

DoD/EEI Model Agreement Explanation

Introduction

The attached document serves as a model for the development of formal agreements between a Department of Defense (“DoD”) installation and its Utility for the procurement of energy services on a “designated” or “sole” source basis.

The Energy Policy Act of 1992 (“EPAAct”) establishes as a federal government goal, identifying and implementing all energy and water conservation projects with a payback of ten years or less. Executive Order 12902, signed on March 8, 1994, requires all federal agencies to achieve a 30% reduction in facilities energy use and a 20% improvement in industrial energy efficiency by the year 2005.

Accomplishing the 2005 goal will result in a billion dollars of annual savings in energy and water cost and an equivalent savings in maintenance costs for the DoD. In addition, energy and water efficiency improvements will improve the installations’ infrastructure, readiness, personnel quality of life and productivity, and reduce the environmental impact of DoD facilities.

The 2005 goal benefits can be realized even though the DoD’s technical and financial resources are being reduced. EPAAct and Executive Order 12902 allow DoD facilities to obtain energy services initially paid for by the private sector and repaid by the DoD from energy and water bill savings. These energy services may be purchased from gas and electric Utilities on a “designated source” or “sole source” basis.

The legal authority for such “sole source” acquisitions comes from 10 USC 2865. On February 21 and 22, 1996, representatives of the three military services (Army, Navy and Air Force) who are involved in utility acquisition policy, legal and regulatory matters met to review the authority contained in 10 USC 2865 and its impact on the legal basis for the non-competitive procurement of energy demand management and energy conservation services from gas and electric Utilities. Those attending concurred in the following position statement and agreed to apply the statement in exercising their acquisition responsibilities within each military department:

“Contracting officers of a military department may procure on a sole source basis from gas or electric Utilities (however, not from unregulated subsidiaries of such Utilities) the design and implementation of cost-effective demand and conservation incentive programs and services including but not limited to the following:

- 1. Energy & water conservation measures including audits and surveys, design and construction, and the operation and maintenance of systems provided.*
- 2. Energy Management Services including services related to DSM, Incentive Programs, Metering, and Energy Management Control Monitoring Systems.*
- 3. The operation and maintenance of existing energy and water systems and equipment including utility distribution and collection systems, generation and treatment systems, energy related equipment, systems, and facilities for buildings and metering.*
- 4. Financial assistance*
- 5. Training*

10 USC 2865(d)(3) should be cited as the legal authority for such sole source acquisition. Any programs or services obtained shall be limited to those with a positive net present value of 10 years or less.”

Clearly, 10 USC 2865 allows a departure from some traditional contracting practices. It gives Contracting Officers the ability to sole source energy service improvements to its Utility. While Section 2865 requires the DoD to contract directly with the Utility in order for “sole sourcing” to occur, the Utility is free to hire Subcontractors, including its subsidiaries, to perform the work so long as the Utility can prove the cost reasonableness of the work to the Contracting Officer. Section 2865 also gives the DoD the option of taking title to an energy services project at any point from the time of acceptance until the project payments are completed.

In order to clarify any confusion that may arise over the unique features of 10 USC 2865, simplify the development of DoD/Utility agreements for individual installations, and provide a level of consistency, the DoD and the Utilities agreed to develop a model agreement which would serve as a guideline for the installations and their local Utilities to follow. The DoD and the Utilities initiated their model agreement discussions in December of 1995.

The attached Model Agreement was developed by a committee with representatives from the Air Force, Army, Navy, Department of Defense, several electric Utilities and the Edison Electric Institute (“EEI”). Attorneys, Contracting Officers, Engineers and other personnel from these organizations reviewed the Model Agreement and recommend it as an approved method for entering into DoD/Utility agreements.

While use of the Model Agreement is broadly recommended, there is no requirement that Utilities or the DoD agencies use all or part of it when entering into their own conservation/demand side management agreements.

