

Note:

The NYSERDA Model RFP can be modified for use by other public organizations by removing the first page which makes reference to “provisions affecting energy performance contracts”, see text below. All other sections of the RFP sample are relevant to other public organizations.

This model "Request for Proposals" (RFP) for a school district interested in securing energy services through an energy performance contract does not purport to cover all circumstances and conditions that may arise. It should be carefully reviewed and modified by the district and their legal counsel to meet both general and specific concerns and conditions of the district.

Please note this RFP requires adherence to Chapter 436 of the Laws of 1997 and Section 155.16 of the Regulations of the Commissioner of Education, which together include four major provisions affecting energy performance contracts by school districts and Boards of Cooperative Educational Services:

- *the amortization period shall not exceed the term of the energy performance contract;*
- *building aid attributable to the project is excluded in determining the cost savings under the energy performance contract;*
- *the performance contractor must guarantee the recovery of contract costs from energy savings over the term of the energy performance contract which shall not exceed 18 years; and*
- *the development and approval of an energy performance contract in accordance with subdivision 8 of section 9-103 of the Energy Law must comply with*
- *regulations promulgated by the Commissioner of Education.*

The RFP and the proposal evaluation forms are available on computer disk in several word processing formats. NYSERDA's assistance in understanding the energy performance contracting process is provided at no cost to the District. More in-depth assistance is available through engineering firms on retainer to NYSERDA through our FlexTech program. These services, which are provided on a cost-shared basis, can include assistance in development of the RFP, selection of the energy performance contractor, and review of the comprehensive energy audit and the proposed energy performance contract. For more information call NYSERDA at (518) 862-1090, extension 3318.

As with any capital construction project, you should contact the Office of Facilities Planning at the State Education Department for guidance on the development and implementation of an energy performance contract.

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[Enter Name and Address of School District]

NOTICE TO ENERGY SERVICES COMPANIES
GENERAL INFORMATION AND REQUEST FOR PROPOSALS
FOR AN ENERGY PROJECT

The _____ School District is issuing this Request for Proposals (RFP) for the selection of an energy services company (ESCO). You are invited to submit a proposal in accordance with this RFP.

Proposals must be received no later than [enter time and date].

Late proposals will be returned unopened.

A mandatory pre-proposal review of the proposal requirements and walk-through inspection tour of the facilities will be held on _____ [enter date] _____.

The district reserves the right to amend the RFP based on questions and issues raised prior to and at the pre-proposal conference. ESCOs represented at the pre-proposal conference will receive any such amendments in writing.

If you have any questions concerning this RFP, or to reserve a place at the pre-proposal conference, please contact [enter name and telephone number of district contact person.]

Enclosures: PROPOSAL INSTRUCTIONS AND CONDITIONS

- I. Introduction and Background
- II. General Information
- III. The Selection Process
- IV. RFP Procedures
- V. Proposal Format and Contents

APPENDIX A: Pre-Proposal Conference and Site Visits

APPENDIX B: Facility Profile

APPENDIX C: Minimum Standard Contract Clauses

APPENDIX D: New York State Energy Law

APPENDIX E: Chapter 436 of the Laws of 1997

APPENDIX F: Regulations for the Development and Approval of Energy
Performance Contracts

[Enter Name and Address of School District]

PROPOSAL INSTRUCTIONS AND CONDITIONS

REQUEST FOR PROPOSALS FOR AN ENERGY PROJECT AT THE _____ SCHOOL DISTRICT

I. INTRODUCTION AND BACKGROUND

The objective of this RFP is to solicit proposals for an energy project to assist the district to become as energy efficient as possible through installation of energy conservation measures and implementation of optimal operation and maintenance procedures. The school district wishes to implement the proposed comprehensive energy project on an energy performance contract basis. (See State Energy Law, Article 9, attached as Appendix D).

Under this solicitation, it is expected that only one energy performance contractor will be selected to perform all of the work for the district. The district will consider energy performance contract proposals based on either a guaranteed savings agreement or a shared savings agreement. For either form of agreement, Section 9-103(2) of the Energy Law requires an executory clause under which payments are subject to annual appropriations.

This RFP requires adherence to Chapter 436 of the Laws of 1997 and Section 155.16 of the Regulations of the Commissioner of Education. Proposals must be consistent with the following requirements for energy performance contracts by school districts and Boards of Cooperative Educational Services:

- the amortization period shall not exceed the term of the energy performance contract;
- building aid attributable to the project is excluded in determining the cost savings under the energy performance contract;
- the performance contractor must guarantee the recovery of contract costs from energy savings realized by the school district over the term of the contract which shall not exceed 18 years; and
- subdivision 8 to section 9-103 of the Energy Law requires school districts and BOCES to comply with State Education Department regulations for the development and approval of energy performance contracts.

The regulations, published in the New York State Register on May 6, 1998, and effective July 1, 1998, are attached as Appendix F.

It is currently planned that the school district will purchase, finance, and own any new equipment installed as a result of this project. Proposals are expected to include the proposer's services in connection with such arrangements. Proposers may wish to propose alternative arrangements (as long as they are permitted under New York State laws and regulations) for acquisition, financing, and ownership of such equipment.

