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Office of
**ENERGY EFFICIENCY &
RENEWABLE ENERGY**

Energy Savings Performance Contract Energy Sales Agreement Toolkit

August 2017



Contacts

Renewable Procurement Lead

Renewable Energy Procurement Program Manager
Tracy (Logan) Niro
U.S. Department of Energy - Federal Energy Management Program
1000 Independence Ave SW
Washington, DC 20585
Phone: (202) 431-7601
E-mail: tracy.niro@ee.doe.gov

Renewable Technical Lead

Renewable Energy Program Manager
Rachel Shepherd
U.S. Department of Energy - Federal Energy Management Program
1000 Independence Ave SW
Washington, DC 20585
Phone: (202) 586-9209
E-mail: rachel.shepherd@ee.doe.gov

Project Assistance

Chandra Shah
National Renewable Energy Laboratory
15013 Denver West Parkway
Golden, CO 80401
Phone: (303) 384-7557
E-mail: chandra.shah@nrel.gov

Gerald Robinson
Lawrence Berkeley National Laboratory
1 Cyclotron Road
Berkeley, CA 94720
Phone: (510) 486-5769
E-mail: gtrobinson@lbl.gov

ESPC Lead

ESPC Program Manager
Kurmit Rockwell
U.S. Department of Energy - Federal Energy Management Program
1000 Independence Ave SW
Washington, DC 20585
Phone: (202) 586-2078
E-mail: kurmit.rockwell@ee.doe.gov

FEMP Federal Project Executives¹

Western Region

Scott Wolf

Oak Ridge National Laboratory

P.O. Box 2008

Oak Ridge, TN 37831

Phone: (360) 866-9163

E-mail: wolfsc@ornl.gov

Serving: Montana, Wyoming, Utah, Colorado, North Dakota, South Dakota, Nebraska, Kansas, Minnesota, New Mexico, Alaska, Washington, Oregon, Idaho, California, Nevada, Arizona, Hawaii

International assignments: Non-State Department work in East Asia and the Pacific, Near East, South and Central Asia

Southeast Region

Doug Culbreth

Oak Ridge National Laboratory

P.O. Box 2008

Oak Ridge, TN 37831

Phone: (919) 870-0051

E-mail: culbrethcd@ornl.gov

Serving: Alabama, Arkansas, Florida, Georgia, Illinois, Indiana, Iowa, Kentucky, Louisiana, Michigan, Mississippi, Missouri, North Carolina, Ohio, Oklahoma, South Carolina, Texas, Tennessee, Wisconsin, Puerto Rico, Virgin Islands

International assignments: Non-State Department work in Europe and the Western Hemisphere\

Northeast Region

Tom Hattery

Oak Ridge National Laboratory

P.O. Box 2008

Oak Ridge, TN 37831

Phone: (202) 256-5986

E-mail: culbrethcd@ornl.gov

Serving: Connecticut, Delaware, District of Columbia, Maryland, New Jersey, New Hampshire, New York, Maine, Massachusetts, Pennsylvania, Rhode Island, Vermont, Virginia, West Virginia

International assignments: All State Department and other agencies on an ad hoc basis as dictated by volume or efficiency

¹ See <https://www.energy.gov/eere/femp/energy-savings-performance-contract-federal-project-executives-0>

Online Resources

Website	Date
Renewable Energy Procurement for Federal Agencies	https://energy.gov/eere/femp/renewable-energy-procurement-federal-agencies
Energy Savings Performance Contract Energy Sales Agreements (EPSC ESA)	https://energy.gov/eere/femp/energy-savings-performance-contract-energy-sales-agreements
Federal On-Site Renewable Power Purchase Agreements On Demand eTraining	https://www4.eere.energy.gov/femp/training/training/federal-site-renewable-power-purchase-agreements
Energy Savings Performance Contract Federal Project Executives	https://www.energy.gov/eere/femp/energy-savings-performance-contract-federal-project-executives-0
Energy Savings Performance Contracts for Federal Agencies	https://www.energy.gov/eere/femp/energy-savings-performance-contracts-federal-agencies
Internal Revenue Bulletin 2017-07 – Rev Proc 2017-19	https://www.irs.gov/pub/irs-irbs/irb17-07.pdf
Procurement Specifications Templates for Onsite Solar Photovoltaic: For Use in Developing Federal Solicitations	https://energy.gov/eere/femp/downloads/procurement-specifications-templates-site-solar-photovoltaic-use-developing
3 rd Party Solar PPA Policies	http://www.dsireusa.org/resources/detailed-summary-maps/3rd-party-ppa_0302015-2/
Database of State Incentives for Renewables & Efficiency (DSIRE)	http://www.dsireusa.org/
See 26 U.S.C. § 48	https://www.gpo.gov/fdsys/granule/USCODE-2011-title26/USCODE-2011-title26-subtitleA-chap1-subchapA-partIV-subpartE-sec48
Renewable Energy Screenings for ESPCs	https://energy.gov/eere/femp/downloads/renewable-energy-screening-espcs
Dept. of Defense Armed Services Board of Contract Appeals (ASBCA) decision No. 57779	http://www.asbca.mil/Decisions/2013/57779%20Honeywell%20International%2C%20Inc.%208.7.13%20PUBLISHED.pdf
NREL's PV Watts Calculator	http://pvwatts.nrel.gov/

Website	Date
Federal Energy Savings Performance Contracts Frequently Asked Questions on the Scope of 42 U.S.C. § 8287 <i>et seq.</i>	https://energy.gov/sites/prod/files/2016/12/f34/espc_faq_42_usc.pdf
Generator Interconnection	https://www.ferc.gov/industries/electric/indus-act/gi.asp
Microgrid Ready Solar PV Fact Sheet	http://www.nrel.gov/docs/fy15osti/64582.pdf
Final Guidance for Federal Departments and Agencies on Establishing, Applying, and Revising Categorical Exclusions under the National Environmental Policy Act	https://energy.gov/nepa/downloads/guidance-federal-departments-and-agencies-establishing-applying-and-revising
Solar Glare Hazard Analysis Tool (SGHAT)	https://share.sandia.gov/phlux
Forge Solar	https://www.forgesolar.com/
Handbook on Siting Renewable Energy Projects While Addressing Environmental Issues	https://www.epa.gov/sites/production/files/2015-04/documents/handbook_siting_repowering_projects.pdf
Best Practices for Siting Solar Photovoltaics on Municipal Solid Waste Landfills	http://www.nrel.gov/docs/fy13osti/52615.pdf
Implementing Solar Technologies at Airports	http://www.nrel.gov/docs/fy14osti/62349.pdf
Solar Glare Hazard Analysis Tool (SGHAT) User's Manual v. 2G	https://share.sandia.gov/phlux/static/references/glint-glare/SGHAT_Users_Manual_v2G.pdf
Water and Data Tools	https://www.epa.gov/environmental-topics/water-topics
Wage Determinations On-Line Program	www.WDOL.gov
Subpart 42.12—Novation and	https://www.acquisition.gov/sites/default/files/curre

Website	Date
Change-of-Name Agreements	nt/far/html/Subpart%2042_12.html
Federal Business Opportunities	www.fbo.gov
U.S. Small Business Administration Table of Small Business Size Standards	https://www.sba.gov/sites/default/files/files/Size_Standards_Table.pdf
System for Award Management (SAM)	http://www.sam.gov/
DOE's Qualified Energy Service Companies	https://energy.gov/eere/femp/doe-qualified-energy-service-companies
Addendum to OMB Memorandum M-98-13 on Federal Use of Energy Savings Performance Contracts (ESPCs) and Utility Energy Service Contracts (UESCs)	https://www.gsa.gov/portal/media/189419/fileName/Environmental_Programs_Addendum_to_OMB_Memo_m-12-21.action
Building Life Cycle Cost Programs	https://energy.gov/eere/femp/building-life-cycle-cost-programs
Procedure for Notifying Congress Prior to Award of Energy Savings Performance Contracts (ESPCs)	https://energy.gov/sites/prod/files/2014/07/f17/espc_congressional_notification.pdf
2017 DOE IDIQ ESPC Generic Contract	https://energy.gov/eere/femp/downloads/2017-doe-idiq-espc-generic-contract
Federal Acquisition Regulation Site	http://farsite.hill.af.mil/
Federal Acquisition Regulation	https://www.acquisition.gov/?q=browsefar

Acknowledgements

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Revision History

Revision #	Date	Revision Type
1.0	08/2015	First draft version
2.0	07/2016	Second draft version – substantial updates
3.0	08/2017	Published version – substantial updates

Abbreviations and Acronyms

AC	Alternating Current
ATCT	Air traffic control tower
AWC	Area-wide Contract
BLM	Bureau of Land Management
Cat Ex	Categorical Exclusion
CEQ	Council on Environmental Quality
C.F.R.	Code of Federal Regulations
CO	Contracting Officer
DBA	Davis-Bacon Act
DC	Direct Current
DLA	Defense Logistics Agency
DoD	U.S. Department of Defense
DOE	U.S. Department of Energy
DOL	U.S. Department of Labor
DSIRE	Database of State Incentives for Renewables and Electricity
EA	Environmental Assessment
ECM	Energy conservation measure
EIS	Environmental Impact Statement
EISA	Energy Independence and Security Act of 2007
EO	Executive Order
EPA	U.S. Environmental Protection Agency
ESA	Energy Sales Agreement
ESCO	Energy service company
ESPC	Energy Savings Performance Contract
FA	Federal agency

FAA	Federal Aviation Administration
FAR	Federal Aviation Administration
FBO	Federal Business Opportunities
FEMP	Federal Energy Management Program
FERC	Federal Energy Regulatory Commission
FMV	Fair-market value
FONSI	Finding of No Significant Impact
GAO	U.S. Government Accountability Office
GSA	U.S. General Services Administration
IDIQ	Indefinite Delivery/Indefinite Quantity
ICA	Interconnection agreement
IGA	Investment Grade Audit
ITC	Investment Tax Credit
kWh	Kilowatt-hour
LLC	Limited liability company
LPTA	Lowest price technically acceptable
MACRS	Modified Accelerated Cost Recovery System
M&V	Measurement and Verification
MW	Megawatt
MWh	Megawatt-hour
NEPA	National Environmental Policy Act
NHPA	National Historic Preservation Act
NREL	National Renewable Energy Laboratory
O&M	Operations and maintenance
PA	Preliminary Assessment
PPA	Power Purchase Agreement

PUC	Public Utility Commission
PURPA	Public Regulatory Policies Act of 1978
Q&A	Questions and Answers
QF	Qualifying Facility
RE	Renewable energy
REC	Renewable Energy Certificate
RFI	Request for Information
RFP	Request for Proposal
RPS	Renewable Portfolio Standard
SCA	[McNamara-O’Hara] Service Contract Act
SF	Standard Form
SGHAT	Solar Glare Hazard Analysis Tool
SHPO	State Historic Preservation Office
SOW	Statement of Work
SPE	Special Purpose Entity
SREC	Solar Renewable Energy Credit
SSP	Source Selection Plan
TCO	Termination Contracting Officer
TOU	Time-of-use
UESC	Utility Energy Service Contract
U.S.C.	United States Code
WD	Wage determination

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Introduction to the Energy Savings Performance Contract Energy Sales Agreement Toolkit

Disclaimer

The information presented herein is meant as a resource only. It is the responsibility of agency staff to ensure that all procurements – including energy savings performance contract energy sales agreement (ESPC ESA) procurements – follow all applicable federal requirements and agency-specific policies and procedures. The use of the ESPC ESA contracting model should be understood by agency decision-makers early in the process, and all documents comprising an ESPC ESA should be thoroughly reviewed by agency contracting and legal staff; and should be modified to address each agency's unique acquisition process, agency-specific authorities, and project-specific characteristics.

Introduction

An energy savings performance contract energy sales agreement (ESPC ESA)² is a project structure that allows federal agencies to utilize the ESPC long-term multiyear contracting authority to implement cost-saving renewable energy conservation measures (ECMs) on federal buildings/land that support domestic energy production and leverage private sector investment. Under an ESPC ESA, just as with a traditional ESPC³, an energy service company (ESCO) incurs the costs of implementing an ECM (in this case the ECM is an onsite renewable energy generation system) and is repaid by the federal agency from a share of the resulting energy savings. An ESPC ESA is subject to the following requirements and considerations:

- **ESPC Authority Requirements:** The ESPC ESA must meet all ESPC legal requirements (See, *e.g.*, 42 U.S.C. § 8287, *et seq.*), including the requirement that the agency pay for the cost of the ESPC ESA from energy 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 (consistent with 42 U.S.C. § 8287(b)(2)(A)-(B) requirements) prior to contract award.
- **Office of Management and Budget Requirements:** In order for the ESPC ESA contract to be scored annually, it must be consistent with the requirements under the Office of Management and Budget (OMB) "Addendum to OMB Memorandum M-98-13 on Federal Use of Energy Savings Performance Contracts (ESPCs) and Utility Energy Service Contracts (UESCs)" (See [Appendix A: OMB Memorandum M-12-21](#), dated September 28, 2012), including the requirement that the federal government retain title to the onsite renewable energy generation system at the conclusion of the contract. For more information, see section "[Applicable OMB Memo Requirements](#)" of this Toolkit.
- **Tax Related Requirements:** The ESCO may be eligible for tax incentives such as the federal Investment Tax Credit (ITC) and the Modified Accelerated Cost Recovery System (MACRS)⁴. Internal Revenue Service (IRS) Revenue Procedure 2017-19⁵ provides a safe harbor (related to ITC eligibility) under which the IRS will not challenge the treatment of an ESPC ESA as a service contract

² These types of agreements are often pursued as power purchase agreements (PPAs), but pursuing such projects under the ESPC authority is attractive because it allows for a long term contract.

³ See <https://www.energy.gov/eere/femp/energy-savings-performance-contracts-federal-agencies> regarding ESPCs.

⁴ Tax incentive eligibility due diligence is the responsibility of the ESCO.

⁵ Published in the Internal Revenue Bulletin on February 13, 2017, see <https://www.irs.gov/pub/irs-irbs/irb17-07.pdf>.

under 26 U.S.C. § 7701(e)(3). Additional details, including the safe harbor requirements, are contained in “[Internal Revenue Service Revenue Procedure 2017-19](#)” section of this Toolkit.

