



# Guideline for Tenders for Energy Performance Contracts

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# Foreword

In partnership with the Ministry of the Interior and Kingdom Relations, Netherlands Enterprise Agency (Rijksdienst voor Ondernemend Nederland, RVO.nl) is implementing the Energy Efficiency Directive in relation to the promotion of energy services.

RVO.nl has prepared reports in the past regarding the many opportunities in improving the sustainability of social properties through energy performance contracts. Yet, the market is only slowly developing.

In the case of energy performance contracts, it is highly imperative for the government to act as a launching customer, so as to communicate the policy regarding energy services and to assist the market in its development in this manner. This requires professional project commissioning.

This guideline is intended to make a contribution to the resolution of the bottleneck concerning invitations for tenders for energy performance contracts.

This guideline, reviewed by the consultative group, is new in the Netherlands and very useful for authorities, as well as for market parties that will respond to such invitation.

Selina Roskam

## Colophon

Version number	1.0	Consultative group	Caspar Boendemaker (BNG) Ivo Booijink (Ernst & Young) Paul van Dorp (Van Dorp Installaties) Thomas van Egmond (PPS Support)
Location	www.rvo.nl/esco		Marijke Menkveld (ECN) Claudia Reiner (Uneto-VNI) Henk Wijnen (PIANOo) Ruben Zonnevrijlle (Cofely Energy Solutions) Ton Marijnissen (Dutch Government Real Estate Agency)
Project leaders	Selina Roskam		
Contact person	J.S. Roskam MSc. Croeselaan 15   3521 BJ Utrecht   The Netherlands PO Box 8242   3503 RE Utrecht		
The Netherlands			
Appendices	4		This publication has been prepared by RVO.nl as a part of the Energy Conservation in the Built Environment programme of the Ministry of the Interior and Kingdom Relations.
Authors	Boot Advocaten		

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## Introduction

Energy performance contracts are being concluded with increasing frequency in the Netherlands. The energy performance contract functions as a contractual framework for the implementation of a guaranteed energy cost savings. The executing party is sometimes also referred to as an Energy Service Company or ESCo.

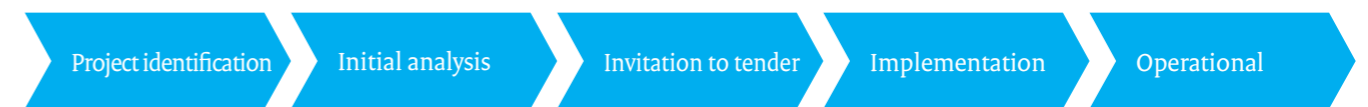
Energy performance contracts are often integrated contracts, which can comprise construction work in the building envelope, the supply of systems and energy, financing, management and maintenance services, and energy conservation guarantees. For contracting authorities that must or want to invite tenders for an energy performance contract, the question is how to do this: What are the suitable tender procedure, requirements, and criteria? The complexity of many energy performance contracts causes the standard procedures, requirements, and criteria for invitations to tender to be less suitable and the entire procurement process to require more preparation.

This guideline provides a step-by-step description of the process of achieving an energy performance contract. It specifically deals with the applicable rules governing tenders, suitable procedures, and examples of criteria for selection and award for the invitation to tender (tendering phase) for energy performance contracts.

## 1 Procurement Process

The invitation to tender for an energy performance contract is one of the phases in the overall process of achieving an energy performance contract. It is very important to complete the preparatory phases in order to achieve a proper invitation to tender and ultimately a successful project. The following steps can be identified in the process of realising an energy performance contract.<sup>1</sup>:

last three years, at the least, as well as hours of use and comfort settings, are required. This information serves to establish the so-called baseline. The conservation guarantee will be determined later in comparison to this baseline. Existing contracts that relate to maintenance or energy management must also be assessed. Setting up a project organisation, including user, and exploring the market are also part of the preparation.



### Project Identification

This first step entails the identification of an energy conservation project and the collection of the required information. This step begins with data collection:

1. Information about the building: functional use; floors; Material Take Off List Gross Floor Area (GFA), Net Internal Area (NIA), and Gross Internal Area (GIA); hours of use; year of construction; year of renovation; existing leases and maintenance contracts; and gas and electricity consumption (a more extensive list can be found in Appendix 1);
2. Information about engineering: HVAC systems, lighting, building physics and building management system, prior recommendations;
3. Financing: internal financing or attract (partial) external financing.

Contracting authorities must realise that contractors and (their) financiers require a large quantity of information to be able to submit a qualitatively sound tender and to conclude an energy performance contract. This information must be gathered and made available at the beginning of the tender procedure.

Furthermore, it is important to identify the objectives of the organisation. Does achieving the energy-saving objectives of an organisation require an energy conservation project? This initial step also entails an assessment of the possible types of contracts; traditional or through an energy performance contract. What does selecting an ESCo mean? What are the advantages and disadvantages? What is the scope of the project (number of property objects)?

### Initial analysis

The technical and economical feasibility of the project is analysed in this phase. The technical conservation measures desired will be identified. It is possible that there is an energy audit available that has already assessed this. Data of the energy consumption over the

### Invitation to tender

The procurement or invitation to tender can be prepared once a project has been identified, a first analysis of its feasibility performed, a project organisation set up, and an (initial) exploration of the market performed. The applicable rules governing tenders, whether an invitation to tender should be issued, and the type of tender procedure to be used should be determined. In addition, it must be decided how the contracts will be specified, which requirements will be imposed on the contractor, and which award criteria will be used when assessing the tenders. Furthermore, the conditions of contract and tender must be prepared. Moreover, the dates and terms must be determined. This concerns the phase in which the energy performance contract is launched. The present guideline deals with that phase.

### Implementation of measures

The implementation phase concerns the implementation of the energy-saving measures. This also includes setting up a measurement and verification system to measure energy consumption and to make it possible to quantify the energy conservation.

### Operational phase

The operational phase revolves around contract management: organisation of maintenance and administration, resolving defects, measurement and verification of conservation, guaranteed or not, and the payment of the agreed instalments. The contracts for this phase are crucial and determine in part the eligibility for financing.