Proposals should include financing provided directly by the ESCO or through a third party. If financing is proposed through a third party, the proposal should clearly explain how it is connected to other elements of the energy performance contract.

II. GENERAL INFORMATION

Proposals are requested for the provision of services for the reduction of energy consumption and for maintenance and operational services on an energy performance contracting basis at school buildings and facilities owned by the district. Specifically, the ESCO selected as a result of this RFP will be expected to:

- A. Provide comprehensive energy services for buildings and facilities serving the school district, including but not limited to:
 - 1. Performance of a comprehensive energy audit.
 - 2. Services in connection with the design and specification of equipment and systems to be used in providing energy efficiency services.
 - 3. Procurement and installation of new equipment and refurbishing existing equipment.
 - 4. Commissioning of the equipment.
 - 5. Preventive and emergency maintenance and servicing of the equipment installed.
 - 6. Staff training.
 - 7. Services in connection with arrangement of financing of the equipment.
 - 8. Energy savings performance guarantees.
 - 9. Identification of available financial incentives or rate reductions.
 - 10. All paperwork necessary for obtaining a State Education Department building permit and assistance in obtaining State Building Aid and any other form of energy aid available.

- B. Identify the most effective measures that can be taken to reduce consumption and costs for heating, cooling, ventilation, lighting, water heating and other energy uses in each facility. The proposal should address consumption of all energy sources including oil, gas and electricity. Measures may involve controlling, modifying, adding or replacing equipment and systems.

The technical strategies addressed by the proposal must include but are not limited to the following items:

[The school district should edit this list as appropriate and should add any mandatory measures.]

1. Lighting and lighting control, including fixture replacement and occupancy sensors.
2. All major heating and cooling equipment, including HVAC air handling.
3. Installation of computerized energy management systems.
4. Envelope components such as doors, windows and insulation.
5. Demand limiting strategies, including cogeneration, if appropriate.
6. Assistance with the procurement of electric, gas, oil and other utilities.

All applicable codes and standards must be adhered to.

- C. Structure the terms of the school district's obligation to pay for the services provided on an energy performance contracting basis and submit a suggested energy performance contract and if necessary, ancillary agreements that specifically meet the needs of the school district. Proposers may substitute an example of an executed energy performance contract with any ancillary agreements that would be the basis for negotiation of a contract with this district. Payments from the school district to the Contractor selected under the RFP must be contingent and based in some fashion on the level of energy savings achieved.

Proposers attention is directed to Article 9 of the New York State Energy Law governing energy performance contracting in connection with public buildings and facilities. All proposed energy performance contracts and other financing arrangements proposed must be capable of being implemented under the laws and regulations of the State of New York.

Appendix A includes information about the **mandatory pre-proposal conference and walk-through inspection tour of the facilities.**

Each school district building identified in Appendix B of this solicitation must be evaluated for any potential savings. Appendix B also includes the square footage, and energy consumption and costs by fuel type for each building.

At the time of the pre-proposal conference the district will provide copies of gas, electric, oil or other utility bills as needed. For proposal preparation, this may require up to two years of billing data. Proposers are expected to prepare a baseline and usage profile from this information. Whenever possible, the district will make copies available of mechanical and electrical drawings of the facilities under consideration. The school district will provide information about any current construction projects under way or projects under consideration and any proposed changes in use or occupancy.

Upon review of proposals received in response to this RFP, the district expects to select a single ESCO to conduct a Comprehensive Energy Audit of the facilities to verify that the estimates in the proposal are valid. If a viable project is identified, the school district expects to negotiate an energy performance contract with the ESCO to provide for the implementation of the proposed project. A two-stage contract is required to allow provision for approval of the plans and specifications by the State Education Department prior to commencement of the equipment procurement and installation phase of the project.

D. Energy Conditions to be Maintained

The following energy end use conditions must be maintained at the facility. Any efficiency measures proposed must allow for the maintenance of these conditions:

Minimum Temperature: Temperatures in occupied areas during the hours of ____ must be maintained at no less than _ degrees F during the heating season.

Maximum Temperature: Temperatures in occupied areas during the hours of ____ must be maintained at no more than _ degrees F during the cooling season.

Water Heating: Hot water for kitchen use must be supplied at a temperature between __ and __ degrees F. Domestic hot water must be delivered at a temperature between __ and __ degrees F.

Indoor and Outdoor Lighting: State Education Department lighting level standards must be maintained.

Air Changes/Ventilation Requirements: Within code at all times.

E. Requirements for the Energy Audit

The proposal must include provisions for the performance and presentation of results of a Comprehensive Energy Audit for the school facilities identified in Appendix B. The selected ESCO will gather and analyze information and data and propose a project to the School District in a Comprehensive Energy Audit report that would reduce the District's expenses for energy. As part of the audit, the ESCO will conduct an on-site survey of the facilities and will interview appropriate personnel to learn the operating characteristics of the facility and the existing equipment and systems therein.

