

Technical Factors:

- (a) Audits of energy consumption of existing equipment and facilities, including estimated energy and cost savings, and proposed retrofit costs and financial incentives/rebates,
- (b) Water audits of supply and utilization facilities, if specified by the Government,
- (c) Equipment to be removed or replaced, and new equipment to be installed,
- (d) Specifications, including catalog cuts, for new equipment. Specifications should include (as applicable): power rating, estimated energy consumption, input/output, power ratio, lighting level and estimated equipment life,
- (e) Operation and maintenance procedures required after ECM implementation (if significantly altered by the ECM),
- (f) Training that will be provided for the proper operation and maintenance of ECPs, including details on how many hours of training will be provided and how many people will be trained,
- (g) Electrical and mechanical sketches for all ECPs that involve changes to existing systems, (sketches will not be required for ECPs involving only component replacement),
- (h) Government support (e.g. minor changes in Government operations, movement of equipment, etc.) required during implementation of the ECM,
- (i) Utility interruptions needed for implementation of each ECP by type (gas, electricity, water, etc.), extent (room number, entire building, etc.) and duration,
- (j) Identification of potential adverse environmental effects,
- (k) Any documentation required to comply with applicable environmental laws,
- (l) The estimated construction time in calendar days, showing significant milestones,
- (m) The estimated annual energy savings in kilowatt-hour and kilowatt demand of electricity, decatherms of natural gas and cubic feet of water for the life of each ECP, including all assumptions and detailed calculations showing how savings were determined,
- (n) The estimated equipment life for each ECP,
- (o) A proposed method to verify energy savings at the time of ECM Acceptance which shall be subject to Government approval,
- (p) Documentation that each proposed ECP has been recommended and selected without regard to fuel source;

Cost Factors:

- (q) Estimated annual operation costs (e.g. increased use of alternate fuel sources, replacement filters) and increased maintenance costs (e.g. relamping with a higher cost product, etc.),

- (r) Total estimated ECM Cost to the Government,
- (s) Estimated breakdown of financial incentives/rebates for each ECM (if any) in a format mutually agreeable to the Parties,
- (t) Estimated Cost-of-Money Rate (percent),
- (u) Estimated annual energy and operations and maintenance cost savings including details on estimated annual savings for each area of savings, such as lighting, controls, motors and transformers,
- (v) Estimated breakdown of implementation costs for each area of energy savings, such as lighting, controls, motors and transformers,
- (w) Estimated costs for replacing existing components and installing new components/systems shall be listed separately,
- (x) Estimated unit costs for major components and systems,
- (y) Estimated Life Cycle Cost Analysis prepared in accordance with the then current edition of the Energy Prices and Discount Factors for Life-Cycle-Cost Analysis, published as the annual supplement to the National Institute of Standards and Technology (NIST) Handbook 135.

GC.20 ECM Engineering and Design Phase. After evaluation and Acceptance of the feasibility study, the Government may elect to proceed with the Engineering and Design Phase. Prior to proceeding, the Parties shall agree upon a statement of work for all engineering and design services necessary for the implementation of a particular ECM, a time frame for completion of the work, and a price or cost cap for engineering and design work for the ECM. If the Government elects to proceed with the Implementation Phase as set forth below, the cost of the engineering and design work shall be rolled into the total ECM Cost. This T.O. shall include an estimated amortization schedule for the ECM.

GC.20.1 Verification of Floor Plans. The Utility will verify the accuracy of any floor plans provided by the Government.

GC.20.2 Government Design Review. Task Orders shall permit adequate time for Government review of engineering and design work at 35% and 95% design completion, or at any other stage, as negotiated in the T.O.

GC.20.3 Site Plans. If proposed ECMs require installation outside existing buildings or structures, a site plan showing recommended siting of ECMs shall be prepared for Government review and approval. Site plans shall be submitted as part of the Utility's proposal. It is recommended that the Utility propose alternate sites for review in case the primary site is unavailable.