The Model Agreement is structured using a task order format under which specific Task/Delivery Orders can be written. It includes recommended language for certain terms and conditions that the DoD agencies and representative Utilities have already endorsed.

The Model Agreement was drafted to provide language that had sufficient specificity to be useful but was not so narrow that it would inadvertently limit the parties’ ability to develop the broad variety of projects that will arise. For this reason, many of the Agreement’s sections defer decisions to the Contracting Officer and Utility representative with the understanding that the decisions will be resolved during the negotiation of individual Task/Delivery Orders or in some cases, the negotiation of agreements patterned after the Model Agreement.

It is important to note that the Model Agreement has been structured such that there are several ways it can be implemented. The Model Agreement may be executed as a stand alone agreement, an attachment to a GSA Areawide Utilities Contract Exhibit, or as a modification to an existing Utility service contract.

The Model Agreement and this Explanation reflect the experience of many active and successful Utilities and DoD Agencies in the area of negotiated energy services agreements. It incorporates the lessons learned by both the Utilities and the Agencies in implementing tens of millions of dollars of energy projects. This is not to say that the Model Agreement is perfect, only that it includes and reflects the lessons learned over the past four years.

The Explanation discusses in detail the reasons behind the specific terms and conditions of the Model Agreement. It mirrors the structure of the Model Agreement and intends to provide the reader with an insight as to why a particular structural approach was taken

and why certain language was included. All capitalized words are defined terms in the Model Agreement.

The Model Agreement Explanation

GC.1 Purpose. - Self Explanatory

GC.2 Definitions.

Acceptance - Acceptance can take place at the end of each Phase and at the final completion of the ECM. Acceptance is used to determine when title is transferred and when the Utility's warranty begins. Payment, however, is not triggered by Acceptance of an ECM. As explained in FP.3, payment begins only after the Government takes Possession of an ECM and the Utility successfully completes Performance Verification Testing, both of which can occur prior to Acceptance of a specific Phase.

Carrying Charge - The term Carrying Charge refers to the rate at which the Utility accrues interest on money advanced for the Feasibility, Engineering and Design and Implementation Phases.

Contracting Officer - Self Explanatory

Contracting Officer's Representative (COR) or Contracting Officer's Technical Representative (COTR) - Self Explanatory

Task Order (T.O.) - Task Orders (sometimes called Delivery Orders) are the mechanisms through which specific projects (ECMs) are negotiated and implemented.

If a DoD facility and the local Utility choose to enter an agreement patterned after the Model Agreement, they will need to write specific Task Orders or Task Orders for each ECM. These Task/Delivery Orders may include additional terms and conditions applicable only to that specific project.

Energy Conservation Measure (ECM) - ECMs consist of one or more Energy Conservation Projects (ECPs) dealing with a broad range of energy needs. An ECM should have a 10 year payback or less as required by 10 USC Section 2865.

Should this 10 year term requirement be altered in subsequent legislation, the new term should be substituted for the present 10 year requirement only for ECMs entered into after the effective date of the legislation.

Energy Conservation Measure Cost (ECM Cost) - the ECM Cost is the total project cost and consists of three major components: 1) Work (direct costs), 2) finance charges, and 3) authorized overhead, carrying cost, taxes and profit. It is this amount that is amortized to determine the Government's monthly payment if an extended payment option is desired.

Energy Conservation Project (ECP) - The ECP is a specific energy or water project. A detailed list of ECP examples is located in GC.17.

Occupied Period - Self Explanatory

Quality Assurance Evaluator (QAE) - The Government personnel responsible for monitoring completion of the ECM.

Quality Control - The process used by the Utility to ensure the ECM is correctly implemented.

Possession - Possession triggers when the warranty period begins and is an element in determining when monthly Government payments begin. While the phrase "beneficial occupancy" is given as the definition of Possession, the word "Possession" is used because it is the term used in the warranty language of the FARs. Within the context of the Model Agreement, the word Possession and the phrase "beneficial occupancy" have the same meaning.