The Comprehensive Energy Audit Report will present an analysis and discussion of the ESCO's proposed energy efficiency measures for each building. The report will detail the ESCO's proposed methodology for the calculation of baseline energy use and, at a minimum, a description of physical conditions, equipment counts, nameplate data, and control strategies prior to project implementation. The energy use allocation must be based on generally accepted engineering practices and must be reconciled with historic usage. In addition to presenting how the proposed baseline is derived, the proposal must define under what conditions it will be adjusted; for example, changes in weather, occupancy, and equipment usage.

For each measure recommended, the Comprehensive Energy Audit Report will provide a detailed description to include: total implementation costs for each measure, equipment counts, performance characteristics and efficiency levels of the equipment comprising the proposed measure, installation and maintenance costs, its useful life, and projected annual energy, demand and cost savings. Projected energy savings calculations must specifically account for energy savings on and off-peak, demand savings, and the interaction between recommended measures.

The report will include an executive summary which lists all proposed energy efficiency measures with the implementation cost, estimated energy savings, energy cost savings, useful life of the equipment and the simple payback (individual and interactive). Payback of each measure should be reported without the inclusion of State Building Aid which may be available to the project.

III. THE SELECTION PROCESS

A. **Timetable**

The school district expects to undertake the selection process according to the following schedule:

- Pre-proposal Conference: _____
- Closing Date for Written Questions: _____
- Deadline for submission of proposals: _____
- Interviews with finalists: _____
- Select ESCO: _____
- Execute Project Development Agreement: _____
- Execute Energy Performance Contract: _____

B. **Proposal Evaluation Criteria**

Proposals will be evaluated and scored on the basis of the following criteria:

1. Experience and Qualifications of the Proposer (maximum 30 points)

Consideration will be given to proposers demonstrating strong capabilities, experience and reputation in undertakings similar to those described in this RFP, and providing authoritative documentation of their financial soundness and stability. Similar experience will be understood to include development of performance contracts to furnish energy efficiency and cogeneration improvements in public schools or commercial and institutional facilities of similar size and use.

2. Technical Approach (maximum 35 points)

Proposals will be evaluated on the soundness and detail of presentation of technical strategies proposed for meeting the school districts' energy efficiency objectives. The proposal should include descriptions of improvements both to the physical facility and to the integration of other relevant services such as training, operations and maintenance practices, utilities procurement, and measurement and verification of savings.

3. Financial Terms (maximum 30 points)

Consideration will be given to proposals that responsibly maximize the net economic benefit to the school district over the term of the proposed energy services agreement and that responsibly minimize the risk to the school district in connection with the proposed transaction.

Factors that will be considered include: the proposed term (length) of the energy services agreement, the projected net dollar benefit to the school district from entering into the transaction, the methods that will be used to determine the amount of the proposer's compensation, purchase option terms (both during the term of and the end of the energy services agreement, if alternative financing is proposed), the proposer's source(s) of financing, and the degree to which the proposer has minimized risk to the school district in connection with the project. Such risks may include performance risks, as well as potential interruptions to building operations and financial risks.

4. Ability to Implement Project Promptly (maximum 5 points)

Preference will be given to proposals demonstrating an ability to carry out the tasks and responsibilities outlined in the proposal, including the procurement of any necessary financing, and the performance of all contract obligations throughout the contract term in a prompt and efficient manner.

IV. RFP PROCEDURES

A. Point of Contact

[Enter the name, address and telephone number of the district contact person.]

B. Submission of Proposals

Proposals must be received by [enter time and date from the NOTICE TO ENERGY SERVICE COMPANIES.] Late proposals will be returned unopened.

An original and five (5) copies of the proposal are required. To prevent opening by unauthorized individuals, your proposal should be identified on the envelope or other wrapper as follows:

Proposal - Energy Project for _____ School District

Proposals should be addressed to:

[Enter name and address of person to receive proposals]

C. Proprietary Information

The New York State Freedom of Information Law, Public Officers Law, Article 6, provides for public access to information. Public Officers Law, Section 87(d)(2) provides for exceptions to disclosure for records or portions thereof that are "trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise." Information that the proposer wishes to have treated as proprietary, and confidential trade information should be identified and labeled "Confidential" or "Proprietary" on each page at the time of submittal. This information should include a written request to except it from disclosure, including a written statement of the reasons why the information should be excepted.

D. Modification or Withdrawal of Proposals

Any proposal may be withdrawn or modified by written request of the proposer, provided such request is received by the school district at the above address prior to the date and time set for receipt of proposals.

E. Right to Reject Proposals

This RFP does not commit the district to award a contract, pay any cost incurred in the preparation of a proposal in response to this RFP or to procure or contract for services. The district intends to award a contract on the basis of the best interest and advantage to the district, and reserves the right to accept or reject any or all proposals received as a result of this request, to negotiate with all qualified proposers or to cancel this RFP in part or in its entirety, if it is in the best interest of the school district to do so. The New York State Energy Research and Development Authority may be providing technical assistance, but will not be awarding any contract and has no liability or responsibility for the project or for any activities in connection with the project or any contractual arrangements that may result from this RFP.

V. PROPOSAL FORMAT AND CONTENTS

Proposals must be submitted in the format outlined in this section. Each of the described parts and sections must be completed in full (except those sections described as optional). Each proposal will be reviewed to determine if it is complete prior to actual evaluation. The district reserves the right to eliminate from further consideration any proposal deemed to be substantially or materially non-responsive to the requests for information contained herein.

