

## **Title 6: Economic Development**

### **Part 3: Energy**

#### **Part 3 Chapter 4: Energy Savings Performance Contracting Policies and Procedures**

*Rule 4.1 Purpose.* Mississippi Development Authority (MDA) promulgates the following policy and procedures in accordance with Section 31-7-14 of the Mississippi Code of 1972, as amended, to provide for the approval of “energy saving performance contracts” (ESPC) and “shared savings contracts” between public entities and Energy Service Companies (ESCO) wherein energy savings and related cost savings are guaranteed over a period of time not to exceed 20 years by the performance contractors.

Source: Miss. Code Ann. §31-7-14 (Supp. 2015).

*Rule 4.2 Responsibility.* MDA-Energy and Natural Resources Division (MDA-ENRD)’s role in evaluating “energy saving performance contracts” and “shared savings contracts” under Section 31-7-14 (4) (b) is to ensure that entities can rely upon projected and guaranteed energy savings and related cost savings. Consequently, these policies and procedures for “energy saving performance contracts” and “shared savings contracts” are developed in order for MDA-ENRD to make determinations that contracts conform to the law.

Source: Miss. Code Ann. §31-7-14 (Supp. 2015).

*Rule 4.3 Contracts within MDA’s Purview.* Contracts authorized in Section 31-7-14 (4) (b) differ from “energy services contracts” authorized in Section 31-7-14 (1) (b) that do not require MDA-ENRD involvement and do not require energy or cost savings to be guaranteed. Projects where there are minimal scientifically quantifiable and measurable energy savings, i.e., MDA-ENRD’s expertise is not required, may be pursued under this Section 31-7-14 (1) (b) as “Energy Services Contract.”

*Rule 4.4 General Contract Construction.* MDA-ENRD will construe proposed contracts submitted pursuant to 31-7-14(6) so that economic benefits to the entity may be maximized.

Source: Miss. Code Ann. §31-7-14 (Supp. 2015).

*Rule 4.5 Energy Savings or Shared Savings Contracts.* Any state agency or local governing authority (entity), as defined in Section 31-7-1 subparagraphs (a) and (b) respectively of the Mississippi Code of 1972, as amended, may contract on a shared savings or energy saving performance contract basis for:

- (i) energy efficiency equipment;
- (i) services relating to the installation, operation or maintenance of equipment;
- (ii) improvements reasonably required to existing or new equipment and existing or new improvements and facilities; and
- (iii) alternative fuel motor vehicles including vehicles that have been converted to such and ancillary equipment related to or associated with the fueling of alternative fuel motor vehicles.

Source: Miss. Code Ann. §31-7-14 (Supp. 2015).

*Rule 4.6 Multiple Contracts.* Section 31-7-14 does not prohibit an entity from entering into a companion “energy services contract” at the same time it enters into an “energy savings performance contract” or “shared savings contract.” Any such dual-purpose contract must clearly state its dual nature under the law and distinguish the guaranteed portion by including a separate scope of work for such contract as a specific addendum.

Source: Miss. Code Ann. §31-7-14 (Supp. 2015).

*Rule 4.7 Energy Saving Performance Contract/Shared Savings Contract Defined.* An “energy saving performance contract” or “shared savings contract” means an agreement to provide energy services which include, but are not limited to, the design, installation, financing and maintenance or management of the energy systems or equipment in order to improve its energy efficiency.

Source: Miss. Code Ann. §31-7-14 (Supp. 2015).

*Rule 4.8* The total “energy saving performance contract” or “shared savings contract” may not have a payback period longer than 20 years. Individual Energy Conservation Measures (ECMs) may have payback periods longer than 20 years; however, the combined payback for the ESPC must be less than or equal to 20 years. Per Section 31-7-14, Miss. Code, the **useful life** of each energy system or equipment shall meet or exceed the term of the contract to be considered an eligible measure. Eligible ECMs are any type of project or technology implemented to reduce the consumption of energy systems or equipment. ECMs should provide long-term operation cost reductions or significantly reduce energy and/or water consumed.

Source: Miss. Code Ann. §31-7-14 (Supp. 2015).

