

Federal Energy Savings Performance Contracts

Frequently Asked Questions on the Scope of 42 U.S.C. §
8287 et. seq.

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Federal Energy Savings Performance Contract Frequently Asked Questions on the Scope of 42 U.S.C. § 8287 *et seq.*

The U.S. Department of Energy (DOE) Federal Energy Management Program (FEMP) is authorized to establish appropriate procedures and methods for use by Federal agencies with regard to the administration and award of energy savings performance contracts (ESPCs). FEMP is issuing this document to provide clarifications and guidance on issues commonly raised regarding the scope of 42 U.S.C. § 8287 *et seq.* This document is intended to supplement [FEMP's extensive collection of materials](#) that are available to assist Federal agencies execute successful ESPC projects.

For assistance with these or any other questions, please contact FEMP or a [FEMP Federal Project Executive](#).

1. What is an ESPC?

An ESPC is a firm fixed-price multiyear contract with a term not to exceed 25 years for the provision of supplies or the performance of services for the design, acquisition, installation, testing, measurement and verification (M&V), and, where appropriate, operation, maintenance, repair, and replacement, of an identified energy conservation measure (see question 14), water conservation measure (see question 15), or series of energy conservation measures or water conservation measures at one or more locations. Additional requirements for, and characteristics of, an ESPC are addressed in this document.

2. What is the process for ESPC implementation?

The ESPC process involves collaboration between a Federal agency (see question 3) and a qualified private sector energy services company (ESCO) (see question 4) to identify potential improvements to facilities that would result in energy savings (see question 9). The ESCO designs, constructs, and installs a project that meets the Federal agency's needs and provides the necessary financing, with no required initial cost to the agency. The ESCO must provide a guarantee to the Federal agency that the improvements will generate annual energy savings sufficient to pay for the project over the term of the contract, guarantee the performance of installed equipment, and have the responsibility for maintenance and repair services during the life of the contract (see question 31).

In exchange for assuming the risk of upfront project financing and the performance guarantee, the ESCO is paid over the term of the contract from contractually guaranteed energy savings. Importantly, annual (or more often, as necessary) M&V must be performed to ensure that the guaranteed energy savings have been met and to ensure that payments to the ESCO do not exceed energy savings (see questions 10 and 11). When the contract term is complete, the recurring energy and cost savings from these improvements accrue to the Federal agency.

3. Which Federal agencies are authorized to implement an ESPC?

Any Federal agency is authorized to implement an ESPC. The term “Federal agency” includes each authority of the government of the United States, whether or not it is within or subject to review by another authority of the government of the United States.

4. Which ESCOs are qualified to implement an ESPC?

In order to be eligible for award of an ESPC, an ESCO must be included on the [DOE list of qualified contractors](#) (or another Federal agency’s list of qualified contractors provided that the Federal agency has developed its own list of qualified contractors and procedural requirements using similar oversight procedures and methods as established by FEMP).

5. What is the process for selecting an ESCO for ESPC award?

A Federal agency may consider several avenues of ESCO selection, including procedures for competitive selection of ESCOs based on both solicited and unsolicited proposals and the use of a multiple-award contract. FEMP and the U.S. Army Corps of Engineers have developed separate multiple-award contracts (the DOE ESPC Indefinite-Delivery Indefinite Quantity (IDIQ) contracts and the Army Multiple Award Task Order Contracts (see question 6)), both of which allow Federal agencies to negotiate individual task orders from an approved pool of ESCOs under an expedited procurement process.

6. What is the process for selecting an ESCO for ESPC award under the DOE ESPC IDIQ?

When issuing a task order under the DOE ESPC IDIQ, a Federal agency is authorized to use simplified contractor selection procedures. The DOE ESPC IDIQ contracts allow a Federal agency to negotiate and award individual task orders from an approved, pre-competed pool of ESCOs under an expedited and streamlined procurement process using either selection procedures based on an ESCO’s qualifications or an ESCO’s preliminary assessment.

Selection by qualifications allows agencies to evaluate ESCOs based on their past experience, performance, and other criteria that the Federal agency deems relevant. Selection by preliminary assessment allows agencies to evaluate ESCOs based on submission of preliminary assessments for an ESPC project. FEMP ESPC experts and agencies with ESPC experience have observed that selection by qualifications can elicit as much useful information for finding the best ESCO for a specific project as other more complex, costly, labor-intensive, and time-consuming methods. Accordingly, FEMP’s website includes a document outlining best practices for ESCO selection. To help agencies select an ESCO please see the Appendix reference for more information on FEMP’s ESCO Selector Tool.

