



THE SCHOOL DISTRICT OF
PHILADELPHIA

BOARD OF EDUCATION
Office of Capital Programs
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Addendum No. 6

**Subject: Guaranteed Energy Savings Act (GESA) Contract
Inclusive of Energy Efficient Building Upgrades
GESA-1 PROPOSAL DUE DATE: December 21, 2018**

**Location: Conwell Middle School, Gompers Elementary School, Lincoln High
School**

This Addendum, dated December 21, 2018, shall modify and become part of the Contract Documents. Any items not mentioned herein, or affected by, shall remain strictly in accordance with the original document.

1. **7.5 - Please add “The performance and payment bonds apply only to the installation portion of the contract and do not apply in any way to energy savings guarantees, payments or maintenance provisions, except that the performance bond shall guarantee that the installation will be free of defective materials and workmanship for a period of twelve (12) months following completion and acceptance of the work”.**
- **Not accepted. The School District of Philadelphia (“School District”) clarifies this provision as follows. Payment and performance bonds, by their very definitions, would not apply to amount of energy savings guarantees, which are undetermined at time of GESA Contract award. However, performance bond would extend to contractual obligation to provide an energy savings guarantee under GESA Contract. Payment and performance bonds would cover contractual payment and maintenance duties under GESA Contract. The Pennsylvania (“PA”) Guaranteed Energy Savings Act (Appendix A to the GESA RFP), at Section 3753(F) states: “A qualified provider to whom a contract is awarded shall give a sufficient bond to the government unit for its faithful performance. ... All other Government units [non-Commonwealth agencies] shall obtain such bonds [security and performance bonds] in accordance with the Act of December 20, 1967 (P.L. 869, No. 385), known as the Public Works Contractors’ Bond Law of 1967” (“Bond Law”). Because the School District is a “political subdivision” – not a “Commonwealth agency” – under PA law, contractors must obtain**

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bonds in accordance with the Bond Law. Sections 193.1(a)(1) & (2) of the Bond Law requires contractors to provide a separate performance bond and a separate payment bond “equal to one hundred percent of the contract amount”. The performance bond guarantees “the faithful performance of the contract in accordance with the plans, specifications and conditions of the contract”. The payment bond guarantees “the prompt payment of all ... material furnished or labor supplied or performed in the prosecution of the work”. The School District also requires a separate maintenance bond, equal to ten percent of the contract amount, which guarantees that the contractor will remedy defects in the contract work that develop during a period of one year from the date of final completion and acceptance of the work performed under the contract.

2. 7.5.4 - Please provide a copy of the required form of payment and performance bonds.
 - Attached are the required Performance, Payment and Maintenance Bonds (1/19 version).

3. 16 - We believe the reference to Guaranteed Period should be based on the Acceptance Date. Using Guaranteed Period results in a potentially varying term due to the School District’s ability to extend the period pursuant to Article 4.4. Also, please clarify the expectations for “operation”, which could require full time staffing to operate controls, lighting, etc.
 - Not accepted. The potential distinction between Guarantee versus Acceptance is immaterial and shouldn’t be a cause for concern for the ESCO. The expectations for “operation” do not require full time staffing. It is simply intended for the School District and the ESCO to cooperate to ensure building operations are not disturbed by interruptions of critical services (for example, heat in the winter).

4. 19.1.2 - There is reference to an ISO form “(including Liability for Employee Injury assumed under a Contract provided in the standard ISO policy form)” that is no longer in use. Please strike this language or clarify the required coverage.
 - Accepted.

5. 19.1.2(e) - Our commercial general liability has an exclusion for EIFS – please allow for “in the alternative, coverage for EIFS can be provided by ESCO’s Pollution Liability Policy.”
 - Accepted.

6. 19.1.4(c) - We request that “including full coverage for mold/fungus, EIFS” be removed, coverage is excluded from the general liability policy and covered by the pollution policy.

