

# **Energy Savings Performance Contracts (ESPC)**

## **Energy Management**

**Office of Financial Management  
and  
Department for Facilities and Support Services  
Finance and Administration Cabinet  
Commonwealth of Kentucky**



**2-05**

## Table of Contents

Briefing Summary.....	A
ESPC Approval Process.....	B
Kentucky Administrative Regulations (KAR) and the Kentucky Revised Statutes (KRS) for Energy Efficiency (Energy Management).....	C
Master Lease Purchase Program with GE Capital Public Finance, Inc.....	D
Log of Approved Energy Savings Performance Contract (ESPC) Projects.....	E
Office of Financial Management and Department for Facilities and Support Services's Evaluation Criteria for ESPC Projects.....	F
Sample ESPC Project Proposal for Department for Corrections (LaGrange Facilities).....	G
Office of Financial Management's Financial Analysis (Corrections-LaGrange Facilities).....	H
Office of Financial Management's Certificate of Review & Approval (Corrections-LaGrange Facilities).....	I

## **Guaranteed Energy Savings Performance Contracts Summary**

- KRS 56.770 to 56.784 provides the framework for Guaranteed Energy Savings Performance Contracts ("ESPC") and for energy conservation measures for state-owned buildings that are financed by means other than through General Fund appropriations. Other means includes, but is not limited to, ESPCs entered into pursuant to KRS 45A.085 and KRS 45A.045(10).
- The statute was originally passed with the understanding that the Commonwealth would not be liable for any of the financing costs associated with implementing these types of contracts, yet ownership of the product is required to remain with the Commonwealth.
- The intent was that the performance contractors would provide the funding for the projects to the state agencies while the payback plus the profit for the agencies would come from reduced energy costs, i.e. the "guaranteed savings". Payments to the performance contractor or vendor would be made from the agency's operating budget.
- The impediment for implementing this program was the inability for the performance contractors to obtain tax-exempt financing as Section 177 of the Kentucky Constitution prohibits the Commonwealth from lending its credit, i.e. the state agency could not pledge the state's credit for payments to the contractor to obtain tax exempt financing. Since a very limited number of these projects work with taxable financing, other options were pursued legislatively.
- As a result, the above referenced sections of the statute were modified, and House Bill 269 of the 2003 General Assembly directed that the state could move forward with up to \$37.5 million of these projects using a lease-purchase mechanism directly with the vendor to achieve the tax-exempt status. Additionally, statutory changes included the requirement of the Office of Financial Management to review and approve the financial aspect of the projects prior to contract execution.
- OFM, in conjunction with the Department of Facilities Management, has prepared general project financial guidelines, which have been modified as these projects and our knowledge base expands.
- An item of future concern is the amount of money authorized for these projects and the potential for significantly more of these projects, which are being financed as lease purchase obligations, which carry higher interest rates than state appropriation supported debt. While the state does not count these obligations as debt or in the debt capacity model, it has become clear in discussions with the rating agencies that these types of obligations do constitute debt and are being considered in the overall credit analysis of the Commonwealth.
- A possible alternative would be the authorization of an ESPC project pool funded with debt service appropriations from the applicable fund source; the drawback is the impact on the state's debt capacity policy.

## ***ESPC APPROVAL PROCESS***

**Authority KRS 56.770-56.784, 200 KAR 5:350**

### **PROPOSAL PHASE (45-60 days from receipt to final selection)**

- Agency works with ESPC Program Coordinator to develop Facility Profiles and Utility Usage History.
- Agency submits Profiles and Utility information to ESPC Program Coordinator for review.
- ESPC Program Coordinator designates Selection Committee and determines walk through and closing dates.
- ESPC Program Coordinator schedules a meeting with Selection Committee and the Commissioner's Office to review Finance's criteria for ESPC projects.
- If submittal is sufficient, it is forwarded to Contracting Officer for issuance of RFP.
- Current Prevailing Wage Rates are obtained.
- Using the latest RFP template, the RFP is issued (within 5 days of receipt).
- Walkthrough is conducted and RFP addendum is issued containing information and questions/answers from walkthrough.
- RFP Addenda are issued as required.
- Contracting Officer schedules Selection Committee meetings for:
  - Proposal Response Distribution
  - Shortlist Meeting
- Contracting Officer is responsible for obtaining all Confidentiality Agreements and Non-Conflict of Interest Statements, scoring instructions and scoring sheets.
- Contracting Officer is present at all meetings, however, is not a participant in the evaluation process.
- Contracting Officer contacts short listed firms to schedule Oral Presentations for the date designated by the Selection Committee.
- Contracting Officer notifies all unsuccessful respondents.
- Oral Presentations are conducted and the Selection Committee makes final recommendation.

- Contracting Officer is responsible for all scoring sheets.
- Contracting Officer notifies successful firm of selection and gives details of all forms to be submitted prior to contract award (detailed in Contract Phase below).
- Contracting Officer notifies unsuccessful firms of results.

#### **PROPOSAL PHASE IS CONCLUDED**

#### **AUDIT/SCOPE OF WORK PHASE (up to 180 days from final selection, or as extended by the Finance and Administration Cabinet)**

- During the Audit Phase, the Selected Firm conducts the industrial grade audit of the facilities included in the proposal.
- The Contracting Officer is not directly involved in this phase, with the exception of updating prevailing wage rates when ESCO is prepared to develop final pricing schedule (if more than 90 days has elapsed since first obtaining).
- The ESCO representative works with Division of Engineering and Agency Representative to develop the appropriate scope of work, proposed equipment, baseline descriptions and savings measurement and verification.
- The ESCO develops pricing, proposed financing and all required financial data.
- Approval is obtained from ESPC Program Coordinator.
- ESPC Program Coordinator submits to the Commissioner's Office for review and approval to proceed. Submittal must include Scope of Work, Proposed Equipment, Proposed Progress and Payment Schedule, Baseline Description, Savings Guarantee Measurement and Verification and list of ECMs (including installed cost, savings and simple payback periods) along with a cover letter with ESPC Program Coordinator's recommendations.
- Commissioner's Office submits financial information to the Office of Financial Management for review and approval in accordance with KRS 56.784(3).
- ESPC Program Coordinator submits all other information to Contracting Officer for Contract Preparation.

#### **END OF AUDIT/SCOPE OF WORK PHASE**

#### **CONTRACT PHASE (7 days from receipt of OFM Approval)**

- Contracting officer prepares contract document utilizing terms and conditions from RFP, Scope of Work, Proposed Equipment, Proposed Progress and Payment Schedule, Baseline Description and Savings Guarantee Measurement and Verification.
- If 90 days or more has elapsed since last wage rate request, new rates must be obtained for inclusion in final contract document. If rates have changed, ESCO will be permitted to adjust pricing accordingly. If pricing changes, Office of Financial Management shall review new figures, and a new approval is required.
- Contracting Officer submits to the ESPC Coordinator for approval.
- ESPC Program Coordinator submits contract and list of ECMs including installed cost, savings and simple payback periods for the project to the Commissioner's Office for review and approval. The submittal shall have a cover letter with ESPC Program Coordinator's recommendations.
- Commissioner's Office submits contract for signature to Office of Legal and Legislative Services and to the Secretary of Finance and Administrative Cabinet.
- Commissioner's Office submits signed contracts to the ESPC Program Coordinator for distribution.
- Contracting Officer issues Intent to Award letter with notification of anticipated award date, contract number, and a detailed list of information to be obtained prior to contract award. These include, but may not be limited to:
  - Insurance Certificate
  - Payment Bond (Commonwealth's Form)
  - Performance Bond (Commonwealth's Form)
  - Energy Savings Guarantee Bond (If Required)
  - Affidavit of Campaign Finance Compliance
  - Affidavit for Unemployment and Workers Comp Insurance
  - Vendor Report of Prior Violations for Firm and all Subcontractors
  - EEO forms for Firm and all subcontractors holding contracts > \$250,000
- Once all information is received, final contract is printed and signed. Master Agreement document is released in PDF.
- ESCO receives contract and is authorized to proceed with work.
- ESPC Program Coordinator provides a signed copy of the Financing Agreement (Contract) to OFM for their records.
- ESPC Program Coordinator submits a report, including OFM's certificate of approval and detail calculations deriving all O&M savings to LRC within 30 days from

execution of the financing (via the Commissioner's Office) for review. Report shall be updated by the 1<sup>st</sup> of each month thereafter.

**END OF CONTRACT PHASE**

**200 KAR 5:350. Guaranteed energy savings performance contracting.**

RELATES TO: KRS 56.770-56.784

STATUTORY AUTHORITY: KRS 56.784(2)

**NECESSITY, FUNCTION, AND CONFORMITY:** KRS 56.784(2) requires the Finance and Administration Cabinet to promulgate administrative regulations to establish a process for procurement of energy savings performance contracts, including required contract language. This administrative regulation establishes the process for procurement of energy-savings performance contracts.