GC.20.4 ECM Implementation Proposal. Upon completion and Acceptance of the Engineering and Design Phase, the Utility will submit to the Government an ECM implementation proposal (the "Proposal"). If requested by the Contracting Officer, the Utility will be required to present

a briefing to the Government explaining the Proposal. At a minimum, the Proposal shall include all pertinent technical and cost factors listed in Paragraph GC.19 of this Agreement plus a copy of subcontractor(s) bid(s). The Proposal shall also set forth negotiated pricing criteria that describes the method for determining the prices to be paid to the Utility for supplies or services. The Government shall evaluate the Proposal for technical soundness and price reasonableness. If the Government elects to proceed with the ECM, the Utility and Government shall agree upon a complete scope of work with specifications, time for performance, ECM Cost, source and cost of capital or financing, payment terms, amortization schedule and final Termination Schedule. If the Contracting Officer deems it appropriate, the Utility will provide acceptable performance and payment bonds.

GC.21 ECM Implementation Phase. The Utility shall perform work in accordance with the T.O. The following provisions shall apply to ECM implementation work performed pursuant to T.O.s executed under this Agreement, unless exceptions are provided in the T.O.

GC.21.1 Pre-Work Requirements. Prior to commencing ECM implementation Work on a T.O., the Utility shall meet with the Contracting Officer or COR at a time mutually agreeable to the Utility and the Contracting Officer, to discuss and develop mutual understandings relative to safety, scheduling, performance, obtaining necessary permits, and administration of the Implementation Phase. Prior to commencement of on-site work, written approval of the following shall be obtained from the Contracting Officer by the Utility:

- (a) Utility's proposed implementation schedule indicating the installation period and time required for delivery of equipment,
- (b) Evidence that the required insurance has been obtained.

GC.21.2 Interruptions. The Utility shall arrange on-site work to minimize interference with normal Government operations. All interruptions shall be made outside occupied periods whenever possible and coordinated with the Contracting Officer or COR. The Utility shall endeavor to keep the duration of utility interruptions to a minimum. Requests for utility outages shall be submitted for approval, in writing, as specified in the T.O. The request shall include the approximate duration, date, time and reason for the interruption. Utility interruptions include, but are not necessarily limited to, the following systems:

- (a) Electrical,
- (b) Natural Gas,
- (c) Sewer,
- (d) Steam,
- (e) Water,

- (f) Telephone,
- (g) Computer cables.

GC.21.3 Construction Documentation. The Utility shall provide construction drawings and specifications, certified by a registered engineer or architect, as applicable, to ensure compliance with all applicable federal, state and local codes and regulations as required by individual T.O.s.

GC.21.4 Standardization of Materials. All materials proposed to be installed pursuant to this Agreement shall be readily, commercially available, and as similar in form, fit and function to each other as is practicable to allow efficient provisioning of replacement parts.

GC.21.5 Water Conservation Measures. The Utility will consider water conservation in all ECMs. The Utility will obtain rebates from the local water utility if available. Rebates, if any, shall be applied to the cost of the project.

GC.21.6 Operation and Maintenance Manuals. At the time of Government Acceptance of a completed ECM, the Utility shall furnish, for the equipment specified, operation and maintenance manuals and recommended spare parts lists identifying components adequate for competitive supply procurement for operation and maintenance of ECM equipment. The operation and maintenance manuals shall include maintenance schedules for all equipment. The scope of each manual shall be agreed upon in the T.O.

GC.21.7 Government Personnel Training for ECPs. The Utility shall train Government personnel, as required, to operate, maintain, and repair ECM equipment and systems. The date and time of training shall normally be coordinated with the Contracting Officer or COR prior to Acceptance of the ECM. The cost for such training shall be included in the ECM Cost.

GC.21.8 As-Built Drawings. Within forty-five (45) calendar days after Government Acceptance of each installed ECM, the Utility shall submit as-built drawings to the Contracting Officer or COR. Drawings will not be required for component replacement. Drawings shall include at a minimum:

- (a) The installation (i.e., form, fit, and attachment details) of the interface between ECM equipment and existing Government equipment,
- (b) The location and rating of installed equipment on building floor plans.