*“For the invitation to tender, determine how the energy performances should be financed. An energy performance contract with external financing offers more powerful incentives, while imposing at the same time more stringent requirements on the preparation of the invitation to tender. No pain, no gain.” – Caspar Boendermaker, BNG Advies*

<sup>1</sup> Source: Transparens Energy Performance Contracting Guideline

## 2 Tendering phase

### 2.1 Rules governing tenders

In principle, the provisions of the Dutch Public Procurement Act 2012 (Aanbestedingswet 2012) govern the commissioning by a Dutch government institution or body governed by public law of the performance of energy conservation services<sup>2</sup>. The Public Procurement Act does not apply to purely private clients. Even when an energy performance contract does not fall within the scope of the Public Procurement Act, it is still subject to the principles arising from European law.

If the contracting authority has prepared and published its own tendering policy, then that contracting authority must also take into account the obligations arising from that tendering policy, in addition to the rules and principles governing tenders described here.

Finally, regarding the regulatory framework, it should be noted that three new European tender directives have been published in March 2014. The national legislators have until 18 April 2016 to transpose these directives into national measures. This guideline does not yet take into account these directives, as it is not yet clear how the Netherlands will transpose them into national measures.

### 2.2 Obligation to put out to tender

The Public Procurement Act imposes an obligation to organise a European invitation to tender if there is (i) a department inviting tenders, (ii) which awards a public contract (iii) that exceeds the European threshold values and (iv) that is not subject to an exception.

#### 2.2.1 Qualification of department inviting tenders

Regarding the application of the rules governing tenders, a distinction is made between the 'classic' departments inviting tenders<sup>3</sup> and the special-sector companies<sup>4</sup>.

Special-sector companies are subject to a special regime. The differences that are relevant are higher threshold values and the possibility for special-sector companies to opt by default for a negotiation procedure with prior notice (refer to 2.3) in addition to the open and private procedure. Since most cases discussed in this guideline fall within the regular regime of Part 2 (department inviting tenders and public procurement) of the Public Procurement Act, the regular regime will be used as the guiding principle in this guideline. Since both regimes have the same foundation, this guide will also be very useful for special-sector companies.

#### 2.2.2 Kwalificatie van een energieprestatiecontract

An energy performance contract with an ESCo can assume many forms. It can target (i) just the implementation of energy management/monitoring (ESCo light), (ii) a single specific measure, e.g. the delivery of LED lighting (product ESCo), (iii) more radical energy-saving measures, such as the design and delivery of climate control systems (system ESCo), (iv) more comprehensive measures in the envelope of a building with construction work, renovation, and the delivery of systems (building ESCo) or of multiple buildings in an area (area ESCo). The contract can also entail the financing of work and systems, e.g. through a loan, rent or lease, as well as administration and maintenance. Since the measures to be implemented can be very diverse (solar panels, insulation, wind, biomass, management systems, and lighting, for instance), this results in a wide range of possible services, supplies, and works that can make up an energy performance contract.

*“Cofely supports frameworks like this, because it sets standards to Energy Performance Contracting. The Guide offers handles to procurement, which includes energy savings and energy performance. Cofely emphasises to think and act integrated.” – Guido Frenken, Cofely*

For the application of the European rules governing tenders, it is important to make a distinction between public works contracts, public supply contracts, and public service contracts.

- A “public works contract” pertains to (the design and) the execution of structural or civil-engineering works destined as such to fulfil an economic or technical function.
- A “public supply contract” pertains to the purchase, leasing, rent or hire-purchase, with or without purchase option, of products, potentially including the additional affixing and/or installation of that supply.
- A “public service contract” pertains to the performance of services, in which any potential products to be delivered are lower in value than those services and in which potential work to be performed is secondary in nature.

As indicated above, energy performance contracts are often integrated contracts, which can comprise construction work in the building envelope, the supply of systems and energy, financing, management and maintenance services, and energy conservation guarantees. As a result, energy performance contracts are in most cases mixed agreements, consisting of a combination of public works contracts, public supply contracts and/or public service contracts, and may even contain an concession element.<sup>5</sup>

In the case of an energy performance contract that entails works as well as supplies and/or services, the contract's main subject must be used to determine whether it concerns a public works contract, a public supply contract or a public service contract. The main subject of the contract must be determined on the basis of the essential obligations that are typical of the concerned contract. The value of the various constituent parts of the contract is merely a factor in the determination of the main subject. When the services and/or supplies are secondary to the works, it concerns a public works contract and vice versa.

The value of the supplies and/or services is decisive if the energy performance contract pertains solely to supplies and services. When the value of the services exceeds that of the supplies, it concerns a public service contract and vice versa. For that matter, this is not a factor in the determination of whether the threshold value has been exceeded, as supplies and services have the same threshold value (refer to 2.2.3).

What can be important is whether an energy performance contract qualifies as a public works contract, public supply contract or public service contract, as the determination of the presence of a European obligation to put out to tender uses different threshold values for the various types of public contracts.

#### 2.2.3 Threshold values and value estimate

The type of contract and the type of department inviting tenders determines the European threshold value to be applied. Once the contract's value has been determined, it must be checked with the applicable threshold value.

The following thresholds apply for the period 2014-2015:

	Works	Supply	Services
Special sectors	€ 5.186.000	€ 414.000	€ 414.000
Central government	€ 5.186.000	€ 134.000	€ 134.000
Local and regional government	€ 5.186.000	€ 207.000	€ 207.000

Table 1 Threshold values 2014-2015

As an example of the application of the threshold values, we use an energy performance contract with a term of 10 years with the following parts:

- Works: insulation and systems; investment: € 2 million
- Services: energy monitoring and maintenance; costs: € 100,000 + € 25,000/year = € 0.35 million/contract
- Supplies: heat and electricity; costs € 600,000/year + € 250,000/year = 8.5 million/contract

The estimated value of the supply of heat and electricity in the above example indicates that the main subject of the contract is energy conservation through the supply of energy. This would mean that the energy performance contract in this example qualifies as a public supply contract, in which the applicable threshold value (currently € 207,000 for local and regional governments) would by far be exceeded.