Each of the parts and sections described below should begin on a separate page, and each page should clearly state the name of the proposer.

A. **Contractor Background and Qualifications**

Section A-1 of the proposal must contain a project management summary including the make-up of the project team and the proposed assignment of responsibility for the major tasks involved in the total project. Include resumes for each of the individuals listed as lead personnel in Section A-1 as an appendix.

If the proposer will have single source responsibility for all portions of the project, they need only respond to Part I. If the proposal anticipates additional prime contractors with individual responsibility to the district, describe the selection process for selection of these prime contractors in Part II.

PART I: Part I should describe the overall make-up of the project team and each member's areas of responsibility with address, telephone numbers, names of contact persons and of lead personnel. Include a chart depicting the management structure envisioned for the project. Describe the process to be followed in selecting and managing subcontractors, if any.

PART II: Part II should provide information about the areas of responsibility for additional prime contractors and the process to be followed in their selection.

In a Section to be labeled **Section A-2**, include the most recent annual reports, financial statements, or other financial information sufficient to permit the school district to evaluate the financial strength of the proposer. If the proposer is a joint venture or other entity with no prior financial history, submit information with respect to constituent or parent entities, as appropriate.

In a Section to be labeled **Section A-3**, describe the prior relevant experience of the proposer or of the partners or parent thereof. For each organization include the information listed below. (If more than ten projects are relevant to this RFP, remaining examples of experience may be briefly summarized):

- (a) Customer's name.
- (b) Total project capital cost at proposal stage and at final contract.
- (c) Type of contract (e.g., guaranteed saving, shared savings, sale, etc.).
- (d) Name and telephone number of reference for the project.
- (e) Brief description of the project's scope of services and status. (Include type of facility at which project was implemented, whether the project was timely completed and whether significant problems occurred that affected project performance. As appropriate, identify all prime contractors or subcontractors and their role in each project.)
- (f) Level of energy cost savings projected in CEA and the level actually achieved subject to M&V.

The right to call the references provided by the proposer will be presumed by the school district.

B. Technical Aspects of the Proposal

Your proposal must explain the approach your organization will take in delivering the comprehensive technical services required to design, install, and maintain the proposed energy efficiency improvements. Actual designs/specifications are not required at this time.

In a Section to be labeled **Section B-1**, describe the Comprehensive Energy Audit that will be conducted for this project after selection of an ESCO on the basis of this RFP. Your proposal must include information on the systems to be covered, the personnel to be involved, the general method to be used, the time frame, and the fee, if any, to be charged in the event the district decides not to proceed with project implementation. Attach a sample energy audit performed by your firm for a similar facility.

In a Section to be labeled **Section B-2**, describe in detail the method you will use to compute the energy baseline. Attach a sample computation from a previous project done by your firm, with full documentation of methods, assumptions and input data.

In a Section to be labeled **Section B-3**, provide a preliminary assessment of the energy efficiency opportunities available at the schools, based on the information provided in this RFP and a tour of the facilities. List the energy efficiency measures to be implemented under your proposal with the estimated implementation cost and the energy cost savings. Are there any potential improvements your company will not consider? If so, list these improvements.

In a Section to be labeled **Section B-4**, describe the ongoing project monitoring and maintenance services your company will provide. Specifically, describe the personnel, schedules, conditions, equipment covered, and extra costs (if any) of the following services:

- (a) Scheduled preventative maintenance
- (b) Emergency service

- (c) Training of on-site staff
- (d) Monitoring of energy use

Identify who will have supervisory responsibility for your firm's maintenance and monitoring operations in this project. Indicate how this work will be coordinated with the daily operations of the facility.

C. Financial Aspects of the Proposal

The district seeks to enter into a project arrangement under which the school district will assume ownership of the energy efficiency improvements upon their installation and acceptance. The district also seeks to structure compensation to the contractor such that payments to finance equipment and public works services plus payments for ongoing project management services will be paid in full or in part by the value of measured energy savings resulting from the project.

The proposer may propose any underlying project financing mechanism so long as it meets the objectives above and complies with New York State laws, rules and regulations.

Detailed Financial Information Required: In a Section to be labeled **Section C-1**, based on the information provided in this RFP and your inspection of the facilities, estimate the following costs:

1. Initial Project Costs:

- (a) Comprehensive Energy Audit
- (b) Designs and specifications for energy efficiency measures
- (c) Implementation costs for the energy efficiency measures
- (d) Total Initial Project Costs

2. Annual Costs:

- (a) Maintenance costs
- (b) Training costs
- (c) Measurement and Verification
- (d) Other service fees (specify)

In a Section to be labeled **Section C-2**, outline the proposed terms of the contract with the school district covering:

- (a) Duration of the contract
- (b) Methods by which the level of payments to the contractor will be determined including: level of guarantees, methods by which energy savings will be valued (i.e. values to be used for unit prices of fuels and electricity)

- (c) The nature and operation of any guarantee provisions, including conditions under which the guarantee can be invoked and the methods for adjusting payments to the contractor.
- (d) Ownership of the equipment (Specify if alternative financing and ownership is proposed and provide explanation in **Section F**).
- (e) Conditions for the early termination of the contract, or parts thereof, by the district and the contractor.