Subcontractor - Self Explanatory

Termination Schedule - The Termination Schedule and how it is referenced within a Task/Delivery Order is critical to the interest rate the Government will be required to pay for financing. Financiers require some level of certainty such that they know how much they will be paid in the event the Task/Delivery Order is terminated. If the Government has the ability to terminate the Delivery/Task Order and it is unclear what it will have to pay to do so, financiers may charge a

higher interest rate or refuse to finance an ECM altogether. Therefore, it is essential to have an agreement and Task/Delivery Orders that make clear what the Government will have to pay at any point in time should the Government decide to terminate the Task/Delivery Order.

In the case of termination during construction financing, the parties should agree upon a termination formula (see Section FP.5) due to the difficulty in predicting the amount of construction dollars that will have been spent at any point in time.

Work - Self Explanatory

GC.3 Term - This Model Agreement may be terminated with 90 days notice by either party. Any Task Orders or other agreements entered into under this Agreement shall remain in full force and effect even after the Model Agreement is terminated. To help provide certainty to the financiers, it is important to expressly state that previous obligations will not be altered by the termination of the Model Agreement.

There is no prescribed contract term in the Model Agreement, however the parties will need to establish such a date if they choose to pattern their agreement after the Model Agreement. The parties should also decide how, if at all, their agreement will be influenced by the termination of higher level contracts such as an Areawide Contract.

GC.4 Services to be Provided by the Utility - The Utility and its subsidiaries may provide a broad range of services (described in GC.17) under the Model Agreement. Any Work performed by either the Utility or its Subcontractors must be “price reasonable” as determined by the Contracting Officer relying on FAR 15.8 for guidance.

The services to be provided for a specific ECM will generally be in Phases, including a Preliminary Audit Phase, Feasibility Study Phase, Design and Engineering Phase, Implementation Phase and Operations and Maintenance Phase. The Government may withdraw from its agreement with the Utility at any point in this staged process. Furthermore, the Government may order any Phase of services without being obligated to order other Phases. For example, the Government may have the Utility perform the Engineering and Design of an ECM and have another Contractor implement the ECM. Conversely, the Government may have an ECM designed by another firm and implemented by the Utility.

GC.5 Information - Self Explanatory

GC.6 Relationship of Parties - This Section makes it clear that the Utility and its Subcontractors are independent Contractors and are not considered employees or agents of the Government. In addition, this Section explicitly requires the Utility to ensure that Subcontractor guarantees and warranties flow to the Government.

GC.7 Subcontractor Selection - The selection process described in this Section is meant to summarize the FAR requirements for selecting Subcontractors to perform Work. The Parties should look to FAR Subpart 15.6 for guidance in selecting Subcontractors.

GC.8 Authority of Contracting Officer - Self Explanatory

GC.9 Ownership of Work Product - This Section makes it clear that the Government owns the work product at the end of any Phase of this process and is free to use that work product in any manner it chooses. One exception to this general rule may be software systems and other intellectual properties which may be proprietary to the Utility or its suppliers.

More importantly, this Section also deals with when ownership/title to Work transfers to the Government. Section (d)(4)(C) of 10 USC 2865 states, "Such title may vest at such time during the term of the agreement, or upon expiration of the agreement, as determined to be in the best interests of the United States." The Model Agreement recommends that title transfer upon Acceptance because this is often the least expensive alternative and it does not diminish the Government's ability to seek relief should the Utility improperly perform its duties under the Task Order.

The reason it costs less to take title at Acceptance is due to the treatment of the associated taxes and insurance. If the Government does not take title at the time of Acceptance, it resides with the financier which means the Utility will be responsible for paying taxes and insurance. The Utility's cost of insuring the Work and paying any taxes will be passed on to the Government thereby increasing the cost of the ECM. If the Government takes title, it will self-insure and may legally avoid personal property taxes which can represent significant savings.