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- Accepted.
- 7. 19.1.5 - Please add to the end of the last sentence “or a property policy incidental course of construction/installation floater”.
- Accepted.
- 8. 19.1.7(c) - This references Occurrence Form but 19.1.7(a) indicates a claims made policy. Please remove the reference to Occurrence Form as our policy is claims made.
- Accepted.
- 9. 19.1.9 - Environmental Liability Insurance - this is the same as our 19.1.7 Pollution Liability Insurance coverage. Please confirm that one policy can satisfy both requirements.
- Accepted.
- 10. 19.1.10 - This requires all self-insured retentions to be \$50,000 - please increase to \$250,000 as our current general liability deductible is \$250,000.
- Accepted.
- 11. 19.1.14(a) - Please add to the beginning “With the exception of professional liability,” It is industry standard that professional liability policies don’t provide this waiver.
- Accepted.
- 12. 19 - The RFP reference \$3M aggregate for Automotive Liability. Our policy is \$1M but we could provide the balance through umbrella coverage. Please confirm this is acceptable.
- Accepted.
- 13. 20 - Please revise the ESCO indemnity so indemnification is for third party claims for damages arising by reason of physical injury or property damage that are caused by ESCO’s negligence or willful misconduct. Please insert a mutual indemnity from the District. We would also look to include ESCO liability limits and would propose a liability cap equal to the sum of payments received under this agreement. ESCO liability in tort should be limited to proceeds of insurance maintained pursuant to this agreement.
- Not accepted. Indemnification language is not negotiable. GESA RFP, page 3, states: “ANY AND ALL LANGUAGE SURROUNDING INDEMNIFICATION IS NON-NEGOTIABLE.”

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14. 20.1 - Please delete the phrase “regardless of whether or not it is caused in part by a party indemnified hereunder” – we do not believe the ESCO should be responsible for full indemnity where there is some contributory negligence.
 - Not accepted. Indemnification language is not negotiable. GESA RFP, page 3, states: “ANY AND ALL LANGUAGE SURROUNDING INDEMNIFICATION IS NON-NEGOTIABLE.”

15. 24.8 - Please add language referencing accrued payments will be made up to termination.
 - Not accepted. No change is required. The ESCO is protected per Section 24.6: “...the ESCO shall have the right to submit a claim to the School District for the payment of costs for all Work performed and expenses incurred...”

16. 26.2 Please add “except that such failure, if corrected or cured within thirty (30) days after written notice by School District to ESCO demanding that such failure be cured, or begun curing in instances where the default cannot be cured within 30 days, shall be deemed cured for purposes of this Contract” to 26.2(d), (g), and (j).
 - Not accepted. No change is required. This language is already incorporated into Section 26.3.1 because the ESCO has 30 days to cure the default.

17. 27.2(d) Please add reference to all limitations on liabilities (i.e. Sections 20 and 28).
 - Not accepted. Indemnification language is not negotiable. GESA RFP, page 3, states: “ANY AND ALL LANGUAGE SURROUNDING INDEMNIFICATION IS NON-NEGOTIABLE.” Sections 20 and 28 will be read together as required by PA contract interpretation law.

18. 29.2 Please add that District approval not to be unreasonably withheld for assignments or delegation. Also, please add that District consent is not required for assignments to affiliates or assignments of payment rights to a lender.
 - Not accepted. The School District has the right to decide which entity the ESCO delegates its duties to. PA Guaranteed Energy Savings Act, at Sections 3753(a) and (d), requires the School District to enter into a guaranteed energy savings contract with “a qualified provider” and to select “the qualified provider that best meets the needs of the governmental unit [School District] in accordance with criteria established by the governmental unit [School District]”.

19. 33.2 Please confirm that all proposers are to include this amount in their proposals, or identify that this will be subject to discussion during the audit phase of the project.
 - Proposers shall include an amount of Hazardous Material Abatement contingency that will be needed for their proposed scope of work. The amount shall be determined by the Proposer and will be finalized during the IGA phase.