In a Section to be labeled **Section C-3**, please complete the annual financial projections indicated below for the length of the proposed contract. Use a discount rate of __ percent. Assume no inflation in current energy prices. However, any anticipated escalation in annual costs should be identified and reflected in the cash flow. Assume an interest rate of __ percent and that payments will be made annually at the end of the period. You may present a second pro-forma with alternative assumptions. If you choose to present a second pro-forma you should describe why the alternative assumptions are reasonable.

	YEAR	1	2	3	4	5 ...
1.	Annual energy costs without improvements					
2.	Annual energy costs with improvements					
3.	Annual energy cost savings (1-2)					
4.	Payments for financing equipment					
5.	Payments for on-going services					
6.	Net annual benefits (3-(4+5) without State financial assistance					
7.	Net annual benefits (3-(4+5) with State financial assistance					
8.	Cumulative cash flow with State financial assistance					
9.	Net Present Value of cash flow with State financial assistance					
10.	Interest rate					

D. Schedule for Construction and Completion

In a Section to be labeled **Section D**, the proposer must provide a complete schedule for achievement of all major project milestones including:

- (a) Commencement and completion of comprehensive energy audits.
- (b) Preparation of list of proposed improvements, baseline calculations, and final contract proposal.
- (c) Execution of energy performance contract.
- (d) Obtaining all required permits and government approvals.
- (e) Procurement of all major equipment.
- (f) Commencement and completion of construction.
- (g) Training of school personnel.
- (h) Commissioning and commencement of normal operation.

E. Official Statement of Proposer

In a Section to be labeled **Section E**, the proposer must provide statements to the following effect signed by an individual authorized to bind the proposer:

1. The proposer shall include a statement to the effect that the proposal is a firm offer for a minimum 120 day period. The proposal shall also provide the following information: Name, title, address and telephone number of individual(s) with authority to negotiate and contractually bind the company and also who may be contacted during the period of proposal evaluation.
2. The proposer shall specifically state acceptance of the minimum standard clauses intended to be used by the school district. The standard clauses are included here as Appendix C. If unable or willing to indicate such acceptance, the proposal shall identify and explain any exceptions or deviations.
3. The proposer shall specifically guarantee:
 - (a) total energy savings projected in the Comprehensive Energy Audit will be at least 85% of the energy savings projected in the proposal; and
 - (b) total project cost projected in the Comprehensive Energy Audit will be no more than 115% of the cost projected in the proposal.

If these conditions are not met, the school district may: terminate the agreement to conduct a Comprehensive Energy Audit without cost or penalty; renegotiate with the ESCO; or begin negotiations with another ESCO.

F. Addendum Relating to Alternative Financing (Optional)

In a section to be labeled, **Section F**, the ESCO may propose an alternative to the School District purchasing, financing and owning the new equipment to be installed as a result of this project. The proposal should clearly identify the advantages to the School District of this alternative.

G. Outline of Proposal Contents

The following is an outline of the required proposal contents as detailed above:

Section A - Contractor Background and Qualifications

Section A-1

Part I: Project team information

Part II: Prime contractor information

Section A-2 Annual reports or financial statements

Section A-3 Work experience

Section B - Technical Aspects of the Proposal

Section B-1 Energy Audit: Attach sample

Section B-2 Baseline and energy savings: Attach sample

Section B-3 Proposed energy efficiency measures

Section B-4 Description of on-going services

Section C - Financial Aspects of the Proposal

Section C-1 Total initial and annual project costs

Section C-2 Financial contract terms

Section C-3 Financial projections

Section D - Schedule for Completion of the Project

Section E - Official Statement by the Proposer - Attach a suggested energy performance contract with proposed terms and conditions

Section F - Addendum Relating to Alternative Financing (Optional)

Appendices - Resumes of key personnel

Other relevant documentation

Appendix A

PRE-PROPOSAL CONFERENCE AND SITE VISITS

The school district will conduct a pre-proposal conference and walk-through inspection tour of the facilities included in this RFP on [enter date]. The pre-proposal conference will be held first at [enter time], with the walk through to begin immediately thereafter. School district officials and project consultants will be present to answer questions regarding the RFP and the project. Contractors interested in attending the conference must contact [enter the name and telephone number of the school district contact person] no later than [enter date].

Proposals will be accepted only from contractors represented at the pre-proposal conference. Following the conference, arrangements can be made by contacting the person named above to make an additional site visit(s) for the purpose of gathering additional information.

Appendix B

FACILITY PROFILE

List the facilities to be evaluated. For each building provide:

Use, occupancy and square footage information; and

Energy cost and consumption history (2 or 3 year summary by fuel type).

Appendix C

MINIMUM STANDARD CONTRACT CLAUSES

Titles to typical Standard Clauses in the proposed Agreement to be supplied by the School District Counsel and attached as Appendix C.

