

**DEPARTMENT OF ENERGY
FEDERAL ENERGY MANAGEMENT PROGRAM**

**Request for Comments on Including Onsite Renewable Energy Generation under Energy
Savings Performance Contracts**

February 2, 2016

The purpose of this request for comments is to obtain information on potential obstacles associated with the implementation of onsite renewable energy generation projects under the federal energy savings performance contract (ESPC) authority, including potential issues with regard to project eligibility for the federal solar investment tax credit (ITC) and the use of the ESPC ENABLE Program for such projects.

DUE DATE: Comments and information are requested electronically on or before March 2, 2016.

COMMENT SUBMISSION INSTRUCTIONS: Interested parties are to submit comments electronically:

E-mail: tracy.logan@ee.doe.gov. Include “Feb 2016 ESPC Request for Comments” in the subject of the message.

FOR FURTHER INFORMATION CONTACT: Tracy Logan, U.S. Department of Energy, Federal Energy Management Program, e-mail: Tracy.Logan@ee.doe.gov.

SUPPLEMENTARY INFORMATION: FEMP recently has observed that certain federal agencies, energy service companies (ESCOs), and investors have been reluctant to pursue

privately-owned onsite renewable energy generation projects under the ESPC authority and has learned anecdotally that two recent events may have engendered uncertainty with regard to the use of the ESPC contracting vehicle for such projects. First, the Office of Management and Budget (OMB) in 2012 specified that for an ESPC that includes an onsite energy source to be scored on an annual basis during the term of the contract the federal agency “must retain title to the installed capital goods at the conclusion of the contract.” *See* OMB Memorandum M-12-21, “Addendum to OMB Memorandum M-98-13 on Federal Use of Energy Savings Performance Contracts (ESPCs) and Utility Energy Service Contracts (UESCs)” (Sept. 28, 2012) (2012 OMB Memorandum), *available at* <https://www.whitehouse.gov/sites/default/files/omb/memoranda/2012/m-12-21.pdf>.

Second, a 2013 opinion from the U.S. Court of Appeals for the Federal Circuit appears to have raised issues as to the tax consequences for certain types of contractual arrangements. *See Consolidated Edison Company of New York, Inc. & Subsidiaries v. United States*, 703 F.3d 1367 (Fed. Cir. 2013).

Given the statutory mandate for DOE to establish procedures and methods for the implementation of federal ESPCs, a contract model recently was developed to facilitate onsite renewable energy generation projects in compliance with the ESPC authority and the 2012 OMB Memorandum while maintaining project eligibility for the federal ITC at 26 U.S.C. § 48. This contract model, referred to as an ESPC Energy Sales Agreement (ESA), is designed to allow an ESCO or its subcontractor to install, maintain ownership, and provide operation and maintenance of the renewable energy asset through the end of the contract term while the federal agency purchases the electricity generated onsite at a rate that is less than its current and forecasted

electricity rate.

Under the ESPC ESA model, an ESCO transfers a portion of the payments it receives from a federal agency each year into a reserve account held by the ESCO for the federal agency's future purchase of the onsite renewable energy generation asset by the end of the term of the ESPC. Consistent with the requirements for ITC eligibility, the amount of funds that the ESCO transfers into its reserve account is not based on a fixed and determinable future purchase price, but is based on the estimated future fair market value of the renewable energy generation equipment at the time the federal agency is required to take title to the asset. The ESPC ESA model contemplates that the federal agency and ESCO will make periodic reappraisals of the fair market value of the equipment to ensure that the reserve account will have sufficient funds for the federal agency to purchase the equipment by the end of the contract term. The fair market value purchase price of the renewable energy generation equipment will be determined at the time of purchase and any excess energy savings held in the reserve account can be used to offset the final ESPC payment.

With this announcement, DOE requests information on potential obstacles associated with the implementation of onsite privately owned renewable energy generation projects under the ESPC authorities, including potential issues with regard to project eligibility for the ITC. DOE specifically is interested in receiving comment on the following issues:

1. Whether greater clarity is needed with regard to 26 U.S.C. § 7701, which contemplates that an arrangement for the sale of electrical energy produced from

an alternative energy source qualifies as a “service contract,” and thus remains eligible for the ITC, if the service recipient is required to purchase all or a part of the alternative energy source at fair market value. *See* 26 U.S.C. § 7701(e)(3)(A), (e)(4)(A)(iv).

2. Specific language included in, and issues raised by, *Consolidated Edison* that may have created uncertainty with regard to project eligibility for the ITC.
3. Information on how the federal government can provide greater assurance to federal agencies, ESCOs, and investors that the implementation of onsite privately-owned renewable energy generation projects under an ESPC ESA remains eligible for the ITC in recognition of the conditions for annual scoring under the 2012 OMB Memorandum and the potential issues raised by the Federal Circuit’s holding in *Consolidated Edison*.
4. Whether further clarity is needed on the authority of a federal agency to make payments to an ESCO in connection with an ESPC ESA or with regard to the establishment of a reserve account that would ensure that the federal agency has sufficient funds to purchase the renewable energy generation equipment at fair market value by the end of the contract term.
5. Information regarding the practicality of implementing onsite, government-owned renewable energy generation projects without the benefit of the ITC or the sale of solar renewable energy certificates both in the context of projects executed under the traditional federal ESPC program and projects executed under the ESPC ENABLE program (<http://energy.gov/eere/femp/energy-savings-performance-contract-enable-federal-projects>).

6. Any other issue that could serve as an obstacle to the implementation of onsite privately-owned renewable energy generation projects under an ESPC ESA under either the DOE ESPC IDIQ or, if permissible, under the ESPC ENABLE Program using the General Services Administration (GSA) Schedule 84.

FEMP invites all interested parties to submit by e-mail by March 2, 2016, comments and information on matters addressed in this announcement. DOE intends to use the comments received as information only. Commenters are advised that DOE is under no obligation to acknowledge receipt or provide feedback with respect to any comments received under this announcement. Comments received in connection with this announcement do not bind DOE to any further actions related to this topic. After the close of the comment period, DOE will consider information received and may issue draft language on this topic in the form of guidance, if warranted. DOE also may elect not to issue such guidance.

CONFIDENTIAL AND PRIVILEGED INFORMATION: DOE advises commenters to avoid including any information in their responses that might be considered business sensitive, proprietary, or otherwise confidential. If, however, a commenter chooses to submit business sensitive, proprietary, or otherwise confidential information, it must be clearly and conspicuously marked as such in the response. In addition, (1) the header and footer of every page that contains confidential, proprietary, or privileged information must be marked as follows: “Contains Confidential, Proprietary, or Privileged Information Exempt from Public Disclosure” and (2) every line and paragraph containing proprietary, privileged, or trade secret information must be clearly marked with double brackets or highlighting. Failure to comply with these marking

requirements may result in the disclosure of the unmarked information under the Freedom of Information Act or otherwise. The U.S. Federal Government is not liable for the disclosure or use of unmarked information and may use or disclose such information for any purpose. If a comment contains confidential, proprietary, or privileged information, the commenter must include a cover sheet identifying the specific pages containing confidential, proprietary, or privileged information.