The most successful ESPC projects reflect a shared responsibility for certain limited risks between the Federal ordering agency (Agency) and the ESPC contractor (ESCO). Because the ESPC authority of 42 U.S.C. §8287 generally requires the placement of risk on the ESCO, the presumption for all ESPC contracts is that the ESCO bears the risk, responsibility, and performance for all aspects of the project.

|  |  |
| --- | --- |
| **Responsibility / Description** | **Contractor-Proposed Approach** |
| **1. Financial** |  |
| **a. Interest Rates**: Neither the contractor (ESCO) nor the customer (ordering agency) has significant control over prevailing interest rates. Higher interest rates will increase project cost, financing/project term, or both. The timing of the Task Order (TO) signing may impact the available interest rate and project cost. **Clarify how the project interest rate will be determined and when it will be locked.** |  |
| **b. Energy/Water Prices:** Neither the contractor (ESCO) nor the customer (ordering agency) has significant control over actual energy or water prices, which tend to fluctuate over time. For calculating savings, the value of the saved energy or water may either be constant, change at a fixed inflation rate, escalate at an agreed-upon rate(s), or float with market conditions. If the value changes with the market, falling energy or water prices place the contractor (ESCO) at risk of failing to meet cost savings guarantees. If energy or water prices rise, there is a small risk to the customer (ordering agency) that energy or water saving goals might not be met while the financial goals are. If the value of saved energy or water is fixed (either constant or escalated), the customer (ordering agency) risks making payments in excess of actual energy or water cost savings. (Conversely, the customer could realize excess savings if actual rates exceed contractual rates). **Clarify how energy or water prices will be valued over time for the purpose of calculating cost savings.** |  |
| **c. Construction/Project Implementation Costs:** The contractor (ESCO) is responsible for determining construction/project implementation costs and defining a budget. In a fixed-price design/build contract, the customer (ordering agency) assumes little responsibility for cost overruns. However, if construction/project implementation estimates are significantly greater than originally assumed for an ESPC project, the contractor (ESCO) may find that the project or measure is no longer viable and drop it before TO award. **Clarify how construction/project implementation costs will be determined and reviewed.** In any design/build contract, the customer (ordering agency) loses some design control. **Clarify design standards and the design approval process (including changes).** |  |
| **Responsibility / Description** | **Contractor-Proposed Approach** |
| **d. Hazardous Materials:** The contractor (ESCO) is responsible for the costs of implementing energy (or water) savings measures, including costs associated with identifying the presence of and removal of any known and possible hazardous material. The contractor (ESCO) and the customer (ordering agency) will negotiate the responsibilities associated with the removal of the known and possible hazardous materials. In this context, responsibility refers to performance responsibility. **Clarify performance responsibilities associated with the removal of hazardous materials, both known and unknown.** |  |
| **e. Measurement and Verification (M&V) Confidence:** The customer (ordering agency) assumes the responsibility of determining the level of confidence that it desires to have in the M&V program and energy (or water) savings determinations. The desired confidence will be reflected in the resources required for the M&V program, and the contractor (ESCO) must consider the M&V requirements prior to submittal of the task order proposal. **Clarify how project savings are being verified (e.g., equipment performance, operational factors, energy or water use) and the impact on M&V costs.** |  |
| **f. Energy (or Water) Related Cost Savings:** The customer (ordering agency) and the contractor (ESCO) may agree that the project will include energy (or water) related savings from *recurring* and/or *one-time* costs. This may include one-time savings from avoided expenditures for projects that were appropriated but will no longer be necessary. Including one-time cost savings in out-years based on avoided operations and maintenance (e.g., replacement costs) may involve certain risk to the customer due to the timing and availability of such funds. Recurring savings generally result from reduced operations and maintenance (O&M) expenses. These O&M savings must be based on actual spending reductions. **Clarify sources of energy (and water) related cost savings and how they will be verified.** |  |
| **g. Delays:** Both the contractor (ESCO) and the customer (ordering agency) can cause delays. Failure to implement a viable project in a timely manner increases costs for the customer (ordering agency) in the form of lost savings, and can add various costs to the ESPC project (e.g., construction/project implementation interest, re-mobilization). **Clarify the schedule and how delays will be handled.** |  |