ESPC ESA Contract Structure Recommendations

With these requirements and considerations in mind, the following is a summary of the recommended ESPC ESA structure⁶:

- The renewable ECM is initially privately owned. The contract price is based on a fixed per-kWh basis and must be paid for by the federal agency from the energy savings generated under the project. By the end of the contract, the federal agency purchases the renewable ECM at FMV, as appraised by a third party at the time of the sale.
- The ESPC ESA contract length is less than or equal to 20 years.⁷
- The ESCO will own, operate, and maintain the system until the title transfer.
- In addition to monetizing the tax incentives, the ESCO may sell the renewable energy certificates (RECs), if deemed beneficial, to reduce overall project costs to a federal agency.
- The ESCO will transfer a portion of the payments it receives from the federal agency each year into a reserve account held by the ESCO. The ESPC ESA financing mechanism allows an ESCO to use a reserve account (i.e., a private account independently held by the ESCO, not an escrow account by both parties to the contract) in which a portion of an agency's annual payments from energy savings are set aside for the agency's future purchase of the onsite energy generation asset by the conclusion of the contract. This is an accounting measure for the ESCO. The funds in the account belong to the ESCO, not to the federal government. The agency satisfies the obligation to take title to the equipment by the end of the contract through its annual payments over the course of the contract (and through any adjustments to the payments resulting from the ESCO's periodic reappraisals of the fair market value of the equipment to ensure that the reserve account has sufficient funds by the point at which title is transferred).
- Any reserve account funds in excess of the equipment FMV purchase price can be applied by the ESCO to offset the final ESPC payment(s).

Assumptions

The following assumptions have been made for the purposes of this Toolkit:

1. The ESPC ESA will be a site-specific/stand-alone ESPC, involving a Request for Proposal (RFP) process.⁸
2. The ESPC ESA includes one ECM – solar photovoltaic (PV).⁹

⁶ Other structures may be acceptable. Contact FEMP for assistance and ensure that the proposed ESPC ESA structure is thoroughly reviewed by agency contracting and legal staff.

⁷ The ESPC authority allows a 25 year contract, however IRS Revenue Procedure 2017-19 limits ESPC ESA contracts to 20 years or less. An ESPC ESA contract term less than 20 years may be beneficial, to allow for contract extensions if needed.

⁸ Other options for executing ESPC ESAs include ESPC ENABLE or multiple-award contracts such as the DOE IDIQ and the Army Corps MATOC. For guidance and more information on the full range of tools and approaches, please contact a DOE-FEMP Federal Project Executive (FPE) or other FEMP expert who can assist an agency in determining the best contracting mechanism for your agency and planned project.

⁹ An ESPC ESA could be used for renewable energy generation measures other than PV with minor changes to the Toolkit language. It also is possible, and may be beneficial, to include other ECMs. The contract term for other ECMs may be up to 25 years. FEMP can assist agencies with the additional considerations involved in a bundled project.

3. The ESCO will monetize the federal tax incentives to reduce the ESPC ESA rate.

Toolkit Purpose

The purpose of this ESPC ESA Toolkit (“Toolkit”) is to provide federal agency contracting officers (COs) and other acquisition team members with information that will facilitate the timely execution of ESPC ESA projects. The information in this Toolkit is presented sequentially and covers the seven phases of a project that the U.S. Department of Energy (DOE) Federal Energy Management Program (FEMP) has identified as necessary for completing a project. A process diagram outlining these seven phases is included in the section "[ESPC ESA Process Diagram](#)" of this Toolkit. While the Toolkit covers all phases of a procurement, it focuses primarily on the pre-award process corresponding to Phases 1 - 4. FEMP is available to provide assistance to federal agencies throughout the process.

In addition to the process diagram, the Toolkit includes a project check list, team member descriptions, project considerations, and other information. At the end of the Toolkit are a series of appendices that contain reference documents and editable templates.

Much of the Toolkit information applies regardless of the contracting mechanism used (i.e., stand-alone ESPC ESA, ESPC ENABLE, or multiple-award contract) to implement a renewable project. Federal agency staff should contact FEMP when utilizing a mechanism other than a stand-alone ESPC ESA for recommendations regarding the appropriate use of the Toolkit and recommended modifications. For example, ESPCs under the DOE IDIQ and ENABLE utilize a different process and contract documents. All documents should be reviewed carefully to ensure that they comply with agency policies.

FEMP hopes this Toolkit will help your agency expedite the implementation of its ESPC ESA project and wishes you much success.

ESPC ESA Process Diagram

Click [here](#) to download an editable version of this section.

An example process diagram with recommended ESPC ESA project phases and steps is shown on the next page. The seven phases are as follows:

- Phase 1: Forming a Strong Project Team
- Phase 2: Project Validation
- Phase 3: Acquisition Planning
- Phase 4: RFP Development
- Phase 5: Procurement
- Phase 6: Proposal Evaluation and Contract Award
- Phase 7: Construction and Performance Period

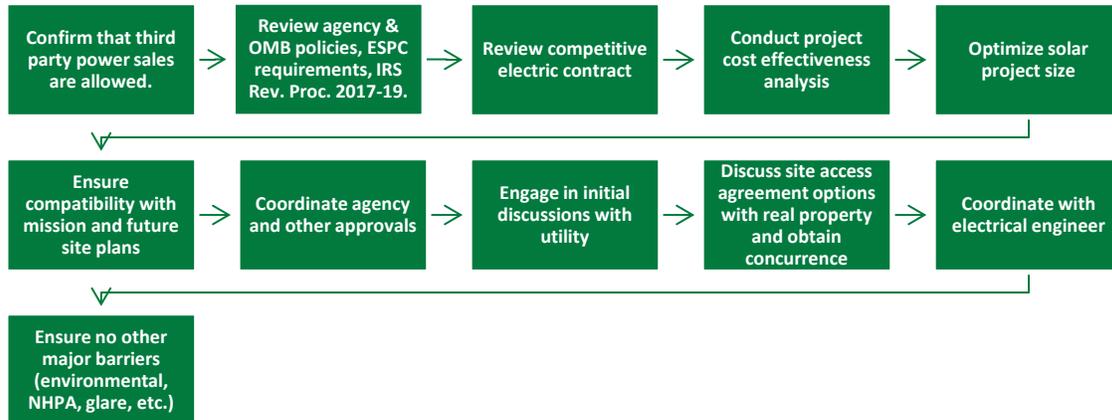
While phases/steps may occur in a different order and/or concurrently, all phases/steps typically must be undertaken to ensure a successful project. This toolkit provides detailed information on each of these phases.

Figure 1: ESPC ESA Process Diagram

Phase 1: Forming a Strong Project Team



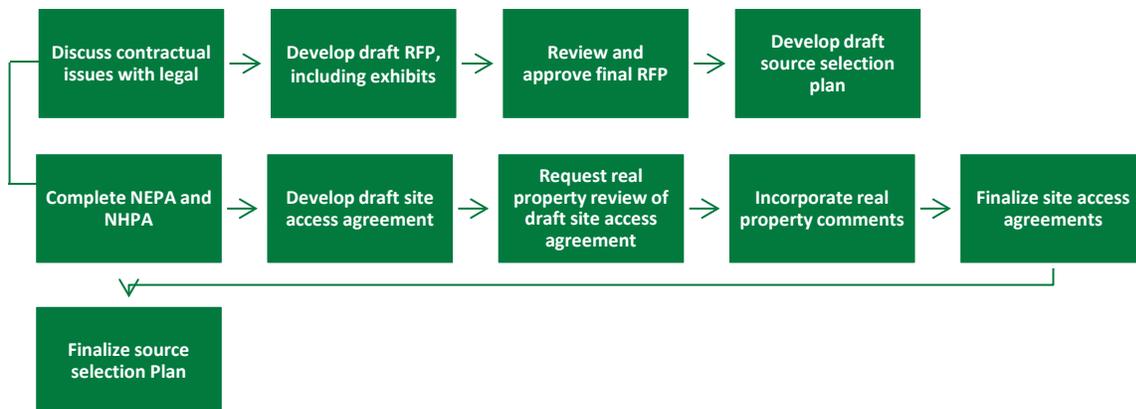
Phase 2: Project Validation



Phase 3: Acquisition Planning



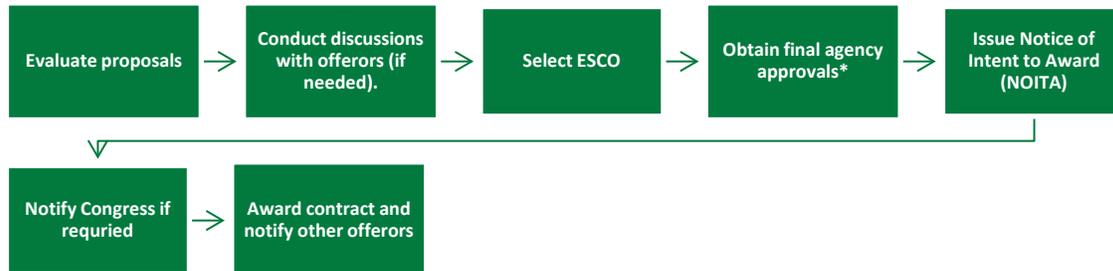
Phase 4: RFP Development



Phase 5: Procurement

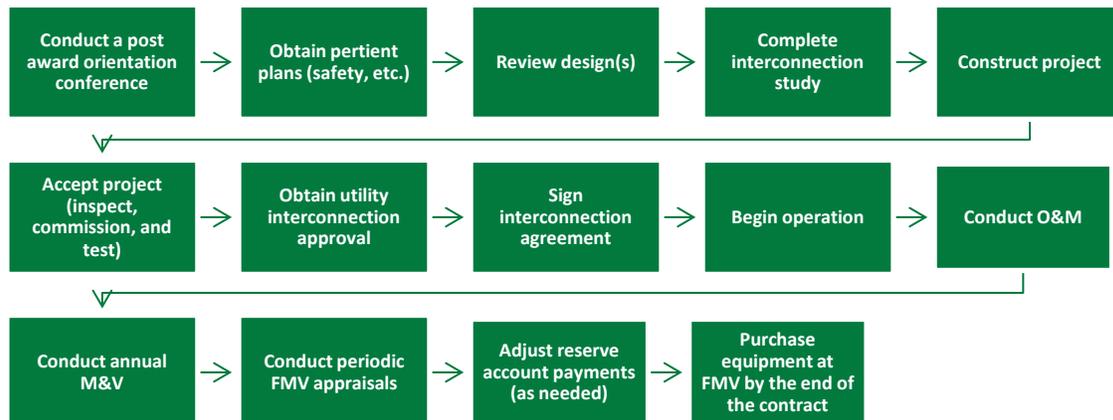


Phase 6: Proposal Evaluation and Contract Award



*NOITA is an optional step. If NOITA step is used, complete the interconnection study and sign the interconnection agreement (if possible) before contract award. Other steps such as final ESCO financing approval can also be completed after NOITA, but before official contract award.

Phase 7: Construction and Performance Period



ESPC ESA Toolkit Checklist

Click [here](#) to download an editable version of this section.

To ensure that all Phases and their recommended steps are followed, FEMP has developed the ESPC ESA Toolkit Checklist (“Checklist”). This Checklist is to be used throughout the ESPC ESA process. The listed responsible team members are the recommended leads and will likely receive support from other team members. Additional information on the responsible team members is provided in this document in “[Phase 1: Forming a Strong Project Team](#)” in the section 1.1 “[Key Team Roles](#)”.

Table 1. ESPC ESA Toolkit Checklist

Phase and Recommended Steps		Responsible Team Member(s)	Notes
Phase 1: Forming a Strong Project Team			
	Hold kickoff meeting.	Energy champion	
	Develop charter and/or project plan.	Energy champion	
Phase 2: Project Validation			
	Ensure that third party power sales are allowed in state and the utility service territory.	Energy champion, Legal	
	Check on applicable agency policies.	Energy champion, Legal	
	Review OMB requirements.	Energy champion, Legal	
	Review ESPC savings and other requirements.	Energy champion, Contracting officer, Legal	
	Review IRS Revenue Procedure 2017-19.	Contracting officer, Legal, Energy champion	
	Ensure that the competitive electric contract does not have provisions that will impact project viability.	Energy champion	
	Complete project cost effectiveness analysis.	Energy champion	
	Determine optimal solar PV project size.	Energy champion	
	Ensure solar project is compatible with mission and site plans.	Energy champion, Leadership	
	Determine land/building ownership and obtain approvals.	Real property, Leadership	
	Obtain approval for project from entity that pays the utility bills.	Energy champion, Leadership	
	Coordinate with tenants about solar project.	Energy champion, Leadership	
	Obtain agency approval for project at required levels.	Energy champion, Leadership	

Phase and Recommended Steps		Responsible Team Member(s)	Notes
	Set up meeting with utility to discuss the Utility Coordination Topics described in Phase 2, Project Validation.	Energy champion	
	Determine available incentives.	Energy champion	
	Determine applicable policies such as net metering.	Energy champion	
	Address the question: Is there a possible tariff change and/or standby charge?	Energy champion	
	Investigate interconnection processes and requirements.	Energy champion, Electrical engineer	
	Determine who signs the interconnection agreement (ICA).	Energy champion	
	Conduct legal review of the ICA.	Energy champion, Legal	
	Discuss Site Access Agreement options with real property staff.	Energy champion, Real property	
	Consult with electrical engineer – discuss electrical considerations and develop solar project electrical connection plan.	Energy champion, Electrical engineer	
	Discuss NEPA, stormwater management, erosion/sediment control and other environmental requirements with environmental staff or other appropriate staff.	Energy champion, Environmental	
	Determine applicable National Historic Preservation Act (NHPA) and other historic preservation requirements.	Environmental	
	Check agency glare policy.	Energy champion	
	Complete glare study if necessary.	Energy champion	
	Ensure agency and/or FAA review of glare study.	Energy champion	
	Determine applicable construction and operating permits.	Energy champion, Site operations	
Phase 3: Acquisition Planning			
	Discuss small business requirements with agency small business staff.	Contracting officer, Legal	
	Conduct small business market research.	Contracting officer, Energy champion	
	Complete necessary small business paperwork and obtain all approvals.	Contracting officer	
	Finalize acquisition plan.	Contracting officer	
Phase 4: RFP Development			