**Section 1. Definitions.** (1) "GESPC" means a guaranteed energy savings performance contract as defined in KRS 56.770(5), and further described at KRS 56.774(5).

(2) "Memorandum of understanding" is defined alternatively as "memorandum of agreement" at KRS 45A.690(1)(d).

(3) "Offeror" is defined at KRS 45A.070(6).

(4) "Owner" means:

(a) The Finance and Administration Cabinet; or

(b) The governing board of an institution of postsecondary education that, pursuant to KRS 164A.560(1), has elected to perform in accordance with KRS 164A.555 to 164A.630 regarding capital construction.

(5) "RFP" means a request for proposals as defined in KRS 45A.070(5).

**Section 2. Contracting Process.** (1) A GESPC shall be awarded by competitive negotiation in accordance with KRS 45A.085, 200 KAR 5:307, and this administrative regulation.

(2) If a GESPC is needed, owner shall form a selection committee and issue an RFP.

(3) The selection committee shall conduct a walk-through of the proposed project facility which interested potential offerors shall attend, if indicated in the RFP.

(4) An offeror shall submit qualifications, a preliminary proposal, and other information and documentation as set out in the RFP.

(5) The selection committee shall evaluate, rank, and interview each offeror in accordance with the criteria set out in the RFP.

(6) The top-ranked offeror shall:

(a) Be notified and authorized to perform a technical energy audit; and

(b) Submit a final proposal indicating the scope of the guaranteed energy savings performance project.

(7) If an acceptable energy audit and project proposal have not been approved by the selection committee within sixty (60) days from the date of notification provided for in subsection (6) of this section, negotiations with the next highest ranked offeror shall be initiated, unless owner has granted an extension of time to the top-ranked offeror.

(8) Owner shall enter into a memorandum of understanding with an entity occupying facilities involved in a guaranteed energy savings performance project. The memorandum shall state the responsibilities and obligations of each party, including reporting, administration, and repayment.

**Section 3. Required Contract Terms.** A GESPC shall contain the following language.

(1) "All savings projected shall be guaranteed to owner."

(2) "A professional engineer licensed in the state of Kentucky shall supervise, review, and approve all design work done in relation to this project."

(3) "The term of this contract shall not exceed the life of the energy savings generated from implementation of the energy efficiency measures financed by the contract, in accordance with KRS 56.770(5)."

(4) "The contractor shall maintain specific standards of comfort, safety, and functionality as determined by the owner. Persistent failure to maintain the defined climate and lighting conditions shall constitute a breach of contract by the contractor."

(5) "Combined savings achieved by the installed projects shall be sufficient to cover all project costs, including debt service and contractor fees maintenance, monitoring, and other services, for the duration of the contract term. If a project does not generate the guaranteed level of savings in any predefined reconciliation term, the contractor shall be liable to owner for the amount of the shortfall plus related costs, in accordance with KRS 56.770(5)."



(6) "The contractor shall provide a sufficient number of sets of operation and maintenance manuals for all equipment replacements or upgrades at each location. The number of sets of manuals shall be determined by owner."

(7) "Owner shall have the right to inspect, test, and approve the work conducted under this contract during construction and operation."

(8) "All drawings, reports, and materials prepared by the contractor in performance of the contract shall become the property of owner and shall be delivered to owner as needed or upon completion of construction." (29 Ky.R. 1429; Am. 2087; eff. 2-16-03.)

**56.770 Definitions for KRS 56.770 to 56.784.**

As used in KRS 56.770 to 56.784, unless the context requires otherwise:

- (1) "Aggregate simple payback period" means the simple payback period of a set of energy efficiency measures taken together for a building;
- (2) "Building" means all contiguous land, structures, appurtenances, and improvements that use energy;
- (3) "Energy audit" means examination of a building's energy-using systems, energy consumption and costs, occupancy patterns, and operation and maintenance procedures;
- (4) "Energy efficiency measure" means any construction, improvement, repair, alteration, or betterment of a building that is intended to reduce energy costs; or any equipment, fixture, or furnishing to be added to or used in a building that will be a cost-effective energy-related project that is intended to reduce energy costs;
- (5) "Guaranteed energy savings performance contract" means an agreement for the provision of energy services or equipment, including energy efficiency measures, energy conservation measures and alternate energy technologies for state government buildings, in which a person agrees to design, construct, install, maintain, operate, or manage energy systems or equipment to improve energy efficiency of, or produce energy in connection with, a state government building. Payments for a guaranteed energy savings performance contract shall be made from measured and verified savings generated from implementation of the energy efficiency measures financed by the contract. The term of a guaranteed energy savings performance contract shall not exceed the life of the energy savings generated from implementation of the energy efficiency measures financed by the contract. If the measured and verified savings are not sufficient to pay the financial obligations under the contract, the contractor is liable for the contract payments;
- (6) "Engineering analysis" means a detailed cost-benefit analysis of energy efficiency investments including a review of potential cost savings through operation and maintenance changes;
- (7) "Life-cycle cost analysis" means a method for estimating the total cost of an energy-using component or building over its useful life, including cost factors such as purchase price or construction, renovation, or leasing costs, energy use, maintenance, interest, and inflation;
- (8) "Low cost/no cost energy conservation measures" means those energy saving practices and energy efficiency measures, usually involving operation and maintenance practices, that can be accomplished by existing personnel within existing operating budgets;
- (9) "Simple payback period" means the number of years it takes to pay back, from estimated savings, the initial cost of an energy efficiency measure with the simple payback period equal to the initial cost divided by the estimated annual savings;
- (10) "Savings" means the reduction in expenditures, excluding any state government and post-secondary education personnel expenditures, that are measured and verified,

including but not limited to energy usage, operating costs, and capital cost avoidance that occur as a result of the implementation of energy efficiency measures;

- (11) "Capital cost avoidance" means savings generated when expenditures of appropriated capital construction or appropriated capital outlay funds are avoided because the budgeted capital improvements or items of equipment are contained within the energy efficiency measures provided by a guaranteed energy savings performance contract; and
- (12) "Operating costs" means expenditures associated with operating and maintaining a properly functioning building and its systems including but not limited to the heating, ventilation, cooling, lighting, plumbing, water heating, electrical, and laundry systems and their controls.

**Effective:** July 15, 2002

**History:** Amended 2002 Ky. Acts ch. 35, sec. 1, effective July 15, 2002. -- Created 1996 Ky. Acts ch. 223, sec. 1, effective July 15, 1996.

**56.772 Legislative intent – Energy Efficiency Program for State Government Buildings.**

The General Assembly finds and declares it to be the public policy of the Commonwealth to maximize the use of energy efficiency measures in the construction, renovation, and maintenance of buildings owned or leased by the Commonwealth. In furtherance of this policy, the Finance and Administration Cabinet shall administer an energy efficiency program, to be known as the Energy Efficiency Program for State Government Buildings.

**Effective:** July 15, 1996

**History:** Created 1996 Ky. Acts ch. 223, sec. 2, effective July 15, 1996.

**56.774 Purpose of program – Engineering analysis – Methods of finance – Documentation of savings.**

- (1) The Energy Efficiency Program for State Government Buildings shall provide for implementation of low cost/no cost energy conservation measures, engineering analyses, energy efficiency measures, building improvements, and monitoring of results for state-owned or state-leased buildings.
- (2) Any engineering analysis conducted on a state-owned building shall assess the energy efficiency of the building and make recommendations for improving the efficient use of energy within the building. The analyses shall be performed by qualified engineers, architects, or other persons trained in energy efficiency who may be employees of the Finance and Administration Cabinet or employed pursuant to KRS Chapter 45A, except that any engineers, architects or other persons trained in energy efficiency and retained under a guaranteed energy savings performance contract, shall not be subject to the provisions of KRS 45A.800 to 45A.835.
- (3) Except as provided in subsection (5) of this section, measures to improve the energy efficiency of a state-owned building, which have an aggregate simple payback period of five (5) years or less, shall be implemented as general fund appropriations become available. No more than five percent (5%) of the cost of energy efficiency measures for a building may be utilized for monitoring the results.
- (4) If general fund appropriations are available for energy efficiency improvements, the Finance and Administration Cabinet shall prioritize projects among the various state-owned buildings to determine which projects shall be implemented to best utilize the available funding.
- (5) If general fund appropriations are unavailable, energy efficiency measures for a state-owned building may be financed by other means. These other means include but are not limited to guaranteed energy savings performance contracts as defined under KRS 56.770 entered into pursuant to KRS 45A.085 and KRS 45A.045(10). Guaranteed energy savings performance contracts shall not be subject to the provisions of KRS 45A.800 to 45A.835. These energy efficiency measures shall not be limited to those that have an aggregate simple payback period of five (5) years or less, but shall result in reasonable economic benefit to the Commonwealth. Ownership of the energy efficiency measures shall be transferred to the Commonwealth upon completion of the guaranteed energy savings performance contract or as otherwise agreed upon in the contract. Savings from the implementation of the energy efficiency measures under the guaranteed energy savings performance contract shall be used to satisfy the obligations under the guaranteed energy savings performance contract and to repay the cost of the other means used to finance the energy efficiency measures, and may be used to repay expenses incurred by the Finance and Administration Cabinet to reimburse the cabinet for expenses related to the guaranteed energy savings performance contract, including but not limited to staff time for monitoring, overseeing, and managing the project. Notwithstanding KRS 45.229, remaining savings shall remain in the state agency account and shall not lapse. All savings projected under a guaranteed energy savings performance contract shall be guaranteed to the Commonwealth.

