

Appendix A

MINIMUM STANDARD CONTRACT CLAUSES

Titles to typical Standard Clauses in the proposed Agreement to be supplied by [SCHOOL DISTRICT] Counsel
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- 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 B

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, 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 therefore 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 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 Lewiston Porter CSD 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 Lewiston Porter CSD 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 C

CHAPTER 436 OF THE LAWS OF 1997

Sections Relevant to School District's
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 district's 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 district's 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 sub clauses 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 Lewiston Porter CSD has 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;

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Appendix D

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 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 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 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 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) the sole trustee, the president of the board of trustees or board of education 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 Lewiston Porter CSD 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 Lewiston Porter CSD 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 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.

APPENDIX E

**Certification and signature form
Affidavit of Non-Collusion**

Name of Bidder _____ . **Phone #** _____ **Ext:** _____

Business Address: _____ **Fax #** _____

I hereby attest that I am the person responsible within my firm for the final decision as to the prices and amount of this bid, or I have written authorization, enclosed within, from that person to make the statements set out below on their behalf.

I further attest that:

1. The price and amount of this bid has been arrived at independently, without consultation, communication or agreement for the purpose of restricting competition with any other contractor, bidder or potential bidder.
2. Neither the price, nor the amount of this bid have been disclosed to any other firm or person who is a bidder or potential bidder on this project.
3. No attempt has been made or will be made to solicit, cause, or induce any firm or person to refrain from submitting a proposal or from bidding on this project.
4. The bid of my firm is made in good faith and not pursuant to any agreement or discussion with, or inducement from any firm or person to submit a complementary bid.
5. My firm has not offered or entered into a subcontract or agreement regarding the purchase of materials or services from any other firm or person, or offered, promised or paid cash or anything of value to any firm or person, whether in connection with this or any other project, in consideration for an agreement or promise by a firm or person to refrain from submitting a bid or to submit a complementary bid on this project.
6. My firm has not accepted or been promised any subcontract or agreement regarding the sale of materials or services to any firm or person and has not been paid cash or anything of value by any firm or person, whether in connection with this project, or for consideration of a future project.
7. I have made a diligent inquiry of all members, officers, employees, and agents of my firm with responsibilities relating to the preparation, approval, or submission of my firm's bid on this project and have been advised by all of them that they have not participated in any such activities outlined above.
8. By submission of this bid I certify that I have read, am familiar with and will comply with any and all segments of these specifications.

The person signing this bid, under the penalties of perjury, affirms the truth thereof.

Print Name and Company Position: _____

Signature: _____ Federal ID Number _____

Company Name: _____ Date Signed: _____