Phase and Recommended Steps		Responsible Team Member(s)	Notes
	Complete NEPA.	Environmental	
	Review contractual issues.	Contracting officer	
	Make decisions on various contractual issues:	Contracting officer	
	Termination for convenience clause(s).	Contracting officer	
	Buy American Act.	Contracting officer	
	Davis Bacon and Services Contract Act.	Contracting officer	
	Fair market value purchase and ESCO's reserve account requirement language.	Contracting officer	
	Develop source selection plan (may also be done in Phase 3).	Contracting officer	
	Discuss project with site security staff.	Energy champion	
	Discuss project with safety staff.	Energy champion	
	Discuss cybersecurity requirements.	Energy champion, Computer services	
	Assemble RFP.	Contracting officer	
	Compile exhibits.	Energy champion	
	Develop Site Access Agreement.	Contracting officer, Real property, legal	
	Obtain final RFP, Site Access Agreement, and Source Selection Plan approvals.	Contracting officer, Legal, Real property	
Phase 5: Procurement			
	Plan pre-proposal conference/site visits.	Contracting officer	
	Issue solicitation.	Contracting officer	
	Hold pre-proposal conference/site visits.	Contracting officer, Energy champion	
	Post amendments (as needed).	Contracting officer	
	Post Q&A document.	Contracting officer, Energy champion	
Phase 6: Proposal Evaluation and Contract Award			
	Evaluate proposals.	Evaluation team	
	Conduct negotiations, if needed.	Contracting officer	
	Obtain all required agency approvals.	Contracting officer	
	Review congressional notification requirements for	Contracting officer	

Phase and Recommended Steps		Responsible Team Member(s)	Notes
	your agency.		
	Award contract ¹⁰ and notify other offerors	Contracting officer	
Phase 7: Construction and Performance Period			
	Conduct a post award orientation conference.	Energy champion	
	Obtain required plans from contractor.	Contracting officer	
	Review PV system design.	Energy champion	
	Confirm interconnection requirements & submit application.	Energy champion	
	Complete project inspection, commissioning and acceptance based on agency requirements.	Energy champion	
	Obtain utility interconnection approval.	Energy champion	
	Sign interconnection agreement.	Contracting officer	
	Pay invoices.	Finance/Accounting	
	Review and approve annual M&V report.	Contracting officer	
	Conduct periodic FMV re-evaluations and adjust the government's reserve account payment (if needed).	Contracting officer, Energy champion	
	Request official solar project FMV assessment.	Contracting officer	
	Purchase equipment at FMV.	Contracting officer	
	ESCO should apply remaining reserve account funds (if any) to remaining ESPC balance.	Contracting officer	
	Close out the contract.	Contracting officer	

¹⁰ A NOITA is an optional step before contract award. See Process Diagram, Phase 6 footnote.

ESPC Authorities

A federal agency may enter into an ESPC ESA for a period of up to 25 years (including design and construction),¹¹ notwithstanding other provisions of law, for the purpose of achieving energy savings and benefits ancillary to that purposes. 42 U.S.C. § 8287(a)(1). ESPC ESAs must meet all ESPC legal requirements. See, *e.g.*, 42 U.S.C. § 8287, *et seq.* For information on ESPC requirements, see FEMP's Energy Savings Performance Contracts for Federal Agencies website¹². The Federal Acquisition Regulation (FAR) authorizes federal agencies to undertake an ESPC for the acquisition of utility services. See 48 C.F.R. § 41.102(b)(7).

Applicable OMB Requirements

OMB Memo 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)" (dated September 28, 2012) sets forth the conditions under which the budget costs of ESPCs may be scored on an annual basis during the term of the contract. The memo includes the following requirements that are specific to onsite generation:

- Title retention requirement: For an ESPC that includes onsite energy generation to be scored on an annual basis, the federal government must retain title to the equipment by the end of the contract. Provisions to meet this requirement, including the ESCO's reserve account to accumulate funds for a fair market value purchase of the equipment at the conclusion of the contract, are set forth in the RFP. The ESPC ESA contract length should be short enough to allow for contract length extension, if needed based on fair market value re-appraisal. This will provide additional time for required reserve account funds to be accumulated in the ESCO's reserve account. In the absence of sufficient additional time, the reserve account payment amount will have to be increased, possibly requiring a more extensive contract modification. Contact FEMP for assistance with RFP development.
- The ESPC authority may not be used to build merchant scale power generating facilities on federal land.

See "[Appendix A: OMB Memo M-12-21](#)" of this Toolkit for a copy of the OMB Memo.

Internal Revenue Service Revenue Procedure 2017-19

Internal Revenue Service (IRS) Revenue Procedure 2017-19 provides a safe harbor under which the IRS will not challenge the treatment of an ESPC ESA between an ESCO and a federal agency as a service contract under 26 U.S.C. § 7701(e)(3). Section 4.02 of the Revenue Procedure sets out several requirements for the safe harbor:

- Term: The total term of the ESPC ESA cannot exceed 20 years in length. The term must be consistent with and appropriate for the scope and scale of the renewable project.
- Other Federal guidance: The ESPC ESA must satisfy the requirements of 42 U.S.C § 8287 and OMB Memorandum M-12-21.

¹¹ While the ESPC authority allows for up to 25 years, pay particular attention to the IRS Revenue Procedure safe harbor requirement for a contract term of 20 years or less.

¹² <https://energy.gov/eere/femp/energy-savings-performance-contracts-federal-agencies>

- Operation of Alternative Energy Facility: Under no circumstances will the federal agency (FA) attempt to operate the renewable energy generation asset. In the event of a shut-down or mechanical issue, FA will immediately notify the ESCO or its designated contractor.
- Risk: The ESCO bears all financial risk for non-performance, except to the extent such non-performance is attributable to a temporary shut-down of the facility for repairs, maintenance, or capital improvements.
- Reduced Costs: The contract price for electricity will not be reduced if operating costs should diminish.
- Equipment Purchase: The FA may have the option to purchase, or may be required to purchase, the renewable energy generation asset at the end of the contract term, for its fair market value (FMV) at the time of the purchase.

Section 5 of the Revenue Procedure provides an example ESPC ESA project. See [Appendix C: Internal Revenue Bulletin 2017-7 with Revenue Procedure 2017-19](#).

1 Forming a Strong Project Team

An engaged, multi-disciplinary team should be established at the outset of the ESPC ESA process. For this reason, the first Phase (Phase 1) of the process is “Forming a Strong Project Team”. Forming a strong official project team ensures that the project moves forward smoothly and efficiently. The team should include personnel who have pertinent knowledge, experience, responsibility, and authority. It is also important to involve key team members at the right time in the process. If certain team members are brought in too soon, the process might be confusing; if they are brought in too late, the project may be delayed. Some team members will be involved from the start, while others can be brought in later in the process or need only be consulted periodically. Pertinent information should be assembled prior to reaching out to the site staff.

It may be beneficial to hold a kick-off meeting so that everyone can agree on key elements of the project. A plan (and/ or a charter) may be helpful to gain commitment for the resources required to develop, award, install, and ensure performance of the project. This plan can help to manage expectations and help the team understand the many steps and obstacles of the project. The plan can facilitate on-going participation and buy-in of key members and stakeholders. Common elements of a team plan include project goals and timeline, personnel and funding resource requirements, individual roles and responsibilities; as well as communication, reporting, and decision-making procedures. After the kickoff meeting, the team should hold periodic meetings to keep the project on track. Some team members will be involved in most or all of the meetings, while others may only be involved on a periodic basis.

The team should prepare for team member turnover by documenting the process and capturing institutional knowledge. In the RFP development process, the team may meet more often than in the project validation Phase. Regardless, periodic check-ins with the group help to keep everyone involved and up-to-date on how the project is progressing.

1.1 Key Team Roles

This section describes the key team roles needed for a successful ESPC ESA project process. These roles are referenced in section 1.2 "[Responsibilities by Team Member](#)". As noted above, some team members will be involved more actively and for a longer period than others.

Disclaimer: This is only meant as a resource, it is not a comprehensive list. There may be other team members, and the team listed may take on different responsibilities than shown. Agency staff should adhere to their agency's policies, procedures, protocols and requirements.

1.1.1 Energy Champion(s)

An enthusiastic energy champion is important for project success. The energy champion will help maintain project momentum and could act as a central point of contact for all team members. This person serves as the team leader and is responsible for coordinating project development. This document assumes that the energy manager is the energy champion, although in some projects someone else, such as a sustainability staff person, may be the energy champion. In addition, some projects may have more than one energy champion.

With team assistance, the energy champion will identify project goals, assist in the development of the contract documents, support solar project site investigation and project development efforts, utility coordination, and possibly provide oversight during construction of the project.

1.1.2 Other Team Members

- **Contracting Officer:** The contracting officer (CO) is responsible for procurement execution. They ensure that the RFP and associated documents adhere to federal regulations while addressing agency needs. Other contracting personnel, such as the contracting officer's representative (COR) or the contracting officer's technical representative (COTR) contribute information to the CO in support of project execution. After the CO awards the contract, the COR/COTR is the first party providing oversight to ensure execution in accordance with contract documents. The COR/ COTR should report any contract discrepancies to the CO for action. Other Internal Team Members
- **Leadership:** Senior decision-makers and management should be engaged to ensure that the proposed project does not conflict with site plans and that project goals are met with mission and budget in mind. Ideally, leadership acts as a high-level champion to provide essential support, ensure that staff are dedicated to the project and are fully trained, and facilitate all necessary approvals to move the project forward within the agency.
- **Legal:** Legal personnel involvement initially is to advise the team on authority and Federal Acquisition Regulation (FAR) clause issues. As requested, they will assist with the development and review of the RFP and other project documents and provide general support and legal advice. Legal should review the RFP and the Site Access Agreement to make sure that there are no redundancies or conflicts.
- **Environmental:** The environmental personnel are responsible for investigating National Environmental Policy Act (NEPA) and other related requirements and considerations such as the National Historic Preservation Act (NHPA), Endangered Species Act, Fish & Wildlife, cultural, archaeological, etc... These requirements can be extensive, depending on the location of the project. They can also assist with other environmental issues such as stormwater management and certain permitting requirements.
- **Real Property:** Real property personnel are key to understanding the land/building ownership, for selecting the type of site access agreement that will be used to convey the land/roofs, and for obtaining associated approvals.
- **Electrical Engineer:** The electrical engineering personnel provide support for all electrical issues, including the connection plan from the solar PV project to the site or building electrical distribution system and interconnection with the utility. They also review the site electrical distribution system, if needed, to determine potential electrical upgrade and/or study requirements.
- **Other Engineering/Technical Staff:** Other specialized engineering or technical staff support may be necessary, depending upon the nature of the project and/or site-specific considerations. They and/or other staff will review and approve designs and Safety Plans, oversee construction and approve the project.
- **Site Operations:** Individuals involved in site operations can provide energy usage, infrastructure constraints, and facility information, and they can help scope technical project goals and considerations. They can also assist with the project cost effectiveness analysis and review any renewable energy feasibility studies.
- **Finance/accounting:** Finance and accounting personnel ensure that funds will be available for payments and then make payments after project execution.
- **Sustainability:** If the site has a sustainability program, the staff can provide support and will often serve as champions.

- **Planning Staff:** The project team will coordinate with the planning group to ensure there are no conflicts with the long-term site plans. Planning staff can often provide project implementation support throughout the project, both before and after the contract is signed. They also should be consulted regarding any plans that will change energy consumption.
- **IT/Computer Services:** Cybersecurity is an important consideration for any energy project. IT/computer services staff can provide up-to-date information regarding cybersecurity requirements that should be included in the RFP.

1.1.2 External Project Stakeholders

- **FEMP:** FEMP provides multifaceted support to ESPC ESA projects through guidance, training, and direct project assistance.
- **Utility Representatives:** Upon request by the agency, utility representatives provide information on interconnection requirements, net metering and other applicable policies, and incentives, and they can also assist with rate questions.
- **Other Stakeholders:** State, local, or private sector stakeholders that may be impacted by the project should be identified early in project development. The energy champion and other team members need to anticipate potential issues to avoid surprises later in the project process. This may require working through proper channels, such as the public affairs office, before engaging these stakeholders. If there are tenants and/or co-located organizations at the site, their staff should also be involved.

1.2 Responsibilities by Team Member

The energy champion and the contracting officer (CO) are responsible for most of the project steps. They often work together and with other team members. This table shows likely responsibilities for the energy champion, CO and other team members. Actual responsibilities will vary depending upon the agency, site and project.

Table 2. Responsibilities for Energy Champion

Energy Champion	
1.	Lead kickoff meeting.
2.	Develop charter and/or project plan.
3.	Ensure third party power sales are allowed in the state and utility service territory.
4.	Review ESPC statutory requirements, OMB Memo M 12-21 and IRS Revenue Procedure 2017-19 with the CO and legal.
5.	Review ESPC savings and other requirements with the CO and legal.
6.	If served by a competitive electric supplier, ensure that the competitive electric contract does not have provisions that will impact project viability.
7.	Conduct project cost effectiveness analysis.
8.	Determine optimal solar project size.
9.	Ensure solar project is compatible with mission and site plans.
10.	Discuss site access agreement options with real property staff.
11.	Consult with electrical engineer – discuss electrical considerations and develop solar project electrical connection plan.
12.	Discuss NEPA, stormwater management, erosion/ sediment control, and other environmental requirements with environmental staff.
13.	Check agency glare policy.
14.	Complete glare study if necessary.
15.	Ensure agency and/or FAA review of glare study.
16.	Determine applicable construction and operating permits.
17.	Discuss project with site security.
18.	Discuss project with safety staff.
19.	Discuss cybersecurity requirements.
20.	Compile RFP and exhibits, in consultation with the CO.
21.	Conduct project kickoff meeting.
22.	Review PV system design.
23.	Confirm interconnection requirements & submit application.
24.	Complete project inspection, commissioning and acceptance based on agency requirements.
25.	Obtain utility interconnection approval.
26.	Obtain and review annual M&V report.
27.	Conduct periodic FMV re-evaluations and adjust reserve account payment if needed.
28.	Report all project findings to the CO.

Table 3. Responsibilities for Contracting Officer

Contracting Officer	
1.	Review ESPC statutory requirements, OMB Memo M 12-21 and IRS Revenue Procedure 2017-19 with the energy champion and legal.
2.	Consult with agency small business experts to determine requirements (such as market research) in consultation with legal.
3.	Discuss small business requirements with agency small business staff. Ensure all appropriate small business requirements are met, complete necessary paperwork, and obtain all approvals.
4.	Develop acquisition plan.
5.	Develop source selection plan (may also be done in Phase 3).
6.	Make decisions regarding RFP format and key clauses (such as FAR Part 12 use) in consultation with legal.
7.	Develop the RFP, in consultation with the Energy Champion.
8.	Assist with site access agreement development.
9.	Facilitate legal review of RFP and site access agreement.
10.	Finalize RFP, site access agreement and any other required documents.
11.	Set pre-proposal conference/site visit date and reserve conference room.
12.	Issue the solicitation.
13.	Hold pre-proposal conference/site visits.
15.	Coordinate responses to RFP questions and post on website.
16.	Develop and post amendments as necessary.
17.	Participate in proposal evaluation process.
18.	Conduct negotiations if necessary.
19.	Award Contract and ensure contract file is documented.
20.	Conduct a post award orientation conference.
21.	Receive, review and place all project findings in the contract file.