- A. Labor Law; Affirmative Action, Prevailing Wage and Workers Compensation
- B. Executory Clause
- C. Transfer of Title
- D. Right-of-Way
- E. Indemnification
Hold Harmless
- F. Performance and Payment Bonds
- G. Standards of Services
- H. Licenses and Permits
- I. Contract Modifications
- J. Assignment or Subletting of Contract
- K. Conflict of Interest
- L. Independent Contractor
- M. Certificate of Insurance
- N. Cancellation of Insurance
- O. Severability

Appendix D

NEW YORK STATE ENERGY LAW ARTICLE 9 - ENERGY PERFORMANCE CONTRACTS IN CONNECTION WITH PUBLIC BUILDINGS AND FACILITIES

Section

9-101. Purpose.

9-102. Definitions.

9-103. Energy performance contracts.

§ 9-101. Purpose

The purpose of this article is to obtain long-term energy and cost savings for agencies and municipalities by facilitating prompt incorporation of energy conservation improvements or energy production equipment, or both, in connection with buildings or facilities owned, operated or under the supervision and control of agencies or municipalities, in cooperation with providers of such services and associated materials from the private sector. Such arrangements will improve and protect the health, safety, security, and welfare of the people of the state by promoting energy conservation and independence, developing alternate sources of energy, and fostering business activity.

§ 9-102. Definitions

For the purposes of this article, the following words and phrases shall have the following meanings unless a different meaning is plainly required by the context.

1. "Agency" means any state department, agency, board, commission, office, or division.
2. "Municipality" means a municipal corporation, as defined in section two of the general municipal law, school district, board of cooperative educational services, fire district, district corporation or special improvement district governed by a separate board of commissioners.
3. "Public authority" means any public authority, public benefit corporation, or the port authority of New York and New Jersey, to the extent its facilities are located within the state of New York.
4. "Energy performance contract" means an agreement for the provision of energy services, including but not limited to electricity, heating, ventilation, cooling, steam or hot water, in which a person agrees to install, maintain or manage energy systems or equipment to improve the energy efficiency of, or produce energy in connection with, a building or facility in exchange for a portion of the energy savings or revenues.

§ 9-103. Energy performance contracts

1. Notwithstanding any other provision of law, any agency, municipality, or public authority, in addition to existing powers, is authorized to enter into energy performance contracts of up to thirty-five years duration, provided, that the duration of any such contract shall not exceed the reasonably expected useful life of the energy facilities or equipment subject to such contract.
2. Any energy performance contract entered into by any agency or municipality shall contain the following clause: "This contract shall be deemed executory only to the extent of the monies appropriated and available for the purpose of the contract, and no liability on account therefor shall be incurred beyond the amount of such monies. It is understood that neither this contract nor any representation by any public employee or officer creates any legal or moral obligation to request, appropriate or make available monies for the purpose of the contract."

3. In the case of a school district or a board of cooperative educational services, an energy performance contract shall be an ordinary contingent expense, and shall in no event be construed as or deemed a lease or lease-purchase of a building or facility, for purposes of the education law.

4. Agencies, municipalities, and public authorities are encouraged to consult with and seek advice and assistance from the state energy office and the New York state energy research and development authority concerning energy performance contracts.

5. Notwithstanding any other provision of law, in order to convey an interest in real property necessary for the construction of facilities or the operation of equipment provided for in an energy performance contract, any agency, municipality or public authority may enter into a lease of such real property to which it holds title or which is under its administrative jurisdiction as is necessary for such construction or operation, with an energy performance contractor, for the same length of time as the term of such energy performance contract, and on such terms and conditions as may be agreeable to the parties thereto and are not otherwise inconsistent with law, and notwithstanding that such real property may remain useful to such agency, municipality or public authority for the purpose for which such real property was originally acquired or devoted or for which such real property is being used.

6. In lieu of any other competitive procurement or acquisition process that may apply pursuant to any other provision of law, an agency, municipality, or public authority may procure an energy performance contractor by issuing and advertising a written request for proposals in accordance with procurement or internal control policies, procedures, or guidelines that the agency, municipality, or public authority has adopted pursuant to applicable provisions of the state finance law, the executive law, the general municipal law, or the public authorities law, as the case may be.

7. Sections one hundred three and one hundred nine-b of the general municipal law shall not apply to an energy performance contract for which a written request for proposals is issued pursuant to subdivision six of this section.

8. In the case of a school district or a board of cooperative educational services, an energy performance contract shall be developed and approved pursuant to the requirements of this section and pursuant to regulations promulgated by the commissioner of education in consultation with the New York state energy research and development authority. Such regulations shall include, but shall not be limited to: a list of the appropriate type of projects that qualify as energy performance contracts; an approval process that includes review of the type and nature of the proposed project, the scope and nature of the work to be performed, and a detailed breakdown of the energy savings to be derived each year and for the duration of the energy performance contract; and a process for ensuring that districts have obtained financing at the lowest cost possible. Such regulations shall require that all energy performance contracts which contain maintenance and monitoring charges as part of the energy performance contract price state such maintenance and monitoring charges separately in the contract in a clear and conspicuous manner. Such regulations shall not apply to energy performance contracts entered into prior to the effective date of such regulations, nor shall they apply to energy performance contracts for which a request for proposals was issued prior to such effective date.