*Rule 4.9 Guaranteed Savings.* The energy savings plus related cost savings are guaranteed by the ESCO and must be used to repay the cost of the project. The guaranteed savings must be more than sufficient to pay the total costs of the project over the guarantee period. The terms of any shared savings or energy saving performance contract entered into must contain a guarantee of savings clause from the performance contractor.

Source: Miss. Code Ann. §31-7-14 (Supp. 2015).

*Rule 4.10 Shared Savings Contract/Energy Saving Performance Contract Differences.* A “shared savings contract” differs from an “energy saving performance contract” in that the ESCO and the entity each receive a pre-agreed percentage or dollar value of the energy cost savings over the life of the contract, rather than the contractor receiving a fee.

Source: Miss. Code Ann. §31-7-14 (Supp. 2015).

*Rule 4.11 Contractual Terms.*

(A) The terms of any performance contract or shared savings contract for efficiency services and equipment entered into under this section shall not exceed 20 years.

(B) All contracts must contain the following annual allocation dependency clause:

***The continuation of this contract is contingent upon the appropriation of funds to fulfill the requirement of the contract by the Legislature or other budgeting authority. If the Legislature or other budgeting authority fails to appropriate sufficient monies to provide for the continuation of the contract, the contract shall terminate on the last day of the fiscal year for which appropriations were made. The termination shall be without penalty or expense to the entity of any kind whatsoever, except as to the portions of payments for which funds were appropriated.***

(C) All contracts must contain a provision for termination of the contract for cause.

(D) All contracts must contain a provision for termination for convenience by the entity.

Source: Miss. Code Ann. §31-7-14 (Supp. 2015).

*Rule 4.12 Program Requirements and Definitions.*

(A) “Eligible Energy Conservation Measures (ECMs)” are energy systems or equipment listed below:

(i) heating, ventilation, and air conditioning systems;

(ii) lighting;

(iii) windows;

(iv) insulation;

(v) energy management controls;

(vi) life safety measures that provide long-term operating cost reductions;

(vii) building operation programs that reduce operating costs;

(viii) renewable energy systems and equipment;

(ix) water conservation systems and equipment, including accuracy and measurement of water distribution and/or consumption;

(x) facilities improvements or enhancements directly related to the above;

(xi) alternative fuel motor vehicles including vehicles that have been converted to such and ancillary equipment related to or associated with the fueling of alternative fuel vehicles; and

(xii) other equipment, services and improvements providing energy efficiency as determined by the division.

(B) Energy Cost Savings: a reduction in the costs related to “Energy Services” or “Energy Efficient Services” as defined in Section 31-7-14 (1)(a)(iii) and 31-7-14 (1)(a)(vii) of the Mississippi Code of 1972, as amended. Energy Cost Savings are a reduction in the cost of energy, renewable energy, water and other natural resources

conservation and must be verifiable. Energy cost savings are generally recurring savings - savings that occur year after year.

- (C) Allowable cost savings may also include savings from the elimination of future expenses and from the avoidance of future replacement expenditures as a result of new equipment installed or services performed.
- (D) Guaranteed energy savings plus verifiable guaranteed related cost savings achieved by the project shall be sufficient to cover all project costs, including annual maintenance and monitoring fees, guarantee fees, and contractor fees.
- (E) For “energy saving performance contracts” and for “shared savings contracts,” MDA-ENRD defines “energy savings plus related cost savings” as scientifically quantifiable and verified measurable savings from energy and/or water usage reductions plus cost savings from related operations and maintenance reductions and other cost-avoidance measures.
- (F) Energy Related Cost Savings: a reduction in expenses (other than energy cost savings) related to energy-consuming equipment, generally related to equipment operations, maintenance, renewal, replacement, repair expenses, or avoided capital costs. Energy related cost savings shall be verified to be considered part of the ESPC.
  - i. Operation and Maintenance (O&M) Savings: a reduction in operation and maintenance costs associated with the equipment. Accompanying documentation, such as invoices of previous repair costs, must be submitted along with detailed calculations and descriptions. O&M savings should only be captured in the applicable years and during the lifetime of the particular equipment. Elimination of maintenance contracts is allowable if verifiable.
  - ii. Capital Cost Avoidance (CCA): a cost reduction generated by avoiding planned future capital expenditures, either for equipment replacement or services performed. CCA on equipment that is being purchased and replaced through the ESPC rather than in the future is calculated by taking the difference between what it would have cost to implement the project in the future and the current costs of that equipment replacement under the ESPC. For additional CCA calculations, it is recommended that a Life Cycle Cost Assessment (LCCA) be used to monetize the non-energy benefits. USDOE (2005) defines life-cycle costs as “...the sum of present values of investment costs, capital costs, installation costs, energy costs, operating costs, maintenance costs, and disposal costs over the lifetime of the project, product, or measure.” Cost avoidance can be captured as a one-time benefit or normalized over the term of the performance contract.
  - iii. Material Savings: a reduction in costs associated with parts and materials purchased for existing energy-consuming systems. These are allowable as long as the initial values can be determined and verified.
  - iv. Labor Savings: a reduction in personnel associated with the operations and maintenance of the energy-consuming system. It will not be considered by

