
State of Wyoming



Wyoming Energy Conservation Improvement Program

For State Agencies, County & Municipal Governments,
Higher Education Facilities, Public School Districts,
Hospitals, and other Public Entities

PROGRAM MANUAL Appendix 1B

ESCO CONTRACT EXAMPLE

APPENDIX 1B – ESCo CONTRACT EXAMPLE

CONTRACT BETWEEN THE WYOMING BUSINESS COUNCIL, BUSINESS AND INDUSTRY DIVISION, STATE ENERGY OFFICE AND

1. **Parties.** This Contract is made and entered into by and between the Wyoming Business Council, an agency of the State of Wyoming, by and for its Business and Industry Division, State Energy Office (Council), whose address is 214 West 15th Street, Cheyenne, Wyoming 82002; and _____ (Contractor), whose address is _____.

2. **Purpose of Contract.** The purpose of this Contract is to provide the Contractor the ability to participate in the Wyoming Energy Conservation Improvement Program (WYECIP) for development and implementation of Energy Performance Contracting (EPC) projects, to ensure the program's standard processes, procedures, and documentation that will be used and to obligate Contractor to follow and adhere to the guidelines, rules, and provisions of the program.

3. **Term of Contract and Required Approvals.** This Contract shall be for an initial three-year term and shall commence upon the date the last signature is affixed hereto, and shall terminate on _____, unless otherwise amended or terminated in accordance with the terms and conditions specifically provided herein. All services shall be completed during this term.

Contractor's performance will be reviewed annually by the Council during the initial term for compliance with WYECIP guidelines, requirements, process, and documentation. Should Contractor be deemed non-compliant during any annual review, at the Council's sole discretion this Contract may be terminated without regard to any time remaining in the initial three-year term.

Following the initial three-year term, this Contract may be extended annually by mutual agreement of the Council and Contractor to a maximum of an additional three years. Annual extensions shall also be subject to the provision for review of compliance with WYECIP guidelines, requirements, process, and documentation. There is no right or expectation of renewal and any renewal will be determined at the discretion of the Council.

4. **Consideration.** In consideration for entering into this Contract, Contractor shall be eligible for participation in the WYECIP and Council's energy conservation efforts shall be promoted.

5. **Responsibilities of Contractor.** The responsibilities of the Contractor shall include, but are not necessarily limited to:

- A. Promoting WYECIP when marketing directly to eligible Facility Owners.

- B. Engaging the Council when a potential energy performance contract project is identified.
 - C. Assigning members to the Contractor project team including project development, engineering, project management, Measurement and Verification specialists, and upper management personnel.
 - D. Ensuring appropriate Contractor personnel attend project development meetings dependent upon the subject matter to be discussed.
 - E. Executing contracts with facility owner using WYECIP Contract documents.
 - F. Performing the Investment Grade Audit, and other project development activities in accordance with the WYECIP Investment Grade Audit and Project Development Contract incorporated herein by reference.
 - G. Working with the Facility Owner and the Council to develop/refine project parameters.
 - H. Providing project proposals, designs, and reports.
 - I. Ensuring recommendations of the Council during reviews are addressed.
 - J. Providing all required information to Council for preparation of WYECIP Energy Performance Contract.
 - K. Assisting the Facility Owner with arrangements for project financing.
 - L. Providing construction project management.
 - M. Performing measurement and verification activities.
 - N. Assisting the facility owner with preparing annual reports for the Council on project cost, status, savings achieved, and square footage impacted by the project.
6. **Responsibilities of Council.** The responsibilities for the Council include, but are not necessarily limited to:
- A. Helping eligible Facility Owners identify potential projects.
 - B. Executing Facility Owner Contracts with facility owners electing to utilize the WYECIP for project development and implementation support.
 - C. Requiring Facility Owners using WYECIP support to use an Energy Services Company (ESCO) that has been pre-qualified by the WYECIP and has executed the WYECIP ESCo Contract with the Council.