Box 1 Example of threshold values

### 2.3 Types of tender procedures

Contracts of departments inviting tenders of which the estimated value exceeds the European threshold values must in principle be put out to tender in accordance with the Public Procurement Act. The open and private procedures are standard procedures that can in that case be used for any contract by the department inviting tenders. The competitive dialogue and the negotiation procedures with and without prior notice are exceptional procedures that can only be used in special circumstances and for contracts with a value below the threshold value. The competitive dialogue offers the most advantages in the case of more complex energy performance contracts. It is therefore recommended by the consultative group of this guideline. The tender procedures to be selected are being expanded in the new tender directives.

The Dutch Public Procurement Act provides that the department inviting tenders must select the type of tender procedure and the enterprises to be admitted on the basis of objective criteria. The reasons for this selection must be given in writing at the request of an enterprise.

#### 2.3.1 Standard procedures: open procedure and private procedure

##### Open procedure

The open procedure is a standard procedure that can always be used. This procedure has a single round, in which all interested ESCo submit a tender. The disadvantage of this procedure is that everyone can submit a tender, which can raise the cost of the procedure and the time consumption for tenderers and

<sup>2</sup> The Dutch Public Procurement Act constitutes the implementation of two EU tender directives (2004/17/EC and 2004/18/EC).

<sup>3</sup> Departments inviting tenders include: the government (the state, a province, a municipality, a water board) and bodies governed by public law.

<sup>4</sup> A special-sector company is a department inviting tenders, a public enterprise or an enterprise or institution to which the department inviting tenders has granted a special or exclusive right, in so far as it performs an activity as referred to in Articles 3.1 to 3.6 inclusive of the Public Procurement Act (gas and heat, electricity, transport or the operation of airports and seaports, drinking water or postal services).

<sup>5</sup> The contract could also be structured as a concession. The difference with a regular (public) contract is that the consideration for the performance of the work, supply or service does not (just) consist of a payment, but of the granting of operating rights. A characteristic is that the operating risk largely resides with the operator. Concessions for works are subject to specific procedural rules, while concessions for services and supply are not subject to a European obligation to put out to tender.

departments inviting tenders. In the case of energy performance contracts, the open procedure can namely be suitable for less complex forms, such as an ESCo that solely focuses on the implementation of energy management/monitoring (ESCo light) or on a single specific measure, e.g. the supply of LED lighting (product ESCo). One of the other procedures is probably more suitable for more complex forms, in which e.g. the technical conservation measure to be implemented has not yet been selected.

#### Private procedure

The private procedure is the standard procedure in which candidates and tenders are assessed in two different rounds. The first round (pre-qualification phase) serves to select those ESCos that will be invited to submit a tender. The tenders of the selected candidates are then assessed in the second round (award phase). The private procedure is more suitable than the open procedure as energy performance contracts are often more complex contracts and require more extensive tenders. However, neither the open nor the private procedure provide ESCos with much leeway for innovative ideas. The two standard procedures are probably not the most suitable tender procedures in situations in which multiple energy-saving solutions are possible and in which one or more measures have not yet been selected.

#### 2.3.2 Exempted procedures: competitive dialogue and negotiation procedure

#### Competitive dialogue

The competitive dialogue can be used by departments inviting tenders for exceptionally complex contracts. A public contract is exceptionally complex when the department inviting tenders is objectively incapable of determining the technical resources or of specifying the legal or financial terms of a project<sup>6</sup>.

The competitive dialogue is the most suitable procedure in situations in which a department wants to put out to tender an energy performance contract for various drastic energy-saving measures, without being able to indicate in advance which solutions can resolve this or without being able to assess which technical and/or financial/legal solutions the market can provide.

When selecting the competitive dialogue, the department inviting tenders conducts a dialogue with the selected candidates for the purpose of determining the resources/solutions that are most suitable for fulfilling the needs of the department inviting tenders as well as possible. The dialogue can cover all aspects of the concerned public contract. A department inviting tenders will continue the dialogue until it has selected, after comparison if

necessary, the solutions that can fulfil its needs. After the dialogue, the participants are asked to submit a final tender for the select solution(s).

The steps of the competitive dialogue are listed below as an example<sup>7</sup>.

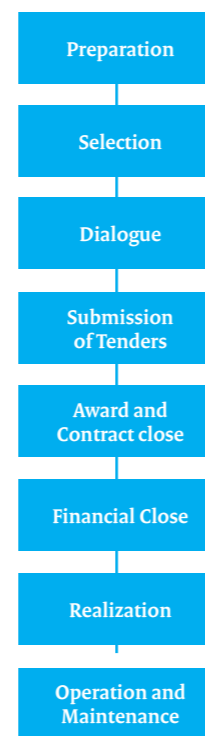


Figure 1 Steps in competitive dialogue

#### Negotiation procedure

The negotiation procedure is a procedure in which the department inviting tenders consults with the enterprises it selected and in which it determines the terms of the contract through negotiations with one or more of those enterprises. The special circumstances in which the negotiation procedure can be applied are interpreted very restrictively in the case law. The department inviting tenders that invokes one of the special circumstances must prove the existence of these circumstances.

The cases in which the use of the negotiation procedure is justified can be divided into categories: those in which a prior notice of the contract must be published and those in which no prior notice must be published<sup>8</sup>. The situations in

which the negotiation procedure can be used without prior notice do not provide justifications specific to energy performance contracts.

Two of the situations in which the negotiation procedure with prior notice may be used, may be relevant in special circumstances to putting energy performance contracts out to tender:<sup>9</sup>

- When the nature and uncertain circumstances make it impossible to determine the total price in advance;
- When it concerns a public financial services contract or a public intellectual services contract for which the specifications for that public contract cannot be determined sufficiently accurately due to the nature of the services to be performed.