MDA-ENRD unless a job is eliminated and staff is released. Even if someone is assigned different responsibilities, that money is not eliminated from the budget and therefore not available as savings.

(G) Simple Payback Period (SPP): the length of time required to recover the costs of the ESPC investments through energy and related cost savings. The combined simple payback period shall not exceed 20 years, although an individual ECM can have a payback longer than 20 years. SPP is calculated by dividing the value of the initial investment by the projected annual energy cost savings. SPP is usually given in years and/or tenths of a year.

**The simple payback formula is:**

$$\text{Simple Payback SPP (years)} = \frac{\text{I}}{\text{ES/year}}$$

Where,

SPP = Simple payback period

I = Initial investment

ES/year = Projected annual energy savings at current prices

(H) Useful Life: the length of time over which equipment can be depreciated. Per Section 31-7-14, Miss. Code, each energy system or equipment useful life shall meet or exceed the term of the contract to be considered an eligible measure.

(I) MDA-ENRD will check to ensure warranty time periods has been captured correctly where applicable.

(J) Verification of savings means MDA-ENRD shall verify all projected savings in an ESPC. Projected savings that are not quantified, measured and verified will not be considered as part of the ESPC. Supporting documentation, including detailed narratives and graphs/charts shall be submitted with each proposed project.

Source: Miss. Code Ann. §31-7-14 (Rev. 2015).

*Rule 4.13 ESPC Issuance and Approval Process.*

(A) Any entity desiring to enter into a contract for energy efficiency equipment, services relating to the installation, operation or maintenance of equipment, or improvements reasonably required to existing or new equipment and existing or new improvements and facilities on a shared savings basis or performance contracting basis, shall issue a Request for Qualifications (RFQ) in the manner prescribed in Section 31-7-14 (1) (b) of the Mississippi Code of 1972, as amended. It is recommended that the entity use the RFQ template located in the MDA Energy Savings Performance Contracting Manual.