GC.21.9 Installation. The Utility will arrange for the installation of approved ECMs and construction oversight and verify that the designed and specified energy efficiency equipment and/or system modifications are properly supplied or installed in a manner that will give the intended long term demand and energy reductions. The Utility will select Subcontractors in accordance with Paragraph GC.7 above.

GC.22 Operation and Maintenance Phase. The Government may elect to have the Utility perform the operation and maintenance on part or all of the ECM. Before exercising its option for this Phase, the Government and Utility shall agree upon a complete scope of work with specifications, schedules, warranties and cost.

GC.23 Required FAR Clauses. The following FAR clauses are required to be included in any contract with the Government:

- 52.203-3 Gratuities,
- 52.203-5 Covenant Against Contingent Fees,
- 52.203-7 Anti-Kickback Procedures,
- 52.222-3 Convict Labor,
- 52.222-25 Affirmative Action Compliance,
- 52.222-26 Equal Opportunity,
- 52.223-6 Drug Free Workplace,
- 52.233-1 Disputes.

CG.24 Title to Contractor-Installed Equipment

- a. All equipment installed by the contractor at installation is and remains the property of the contractor during the contract term.
- b. At the expiration of the contract term, all rights, title, and interest in and to all improvements and equipment constructed or installed on the premises and additions, shall vest in the Government at no additional cost free and clear of all and any mechanics liens and encumbrances created or caused by the contractor. The contractor shall surrender possession of said premises and the improvements and equipment to the Government in good repair and condition, reasonable wear and tear accepted.
- c. If the contract is terminated for convenience, all right title and interest in and to all improvements, additions, or equipment of all ECMs installed by the contractor to which the Government determines to take possession shall vest in the Government. For those ECMs for which the Government takes possession and thereby obtains title, the contractor shall be compensated in accordance with FAR clause Termination for Convenience (52.249-2).

Warranties and Remedies

WR.1 Warranties. The Utility shall pass through to the Government all warranties on equipment installed pursuant to a T.O. In addition, the Utility will provide, from the date of Acceptance or Government Possession of an ECP, whichever is earlier, a one year comprehensive wrap-around

warranty guaranteeing that the equipment installed shall perform in accordance with the specifications agreed upon between Government and Utility, as set forth in the applicable T.O.

In the event the Utility provides O&M services, a separate warranty will be negotiated for such services, in accordance with FAR Part 52, Subpart 52.246-20.

WR.2 No Other Warranties. The warranties set forth in WR.1 are exclusive and in lieu of all other warranties. The Utility makes no other representations or warranties of any kind with respect to the services and products it provides pursuant to this Agreement and subsequent T.O.s., The Utility does not guarantee any level of energy or water savings or cost reductions.

WR.3 Utility Limitation of Liability. The Utility shall not be liable for any special, incidental, indirect, or consequential damages, connected with or resulting from the performance or non-performance of work under this Agreement or subsequent T.O.s. In addition, the Utility shall not be liable under its warranty to the extent that damages are caused by Government negligence.

WR.4 Utility Default. The Government and Utility agree that Utility default provisions will be governed by those FAR clauses applicable to specific circumstances. A determination of applicable FAR default clauses will be made by the Contracting Officer for a specific T.O.

WR.5 Prompt Payment. As required in FAR, Part 32, Subpart 32.903, the Government shall promptly pay ECM utility bills. Late payments shall accrue interest as provided in FAR, Part 32, Subpart 32.907.

WR.6 Disputes. Disputes that arise under this Agreement and subsequent T.O.s shall be governed by the applicable dispute provisions found at FAR, Part 33, Subpart 33.2.

WR.7 Differing Site Conditions. In the event site conditions differ materially from those contained in the T.O. additional costs incurred by the Utility due to the differing conditions shall be negotiated prior to work, and the ECM Cost shall be increased to reflect an equitable adjustment as permitted in FAR, Part 36, Subpart 36.502.