7. Are there other simplified ESCO selection procedures that are authorized under the ESPC authority that can benefit smaller ESPC projects?

Yes. The [ESPC ENABLE program](#) provides a standardized and streamlined procurement process for Federal projects involving targeted energy conservation measures to administer projects through the General Services Administration (GSA) Federal Supply Schedule SIN 334512.

While ideal for small projects, ENABLE also is applicable to larger projects that contemplate the implementation of targeted energy conservation measures on an expedited basis.

8. What activities are authorized under an ESPC?

An ESPC must be solely for the purpose of achieving energy savings (see question 9) and benefits ancillary to that purpose and must be for the implementation of an energy conservation measure (see question 14), water conservation measure (see question 15), or series of energy conservation measures or water conservation measures at one or more locations. An ESPC must include activities that result in energy savings, which include savings that arise directly from reductions in the cost of energy, water, and wastewater treatment and from reductions in the cost of related operation and maintenance (see questions 9, 10, 11, and 20).

9. What qualifies as “energy savings”?

- Reductions in the cost of energy, water, and wastewater treatment in an existing Federal building (see question 33), including a reduction in the cost of related operation and maintenance, achieved under an ESPC as compared to the cost of energy, water, and wastewater treatment in the existing Federal building in the absence of an ESPC, and as a result of:
 - The lease or purchase of operating equipment, improvements, altered operation and maintenance, or technical services; or
 - The increased efficient use of existing energy sources by cogeneration or heat recovery realized in connection with a Federal building; or
 - The increased efficient use of existing water sources in either interior or exterior applications.
- The increased efficient use of an existing energy source by cogeneration or heat recovery; or
- If otherwise authorized by Federal or state law, the sale or transfer of electrical or thermal energy generated onsite from renewable energy sources or cogeneration under an ESPC, that is in excess of Federal needs, to utilities or non-Federal energy users.
- The increased efficient use of existing water sources in interior or exterior applications under an ESPC.
- The use, sale, or transfer of any energy and water incentive, rebate, grid services revenue, or credit (including a renewable energy certificate); or
- Any revenue generated from a reduction in energy or water use, more efficient waste recycling, or additional energy generated from more efficient equipment.

10. What is the appropriate source of Federal agency funds for ESPC payments?

As discussed above and as outlined in [FEMP guidance](#), the ESCO is paid over the term of the ESPC from any resulting energy savings achieved during the performance service period. Once a Federal agency determines whether the funds that it anticipates using for ESPC payments result

from energy savings (see question 9), it then must ensure that any payment is made only from funds appropriated to, or otherwise made available by, the Federal agency for the payment of energy, water, or wastewater treatment expenses, and related operation and maintenance expenses. Funds that are “otherwise made available to the agency” for these expenses refers to internally-allocated Federal agency funds that have been or may be designated by the agency for energy- and water-related expenses (including related operation and maintenance expenses).

A central tenet of the ESPC program is that aggregate annual ESPC payments in each year of an ESPC may not exceed energy savings. Under limited circumstances, however, ESCO payments for ESPC cancellations and terminations need not be limited to funds appropriated to, or otherwise made available by, the Federal agency for the payment of energy, water, or wastewater treatment expenses (and related operation and maintenance expenses). A Federal agency that is seeking to terminate or cancel an ESPC should consult with FEMP to ensure compliance with the ESPC authorities.

11. Can a Federal agency make ESPC payments from energy savings other than the annual recurring energy savings achieved under an ESPC?

Yes. As outlined in [FEMP guidance](#), ESPC payments may be made from recurring and nonrecurring energy savings. Recurring energy savings include savings to a Federal agency’s annual utility bills or annual operation or maintenance cost savings that result from ESPC implementation. Non-recurring energy savings include avoided costs associated with funds that have been appropriated to, or otherwise made available and may be used for, energy, water, or wastewater treatment project expenses (and related operation or maintenance expenses, including costs related to equipment repair, equipment replacement, equipment renewal, and other capital expenditures). For example, funding appropriated or otherwise made available to an agency for energy efficiency improvements could be used to install or replace existing energy related systems to improve energy efficiency.