Table 4. Responsibilities for Other Team Members

Leadership	
1.	Review ESPC statutory requirements, OMB Memo M 12-21 and IRS Revenue Procedure 2017-19 with CO and energy champion.
2.	Determine land/ building ownership and obtain approvals.
3.	Obtain project approval from entity that pays the utility bills.
4.	Coordinate with tenants.
5.	Obtain agency approval for project at required levels.
Legal	
1.	Review OMB requirements.
2.	Review ESPC savings and other requirements.
3.	Ensure PPAs are allowed in state and utility service territory.
4.	Upon CO request, make recommendations regarding RFP format and key clauses (such as FAR Part 12 use).
6.	Review RFP, site access agreement, contract award, and other procurement documents.
Environmental	
1.	Make decisions regarding NEPA and other environmental requirements.
2.	Determine applicable NHPA and other historic preservation requirements.
3.	Complete NEPA.
4.	Ensure all other environmental and permitting requirements are identified.
Real Property	
1.	Determine land/ building ownership and obtain approvals.
2.	Determine the appropriate site access agreement to use.
3.	Develop site access agreement.
4.	Approve site access agreement.
Electrical Engineer	
1.	Develop solar project electrical connection plans.
2.	Understand all interconnection processes and requirements.
3.	Assist with completing the utility interconnection process.

2 Project Validation

The second phase (Phase 2) of the ESPC ESA process is Project Validation. This key Phase consists of a series of activities that are designed to determine both the feasibility and risks associated with a proposed solar PV project. It is only after the issues described in the Project Validation Phase have been addressed that the project can move to the Acquisition Planning phase. The research carried out during the Project Validation Phase will also provide valuable information regarding potential impact on the solar project costs and the implementation schedule. Some activities, such as NEPA, may be conducted in parallel with the Acquisition Planning and the RFP Development phases.

This section discusses the issues associated with the Project Validation Phase. Keep in mind, though, that certain topics – such as interconnection – should be revisited in each Phase of the project process. The project size and interconnection plan should be tailored to the state and local regulatory environment, with specific recommendations listed below. FEMP can provide assistance with Project Validation Phase tasks such as the solar PV project cost-effectiveness analysis, policy research, interconnection and other utility coordination questions, etc. Contact FEMP for assistance with this or other possible project implementation approaches.

2.1 Power Purchase Agreements Legality and Regulatory Oversight

The first step before beginning project implementation is to research whether third party power sales are allowed in your state and your utility service territory. In some states, any third-party selling electricity will be considered a “utility” and are subject to Public Utility Commission (PUC) regulation and/or certain approvals.

Information regarding third party solar power purchase agreement (PPA) policies is available on the Database of State Incentives for Renewables and Efficiency (DSIRE) website¹³. After reviewing the DSIRE information, discuss your planned project with your utility¹⁴ to confirm legality and regulatory considerations. The utility’s federal account representative should be able to provide assistance or direct the federal agency to the appropriate utility staff. In some cases, it may be beneficial to contact the state PUC. If PPAs are not allowed, a contract with the serving utility is another option that could be pursued. Contact FEMP for assistance with this or other possible project implementation approaches.

2.2 Agency and Other Requirements Review

Discuss the planned project with the appropriate agency staff to ensure that the project is in alignment with current agency policy. Agencies often have policies regarding the implementation of ESPC projects and guidelines such as the suggested maximum contract length. Additionally, review ESPC authority information, OMB Memo M-12-21 and the IRS Revenue Procedure 2017-19 (see section "[ESPC Authorities](#)", "[Applicable OMB Memo Requirements](#)", and "[IRS Revenue Procedure 2017-19](#)"), and discuss plan to ensure compliance. Contact FEMP for assistance as needed.

2.3 Competitive Electric Contract Review

If your site is in a competitive electricity market, find out whether your site’s electricity supplier was competitively selected and if so, by which agency or other entity (e.g., DLA Energy, GSA, or other). Review

¹³ See “3rd Party Solar PPA Policies,” at URL http://www.dsireusa.org/resources/detailed-summary-maps/3rd-party-ppa_0302015-2/.

¹⁴ Ensure that utility discussions are with regulated utility staff only, especially if the utility has an un-regulated subsidiary that may be interested in bidding on the proposed project.

the electricity supply contract for information such as the electricity price, the current contract end date, and future procurement plans.

Ensure that the current contract does not have any provisions (such as restrictions on electricity usage reduction) that will impact the solar PV project viability. Also add provisions to future competitive electricity RFPs, so that potential electricity suppliers are aware of the planned solar PV project and the expected impact on the site load.

2.4 Project Cost Effectiveness

The ESPC authority requires that payments made pursuant to an ESPC come from energy project cost savings, so the expected price for electricity from the proposed solar PV project (including reserve payment for the FMV purchase) must be lower than the current and forecasted rate. Thus, it is crucial to conduct a project cost effectiveness analysis to confirm that the proposed project will result in cost savings. FEMP can provide assistance with this analysis.

There are four steps associated with ensuring project cost effectiveness. These are described in more detail below.

2.4.1 Step 1 – Review the applicable electricity rate tariff information

Gather detailed tariff information such as time-of-use (TOU) rates, demand charges, and future forecasted rates. If the site is in a competitive electricity market (see section 2.3 "[Competitive Electric Contract Review](#)"), the current and future expected electricity supply price should be considered. Determine if the applicable tariff will change due to reduced electricity usage and whether there will be applicable stand-by charges.

2.4.2 Step 2 – Research incentives

Rebates and other incentives are important considerations because they represent additional revenue streams for an ESCO, which should result in a lower price for your project. The ESCO may be able to take advantage of available federal, state, and local tax incentives such as the federal investment tax credit for the privately-owned PV asset.^{15,16} Initial research can be conducted using the DSIRE website (<http://www.dsireusa.org/>) which contains information on incentives by state. Confirm the DSIRE information with the local serving utility, as the DSIRE website is only updated on a periodic basis. The utility can also provide additional incentive details, including whether an ESCO is eligible for all available incentives, and whether the incentives can be assigned to them.

2.4.3 Step 3 – Research SREC markets to determine if SRECs are valuable

Some states have renewable portfolio standards (RPS) with solar requirements that must be met by the utilities and/or retail electric providers. Solar renewable energy certificate (SREC) prices in these “compliance” markets are usually much higher than “voluntary” market national REC prices. If the site is located in a state with a solar requirement, research the current compliance SREC prices and the SREC market conditions. For example, determine whether prices have been volatile in the past and research whether the state has a solar alternative compliance payment (that effectively puts a cap on SREC prices). Certain states allow SRECs from other states to count towards their solar requirement, although SREC prices in these states tend to be relatively low.

¹⁵ See 26 U.S.C. § 48 at <https://www.gpo.gov/fdsys/granule/USCODE-2011-title26/USCODE-2011-title26-subtitleA-chap1-subchapA-partIV-subpartE-sec48>.

¹⁶ Tax incentive eligibility due diligence is the responsibility of the ESCO.

In states with high SREC prices, it may be beneficial for the ESCO to sell the project SRECs so that the ESPC ESA price can be reduced. If the SRECs are sold, replacement RECs must be purchased for credit towards the Energy Policy Act of 2005 renewable goal and the onsite double bonus. An agency can require the ESCO to purchase replacement RECs as part of the ESPC ESA contract (i.e., a “REC swap”), or the agency can purchase replacement RECs (through DLA Energy, GSA, or another method).

It may be beneficial for the government to request SREC ownership in the later years of the contract since SREC prices may be very low or zero. Then the federal agency can avoid the cost of replacement RECs. Contact FEMP for assistance in developing RFP SREC provisions that are in the best interest of the government for the specific project. After the title transfer, agencies should consult with their counsel to determine whether they are authorized to dispose of SRECs generated by government-owned equipment.¹⁷

Keep in mind that SREC markets can be volatile, so the SREC prices at time of contract award may be significantly different from the price when proposals were due (typically lower, but it is possible that prices will increase). It is best to minimize delays in ESPC ESA contract awards to avoid problems associated with potential significant SREC price reductions (that could impact proposal pricing viability).

Also, determine whether the state regulatory commission or other governmental body oversees the sale or certification of SRECs. For example, the SRECs may be required to meet certain certification requirements and/or approval of SREC sales may be required if they are being used for the state solar requirement. Confirm that the solar project meets all of the SREC requirements and include language in the RFP regarding who is responsible for meeting SREC certification and/or other requirements.

2.4.4 Step 4 – Conduct project cost effectiveness analysis

Utilize the information collected in steps 1-3 to determine whether the energy savings generated by your project will be sufficient to pay for the cost of the ESPC ESA, including the reserve account payment, over the term of the contract. A more detailed analysis will be required if your site has a complicated rate structure that includes TOU rates and/or demand charges. PV projects usually result in limited demand reductions (10% of PV system capacity is a conservative estimate). However, actual demand reductions are dependent upon a variety of factors.¹⁸ A detailed analysis can provide a better estimate of demand charge and other savings based upon the actual time of solar electricity generation. It may be beneficial to develop a Business Case Analysis to formally document cost effectiveness analysis results

FEMP provides no-cost support to agencies to identify the economic feasibility of renewable technologies that could be considered as ECMs in the ESPC ESA. FEMP’s pre-screening analysis requires agencies to complete a form with high-level site and related energy data. The data input form is available at <https://energy.gov/eere/femp/downloads/renewable-energy-screening-espcs>. The completed form should be sent to the points of contact provided on the form. The screening tool uses local solar resource data, current estimated solar equipment costs, and a blended utility rate, and it takes into account applicable incentives such as rebates, tax incentives, and SRECs. This screening is a first step to determine if your project is cost-effective. As noted above, a more detailed analysis will be required if there are TOU rates, demand charges, or other tariff considerations. FEMP also has limited funding to provide this analysis.

¹⁷ Dept. of Defense Armed Services Board of Contract Appeals (ASBCA) decision No. 57779; available online at: <http://www.asbca.mil/Decisions/2013/57779%20Honeywell%20International.%20Inc.%208.7.13%20PUBLISHED.pdf>.

¹⁸ The Impact of Retail Rate Structures on the Economics of Commercial Photovoltaic Systems in California, by Ryan Wisner, Andrew Mills, Galen Barbose, and William Golove; Environmental Energy Technologies Division, Lawrence Berkeley National Laboratory; LBNL-63019, July 2007. Available online at: <https://emp.lbl.gov/sites/all/files/report-lbnl-63019.pdf>.

2.5 Optimizing Solar PV Project Size

The solar PV project size depends in part upon the available land and/or roof space. However, it may be necessary to down-size the project if generation will exceed usage at any time. If this is the case, electricity export must be allowable by the utility through a policy such as net metering, a feed-in tariff, virtual net metering, or community renewables (see section 2.9.1 "[Incentives, Tariff, and Policy Information](#)" for more information). Carefully review the utility net metering policy, especially the treatment of net excess generation at the end of the month and at the end of the year, as policies vary widely across the country. In most cases it is best to size projects so that there is minimal (or no) net metering, with no net excess generation at the end of any given month. If the PV project(s) will serve more than one meter, compare the estimated generation from each PV project with the load behind the meter the project will serve.

To determine the estimated solar PV project generation, use NREL's PVWatts Calculator available at <http://pvwatts.nrel.gov/> or some other method that utilizes local solar resource weather data. If your site has more than one meter that is used for billing purposes, determine what meter(s) the solar project will serve. Compare the estimated solar project electricity generation to historical electricity usage data for the specified meter(s). The detail of data required will depend upon whether the solar electricity generation estimates are high relative to the load the solar project will serve. If solar generation estimates are much less than the load, simple information such as annual kilowatt-hour (kWh) usage (and possibly the maximum monthly or annual demand) may be sufficient. If electricity export is possible and needs to be avoided, then analysis of hourly electricity generation and detailed interval usage data may be necessary.

2.6 Project Compatibility with Mission and Future Site Plans

Confirm that the proposed solar PV project is compatible with the mission activities and the site master plan. For example, a potential site for a ground-mounted solar PV system may be planned for a new building, a building may be torn down, or the entire site may be shutting down in the future. Or, there may be energy efficiency plans that will change energy consumption. Also consult with environmental staff regarding potential environmental barriers. Consult with master planning, agency management, and any other groups that may have pertinent information early in the process to ensure the solar PV project and the planned location is acceptable before expending too much time and effort.

2.7 Agency and Other Approvals

Numerous approvals may be required for the solar PV project before it moves forward and/or at other steps in the process (such as before an RFP is issued and/or before contract award). Consider each of the following issues discussed below.

2.7.1 Agency Approval Requirements

Determine what approvals are required – at both the site, as well as at your agency regional and headquarters level. Ensure that your project timeline takes into account the time required for these approvals. Linking the project to agency mission, goals, and priorities should help with project approval.

2.7.2 Land/Building Ownership

Determine whether your agency owns the land/buildings where the solar PV project will be installed by consulting with real property personnel and/or other appropriate agency staff. If the land/building is not owned by the agency, contact FEMP for assistance in determining whether an ESPC would be allowed. An ESPC may be permitted if the federal agency owns a building, but does not own the land. The length of the underlying lease should be at least as long as the planned contract. See https://energy.gov/sites/prod/files/2016/12/f34/espc_faq_42_usc.pdf for additional information.

Also determine whether the land is Bureau of Land Management (BLM) withdrawn (this is especially important in the western United States). If the land is BLM withdrawn, review the BLM withdrawal (found in the Public Land Order), and any applicable contract to determine if the proposed solar PV project is allowed or whether there are any applicable restrictions. Consult BLM regarding approval if needed. It is also important to discuss the site access agreement (see section 2.10 "[Discuss Options for Site Access Agreement](#)") with the land/building owner.

2.8 Coordination with Tenants

Ensure that approval is received from any tenants that may be impacted by the project.

2.9 Utility Coordination Topics

It is very important to coordinate closely with the serving utility to get information regarding your tariff, available incentives, and interconnection requirements. More detailed information regarding these topics is below. Contact the utility early in the process and periodically throughout project development. The federal account representative should be able to answer some questions, but often utility staff from another division should be consulted. It is beneficial to get answers in writing when possible. The utility should also be consulted regarding some of the topics discussed in the section "Electrical Considerations" of this Toolkit.

