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## TITLE 10--ENERGY

### CHAPTER II--DEPARTMENT OF ENERGY

#### PART 436--FEDERAL ENERGY MANAGEMENT AND PLANNING PROGRAMS--Table of Contents

##### Subpart B--Methods and Procedures for Energy Savings Performance Contracting

Source: 60 FR 18334, Apr. 10, 1995, unless otherwise noted.

##### Sec. 436.30 Purpose and scope.

(a) General. This subpart provides procedures and methods which apply to Federal agencies with regard to the award and administration of energy savings performance contracts awarded within five years of April 10, 1995. This subpart applies in addition to the Federal Acquisition Regulation at Title 48 of the CFR and related Federal agency regulations. The provisions of this subpart are controlling with regard to energy savings performance contracts notwithstanding any conflicting provisions of the Federal Acquisition Regulation and related Federal agency regulations.

(b) Utility incentive programs. Nothing in this subpart shall preclude a Federal agency from--

(1) Participating in programs to increase energy efficiency, conserve water, or manage electricity demand conducted by gas, water, or electric utilities and generally available to customers of such utilities;

(2) Accepting financial incentives, goods, or services generally available from any such utility to increase energy efficiency or to conserve water or manage electricity demand; or

(3) Entering into negotiations with electric, water, and gas utilities to design cost-effective demand management and conservation incentive programs to address the unique needs of each Federal agency.

(c) Promoting competition. To the extent allowed by law, Federal agencies should encourage utilities to select contractors for the conduct of utility incentive programs in a competitive manner to the maximum extent practicable.

(d) Interpretations. The permissive provisions of this subpart shall be liberally construed to effectuate the objectives of Title VIII of the National Energy Conservation Policy Act, 42 U.S.C. 8287-8287c. [60 FR 18334, Apr. 10, 1995, as amended at 60 FR 19343, Apr. 18, 1995]

##### Sec. 436.31 Definitions.

As used in this subpart--

Act means Title VIII of the National Energy Conservation Policy Act.

Annual energy audit means a procedure including, but not limited to, verification of the achievement of energy cost savings and energy unit

savings guaranteed resulting from implementation of energy conservation measures

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and determination of whether an adjustment to the energy baseline is justified by conditions beyond the contractor's control.

Building means any closed structure primarily intended for human occupancy in which energy is consumed, produced, or distributed.

Detailed energy survey means a procedure which may include, but is not limited to, a detailed analysis of energy cost savings and energy unit savings potential, building conditions, energy consuming equipment, and hours of use or occupancy for the purpose of confirming or revising technical and price proposals based on the preliminary energy survey.

DOE means Department of Energy.

Energy baseline means the amount of energy that would be consumed annually without implementation of energy conservation measures based on historical metered data, engineering calculations, submetering of buildings or energy consuming systems, building load simulation models, statistical regression analysis, or some combination of these methods.

Energy conservation measures means measures that are applied to an existing Federally owned building or facility that improves energy efficiency, are life-cycle cost-effective under subpart A of this part, and involve energy conservation, cogeneration facilities, renewable energy sources, improvements in operation and maintenance efficiencies, or retrofit activities.

Energy cost savings means a reduction in the cost of energy and related operation and maintenance expenses, from a base cost established through a methodology set forth in an energy savings performance contract, utilized in an existing federally owned building or buildings or other federally owned facilities as a result of--

(1) The lease or purchase of operating equipment, improvements, altered operation and maintenance, or technical services; or

(2) The increased efficient use of existing energy sources by cogeneration or heat recovery, excluding any cogeneration process for other than a federally owned building or buildings or other federally owned facilities.

Energy savings performance contract means a contract which provides for the performance of services for the design, acquisition, installation, testing, operation, and, where appropriate, maintenance and repair of an identified energy conservation measure or series of measures at one or more locations.

Energy unit savings means the determination, in electrical or thermal units (e.g., kilowatt hour (kwh), kilowatt (kw), or British thermal units (Btu)), of the reduction in energy use or demand by comparing consumption or demand, after completion of contractor-installed energy conservation measures, to an energy baseline established in the contract.

Facility means any structure not primarily intended for human occupancy, or any contiguous group of structures and related systems, either of which produces, distributes, or consumes energy.

Federal agency has the meaning given such term in section 551(1) of Title 5, United States Code.

Preliminary energy survey means a procedure which may include, but is not limited to, an evaluation of energy cost savings and energy unit savings potential, building conditions, energy consuming equipment, and

hours of use or occupancy, for the purpose of developing technical and price proposals prior to selection.

Secretary means the Secretary of Energy.

#### Sec. 436.32 Qualified contractors lists.

(a) DOE shall prepare a list, to be updated annually, or more often as necessary, of firms qualified to provide energy cost savings performance services and grouped by technology. The list shall be prepared from statements of qualifications by or about firms engaged in providing energy savings performance contract services on questionnaires obtained from DOE. Such statements shall, at a minimum, include prior experience and capabilities of firms to perform the proposed energy cost savings services by technology and financial and performance information. DOE shall issue a notice

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annually, for publication in the Commerce Business Daily, inviting submission of new statements of qualifications and requiring listed firms to update their statements of qualifications for changes in the information previously provided.