Added L. 1985, c. 733, § 2; amended L. 1989, c. 638, §§ 1,2; amended L. 1994, c. 368, §§ 1,2; amended L. 1995, c.83, §47; amended L. 1997, c. 436, §78.

Appendix E

CHAPTER 436 OF THE LAWS OF 1997
Sections Relevant to School Districts and BOCES
Energy Performance Contracts
from 1997 Senate bill 5788
signed by Governor Pataki on August 20, 1997

AN ACT to amend the education law, in relation to the calculation and payment of state aid to school districts and boards of cooperative educational services * * * , to amend the energy law, in relation to energy performance contracts * * *

PART A

Section 1. Section 305 of the education law is amended by adding a new subdivision 27 to read as follows:

27. The commissioner shall promulgate regulations in consultation with the New York state energy research and development authority concerning the development and approval of energy performance contracts for school districts and boards of cooperative educational services in accordance with subdivision eight of section 9-103 of the energy law.

* * *

§40. Paragraph i of subdivision 6 of section 3602 of the education law, as added by chapter 474 of the laws of 1996, is amended to read as follows:

i. Approved expenditures for debt service.

* * *

(5) Notwithstanding any inconsistent provisions of this paragraph, for the purpose of calculating an apportionment pursuant to this subdivision:

(i) current approved expenditures for debt service for energy performance contracts authorized pursuant to section 9-102 of the energy law shall mean approved debt service incurred by a school district under such contract during the current school year related to the financing of such construction, acquisition, reconstruction, rehabilitation or improvement of any school building, provided that as a condition of eligibility for aid:

A. The amortization period shall not exceed the term of the energy performance contract.

* * *

§ 41. Clause (i) of subparagraph 5 of paragraph i of subdivision 6 of section 3602 of the education law, as added by section forty of this act, is amended by adding two new subclauses B and C to read as follows:

B. Any state building aid attributable to such project shall be excluded in determining the cost savings under the energy performance contract.

C. The energy performance contractor shall guarantee recovery of contract costs from energy savings realized by the school district during the term of the energy performance contract, which shall not exceed eighteen years.

* * *

§ 78. Section 9-103 of the energy law is amended by adding a new subdivision 8 to read as follows:

8. In the case of a school district or a board of cooperative educational services, an energy performance contract shall be developed and approved pursuant to the requirements of this section and pursuant to regulations promulgated by the commissioner of education in consultation with the New York state energy research and development authority. Such regulations shall include, but shall not be limited to: a list of the appropriate type of projects that qualify as energy performance contracts; an approval process that includes review of the type and nature of the proposed project, the scope and nature of the work to be performed, and a detailed breakdown of the energy savings to be derived each year and for the duration of the energy performance contract; and a process for ensuring that districts have obtained financing at the lowest cost possible. Such regulations shall require that all energy performance contracts which contain maintenance and monitoring charges as part of the energy performance contract price state such maintenance and monitoring charges separately in the contract in a clear and conspicuous manner. Such regulations shall not apply to energy performance contracts entered into prior to the effective date of such regulations, nor shall they apply to energy performance contracts for which a request for proposals was issued prior to such effective date.

* * *

§ 119. This act shall take effect immediately and shall be deemed to have been in full force and effect on and after July 1, 1997, except that:

(1) sections one and seventy-eight of this act shall take effect immediately, and the commissioner of education is authorized and directed to promulgate the regulations necessary to implement the provisions of such sections within 180 days of such effective date;

* * *

(5) section forty of this act shall take effect immediately and shall be deemed to have been in full force and effect on and after the effective date of section 41 of chapter 474 of the laws of 1996;

(6) section forty-one of this act shall take effect immediately;

* * *

Appendix F

REGULATIONS OF THE COMMISSIONER OF EDUCATION (8 NYCRR §155.16)

Pursuant to sections 101, 207 and 305 of the Education Law, section 9-103(8) of the Energy Law and Chapter 436 of the Laws of 1997, Section 155.16 of the Regulations of the Commissioner of Education is added, effective July 1, 1998, to read as follows:

155.16 Energy Performance contracts. (a) The following procedures consistent with Energy Law section 9-103(8), and Education Law sections 305(27), and 3062 (6)(i)(5)(i)(b) and (c) shall apply to energy performance contracts entered into by a school district or a board of cooperative educational services (BOCES) on or after July 1, 1998, provided that this section shall not apply to energy performance contracts for which a request for proposals was entered into prior to July 1, 1998.

(b) Definitions: For the purposes of this section:

(1) Energy Performance Contract shall mean an agreement for the provision of energy services, including but not limited to electricity, heating, ventilation, cooling, steam or hot water, in which a person agrees to install, maintain or manage energy systems or equipment to improve the energy efficiency of, or produce energy in connection with, a building or facility in exchange for a portion of the energy savings or revenues.

(2) Simple payback period shall mean a measure of the length of time required for the cumulative cost savings, net of cumulative future costs, from an investment in an energy conservation project to pay back the investment cost, without taking into account the time value of money, or the Differential Energy Price Escalation Rate, or the State building aid payable for the project.