There has been some concern about taking title at the time of Acceptance in the belief that if the Utility/financier retains title it gives the Government more leverage if something goes wrong. This is not the case. In the first place, the Government does not start paying the Utility until after the project is accepted. To the extent the Government is dissatisfied with the project implementation, it has all of the remedies under the FARs and has the ultimate leverage because the Utility is paying all of the implementation costs and

the Government does not have an obligation to pay until it verifies that the ECM works as designed. Once the project is complete and permanent financing is in place, the Government has an obligation to pay a fixed monthly amount. The Government's remedies at that time are governed by the FARs, just as they would be if title remained with the financier.

GC.10 Responsibility for Operations and Maintenance - This Section assumes that the operation and maintenance of equipment installed pursuant to the Agreement will lie with the Utility. However, utility O&M is simply an option and not a requirement under the Model Agreement.

GC.11 Government Projects - The Model Agreement is not intended to restrict the Government from implementing other energy projects independent of the Work the Utility will perform. Although such Work will need to be coordinated, the Government is free to pursue other energy projects on its own or with other companies.

GC.12 ECM Performance Verification - Performance verification provides the Government with assurance that the ECM will perform as designed. Each ECM should have its own measurement and verification (M&V) plan that takes into account the cost of the plan, complexity of the project and risk sharing between the Government and Utility. The measurement and verification plan anticipated in the Model Agreement would be a plan similar to Option A of the Department of Energy M&V Guidelines for Federal Energy Projects (DOE/GO-10096-248-February 1996). This alternative requires confirmation that the equipment is installed per specifications, is operating and meets all functional tests at the time of Acceptance. It does not assume ongoing M&V with subsequent adjustments to Government payments.

GC.13 Emission Credits - Self Explanatory

GC.14 Order of Precedence - This Section was included in the Model Agreement to draw attention to the need to ensure consistency or determine an order of precedence among all of the agreements that make up a relationship between a Utility and the Government. For example, what happens if the Model Agreement is written as an exhibit to an Area Wide Contract ("AWC") and the AWC is terminated? Can the Government still continue to execute T.O.s under the Model Agreement? Many of the Drafters believed that the Task/Delivery Order should take precedence over the Model Agreement which in turn should take precedence over a higher level agreement such as an Area Wide Contract. Others were concerned that such an order of precedence might be contrary to the order of precedence found in most Government contracts and would create confusion.

Due to the variety of opinions on this issue, the Model Agreement leaves it to the Utility and Contracting Officer to determine what order of precedence makes the most sense. However, this Section is included as a reminder to the negotiating parties that they need to discuss and resolve the issue of what happens if there are inconsistencies among agreements.

GC.15 Preliminary Audits - The Preliminary Audit is often the first step a Utility and the Government take in identifying economical energy projects. The Preliminary Audit is frequently provided at no cost to the Government. The Model Agreement suggests types of information the Government should expect in this phase of project identification. The parties should feel free to add to or delete from this list. The Utility may request that the Government keep the audit report confidential. While the ideas suggested in the audit are not confidential, the audit report itself may be considered confidential, if such treatment is required of other customers.

GC.16 ECM Proposal - After the Government has received the results of the Preliminary Audit, it may ask the Utility to submit a proposal detailing energy improvements available to the Government. The proposal will be prioritized and contain a number of key elements such as the cost of the project and estimated savings. Should the Government decide to proceed, the Utility and the Government will move to the Feasibility Study Phase where the ECM proposal will be further refined.

GC.17 Energy Conservation Projects (ECPs) - The list of ECPs provided in Section GC.17 reflects the range of services that Utilities can provide on a “designated” or “sole” source basis pursuant to 10 USC 2865. Section GC.17 (ss) is included to demonstrate that the types of projects listed in this Section are only examples and are not meant to be a complete list.