- (B) The entity shall notify the MDA-ENRD in writing in advance of its determination to issue an RFQ to develop an Energy Saving Performance Contract or a Shared Savings Contract project.
- (C) The entity may request, at its discretion, that the MDA-ENRD reviews its RFQ before it is published, but if not, the RFQ must be forwarded to MDA after it has been published.
- (D) Any entity intending to contract for a shared savings or energy saving performance contract for energy services must advertise once each week for two (2) consecutive weeks in a regular newspaper published in the county or municipality in which such entity is located. On the same date that the notice is submitted to the newspaper for publication, the agency or governing authority involved shall mail written notice to or provide electronic notification to the main office of the Mississippi Procurement Technical Assistance Program under the Mississippi Development Authority that contains the same information as that in the published notice.
- (E) The MDA-ENRD shall review each contract pursuant to code 31-7-14 (4) (b) and approve those it determines to be in compliance with the code, this policy, and these guidelines.
- (F) No energy saving performance contract or shared savings contract shall be valid until approved by the MDA-ENRD in writing.
- (G) The MDA-ENRD will not approve any energy saving performance contract or shared savings contract that does not generate verified quantifiable and measurable energy and/or operating costs savings as defined above.
- (H) Project documentation must be submitted to the MDA- ENRD for review and comment. The documents to be submitted include: 1) Technical Energy Analysis; 2) final contract, and 3) Measurement and Verification (M&V) Plan. If any of the above listed documents are not submitted together, MDA-ENRD will not accept the project and will send a letter to the governmental entity to inform them that the review process will not begin until all required documents are submitted.
- (I) Contracts submitted to MDA-ENRD shall be signed by both parties. Unsigned or partially signed contracts will be returned to the governmental entity. The governmental entity shall submit documentation of board or council approval of the submittal of the proposed project to MDA-ENRD for review with the project packet.
- (J) The use of a 3rd party engineer or engineering firm to specifically review M&V is a requirement for state agencies with energy savings performance contracts. Third party review is optional for other public entities, but it is highly recommended. The third party reviewer must be chosen by the entity without input from the ESCO. The 3rd party reviewer must be neutral and the review of M&V must be paid out of the savings, not paid by the ESCO or the governmental entity.

- (K) The Technical Energy Analysis must be signed and stamped by a professional engineer registered and licensed to practice in Mississippi.
- (L) The MDA-ENRD initial review process will begin and commence immediately upon receiving a complete set of documents in our office or via email. MDA-ENRD will send written correspondence to the governmental entity acknowledging receipt of review documents.
- (M) MDA-ENRD will attempt to complete review within forty-five (45) days of receipt of a complete package as outlined in (viii) above; however, this is heavily dependent on the responsiveness of the entity and ESCO to questions posed throughout the review process.
- (N) The entity will be provided in writing any questions and comments raised by the MDA-ENRD during its review process. The entity will be required to respond to these questions and comments in writing within ten (10) business days. Although it is the intent of MDA-ENRD to work with an entity to resolve any issues in a timely manner, if MDA-ENRD has not received a response from a review report after fourteen (14) business days, a decision on the remaining issues will be made based on the latest available data.
- (O) Direct communication (i.e., meetings, phone conferences, etc.) with the third party is acceptable – only with the governmental entities written consent and if it will be beneficial to clarify or resolve any issues that may arise during the resolution process.
- (P) Upon completion of the review process, the MDA-ENRD will issue a letter signed by the MDA-ENRD director, indicating approval or denial of the proposed project. The final contract shall be approved by MDA-ENRD, in accordance with 31-7-14 (4) (b) of the Mississippi Code of 1972, as amended.
- (Q) If a project is denied, a letter will be issued indicating the project failed to meet 31-7-14 of the Mississippi Code of 1972, as amended, and/or the policy and procedures as set forth in the Mississippi Performance Contracting Policy and Procedures Manual. A denial letter will end the review process of the proposed project. A governmental entity must restart the performance contracting project process (*see AppendixA-3*) if it is still interested in an ESPC.
- (R) Appeals Process: Entities will be given ample opportunity to provide explanations to questions from MDA-ENRD in an attempt to reach a favorable conclusion during the review process. A final determination will stand unless the entity can substantiate that MDA-ENRD did not follow 31-7-14 of the Mississippi Code of 1972, as amended, and/or the policy and procedures as set forth in the Mississippi Performance Contracting Policy and Procedures Manual. In the event that the entity believes MDA-ENRD failed to follow the Section 31-7-14 or the policies and procedures of this program, the entity will send a letter to the MDA executive director documenting its reasons that the law and/or policies were not followed. The MDA executive director, or his designee, will

make a decision as to whether to re-open the review process or to affirm the decision by MDA-ENRD. The executive director, or his designee, can only reopen the review process if there is clear documented evidence that the law or policies were not followed.

(S) Annual Energy Savings Reports are also required and must be submitted to the MDA-ENRD within 60 days of the date the reports are received by the entity. It is the responsibility of the ESCO to submit the annual reports to MDA-ENRD.

Source: Miss. Code Ann. §31-7-14 (Rev. 2015).