WR.8 Suspension of Work. In the event Work is delayed, suspended or stopped by the Government, FAR, Part 42, Subpart 42.13 shall apply.

FINANCING AND PAYMENT PROVISIONS

FP.1 Energy Savings and Financing. It is intended that the annual energy savings achieved from the implementation of a Utility financed ECM under this Agreement will produce financial savings to the Government which are greater than the cost of implementing the ECM, including the cost of financing provided under this Agreement. The payment term cannot exceed ten years.

FP.2 Financial Incentives, Rebates, and Design Assistance: The Utility will provide to the Government the same financial incentives, rebates, design review, goods, services, and/or any other assistance provided without charge, that is generally available to customers of a similar rate class or size. Incentives that may be available are to be identified in the preliminary audit report provided according to Paragraph GC.15 and the ECM implementation proposal provided according to Paragraph GC.20.4.

FP.3 Calculation of Payment. Payment for accepted ECMs shall be equal to the ECM Cost amortized over a negotiated term. The cost of financing, if any, for any completed ECM shall be recovered under terms and conditions no less favorable than those for others in the same customer class. Monthly payments will commence on the date of the first Utility bill following the 30 day period after the date the Government takes Possession of the ECM and ECM Performance Verification Testing, as required by GC.12 and negotiated in the T.O., is satisfactorily completed.

FP.4 Buydown. The Government reserves the right, at any time following Acceptance, but prior to final payment, to buydown the outstanding T.O. payments without penalty by giving thirty (30) days written notice to the Utility. Upon such buydown, the Government shall pay to the Utility a negotiated percentage of the Termination Schedule amount. Monthly payments will continue at the same level but the term of ECM financing will be shortened to reflect the amount of the buydown payments.

FP.5 Pre-Acceptance Termination. In the event the Government desires to terminate a Task Order for any reason (including, without limitation, for convenience) prior to Acceptance, the Government may do so by giving written notice to the Utility thirty (30) days prior to the effective date of such termination. The Government shall pay the Utility an amount calculated using a formula agreed to by the Government and Utility and which will be Attachment A of the Task Order. If a termination occurs for the convenience of the Government, the amount payable pursuant to this paragraph shall be deemed as an allowable cost under FAR. (See Part 17 and Part 52, Subpart 52.249-2.)

FP.6 Post-Acceptance Termination. In the event the Government desires to terminate a Task Order for any reason (including, without limitation, for convenience) after Acceptance, the Government may do so by giving written notice to the Utility thirty (30) days prior to the effective date of such termination. The Government shall pay the Utility the amount set forth in the Termination Schedule which shall be Attachment B of the Task Order. If a termination occurs for the convenience of the Government, the amount payable pursuant to this paragraph shall be deemed as an allowable cost under FAR. (See Part 17 and Part 52, Subpart 52.249-2.)

FP.7 Assignment of Claims. Government payments under each T.O. executed pursuant to this Agreement may be assigned pursuant to FAR, Part 52, Subpart 52.232.23 "Assignment of Claims." Any bank, trust company or other financing institution that participates in financing an

ECM shall not be considered a Subcontractor of the Utility. Any "Assignment of Claims" must comply with the provisions of FAR, Part 32, Subpart 32.8.

FP.8 Novation. The Parties agree that if, subsequent to the execution of this Agreement, it should become necessary, or desirable, to execute a "Novation Agreement," said Novation Agreement will comply with the provisions of FAR, Part 42, Subpart 42.12 and will be in the form as provided at FAR, Part 42, Subpart 42.1204.