- D. Preparing the WYECIP Contract documents.
- E. Reviewing audits, proposals, calculations, contracts, and reports.
- F. Assisting with oversight of project development.
- G. Providing monitoring of the project implementation.
- H. Reviewing measurement and verification of savings.
- I. Mediating as needed any conflicts between Facility Owner and ESCo that may arise after execution of the WYECIP Investment Grade Audit and Project Development or Energy Performance Contract.

7. Special Provisions.

A. Cost and Pricing Elements. Contractor agrees to the maximum cost for performing an Investment Grade Audit and maximum project markups and fees for pre-defined categories illustrated in the schedules and the Open Book Pricing requirement included in Attachment A, which is attached and made a part of this Contract.

B. Adherence to WYECIP Requirements. Contractor shall engage in a good faith effort to promote the WYECIP and shall adhere to its guidelines, requirements, and provisions.

C. Standard Contract Documents. Contractor agrees to use and adhere to the WYECIP Investment Grade Audit and Project Development Contract and the WYECIP Energy Performance Contract, Attachments B and C, which are attached and made a part of this Contract.

D. Eligible Facility Owners. Facility Owners eligible for participation in the WYECIP consist of State Agencies, County & Municipal Governments, Higher Education Facilities, Public School Districts, Hospitals, and other Non-Profit entities that have executed a WYECIP Facility Owner Contract with the Council.

8. General Provisions.

A. Amendments. Any changes, modifications, revisions or amendments to this Contract which are mutually agreed upon by the parties to this Contract shall be incorporated by written instrument, executed and signed by all parties to this Contract.

B. Americans with Disabilities Act. The Contractor shall not discriminate against a qualified individual with a disability and shall comply with the Americans with Disabilities Act, P.L. 101-336, 42 U.S.C. 12101, et seq., and/or any properly promulgated rules and regulations related thereto.

C. Applicable Law/Venue. The construction, interpretation and enforcement of this Contract shall be governed by the laws of the State of Wyoming. The Courts of the State of Wyoming shall have jurisdiction over this Contract and the parties, and the venue shall be the First Judicial District, Laramie County, Wyoming. The parties acknowledge and agree that this subsection does not waive, limit, or otherwise affect or reduce the full operation and effect of the provision in this Contract relating to the State's and the Council's full retention of all rights of sovereign immunity.

D. Assignment/Contract Not Used as Collateral. Neither party shall assign or otherwise transfer any of the rights or delegate any of the duties set forth in this Contract without the prior written consent of the other party. The Contractor shall not use this Contract, or any portion thereof, for collateral for any financial obligation, without the prior written permission of the Council.

E. Assumption of Risk. The Contractor shall assume the risk of any loss of state or federal funding, either administrative or program dollars, due to the Contractor's failure to comply with state or federal requirements. The Council shall notify the Contractor of any state or federal determination of noncompliance.

F. Audit/Access to Records. The Council and any of its representatives shall have access to any books, documents, papers, and records of the Contractor that are pertinent to this Contract.

G. Availability of Funds. Each payment obligation of the Council is conditioned upon the availability of government funds that are appropriated or allocated for the payment of this obligation. If funds are not allocated and available for the continuance of the services performed by the Contractor, the Contract may be terminated by the Council at the end of the period for which the funds are available. The Council shall notify the Contractor at the earliest possible time of the services that will or may be affected by a shortage of funds. No penalty shall accrue to the Council in the event this provision is exercised, and the Council shall not be obligated or liable for any future payments due or for any damages as a result of termination under this section. This provision shall not be construed to permit the Council to terminate this Contract to acquire similar services from another party.

H. Award of Related Contracts. The Council may undertake or award supplemental or successor contracts for work related to this Contract. The Contractor shall cooperate fully with other contractors and the Council in all such cases.