- (6) The savings in reduced expenditures that are specified as payment sources shall be documented in the guaranteed energy savings performance contract. Savings shall be determined by using one (1) of the measurement and verification methodologies listed in the United States Department of Energy's "International Performance Measurement and Verification Protocol." If specific data limitations or documented unique characteristics of the project prevent use of the "International Performance Measurement and Verification Protocol," an alternative method that is compatible shall be adopted upon documentation and approval of the secretary of the Finance and Administration Cabinet.

**Effective:** July 15, 2002

**History:** Amended 2002 Ky. Acts ch. 35, sec. 2, effective July 15, 2002. -- Amended 1998 Ky. Acts ch. 375, sec. 5, effective July 15, 1998. -- Created 1996 Ky. Acts ch. 223, sec. 3, effective July 15, 1996.

**56.776 Energy audit training program – Additional programs on energy awareness.**

The Finance and Administration Cabinet, with the assistance of the Division of Energy within the Department for Natural Resources of the Natural Resources and Environmental Protection Cabinet, shall institute an energy audit training program to identify energy saving techniques for state-owned building maintenance staff. Additional programs shall be developed to educate state employees and other building occupants on energy awareness and practices to reduce energy use in state-owned buildings. Local government employees may be included in training and educational programs.

**Effective:** July 15, 1996

**History:** Created 1996 Ky. Acts ch. 223, sec. 4, effective July 15, 1996.

**56.778 Inclusion of life-cycle energy cost analyses in bids or plans to construct or renovate state-owned buildings.**

The Finance and Administration Cabinet shall require persons submitting bids or plans for state-owned buildings to be constructed or substantially renovated after July 15, 1996, to include within those bids or plans life-cycle energy cost analyses. The cabinet shall consider those life-cycle cost analyses when evaluating competing bids or plans.

**Effective:** July 15, 1996

**History:** Created 1996 Ky. Acts ch. 223, sec. 5, effective July 15, 1996.



**56.780 Evaluation for cost-effective energy use and energy efficiency of buildings prior to lease or purchase – Structure of leases.**

- (1) Any building which the Finance and Administration Cabinet considers for leasing or purchase shall be evaluated for cost-effective energy use and energy efficiency. This evaluation shall be considered in choosing between competing leases or building purchases. The cabinet shall consider the energy costs of operating a building to ensure the selection of a cost-effective lease, and the cabinet shall compare life-cycle energy cost analyses for competing leases.
- (2) A lease may be structured so that both the lessor and the state agency as lessee may share energy cost savings that can be accomplished by energy-efficient lease arrangements. The lease may incorporate financial incentives to make energy efficiency improvements that are cost effective in reducing the operating cost of the building. The lease may provide for the state agency to make lease payments which may be used to help fund the costs of energy efficiency measures in the building, if the costs are amortized and returned to the state agency over a period of years not to exceed the useful life of the energy efficiency measures. Thereafter, the state agency shall be entitled to a reduction in the lease amount based on any continued savings resulting from the energy efficiency measures. The amount of reduction shall be negotiated between the lessor and the state agency.

**Effective:** July 15, 1996

**History:** Created 1996 Ky. Acts ch. 223, sec. 6, effective July 15, 1996.

**56.782 Report on use of energy-efficiency measures in state government --  
Contents.**

The Finance and Administration Cabinet shall report on or before October 15 in odd-numbered years to the Legislative Research Commission on progress made to maximize the use of energy-efficiency measures in state government. The Legislative Research Commission shall transmit the report to the appropriate interim joint committees and to the General Assembly when it convenes. The report shall include, but not be limited to:

- (1) A summary of initiatives undertaken by the cabinet during the reporting period to promote adoption of low cost/no cost energy-efficiency measures, including employee training efforts;
- (2) A summary of energy-efficiency measures installed and energy improvements made during the reporting period;
- (3) Energy consumption and expenditure data for facilities owned or leased by state government and any documented savings made as a result of energy-efficiency measures and improvements;
- (4) Status report on efforts to assure buildings newly constructed, renovated, or leased are energy-efficient;
- (5) Any efforts made during the reporting period to promote acquisition of energy-efficient products pursuant to KRS 45A.045(12); and
- (6) Any recommendations for future funding of energy improvements or other measures needed to assure energy efficiency in state government.

**Effective:** May 30, 1997

**History:** Amended 1997 (1st Extra. Sess.) Ky. Acts ch. 4, secs. 34 and 43, effective May 30, 1997. -- Created 1996 Ky. Acts ch. 223, sec. 7, effective July 15, 1996.

**Legislative Research Commission Note (7/28/97).** This section was amended by 1997 (1st Extra. Sess.) Ky. Acts ch. 4, secs. 34 and 43, which are identical and have been compiled together.

**56.783 Energy efficiency in state government buildings revolving loan fund.**

- (1) A special fund in the State Treasury is hereby created which shall be known as the energy efficiency in state government buildings revolving loan fund. The fund shall be used to provide financial assistance to state government agencies for the purposes of KRS 56.770 to 56.784.
- (2) The fund may receive state appropriations, gifts, grants, and federal funds and shall include earnings from the investment of moneys in the fund. Any fund balance at the close of the fiscal year shall not lapse but shall carry forward to the next fiscal year and shall remain available solely for the purposes of this section.
- (3) Administration of this fund shall be the responsibility of the Finance and Administration Cabinet. The cabinet shall establish terms and conditions for loans from the fund including the application and repayment process. The cabinet shall establish and implement fiscal controls and accounting periods for payments received and disbursements made by the fund and for fund balances at the beginning and end of each accounting period.
- (4) All repayments of loans made under this section shall be paid into the fund. Balances, or portions thereof, in the fund shall not revert to the general fund.

**Effective:** July 15, 2002

**History:** Created 2002 Ky. Acts ch. 35, sec. 4, effective July 15, 2002.

**56.784 Authority for administrative regulations – Energy savings performance contracts.**

- (1) The Finance and Administration Cabinet may implement the provisions of KRS 56.770 to 56.784 through the promulgation of administrative regulations pursuant to KRS Chapter 13A.
- (2) By July 15, 2002, the secretary of the Finance and Administration Cabinet shall promulgate administrative regulations in accordance with the provisions of KRS Chapter 13A establishing a process for procurement of energy savings performance contracts, including required contract language. The following entities shall adhere to these regulations when procuring services under a guaranteed energy savings performance contract:
  - (a) Any governing body of a postsecondary institution that manages its capital construction program under KRS 164A.580; or
  - (b) Any public corporation as defined by KRS 45.750(2)(c) or as created under the Kentucky Revised Statutes as a governmental agency and instrumentality of the Commonwealth that manages its capital construction program.
- (3) All state agencies, including those identified in subsection (2) of this section, shall submit proposed guaranteed energy savings performance contracts to the Office of Financial Management for review and approval prior to contract execution.
- (4) The secretary shall report all authorized guaranteed energy savings performance contracts to the Capital Projects and Bond Oversight Committee for its review.

**Effective:** July 15, 2002

**History:** Amended 2002 Ky. Acts ch. 35, sec. 3, effective July 15, 2002. – Created 1996 Ky. Acts ch. 223, sec. 8, effective July 15, 1996.