With respect to the situation in which the total price can be determined in advance, the European commission notes in its Green Paper on Public-Private Partnership (PPP)<sup>10</sup> that the derogation applies exclusively to exceptional situations in which there is prior uncertainty about the nature or the scope of the work to be performed, but not situations in which the uncertainties are attributable to other causes, such as when it is difficult to determine the price in advance due to the complexity of the financial-legal structure. In situations in which the total price of energy performance contracts cannot be determined exactly in advance, the cause will often not reside (mainly) in the nature or scope of the work to be performed. It is therefore recommended to act with reticence when using the negotiation procedure to put energy performance contracts out to tender.

The derogation for financial services (including banking services) can be important when a financial service provider grants financing for an energy performance contract (e.g. bank financing for a system).

When the negotiation procedure with prior notice has been selected and justified, the department inviting tenders will negotiate the tenders submitted with the tenderers, for the purpose of adapting these tenders to the imposed requirements in order to find the best tender to award the contract to. This also reveals the practical difference between the competitive dialogue and the negotiation procedure, namely the moment of consultation and negotiation. In the negotiation procedure, the consultation occurs once the tenders have been submitted, while the consultation for the competitive dialogue takes place prior to the submission of the final tender.

## 2.4 Criteria for the selection of enterprises

#### 2.4.1 Distinction

The award of a contract within the context of the invitation to tender is divided into (a) the selection of candidates with the

required capacities by means of selection criteria, and (b) the selection of a tender on the basis of award criteria. Selection criteria pertain to the enterprise that registers or submits a tender.

Grounds of exclusion are used to check whether the candidate is subject to personal circumstances that preclude admission to the procedure. For example, enterprises that are in involuntary liquidation or that have obtained a moratorium on payments, that did not pay their taxes or social security contributions, that have committed serious professional errors or that have committed an offence. The Public Procurement Act contains a limitative list of grounds for exclusion.

Suitability requirements indicate the minimum level of the competences the tenderer must possess to qualify for being awarded the contract. The suitability requirements can be requirements that pertain to the economic and financial strength and the technical and professional competence.

Selection criteria are subsequently used in a pre-selection procedure to restrict the number of participants (shortlist) that will be invited to submit a tender.

#### 2.4.2 Grounds for exclusion

The Public Procurement Act also provides for two types of grounds for exclusion above the European tender thresholds, namely mandatory and optional grounds for exclusion. Imposing grounds for exclusion is optional under the European tender thresholds. It is not always necessary to unreservedly impose (all) grounds for exclusion for each contract. For each contract, it must be assessed in advance which (optional) grounds for exclusion are relevant<sup>11</sup>.

In the case of an invitation to tender for energy performance contracts, the grounds for exclusion that are relevant are namely those that pertain to enterprises that have repeatedly violated environmental laws and regulations and that have been irrevocably sentenced for those violations, or that can be considered to have committed a serious error in the performance of their profession, as referred to in Article 2.87, paragraph 1 (b) and (c), respectively, of the Public Procurement Act.

#### 2.4.3 Requirements with regard to financial and economic strength

The requirements with regard to financial and economic strength pertain to the strength of the candidate or tenderer and to potential third parties whose strength that candidate or tenderer can invoke. Giving substance to these requirements demands a tailor-made approach and depends on the nature, scope, and value of the energy performance contract.

The Public Procurement Act (Article 2.91) provides four pieces of evidence with which the department inviting tenders can check these requirements, namely the banker's opinion, occupational

<sup>6</sup> Article 2.28 of the Public Procurement Act

<sup>7</sup> For more information about the competitive dialogue and experiences with their use in invitations to tender for integrated DBFM(O) projects, see: The Competitive Dialogue Guide (Handreiking De concurrentiegerichte dialoog). (<http://www.rijksoverheid.nl/documenten-en-publicaties/rapporten/2009/10/01/de-concurrentiegerichte-dialoog.html>)

<sup>8</sup> Articles 2.30 and 2.32 of the Public Procurement Act

<sup>9</sup> Articles 2.30, paragraph 1, under b and c of the Public Procurement Act

<sup>10</sup> COM (2004) 327

<sup>11</sup> Guide on Proportionality (Gids Proportionaliteit), regulation 3.5A.

hazard insurance, submission of balance sheets, and a statement concerning turnover. This is not an exhaustive list. According to the law, the guiding principle is that there will be no turnover requirement, unless the department inviting tenders substantiates its necessity in the tender documents. Financial ratios can be imposed, but this should be done carefully. Due to the diversity in accounting methods and differences between industries, it is not unusual for the mutual comparability of those ratios to be problematic. Potential ratios must therefore be defined clearly in the tender documents.

The candidate is insured against business risks and has taken out a corporate liability insurance policy at the least.

Box 2: Example of financial and economic strength requirement

#### 2.4.4 Requirements with regard to technical and professional competence

The requirements concerning technical and professional competence pertain to the required competence of the enterprise for the fulfilment of the energy performance contract. The Public Procurement Act contains a limitative list of the pieces of evidence requested to prove this competence.

When imposing these requirements, it is important to find wording that fits in with the core competencies that are relevant to the fulfilment of the energy performance contract. For the verification of the technical and professional competence, the Guide on Proportionality in the Public Procurement Act prescribes the determination of core competencies that correspond to the desired experience in essential aspects of the contract. Giving substance to the technical and professional competence also demands a tailor-made approach and depends on the nature, scope, and value of the energy performance contract.

#### Certification requirements

In the context of energy performance contracts, environmental management measures at enterprises can namely be suitable to serve as evidence to demonstrate their technical capacity. Environmental management systems are tools that pertain to the enterprise itself and that target the improvement of its general environmental performance, including the use of natural resources, the training of employees, and the use of environmentally-friendly production methods.

Enterprises can have their environmental management system certified on the basis of one of the two most important environmental management systems used in the EU: The Environmental Management and Audit Scheme (EMAS) or the European/international standard for environmental management systems (EN/ISO 14001). Europe counts approximately 89,000 ISO 14001-certified organisations and approximately 4,500 EMAS-certified organisations. The EMAS certification comprises the

requirements of EN/ISO 14001 as well as additional elements pertaining to evaluation and audit, the involvement of employees, and continuous improvement of the environmental performance, and communication with the public and the employees.

