

## Energy Savings Performance Contract Energy Sales Agreements

An energy savings performance contract energy sales agreement—referred to as an ESPC ESA or ESPC with an ESA—is a project structure that uses the multiyear ESPC authority to implement distributed energy projects on federal buildings or land. The distributed energy project implemented under an ESPC ESA is referred to as an ESA energy conservation measure, or ESA ECM.

Just like a traditional ESPC, an energy service company (ESCO) incurs the upfront capital costs of implementing an ESA ECM, and guaranteed cost savings are required. Unlike traditional ESPCs, the ESA ECM is initially privately owned for tax incentive purposes, and the federal agency purchases the electricity produced<sup>1</sup> (price in cents/kilowatt-hour, similar to a power purchase agreement). An ESA ECM can be a single measure within the ESPC, or it can be bundled with other ECMs. ESPC ESAs use the same established contract vehicles as traditional ESPCs:

- U.S. Department of Energy (DOE) indefinite-delivery, indefinite-quantity (IDIQ) ESPC
- DOE ESPC ENABLE
- Site-specific/stand-alone
- U.S. Army Corps of Engineers multiple award task order contract (MATOC) (Department of Defense only).



Figure 1. A solar carport may be implemented under an ESPC ESA.

Photo by Dennis Schroeder, NREL 37952

### Why ESPC ESAs?

A federal agency should consider an ESPC ESA if they:

- Are interested in a cost-effective on-site distributed energy ECM (i.e., renewable energy, battery storage, and combined heat and power)
- Have limited long-term contracting authority options
- Lack upfront capital for a project
- Think the intended project would benefit from tax incentives.

### ESPC ESA Requirements

An ESPC ESA must meet the following legal, contracting, and tax incentive eligibility requirements.

#### ESPC Authority Requirements

The ESPC ESA must meet all ESPC legal requirements (see 42 U.S.C. § 8287, et seq.), including the requirement that the agency pay for the cost of the ESPC ESA from energy cost savings generated each year over the life of the contract. The ESCO must be on DOE's Qualified List of ESCOs or an agency's list of qualified contractors prior to contract award.

#### Office of Management and Budget (OMB) Requirements

In order for the ESPC ESA to be scored annually, it must be consistent with the requirements under the OMB Memo M-12-21,<sup>2</sup> including the requirement that the federal government retain title to the ESA ECM by the end of the contract.

#### Tax Incentive Requirements

The ESCO may be eligible for tax incentives such as the federal Investment Tax Credit (ITC) and accelerated depreciation. The Internal Revenue Service (IRS) Revenue Procedure 2017-19<sup>3</sup> provides a safe harbor under which the IRS will not challenge the treatment of an ESPC ESA as a service under 26 U.S.C. § 7701(e)(3). Section 4 specifies safe harbor requirements, including a maximum contract length of 20 years. Section 5 contains details regarding an example ESPC ESA project. The IRS Revenue Procedure requirements are separate from ESPC statutory requirements at 42 U.S.C. § 8287, et seq. Under a typical ESPC executed pursuant to 42 U.S.C. § 8287, et seq., a project may include ECMs with different lengths of performance as long as the total contract term is no longer than 25 years. Tax incentive eligibility due diligence and compliance with IRS Revenue Procedure requirements are

<sup>1</sup> 48 CFR § 41.102(b)(7) (2015) allows an ESPC to be used for the acquisition of utility services. For more information see <https://www.govinfo.gov/content/pkg/CFR-2015-title48-vol1/pdf/CFR-2015-title48-vol1-sec41-102.pdf>.

<sup>2</sup> "Addendum to OMB Memorandum M-98-13 on Federal Use of Energy Savings Performance Contracts (ESPCs) and Utility Energy Service Contracts (UESCs)," Executive Office of the President, Office of Management and Budget, <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2012/m-12-21.pdf>.

<sup>3</sup> "Internal Revenue Bulletin 2017-7," Internal Revenue Service, February 13, 2017, <https://www.irs.gov/pub/irs-irbs/irb17-07.pdf>.

## Benefits of ESPC ESAs

- ESPC ESAs do not require any upfront capital from a federal agency for the ESA ECM. They provide guaranteed cost savings, and a federal agency only pays for the electricity that is generated, minimizing federal risk.
- The ESCO may be able to take advantage of federal and other tax incentives and can sell the renewable energy certificates generated by the ESA ECM to reduce the ESPC ESA price.
- The ESCO is responsible for ESA ECM operations and maintenance, and for equipment repair and replacement.

the responsibility of the ESCO (not the government). Federal agencies must ensure that an ESPC ESA meets the ESPC statutory requirements.

