

Guaranteed Energy Savings Contracts: Step-By-Step Contracting Process

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I. Key Terms¹

Guaranteed Energy Savings Contract (GESC)

A contract for the evaluation, recommendation, or implementation of energy conservation measures, including the design and installation of equipment or the repair or replacement of existing equipment or meters, in which all payments, except obligations on termination of the contract before its expiration, are to be made over time, and in which energy savings are guaranteed to exceed costs.

Energy Conservation Measure (ECM)

A facility or meter alteration, training, or services related to the operation of the facility or meter, when the alteration, training, or services provide anticipated energy savings or capture lost revenue.

Energy Savings

A measured reduction in fuel costs, energy costs, water costs, stormwater fees, other utility costs, or operating costs, including environmental discharge fees, water and sewer maintenance fees, and increased meter accuracy, created from the implementation of one or more energy conservation measures when compared with an established baseline of previous costs, including captured lost revenues, developed by the governmental unit.

Qualified Provider (ESCO)

A person or business experienced in the design, implementation, and installation of energy conservation measures (referred to as an “energy service company” or “ESCO”). An ESCO must be prequalified by the State Energy Office in order to be considered qualified.

Qualified Reviewer

An architect or engineer who is licensed in North Carolina and experienced in the design, implementation, and installation of energy efficiency measures.

Request for Proposals (RFP)

A negotiated procurement initiated by a governmental unit by way of a published notice that includes the following: (1) the name and address of the governmental unit; (2) the name, address, title, and telephone number of a contact person in the governmental

¹ All definitions found in G.S. 143-64.17.

unit; (3) notice indicating that the governmental unit is requesting qualified providers to propose energy conservation measures through a guaranteed energy savings contract; (4) the date, time, and place where proposals must be received; (5) the evaluation criteria for assessing the proposals; (6) a statement reserving the right of the governmental unit to reject any or all the proposals; (7) any other stipulations and clarifications the governmental unit may require.

II. GESC Contracting Process

Outlined below are the basic statutory requirements for entering into a GESC pursuant to Part 2, Article 3B of G.S. Chapter 143 and other related statutes.

Step 1: Develop a Request for Proposals (RFP)

- Must use RFP process for GESCs; contract otherwise exempt from most competitive procurement requirements (note: requirements for sealed plans on public construction project over certain dollar thresholds and architect/engineer conflicts of interest prohibitions still apply).
- Local government may choose to hire a consultant or outside legal counsel to assist with developing RFP and/or seek technical assistance from the State Energy Office (note: costs for these contracts can be recovered as part of the “total contract cost” including costs for consultants or outside legal counsel).
- No statutory procedures required for hiring consultant or outside legal counsel (unless consultant is an architect or engineer, in which case Mini-Brooks Act requirements apply unless local government exempts itself from those requirements – G.S. 143-64.31, -64.32).
- Contract for consulting services or energy audit services is not itself a GESC unless contract also includes evaluation, recommendation, or installation of energy conservation measures; however, these costs can still be recovered under the “total contract cost” of the GESC.
- RFP must include evaluation criteria and any other stipulations and clarifications the local government may require.
- Local government is responsible for establishing baseline of previous energy costs, including captured lost revenues.

Step 2: Issue a Request for Proposals (RFP) & Conduct Mandatory Pre-Bid Meeting

- Must publish notice of RFP at least 15 days prior to time of opening.
- Notice must be published in newspaper of general circulation in local government’s geographical area.
- Notice and/or RFP must include:²

² G.S. 143-64.17(6) is not clear on what specific information must be included in the notice as opposed to the RFP itself. So long as the required information is made publically available either by the notice itself or in the RFP, the goal of public dissemination of this information is presumably met. From a practical

- Name and address of local government
- Name, address, title, and telephone number of contact person
- Notice indicating that local government is requesting qualified providers to propose energy conservation measures through a GESC
- Date, time, and location where proposals must be received
- Evaluation criteria
- Statement reserving the right to reject any or all proposals
- Any other stipulations and clarifications the local government may require
- Minority business participation requirements under G.S. 143-128.2 apply.
- Local government must conduct a mandatory pre-bid meeting (statute does not stipulate what information is to be provided at the mandatory pre-bid meeting). If less than 2 qualified providers attend the mandatory pre-bid meeting, the local government must cancel the RFP process and readvertise

Step 3: Receive proposals in response to RFP solicitation

- Proposals must be sealed.
- Cannot open until date and time specified in notice.

Step 4: Open proposals received in response to RFP solicitation

- Must have at least 2 proposals from qualified providers who attended the mandatory prebid meeting to award contract. If only 1 proposal from a qualified provider is received, must republish for 15 days – if only 1 proposal from qualified provider is received after republishing, can open and select the proposal if qualified.
- Proposals must be opened by employee of local governmental or member of governing board.
- Proposals must be opened in public.
- Contents of proposals must be announced and recorded in minutes of governing body.

Step 5: Evaluate proposals

- Proposals must be evaluated by a qualified reviewer who provides the local government with a letter report on the reviewer's qualitative and quantitative evaluation of the proposals based on the criteria of the RFP. The reviewer may offer a recommendation for selection but local government is not bound by the reviewer's recommendation.
- Local government may require proposals to include the cost for hiring the qualified reviewer to conduct the review. Hiring a qualified reviewer is

standpoint, local governments should consider including items 1-4 (listed in Step #2) in the published notice. See, G.S. 1143-64.17(6)a-d.

governed by the Mini-Brooks Act (G.S. 143-64.31) unless the local government exempts itself from these requirements (G.S. 143-64.32).