The Public Procurement Act expressly offers the option to request environmental management measures as the evidence with which enterprises can demonstrate their technical capacity in appropriate cases. Appropriate cases are those cases<sup>13</sup> in which the nature of the works and/or the services justifies the application of environmental management measures in the fulfilment of the public contract. The nature of an energy performance contract will in general justify the request for an environmental management measure in an invitation to tender.

The department inviting tenders must also accept other pieces of evidence if those pieces demonstrate that equivalent measures of environmental management have been fulfilled. This means that the department inviting tenders cannot demand that enterprises have an EMAS or ISO registration or that they (fully) fulfil the requirements for registration.

A few examples of certification requirements that can be imposed in invitations to tender for energy performance contracts have been included below.

Note: Depending on the nature, scope, and value of the energy performance contract to be put out to tender, it must be determined whether and, if yes, which (combination of) model requirements (with related preconditions) are (is) applicable in a specific invitation to tender. The simultaneous use of all or multiple model requirements can be disproportional with as an undesirable consequence that none or fewer of the enterprises can fulfil them.

From the moment the candidate submits its registration and throughout the entire fulfilment period, the candidate must possess:

1. a valid certificate of an environmental management system in conformity with ISO 14001 or an equivalent;
2. a valid certificate of a safety management system in conformity with the Safety Checklist Contractors (Safety, Health, and Environment (SHE\*\*)) or an equivalent certified safety management system applicable to the mentioned works;
3. a valid certificate of a quality management system in conformity with ISO 9001:2008 or an equivalent.

This certificate must be valid on the date of registration/tender and during the entire tender procedure and the fulfilment of the contract, or be demonstrably renewable. The certificates (or a potential statement of equivalence) must have been issued by one of the institutions recognised by the Accreditation Board.

Box 3: Examples of certification requirements

#### Examples of requirements regarding experience:

A few examples of requirements regarding experience that can be imposed in invitations to tender for energy performance contracts have been included below.

Additional or other requirements can be imposed on experience when an energy performance contract has been selected in which other competencies are being requested.

Using one or more reference projects, the candidate must demonstrate that its experience consist of each of the core competencies mentioned below:

1. Experience in the analysis and design of energy-saving measures

The reference project for this core competency must fulfil the following preconditions:

- The project was completed in the last three years;
- The work performed was executed by the candidate itself or under its responsibility;
- It concerns a [utility] building;
- The gross floor area amounts (in total) to a minimum of [=].000 m<sup>2</sup>.

2. Experience in the design of energy-efficient systems

The reference project for this core competency must fulfil the following preconditions:

- The project was completed in the last three years;
- The work performed was executed by the candidate itself or under its responsibility;
- It concerns a [utility] building;
- The gross floor area amounts (in total) to a minimum of [=].000 m<sup>2</sup>.

3. Experience in the implementation of energy-saving measures, in which the work performed pertains at the least to<sup>14</sup>:

- The installation of energy-saving measures for electro-technical and mechanical systems
- Measures in the building envelope.

The reference project for this core competency must fulfil the following preconditions:

- The project was completed within the last five years;
- The work performed was executed by the candidate itself or under its responsibility;
- It concerns a [utility] building;

- 4A. Experience in the maintenance and repair of buildings and systems, in which the work performed pertains at the least to<sup>15</sup>:

- Providing for the management;
- Regular maintenance (i.e. remedial, preventive and corrective maintenance);
- Daily maintenance;
- Rectification of failures in structural parts and systems.

The reference project for this core competency must fulfil the following preconditions:

- The management and maintenance were performed for at least [two] years within the five-year period preceding the final registration date.
- The work performed was executed by the candidate itself or under its responsibility;
- It concerns a [utility] building;
- The gross floor area amounts (in total) to a minimum of [=].000 m<sup>2</sup>.

- 4B. Experience in monitoring energy performance and maintenance, in which the work performed pertains at the least to:

- The installation and management of a digital system used to measure, record, and report the energy performance of a building on the basis of a generic interchange format.
- Monitoring on at least two of the following energy flows: gas, electricity, and heat (and potentially water).

The reference project for this core competency must fulfil the following preconditions:

- The monitoring was performed for at least [one] year within the [five]-year period preceding the final registration date.
- The management and maintenance were performed for at least [two] years within the five-year period preceding the final registration date.
- The work performed was executed by the candidate itself or under its responsibility;
- It concerns a [utility] building;
- The gross floor area amounts (in total) to a minimum of [=].000 m<sup>2</sup>.

Box 4: Examples of requirements as regards experience

<sup>12</sup> Regulation 3,5 F and G: Only one reference can be asked for each named core competency and requested reference projects cannot have a value that exceeds 60% of the estimated value of the present contract.

<sup>13</sup> Article 2.93, paragraph 1, under g, in conjunction with Article 2.97.

<sup>14</sup> Based on the specific contract, it must be determined which of the activities mentioned are relevant.

<sup>15</sup> In principle, a contract will concern either management and maintenance or monitoring, so that the model experience requirement 4A or 4B can be selected in function of the situation.

#### 2.4.5 Criteria for further selection

If several suitable companies remain after verifying the registrations on their completeness, legal validity, grounds for exclusion, and suitability requirements, then the department inviting tenders can opt for restricting the number of candidates admitted to the next phase by means of (additional) selection criteria.

One potential method of restricting that number is to create a ranking of the suitable candidates on the basis of the degree in which the reference projects supplied fulfil the requested core competencies and/or the number of competencies in a single reference/project. In addition, a further assessment can be made of the extent in which the core competencies pertain to e.g. the type of building to which the contract pertains or the specific background of the contracting authority. For example: 'experience in energy conservation for office buildings/sports-centres/[other]', or 'energy conservation for buildings with a public function'.