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20. 37.19(i) Please add a cure period and diligent pursuit language similar to 26.3.1.
- Not accepted. This is the required language for the School District's Tax Compliance Policy. Contract provisions for the School District's Tax Compliance Policy were approved by the School Reform Commission (School District predecessor governing body), and are binding on the Board of Education [School District current governing body] and the School District.
21. 52.11(b) Please clarify intent of language and consider deleting the first sentence. Construction managers and professional staff often drive personal vehicles to the project site.
- Not accepted. Parking on school property is reserved for School District employees working at the school (e.g., principal, teachers). After hours' use of the parking area is permitted to contractors and consultants, etc., engaged in work at the specific properties.
22. Schedule D Please clarify the intended payment terms as the project is implemented. Will the District allow for percent complete billing, subject to the retainage language in Section 5.5.1?
- Yes. The School District will allow for incremental percentage billing on a completion basis.
23. Section 7.2 (pg. 16): For purposes of clarity and to ensure the Project Manager is solely responsible for both rejecting and accepting Work, ESG suggests that the third sentence in Section 7.2 on page 16 be modified as follows: "The Project Manager shall in all cases be determine the amount, quality, acceptability, and fitness of the several kinds of Work and materials which are to be paid for under the Contract, and shall have authority and solely responsible for accepting or discretion to rejecting all Work and materials which in his or her opinion do not conform to the requirements of the Contract."
- Not accepted. Language clearly explains that ESCO is looking at amount of work, quality of work, acceptability of work and fitness of work when making decision to accept or reject work.
24. Section 7.5 (pg. 21): Because of the nature of performance contracting, it is important to ESG's surety that the Contract clearly describes the scope of the performance, labor and materialmen's bond. ESG suggests the following clarifying sentence be added to the end of Section 7.5: "Notwithstanding any other provision of this Contract or the bonds, in no event and in no manner shall coverage under the Performance/Construction Bond extend to the ESCO's Energy Savings

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- Guarantee.** If the School District desires ESG to seek pricing for a prospective annual Energy Savings Bond, we are happy to do so.
- Not accepted. Performance/Construction Bond extends to ESCO's contractual obligation to provide an energy savings guarantee under GESA Contract. School District bonds contain clear language indicating what these bonds cover.
25. Section 21.1 (pg. 51): To clarify ESG is not responsible for wholly unrelated damage or accidents, ESG requests the end of the first sentence in Section 21.1 be revised as follows: "...whether such damage or accident is due to the ESCO's own negligence or that of its servants, agents, employees, or representatives, or whether such damage or accident be due to the inherent nature of the Work ~~or whether such damage or accident be due to other causes.~~"
- Not accepted. Language "or whether such damage or accident be due to other causes" covers damages, accidents, or injuries due to "breach of the GESA Contract", "errors or omissions" and "intentional acts", which ESCO is liable for under PA law.
26. Section 25.1 (pg. 56): ESG believes that termination for convenience should require a longer notice period except for bona fide emergencies of the School District. ESG suggests revisions to the Section 25.1 as follows: "The School District may, at any time which does not involve a bona fide emergency situation requiring immediate termination for convenience, upon ten-thirty (130) calendar days' written notice to the ESCO, terminate ...".
- Not accepted. School District has unqualified right to terminate GESA Contract for convenience, at any time, and for any reason, under PA law. 10 calendar days is a reasonable time under the circumstances for School District notice to ESCO of its intent to terminate contract for convenience.
27. Section 25.2 (pg. 56): ESG takes exception to Paragraph 25.2. of the Contract. If the School District exercises its right to terminate this Contract for convenience, in addition to paying ESG for Work performed to the date of termination, ESG requests the following sentence be added to Section 25.2: "ESG shall also be entitled to payment from the School District for reasonable, verified demobilization expenses, as well as any expenses incurred to terminate subcontracts and contracts with suppliers."
- Not accepted. School District does not pay for these types of costs when it exercises its legal right to terminate for convenience its design and construction contracts. Under PA law, School District is not liable for payment of these costs because it has the unqualified right to terminate contracts for convenience, at any time and for any reason. Inclusion of these types of costs also conflicts with express language in Section 25.4.