2.9.1 Incentives, Tariff, and Policy Information

Ask your utility for details regarding available incentives and applicable policies. For example, if electricity export is planned, policies that allow for export such as net-metering and/or feed-in tariffs are important (see section 2.5 "[Optimizing Solar PV Project Size](#)"). Discuss net metering policy details such as REC ownership, the aggregate capacity limit, the allowable renewable project size and how they measure project capacity (based on PV project or inverter capacity in DC or AC). Also ask if the utility or state has emerging policies such as virtual net metering/community renewables that would allow exported electricity to be "used" by another entity (federal or otherwise). Ensure that utility discussions are with regulated utility staff only, especially if the utility has an un-regulated subsidiary that may be interested in bidding on the proposed project.

Ask your utility how the solar PV project will impact your utility costs. For example, depending upon the size of the project, standby charges may apply. Also, the applicable tariff may change due to a reduction in load and/or changes in load characteristics. Ensure that the rate impacts are included in the cost effectiveness analysis (see section 2.4 "[Project Cost Effectiveness](#)").

2.9.2 Solar Project Connection Plans

Discuss general solar PV project connection plans with the utility including how it will likely be connected to the site electrical system and which meter(s) it will serve. See section 2.11 "[Electrical Considerations](#)" of this Toolkit for more issues to discuss with the utility.

2.9.3 Interconnection Requirements

Ensure that the interconnection process and requirements are fully understood including the interconnection application and study requirements, the time required for study completion, costs (such as application fee, study fees, and possible equipment upgrade costs), and the current interconnection study queue. Depending upon the project details, Federal Energy Regulatory Commission (FERC) requirements may apply.¹⁹ The

¹⁹ "Generator Interconnection," FERC website, available at: <http://www.ferc.gov/industries/electric/indus-act/gi.asp>. This site includes links to the Standard Interconnection Agreements and Procedures for both Large and Small Generators as well as for wind energy and other alternative technologies.

utility may have additional interconnection requirements that depend upon project size and characteristics. The RFP can specify that interconnection costs and management are the responsibility of the ESCO (with some level of assistance from site staff).

2.9.4 Interconnection Agreement

Ask the utility if there is a template interconnection agreement (ICA) and who needs to sign the ICA. If the federal site needs to sign the ICA, legal staff should review the ICA early in the process as ICAs often include provisions such as indemnification, insurance, and/or choice of law that are problematic for the federal government. ICAs can be signed under Exhibit A of a utility's AWC. For some utilities, GSA has created Exhibit D, which can be signed with the ICA as an attachment.

2.10 Discuss Options for Site Access Agreement

Another part of the Project Validation Phase is the discussion of options for the Site Access Agreement.²⁰ This refers to the real property instrument that gives the ESCO access to the premises upon which the solar PV project will go. While the actual development of this agreement is part of Phase 4 of the ESPC ESA process (see section 4.5 "[Developing the Site Access Agreement](#)"), it is important for your agency's staff to consider possible agreement terms – including details such as the term of the agreement, the appropriate individual to sign the agreement, the approval process, and expected approval timeframe. Agency staff should also consider what type of legal instrument is optimal for the situation and if the agreement needs to be recorded. Options include a license, permit, easement, or lease.

Another option is to use FAR Part 52.241-5 Contractor Facilities clause which provides that the Government may grant a revocable permit or license and is allowable under FAR Part 41.501(c)(4). The site access provisions can be included in the ESPC ESA, although this is not optimal, primarily due to financier requirements and loss of access rights if the ESPC ESA is terminated.

This clause should be included in full text in Section I.

2.11 Electrical Considerations

It is very important to include an electrical engineer in the project planning team. Below are some issues to discuss with the electrical engineer (and in some cases, the utility):

1. Is the site on a network distribution system? If so, this will impact the ability to export electricity and may impact the optimal solar PV project size.
2. What are acceptable solar PV project interconnection options and are they behind-the-meter? Interconnecting on the utility side of the meter may not be allowed.
3. For ground-mounted PV systems, determine the distance from the solar PV project to the planned interconnection and whether there are existing electrical lines that can be used to transmit the electricity. If there are existing electrical lines, determine line ownership. If the lines are privatized, review the privatization contract to ensure that it does not contain provisions that conflict with the solar PV project plans. Discuss the solar PV project with the line owners to get their approval and negotiate any required payments. If line use is not allowed, the ESCO will have to build separate lines. Any additional costs should be considered in the cost effectiveness

analysis. New lines should be considered in the NEPA analysis, and the site access agreement should include access to the new transmission lines.

4. Are there any site electrical system impacts and are any electrical system upgrades likely to be required to accommodate the solar PV project? In some cases, a system integration study of the site's electrical distribution system may be beneficial, especially if a large project is planned, or if the estimated generation is large relative to the site electricity demand. Note that this study would be in addition to any utility required interconnection studies. If there are required electrical system upgrades, determine when they should be completed and who will be responsible - the federal agency and/or the ESCO.
5. What are acceptable inverter locations? If the inverters will be located outside, determine the enclosure requirements.

Discuss whether the solar project should provide energy security/resiliency benefits. If so, the solar PV project specifications should be modified accordingly, with the extra costs considered in the cost effectiveness analysis. One option is to request that the PV system be "micro-grid ready."²¹

2.12 National Environmental Policy Act Compliance

All federal agencies are required to conduct environmental reviews for projects involving federal facilities, lands and federal funding to comply with the National Environmental Policy Act (NEPA). The process includes consideration of various issues such as biological, cultural, and archaeological resources, as well as socio-economic ones (i.e., local social and economic impacts). The White House Council on Environmental Quality (CEQ) provides guidance on NEPA compliance, although it does not dictate decisions.

There are three levels of environmental review including Categorical Exclusion, Environmental Assessment (EA), and Environmental Impact Statement, each of which is discussed in more below. Your organization's environmental official can recommend the required environmental review. Also determine who will conduct the NEPA work (will it be site staff or through a separate contract?), the timeline, and the estimated cost. It is preferable to complete the NEPA process before the RFP is issued, but no later than proposal response date, to ensure that the project is acceptable and so that any requirements/restrictions can be included in the RFP. This can help reduce risks and the associated cost.

2.12.1 Categorical Exclusion

A Categorical Exclusion or "Cat Ex"²² provides documentation that there is no potential environmental impact and may apply to rooftop mounted PV systems. Check with agency environmental staff regarding agency-specific Cat Ex policies and requirements early in the project process.²³

²¹ NREL "Microgrid-Ready Solar PV" fact sheet available at <http://www.nrel.gov/docs/fy15osti/64582.pdf>

²² Categorical exclusion means a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations and for which, therefore, neither an environmental assessment nor an environmental impact statement is required." See 40 C.F.R. § 1508.4.

²³ "Final Guidance for Federal Departments and Agencies on Establishing, Applying, and Revising Categorical Exclusions under the National Environmental Policy Act," CEQ 3125-W0; available at: <https://energy.gov/nepa/downloads/guidance-federal-departments-and-agencies-establishing-applying-and-revising>

2.12.2 Environmental Assessment

An Environmental Assessment (EA) may be required for ground mounted PV systems and generally includes narratives on Purpose & Need and Proposed Actions & Alternatives (including “no action alternative”) and maps of the proposed project will be required. A site survey (e.g., archeological, cultural resources, and biological) may also be required. There is a draft Finding of No Significant Impact (FONSI) if the EA review shows that no further NEPA analysis is required. The proposed EA and draft FONSI should be distributed to local libraries, agencies, environmental organizations, and interested individuals for comment 30 days prior to publishing the final FONSI in a local newspaper. EAs can typically be completed in 3-6 months.

2.12.3 Environmental Impact Statement

An Environmental Impact Statement (EIS) may be required for large-scale ground-mounted solar PV projects. Like an EA, it requires a Purpose & Need, Proposed Actions & Alternatives, and maps of proposed project. Likely site surveys (e.g., archaeological, culture resources, and biological) and scientific analysis of impacts, such as construction (ground disturbance/dust) and socio-economic factors will also be required. The EIS includes a process for considering public comments, including required public meetings on the draft EIS, as well as the final EIS that includes revisions based on public comments and documentation of public comments. The final EIS provides recommended action and impact mitigation strategies, as applicable. The final EIS is forwarded to senior agency environmental managers to issue a Record of Decision. The EIS process can take 1-2 years or more.

There are special considerations for projects that will be located on closed landfills or sites that are contaminated. The Environmental Protection Agency (EPA) has published the Handbook on Siting Renewable Energy Projects While Addressing Environmental Issues and, jointly with the National Renewable Energy Laboratory (NREL), Best Practices for Siting Solar Photovoltaics on Municipal Solid Waste Landfills, both of which contain useful information for siting solar PV projects on such sites.^{24,25}

2.13 Glare Study Requirements and Related Information²⁶

2.13.1 Solar Glare Hazard Analysis Tool

If a site is at or within close proximity to an airport, potential glare from PV panels (modules) is an important consideration. Sandia National Laboratories has developed a tool that can be used to evaluate glare for airport runways and the air traffic control tower (ATCT). Known as the Solar Glare Hazard Analysis Tool (SGHAT), it can be accessed at <https://share.sandia.gov/phlux>. Previously freely available, use of SGHAT now requires a license. Users seeking to use SGHAT for glare analyses can visit the following licensed SGHAT application that is available for online usage and includes recent SGHAT enhancements and features: <https://www.forgesolar.com/> hosted by Sims Industries, LLC.

The Federal Aviation Administration (FAA) requires that the SGHAT tool be used to analyze potential glare for PV systems sited at federally-obligated airports. Private airports and land adjacent to airports are not covered under these policies, although the FAA encourages landowners interested in siting solar PV systems to follow the FAA’s policies. Some glare is acceptable on flightpaths; however, ATCT glare generally is not desirable.

²⁴ The EPA document is available online at: https://www.epa.gov/sites/production/files/2015-04/documents/handbook_siting_repowering_projects.pdf.

²⁵ The NREL/EPA report is available online at <http://www.nrel.gov/docs/fy13osti/52615.pdf>.

²⁶ Additional information is available in the NREL report Implementing Solar Technologies at Airports by A. Kandt and R. Romero that is available online at: <http://www.nrel.gov/docs/fy14osti/62349.pdf>.

There also may be agency-specific glare policies. The site staff should consult with internal agency experts for current agency requirements and then the FAA for current review requirements and information. Once completed, the SGHAT analysis results should be submitted to internal agency reviewers (if required) and to the FAA.

2.13.2 Running a SGHAT Analysis: Factors to Consider

The location, size, shape, tilt, and orientation of the solar PV system can have an effect on glare, so the submitted SGHAT analysis should be based on the final design. However, it may be beneficial to do a SGHAT analysis based on a conceptual design in the initial planning period to ensure that there are not serious glare issues that cannot be mitigated.

Additionally, if the development schedule needs to be compressed, submitting a preliminary analysis using a conceptual array design may also be useful. This allows for modification of the original submittal if array parameters change from conceptual to final design, which can lead to a faster resubmittal and review process. Keep in mind, though, that if system parameters do not change from conceptual to final design, the previously submitted analysis is valid and simply needs to be transferred to the final system owner without resubmission.

The minimum solar PV system information required to run a SGHAT analysis includes the location (address or latitude/ longitude); array orientation and module tilt; tracking or fixed PV orientation (for ground-mounted systems); height of the modules above the ground or roof (highest point); roof height (for roof systems); module surface material; whether anti-reflective coatings will be used on the PV modules; and a PV module layout. The runway locations and flight paths/patterns, the ATCT location, and the eye-level height above ground of the ATCT workers are also required.

Tilt and orientation are the most important drivers of reflectivity, so modification of these design factors can often mitigate glare issues. Sandia tested different PV modules and did not see much variance in reflectivity based on PV module type (i.e., thin film or other).²⁷ Reflectivity is primarily due to the glass coverings that are on most PV modules (some modules, such as building-integrated laminate-type products, do not have glass covering) and an anti-reflective coating does not impact reflectivity significantly. While heavily textured glass can provide a substantial glare reduction, this comes with significantly higher cost and soiling issues.

2.14 National Historic Preservation Act

Determine if there are National Historic Preservation Act (NHPA) Section 106 (16 U.S.C. 470 *et seq.*), state, and/or local historic preservation requirements that apply to the planned solar PV systems. If so, it is important to contact the State Historic Preservation Office (SHPO) early in the project development process to discuss the proposed PV system, the approval requirements, and project timeline. In some locations (such as Washington, D.C.) there may be significant approval requirements, possibly involving other governmental organizations.

It is important to fully understand the review process and incorporate it into the overall project timeline. Working with preservation professionals to identify the building's character-defining features and the potential location for a PV system is an important early step in the process to ensure that the system does not negatively impact these features. One possible requirement is that the PV system not be visible from the street - requiring flat PV modules or modules with a tilt less than the roof parapets.

²⁷ Solar Glare Hazard Analysis Tool (SGHAT) User's Manual v.2G (Updated March 2, 2015); see p. 34; Available online at: https://share.sandia.gov/phlux/static/references/glint-glare/SGHAT_Users_Manual_v2G.pdf.

2.15 Shading Considerations

The best solar PV project is only as good as the amount of sunlight it receives, which is why solar resource weather data is such an important upfront consideration. Less appreciated but just as important are shading considerations from any nearby structures that might be constructed during the lifetime of the solar PV project. For this reason, it is important to evaluate the risk that future buildings at your site, or from an adjacent property owner over which you have no control, could shade the planned PV array.

If there is risk from agency construction, the planned PV system location may need to be moved. If the risk from a neighbor is not acceptable, negotiate a solar easement to secure access to sunlight for the duration of the project, keeping in mind that it may not be practical to avoid 100% of any shading. This solar easement should be in writing and recorded, and should contain terms under which the solar easement can be revised or terminated. Define the dimensions of the easement in such a way that they can be confirmed. An easement may be granted for free, but in general an adjacent land owner will probably require some consideration or payment that should be factored into the financial analysis.

2.16 Construction Considerations and Requirements

A solar PV project is likely to have numerous considerations and requirements during the construction Phase such as permitting, stormwater management, and erosion and sediment control. This section provides just a brief a discussion of these topics. In addition, agency documents such as Installation Design Guidelines may include more detailed requirements and will be useful in the development of the SOW for the ESPC ESA.

2.16.1 Permitting Requirements

Determine if there are any applicable permitting requirements, such as construction and operating permits. The RFP can state that the ESCO is responsible for determining permitting requirements. However, it can be beneficial to conduct initial research since – while typically the government is exempt from certain requirements – it may still follow the local, state, or federal regulations.