#### 2.5 Award criteria for the assessment of tenders

The Public Procurement Act prescribes that a public contract must in principle be awarded on the basis of the criterion 'economically most advantageous tender'<sup>16</sup>. If the department inviting tenders nevertheless opts for awarding the contract on the basis of the lowest price in derogation of the previous sentence, the department must justify the application of that criterion in the tender documents. The lowest price criterion will be difficult to apply in many energy performance contracts and will require the use of a combination of award criteria, such as a reduction in energy consumption, energy cost-savings potential, term of the contract, and net present value.

The economically most advantageous tender comprises a combination of additional criteria selected by the department inviting tenders that must be connected with the subject of the contract (energy performance contract). Examples of these criteria are quality, price, technical value, aesthetical and functional attributes, environmental attributes, operating costs, profitability, customer service, and technical assistance, delivery date or date of transfer, and fulfilment period<sup>17</sup>. This is not an exhaustive list of examples.

The department inviting tenders is obliged to disclose in the notice or in the tender documents the relative weight of each of the criteria it selected for the determination of the economically most advantageous tender. In addition, it is recommended to also disclose the scoring method in advance, if possible<sup>18</sup>.

It is possible to apply award criteria on the basis of environmental conditions, provided that these criteria:

- are connected with the subject of the contract;
- do not grant unlimited freedom of choice to the department inviting tenders;
- are announced in advance;

- are not selection criteria (see 2.4);
- are in agreement with the fundamental principles of EU law, non-discrimination in particular.

#### Examples of award criteria:

Based on the award criterion 'economically most advantageous tender', two types of additional award criteria can be distinguished: quantitative and qualitative criteria. The application of both types of criteria will be preferred in most invitations to tender for energy performance contracts. Examples of both types have been included below.

Note: Which (combination of) award criteria are relevant and suitable must be determined in function of the specific contract.

#### Quantitative criteria:

Price component(s):

1. Net present value of the energy cost savings in favour of the contracting authority, consisting of:

annually guaranteed energy cost savings during the term  
-/- annual fee for the contractor (ESCo)  
+ residual value after the conclusion of the project (on the basis of NEN 2767-1:2011)  
Potentially supplementary: Energy consumption-related component

2. Lowest guaranteed energy consumption and the percentage of the use of renewable energy sources that generate capacity at the site of the building itself (e.g. solar panels and cells, biomass boilers, and wind turbines) and/or high-efficiency cogeneration: Energy consumption lower than required in the specifications/schedule of requirements.

Box 5: Examples of quantitative criteria

#### Qualitative criteria:

1. Action plan (+ presentation with explanation):

- Vision and strategy
  - Outline vision on the energy plan
  - Vision on the relationship with actors and players in the area (stakeholder analysis): involving/encouraging users, among others
  - Blueprint for organisational form
  - Future role of the contracting authority and the fulfilling parties.
- Outline business case
  - Earnings model: costs, revenues/returns, investments, eligibility for financing
  - Significance of the business case for users
  - Significance of the business case for contracting authority
  - Division of tasks and risks
- Vision on migration
  - Description of current situation and developments
  - Description of future situation
  - Strategy for dealing with anticipated and unanticipated developments
  - Opportunities and threats
  - Description of strengths and weaknesses in the business case in comparison to opportunities/threats
  - Compatibility of proposed measures with existing structures
- Maintenance and failure management plan

2. Strength of the financing concept: access to and ability to obtain financing for the implementation of the project.

3. Quality of the package of measures:

- quality of life span of the proposed installations and technical systems,
- future availability of spare parts,
- the compatibility with existing systems<sup>19</sup>, and
- the quality of the guarantees offered for equipment/systems.

4. Qualifications and experience of the project team

5. Quality of monitoring/measuring/control systems

6. (Quality of the training for the personnel of the building manager and/or building users

7. Duration of the agreement.

8. Use of an environmental management system in the fulfilment of a contract.

9. Innovative, efficient energy services for the building: The tenderer must submit specific proposals for energy-efficient lighting, heating, cooling, high-efficiency cogeneration, and ventilation in the building. Additional points are granted on the basis of an assessment of the estimated energy conservation (in comparison with standard systems) and the use of passive components (e.g. insulation, daylight).

Box 6: Examples of qualitative criteria

#### Re. Net present value of the energy cost savings

The calculation of the net present value of energy cost savings is a technique for assessing the investment for the contracting authority. The savings in favour of the contracting authority are calculated by decreasing the annually guaranteed energy cost savings for the duration of the contract by the annual fee to the contractor and to increase it by the residual value after the expiry of the contract. The calculation of the net present value has been presented diagrammatically in Appendix 2.

#### Re. Maintenance and failure management plan

The maintenance and failure management plan provides an indication of the degree of hindrance, nuisance for daily operations and the availability of the site for the various users, for the implementation phase as well as for daily maintenance. The candidate is asked to submit a proposal that effectively deals with the time made available for the fulfilment and interim adjustments. Re. Use of an environmental management system  
In some cases, an environmental management system can play a role in the assessment of the award criteria. The manner in which a contract will be fulfilled is assessed in the award phase, so that a tender in which certain measures are applied in conformity with an environmental management system can be relevant. In most cases, it is wiser to assess the existence of an environmental management system in the context of the suitability requirements.

#### 2.6 Determining the conditions of contract and tender

Furthermore, a selection will have to be made of substantive requirements (specifications) to be attached to the contract. The (minimum) requirements that the contract must fulfil can be specified technically or functionally.

Technical specifications provide an exact description of the work, the service or product to be supplied (dimensions, performance, characteristics, etc.). Functional specifications provide a description of the intended results, the required performance or the envisioned purpose of the work, the service or product to be provided. In that case, the tenderers must describe how the results will be achieved with their tender.

In the case of energy performance contracts, it makes sense to provide functional specifications as it is often the purpose to make use of the knowledge, experience, and inventiveness of market parties with regard to energy-saving measures.