If an ESPC were to include an energy conservation measure that replaced a utility related system, eliminated the need for a system, or installed new equipment for the purpose of improved efficiency, the ESPC would result in avoiding the expenditure of funds appropriated or otherwise made available for utility efficiency improvements. As such, the funds generally made available for utility efficiency improvements could be appropriately applied to an ESPC as a payment from non-recurring energy savings. The following example illustrates these different sources of contractor payments under an ESPC:

- A Federal agency awards an ESPC for \$1,000,000 to replace all of the windows in a Federal building. It is estimated that the new windows will result in \$50,000 annual savings to the Federal building’s electricity bill. The Federal agency currently spends \$25,000 on re-caulking annually to maintain the existing windows. The Federal agency also has \$200,000 generally available for energy- or water- related expenses. In this example, allowable sources of funding to make contractor payments under the ESPC include:

- Annual recurring energy savings of \$50,000 that arise from the reduction in the cost of electricity for the building.
- Annual recurring energy savings of \$25,000 that arise from related operations and maintenance expense savings because the ESPC eliminates the need to re-caulk the existing windows.
- Non-recurring energy savings of up to \$200,000 from the funds generally available for energy- or water-related expenses because the ESPC avoids an expenditure that otherwise could have been paid for from these funds.

Other examples can be found in the FEMP guidance, “[How to Determine and Verify Operating and Maintenance Savings in Energy Savings Performance Contracts.](#)”

12. Can a Federal agency rely on estimated energy and water tariffs in determining projected energy savings?

Yes. To the extent that future energy or water rates are known at the time of contract formation, the calculation of ESPC payments should rely on known values. If future energy or water rates over the term of an ESPC are unknown at the time of contract formation, Federal agencies are authorized to rely on estimated values in determining the energy or water tariffs. For more information, see [FEMP guidance](#) and [FEMP’s Energy Escalation Rate Calculator \(EERC\) tool](#) on the use of certain procedures to determine escalation rates that are in the best interest of the government.

13. Can a Federal agency rely on normalized weather values in determining projected energy savings?

Yes. Federal agencies are authorized to rely on normalized weather data when determining energy or water tariffs. For more information, see [FEMP guidance](#) on using normalized weather values to obtain best value for the government.

14. What is an energy conservation measure?

As discussed in [FEMP guidance](#), a measure must satisfy four criteria in order to qualify as an “energy conservation measure (ECM).” It must (1) be applied to a Federal building (see question 16); (2) improve energy efficiency (see question 18); (3) be lifecycle cost-effective (see question 19); and (4) involve energy conservation, cogeneration facilities, renewable energy sources, improvements in operation and maintenance efficiencies, retrofit activities or energy consuming devices and required support structures.

There are many ECMs that can meet the four criteria including operation and maintenance upgrades and renewable energy (see questions 20 and 21, respectively). In addition, measures that do not save energy or water, but that reduce cost and are related to an ECM may be included under certain circumstances (see question 25).

A non-exhaustive sample of ECMs can be found in Attachment J-3 of the [generic 2017 DOE ESPC IDIQ contract](#).

https://www.energy.gov/sites/default/files/2019/05/f63/2017_generic_doe_idiq_espc_contract.pdf)

15. What is a water conservation measure?

A measure must satisfy three criteria in order to qualify as a “water conservation measure.” It must: (1) improve the efficiency of water use; (2) be life cycle cost-effective (see question 20); and (3) involve water conservation, water recycling or reuse, more efficient treatment of wastewater or stormwater, improvements in operation or maintenance efficiencies, retrofit activities, or other related activities.

Water conservation measures are not authorized to be implemented at a Federal hydroelectric facility.

There are many water conservation measures that can meet the three criteria including operation and maintenance upgrades (See Question 20). In addition, measures that do not conserve water or wastewater, but that reduce cost and are related to a water conservation measure may be included under certain circumstances (See question 25).

A non-exhaustive sample of ECMs can be found in Attachment J-3 of the [generic 2017 DOE ESPC IDIQ contract](https://www.energy.gov/sites/default/files/2019/05/f63/2017_generic_doe_idiq_espc_contract.pdf).

https://www.energy.gov/sites/default/files/2019/05/f63/2017_generic_doe_idiq_espc_contract.pdf)

16. What does it mean for an energy conservation measure to “be applied to a federal building”?

A measure satisfies the “applied to a Federal building” criterion of the “energy conservation measure (ECM)” definition (see question 14) if it is applied to, serves, or impacts an existing Federal building. There are a number of ways an ECM can qualify as being applied to a Federal building. The measure may be located onsite but not necessarily on or in an actual structure. For example, a ground-mounted solar array need not be physically attached to a building, or a measure could be applied to a building but be movable. Examples include computer equipment, spot cooling, vending machines, or improvements to operations and maintenance (see question 20). A single energy conservation measure that is applied across multiple facilities (including geographically dispersed facilities) may also be considered to be “applied to a Federal building.” In addition, a Federal building need not be located in the United States to be considered for an ESPC. As discussed in question 17, ESPCs may be applied to existing Federal buildings, as well as existing designs for Federal buildings.