(b) On the basis of statements of qualifications received under paragraph (a) of this section and any other relevant information, DOE shall select a firm for inclusion on the qualified list if--

(1) It has provided energy savings performance contract services or services that save energy or reduce utility costs for not less than two clients, and the firm possesses the appropriate project experience to successfully implement the technologies which it proposes to provide;

(2) Previous project clients provide ratings which are "fair" or better;

(3) The firm or any principal of the firm has neither been insolvent nor declared bankruptcy within the last five years;

(4) The firm or any principal of the firm is not on the list of parties excluded from procurement programs under 48 CFR part 9, subpart 9.4; and

(5) There is no other adverse information which warrants the conclusion that the firm is not qualified to perform energy savings performance contracts.

(c) DOE may remove a firm from DOE's list of qualified contractors after notice and an opportunity for comment if--

(1) There is a failure to update its statement of qualifications;

(2) There is credible information warranting disqualification; or

(3) There is other good cause.

(d) A Federal agency shall use DOE's list unless it elects to develop its own list of qualified firms consistent with the procedures in paragraphs (a) and (b) of this section.

(e) A firm not designated by DOE or a Federal agency pursuant to the procedures in paragraphs (a) and (b) of this section as qualified to provide energy cost savings performance services shall receive a written decision and may request a debriefing.

(f) Any firm receiving an adverse final decision under this section shall apply to the Board of Contract Appeals of the General Services Administration in order to exhaust administrative remedies.

#### Sec. 436.33 Procedures and methods for contractor selection.

(a) Competitive selection. Competitive selections based on solicitation of firms are subject to the following procedures--

(1) With respect to a particular proposed energy cost savings performance project, Federal agencies shall publish a Commerce Business Daily notice which synthesizes the proposed contract action.

(2) Each competitive solicitation--

(i) Shall request technical and price proposals and the text of any third-party financing agreement from interested firms;

(ii) Shall consider DOE model solicitations and should use them to the maximum extent practicable;

(iii) May provide for a two-step selection process which allows Federal agencies to make an initial selection based, in part, on proposals containing estimated energy cost savings and energy unit savings, with contract award conditioned on confirmation through a detailed energy survey that the guaranteed energy cost savings are within a certain percentage (specified in the solicitation) of the estimated amount; and

(iv) May state that if the Federal agency requires a detailed energy survey which identifies life cycle cost effective energy conservation measures not in the initial proposal, the contract may include such measures.

(3) Based on its evaluation of the technical and price proposals submitted, any applicable financing agreement (including lease-acquisitions, if any), statements of qualifications submitted under Sec. 436.32 of this subpart, and any other information determines to be relevant, the Federal agency may select a firm on a qualified list to conduct the project.

(4) If a proposed energy cost savings project involves a large facility with too many contiguously related buildings and other structures at one site for proposing firms to assume the costs

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of a preliminary energy survey of all such structures, the Federal agency--

(i) May request technical and price proposals for a representative sample of buildings and other structures and may select a firm to conduct the proposed project; and

(ii) After selection of a firm, but prior to award of an energy savings performance contract, may request the selected firm to submit technical and price proposals for all or some of the remaining buildings and other structures at the site and may include in the award for all or some of the remaining buildings and other structures.

(5) After selection under paragraph (a)(3) or (a)(4) of this section, but prior to award, a Federal agency may require the selectee to conduct a detailed energy survey to confirm that guaranteed energy cost savings are within a certain percentage (specified in the solicitation) of estimated energy cost savings in the selectee's proposal. If the detailed energy survey does not confirm that guaranteed energy savings are within the fixed percentage of estimated savings, the Federal agency may select another firm from those within the competitive range.

(b) Unsolicited proposals. Federal agencies may--

(1) Consider unsolicited energy savings performance contract proposals from firms on a qualified contractor list under this subpart

which include technical and price proposals and the text of any financing agreement (including a lease-acquisition) without regard to the requirements of 48 CFR 15.503 (a) and (c); 48 CFR 15.506-2(a)(1); and 48 CFR 15.507(a), (b)(2), (b)(3), (b)(4) and (b)(5).

(2) Reject an unsolicited proposal that is too narrow because it does not address the potential for significant energy conservation measures from other than those measures in the proposal.

(3) After requiring a detailed energy survey, if appropriate, and determining that technical and price proposals are adequate, award a contract to a firm on a qualified contractor list under this subpart on the basis of an unsolicited proposal, provided that the Federal agency complies with the following procedures--

(i) An award may not be made to the firm submitting the unsolicited proposal unless the Federal agency first publishes a notice in the Commerce Business Daily acknowledging receipt of the proposal and inviting other firms on the qualified list to submit competing proposals.

(ii) Except for unsolicited proposals submitted in response to a published general statement of agency needs, no award based on such an unsolicited proposal may be made in instances in which the Federal agency is planning the acquisition of an energy conservation measure through an energy savings performance contract.