2.16.2 Stormwater Management

Section 438 of the Energy Independence and Security Act of 2007 (EISA) outlines strict stormwater runoff requirements for federal development and redevelopment projects. The solar PV project must maintain or restore the pre-development hydrology to the maximum extent technically feasible. This is mostly relevant to ground-mounted solar PV systems, especially if grading of the site is required before project installation.

2.16.3 Erosion and Sediment Control from Construction Sites

The EPA pollutant discharge rule for construction projects requires that erosion and sediment control measures be taken during construction.²⁸ These rules will apply to ground-mounted (and in some cases carport) solar PV systems, especially if the land is cleared of vegetation and/or graded. Consult agency environmental staff regarding pertinent requirements to include in the RFP to ensure that the ESCO meets the applicable standard.

²⁸ “Water and Data Tools,” EPA, available at: <http://www.epa.gov/waterscience/guide/construction/>.

3 Acquisition Planning

Once the Project Validation Phase has been completed, the third Phase (Phase 3) of the ESPC ESA process can begin. As a starting point, development of the Acquisition Plan and small business considerations are key components of this Phase.

3.1 Developing an Acquisition Plan

The Acquisition Plan includes an acquisition strategy that sets forth how to document and inform project stakeholders about how the acquisition will be planned, executed, and managed. This plan outlines the specific actions necessary to execute the approved acquisition strategy. Specifically, it documents the approach to be taken for items such as the actual acquisition, contracting, and fiscal, legal, and personnel. The Acquisition Plan should also address any policy, process, regulation, law, etc., necessary to comply with FAR, and any other requirements related to the specific acquisition.

In order to facilitate attainment of the acquisition objectives, the Acquisition Plan must:

- Identify milestones at which decisions should be made.
- Address the items prescribed in FAR 7.105 Contents of Written Acquisition Plans to the extent necessary or beneficial.
- Address all the technical, business, management, and other significant considerations that will control the acquisition.
- Be tailored based on the size, complexity, unit familiarity with the product or service; as well as the nature and circumstances.

OMB Memo M-12-21 requires that, unless otherwise exempt, agencies must adhere to FAR requirements, including appropriate application of FAR Part 8, Required Sources of Supplies and Services and Subpart 23.2, Energy and Water Efficiency and Renewable Energy when entering into either Energy Savings Performance Contract (ESPC) or Utility Energy Service Contract (UESC) procurements.

An Acquisition Plan template is provided to federal agencies upon request. The template may be used as a resource. This template should be carefully reviewed by agency counsel, agency contracting staff, and other appropriate agency staff, as applicable. Agency staff should adhere to their agency's policies and requirements, and should use their agency's templates and forms, as appropriate.

3.2 Small Business Utilization

All federal agencies have procurement requirements to maximize the use of small business companies, per FAR Part 19.704, Subcontracting Plan Requirements. Work with your agency's Office of Small and Disadvantaged Business Utilization (or equivalent) to determine what steps (such as market research) and approvals are required.

A small business Sources Sought template that could be used as part of your market research activities is included in [Appendix D: Small Business Sources Sought Template](#) to this Toolkit.

If it is determined that a small business set-aside will not be used, ensure that all of the appropriate approvals to support this decision are obtained and that the RFP incorporates FAR 52.219-9 Small Business

Subcontracting Plan, requiring that large businesses identify planned use of small business suppliers or labor force. FAR 52.219-16, Liquidated Damages, must also be included in solicitations that contain FAR 52.219-9.

Each agency has goals established for all classes of small business subcontractor categories. To support offeror development of Small Business Subcontracting Plans, a table providing the desired level of small business subcontracting goals (per agency procurement guidance or memos) should be included in the RFP. A similar table must be filled out by each offeror, showing the total planned small business subcontracting, in total dollars and percentage of total solar PV system installation cost.

4 RFP Development Phase

The fourth Phase (Phase 4) of the ESPC ESA process is the RFP) Development Phase. This section discusses the activities and issues associated with this phase, in particular, the contractual requirements and FAR regulations that must be included in the actual RFP. In addition, while options for site access should have been discussed during Phase 2 (see section 2.10 "[Discuss Options for Site Access Agreement](#)"), development of the agreement takes place during this Phase in tandem with the development of the RFP. The RFP should include details regarding information needed for annual reporting requirements. While discussions about options for the Site Access Agreement should have already occurred during Phase 2 (see section 2.10 "[Discuss Options for Site Access Agreement](#)"), the actual development of the agreement takes place during this Phase in tandem with the development of the RFP.

4.1 Source Selection Plan

The Source Selection Plan (SSP) is intended to ensure that a thorough, fair, equitable, and unbiased evaluation of each offeror's proposal is conducted. In developing the SSP for an ESPC ESA project, the evaluation process should be discussed and evaluation team members designated.

A comprehensive SSP template is provided to federal agencies upon request. This template does the following:

- Establishes the evaluation process, procedures, management, and operating structure;
- Defines an environment for impartial and complete evaluations;
- Defines the responsibilities of the source selection participants;
- Requires assignment of skilled, experienced, and appropriately eligible individuals to the evaluation tasks; and
- Presents the evaluation criteria to be used in selecting the offeror(s) whose proposal(s) is most advantageous and of best value to the Government.

The template SSP also includes a series of attachments that show the Source Selection Evaluation Team (Attachment 1); a blank Team Member List (Attachment 2); Source Selection Process Milestone Schedule (Attachment 3); a template Confidentiality Agreement and Conflict of Interest Certification Form (Attachment 4); and a template Nondisclosure Agreement (Attachment 5).

4.2 Request for Information

A Request for Information (RFI) may be a useful tool where a project has unique considerations that could benefit from industry feedback prior to issuing the RFP. [Appendix E: Sample RFI](#) includes a sample RFI that requests information on possible project approaches, opportunities, and strategies to implement cost-effective PV array.

This sample RFI is intended to be used as a resource and should be reviewed and modified by agency counsel to meet the agency's needs, policies, and requirements. In addition, agency counsel should advise on the proper format and publication of the RFI.

4.3 Contractual Issues and FAR Clause Determination

This section considers some important contractual issues and FAR clauses for possible inclusion in the RFP, for the consideration of the agency contracting and legal staff.

4.3.1 FAR Part 12 Commercial Items

The use of FAR Part 12 enables agencies to obtain customary commercial practices and incorporate them into contracts. Solicitation provisions and contract clauses for the acquisition of commercial items are listed at FAR 12.301. Other clauses, as appropriate and described in the aforementioned FAR Part, may be incorporated when their use is consistent with the limitations contained in FAR 12.302.

Because some construction effort is required to install the equipment, certain construction clauses are included in the RFP, grouped together in Section I. Note also that “Installation” services fall within the FAR 2.101 definition of a “Commercial item”.

All of the FAR clauses, especially the Davis-Bacon Act and the Service Contract Act clauses, should be carefully reviewed by agency counsel and contracting staff to ensure that there is no conflict between FAR Parts. The RFP should be modified accordingly, should an agency decide not to use FAR Part 12.

Contact FEMP for assistance with RFP development.

4.3.2 Termination for Convenience/Cause

The federal government’s right to unilaterally terminate a contract for convenience or cause is set forth in FAR 52.212-4 (l) and (m), respectively, and these clauses provide guidance for such terminations. Federal site changes during the term of the contract may require a partial or complete termination of the contract. It is government policy that the CO should exercise the government’s right to terminate a contract only when such a termination would be in the best interest of the government. Because the settlement process for termination is usually complex and involves procedural steps that most COs do not encounter in the course of normal business, termination settlements are often delegated to a specialist designated as a Termination Contracting Officer (TCO). Agency counsel should be consulted prior to initiating a Termination for Convenience or Termination for Cause, and for all issues related to termination.

4.3.3 Cancellation Ceiling/Termination Liability

Every ESPC is required to include a schedule showing the maximum liability that can be negotiated at any point in the event of a cancellation during the performance period. This information is part of the contractor’s proposal and will be negotiated as necessary and incorporated into the contract. An example cancellation ceiling schedule is shown below. It should be noted that the values in the cancellation ceiling are not automatic but a *maximum* amount payable, subject to the settlement claim and supporting documentation furnished by the ESCO within one year of the cancellation.

4.3.4 Example Annual Cancellation Ceiling Schedule

Table 5: Example Annual Cancellation Ceiling Schedule

IMPORTANT INFORMATION:

1. Cancellation Ceilings for each time period specified below establish the maximum termination liability for that time period. Actual total termination costs will be negotiated.
2. The contractor may attach a monthly Financing Termination Liability Schedule

In the event of contract cancellation or termination for convenience, FAR 52.217-2 or 52.249-2 will apply.

Time Period	Cancellation Ceiling
Installation Acceptance	
End of Year One	
End of Year Two	
End of Year Three	
End of Year Four	
End of Year Five	
End of Year Six	
End of Year Seven	
End of Year Eight	
End of Year Nine	
End of Year Ten	
End of Year Eleven	
End of Year Twelve	
End of Year Thirteen	
End of Year Fourteen	
End of Year Fifteen	
End of Year Sixteen	
End of Year Seventeen	
End of Year Eighteen	
End of Year Nineteen	
End of Year Twenty	

4.3.5 Buy American Act/Trade Agreements Act

The FAR dictates which Buy American and/or Trade Agreement Act (BAA/TAA) clauses apply for a particular procurement. Agency CO and legal staff should determine which clauses to include in an RFP based on the FAR and any further guidelines stipulated in agency-specific regulations. The applicable BAA/TAA FAR guidelines are found at FAR Part 25. Consider existing Executive Orders and related agency policies when determining the applicable FAR clause to use.

4.3.6 Davis-Bacon Act

The Davis-Bacon Act (DBA) (40 U.S.C. § 3141, *et seq.*) is applicable to contracts of the United States in excess of \$2,000 for construction, alteration, and/or repair (including painting and decorating) of public buildings or public works, but not routine maintenance. Any work on an agency facility or land is likely to be covered by the DBA, even if the construction is financed by a third party. Agencies should consult with their CO and legal counsel to determine the applicability of and ensure compliance with these requirements.

If DBA is determined applicable to an ESPC ESA, certain DBA FAR clauses must be considered for inclusion. The FAR guidelines are found at FAR 22.4 and FAR contract clauses at 52.222. U.S. Department of Labor (DOL) regulations are contained in FAR 22.403-4. DOL is responsible for determining the minimum wages required under DBA and regularly publishing these wages in Wage Determinations (WD). Current and archived wage determinations are easily obtained through Wage Determinations On-Line²⁹. The agency CO will insert the applicable DBA wage determination into the contract. Follow the menu under “Selecting DBA WDs”, and either insert the WD number or the State, County, and Construction Type to obtain the correct wage determination.

When DBA applies to a federal contract, contractors are required to inform employees of the required wage rates, pay on a weekly basis, pay no less than the stipulated wages to covered employees performing work on the construction site, and provide a certified payroll report to the CO.

4.3.7 McNamara-O’Hara Service Contract Act of 1965

The McNamara-O’Hara Service Contract Act of 1965 (SCA), codified at 41 U.S.C. § 351–358, requires contractors and subcontractors performing on covered service contracts over \$2,500 to pay service employees in various classes no less than the wage rates and fringe benefits found prevailing in the locality as defined by DOL. The wage determination process is similar to that of the DBA. The difference is that SCA covers workers employed to perform preventive maintenance on ESPCs. The agency CO will insert the appropriate SCA wage determination into the contract. All WDs in all localities, including archived WDs, can be obtained from the same website.²⁹ Agencies should consult with their CO and legal counsel to determine SCA applicability and ensure compliance with these requirements.

The FAR clause to use when the contract will be covered by the SCA is 52.222-43 – Fair Labor Standards Act and Service Contract Labor Standards -- Price Adjustment (Multiple Year and Option Contracts) (May 2014).

4.3.8 Novation

For these types of projects, in some instances the tax equity investor pursuing applicable tax incentives for the renewable energy asset – such as the federal investment tax credit (ITC) & Modified Accelerated Cost Recovery System (MACRS) for 5-year depreciation – may wish to establish a limited liability company (LLC) or other type of Special Purpose Entity (SPE) to assume ownership and operations, maintenance, repair, and

²⁹ See Wage Determinations On-Line Program at www.WDOL.gov.

replacement of the renewable energy asset. Creation of an SPE under an ESPC ESA requires the execution of a novation agreement by the agency CO and ESPC prime contractor to recognize a successor in interest to the agency contract when contractor assets are transferred.

The ESPC statutory authority provides that an agency may enter into an ESPC with an ESCO that is on a qualified list established pursuant to the requirements under 42 U.S.C. § 8287(b)(2)(A). The initial award of an ESPC ESA to a qualified list ESCO satisfies this requirement, even though the newly created SPE may not be on an established qualified list.

Any subsequent agreement that is executed to novate the contract to a SPE must be approved by the responsible contracting officer and must be consistent with all applicable statutory and regulatory requirements. Specifically, the requirement that the transferor (ESCO) guarantees performance of the contract by the transferee (SPE) must be met. See FAR 42.1204(h)(3).

The applicable FAR provisions are located at FAR Subpart 42.12 Novation and Change-of-Name Agreements.³⁰

4.4 Developing the Site Access Agreement

As discussed in the section 2.10 "[Discuss Options for the Site Access Agreement](#)" in the Phase 2 "Project Validation" section, the Site Access Agreement refers to the real property instrument that gives the ESCO access to the land/building(s) upon which the solar PV project will be built. Agency staff should have already given consideration to this agreement including details such as the term of the agreement and the appropriate individual to sign the agreement, the approval process, and expected approval timeframe.

It is also necessary at this point to decide on the type of legal instrument that is optimal for the situation. Options include a license, permit, easement, or lease, depending upon the authority and policy of the issuing agency. A license is often used for rooftop systems. Also, it will be necessary to determine if the agreement needs to be recorded at the County Recorder's Office. A site survey may be required.

Finally, during development of the Site Access Agreement, certain agency staff such as site security should be consulted to discuss physical security issues. The Site Access Agreement should provide for termination in the event the ESPC ESA is terminated and vice versa.

[Appendix F: Site Access Agreement Template](#) to this Toolkit contains a sample Site Access Agreement.