There is no requirement for a water conservation measure to “be applied to a Federal building.”

17. Can an energy conservation measure or water conservation measure be applied to a new building?

Yes. As discussed in [FEMP guidance](#), under certain limited circumstances an energy conservation measure or water conservation measure may be applied to a new building. First, an ESPC could provide incremental energy or water efficiency improvements to a design for

construction of a planned facility. In this regard, the design for construction would serve as the “existing” facility and would be required to reflect the energy efficiency design requirements set forth in all relevant regulations, including but not limited to 10 C.F.R. Parts 433 and 435, as applicable. Second, construction of a “new” facility would be authorized where the construction is necessary for implementation, operation, and maintenance of an energy conservation measure or a water conservation measure. For example, construction of a facility to house a cogeneration facility would be authorized so long as the facility also met all of the criteria set forth under the definition of “energy conservation measure” (see question 14).

18. What does it mean for an energy conservation measure to “improve energy efficiency”?

A measure satisfies the “improve[s] energy efficiency” criterion of the “energy conservation measure” definition (see question 14) by means including, but not limited to, reducing energy consumption, electricity load management (for example, by managing electricity load through the use of batteries), reducing energy loss (for example, by generating energy closer to its use), reducing the use of fossil-based energy by substituting renewable energy, or reducing greenhouse gas emissions or other pollutants by substituting fuels.

19. What does it mean for an energy conservation measure or water conservation measure to be “life cycle cost-effective”?

A measure satisfies the life cycle cost-effectiveness criterion of both the “energy conservation measure” and “water conservation measure” definitions (see questions 14 and 15) by determining life cycle cost-effectiveness either in the context of the individual measure or in the context of the combined effect of all energy conservation measures and water conservation measures included under the same energy savings performance contract, as calculated in accordance with 10 C.F.R. § 436.10 *et seq.* That is, multiple energy conservation measures and water conservation measures under the same ESPC may be “bundled” in evaluating life cycle cost-effectiveness. Additional DOE guidance on determining life cycle cost-effectiveness for ESPCs with multiple or single energy conservation measures or water conservation measures is available on the FEMP website.

20. Can operation and maintenance upgrades qualify as an energy conservation measure or a water conservation measure?

Yes. The ESPC authorities provide that measures that involve improvements in operation and maintenance efficiencies may qualify as an energy conservation measure or a water conservation measure.

21. Can renewable energy sources qualify as an energy conservation measure?

Yes. The ESPC authorities provide that measures that involve renewable energy sources may qualify as an energy conservation measure.

22. Can a third-party-owned and -operated onsite energy source qualify as an energy conservation measure?

Yes, however, the Office of Management and Budget (OMB) has determined that for an ESPC to be scored (and obligated) on an annual basis during the term of the contract, an onsite energy source must comply with the “Conditions for Annual Scoring of ESPCs” as set forth in [OMB Memorandum M-12-21](#).

23. How can a Federal agency implement an ESPC with a third-party-owned and -operated onsite energy source?

Federal agencies that are considering whether to implement an onsite energy source under an ESPC should contact FEMP for information on the ESPC Energy Sales Agreement (ESPC ESA) contracting model, which Federal agencies may use to implement onsite energy sources under an ESPC in compliance with the OMB conditions for annual scoring (see question 22).

24. Can an ESCO utilize a reserve account to hold energy savings for a specified future use under an ESPC ESA?

Yes. Federal agencies generally are prohibited under 31 U.S.C. § 3324 from making advance payments from appropriations and, as such, may not establish an escrow account with a third party. This prohibition does not extend to an ESCO that establishes its own independent reserve account in connection with an ESPC ESA, which would not be considered to be an “escrow” account and should not be characterized as such. A Federal agency that is considering the use of a reserve account should consult with its counsel as well as FEMP to ensure compliance with ESPC authorities and other applicable laws.

25. Can an arrangement that does not improve energy efficiency or conserve water be included in an ESPC?

An ESPC must be for the implementation of an identified energy conservation measure (see question 14), water conservation measure (see question 15), or series of energy conservation measures or water conservation measures. An activity that results in cost savings with no associated improvement in energy or water efficiency must be combined with a separate activity that demonstrates an improvement in energy or water efficiency (so long as the separate activities are reasonably related to each other) in order for the activities as combined to qualify as an energy conservation measure or water conservation measure.

26. Can infrastructure improvements be included in an ESPC?

An ESPC may include an infrastructure improvement so long as (1) the contract is solely for the purpose of achieving energy savings (see question 9) and benefits ancillary to that purpose and (2) the infrastructure improvement is reasonably related to or would qualify as an energy conservation measure (see question 14), water conservation measure (see question 15), or series of energy conservation measures or water conservation measures (see question 25).