<sup>16</sup> Art. 2.114 of the Public Procurement Act

<sup>17</sup> Art. 2.115, paragraph 2, of the Public Procurement Act

<sup>18</sup> Refer to PIANOo's document 'Applying EMAS' (EMVI toepassen) for general tips for preparing EMAS criteria.

<sup>19</sup> Pay attention to the repetition of this aspect in the action plan.

### 3 Execution of the tender procedure

Once the preparations have been concluded and the tender documents with terms, requirements, and criteria are ready, the selected tender procedure can be initiated. The steps to follow in that regard are:

1. Notice
2. Possibly prior registration
3. Possibly prior selection
4. Tender
5. Award (decision)
6. Award and conclusion of the contract

### 4 Award of the contract

The intended outcome of the invitation to tender is the conclusion of an energy performance contract. A draft contract will have to be prepared prior to the invitation to tender. This draft contract must be added to the tender documents.

In essence, the following subjects constitute the essential components of an energy performance contract:

- the identification of the contract partners;
- the determination of the energy-saving measures and services to be supplied by the contractor;
- the conservation guarantee provided by the contractor;
- remuneration arrangement on the basis of the conservation guarantee;
- term of the contract;
- performance conditions;
- ownership structure.

The RVO Buildings Management and Maintenance Performance Contracts Guideline (Leidraad Prestatiecontracten Beheer en Onderhoud Gebouwen van RVO) provides support for the preparation of performance contracts for the technical management and maintenance of buildings. The guideline offers tools for making agreements with the supplier on customer satisfaction, sustainable management, optimal costs, and quality and innovation. An ideal balance is strived for by means of indicators (KPIs) to save costs and conserve energy and to increase the quality of the maintenance. The no-claim discount system (bonus/malus) is also explained.

Completing a tender procedure for an energy performance contract is in fact not that different from completing a tender procedure for another type of contract. More information about the execution and completion of tender procedures can therefore be found in the procurement law manual and e.g. the description on the website of PIANOo<sup>20</sup>.

In addition, on its website, RVO has made available a model performance contract for the supply of heat and/or cooling by an ESCo, including a manual, which can serve as an example (references/downloads have been included in the bibliography). There are also various usable foreign model performance contracts from Belgium, Germany, and Great Britain, among other countries.

*“Attaining energy objectives and saving costs with ESCos without investment!” - Henk Wijnen, PIANOo*

### 4 Appendices

#### Appendix 1: Indicative list of information required for start of tender

##### Building:

1. Functional use
2. Material Take Off List GFA, NIA, and GIA
3. Number of floors
4. Opening hours
5. Systems hours of use
6. Building height
7. Year of construction
8. Year of renovation

##### Tenants

9. Building layout Multi-tenant or single-tenant? Which tenants are occupying which floors and what square metreage?
10. What is the term of the current tenants' leases?
11. Are new tenants being expected?
12. Were the current tenants already tenants of the building in the past three years and did they lease the same metreage at that time?
13. What is the current occupancy rate of the building, what has this rate been in the past three years, and which rate is anticipated in the next years?
14. How many employees are currently working on the premises?

##### Energy

15. The annual consumption of electricity and gas (and municipal heating, if present) of the past three years, including annual invoices that specify the monthly consumption.
16. The most recent energy invoices for electricity and gas (and municipal heating, if present): including grid operation and meter rental, in addition to supply.

##### Technology

17. HVAC systems:
  - Inventory of the installed HVAC systems, including:
    - i. Capacity;
    - ii. Clock times;
    - iii. Age of the systems;
    - iv. Heating curves.
  - Main diagram of HVAC systems
18. Lighting:
  - Current operating hours;
  - Drawings of the current lighting plan combined with a list of the types of fittings/lighting sources used;
  - Age of the lighting.
19. Building physics:
  - Façade, roof, and floor insulation data: type and insulation values
  - Glass data: type and insulation values
  - Floor plans and appearance of the object

##### 20. Building management system (BMS):

- The brand, type, and age of (the parts of) the current BMS;
- Login information (observer login);
- If it is a Priva BMS, the Priva project file of the premises.

##### 21. Organisation of the current energy management: which systems are currently used for that purpose?

##### Maintenance

22. The current annual cost for corrective and preventive maintenance of the mechanical and electro-technical systems, as well as for structural maintenance.
23. Which replacement investments are planned for the next years (do you have a multi-year maintenance plan)?
24. Is the replacement of the climate control systems (AHUs, cooling machines, boilers, etc.) the responsibility of the tenant or the owner?
25. Is the replacement of the lighting sources the responsibility of the tenant or the owner?
26. Is the replacement of the lighting fixtures the responsibility of the tenant or the owner?