GC.17.1 ECM Restrictions - While 10 USC 2865 authorizes a broad range of energy services that can be provided by Utilities, there are some restrictions on those services that should be noted. Except in the cases of GC.17.1(c) and (f), all of the restrictions are unconditional. In (c) and (f), dealing with measures that result in increased water consumption and the use of electrical capacity reserved for other uses, the Model Agreement provides the Contracting Officer the flexibility to decide whether the increased energy savings are great enough to justify the use of more water or reserved capacity. For example, a Contracting Officer may elect to install an air conditioning evaporation unit which would use more water but save substantially more money on energy costs.

GC.17.2 Facility Performance Requirements of ECMs - Self Explanatory

GC.18 Task Orders - This Section describes the mechanics of how a Utility/Government relationship will work under the Model Agreement. The Model Agreement provides a format for Delivery/Tasking Orders that are issued for each ECM for a Government facility. Delivery/Task Orders will be issued for each ECM.

A Task Order can have up to five Phases - Audit (when applicable), Feasibility Study Phase, Engineering and Design Phase, Implementation Phase and Operations and Maintenance Phase. For each T.O. Phase, the Utility will provide a cost estimate and preliminary scope of services. The Government may proceed with a Phase of the T.O. only after it has received a complete scope of work and a price for that Phase from the Utility. For example, a military base may sign the T.O. and commit to move ahead with the Feasibility Phase but it is not obligated to do anything more than complete the Feasibility Study.

If the Government decides not to proceed to the next Phase, it owes the Utility the cost of the Audit, if applicable, or if not, the Feasibility Study and interest (Carrying Charge) on money used to conduct the audit or study. If it decides to move to the next Phase, the cost of the Feasibility Study and its Carrying Charge may be rolled into the cost of the next Phase. Should the Government decide to implement the project, the costs for earlier Phases will be included in the ECM Cost financing.

With respect to the O&M Phase, the Model Agreement recommends that O&M services and their scope, term, warranty and payment, be negotiated as a Phase separate from the Implementation Phase. Generally, O&M services will not be financed but will be paid out of savings generated by the project on an ongoing basis.

The last paragraph of Section 18 reflects an important part of the Model Agreement. Due to the extremely wide range of potential projects, services and combinations thereof that could be pursued under the Model Agreement, it is impossible to identify the FAR clauses, other than those listed in Section 23, that may apply to a specific Task Order. Therefore, in an effort to make the contracting process as streamlined and flexible as possible, the Model Agreement assumes that the Contracting Officers will determine what FAR provisions should be included in the Delivery/Task Order.

GC.19 ECM Feasibility Study Phase - The Feasibility Study Phase is the first step in refining the Preliminary Audit. In order to help the parties conduct a Feasibility Study that provides the Government with adequate information to decide whether to proceed to

the Engineering and Design Phase, the Model Agreement provides a list of recommended technical and cost factors that should be addressed in the Feasibility Study Phase.

GC.20 ECM Engineering and Design Phase - After the Feasibility Study Phase, the ECM is further refined in the Engineering and Design Phase. At the end of this Phase, the Utility will provide the Government with a project proposal that includes financing costs and monthly payment and savings figures.

GC.20.1 Verification of Floor Plans - The Model Agreement recommends that the Utility, with the cooperation of the Government, be responsible for verification of floor plans. By assigning responsibility to the Utility, the parties will avoid later misunderstandings about verification responsibility if the project design and floor plans are inconsistent.

GC.20.2 Government Design Review - The Model Agreement provides for Government review of the project design at least twice during the engineering and design process. It suggests, at a minimum, reviews at 35% and 95% completion and encourages the parties to decide what design reviews make the most sense for their specific ECM.

GC.20.3 Site Plans - As was the case with verification of floor plans, the Utility has responsibility for reviewing site plans if the ECM installation is outside existing buildings. It is recommended that the Utility offer a preferred site plan and at least one alternative.