- May communicate and negotiate with providers during evaluation period, but should not extend beyond the scope of the RFP.

Step 6: Select the qualified provider that best meets the unit's needs

- Based on qualified reviewer's evaluation, local government ranks respondents based on references from past clients and the following criteria:
 - Quality of products and energy conservation measures.
 - Amount of energy savings.
 - General reputation and performance capabilities of qualified providers.
 - Substantial conformity with specifications and other conditions of RFP.
 - Time for performance.
 - Other factors deemed necessary (other factors must be "made a matter of record").
 - Standard of award is "provider that best meets the unit's needs"; not bound by lowest responsive responsible bidder standard.
- Select short list of finalists based on rankings
- Highest-ranked finalists provides cost-savings analysis for proposed contract comparing total estimated project savings and total estimated project costs over the life of the contract.
- Local government and highest-ranked finalist negotiated contract terms, pricing, and savings estimates.
- If negotiations with highest-ranked finalist are not successful, terminate those negotiations and begin negotiations with second highest-ranked finalist, and so on.

Step 7: Award the contract

- Notice of award must be published at least 15 days prior to meeting at which award will be approved; notice must include:
 - Time, date, and location of meeting
 - Names of parties to the contract
 - Purpose of the contract
- Term of contract cannot exceed 20 years from the date of installation and local government's acceptance of energy conservation measures.
- Local government must find that energy savings will equal or exceed "total cost" of the contract.
- "Total costs" include not only costs of construction, but also other costs associated with contract including costs of financing, maintenance, and training during the term of the contract.
- Energy conservation measures must be for existing building or utility structure (cannot be for new construction).

- Provider must give a bond (in form acceptable to State Treasurer) equaling 100% of the guaranteed savings for the term of the contract; bonds subject to Article 3 of G.S. Chapter 44A. This bond guarantees the savings under the contract - if savings from contract are less than projected and all required shortfall payments to local government have not been made, local government may terminate contract without incurring any additional obligation to provider.
- Cannot require local government to purchase a maintenance contract if the local government uses its own forces or hires another maintenance firm.
- Must stipulate that contract does not constitute a direct or indirect pledge of taxing power or full faith and credit of the local government.
- Governing board approval not required under GESC statutes; governing board approval is required for financing arrangements (in essence, unless project is 100% self-financed by local government, all GESC's require board approval under local government finance requirements).

Step 8: Submit GESC to SEO and LGC for approval

- State Energy Office must review selected provider's proposal, cost-benefit analysis, and other relevant documents prior to announcement of contract award by local government.
- May use installment purchase or lease purchase arrangement (subject to G.S. 160A-19 and G.S. 160A-20, including LGC approval). Installment or lease purchase of equipment under GESC not subject to competitive procurement requirements of Article 8 of G.S. Chapter 143.
- LGC reviews GESC financing under same criteria as any other installment purchase contract or similar financing arrangement.
- Examples of LGC considerations:
 - Must find project "necessary and expedient"
 - Must find amount of funds borrowed "adequate and not excessive"
 - Guaranteed energy savings must equal or exceed debt payments
 - Financial solvency of ESCO, including bond rating or other security by which ESCO guarantees energy savings
 - Contract must enable local government to recover "total costs" as defined in GESC statutes
 - How "energy savings" are calculated and what the "energy escalation factor" is as part of total cost recovery
 - Verification of "M&V" (annual monitoring and evaluation by ESCO) to ensure saving are being achieved per terms of the GESC
- Reporting: Local government must report contract and its terms to the Local Government Commission and the State Energy Office (Dept. of Commerce).
 - LGC compiles information and reports biennially to Gov. Ops on expected energy savings realized from contracts.
 - LCG evaluates whether expected energy savings have been realized.

Step 9: Budget for the contract

- May budget either operating or capital funds not otherwise restricted by law for payment of contract.
- Authorized to extend contract beyond fiscal year in which contract was entered.
- State appropriations to any local government cannot be reduced as a result of energy savings occurring as a result of the contract.

Step 10: Reconcile Annually

- Qualified provider gives local government an annual reconciliation statement documenting measurement and verification of energy savings. Reconciliation statement must show shortfalls or surplus between energy savings under the contract and actual energy savings during that year.
- Energy and operational savings must be determined using measurement and verification methodologies listed in the statute.³
- In the event of a shortfall, the qualified provider pays the difference to the local government. In the event of a surplus, the local government retains the surplus, but that surplus cannot be carried forward to another year.

Resources

NC Local Government Commission

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³ G.S. 143-64.17B(g) requires that “Any guaranteed energy and operational savings shall be determined by using one of the measurement and verification methodologies listed in the United States Department of Energy’s Measurement and Verification Guidelines for Energy Savings Performance Contracting, the International Performance Measurement and Verification Protocol (IPMVP) maintained by the Efficiency Valuation Organization, or Guideline 14-2002 of the American Society of Heating, Refrigerating, and Air-Conditioning Engineers. If due to existing data limitations or the nonconformance of specific project characteristics, none of the three methodologies listed in this subsection is sufficient for measuring guaranteed savings, the qualified provider shall develop an alternate method that is compatible with one of the three methodologies and mutually agreeable to the governmental unit.”