27. Can an energy conservation measure, water conservation measure, or other arrangement with a payback period in excess of twenty-five years be included in an ESPC?

ESPCs are limited to a twenty-five-year maximum contract period (see question 1). An energy conservation measure or water conservation measure that, on its own, would not have a payback period within twenty-five years is permissible only if the ESPC as a whole has a payback period within the twenty-five-year contract period.

28. Is there a requirement for Congressional notification in advance of an ESPC award?

Although the Energy Independence and Security Act of 2007 repealed the express Congressional notification requirement in the ESPC statute, ESPCs currently remain subject to the requirements of part 17.1 of the Federal Acquisition Regulation (FAR), which requires agencies to notify Congress at least 30 days prior to the award of certain proposed multiyear contracts. Specifically, FAR part 17.1 establishes a requirement for Congressional notification of at least 30 days prior to award of a multiyear contract with certain cancellation ceiling thresholds. Each Federal agency should refer to 48 C.F.R. § 17.108 for the current thresholds. FEMP can also provide current reporting thresholds.

DOE has implemented a process to provide Congressional notification for pending task orders under the DOE IDIQ contracts, including for pending task orders at non-DOE sites. Federal agencies should consult [FEMP guidance](#) for more information on this process. Each agency also should discuss with its counsel to determine whether other reporting requirements may be triggered by the award or implementation of an ESPC.

29. Are ESCOs required to submit certified cost or pricing data as a requirement of ESPC award?

No. A Federal agency may not require an ESCO to submit certified cost or pricing data; rather, offerors should submit information, including pricing information, required by the Federal agency to ensure an impartial and comprehensive evaluation of fair and reasonable prices.

30. Which party is responsible for maintenance and repair of an energy conservation measure or water conservation measure under an ESPC?

Performance of maintenance and repair services is negotiable; however, the ESCO bears the ultimate responsibility of ensuring the performance of maintenance and repair services even if routine maintenance is assigned to the Federal agency. FEMP recommends that Federal agencies follow the guidelines and methods for measuring and verifying energy savings under ESPCs as provided in [FEMP guidance](#). A project-specific risk, responsibility, and performance matrix is required for ESPC projects awarded under the DOE ESPC IDIQ and is a useful tool for considering the risks in an ESPC project.

31. Does the authority to award an ESPC have an expiration date?

No. The Energy Independence and Security Act of 2007 removed the sunset date from 42 U.S.C. 8287(c), making the ESPC authority permanent.

32. Does the language at 42 U.S.C. § 8287(a)(2)(F) that “a Federal agency shall not . . . limit the recognition of operation and maintenance savings. . .” change the current practice of including operation and maintenance savings in ESPCs?

This provision confirms current FEMP guidance of placing no limitation on the percentage of operations and maintenance (O&M) savings that may be used to fund an ESPC, in comparison to other sources of energy savings. Each ESPC must result in energy savings; however, there is no requirement that the level of savings associated with reductions in the cost of energy, water, and wastewater treatment must exceed the level of savings associated with related operation and maintenance. A Federal agency is not required to incorporate all possible O&M savings that are identified as possible sources of energy savings. The Federal agency has the discretion to determine the amount of O&M savings that is appropriate to include in any ESPC in accordance with agency requirements, policies, priorities, or preferences.

Consistent with this provision, FEMP encourages agencies to leverage O&M savings in ESPC projects. O&M savings captured for the use and benefit of the agency can provide additional energy savings that allow for increased project scope. In addition, ESCO provided O&M services can help maintain the performance of the ESPC; ensure persistence of energy savings during the contract term; and reduce O&M burden on agencies since the responsibility of O&M and risk of non-performance remains with the ESCO.

33. What factors and requirements should agencies consider before undertaking an ESPC at a building leased from a private entity?

The Energy Act of 2020 amended the ESPC authority to remove the requirement that ESPCs be undertaken at “*Federally-owned* buildings.” As a result, an ESPC may be implemented at any building that meets the definition of “Federal building” at 42 U.S.C. § 8259(6), which includes buildings, structures, or facilities leased by the Federal government and which consume energy. While 42 U.S.C. 8287, et seq. does provide express authority to undertake ESPCs at buildings leased by the Federal government, before undertaking an ESPC at a building leased from a private entity it is advisable that a Federal agency consult with their own specific policy and counsel and consider the following factors.