**45A.045 Authority of cabinet – Authority to promulgate administrative regulations.**

- (1) The Finance and Administration Cabinet shall serve as the central procurement and contracting agency of the Commonwealth.
  - (a) The cabinet shall require all agencies to furnish an estimate of specific needs for supplies, materials, and equipment to be purchased by competitive bidding for the purpose of permitting scheduling of purchasing in large volume. The cabinet shall establish and enforce schedules for purchasing supplies, materials, and equipment. In addition, prior to the beginning of each fiscal year all agencies shall submit to the Finance and Administration Cabinet an estimate of all needs for supplies, materials, and equipment during that year which will have to be required through competitive bidding.
  - (b) The Finance and Administration Cabinet shall have power, with the approval of the secretary of the Finance and Administration Cabinet, to transfer between departments, to salvage, to exchange, and to condemn supplies, equipment, and real property.
  - (c) The Finance and Administration Cabinet shall attempt in every practicable way to ensure that state agencies are fulfilling their business needs through the application of the best value criteria.
- (2) The Finance and Administration Cabinet shall recommend regulations, rules, and procedures and shall have supervision over all purchases by the various spending agencies, except as otherwise provided by law, and, subject to the approval of the secretary of the Finance and Administration Cabinet, shall promulgate administrative regulations to govern purchasing by or for all these agencies. The cabinet shall publish a manual of procedures which shall be incorporated by reference as an administrative regulation pursuant to KRS Chapter 13A. This manual shall be distributed to agencies and shall be revised upon issuance of amendments to these procedures. No purchase or contract shall be binding on the state or any agency thereof unless approved by the Finance and Administration Cabinet or made under general administrative regulations promulgated by the cabinet.
- (3) The Finance and Administration Cabinet shall purchase or otherwise acquire, or, with the approval of the secretary, may delegate and control the purchase and acquisition of the combined requirements of all spending agencies of the state, including, but not limited to, interests in real property, contractual services, rentals of all types, supplies, materials, equipment, and services.
- (4) The Finance and Administration Cabinet shall sell, trade, or otherwise dispose of any interest in real property of the state which is not needed, or has become unsuitable for public use, or would be more suitable to the public's interest if used in another manner, as determined by the secretary of the Finance and Administration Cabinet. The determination of the secretary of the Finance and Administration Cabinet shall be set forth in an order and shall be reached only after review of a written request by the agency desiring to dispose of the property. This request shall describe the property and state the reasons why the agency believes the property should be disposed. All instruments required by law to be recorded which convey any interest

in any real property so disposed of shall be executed and signed by the secretary of the Finance and Administration Cabinet and approved by the Governor. Unless the secretary of the Finance and Administration Cabinet deems it in the best interest of the state to proceed otherwise, all interests in real property shall be sold either by invitation of sealed bids or by public auction. The selling price of any interest in real property shall not be less than the appraised value thereof as determined by the cabinet, or the Transportation Cabinet for the requirements of that cabinet.

- (5) The Finance and Administration Cabinet shall sell, trade, or otherwise dispose of all personal property of the state that is not needed, or has become unsuitable for public use, or would be more suitable to the public's interest if used in another manner, or, with the approval of the secretary, may delegate the sale, trade, or other disposal of the personal property. In the event the authority is delegated, the method for disposal shall be determined by the agency head, in accordance with administrative regulations promulgated by the Finance and Administration Cabinet, and shall be set forth in a document describing the property and stating the method of disposal and the reasons why the agency believes the property should be disposed of. In the event the authority is not delegated, requests to the Finance and Administration Cabinet to sell, trade, or otherwise dispose of the property shall describe the property and state the reasons why the agency believes the property should be disposed of. The method for disposal shall be determined by the Division of Surplus Property, and approved by the secretary of the Finance and Administration Cabinet or his or her designee.
- (6) The Finance and Administration Cabinet shall exercise general supervision and control over all warehouses, storerooms, and stores and of all inventories of supplies, services, and construction belonging to the Commonwealth. The cabinet shall promulgate administrative regulations to require agencies to take and maintain inventories of plant property, buildings, structures, other fixed assets, and equipment. The cabinet shall conduct periodic physical audits of inventories.
- (7) The Finance and Administration Cabinet shall establish and maintain programs for the development and use of purchasing specifications and for the inspection, testing, and acceptance of supplies, services, and construction.
- (8) Nothing in this section shall prevent the Finance and Administration Cabinet from negotiating with vendors who maintain a General Services Administration price agreement with the United States of America or any agency thereof. No contract executed under this provision shall authorize a price higher than is contained in the contract between the General Services Administration and the vendor affected.
- (9) Except as provided in KRS Chapters 175, 176, 177, and 180, and subject to the provisions of this code, the Finance and Administration Cabinet shall purchase or otherwise acquire all real property determined to be needed for state use, upon approval of the secretary of the Finance and Administration Cabinet as to the determination of need and as to the action of purchase or other acquisition. The amount paid for this real property shall not exceed the appraised value as determined by the cabinet or the Transportation Cabinet (for such requirements of that cabinet), or the value set by eminent domain procedure. Subject to the provisions of this code, real property or any interest therein may be purchased, leased, or otherwise acquired

from any officer or employee of any agency of the state upon a finding by the Finance and Administration Cabinet, based upon a written application by the head of the agency requesting the purchase, and approved by the secretary of the Finance and Administration Cabinet and the Governor, that the employee has not either himself or herself, or through any other person, influenced or attempted to influence either the agency requesting the acquisition of the property or the Finance and Administration Cabinet in connection with such acquisition. Whenever such an acquisition is consummated, the request and finding shall be recorded and kept by the Secretary of State along with the other documents recorded pursuant to the provisions of KRS Chapter 56.

- (10) The Finance and Administration Cabinet shall maintain records of all purchases and sales made under its authority and shall make periodic summary reports of all transactions to the secretary of the Finance and Administration Cabinet, the Governor, and the General Assembly. The Finance and Administration Cabinet shall also report trends in costs and prices, including savings realized through improved practices, to the above authorities. The Finance and Administration Cabinet shall also compile an annual report of state purchases by all spending agencies in the state's statewide accounting and reporting system. The report format shall include, but not be limited to, dollar amount, volume, type of purchase, and vendor.
- (11) For capital construction projects, subject to the provisions of this code and KRS 45A.180, the procurement may be on whichever of the following alternative project delivery methods, in the judgment of the secretary of the Finance and Administration Cabinet after first considering the traditional design-bid-build project delivery method, offers the best value to the taxpayer:
  - (a) A design-build basis; or
  - (b) A construction management-at-risk basis.

Proposals shall be reviewed by the engineering staff to assure quality and value, and compliance with procurement procedures. All specifications shall be written to promote competition. Nothing in this section shall prohibit the procurement of phased bidding or construction manager-agency services.

- (12) The Finance and Administration Cabinet shall have control and supervision over all purchases of energy-consuming equipment, supplies, and related equipment purchased or acquired by any agency of the state as provided in this code, and shall promulgate administrative regulations to designate the manner in which an energy-consuming item will be purchased so as to promote energy conservation and acquisition of energy efficient products. Major energy components shall be amortized on a seven (7) to ten (10) years' recovery basis and shall take into consideration the projected cost of fuel. The Finance and Administration Cabinet, in consultation with the Cabinet for Economic Development, shall conduct a thorough economic feasibility analysis on any major energy-using component of at least three million (3,000,000) BTU's per hour heat input and shall issue a certificate of economic feasibility prior to the Finance and Administration Cabinet's purchasing or retrofitting any such component that utilizes any fuel other than coal. The economic feasibility analysis shall consist of life-cycle cost comparisons of a component that

would utilize coal and one(s) that would utilize any fuel other than coal. For the analysis, the Finance and Administration Cabinet shall provide detailed estimates of equipment purchase price, installation cost, annual operation and maintenance costs, and usage patterns of energy-using components.

**Effective:** June 24, 2003

**History:** Amended 2003 Ky. Acts ch. 98, sec. 2, effective June 24, 2003. — Amended 2000 Ky. Acts ch. 5, sec. 7, effective July 14, 2000. — Amended 1997 (1st Extra. Sess.) Ky. Acts ch. 4, sec. 24, effective May 30, 1997. — Amended 1994 Ky. Acts ch. 277, sec. 4, effective July 15, 1994. — Amended 1990 Ky. Acts ch. 496, sec. 1, effective July 13, 1990. — Created 1978 Ky. Acts ch. 110, sec. 10, effective January 1, 1979.

**2002-2004 Budget Reference.** See State/Executive Branch Budget, 2003 Ky. Acts ch. 156, pt. IX, item 16(o), at 1867; and State/Executive Branch Budget Memorandum, 2003 Ky. Acts ch. 143, at 773 (Final Budget Memorandum, at 365).