| **h. Major changes in facility:** The ordering agency (or Congress) controls major changes in facility use, including closure. **Clarify responsibilities in the event of a premature facility closure, loss of funding, or other major change.** |  |
| **Responsibility / Description** | **Contractor-Proposed Approach** |
| **2. Operational** |  |
| **a. Operating Hours:** The customer (ordering agency) generally has control over operating hours. Increases and decreases in operating hours can show up as increases or decreases in “savings” depending on the M&V method (e.g., operating hours multiplied by improved efficiency of equipment vs. whole-building/utility bill analysis). **Clarify whether operating hours are to be measured or stipulated and what the impact will be if they change.** If the operating hours are stipulated, the baseline shall be carefully documented and agreed to by both parties. |  |
| **b. Load:** Equipment loads can change over time. The customer (ordering agency) generally has control over hours of operation, conditioned floor area, intensity of use (e.g., changes in occupancy or level of automation). Changes in load can show up as increases or decreases in “savings” depending on the M&V method. **Clarify whether equipment loads are to be measured or stipulated and what the impact will be if they change**. If the equipment loads are stipulated, the baseline shall be carefully documented and agreed to by both parties. |  |
| **c. Weather:** Certain energy or water conservation measures are affected by weather, which neither the contractor (ESCO) nor the customer (ordering agency) has control over. Should the customer (ordering agency) agree to accept risk for weather fluctuations, it shall be contingent upon aggregate payments not exceeding aggregate savings. **Clearly specify weather data used and how weather corrections will be performed.** |  |
| **d. User participation:**  Many energy (or water) conservation measures require user participation to generate savings (e.g., control settings). The savings can be variable and the contractor (ESCO) may be unwilling to invest in these measures. **Clarify what degree of user participation is needed and use monitoring and training to mitigate risk.** If performance is stipulated, document and review assumptions carefully and consider the appropriate M&V method to confirm the capacity to save (e.g., confirm that the controls are functioning properly). |  |
|  |  |
|  |  |
| **Responsibility / Description** | **Contractor-Proposed Approach** |
| **3. Performance** |  |
| **a. Equipment Performance:** The contractor (ESCO) has control over the selection of equipment and is responsible for its proper installation, commissioning, and performance as well as all guaranteed energy and/or water savings. The contractor (ESCO) has responsibility to demonstrate that the new improvements meet expected performance levels, including specified equipment capacity, standards of service, and efficiency. **Clarify how performance and standards of service will be verified, and what will be done if it does not meet expectations.** |  |
| **b. Operations:** Performance of the day-to-day operations activities is negotiable and can impact performance. However, the contractor (ESCO) bears the ultimate risk of operations and all guaranteed energy and/or water savings regardless of which party performs the activity. **Clarify which party will perform equipment operations, the implications of equipment control, how changes in operating procedures will be handled, and how proper operations will be assured.** |  |
| **c. Preventive Maintenance:** Performance of day-to-day maintenance activities is negotiable and can impact performance. However, the contractor (ESCO) bears the ultimate risk of maintenance and all guaranteed energy and/or water savings regardless of which party performs the activity. **Clarify how long-term preventive maintenance will be ensured, especially if the party responsible for long-term performance is not responsible for maintenance (e.g., contractor provides maintenance checklist and reporting frequency).**  **Clarify who is responsible for performing long-term preventive maintenance to maintain operational performance throughout the contract term.** **Clarify what will be done if inadequate preventive maintenance impacts performance.** |  |
|  | |
|  | |
| **Responsibility / Description** | **Contractor-Proposed Approach** |
| **d. Equipment Repair and Replacement:** Performance of day-to-day repair and replacement of contractor-installed equipment is negotiable; however, it is often tied to project performance. The contractor (ESCO) bears the ultimate risk of equipment repair, replacement, and all guaranteed energy and/or water savings regardless of which party performs the activity. **Clarify who is responsible for performing replacement of failed components or equipment replacement throughout the term of the contract. Specifically address potential impacts on performance due to equipment failure. Specify expected equipment life and warranties for all installed equipment. Discuss replacement responsibility when equipment life is shorter than the term of the contract.** |  |

NOTE: The column entitled “Contractor-Proposed Approach” shall be negotiated between the customer (ordering agency) and the contractor (ESCO) for each TO and then the word “Proposed” removed from the title prior to Task Order (TO) finalization/award.