1. Is the cost of the ESPC reasonable?
 - a. Is the cost of the ESPC in reasonable proportion to the cost of the overall cost of the lease, and not disproportionate to the needs to which the facilities are to be used by the government?
 - b. Is the Federal government obligated to disassemble/remove the ESPC, or to restore/rehabilitate the premises, at the end of the lease?
2. Is the ESPC to be used for the principal (not exclusive) benefit of the government?

3. Are the government's interests in the ESPC protected?
 - a. If the ESPC is a temporary improvement, has the government reserved the right to remove the ESPC at the expiration of the lease?
4. Does your agency expect to be in the facility for the duration of the ESPC? Does the term of the lease meet or exceed the term of the ESPC or is it likely to be renewed for that duration?
5. Is the Federal government tenant responsible for the related utilities at the leased property?
6. Will the ESCO have access to the site and what arrangements for ESCO site access need to be made with the landlord?
7. How will the risk and responsibility matrix change (i.e., who will perform O&M and R&R)?
8. Are there other tenants at the property and, if so, will it be possible to properly perform annual performance period services including M&V?
9. Who will take title/ownership of the ECMs and is it addressed in the ESPC?
10. Does the building owner/lessor concur on the agreement?

Where a privately owned building is leased by GSA, agencies should consult with GSA.

34. Can the proceeds from the sale of renewable energy certificates (RECs) be used to fund ESPCs?

Yes. The Energy Act of 2020 amended the ESPC authority to include energy and water incentives, rebates, grid services revenues, or credits (including RECs) among the authorized sources of ESPC "energy savings." 42 U.S.C. § 8287c(2)(E). Pursuant to 42 U.S.C. § 8287(a)(2)(H), Federal agencies are also authorized to accept, retain, sell, or transfer RECs, and apply the proceeds of the sale or transfer to fund an ESPC. Importantly, this provision provides exceptions to both the General Services Administration (GSA) personal property disposal regulations (41 CFR §§ 102-35 - 102-42) and the Miscellaneous Receipts Act (31 U.S.C. § 3302), allowing agencies to sell or transfer RECs and retain and use the proceeds from such sale or transfer, as long as the proceeds are applied to fund an ESPC.

35. Can Federal agencies use ESPCs to purchase electric vehicle supply equipment?

Electric vehicle supply equipment (EVSE) may be incorporated into an ESPC if it is part of an energy conservation measure (ECM) or if it is demonstrated that the EVSE results in energy savings to a federal building. Three examples demonstrate permissible instances: (1) a power generation ECM, such as photovoltaics or cogeneration, that includes equipment such as EVSE to facilitate delivery of power to an end use; (2) an ECM that includes EVSE with charging capabilities employed for load management (e.g., kW savings and energy related cost savings), such as participation in a demand response program; or (3) an ECM that replaces existing EVSE with more efficient EVSE, where doing so results in energy savings to the federal building.

Where EVSE is incorporated in an ESPC, the energy used by the EV (e.g., gasoline, electricity, or other) for non-building purposes would not be included in the ESPC building energy use calculations.

Because ESPC applications for EVSE could be complex, agencies should contact FEMP as they consider the incorporation of EVSE in an ESPC.

36. Can Federal agencies use ESPCs to purchase electric vehicles?

The ESPC statute does not confer authority for agencies to procure electric vehicles (EVs) as part of an ESPC. In limited circumstances, however, there may be an opportunity for *components* of EVs to be included in an ESPC. For example, a load management ECM that incorporates bi-directional charging from an EV to provide power for building backup or load management (e.g., for the purpose of participating in a demand response program) could incorporate the EV components used for those purposes (e.g., the vehicle's battery, charging unit, controls, related construction and/or supporting infrastructure, and related components) in an ESPC.

Where EV components are incorporated in an ESPC, the energy used by the EV (e.g., gasoline, electricity, or other) for non-building purposes would not be included in the ESPC building energy use calculations.

Because ESPC applications for EV components are limited, agencies should contact FEMP as they consider the incorporation of EV components in an ESPC.

37. What are the current requirements relating to Covered Facility audits for project implementation and reporting?

Note: The purpose of questions 37-40 of the FAQ is to provide agencies with preliminary direction for planning in meeting certain new performance contracting requirements relating to Energy Act of 2020, amended 42 U.S.C. § 8253(f)(4). DOE will provide final clarification and guidance when DOE releases the forthcoming Consolidated Guidance for Management of Energy and Water Efficiency in Federal Covered Facilities (per 42 U.S.C. § 8253(f)). When published, the updated guidance will be available here:

<https://www.energy.gov/eere/femp/eisa-federal-facility-management-and-benchmarking-reporting-requirements>.