**45A.085 Competitive negotiation.**

- (1) When, under administrative regulations promulgated by the secretary or under KRS 45A.180, the purchasing officer determines in writing that the use of competitive sealed bidding is not practicable, and except as provided in KRS 45A.095 and 45A.100, a contract may be awarded by competitive negotiation.
- (2) Adequate public notice of the request for proposals shall be given in the same manner and circumstances as provided in KRS 45A.080(3).
- (3) Contracts other than contracts for projects utilizing an alternative project delivery method under KRS 45A.180 may be competitively negotiated when it is determined in writing by the purchasing officer that the bids received by competitive sealed bidding either are unreasonable as to all or part of the requirements, or were not independently reached in open competition, and for which each competitive bidder has been notified of the intention to negotiate and is given reasonable opportunity to negotiate.
- (4) Contracts for projects utilizing an alternative project delivery method shall be processed in accordance with KRS 45A.180.
- (5) The request for proposals shall indicate the relative importance of price and other evaluation factors.
- (6) Award shall be made to the responsible offeror whose proposal is determined in writing to be the most advantageous to the Commonwealth, taking into consideration price and the evaluation factors set forth in the request for proposals.
- (7) Written or oral discussions shall be conducted with all responsible offerors who submit proposals determined in writing to be reasonably susceptible of being selected for award. Discussions shall not disclose any information derived from proposals submitted by competing offerors. Discussions need not be conducted:
  - (a) With respect to prices, where the prices are fixed by law or administrative regulation, except that consideration shall be given to competitive terms and conditions;
  - (b) Where time of delivery or performance will not permit discussions; or
  - (c) Where it can be clearly demonstrated and documented from the existence of adequate competition or prior experience with the particular supply, service, or construction item, that acceptance of an initial offer without discussion would result in fair and reasonable best value procurement, and the request for proposals notifies all offerors of the possibility that award may be made on the basis of the initial offers.

**Effective:** June 24, 2003

**History:** Amended 2003 Ky. Acts ch. 98, sec. 5, effective June 24, 2003. -- Amended 1997 (1st Extra. Sess.) Ky. Acts ch. 4, sec. 28, effective May 30, 1997. -- Amended 1979 (1st Extra. Sess.) Ky. Acts ch. 9, sec. 2, effective February 10, 1979. -- Created 1978 Ky. Acts ch. 110, sec. 18, effective January 1, 1979.

<b>Catalog Master Agreement</b>	<b>Document No.</b> C-03042738	<b>Document Title</b> MASTER LEASE PURCHASE-OFM	Page 1 of 41
	<b>Buyer Name</b> Stephanie Williams (FAC-DMPS)		

## **MASTER LEASE PURCHASE PROGRAM ADMINISTRATOR**

### **CATALOG MASTER AGREEMENT C-03042738**

**Issued by:  
The Finance and Administration Cabinet  
On Behalf Of  
The Office of Financial Management**

**Issued to:  
GE CAPITAL PUBLIC FINANCE, INC.  
8400 Normandale Lake Blvd. Suite 470  
Minneapolis, MN 55437  
Contact Person: Peter Johnson  
800-346-3164 ext. 5698  
Fax: 952-897-5601  
Email: peter.johnson@ge.com**

<b>Catalog Master Agreement</b>	<b>Document No.</b>	<b>Document Title</b>	Page 2 of 41
	C-03042738	MASTER LEASE PURCHASE-OFM	
	<b>Buyer Name</b> Stephanie Williams (FAC-DMPS)		

**THIS MASTER LEASE CONTRACT SHALL SUPERSEDE THE 1995 MASTER LEASE AGREEMENT AND ALL OF ITS AMENDMENTS. THE CONTRACTOR SPECIFICALLY UNDERSTANDS, ACKNOWLEDGES AND AGREES TO THE FOLLOWING:**

1. **The terms and conditions of Section 40 of Solicitation S-03042738 are fully incorporated herein;**
2. **All other requirements and components of Solicitation S-03042738 are fully incorporated herein, except for the Contractor's exceptions listed below:**

**Commonwealth's Response to Contractor's Exceptions**

**1. Section 30.050**

GE Capital "GECPF is prepared to execute the Kentucky Master Lease with Option to Purchase Agreement originally executed in 1995. Please note that the definitions of Cabinet and Using Departments were amended in 1997 to serve the administrative needs of the Commonwealth. GECPF would be happy to adopt these 1997 definitions if the Commonwealth would prefer to do so."

**Response THIS MASTER LEASE CONTRACT SHALL SUPERSEDE THE 1995 MASTER LEASE AGREEMENT AND ALL OF ITS AMENDMENTS.**

**2. Section 40.010**

GE Capital "GECPF prefers the provisions of Section 13.5 in the 1995 Kentucky Master Lease with the Option to Purchase Agreement to those contained in Section 40.010 of the Terms and Conditions."

**Response THIS MASTER LEASE CONTRACT SHALL SUPERSEDE THE 1995 MASTER LEASE AGREEMENT AND ALL OF ITS AMENDMENTS. The vendor shall comply with Section 40.010 of Solicitation S-03042738.**

<b>Catalog Master Agreement</b>	Document No.	Document Title	Page 3 of 41
	C-03042738	MASTER LEASE PURCHASE-OFM	
	Buyer Name Stephanie Williams (FAC-DMPS)		

**3. Section 40.065**

GE Capital "GECPPF prefers the provisions of Section 11.1 of the 1995 Kentucky Master Agreement with Option to Purchase Agreement wherein no consent to assignment is required."

**Response**

**THIS MASTER LEASE CONTRACT SHALL SUPERSEDE THE 1995 MASTER LEASE AGREEMENT AND ALL OF ITS AMENDMENTS.**

**Assignment of Benefits-Post Approval**

**FAP 120-08-07, ASSIGNMENT OF BENEFITS states "A vendor wishing to assign part or all of the proceeds of a contract entered into with a state agency shall submit to the Finance and Administration Cabinet's Division of Statewide Accounting Services a notarized assignment form stating the name, address, and TIN (taxpayer identification number) of the assignor and assignee. If the assignment is approved by the director of the Division of Statewide Accounting Services, a copy shall be sent to the assignor, the assignee, the Finance and Administration Cabinet's Division of Material and Procurement Services, and the affected agency. The original shall be filed in the director's office, Division of Statewide Accounting Services." *Only the proceeds of a contract can be assigned, not the contract itself.***

**Assignment of Benefits-Initial Approval**

**If Lessor intends to assign payments upon the Funding Date of the Lease, the Equipment Schedule (Exhibit A), shall be executed by Lessee, Lessor, Division of Statewide Accounting Services and notarized by Lessor. The Equipment Schedule shall state the name, address and TIN (taxpayer identification number) of the assignor and assignee, the amount to be assigned and the contract number. *Only the proceeds of a contract can be assigned, not the contract itself.***

**4. Standard Attachments Menu Choice 02-General Provisions**

GE Capital "This Attachment also includes a merger or integration clause. GECPPF prefers the merger/integration clause in Section 13.5 of the 1995 Kentucky Master Lease with Option to Purchase Agreement."

<b>Catalog Master Agreement</b>	<b>Document No.</b>	<b>Document Title</b>	Page 4 of 41
	C-03042738	MASTER LEASE PURCHASE-OFM	
	<b>Buyer Name</b> Stephanie Williams (FAC-DMPS)		

**Response THIS MASTER LEASE CONTRACT SHALL SUPERSEDE THE 1995 MASTER LEASE AGREEMENT AND ALL OF ITS AMENDMENTS. The vendor shall comply with the merger/integration clause in the Standard Attachments Menu Choice 02-General Provisions of Solicitation S-03042738.**

**5. FAP110-10-00: General Conditions and Instructions for Solicitations and Contracts**

GE Capital “Section 5(t) says there cannot be an assignment unless in accordance with FAP120-08-07. Such provision requires approval of the assignment by the Director of the Division of Statewide Accounting Services. GECPF prefers the assignment provisions in Section 11.1 of the 1995 Kentucky Master Lease with Option to Purchase Agreement.”

**Response THIS MASTER LEASE CONTRACT SHALL SUPERSEDE THE 1995 MASTER LEASE AGREEMENT AND ALL OF ITS AMENDMENTS. See response to #3.**

<b>Catalog Master Agreement</b>	<b>Document No.</b>	<b>Document Title</b>	Page 5 of 41
	C-03042738	MASTER LEASE PURCHASE-OFM	
	<b>Buyer Name</b> Stephanie Williams (FAC-DMPS)		

**TYPICAL EQUIPMENT FINANCED AND FINANCED TERMS**

<b><u>Equipment</u></b>	<b><u>Typical Term (yrs)</u></b>
Police Vehicles	3-5
Administrative Vehicles	5-7
School Buses	5-7
Public Works Equipment (medium and heavy trucks)	5-7
Fire Apparatus	10
Tracked Construction Equipment	5-7
Wheeled Construction Equipment	5-7
Telecommunications	7-10
Modular Buildings	7-10
Energy Management Systems	10-15
Mainframes/Mini Computers/Computer Workstations*	3-5
Personal Computers*	3-5

\*GECPF is willing to finance 100% of the hard cost of computer equipment. Soft costs software and maintenance will be considered on a case-by-case basis. The IRS does limit financing of maintenance and other soft costs, which must be considered.

Additionally, GECPF will offer flexibility in terms depending on the total mix of collateral submitted for financing on individual schedules.