##### Prior recommendations

27. Prior advisory reports issued for this building.
28. Current energy performance label including substantiation.

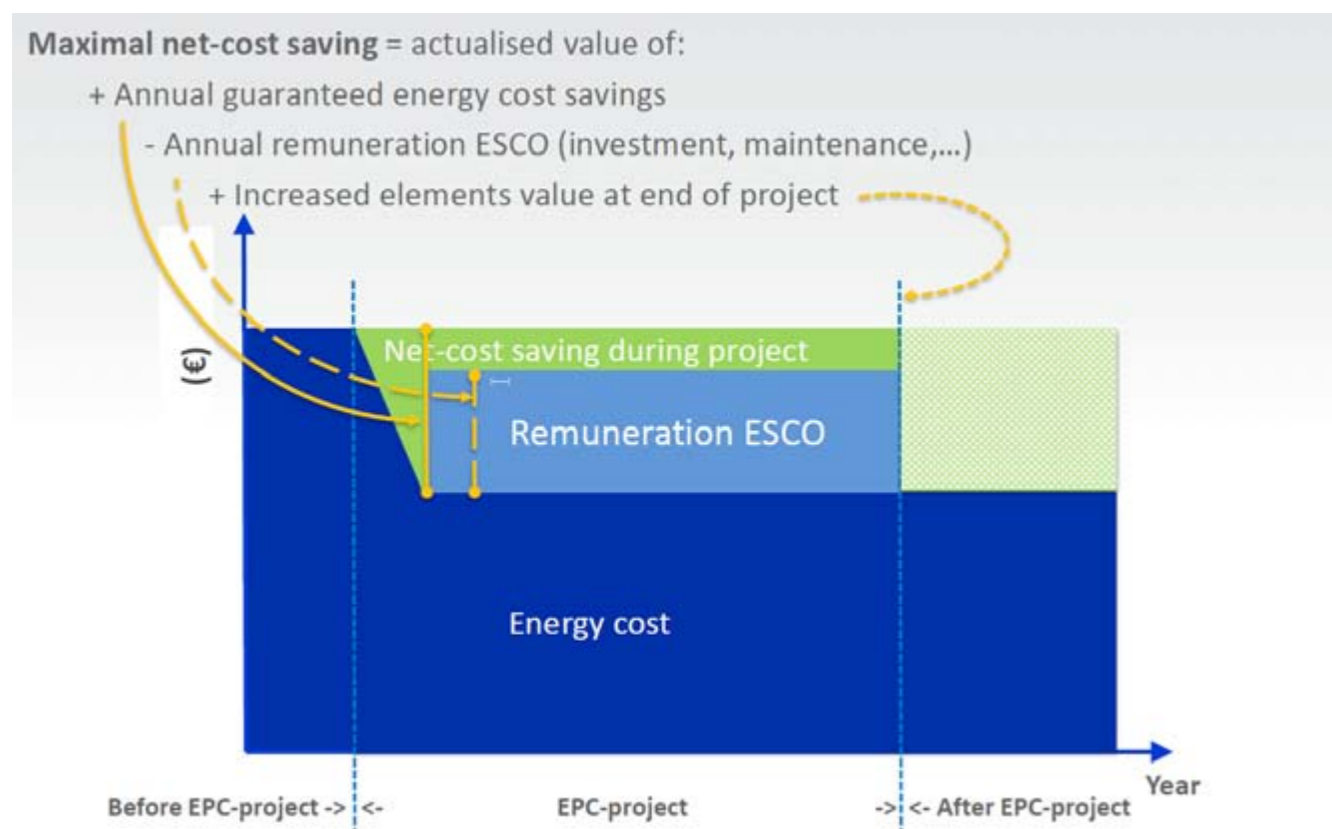
##### Contract

29. Is there an existing loan agreement or loan agreements attached to the real property that constitutes or constitute an obstacle to creating a right of superficies? If yes, what obstacles and can they be surmounted?
30. Is it possible to provide a corporate guarantee or a bank guarantee?

<sup>20</sup> www.pianoo.nl/inkoopproces/fase-2-doorlopen-aanbestedingsprocedure



Appendix 2: Chart of net present value calculation



Appendix 3: 10 tips for contracting authorities in the case of performance contracts

## 10 tips for contracting authorities letting Energy Performing Contracts

- 1 Clear instructions**  
Devote time to the specification of requirements to be submitted to the fulfilling party. Consider which performance indicators are important. Be clear and act as an intelligent client. Accept that you cannot do this 100% comprehensively and perfectly.
- 2 Confidence**  
Develop a relationship based on trust and strive for a win-win situation. Agree on what to do if trust is lost. Talk to each other about expertise.
- 3 Contract manager**  
Appoint a contract manager who is knowledgeable about buildings, energy, and procurement and who can deliver results.
- 4 Available data**  
Make a baseline measurement. Set out what will be measured and how. Make as much data available as possible about the building and its energy consumption history.
- 5 Open questions**  
Ask open questions. Ask the fulfilling party to propose performance indicators and innovations.
- 6 Flexible**  
Ensure a flexible contract that can accommodate changing circumstances, such as changing hours of use and occupancy rate.
- 7 Communication**  
Create a clear and open communication structure and include it in the contract: who communicates with whom, in what manner, and about which subjects.
- 8 Employees**  
Take account of employees' experiences in the specification. Listen to employees who will have to deal with the consequences of environmental changes.
- 9 Expectations**  
Manage end users' expectations of the environment and services to be provided under the contract.
- 10 Manual**  
Ask the fulfilling party to prepare a building use manual for end users and building managers.

For the Energy Performance Contracts menu (Menukaart prestatiecontracten), go to [www.platformduurzamehuisvesting.nl/prestatiecontract](http://www.platformduurzamehuisvesting.nl/prestatiecontract)

**PLATFORM DUURZAME HUISVESTING**  
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## Literature, sources, and downloads

- Experience with energy performance contracts for offices (NESK)  
(Ervaringen met energieprestatiecontracten voor kantoren (NESK))  
(<http://www.rvo.nl/sites/default/files/Infoblad%20Prestatiecontracten%20Kantoren%20%28NESK%29.pdf>)
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- RGG model maintenance and energy performance contract (19 April 2012)  
(Model onderhoud- en energieprestatiecontract RGG (19apr2012))  
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- European Code of Conduct for Energy Performance Contracting (EPC Code of Conduct)  
(<http://www.transparens.eu/eu/epc-code-of-conduct/epc-code-of-conduct/>)
- Retscreen – free software tool for energy efficiency projects  
(<http://www.retscreen.net/ang/home.php>)
- Performance contracts menu (Menukaart prestatiecontracten)  
(<http://www.platforduurzamehuisvesting.nl/prestatiecontract>)
- Applying EMAS: 39 tips (EMVI toepassen: 39 tips)  
(<http://www.pianoo.nl/sites/default/files/documents/documents/emvitoepassen39tips.pdf>)



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Het ESCoNetwerk biedt partijen concrete ondersteuning bij het realiseren van energietransities door middel van het actief uitwisselen van kennis en beschikbaar stellen van praktische tools.



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Dit is een publicatie van:

Rijksdienst voor Ondernemend Nederland

Croeselaan 15 | 3521 BJ Utrecht

Postbus 8242 | 3503 RE Utrecht

T 088 042 42 42

E klantcontact@rvo.nl

W [www.rvo.nl/gebouwen](http://www.rvo.nl/gebouwen)

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