I. Compliance with Laws. The Contractor shall keep informed of and comply with all applicable federal, state and local laws and regulations in the performance of this Contract. The Contractor shall, immediately upon receiving written instruction from the Council, provide to any independent auditor, accountant, or accounting firm, all books, documents, papers and records of the Contractor that are pertinent to this Contract. The Contractor shall cooperate fully with any such independent auditor, accountant, or accounting firm, during the entire course of any audit authorized by the Council.

J. Confidentiality of Information. All documents, data compilations, reports, computer programs, photographs, and any other work provided to or produced by the Contractor in the performance of this Contract shall be kept confidential by the Contractor unless written permission is granted by the Council for its release.

K. Entirety of Agreement. This Contract, consisting of nine (9) pages, Attachment A, consisting of three (3) pages, Attachment B, consisting of eighty-four (84) pages, and Attachment C, consisting of sixty-one (61) pages represents the entire and integrated Contract between the parties and supersedes all prior negotiations, representations, and agreements, whether written or oral.

L. Ethics. Contractor shall comply with any and all ethical standards governing Contractor's profession, and any applicable statutes, rules, regulations or standards governing contracting with a state agency.

M. Extensions. Nothing in this Contract shall be interpreted or deemed to create an expectation that this Contract will be extended beyond the term described herein. Any extension of this Contract shall be initiated by the Council, and shall be effective only after it is reduced to writing and executed by all parties to this Contract. Any agreement to extend the term of this Contract shall include, but not necessarily be limited to: an unambiguous identification of the Contract being extended; the term of the extension; the amount of any payment to be made during the extension, or a statement that no payment will be made during the extension; a statement that all terms and conditions of the original Contract shall, unless explicitly delineated in the exception, remain as they were in the original Contract; and, if the duties of either party will be different during the extension than they were under the original Contract, a detailed description of those duties.

N. Force Majeure. Neither party shall be liable for failure to perform under this Contract if such failure to perform arises out of causes beyond the control and without the fault or negligence of the non-performing party. Such causes may include, but are not limited to, acts of God or the public enemy, fires, floods, epidemics, quarantine restrictions, freight embargoes, and unusually severe weather. This provision shall become effective only if the party failing to perform immediately notifies the other party of the extent and nature of the problem, limits delay in performance to that required by the event, and takes all reasonable steps to minimize delays. This provision shall not be effective unless the failure to perform is beyond the control and without the fault or negligence of the non-performing party.

O. Indemnification. The Contractor shall indemnify, defend and hold harmless the State, the Council, and their officers, agents, employees, successors and assignees from any and all claims, lawsuits, losses and liability arising out of Contractor's failure to perform any of Contractor's duties and obligations hereunder or in connection with the negligent performance of Contractor's duties or obligations, including but not limited to any claims, lawsuits, losses or liability arising out of Contractor's malpractice.

P. Independent Contractor. The Contractor shall function as an independent contractor for the purposes of this Contract, and shall not be considered an employee of the State of Wyoming for any purpose. The Contractor shall assume sole responsibility for any debts or

liabilities that may be incurred by the Contractor in fulfilling the terms of this Contract, and shall be solely responsible for the payment of all federal, state and local taxes which may accrue because of this Contract. Nothing in this Contract shall be interpreted as authorizing the Contractor or its agents and/or employees to act as an agent or representative for or on behalf of the State of Wyoming or the Council, or to incur any obligation of any kind on the behalf of the State of Wyoming or the Council. The Contractor agrees that no health/hospitalization benefits, workers' compensation and/or similar benefits available to State of Wyoming employees will inure to the benefit of the Contractor or the Contractor's agents and/or employees as a result of this Contract.

Q. Kickbacks. The Contractor certifies and warrants that no gratuities, kickbacks or contingency fees were paid in connection with this Contract, nor were any fees, commissions, gifts, or other considerations made contingent upon the award of this Contract. If the Contractor breaches or violates this warranty, the Council may, at its discretion, terminate this Contract without liability to the Council, or deduct from the Contract price or consideration, or otherwise recover, the full amount of any commission, percentage, brokerage, or contingency fee.