<b>Catalog Master Agreement</b>	<b>Document No.</b>	<b>Document Title</b>	Page 6 of 41
	C-03042738	MASTER LEASE PURCHASE-OFM	
	<b>Buyer Name</b> Stephanie Williams (FAC-DMPS)		

### **STANDARD TERMS AND CONDITIONS**

THIS MASTER LEASE CONTRACT dated as of **September 1, 2003**, is made and entered into by and between GE Capital Public Finance, Inc., a corporation duly organized and existing under the laws of the state of Delaware, as lessor ("Lessor"), whose principal business address is as shown on the execution page hereof; and the Commonwealth of Kentucky as lessee ("Lessee"), acting by and through its Finance and Administration Cabinet, whose address is as shown on the execution page hereof.

**This Contract does not constitute a debt of the Commonwealth of Kentucky. Neither the full faith and credit nor the taxing power of the Commonwealth of Kentucky have been pledged for the payment of sums due under this Contract. Lease Payments due under this Contract are payable solely from appropriations by the General Assembly of the Commonwealth of Kentucky to the Using Departments of the Cabinets which are parties to this Contract made on a biennial basis for the purpose of obtaining Equipment hereunder. Failure to make Lease Payments due to lack of appropriations does not constitute a default under this Contract.**

In consideration of the mutual covenants herein contained, the parties hereto recite and agree as follows:

#### **ARTICLE I: DEFINITIONS AND EXHIBITS**

**Section 1.1. Definitions.** The following terms have the meanings specified below unless the context clearly requires otherwise.

Cabinet: For purposes of this Contract, the term Cabinet shall include agencies of the State whose heads are appointed pursuant to KRS 12.040; quasi-governmental state corporations established by State statute and State Departments and Agencies headed by constitutional officers.

Chattel Paper: A record or records that evidence both a monetary obligation and a security interest in specific goods, a security interest in specific goods and software used in the goods, a security interest in specific goods and license of software used in the goods, a lease of specific goods, or a lease of specific goods and license of software used in the goods. In this paragraph, "monetary obligation" means a monetary obligation secured by the goods or owed under a lease of the goods and includes a monetary obligation with respect to software used in the goods. The term does not include:

<b>Catalog Master Agreement</b>	<b>Document No.</b>	<b>Document Title</b>	Page 7 of 41
	C-03042738	MASTER LEASE PURCHASE-OFM	
	<b>Buyer Name</b> Stephanie Williams (FAC-DMPS)		

1. Charters or other contracts involving the use or hire of a vessel; or
2. Records that evidence a right of payment arising out of the use of a credit or charge card or information contained on or for use with the card.

*If a transaction is evidenced by records that include an instrument or series of instruments, the group of records taken together constitutes chattel paper.*

Contract: This Contract and all Equipment Schedules hereto.

Contract Date: The date designated in the first paragraph hereof.

Contract Term: **September 1, 2003 through August 31, 2005**, with the option to renew for two (2) additional two (2) year periods upon the mutual agreement of the Parties.

Contractor: Each of the manufacturers or vendors from whom Using Department has ordered or with whom a Using Department has contracted for the manufacture, delivery and/or installation of the Equipment.

Counsel: An attorney duly admitted to the practice of law before the highest court of the State.

Equipment: All items of personal property described in Equipment Schedules and subject to this Contract.

Equipment Group: The Equipment listed in a single Exhibit A.

Equipment Schedule: A schedule consisting of the separate but like numbered pages of Exhibits A and B which have been completed with respect to an Equipment Group and executed by Lessor, by a Cabinet on behalf of Lessee and by a Using Department.

Escrow Agreement: An Escrow Agreement among Lessor, Lessee and an escrow agent pursuant to which an escrow account is established for the deposit by Lessor of the proceeds of a Lease ("Escrow Account") and procedures for disbursement thereof are set forth.

Escrow Structure: If applicable, Lessor will deposit the principal sum of the total financing amount of individual Equipment Schedules into an Escrow Account with an escrow agent selected by Lessor and Lessee. Lessee will be responsible for any escrow/agent fees and any other expenses associated with the establishment of the Escrow Account. Payments from Lessee under the Lease commence upon deposit of funds into the Escrow Account. Interest earnings from the Escrow Account will accrue to the benefit of Lessee.



<b>Catalog Master Agreement</b>	<b>Document No.</b>	<b>Document Title</b>	Page 8 of 41
	C-03042738	MASTER LEASE PURCHASE-OFM	
	<b>Buyer Name</b> Stephanie Williams (FAC-DMPS)		

Events of Default: Those events described in Section 11.1.

Final Acceptance Date: The date designated in each Exhibit A as the last date on which the Using Department identified in such Exhibit A on behalf of Lessee may submit a Certificate of Acceptance to Lessor for the Equipment Group described in such Exhibit A.

Fiscal Period: The twenty-four (24) month period commencing July 1 in each even-numbered year and ending June 30 in the next even numbered year.

Interest: The portion of any Lease Payment designated as and comprising interest as shown in any Exhibit A.

Lease: With respect to each Equipment Group, this Contract and the Equipment Schedule relating thereto, which shall constitute a separate contract relating to such Equipment Group. Each such Lease is entered into by Lessee acting by and through a Cabinet for the benefit of a Using Department as identified in a respective Exhibit A.

Lease Date: The date so designated in each Exhibit A.

Lease Payment: With respect to any Equipment Group, the payment due from Lessee to Lessor on each Payment Date during the Lease Term as shown in the Exhibit A relating thereto.

Lease Term: With respect to any Equipment Group, the period during which the related Lease is in effect as specified in Section 4.1. Lease Terms are expected to range from two (2) to fifteen (15) years.

Lessee: The Commonwealth of Kentucky acting by and through a Cabinet, which is a party to this Contract.

Lessor: GE Capital Public Finance, Inc., any surviving, resulting or transferee corporation, or its assignee of a Lease hereunder.

Net Proceeds: Any insurance proceeds or condemnation awards paid with respect to any Equipment remaining after payment therefrom of all expenses incurred in the collection thereof.

Non-Appropriation: The failure of the General Assembly of the Commonwealth of Kentucky to appropriate money to a Using Department for Equipment subject to this Contract for any Fiscal Period of Lessee sufficient for the payment of Lease Payments and any other amount due under a Lease.

<b>Catalog Master Agreement</b>	<b>Document No.</b>	<b>Document Title</b>	Page 9 of 41
	C-03042738	MASTER LEASE PURCHASE-OFM	
	<b>Buyer Name</b> Stephanie Williams (FAC-DMPS)		

Payment Date: The date upon which any Lease Payment is due and payable as provided in any Exhibit A.

Principal: The portion of any Lease Payment designated as principal in any Exhibit A.

Purchase Option Price: With respect to any Equipment Group, as of the Payment Dates specified in the Exhibit A relating thereto, the amount so designated and set forth opposite each such date in such Exhibit A, also to be defined as the Buyout Price.

Specifications: The bid specifications and/or purchase order pursuant to which a Using Department has ordered any Equipment from a Contractor.

State: The Commonwealth of Kentucky.

State and Federal Law or Laws: The Constitution and any law of the State and any charter, ordinance, rule or regulation of any agency or political subdivision of the State; and any law of the United States, and any rule or regulation of any federal agency.

Structure: Tax-Exempt Master Lease Contract.

Total to Finance: Estimated at \$15,000,000 annually with an additional \$37,500,000 in Energy Management Projects for Fiscal 2004. This amount can be increased by mutual consent by Lessor and Lessee.

Using Department: A department or unit of the State Government, which may be a Cabinet itself, which has been authorized by a Cabinet to have the possession and use of an Equipment Group as indicated on the Exhibit A relating to such Equipment Group.

## **Section 1.2. Exhibits**

Exhibit A. Form of schedule executed by Lessor, by a Cabinet on behalf of Lessee and by a Using Department describing an Equipment Group and setting forth the Lease Payments and Purchase Option Prices. Lessee hereby authorizes Lessor to insert on Exhibit A the Payment Dates and the serial or other identifying numbers relating to the Equipment Group when available.

Exhibit B. Form of Certificate of Acceptance executed by the Using Department on behalf of Lessee.

Exhibit C. Form of Opinion of Counsel to the Cabinet.

Exhibit D. Forms of Uniform Commercial Code Financing Statements.

<b>Catalog Master Agreement</b>	<b>Document No.</b>	<b>Document Title</b>	Page 10 of 41
	C-03042738	MASTER LEASE PURCHASE-OFM	
	<b>Buyer Name</b> Stephanie Williams (FAC-DMPS)		

Exhibit E. Forms of Form 8038-G and Form 8038-GC.

