

Disclaimer:

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GESPC-U Lesson #122:

Hammer Time: Project Implementation

FYI: Terms and Acronyms can be found on the last page

Summary: The construction phase of a performance contract is when the agreed to strategies and improvements identified because of the background research in the IGA are put into practice. In this lesson we will outline some of the best practices that should guide this phase of the project.

We've reached project implementation, or what is otherwise known as the construction part of a performance contract.

Having researched, audited, engineered, planned and prepared, reviewed, approved and signed the GESPC contract, and separately, executed a financing agreement -- it's time to start implementing the improvements the owner and ESCO worked so hard to finalize. But before the hammers start swinging, let's outline what should guide this part of the process.

Repeatedly, we've referenced the template documents displayed on our website. Noticeably absent from the collection of instruments, is a construction contract; the terms and conditions, guidelines and processes that bound construction. And the reason there isn't one is pretty simple. You probably already have one!!!

GESPC is novel as it combines the requirements of design, with the obligation to build and achieve or exceed the efficiency and performance of what is proposed. For public practitioners, this single point responsibility model along with its accompanying guarantee to achieve, yields a paid-for-by-savings model using funds already budgeted for operations, maintenance and utilities. But construction -- well, Owners already know how to do that.

Cities, counties, universities, schools, special districts, and state agencies all have years and years of experience building, retrofitting and remodeling their systems and infrastructure. They've got contracts that define, guide, even direct quality and process. Many have form sets, invoice guidelines, meeting and minute requirements -- even particular guidance on closeout, commissioning, training and managing warranty considerations.

Way back when the ESCO selection phase was in process, it should have been made clear that the ESCO is required to follow the owner's construction contract, as it is part of the performance contracting set of documents. In this way, all parties are aware of what is expected and required to meet or exceed the quality and process standards for the project. Folks who construct and maintain facilities and systems deserve to know the project will meet or exceed the quality standards of every other project and the ESCO will follow the processes and procedures customary to the institution or agency. Projects do well when the facility professionals have an oversight role in the project construction and closeout. In the end, they will literally inherit the work.

Once again, the term that comes to mind is partnering. When facilities professionals provide input into design considerations, product and subcontractor selection, along with oversight of the construction following their documented processes and procedures, both the Owner and the ESCO benefit. In fact, many large institutions have complete construction manuals that must be followed as a part of their construction contract. Manuals with standardized forms, application for payment and other essential paperwork that allows them to document consistent process seeking quality projects and fair value for the constituency they serve. Just another example of managed expectations and transparency to garner the best possible project results.

As a minimum, these construction contracts layout the terms and conditions of providing construction services for any project the Owner implements. And, they should make it clear that these terms and conditions will apply to all subcontractors, delivery personnel, manufacturers' representatives -- everyone associated with this project. Construction contracts generally outline what information is required prior to the commencement of work, adherence to construction schedules as well as the impact of any delays -- approved or otherwise. Other examples typically include guidelines on access to the site and safety measures to be followed. They'll also address matters such as permit requirements, submittals and substitutions, cleanup, and work inspections and approvals.

Construction contracts also speak to the concept of change orders. For GESPC projects, special attention should be paid to this concept. The industry has long held that these projects cannot be subject to change

orders since they are paid for by the very savings or avoidance of costs they create. And while we all know there will likely be some sort of changes that are required as construction proceeds, the mandate that the price cannot exceed that which the project can pay for establishes a guaranteed maximum price. Further, because the ESCO was the responsible party to investigate the site and create the design guiding the work of the project, they can hardly be allowed to request a change order for what they didn't envision. To be fair, if there is something not concrete in the scope of work, it should have been pointed out for consideration in the Investment Grade Audit and Project proposal. As a matter of fact, this whole concept of single point responsibility and eliminating change orders is a big advantage of using performance contracting.

Another specific area construction contracts manage is invoicing and progress payments. Most specify the forms to be used, the process to follow and what is and is not allowable regarding claims, liens and ownership of the work. This includes the timing or pay schedule for approved invoices, making it clear to all, just how payment will be applied for, reviewed, approved, and paid, and point out circumstances that might warrant withholding payment. And importantly, the how, when, and what will be required for final project acceptance, close out, and payment. If you are a small governmental unit dealing with a large ESCO, do not feel pushed to pay the ESCO on their invoice schedule. Stick to the one you have always used and make ESCO adhere to how you normally reimburse for construction projects. You oversee the money.

Finally, construction contracts generally address a set of vitally important considerations like, termination both for cause and for convenience, tax obligations if any, insurance and required bonds, indemnification, the management of disputes and consequential damages.

So, you can see why it is essential any performance contracting project contain the Owner's, agency or institution's standard construction contract and all parties come to agreement on any language conflicts that might arise from any of these project instruments prior to beginning construction.

We all can agree how important the construction contract is and realize performing the work may not be any easier than getting the paperwork right, but we know for sure even when the work proceeds flawlessly, if there is confusion about who is responsible for what and why, things just won't go well.

Once you feel comfortable with the information above, please scroll down and complete the quiz below. Email your answers to Reid Conway at reid.conway@ncdenr.gov. If you have additional questions, feel free to include them as well.

Lesson 22 Quiz

1. Why are construction contracts absent from the GESPC documents?
2. Construction processes in states, cities, counties, and other institutions typically contain a host of guidance

regarding construction projects and practices. List some of the guidance that they generally provide.

3. True or False; construction contracts are specific and only apply to the ESCO, not the subcontractors or other personnel engaged in the project implementation. Why or why not?
4. When is the best time to inform the ESCO about the requirement to use an internal (owner) construction contract as a part of the GESPC process?
5. True or False; change orders are considered inevitable in a traditional construction project.
6. What bounds the consideration of a change order in a GESPC project?
7. True or False; it is quite common in public contracting to prepay for work not yet performed. Why or why not?

Terms and Acronyms

3 rd Party	3 rd Party Engineer
COS	Council of State
DOA	NC Department of Administration
DPI	NC Department of Public Instruction
ECM	Energy Conservation Measure
ESA	Energy Services Agreement
ESC	Energy Services Coalition
ESCO	Energy Service Company could be interchangeable with QP
ESPC	Energy Saving Performance Contracting
GEPC	Guaranteed Energy Performance Contracting
GESPC	Guaranteed Energy Saving Performance Contracting
GS	General Statute
GU	Governmental Unit
IGA	Investment Grade Audit
IPMVP	International Performance Measurement and Verification Protocol
LGC	Local Government Commission (Housed in the Treasurer's Office)
LGU	Local Governmental Unit
M and V	Measurement and Verification
OR	Owner's Representative
OSBM	NC Office of State Budget and Management
PC	Performance Contracting
Pre-Bid	Meeting held prior to the bid opening
QP	Qualified Provider could be interchangeable with ESCO
QR	Qualified Reviewer
RFP	Request for Proposal
SEO	State Energy Office
UNC	Refers to the UNC System
USI	Utility Savings Initiative