R. Notices. All notices arising out of, or from, the provisions of this Contract shall be in writing and given to the parties at the address provided under this Contract, either by regular mail or delivery in person. Any change of address must be provided in writing to both parties.

S. Notice and Approval of Proposed Sale or Transfer of the Contractor. The Contractor shall provide the Council with the earliest possible advance notice of any proposed sale or transfer or any proposed merger or consolidation of the assets of the Contractor. Such notice shall be provided in accordance with the notice provision of the Contract. If the Council determines that the proposed merger, consolidation, sale or transfer of assets is not consistent with the continued satisfactory performance of the Contractor's obligations under this Contract, then the Council may, at its option, terminate or renegotiate the Contract.

T. Order of Preference. In the event of any inconsistencies between the terms of this Contract and any attachment or document referenced herein, the descending order of precedence for purposes of determining which terms shall govern is as follows: this Contract, the Council's WYECIP Program Documents, Contractor's RFP response, the Council's RFP.

U. Ownership of Documents/Work Product/Materials. All documents, reports, records, field notes, data, samples, specimens, and materials of any kind developed for Facility Owners under the WYECIP are at all times the property of the Facility Owner, provided that Council shall have a non-revocable, royalty-free license to use those documents, reports, records, field notes, data, samples, specimens, and materials related to the WYECIP. All other documents are at all times the property of the Council.

V. Patent or Copyright Protection. The Contractor recognizes that certain proprietary matters or techniques may be subject to patent, trademark, copyright, license or other similar restrictions, and warrants that not work performed by the Contractor or its subcontractors will violate any such restriction. The Contractor shall defend and indemnify the Council for any violation or alleged violation of such patent, trademark, copyright, license or other restrictions.

W. Prior Approval. This Contract shall not be binding upon either party, no services shall be performed under the terms of this Contract, and the Wyoming State Auditor shall not draw warrants for payment on this Contract, until this Contract has been reduced to writing and approved as to form by the Office of the Attorney General.

X. Severability. Should any portion of this Contract be judicially determined to be illegal or unenforceable, the remainder of this Contract shall continue in full force and effect, and either party may renegotiate the terms affected by the severance.

Y. Sovereign Immunity. The State of Wyoming and the Council do not waive sovereign immunity by entering into this Contract and specifically retain immunity and all defenses available to them as sovereigns pursuant to Wyo. Stat. § 1-39-104(a) and all other applicable law.

Z. Taxes. The Contractor shall pay all taxes and other such amounts required by federal, state and local law, including but not limited to federal and social security taxes, workers' compensation, unemployment insurance and sales taxes.

AA. Termination of Contract. This Contract may be terminated, without cause, by either party upon thirty (30) days written notice. The Council may terminate this Contract immediately for cause if the Contractor fails to perform in accordance with the terms and conditions of this Contract or upon a finding by the Council of non-compliance in accordance with Section 3 of this Contract.

BB. Third Party Beneficiary Rights. The parties do not intend to create in any other individual or entity the status of third party beneficiary, and this Contract shall not be construed so as to create such status. The rights, duties and obligations contained in this Contract shall operate only between the parties to this Contract, and shall inure solely to the benefit of the parties to this Contract. The provisions of this Contract are intended only to assist the parties in determining and performing their obligations under this Contract.

CC. Time is of the Essence. Time is of the essence in all provisions of this Contract.

DD. Titles Not Controlling. Titles of paragraphs are for reference only, and shall not be used to construe the language in this Contract.

EE. Waiver. No term or condition of this Contract shall be held to be waived, modified, or deleted except by an instrument, in writing, signed by the parties.