The current requirements:

The Energy Act of 2020 amended 42 U.S.C. § 8253(f)(4), Implementation of Identified Energy and Water Efficiency Measures to read as follows:

(4) IMPLEMENTATION OF IDENTIFIED ENERGY AND WATER EFFICIENCY MEASURES.

- (A) *IN GENERAL.* —Not later than 2 years after the date of completion of each evaluation under paragraph (3), each energy manager shall implement any energy- or water-saving measure that
- i. the Federal agency identified in the evaluation; and

- ii. *is life cycle cost-effective, as determined by evaluating an individual measure or a bundle of measures with varying paybacks.*

(B) PERFORMANCE CONTRACTING. —Each Federal agency shall use performance contracting to address at least 50 percent of the measures identified under subparagraph (A)(i).

Agencies are required to complete comprehensive evaluations of each covered facility at least once every four years. 42 U.S.C. § 8253(f)(3). Agencies report the findings of their covered facility evaluations in the web-based Compliance Tracking System (CTS) established by DOE FEMP under authority of 42 U.S.C. § 8253(f)(7)(B). These findings include:

- Total implementation cost of identified potential energy- and water-saving measures
- Estimated anticipated annual energy and water savings (or electricity or thermal energy generated) from the potential energy- and water-saving measures
- A count of potential energy- and water-saving measures by specific technology or technology category
- Evaluation completion date

Agencies are also required to report the projects that are implemented in their covered facilities, with projects typically consisting of a collection of energy- and water-saving measures.

Reported data includes:

- Total implementation cost of initiated projects
- Estimated annual energy and water savings (or electricity or thermal energy generated) from the initiated project
- A count of energy- and water-saving measures implemented by specific technology or technology category
- Type of funding mechanism used (Direct funded, performance contracts such as energy savings performance contracts and utility energy service contracts, and others)
- Project initiation date (contract award)

38. What are the requirements relating to the implementation deadlines for projects identified in the Covered Facility audits? (see note under question 37 above)

As amended by the Energy Act of 2020, 42 U.S.C. 8253(f)(4) requires implementation of any life cycle cost-effective energy- or water-saving measure identified in a Federal agency's evaluation of a covered facility not later than two years after the completion date of the evaluation. This requirement applies to evaluations completed on or after December 27, 2020. Until further guidance is released, agencies should assume that for each covered facility, they have two years after the evaluation completion date to award a contract for the implementation of any identified energy- or water-saving measures that are determined to be life cycle cost-effective. This is a facility-level compliance metric since it is assigned to each energy manager. Progress will be assessed at the agency level in terms of percentage of covered facilities that have implemented all life cycle cost-effective energy- or water-saving measures identified in an evaluation within two years of evaluation completion. This requirement applies to all life cycle

cost-effective energy- or water-saving measures identified in evaluations, whether directly funded or implemented through a performance contract.

Compliance with the energy- or water-saving measure implementation requirement will be assessed by comparing the estimated implementation cost of all energy- or water-saving measures identified in the evaluation with the implementation cost of the energy- or water-saving measures in subsequently awarded project contracts. CTS will generate a report showing potential implementation costs of energy- or water-saving measures identified in the covered facility evaluation with the implementation costs of subsequently awarded projects, along with any remaining potential investment from unimplemented energy- or water-saving measures. CTS reports will also compare a count of energy- or water-saving measures identified in the facility evaluation with a count of the energy- or water-saving measures implemented in the awarded contract(s) for the project(s) as reported in CTS.

The Energy Act of 2020 was signed into law on December 27, 2020. To meet the intent of the law and accurately measure compliance, the evaluation completion date field in covered facility evaluation records in CTS with completion dates on or after December 27, 2020, will be locked for two years from that completion date. However, agencies may still update the findings of existing evaluations to remove energy- or water-saving measures that are not life cycle cost-effective or identify additional energy- or water-saving measures (without changing the locked evaluation completion date). After the two-year evaluation lock period, agencies are free to re-evaluate the covered facility. Under the law, evaluations must be completed at covered facilities at least once every four years. The need to maintain the integrity of compliance tracking of the two-year implementation requirement and associated metrics therefore indirectly limits covered facilities to no more than two evaluations that can be completed every four years.