## ESPC ESA Contract Structure Recommendations

The following recommendations are based on best practices and requirements set forth by OMB and IRS.

- The ESA ECM contract length must be less than or equal to 20 years.
- The title retention requirement is satisfied through an ESA ECM title transfer by the end of the contract term.

The title transfer must be at fair market value (FMV), as appraised at the time of title transfer. The ESCO will transfer a portion of the payments it receives from the agency each year into a reserve account<sup>4</sup> held by the ESCO and will use these funds for the FMV title transfer.

- Initially, the amount transferred to the reserve account is calculated based on an appraisal (or estimate) of the ESA ECM's FMV at the end of the contract. The reserve account payments will be adjusted periodically (as needed and through a contract modification) during the contract term based on updated FMV estimates/appraisals. This will ensure that the reserve account has sufficient funds for the title transfer at FMV by the end of the contract. Any reserve account funds remaining after the title transfer can be applied by the ESCO to offset final ESA ECM payment(s).
- The ESPC ESA electricity price is based on a fixed cents-per-kilowatt-hour rate, which may escalate annually and must be paid for by the federal agency from generated energy cost savings. The electricity price does not change if operating costs diminish, and the ESCO bears all financial risk for nonperformance. The amount charged for each payment period includes the price of electricity and a separate,

additional amount for the reserve account (see Figure 2).

- Only the ESCO can operate and maintain the ESA ECM during the ESPC ESA.

## ESPC ESA Resources

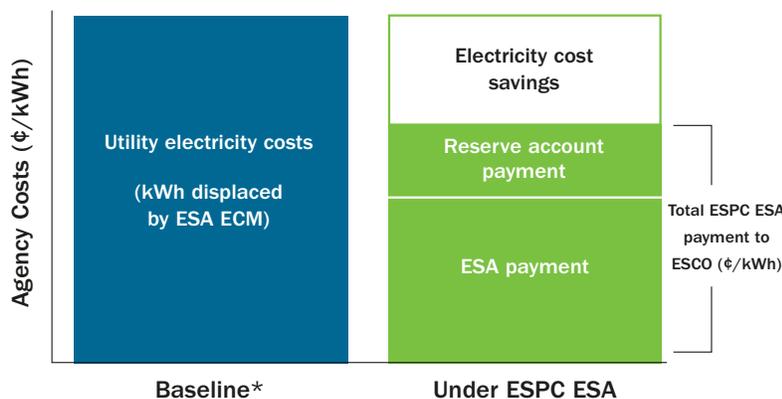
The Federal Energy Management Program (FEMP) offers best practice documents and templates for ESPC ESAs. For site-specific/stand-alone ESPC ESAs, FEMP's ESPC ESA Toolkit provides best practices and editable templates, including a request for proposal. The Toolkit helps federal acquisition team members facilitate the timely execution of ESPC ESAs. Access the Toolkit at [www.energy.gov/eere/femp/downloads/energy-savings-performance-contract-energy-sales-agreement-toolkit](http://www.energy.gov/eere/femp/downloads/energy-savings-performance-contract-energy-sales-agreement-toolkit).

## ESPC ESA Project Assistance

Learn more about ESPC ESAs at [www.energy.gov/eere/femp/energy-savings-performance-contract-energy-sales-agreements](http://www.energy.gov/eere/femp/energy-savings-performance-contract-energy-sales-agreements).

To get started on an ESPC ESA, please do one of the following:

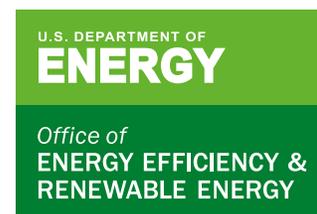
- Contact a Federal Project Executive at <https://www.energy.gov/eere/femp/energy-savings-performance-contract-federal-project-executives-0>
- Request assistance through the FEMP Assistance Portal at [www7.eere.energy.gov/femp/assistance/](http://www7.eere.energy.gov/femp/assistance/)
- Email Rachel Shepherd at [Rachel.Shepherd@ee.doe.gov](mailto:Rachel.Shepherd@ee.doe.gov).



\*Either the blended rate or a rate that only considers cost offset by the ESA ECM

Figure 2. Electricity cost savings achieved through an ESPC ESA

<sup>5</sup> This is a private account independently held by the ESCO, not an escrow account held by both parties to the contract. This is an accounting measure for the ESCO. The funds in the account belong to the ESCO, not the federal government.



For more information, visit: [energy.gov/eere/femp](http://energy.gov/eere/femp)