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28. Section 27.2 (pg. 60): ESG believes it is fair and in conformance with standard construction practice to include the right to cure a properly noticed Event of Default. As such, ESG requests the beginning of Section 27.2 be modified as follows: **“In the Event of Default by ESCO and following the School District’s notice of such Event of Default and ESG’s failure to cure the same within ten (10) days thereof, the School District shall have the choice of one or more of the following remedies without waiving any other rights or remedies in law or equity:...”**
- Not accepted. This issue is covered in Section 26.3.1. 30 days – not 40 days – is the time period for the ESCO’s curing of contract defaults under the GESA Contract.
29. Section 28.1(b) (pgs. 61-62): ESG believes there is an ambiguity with respect to the impact of the parties’ waiver of consequential damages. ESG requests the last sentence of Section 28.1(b) be modified as follows: **“...the assessment by the School District of penalties ~~or~~, liquidated direct damages, ~~or other damages when applicable in accordance with any provision of this Contract.~~”**
- Not accepted. Language “or other damages when applicable in accordance with any provision of this Contract” covers damages for “breach of GESA Contract”, “errors or omissions” and “intentional acts”, which ESCO is liable for under PA law.
30. ESCO Limitation of Liability: Due to the incredibly expansive nature of the School District’s required indemnity provision. ESG asks the School District consider its request that the Contract contain some form of limitation of liability in favor of ESG. ESG’s standard provision, which it is not unwilling to negotiate in an appropriate circumstance, follows: **"The aggregate total liability of Contractor on all claims, whether in contract, warranty, tort, strict liability, indemnity or otherwise, arising out of the performance of this Contract, shall in no event exceed the Contract Sum. NOTWITHSTANDING ANY OTHER PROVISION CONTAINED IN THIS CONTRACT TO THE CONTRARY, IN NO EVENT SHALL CONTRACTOR OR SCHOOL DISTRICT BE LIABLE FOR INDIRECT, CONSEQUENTIAL, SPECIAL, SPECULATIVE, PUNITIVE OR REMOTE DAMAGES INCLUDING, BUT NOT LIMITED TO, LOSS OF PROFITS OR REVENUE, COSTS OF CAPITAL, AND DOWNTIME COSTS."**
- Not accepted. Limitation of Liability provision conflicts with Indemnification provision in GESA Contract. Indemnification language is not negotiable. GESA RFP, page 3, states: **“ANY AND ALL LANGUAGE SURROUNDING INDEMNIFICATION IS NON-NEGOTIABLE.”**
31. Dispute Resolution: ESG requests that with the exception of bona fide emergency scenarios involving requests for injunctive relief, that some form of contractually required mediation or other informal resolution attempts be included as a

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precondition to either party's decision to file suit. ESG has found in working with thousands of customers over roughly 25 years that nearly all disagreements are capable of being resolved when rational decision-makers sit down to discuss their grievances, their options and opportunities to resolve them.

- Not accepted. This issue is covered in Section 28.2 at Subsections (b), (c), (d) and (e).
32. **Insurance Requirements:** ESG believes its standard insurance policies and endorsements, or a combination thereof, will provide coverage commensurate with the requirements of the proposed GESA. ESG reserves the right to seek clarifications from the School District on behalf of its insurer concerning future Contract terms discussions.
- Not accepted. The School District's Director of Risk Management has determined the acceptable insurance coverages and provisions for the GESA Contract and has provided the acceptable insurance coverages and provisions for the GESA Contract, which apply to all Proposers, in the GESA Contract itself. Under PA law, Proposers are required to request changes or clarifications of insurance provisions in the GESA Contract during the public RFP procurement process and are barred from attempting or seeking to negotiate or make changes to these insurance provisions after award of this public contract. Doing this would violate the "common standard" requirement for procurement of public contracts.

End of Addendum #5