FF. Workers' Compensation and Unemployment Insurance. The Contractor shall provide to the Council proof of workers' compensation and unemployment coverage for all its employees who are to work on the project described in this Contract. Certificates of good standing in each of the Wyoming Workers' Compensation and Unemployment Insurance programs shall serve as sufficient proof if the Contractor is statutorily required to participate in those programs. If the Contractor's coverage is under a program different from the coverage provided by the Wyoming Department of Employment, proof of coverage shall be satisfied in manner to be determined sufficient in the discretion of the Council.



9. Signatures. In witness thereof, the parties to this Contract, either personally or through their duly authorized representatives, have executed this Contract on the days and dates set out below, and certify that they have read, understood, and agreed to the terms and conditions of this Contract.

The effective date of this Contract is the date of the signature last affixed to this page.

WYOMING BUSINESS COUNCIL

Tucker Fagan, Chief Executive Officer

Date

Mark Willis, Director, Business and Industry Division

Date

Thomas Fuller, Manager State Energy Programs

Date

Name, Title

Date

ATTORNEY GENERAL'S OFFICE APPROVAL AS TO FORM

Donald Gerstein, Senior Assistant Attorney General

Date

ESCo Contract Attachment A Cost and Pricing Elements

1. Costs, Markups, and Fees. Cost for performing the Investment Grade Audit and maximum project markups and fees for pre-defined categories shall be per the following schedules. Cost, markups, and fees shall not exceed the maximums shown. Markups on fees are not allowable under the WYECIP.

MARK-UPS		
<i>CATEGORY OF MARK-UP</i>	<i>MARK-UP APPLICATION</i>	<i>MAXIMUM % MARK-UP</i>
Overhead	Approved Mark-up Categories Below	15%
Profit	Approved Mark-up Categories Below	10%
Labor - Internal	OH&P above-no additional mark-up	N/A
Equipment Purchased	OH&P above-no additional mark-up	N/A
Materials Purchased	OH&P above-no additional mark-up	N/A
Subcontract Labor	OH&P above-no additional mark-up	N/A
Subcontract Material	OH&P above-no additional mark-up	N/A

FEEES		
<i>CATEGORY OF FEE</i>	<i>MAXIMUM FEE AMOUNT</i>	<i>YEARS APPLIED (One-time, Annual, etc.)</i>
Investment Grade Audit and Project Development	\$ <u>0.12</u> per Square Foot	One time
Solicit & Evaluate Project Financing Proposals	Included in IGA & Project Development Fee above	N/A
Design	9 % of total construction cost	One time
Project Management	7 % of total construction cost	One time
Contingency	7 % of total construction cost	One time
Permits	Actual Cost – No Mark-up	One time
Performance Bond	Actual Cost – No Mark-up	One time
Commissioning	2 % of total construction cost	One time
Initial Training on Installed Measures	1 % of total construction cost	One time
Additional Training	Per Project Training Plan	
Monitoring and Verification	Per Project M&V Plan	Annual
Warranty Service	2 % of total construction cost	One time
Maintenance on Installed Measures	Per Project Maintenance Plan	

Facility owners may choose to accept audit costs, markups, and fees proposed by Contractor for individual projects without further negotiation, provided they do not exceed the maximums established in the tables above, or directly negotiate with Contractor for reductions as dictated by individual facility or project requirements. Contractor may also propose lower audit costs, markups, and fees depending upon individual project considerations or their own internal business approach.

2. Open Book Pricing. Open book pricing is full disclosure by the Contractor to the facility owner of all costs and markups for materials, labor, and services received during the project development, implementation, and performance period phases. Open book pricing will be required such that the Contractor will fully disclose all costs, including all costs of subcontractors and vendors. The Contractor shall maintain cost accounting records on authorized work performed under actual costs for labor and material, or other basis requiring accounting records.

The Contractor will afford the Council and facility owner access to these records and preserve them for a period of three (3) years after final payment. Costs will be evaluated through price analysis to compare costs with reasonable criteria such as established catalog and market prices or historical prices to ensure the Contractor's prices are reasonable and acceptable and that markups are being properly applied.