³⁰ See applicable FAR provisions at https://www.acquisition.gov/sites/default/files/current/far/html/Subpart%2042_12.html

5 Procurement

The fifth Phase (Phase 5) is the Procurement. Before issuing the RFP, the pre-proposal conference should be planned so that the date can be included in the RFP. Typically, the site visit occurs at the same time, so that potential offerors can tour the planned solar project location. A conference room should be reserved as soon as possible and should hold as many as 50 – 100 people, depending upon expected participation.

Once the RFP is complete, it should be publicized on the Federal Business Opportunities website, www.fbo.gov.

The pre-proposal conference can serve the purpose of providing an opportunity to summarize key components of the RFP. Agency counsel should advise on how best to proceed with this conference and how best to field questions from participants in order to meet applicable federal ethical requirements.

This phase ends with the submittal of offeror proposals.

6 Proposal Evaluation and Contract Award

The sixth Phase (Phase 6) is Proposal Evaluation and Contract Award. The evaluation team should be convened to conduct the evaluation in accordance with agency policy and the Source Selection Plan. The CO will lead final negotiations if needed. In some cases, offerors will need to submit additional information.

Once a final selection is made, all required agency approvals should be requested. Congress should be notified if required for your agency. The contract can be awarded once all approvals are received and notifications are complete.

7 Construction and Performance Period

The seventh and final Phase (Phase 7) is Construction and Performance Period. Conduct a post award orientation conference to ensure that both parties understand the contract requirements. At this time, the CO and other team members can ensure that the contractor is fully aware of all of the contract deliverables, including various required plans and the project design. The appropriate agency staff should review all submittals within the designated timeframe and provide feedback to the contractor. The interconnection process is crucial during this Phase, so ensure that the agency staff works with the contractor to submit the required application and necessary steps.

Once the project construction is complete, project inspection, commissioning and final project acceptance can occur based on agency requirements. The utility may need to accept the project, especially to ensure that all safety requirements are met. The interconnection agreement must be signed before the system can become fully operational.

Monitor performance once the system is operational and notify the contractor if any performance issues are discovered. Annual M&V reports should be submitted by the contractor and reviewed by agency staff. Ensure that the contractor has provided all information needed to comply with current annual energy reporting requirements. The solar project fair market value (FMV) should be re-appraised periodically throughout the contract term to ensure that the ESCO's reserve account funds will be sufficient. If it is determined that the ESCO's reserve account funds will be insufficient, either the government payments need to be increased or the contract term will need to be extended. Near the end of the contract, an official FMV appraisal should be made and then the equipment purchased for that amount. The ESCO can apply any excess in its reserve account to the final ESPC balance.

Appendix A: OMB Memorandum M-12-21



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

September 28, 2012

M-12-21

MEMORANDUM FOR HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

FROM: Jeffrey D. Zients 
Deputy Director for Management

SUBJECT: Addendum to OMB Memorandum M-98-13 on Federal Use of Energy Savings Performance Contracts (ESPCs) and Utility Energy Service Contracts (UESCs)

This memorandum provides guidance to agencies regarding their entering into Energy Savings Performance Contracts (ESPCs) and Utility Energy Service Contracts (UESCs) for energy efficiency and new renewable power generation. In so doing, this memorandum supplements the OMB guidance in Memorandum M-98-13, *Federal Use of Energy Savings Performance Contracting*, which remains in effect and is enclosed. This guidance covers conditions of using ESPC and UESC authority and extends the budget scoring treatment prescribed in OMB Memorandum M-98-13 to include UESCs and onsite energy sources in ESPCs, if they meet the four criteria described below.

This memorandum sets forth, below, the conditions under which the budget costs of ESPCs and UESCs – including their total capital costs – may be scored (and obligated) on an annual basis during the term of the contract, rather than have these costs be fully scored (and obligated) “up front” to the first year of the contract, as would be the standard scoring under OMB Circular A-11. Under this scoring, an agency must obligate, at the time the contract is executed, sufficient discretionary budgetary resources to cover the agency’s contract payments during the fiscal year in which the contract is signed. For each of the subsequent fiscal years during the contract period, the agency must obligate for such fiscal year the full amount of the contract payments that the agency is required to make during that year.

I. Conditions for Annual Scoring of ESPCs

The authority for ESPCs is established in the National Energy Conservation Policy Act, as amended. (See 42 U.S.C. § 8287 *et seq.*) The regulations implementing the ESPC statutory authority are located at 10 C.F.R. Part 436, subpart B.

An *energy conservation measure* (ECM) is a measure that is applied to a Federal building that improves energy efficiency, is life-cycle cost effective, and involves energy conservation, cogeneration facilities, renewable energy sources, improvements in operations and maintenance efficiencies, or retrofit activities. See 42 U.S.C. § 8259(4).

An ESPC is a contract that provides for the performance of services for the design, acquisition, installation, testing, and, where appropriate, operation, maintenance, and repair, of an identified energy conservation measure (ECM) or series of ECMs at one or more locations. 42 U.S.C. § 8287c(3).

For an *onsite energy source* to qualify as an ECM, it must meet the four criteria specified in the statutory definition. Under these criteria, the arrangement must –

- (1) be “applied to a Federal building”;
- (2) “improve energy efficiency”;
- (3) be “life cycle cost effective”; and
- (4) involve energy conservation, cogeneration facilities, renewable energy sources, improvements in operations and maintenance efficiencies, or retrofit activities.

The following is additional guidance with respect to these four criteria:

(1) ***“Applied to a Federal Building”***

- The term “Federal building,” as defined in the context of an ESPC, includes a “facility, or part thereof . . . , which consumes energy.” 42 U.S.C. § 8259(6).
- Accordingly, an energy source that both supplies energy and is installed on the Federal site (but is not necessarily located on or in an actual structure) would be considered to be “applied to a Federal building.”

(2) ***“Improves Energy Efficiency”***

- An onsite energy source would be considered to “improve energy efficiency” if it would decrease the amount of energy required by a Federal building to maintain its same level of operation. That is, if the arrangement resulted in reduced energy consumption while allowing the same level of building performance, the arrangement would be considered to improve energy efficiency.
- In determining whether an ECM qualifies for the energy efficiency definition, calculations may be done on either a “site energy” basis or a “source energy” basis. Source energy is a more detailed means (than is site energy) for evaluating a building’s resource-use efficiency performance, because “source energy” accounts for the embedded inefficiencies of transmission, distribution, and conversion.
- For example, when onsite renewable energy is substituted for conventional energy fuels, the substitution would in most cases reduce total system demand (due to

reduced line losses from transmission) and thus would “improve energy efficiency” in terms of system-wide energy used to perform work.

(3) “Life-Cycle Cost Effective”

- The term “life-cycle cost,” as defined in the context of an ECM, means the total costs of owning, operating, and maintaining a building over its useful life (including such costs as fuel, energy, labor, and replacement components) determined on the basis of a systematic evaluation and comparison of alternative building systems.
- Savings that result from the life-cycle cost effectiveness of ECMs must be guaranteed in the ESPC and must cover the full cost of Federal investment for improvements.
- Accordingly, an *onsite energy source* would be considered life-cycle cost effective if it results in the reduction in the total cost of owning, operating, and maintaining a Federal building, as compared to a baseline in which the existing energy source and related energy support structure is maintained, including any marginal disposal costs.

(4) Permissible Types of Activities

The fourth element of the ECM definition is that an arrangement must involve energy conservation, and may include cogeneration facilities, renewable energy sources, improvements in operations and maintenance efficiencies, or retrofit activities.

II. Conditions for Annual Scoring of UESCs

A UESC is a contract between a Federal agency and a local utility providing energy, water, or sewage services, as well as provision of technical services and/or upfront project financing for energy efficiency, water conservation, and renewable energy investments, allowing Federal agencies to pay for the services over time, either on their utility bill, or through a separate agreement.

UESCs that meet the criteria prescribed in this memorandum, and follow the guidance prescribed in M-98-13, can receive the same budget scoring treatment as ESPCs. Through this authority, a UESC may be scored on an annual basis if the UESC requires:

- (1) energy savings performance assurances or guarantees of the savings to be generated by improvements, which must cover the full cost of the Federal investment for the improvements;
- (2) measurement and verification (M&V) of savings through commissioning and retro-commissioning; and

- (3) competition or an alternatives analysis as part of the selection process prior to entering into a UESC.

III. Procurement

When entering into ESPC and UESC procurements, unless otherwise exempt, agencies shall adhere to the Federal Acquisition Regulation (FAR), including appropriate application of FAR Part 8, Required Sources of Supplies and Services and Subpart 23.2, Energy and Water Efficiency and Renewable Energy.

For an ESPC or UESC that includes *onsite energy generation* to be scored on an annual basis under this memorandum and M-98-13, the Federal government must retain title to the installed capital goods at the conclusion of the contract. (Lease arrangements, where the Federal government does not retain title, will be scored under the standard leasing scoring rules described in OMB Circular A-11 Appendix B, which for capital leases requires that agencies have sufficient resources to cover the full cost of the contract when the contract is signed, rather than applying the scoring exceptions in M-98-13.)

IV. Off-Site Generation or other Arrangements

This memorandum does not specifically and separately address power purchase agreements (PPAs), and they are not independently covered by the guidance in M-98-13. ESPCs and UESCs are solely for the purpose of achieving energy savings and benefits ancillary to that purpose. To qualify for the scoring on an annual basis covered under this memorandum and M-98-13, ESPC and UESC authority may not be used for the long-term purchase of off-site new renewable generation or to build merchant scale power generating facilities on federal land. In advance of award, summaries of all lease arrangements related to power purchase agreements should be submitted to OMB and the Department of Energy Federal Energy Management Program (FEMP), as noted in the OMB-CEQ Memorandum of August 16, 2011, on *Supporting Energy and Sustainability Goal Achievement Through Efficiency and Deployment of Clean Energy Technology* (also enclosed).

V. Coordination and Reporting

FEMP's mission is to assist agencies to maximize federal energy efficiency and to provide assistance on the use of these tools by providing education and training, best practices and model contracts. FEMP will also assist OMB in providing oversight to ensure that the guidance is followed, and that agencies are on track to achieve their targets toward the President's \$2 billion performance-based contracting goal for energy savings.

Agencies should take advantage of FEMP expertise, ensure compliance with this and other guidance, and use the OMB MAX Collect reporting tool to streamline the reporting process and reduce the burden of duplicative reporting. Agencies are required to provide monthly updates to agency implementation plans and track milestones for individual projects underway to meet the President's goal.

Agencies should keep FEMP updated and apprised of all contract actions and awards, regardless of the contracting agency, that are part of the \$2 billion commitment.

Enclosures:

Memorandum M-98-13:

<http://www.whitehouse.gov/sites/default/files/omb/assets/omb/memoranda/m98-13.pdf>

Memorandum of August 16, 2011:

<http://www.whitehouse.gov/sites/default/files/omb/procurement/memo/supporting-energy-and-sustainability-goal-achievement-through-efficiency-and-deployment-of-clean-energy-technology.pdf>



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

July 25, 1998

THE DIRECTOR

M-98-13

MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND
ESTABLISHMENTS

FROM:

Jacob J. Lew
Acting Director

A handwritten signature in black ink, appearing to read "Jacob J. Lew".

SUBJECT:

Federal Use of Energy Savings Performance Contracting

PURPOSE: To increase Federal use of Energy Savings Performance Contracting (ESPC) in order to improve Federal energy management; and to provide guidance for developing and entering into these contracts.

BACKGROUND: ESPC is a technique to reduce energy costs and consumption at Federal facilities, without increasing budgetary outlays. Energy Savings Performance Contracts are awarded to private firms to reduce energy consumption in Federal facilities and guarantee savings. Additional benefits of ESPC can include new capital equipment, reduced maintenance costs, improved indoor environments and reduced pollution. Contractors, using private investment capital, design, purchase, install and maintain energy efficiency improvement projects at a facility. Contractors then receive a negotiated share of the value of the energy savings generated by their efforts, and since the contractor is required to guarantee the savings, payment is made only if actual savings result from reduced energy use. When a contractor is fully paid its negotiated share of the delivered energy savings, all additional savings accrue to the government.

On October 22, 1997, President Clinton announced proposals for the Climate Change Technology Initiative which included immediate actions that the United States would take. One of these was to affect Federal energy management by expanding the use of ESPC — using private investment capital and expertise to accomplish energy and cost saving projects in Federal facilities. The Departments of Defense (DOD) and Energy (DOE) have streamlined the contracting process by putting in place regional ESPC multiple award contracts, which are beginning to speed large investments in energy projects and are available for use by any agency. However, Federal agencies' use of ESPC authority has been below anticipated levels. This memorandum is intended to encourage increased use of ESPC and improve Federal energy management.

Both the Energy Policy Act of 1992 (EPACT, *P.L. 102-486*) and Executive Order 12902, *Energy Efficiency and Water Conservation at Federal Facilities* contain requirements for Federal energy management and establish energy reduction goals. EPACT requires agencies to install energy conservation measures with payback periods of less than 10 years and to reduce energy consumption levels by 20 percent relative to 1985 levels by the year 2000. Executive Order

12902 requires comprehensive facility audits to be conducted and establishes a 30 percent energy reduction goal by 2005. Facility audits cover the size, type, energy use and performance of all energy-using systems, appropriate conservation maintenance and operating procedures, recommendations for installing conservation measures, and a strategy to implement the recommendations.

To help agencies meet the EPACT and Executive Order requirements, section 155 of EPACT authorizes and the Executive Order encourages ESPC as a means of alternative financing. Agencies are requested to review their facility audits and determine the appropriateness of ESPC for projects that exceed current fiscal year funding capabilities or that can be combined with expensive or long term payback projects for faster implementation and generation of savings.

GUIDANCE: Agencies are encouraged to use ESPC to achieve significant long-term energy and financial savings in their operations. Government-wide regulatory guidance on ESPC is contained at 10 CFR 436. In addition, the Department of Energy's Federal Energy Management Program (FEMP) is available to provide assistance on facility audit reviews, investment decisions, technical issues, or general guidance on using ESPC. FEMP can be reached at (202) 586-5772. Additionally, the Defense Energy Support Center at Fort Belvoir, Virginia, and the U.S. Army Corps of Engineers, Engineering and Support Center, Huntsville, Alabama, can also offer ESPC support. They can be reached at (703) 767-8572 and (256) 895-1531, respectively.

The law authorizes agencies to enter into competitive, multi-year ESPC as long as funds are available and adequate for payment of the first fiscal year costs. Outyear costs or potential cancellation charges are not required to be financed up front. The statute also permits ESPC for a period of up to 25 years; but, requires a 30-day advance Congressional notification for any contract containing a cancellation ceiling in excess of \$750,000. Agencies will be asked to report to OMB on a semi annual basis those ESPCs and task orders they have entered into during the year.