SPECIAL REQUIREMENTS

SR.1 Environmental Protection. The Utility shall comply with all applicable federal, state and local laws, regulations and standards regarding environmental protection ("Environmental Laws"). All environmental protection matters shall be coordinated with the Contracting Officer or designated representative. The Utility shall immediately notify the Contracting Officer of, and immediately clean up, in accordance with all federal, state and local laws and regulations, all oil spills, hazardous wastes, (as defined at 42 U.S.C. §9601), and hazardous materials (as defined at 49 C.F.R. Pt. 172) collectively referred to as "Hazardous Materials," resulting from its operations on Government property in connection with the implementation of ECMs. The Utility shall comply with the instructions of the Government with respect to avoidance of conditions that create a nuisance or create conditions that may be hazardous to the health of military or civilian personnel.

SR.2 Environmental Permits. Unless otherwise specified, the Utility shall provide, at its expense, all required environmental permits and/or permit applications necessary to comply with all applicable federal, state and local requirements prior to implementing any ECM in the performance of a T.O. executed pursuant to this Agreement. If any such permit or permit application requires the signature or other cooperation of the Government as owner/operator of the property, the Government agrees to cooperate with the Utility in obtaining the necessary permit or permit application.

SR.3 Handling and Disposal of Hazardous Materials. Notwithstanding the provisions of the FAR, Part 52, Subparts 52.236-2 "Differing Site Conditions" and 52.236-3 "Site Investigations and Conditions Affecting Work", the Government understands and agrees that (i) the Utility has not inspected, and will not inspect, the project site in connection with a proposed ECM for the purpose of detecting the presence of pre-existing Hazardous Materials that relate to an ECM or any project site, and (ii) the Government shall retain sole responsibility for the proper identification, removal, transport and disposal of any fixtures, components thereof, or other equipment or substances incidentally containing pre-existing Hazardous Materials, except as specifically agreed to by the Utility pursuant to Paragraphs SR.4 and SR.5 (below).

If the Utility, during performance of the work under a T.O. executed pursuant to this Agreement, has reason to believe that it has encountered or detected the presence of pre-existing Hazardous Materials, the Utility shall stop work and shall notify the Government. The Government will evaluate the site conditions and notify the contractor of the results of this evaluation. The Utility

shall not be required to recommence work until this situation has been resolved. Any delay resulting therefrom shall be grounds to request an increase in the ECM Cost to the extent that such delay increases ECM Costs.

SR.4 Asbestos and Lead-Based Paint. To the extent provided for in a T.O. executed pursuant to this Agreement, in connection with the implementation of any ECM, the Utility may agree to remove pre-existing asbestos containing material or lead-based paint, incidental to implementation of an ECM. However, unless the Utility explicitly agrees in said T.O. to perform any portion of the testing, removal or abatement of the pre-existing asbestos or lead-based paint as part of the scope of work for any ECM, and unless the T.O. specifically references this Paragraph SR.4, the Government shall be deemed to be solely responsible as provided for in Paragraph SR.3.

If the Utility in the course of ECM implementation disturbs suspected lead-based paint or asbestos containing material, the Utility may propose to the Government that the Utility will perform any portion of the testing, removal, or abatement of the lead-based paint or asbestos containing material. Said proposal will include the requested increase in the ECM Cost on account of such additional work. The Utility will not commence work involving additional cost without approval of the Contracting Officer. In the absence of an agreement to the contrary, the provisions of Paragraph SR.3. (above) shall apply.

In the event the Utility agrees to include any portion of the testing, removal or abatement of the asbestos within the scope of work for an ECM implemented as described above in this Paragraph, the hazardous waste manifests or other shipping papers shall identify the Government as the sole generator of the Hazardous Materials.

SR.5 Refrigerants, Fluorescent Tubes and Ballasts. To the extent provided for in a T.O. executed pursuant to this Agreement in connection with the implementation of any ECM, the Utility shall remove and/or dispose of all ozone depleting refrigerants, fluorescent tubes and fluorescent magnetic core and coil ballasts incidental to an ECM to the Hazardous Materials Disposal site (HAZMAT) on the installation. If there is no HAZMAT on the installation, the above Hazardous Materials will be disposed in accordance with all applicable federal, state and local laws and regulations, provided however, that the hazardous waste manifests or other shipping papers shall identify the Government as the sole generator of the Hazardous Materials.