GC.20.4 ECM Implementation Proposal - At the end of the Engineering and Design Phase, the Utility is required to present the Government with a detailed project proposal. The Government will need enough information from this proposal to decide whether to proceed with implementation. This Section sets forth some of the recommended elements of the proposal. This information will permit the Government to determine for the ECM such issues as technical soundness, time for performance, price reasonableness, project cost and savings and a payment and termination schedule. It is at this point that the Government will decide whether to implement all or part of the proposed ECM.

GC.21 ECM Implementation Phase - Sections GC.21.1-GC.21-9 provide language regarding key areas the Government and Utility may want to address prior to beginning the implementation phase of the ECM.

GC.21.1 Pre-Work Requirements - The first step of the Implementation Phase is for the Government and Utility to agree on how the project will proceed with respect to issues of safety, scheduling, performance, obtaining necessary permits, and administration of the Implementation Phase. It is assumed that during this step, the parties will establish a

schedule and protocol to insure that communications are effective throughout the ECM implementation process. In addition, it is recommended that the project not go forward until the Government has reviewed and approved the Utility's implementation schedule and has obtained evidence of all required insurance.

GC.21.2 Interruptions - Self Explanatory

GC.21.3 Construction Documentation - Self Explanatory

GC.21.4 Standardization of Materials - Self Explanatory

GC.21.5 Water Conservation Measures - This Section reinforces that ECMs which save water as well as energy should be pursued as authorized under 10 USC 2865. It also makes it clear that it is the Utility's responsibility to acquire local water company rebates for water conservation and credit them to the ECM Cost.

GC.21.6 Operation and Maintenance Manuals - Self Explanatory

GC.21.7 Government Personnel Training for ECPs - The Model Agreement recommends leaving the time and date of training up to the Contracting Officer and Utility. This timing will provide the flexibility to schedule the training when it is appropriate to the specific ECM. For example, if the Utility was going to perform all of the O&M on the equipment, the need to train Government personnel would be vastly different than if the Government was performing the O&M.

GC.21.8 As-Built Drawings - Self Explanatory

GC.21.9 Installation and Acceptance - This Section reinforces the notion that the Utility is the party ultimately responsible for the proper design and installation of the ECM.

GC.22 Operation and Maintenance Phase - This Section emphasizes that the O&M Phase may be separate and distinct from the Implementation Phase and that it may be an independent agreement between the Government and Utility with its own scope, terms, cost, payment and warranty.

GC.23 Required FAR Clauses - The FAR Clauses listed in GC.23 are required by law to be included in all federal government contracts and cannot be negotiated away by a Contracting Officer. They are listed to inform the Parties (especially those not familiar with Government contracting) of provisions that must be included in the agreement.

WARRANTIES AND REMEDIES

WR.1 Warranties - The Warranty Section of the Model Agreement once again reflects the philosophy that the Government should have to go to only one place (the Utility) to resolve contract performance issues. The Government should not need to pursue Subcontractors in the event an ECM is not working properly nor to be involved with determining relative “blame” if several Subcontractors are involved in an ECM performance problem during the term of the Utility’s warranty.

WR.2 No Other Warranties - This Section makes it clear that the Utility is not offering warranties in addition to the wrap around warranty and the pass through of Subcontractor warranties.

This Section also makes it clear that the Utility is not necessarily guaranteeing energy or water savings beyond the Acceptance and verification period. The Utility will guarantee that the ECM will operate as designed at the time the Government takes Possession and successfully concludes monitoring and verification procedures. While some Utilities may be interested in guaranteeing savings during the term of the Task Order, most will not for two reasons. First, ongoing performance guarantees add significant financing and operational costs to the ECM. In cases such as lighting projects, the cost of this “performance insurance” is probably not justified.

Second, ongoing performance guarantees will require the Utility to make certain guarantees to the financiers which may not be possible under the Utility’s regulatory structure or may require regulatory approval which could significantly delay the project or discourage the Utility from entering the Agreement in the first place.

Government facilities are encouraged to consider whether the additional cost and time involved with an ongoing performance guarantee (beyond the Utility’s performance warranties at Acceptance and possible ongoing O&M contract guarantees) are worth the additional cost. If the answer is yes for all or part of the project, the Contracting Officer should raise this issue as early as possible in the negotiation process.