(3) Energy Savings shall mean the positive difference between the energy and associated cost before the retrofit and its estimated cost after the retrofit of a proposed alternative building system, taking into account all types of energy effected.

(4) Cost savings shall mean the positive difference between the operation and maintenance cost before the retrofit and its established operation and maintenance cost after the retrofit.

(5) Co-generation shall mean the simultaneous production of electricity and thermal energy. Typical systems utilize natural gas engines to turn electric generators thereby producing electricity, which reduces utility costs. Waste heat captured from the natural gas combustion process can be used to produce domestic hot water, provide space heat in winter or air conditioning in summer when used in conjunction with absorption chillers.

(c) The appropriate type of projects that qualify to be completed under an energy performance contract may include, but are not limited to:

- (1) replacement of lighting fixtures;
- (2) installation of energy efficient boiler/furnace, heating, ventilating, air conditioning (HVAC) equipment;
- (3) installation of vestibules;
- (4) installation of automatic setback thermostat;
- (5) energy management system;
- (6) upgrade domestic hot water system;
- (7) roof insulation;
- (8) installation of energy efficient window/doors;
- (9) co-generation; or
- (10) the installation, maintenance or management of other energy systems or equipment to improve the energy efficiency of, or produce energy in connection with, a building or facility.

(d) Every energy performance contract entered into by a school district or BOCES to which this section applies and every amendment to an energy performance contract entered into on or after July 1, 1998 by a board of education or a BOCES shall be subject to approval by the Commissioner of Education and shall contain a provision that such contract shall not be executory until approval of the Commissioner is obtained. In order to obtain approval by the Commissioner of Education to enter into an energy performance contract, the school district or BOCES shall:

- (1) demonstrate that the project complies with all applicable provisions of section 155.2 of this Part;
- (2) describe the scope and nature of the work to be performed;
- (3) demonstrate that the types of projects included in the energy performance contract are appropriate in accordance with subdivision (c) of this section.;
- (4) provide a detailed breakdown of the energy performance savings to be derived each year and for the duration of the energy performance contract in the project summary form, which shall include:

(i) a description of each energy conservation measure included in the energy performance contract;

(ii) the cost of each energy conservation measure;

(iii) the project energy savings and cost savings;

(iv) the useful life of each energy conservation measure; and

(v) the simple payback period;

(5) state any maintenance and monitoring charges that are part of the energy performance contract in a clear and conspicuous manner separately in the contract;

(6) provide the interest rate applicable to the energy performance contract and length of borrowing. The interest rate will be compared to the U.S. Treasury rate for like terms as published in the Wall Street Journal and must be comparable;

(7) provide the following certifications:

(i) he sole trustee, the president of the board of trustees or board of education, or the president of the BOCES shall certify that in lieu of competitive bidding, the energy performance contract was procured pursuant to a request for proposal (RFP) process in accordance with the school district's or BOCES' procurement policies and procedures adopted pursuant to applicable provisions of General Municipal Law section 104-b;

(ii) The energy performance contractor shall certify that such energy performance contractor has guaranteed recovery of contract costs from energy savings realized by the school district during the term of the energy performance contract, which shall not exceed 18 years, or the useful life of the equipment being installed, whichever is less. This certification shall be based on an analysis of energy costs and savings, which shall not include any cost savings attributable to state building aid. If a simple payback calculation is used to demonstrate compliance with the 18 year payback limitation, it shall be calculated by dividing the initial contract cost by the first year cost savings. If another analysis is used to support the certification, it should be submitted with the certification;

(iii) The energy performance contractor shall certify that measurement and verification techniques for determining cost savings will be performed in accordance with the North American Energy Measurement and Verification Protocol, March 1996, (U.S. Department of Energy, Washington, D.C. 20585: available at the Office of Facilities Planning, Room 1060 State Education Building Annex, Albany, NY 12234);

(iv) The energy performance contractor shall certify that any state building aid attributable to such project has been excluded in determining the cost savings and payback period under the energy performance contract; and

(v) The architect and/or engineer of record shall certify that he or she is free from financial interest in the energy performance contractor which conflicts with the proper completion of the audit and any design work associated with the energy performance contract

and that full disclosure has been made to the school district and/or BOCES detailing all financial compensation received from the energy performance contractor.

(e) The administrative and technical review by the State Education Department shall include:

(1) review of project scope and its appropriateness to be done under an energy performance contract and its eligibility for building aid;

(2) review of the project's compliance with applicable provisions of section 155.2 of this Part;

(3) review of detailed breakdown of the energy savings to ensure compliance with Education Law section 3602 (6)(i)(5)(1);

(4) review of certifications by the president of the board of education, energy performance contractor and architect/engineer as specified in regulations;

(5) review of interest rate and comparison to the U.S. Treasury Rate for like terms;

(6) review of technical specifications for compliance with the Uniform Fire Prevention and Building Code, State Education Department standards and other applicable standards,

(f) Capital construction costs and associated incidental costs such as architect/engineer fees, administrative costs and feasibility costs may be eligible for building aid. Costs associated with operation and maintenance, repairs extended warranties and service agreements are not eligible for building aid and should be separated in a clear and conspicuous manner from those eligible expenses.