## **ARTICLE II: REPRESENTATIONS, WARRANTIES AND COVENANTS**

**Section 2.1. Representations, Warranties and Covenants Lessee.** Lessee represents and warrants and covenants as follows:

- (a) Lessee is the Commonwealth of Kentucky and is authorized under the Constitution and laws of the State to enter into this Contract, each Lease and the transactions contemplated hereby and thereby, and to perform all of its obligations under this Contract and each Lease.
- (b) The execution and delivery of this Contract by the Cabinets for Lessee and each Lease by an officer of a Cabinet and an officer of the Using Department which has the use and possession of the Equipment Group has been duly authorized by appropriate official action, and such action is in compliance with all public bidding and other State and Federal Laws applicable to this Contract, each Lease and the acquisition and financing of the Equipment by Lessee. All requirements have been met and procedures have occurred in order to ensure the enforceability of this Contract and each Lease against Lessee.
- (c) Lessee will ensure that the Cabinets on behalf of their respective Using Departments use the Equipment only to perform essential governmental or proprietary functions of Lessee within the scope of Lessee's authority. Lessee will not permit the Equipment to be used in or for any private commercial activity.
- (d) Lessee will not lease, sublease, sell or contract with a private user for the use or management of the Equipment, Lessee will calculate and pay any rebate to the Internal Revenue Service and Lessee will comply with the Internal Revenue Code of 1986, as amended (the "Code") and all rules and regulations promulgated thereunder (the "Regulations") which are applicable to the Contract.
- (e) Lessee will submit to the Secretary of the United States Treasury information reporting statements executed by the Cabinet and other information relating to each Lease at times and in the forms required by the Code and the Regulations.
- (f) There is no action, suit, proceeding, inquiry or investigation, at law or in equity, before or by any court, regulatory agency, public board or body pending or, to the best of Lessee's knowledge, threatened against or affecting Lessee wherein an unfavorable ruling or finding would adversely affect the enforceability of this Contract or any Lease hereunder or any

<b>Catalog Master Agreement</b>	<b>Document No.</b>	<b>Document Title</b>	Page 11 of 41
	C-03042738	MASTER LEASE PURCHASE-OFM	
	<b>Buyer Name</b> Stephanie Williams (FAC-DMPS)		

other transaction of the Lessee which is similar hereto, or the exclusion of the interest portion of Lease Payments from gross income for federal tax purposes under the Code, or would materially and adversely affect any of the transactions contemplated by this Contract.

- (g) Within three (3) business days of delivery and installation of any Equipment Group or part thereof, the respective Using Department on behalf of Lessee will inspect such Equipment and if it meets Lessee's Specifications, provide to Lessor a completed and executed Certificate of Acceptance executed by the Using Department on behalf of Lessee relating thereto in the form attached hereto as Exhibit B. Lessee hereby confirms the authority of each Using Department named in an Exhibit A to order Equipment, and to execute Certificates of Acceptance. Lessee agrees that Lessor may rely on Certificates of Acceptances executed by the Using Departments and Lessee agrees to be bound by Certificates of Acceptance executed by the Using Departments.
- (h) Lessee acknowledges that (i) under Article XI of this Contract, upon Event of Default of Lessee relating to a particular Lease entered into for the benefit of a particular Using Department, Lessor may elect to terminate this Contract with respect to all Leases for the benefit of such Using Department notwithstanding that the Event of Default is with respect to only one or more specific Leases involving such Using Department and (ii) in the event of Non-Appropriation by Lessee, acting through a Cabinet, of any particular Lease for the benefit of a Using Department within that Cabinet, this Contract shall terminate as to all Leases for that particular Using Department, and all Equipment subject to Leases entered into for that Using Department are subject to return by Lessee pursuant to Section 11.5.

### **ARTICLE III: LEASE OF EQUIPMENT**

**Section 3.1. Acquisition of Equipment.** Lessee, through a Cabinet, shall advise Lessor of its desire to lease equipment, the equipment cost, the Contractor of the equipment, expected delivery date and the desired lease terms for such equipment. By execution hereof, Lessor has made no commitment to lease any equipment to Lessee. Nothing herein shall obligate Lessor to lease any equipment to Lessee until Lessor has executed an Equipment Schedule relating thereto. If Lessor, in its sole discretion, determines the proposed equipment may be subject to a Lease hereunder, Lessor shall furnish to the Cabinet a proposed Exhibit A relating to the Equipment Group completed insofar as possible. The Using Department shall order the Equipment Group from the appropriate Contractor or Contractors. In no event shall Lessee enter into any contract with any Contractor or issue a purchase order that references Lessor. Lessor shall

<b>Catalog Master Agreement</b>	<b>Document No.</b>	<b>Document Title</b>	Page 12 of 41
	C-03042738	MASTER LEASE PURCHASE-OFM	
	<b>Buyer Name</b> Stephanie Williams (FAC-DMPS)		

have no obligation to make any payment to a Contractor or reimburse Lessee for any payment it made to a Contractor for an Equipment Group until five (5) business days after Lessor has received all of the following in form and substance satisfactory to Lessor (provided, however, Lessor shall make no payment to a Contractor for any Equipment for which Lessor did not receive a Certificate of Acceptance prior to the Final Acceptance Date) (a) an Exhibit A executed by Lessor, by a Cabinet acting for and on behalf of Lessee and the applicable Using Department ; (b) a Certificate of Acceptance executed by the Using Department; (c) Contractor invoice(s) and/or bill(s) of sale relating to the Equipment Group and if such invoices have been paid by Lessee, evidence of payment thereof and, if applicable, evidence of official intent to reimburse such payment as required by the Regulations; (d) the legal description of the real estate where the Equipment is located and/or the original certificate of title or manufacturer's certificate or origin and title application if any of the Equipment Group is subject to certificate of title laws; (e) a completed Form 8038-G or -GC executed by a Cabinet on behalf of the Commonwealth of Kentucky in one of the forms attached hereto as Exhibit E or evidence of filing thereof with the Secretary of Treasury; (f) an Opinion of Counsel to the Cabinet in the form of Exhibit C thereto and (g) any other documents or items required by Lessor.

**Section 3.2. Lease; Enjoyment; Inspection.** Lessor hereby leases to Lessee each Equipment Group made subject to an Equipment Schedule hereto, and Lessee hereby leases from Lessor such Equipment Group, upon the terms and conditions set forth herein and in the related Equipment Schedule. During the Lease Term, Lessee shall peaceably and quietly have and hold and enjoy the Equipment Group, except as expressly set forth in this Contract. Lessee agrees that Lessor and its agents shall have the right at all reasonable times to examine and inspect the Equipment, and Lessor and its agents shall have such rights of access to the Equipment as may be reasonably necessary to cause the proper maintenance of the Equipment in the event of failure by Lessee to perform its obligations hereunder. Notwithstanding the designation of GE Capital Public Finance, Inc. as Lessor, GE Capital Public Finance, Inc. does not own the Equipment and by this Contract and each Lease is merely financing the acquisition thereof for Lessee. Lessor has not been in the chain of title of the Equipment, does not operate, control or have possession of the Equipment and has no control over the Lessee or the Lessee's operation, use, storage or maintenance of the Equipment. Lessee is solely responsible for the selection of the Equipment, and the manufacturer and vendor thereof and is solely responsible for the use, maintenance, operation and storage of the Equipment.

**Section 3.3. Alternative Procedure; Escrow Agreement.** Notwithstanding the provisions of Section 3.1, if, upon agreement by Lessor and Lessee as to any Equipment Group to be acquired and leased by Lessee under this Contract, Lessor and Lessee enter into an Escrow Agreement with an escrow agent establishing an Escrow

<b>Catalog Master Agreement</b>	<b>Document No.</b>	<b>Document Title</b>	Page 13 of 41
	C-03042738	MASTER LEASE PURCHASE-OFM	
	<b>Buyer Name</b> Stephanie Williams (FAC-DMPS)		

Account from which the Equipment Group cost is to be paid (a) Lessor and Lessee shall immediately complete and execute an Exhibit A relating to the Equipment Group; (b) the amount deposited by Lessor into the Escrow Account shall be repaid by the Lease Payments due under the related Lease and Interest on the Lease shall commence on the date of deposit; and (c) the Lease Payments relating to the Equipment Group shall have an aggregate Principal component equal to the amount of Lessor's deposit into the Escrow Account and shall be due and payable as provided in the related Exhibit A commencing upon the deposit of funds by Lessor into the Escrow Account. Lessee acknowledges and agrees that no disbursements shall be made from an Escrow Account except for portions of the Equipment Group which are operationally complete and functionally independent and which may be utilized by Lessee without regard to whether the balance of the Equipment Group is delivered and accepted.

#### **ARTICLE IV: CONTRACT TERM**

**Section 4.1. Term.** The initial term of this Contract shall be for a period of two (2) years from the effective date of the award of contract, **September 1, 2003.**

This Contract may be renewed at the completion of the initial Contract Term for two (2) additional two (2) year periods upon the mutual agreement of the Parties. Such mutual agreement shall take the form of an addendum to this Contract under Section 40.050 of Solicitation S-03042738.