39. Do the requirements for projects identified in the Covered Facility audits apply to all projects, even for evaluations completed before the Law's enactment? (see note under question 37 above)

Energy- or water-saving measure identified in evaluations completed prior to December 27, 2020, are subject to the statutory requirements in place at the time the evaluation was completed and therefore are not required to meet the two-year implementation or the 50-percent performance contracting requirements of the Energy Act of 2020 amendments. Prior to the Energy Act of 2020, 42 U.S.C. 8253(f)(4)(A) provided, "Not later than 2 years after the completion of each evaluation . . . each energy manager *may* (A) implement any energy- or water-saving measure that the Federal agency identified in the evaluation. . . that is life cycle cost-effective and (B) bundle individual measures of varying paybacks together into combined projects."

Under the same logic, energy- or water-saving measures identified in evaluations completed prior to December 27, 2020, and subsequently implemented do NOT count toward the two-year implementation requirement OR the 50-percent performance contracting requirement. In order for energy- or water-saving measures identified in an evaluation completed prior to December 27, 2020, to count toward the Energy Act of 2020 requirements, the evaluation record in CTS would need to be updated with a new evaluation completion date *prior* to the award of the

contract. (Note: the CTS evaluation records for evaluations completed before December 27, 2020, are not locked and may continue to be updated including the evaluation completion date field.)

For example, a covered facility is planning to award an energy savings performance contract (ESPC) in August of 2021 to implement energy- or water-saving measures identified in its evaluation that was completed in November of 2020. The award of the ESPC will not fulfill the new requirements of 42 U.S.C. § 8253(f)(4), as amended, unless the evaluation record in CTS is updated. If the agency wants the ESPC to count toward the new requirements, the evaluation record for that covered facility can be updated with the findings of the ESPC preliminary assessment (PA) or investment grade audit (IGA) with an evaluation completion date on or after December 27, 2020. An ESPC PA or IGA contains the necessary information required to update the covered facility evaluation record in CTS.

40. Can you clarify the requirement that at least 50% of the Covered Facility projects be implemented by agencies via a performance contract? (see note under question 37 above)

At least 50 percent of the life cycle cost-effective energy- or water-saving measures identified in evaluations of covered facilities are required to be undertaken through performance contracting (e.g., ESPCs, including ESPC ENABLE, or utility energy service contracts (UESCs)). 42 U.S.C. § 8253(f)(4)(B). Compliance with this requirement will be assessed at the agency level and can only be assessed within the context of the two-year implementation requirement. Therefore, an agency must be in compliance with the two-year implementation requirement for all of its covered facilities in order to be compliance with the performance contracting requirement. Agency progress (distinct from compliance) will be measured in terms of implementation cost (investment value) of projects awarded by each agency in its covered facilities during the fiscal year, with percentages noted for performance contracting and direct funding.

For purposes of compliance assessment, total implementation cost will be considered “performance contracting” if the contract vehicle is an ESPC or UESC, even if direct funding is used in combination with the performance contracting method (e.g., an ESPC with 10 percent of implementation cost covered by direct funding will be counted as 100% performance contracting for the purpose of compliance tracking).

Appendix

In the event that a Federal agency believes that any provision of the ESPC authorities is ambiguous or requires clarification, the Federal agency should contact FEMP for guidance.

FEMP can provide expert assistance, guidance, and training to assist Federal agencies in implementing ESPCs that are technically excellent, legally sound, and a good deal for the government. Several resources and tools are available on the FEMP website and Federal agencies can also contact FEMP directly.

- For general ESPC information and FEMP contact information, see <https://www.energy.gov/eere/femp/contacts-federal-energy-savings-performance-contracts>
- For FEMP ESPC guidance documents, see <http://www.energy.gov/eere/femp/resources-implementing-federal-energy-savings-performance-contracts>.
- For information on ESPC ENABLE see <http://energy.gov/eere/femp/energy-savings-performance-contract-enable-federal-projects>.
- FEMP's ESCO Selector Tool helps create a notice of opportunity (NOO) that complies with federal requirements and meets agency needs. For more information, see <https://esco-selector.ornl.gov>.
- eProject Builder, a secure web-based data energy and tracking system for ESPC projects, is another tool that is available to agencies to increase efficiencies. eProject Builder allows agencies to upload, track, and access project-level information for the life of the ESPC, automatically generate task order schedules, quickly generate data for project and portfolio reports, develop project scenarios using amortization calculations, and benchmark new ESPC projects against historical project data. Contracting Officers may request that ESCO's utility eProject Builder for their ESPCs. For more information, see <https://eprojectbuilder.lbl.gov/home/#/login>.
- FEMP's Energy Escalation Rate Calculator (EERC) computes an average annual escalation rate for a specified time period, which can be used as an escalation rate for contract payments in energy savings performance contracts and utility energy services contracts. For more information, see <http://energy.gov/eere/femp/energy-escalation-rate-calculator-download>.



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