WR.3 Utility Limitation of Liability - The limitation of liability language found in this Section is standard language for any construction contract. It stipulates that the Utility will be responsible for insuring the ECM operates as designed but that the Utility will not

be responsible for indirect or consequential damages that may arise if the ECM operates improperly. In addition, this Section points out that the Utility will not be liable if damages arise from the Government's negligence.

WR.4 Utility Default - Self Explanatory

WR.5 Prompt Payment - Self Explanatory

WR.6 Disputes - Self Explanatory

WR.7 Differing Site Conditions - Sections WR.4-7 paraphrase and reference FAR provisions that are often included by reference in contracts between Utilities and the Government. They are explicitly cited in the Model Agreement because they are important issues to the parties as well as financiers.

FINANCING AND PAYMENT PROVISIONS

FP.1 Energy Savings and Financing - It is envisioned that the savings from the ECM will exceed the payments to the Utility. The Model Agreement recognizes that the repayment period for financing of the ECM should not exceed 10 years.

FP.2 Financial Incentives, Rebates, and Design Assistance - This Section confirms that the Government will receive the same rebates, incentives and other services that other Utility customers in the same class receive.

FP.3 Calculation of Payment - Government payments will be determined using the ECM Cost. These payments will not begin until two events have occurred: 1) the Government takes Possession of the ECM and 2) ECM Performance Verification Testing is successfully completed.

FP.4 Buydown - It is critical to the financiers that the consequences of a buydown be clearly defined in the agreement between the Government and the Utility.

FP.5 Pre-Acceptance Termination - As noted elsewhere in this Explanation, financiers want to know with certainty what they will be paid should the Government terminate the Task Order prior to Acceptance. It is impossible to develop a schedule that would be able to predict how many construction dollars would have been spent at any one point in

time. Therefore the Model Agreement recommends that the parties develop a formula that can be applied to the actual dollars spent to determine what the Government will pay should it decide to terminate the Task Order prior to Acceptance.

FP.6 Post-Acceptance Termination - This Section describes what will happen should the Government terminate the Task Order. It recommends that a Termination Schedule be developed by the parties so that there will be a pre-agreed sum the Government will pay upon termination. The creation of a Termination Schedule will be critical to attracting financing and will be required by the financiers.

FP.7 Assignment of Claims - In most cases, Utilities will finance ECMs using third party financiers rather than internal cash. The financiers provide the money for the project in exchange for the Utility assigning to the financier all of the payments the Government is obligated to make under its agreement with the Utility. In order for an assignment of claims to be successful, the parties need to use specific language and follow specific procedures.

FP.8 Novation - A novation agreement is one in which the parties agree that the Model Agreement shall be binding even if the Utility is purchased by or merges with another company. The Model Agreement recommends a novation clause be considered, but it is not necessarily required.

SPECIAL REQUIREMENTS

SR.1 Environmental Protection - This Section and the ones that follow set out the Utility's and Government's obligation regarding environmental protection issues and hazardous wastes.

SR.2 Environmental Permits - It is the Utility's responsibility to acquire all of the necessary environmental permits and the Government's responsibility to help where necessary.

SR.3 Handling and Disposal of Hazardous Materials - It is the Government's responsibility to handle and dispose of pre-existing hazardous materials. The Government agrees that the Utility has assumed no obligation to search for pre-existing hazardous materials and if the Utility discovers such materials during its work, it shall stop Work and notify the Government.

SR.4 Asbestos and Lead-Based Paint - Asbestos and Lead-Based Paint may be the exception to the rule that the Government is responsible for removal of hazardous wastes.

This Section offers some suggestions as to how the Government and Utility may agree to have the Utility perform the testing, removal or abatement of lead-based paint or asbestos.

SR.5 Refrigerants, Fluorescent Tubes and Ballasts - Self Explanatory