Lessee reserves the right not to exercise any or all renewal options. Lessee reserves the right to extend this Contract for a period less than the length of the above-referenced renewal period if such an extension is determined by the Commonwealth Buyer to be in the best interest of Lessee.

Notwithstanding the termination of the Contract Term during which Equipment Schedules may be executed, Lessee shall continue to make Lease Payments under each Lease and perform its obligations under each Lease until the termination of each such Lease as provided in Section 4.5. Each Lease with respect to an Equipment Group shall be in effect for a Lease Term commencing upon the Lease Date and ending as provided in Section 4.5.

**Section 4.2. Termination by Lessee.** (a) This Contract shall be subject to the provisions set forth in 200 KAR 5:312. In reference to Termination for Default, Lessee shall notify Lessor in writing at least thirty (30) days prior to the proposed termination date of the default. Such written notice shall specifically state the reason of the intention to terminate. Lessor shall have thirty (30) days in which to cure the default, unless such cure period is extended by agreement of the Parties. If the default is not cured to the

<b>Catalog Master Agreement</b>	<b>Document No.</b>	<b>Document Title</b>	Page 14 of 41
	C-03042738	MASTER LEASE PURCHASE-OFM	
	<b>Buyer Name</b> Stephanie Williams (FAC-DMPS)		

satisfaction of Lessee within the thirty (30) day cure period or any extension thereof, this Contract shall be considered terminated as to the ability to fund future Equipment Schedules at close of business on the thirtieth (30<sup>th</sup>) day or any agreed upon extension.

Lessee may also terminate this Contract for convenience if it determines that such termination is in its best interests.

Upon delivery by certified mail to Lessor of a Notice of Termination specifying the nature of the termination and the date upon which such termination becomes effective, Lessor shall not fund any additional Equipment Schedules under this Contract.

In the event of termination of this Contract by Lessee for an alleged default of the Lessor or for convenience, this Contract is terminated as to the ability to fund additional Equipment Schedules, but the Equipment Schedules previously funded will remain in full force and effect unless Lessee determines to purchase the Equipment.

(b) In the event of Non-Appropriation relating to a Lease entered into for the benefit of a particular Using Department, this Contract shall terminate with respect to each Lease hereunder entered into for the benefit of such Using Department, in whole, but not in part, as to all Equipment Groups subject to such Leases effective upon the last day of the Fiscal Period for which funds were appropriated, in the manner and subject to the terms specified in this Article. Lessee may effect such termination by giving Lessor a written notice of termination and by paying to Lessor any Lease Payments and other amounts which are due under such Leases and have not been paid at or before the end of its then current Fiscal Period. Lessee shall endeavor to give notice of such termination not less than forty-five (45) days prior to the end of the Fiscal Period for which appropriations were made, and shall notify Lessor of any anticipated termination. In the event of termination of any Leases as provided in this Section, Lessee shall comply with the instructions received from Lessor in accordance with Section 11.5 within ten (10) days after the termination of such Leases.

**Section 4.3. Intent to Continue Lease Term; Appropriations.** Lessee presently intends to continue each Lease hereunder for its entire Lease Term and to pay all Lease Payments relating thereto and own all Equipment at the end of the Lease Term. Each Cabinet will include in its budget request for each Fiscal Period the Lease Payments to become due in such Fiscal Period with respect to Equipment Groups leased hereunder for the benefit of the Using Department within the respective Cabinet's jurisdiction, and will use all reasonable and lawful means available to secure the appropriation of money for such Fiscal Period sufficient to pay all Lease Payments coming due therein. The parties acknowledge that appropriation for Lease Payments is a governmental function which Lessee cannot contractually commit itself in advance to perform and this Contract does not constitute such a commitment. However, Lessee

<b>Catalog Master Agreement</b>	<b>Document No.</b>	<b>Document Title</b>	Page 15 of 41
	C-03042738	MASTER LEASE PURCHASE-OFM	
	<b>Buyer Name</b> Stephanie Williams (FAC-DMPS)		

reasonably believes that moneys in an amount sufficient to make all Lease Payments can and will lawfully be appropriated and made available to permit Lessee's continued utilization of the Equipment in the performance of its essential functions during the applicable Lease Terms.

**Section 4.4. Effect of Termination Due to Non-Appropriation.** Upon termination of this Contract in the event of a Non-Appropriation as to all Leases involving a specific Using Department as provided in this Article, Lessee shall not be responsible for the payment of any additional Lease Payments coming due in succeeding Fiscal Periods with respect to such Leases, but if Lessee has not complied with the instructions received from Lessor in accordance with Section 11.5 within ten (10) days after termination of such Leases, the termination shall nevertheless be effective, but Lessee shall be responsible for the payment of damages in an amount equal to the amount of the Lease Payments that would thereafter have come due if such Leases had not been terminated and which are attributable to the number of days after such ten (10) day period during which Lessee fails to comply with Lessor's instructions and for any other loss suffered by Lessor as a result of Lessee's failure to take such actions as required.

**Section 4.5. Termination of Lease Term.** The Lease Term with respect to any Lease will terminate upon the occurrence of the first of the following events: (a) the termination by Lessee in accordance with Section 4.2(b); (b) the payment of the Purchase Option Price of the Equipment by Lessee pursuant to Article XIII; (c) An Event of Default by Lessee and Lessor's election to terminate the Lease pursuant to Article XI; or (d) the payment by Lessee of all Lease Payments and all other amounts authorized or required to be paid by Lessee pursuant to the Lease.

**Section 4.6. Nonsubstitution.** If Leases are terminated by Lessee in accordance with Section 4.2(b), to the extent permitted by State Law, Lessee agrees not to purchase, lease, rent, borrow seek appropriations for, acquire or otherwise receive the benefits of any personal property to perform the same functions as, or functions taking the place of, those performed by any of the Equipment Groups subject to such terminated Leases, and agrees not to permit such functions to be performed by its own employees or by any agency or entity affiliated with or hired by Lessee, for a period of three hundred sixty-five (365) days succeeding such termination; provided, however, these restrictions shall not be applicable in the event the Equipment Groups shall be sold by Lessor and the amount received from such sale, less all costs of such sale, is sufficient to pay the then applicable Purchase Option Prices relating thereto as set forth in Exhibits A to such Leases; or to the extent that the application of these restrictions is unlawful and would affect the validity of this Contract.



<b>Catalog Master Agreement</b>	<b>Document No.</b>	<b>Document Title</b>	Page 16 of 41
	C-03042738	MASTER LEASE PURCHASE-OFM	
	<b>Buyer Name</b> Stephanie Williams (FAC-DMPS)		

**ARTICLE V: LEASE PAYMENTS**

**Section 5.1. Lease Payments.** Lessee agrees to pay Lease Payments with respect to an Equipment Group during the related Lease Term in the amounts and on the dates specified in the Exhibit A relating thereto. A portion of each Lease Payment is paid as and represents the payment of Interest as set forth in Exhibit A of each Equipment Schedule; provided that Interest accrual will not commence until Lessor has paid the Contractor for the Equipment or deposited the proceeds of a Lease pursuant to an Escrow Agreement. All Lease Payments shall be paid to Lessor; or to such assignee(s) to which Lessor has assigned such Lease Payments, at such place as Lessor or such assignee(s) may from time to time designate by written notice to Lessee. Lessee shall pay the Lease Payments exclusively from moneys legally available therefor, in lawful money of the United States of America.

**Section 5.2. Current Expense.** The obligations of Lessee, including its obligation to pay the Lease Payments due in any Fiscal Period of a Lease Term, shall constitute a current expense of Lessee for such Fiscal Period and shall not constitute an indebtedness of Lessee within the meaning of the Constitution and laws of the State. Nothing herein shall constitute a pledge by Lessee of any taxes or other moneys (other than moneys lawfully appropriated from time to time by or for the benefit of Lessee for this Contract and the Net Proceeds of the Equipment) to the payment of any Lease Payment or other amount coming due hereunder.

**Section 5.3. Lease Payments To Be Unconditional.** Except as provided in Section 4.2(b), the obligation of Lessee to make Lease Payments or any other payments required hereunder shall be absolute and unconditional in all events. Notwithstanding any dispute between Lessee and Lessor or between Lessee and Contractor or any other person, Lessee shall make all Lease Payments and other payments required hereunder when due and shall not withhold any Lease Payments or other payment pending final resolution of such dispute nor shall Lessee assert any right of set-off or counterclaim against its obligation to make Lease Payments or other payments required hereunder. Lessee's obligation to make Lease Payments or other payments shall not be abated through accident, unforeseen circumstances, failure of the Equipment to perform as desired, damage or destruction to the Equipment, loss of possession of the Equipment or obsolescence of the Equipment.