(c) Certified cost or pricing data.

(1) Energy savings performance contracts under this part are firm fixed-price contracts.

(2) Pursuant to the authority provided under section 304A(b)(1)(B) of the Federal Property and Administrative Services Act of 1949, the heads of procuring activities shall waive the requirement for submission of certified cost or pricing data. However, this does not exempt offerors from submitting information (including pricing information) required by the Federal agency to ensure the impartial and comprehensive evaluation of proposals.

#### Sec. 436.34 Multiyear contracts.

(a) Subject to paragraph (b) of this section, Federal agencies may enter into a multiyear energy savings performance contract for a period not to exceed 25 years, as authorized by 42 U.S.C. 8287, without funding of cancellation charges, if:

(1) The multiyear energy savings performance contract was awarded in a competitive manner using the procedures and methods established by this subpart;

(2) Funds are available and adequate for payment of the scheduled energy cost for the first fiscal year of the multiyear energy savings performance contract;

(3) Thirty days before the award of any multiyear energy savings performance contract that contains a clause setting forth a cancellation ceiling in excess of \$750,000, the head of the awarding Federal agency gives written notification of the proposed contract

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and the proposed cancellation ceiling for the contract to the appropriate authorizing and appropriating committees of the Congress; and

(4) Except as otherwise provided in this section, the multiyear

energy savings performance contract is subject to 48 CFR part 17, subpart 17.1, including the requirement that the contracting officer establish a cancellation ceiling.

(b) Neither this subpart nor any provision of the Act requires, prior to contract award or as a condition of a contract award, that a Federal agency have appropriated funds available and adequate to pay for the total costs of an energy savings performance contract for the term of such contract.

#### Sec. 436.35 Standard terms and conditions.

(a) Mandatory requirements. In addition to contractual provisions otherwise required by the Act or this subpart, any energy savings performance contract shall contain clauses--

(1) Authorizing modification, replacement, or changes of equipment, at no cost to the Federal agency, with the prior approval of the contracting officer who shall consider the expected level of performance after such modification, replacement or change;

(2) Providing for the disposition of title to systems and equipment;

(3) Requiring prior approval by the contracting officer of any financing agreements (including lease-acquisitions) and amendments to such an agreement entered into after contract award for the purpose of financing the acquisition of energy conservation measures;

(4) Providing for an annual energy audit and identifying who shall conduct such an audit, consistent with Sec. 436.37 of this subpart; and

(5) Providing for a guarantee of energy cost savings to the Federal agency, and establishing payment schedules reflecting such guarantee.

(b) Third party financing. If there is third party financing, then an energy savings performance contract may contain a clause:

(1) Permitting the financing source to perfect a security interest in the installed energy conservation measures, subject to and subordinate to the rights of the Federal agency; and

(2) Protecting the interests of a Federal agency and a financing source, by authorizing a contracting officer in appropriate circumstances to require a contractor who defaults on an energy savings performance contract or who does not cure the failure to make timely payments, to assign to the financing source, if willing and able, the contractor's rights and responsibilities under an energy savings performance contract;

#### Sec. 436.36 Conditions of payment.

(a) Any amount paid by a Federal agency pursuant to any energy savings performance contract entered into under this subpart may be paid only from funds appropriated or otherwise made available to the agency for the payment of energy expenses and related operation and maintenance expenses which would have been incurred without an energy savings performance contract. The amount the agency would have paid is equal to:

(1) The energy baseline under the energy savings performance contract (adjusted if appropriate under Sec. 436.37), multiplied by the unit energy cost; and

(2) Any related operations and maintenance cost prior to implementation of energy conservation measures, adjusted for increases in labor and material price indices.

(b) Federal agencies may incur obligations pursuant to energy savings performance contracts to finance energy conservation measures

provided guaranteed energy cost savings exceed the contractor's debt service requirements.

Sec. 436.37 Annual energy audits.

(a) After contractor implementation of energy conservation measures and annually thereafter during the contract term, an annual energy audit shall be conducted by the Federal agency or the contractor as determined by the contract. The annual energy audit shall verify the achievement of annual energy cost savings performance guarantees provided by the contractor.

(b) The energy baseline is subject to adjustment due to changes beyond the contractor's control, such as--

(1) Physical changes to building;

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(2) Hours of use or occupancy;

(3) Area of conditioned space;

(4) Addition or removal of energy consuming equipment or systems;

(5) Energy consuming equipment operating conditions;

(6) Weather (i.e., cooling and heating degree days); and

(7) Utility rates.

(c) In the solicitation or in the contract, Federal agencies shall specify requirements for annual energy audits, the energy baseline, and baseline adjustment procedures.

Sec. 436.38 Terminating contracts.

(a) Except as otherwise provided by this subpart, termination of energy savings performance contracts shall be subject to the termination procedures of the Federal Acquisition Regulation in 48 CFR part 49.

(b) In the event an energy savings performance contract is terminated for the convenience of a Federal agency, the termination liability of the Federal agency shall not exceed the cancellation ceiling set forth in the contract, for the year in which the contract is terminated.