Thorough analysis through a capital planning and budgeting or equally disciplined process should be conducted in advance of entering into all ESPC agreements. Agencies should be aware of the budgetary implications of using ESPC -- the fact that they are financing an investment and creating obligations for future year funding that could impact the future funding of other programs. When an agency is considering ESPC, the following issues should be considered as part of acquisition planning:

- **Most Appropriate Mechanism:** Agencies should determine whether an ESPC agreement is appropriate for the work required. Although ESPC can be a valuable tool for obtaining energy conservation investments in an expeditious manner, these contracts may not be appropriate for buildings or facilities where usage may be reduced considerably or where operations may be terminated. Alternatives to consider include use of appropriated funds and Demand Side Management/Area-Wide agreements with local utilities.

- **Competition and Contracting:** Competitive selection among qualified firms for ESPC work is important to ensure that the government is receiving the best value possible, in terms of the expected savings realized by the government, quality of the installed material and equipment, and risk. This may be accomplished with commercial style procedures such as streamlined evaluation of approaches received from multiple award contract holders, or other processes. The goal is to enable the government to obtain the best deal possible by encouraging vendors to exercise due diligence to investigate and solve an agency's particular energy use problems and by making cost-effective, merit-based selections.
- **Termination or Cancellation:** ESPC must specifically address the rights and obligations of each party in the case of a termination or cancellation. Recognizing that it may be necessary for the government to terminate or cancel an ESPC agreement, the contract should contain provisions for determining equitable adjustments if the agreement is terminated or canceled during the term of the contract. There may be circumstances where the government should terminate or cancel the agreement due to a deficiency in the contractor's performance. Such deficiencies may include not achieving the savings projected by the contractor in its proposal or violating security agreements where the contract requires system maintenance on a government installation.
- **Ownership Retention:** Agencies must also consider issues of ownership of energy saving investments (materials and equipment) the contractor installs in government buildings and facilities. Through appropriate contract clauses, agencies need to ensure that contractors and their lenders do not have the right to remove items, which could interrupt government operations if anticipated savings have not been realized. Ownership is especially important when the contractor uses third party financing that may subject the material or equipment to liens or other types of security interests. In such cases, the government must ensure that it has an interest paramount to any lien or other types of security interest.
- **Energy Costs and Savings:** ESPC agreements must contain a guarantee of minimum savings to be generated by improvements, which must cover the full cost of Federal investment for improvements, if any. Agencies should consider providing for adjustments due to significant changes in the price of energy. For example, electricity industry restructuring may cause a significant change in power rates which would impact energy cost savings without necessarily impacting actual energy usage.

BUDGET TREATMENT: Obligations, budget authority, and outlays will be recognized on an annual basis. There must be sufficient discretionary budgetary resources to complete the first fiscal year's contract costs. For each of the subsequent fiscal years, discretionary budget authority and outlays will be recognized annually to the extent that payments are made on the contract. It is expected that energy costs will be reduced, reflecting ESPC savings and retained savings. All budget authority and outlays associated with ESPC will be classified as discretionary and will be subject to the discretionary caps under the Balanced Budget Agreement (BBA).

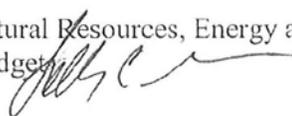
RETENTION OF SAVINGS: All agencies have been granted statutory authority to retain half of the government's portion of ESPC savings generated (DOD and the General Services Administration (GSA) have specific retention authorities, and EPACT grants it to all other agencies). The Office of Management and Budget (OMB) encourages agencies to permit the retention of some or all of the savings at the facility or site where they occur in order to provide incentive for facility and site managers to undertake more Federal energy management initiatives and to offset other operation and maintenance costs.

COORDINATION AND REPORTING: Within 60 days, OMB will convene an interagency policy group to address Federal energy management initiatives, including the increased use of ESPC. This group, which will include both energy and procurement program officials, will convene to report on the status of agencies' efforts in response to this memo, address other energy policy concerns and help spread successful energy program efforts more quickly among agencies.

Also, in accordance with the National Energy Conservation and Policy Act (NECPA), EPACT, Executive Order 13031 on Alternative Fuel Vehicle Leadership, and guidance published in OMB Circular A-11, each agency is required to submit information on energy use and energy efficiency improvements to both OMB and FEMP. OMB and DOE are working to coordinate that data collection and minimize agencies' reporting burden, while still meeting the intent of the overall reporting requirements.



MEMORANDUM FOR AGENCY SENIOR SUSTAINABILITY OFFICERS

FROM: Nancy Sutley, Chair, Council on Environmental Quality 
Sally Ericsson, Associate Director for Natural Resources, Energy and Science
Programs, Office of Management and Budget 

DATE: August 16, 2011

SUBJECT: Supporting Energy and Sustainability Goal Achievement Through Efficiency and
Deployment of Clean Energy Technology

The Administration is committed to making the Federal government a leader in energy efficiency and sustainability, including making the Federal Government itself cleaner, greener, and more efficient. That is why we want to make it clear that the Obama Administration continues to support implementation of OMB Memorandum M-98-13, *Federal Use of Energy Savings Performance Contracting*, issued on July 25, 1998, to increase Federal use of Energy Savings and Performance Contracts (ESPCs).

Executive agencies have been asked to lead by example to increase energy efficiency, reduce greenhouse gas emissions, and promote sustainability, consistent with Executive Order 13514, "Federal Leadership in Environmental, Energy, and Economic Performance," issued on October 5, 2009. Upgrading the energy performance of Federal buildings can be one of the fastest and most cost-effective ways to reduce energy costs, combat pollution, and create local jobs.

To meet our stated goals, Executive agencies should prioritize building upgrades with the highest return on investment, and responsibly fund capital improvements and services that will yield future savings and sustainability performance improvements. While the best return on these investments is often a result of carefully planned projects funded directly with agency dollars, effective and responsible use of available statutory authorities and contracting tools can leverage private investment. ESPCs and Utility Energy Services Contracts (UESCs) are important tools to help meet identified energy management goals while deploying clean energy technology. These contracts use qualified private sector firms and utilities to design and construct energy upgrade projects, which are financed based on the energy and water and other cost savings they will generate. OMB Memorandum M-98-13 provides guidance for developing and entering into these contracts. That guidance remains in effect, and agencies are encouraged to consider the responsible use of performance-based contracts that offer private-sector investment in energy and water conservation and renewable energy projects as part of their portfolio of tools to implement their Strategic Sustainability Performance Plans.

The Federal Government is the world's largest single consumer of energy, incurring approximately \$20 billion in energy costs in FY 2010 alone. Of that, \$7 billion was for energy consumption in Federal buildings. As directed in Executive Order 13514, Executive agencies should lead in employing strategies to improve energy management.

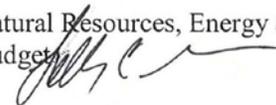
Effective management and coordination is necessary to ensure that the various tools for energy performance improvements are employed effectively and deliver on long-term energy cost savings to the benefit of the American taxpayer. ESPCs can incorporate purchase of on-site renewable energy, if the result is lower energy consumption and costs to the Government, but the complexity of power purchase agreements (PPAs) deserve special consideration. Agencies should therefore submit to OMB for review all proposals for PPAs entered into under ESPC authority, or that would otherwise require review as a non-routine financing proposal under OMB Circular A-11, Appendix B. OMB will review existing practices for PPAs and consider whether additional guidance is necessary to ensure maximum efficiency in the use of Federal funds.

To increase transparency and accountability, OMB is asking the Department of Energy's Federal Energy Management Program (FEMP) to report annually on Government-wide use of ESPCs and UESCs, including aggregate energy performance improvement, increased renewable energy production at Federal facilities, and cost savings achieved through the use of these tools. These tools have already been proven effective in many circumstances. Since 2003, almost half of Federal facility investment in energy efficiency has been made through ESPC and UESC use, covering projects in 49 States and US facilities overseas, and representing every Federal agency that owns and operates buildings. In their sustainability plans, agencies are encouraged to explore leading-edge technologies in order to leverage this opportunity to drive American innovation, support entrepreneurship, and demonstrate the benefits of these new practices and technologies. Agencies should consider consulting with FEMP at the planning stages of their projects to both take advantage of FEMP expertise and to reduce the burden of meeting the reporting requirements.

Appendix B: OMB Memorandum for Agency Senior Sustainability Officers



MEMORANDUM FOR AGENCY SENIOR SUSTAINABILITY OFFICERS

FROM: Nancy Sutley, Chair, Council on Environmental Quality 
Sally Ericsson, Associate Director for Natural Resources, Energy and Science Programs, Office of Management and Budget 

DATE: August 16, 2011

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Appendix C: Internal Revenue Bulletin 2017-07 – Rev Proc 2017-19

INTERNAL REVENUE BULLETIN



HIGHLIGHTS OF THIS ISSUE

Bulletin No. 2017-7
February 13, 2017

These synopses are intended only as aids to the reader in identifying the subject matter covered. They may not be relied upon as authoritative interpretations.

INCOME TAX

REG-127203-15, page 918.

Proposed regulations address transfers of appreciated property by United States persons (U.S. persons) to partnerships with foreign partners related to the transferor. The regulations override the rules providing for nonrecognition of gain on a contribution of property to a partnership in exchange for an interest in the partnership under section 721(a) of the Internal Revenue Code (Code) pursuant to section 721(c) unless the partnership adopts the remedial method and certain other requirements are satisfied. The document also contains regulations under sections 197, 704, and 6038B that apply to certain transfers described in section 721. The regulations affect U.S. partners in domestic or foreign partnerships. The text of the proposed regulations is the same as temporary regulations published in TD 9814.

REG-137604-07, page 920.

The proposed regulations reflect changes to the Code relating to the dependency exemption. The proposed regulations also make conforming changes relating to the definition of surviving spouse and the definition of head of household, the tax tables for individuals, the child and dependent care credit, the earned income credit, the standard deduction, joint tax returns, and taxpayer identification numbers for children placed for adoption. To make the earned income credit and the dependency exemption easier for taxpayers to claim, the proposed regulations change the IRS's position regarding who may take the childless earned income credit and the source of support for certain payments originating as governmental payments. The proposed regulations also change the IRS's position regarding the adjusted income of a taxpayer filing a joint return to be consistent with other Code sections that require the filing of a joint return.

Action On Decision 2017-01, page 868.

Nonacquiescence to the holding that a limited partnership was not a farming syndicate because the sole shareholder of a limited partner S Corporation actively participated in the farming business.

Notice 2017-16, page 913.

This notice provides that, pursuant to the authority granted to the Secretary by § 35(g)(11)(B), a health coverage tax credit (HCTC) election for a month in 2016 may be made at any time before the expiration of the 3-year statute of limitation under § 6511 for such year, including on an amended income tax return. This extension of time is provided because, prior to its expiration, the HCTC did not require an election and the Treasury Department and the IRS are concerned that eligible taxpayers may not be aware of the requirement to affirmatively elect the HCTC for coverage provided in 2016.

Rev. Proc. 2017-19, page 913.

This revenue procedure provides a safe harbor under which the Service will respect certain Energy Savings Performance Contracts for the sale of electricity by an Energy Service Company to a Federal Agency as a service contract under § 7701(e)(3).

Rev. Proc. 2017-24, page 916.

This revenue procedure extends the relief provided under Rev. Proc. 2015-57, 2015-51 I.R.B. 863, to taxpayers who took out Federal student loans to finance attendance at a school owned by American career Institutes, Inc. (ACI) and whose Federal student loans are discharged under the Department of Education's "Defense to Repayment" or "Closed School" discharge process. Further, this revenue procedure provides that the Internal Revenue Service (IRS) will not assert that the creditor must file information returns and furnish payee statements as a result of discharging these loans. This revenue procedure also modifies Rev. Proc. 2015-57 to provide that the IRS will not assert that creditors under that revenue procedure must file information returns and furnish payee statements as a result of discharges under the revenue procedure.

(Continued on the next page)

Finding Lists begin on page ii.

Part III. Administrative, Procedural, and Miscellaneous

Extension of the Due Date for a Section 35 Health Coverage Tax Credit Election

Notice 2017-16

SECTION 1. PURPOSE

This notice provides guidance regarding the health coverage tax credit (HCTC) under § 35 of the Internal Revenue Code, as modified by the Trade Preferences Extension Act of 2015, Pub. L. 114-27 (June 29, 2015) (Act). Specifically, this notice extends the due date for the election to claim the HCTC for eligible coverage months in taxable years beginning on or after June 29, 2015, and before January 1, 2017.

SECTION 2. BACKGROUND

Section 35 provides for the HCTC, which is a tax credit equal to 72.5 percent of the amount paid by an eligible individual for qualified health coverage of the individual and qualifying family members for eligible coverage months. Section 35 was originally enacted by the Trade Act of 2002, Pub. L. 107-210 (Aug. 6, 2002), but expired at the end of 2013. The Trade Act of 2002 also enacted § 7527, which provides for the establishment of a program for making advance payment of the HCTC. In 2015, § 35 was reinstated retroactively to 2014, modified, and extended through 2019 by the Act, and § 7527 was revised by the Act.¹

As part of the reinstatement of § 35, the Act added a new § 35(g)(11). Section 35(g)(11)(A) provides that, for eligible coverage months in taxable years beginning after December 31, 2013, a taxpayer must make an election to claim the HCTC. Under § 35(g)(11)(B), "except as the Secretary may provide," an HCTC election for any eligible coverage month in a taxable year must be made not later than the due date (including extensions) of the individual's Federal income tax return for the taxable year. However, the Act pro-

vided a transition rule under which, for eligible coverage months in taxable years beginning after December 31, 2013, and before the date of enactment of the Act (June 29, 2015), the HCTC election may be made at any time on or after June 29, 2015, and before the expiration of the 3-year period of limitation prescribed in § 6511(a) for the taxable year, and may be made on an amended return. See Act § 407(f)(3). Eligible taxpayers elect to claim the HCTC by completing line 1 of Form 8885, Health Coverage Tax Credit, and filing the form with their Federal income tax return. See Notice 2016-2 and Instructions for Form 8885.

Prior to its reinstatement, § 35 did not specifically require that taxpayers claim the HCTC by making an election on their Federal income tax return. Taxpayers claimed the HCTC on their Federal income tax return (using Form 8885) only if they were eligible to claim the HCTC in excess of the advance payments made on the taxpayer's behalf under § 7527. Most eligible individuals received the benefit of the HCTC through the advance payment process described in § 7527 and, therefore, did not claim the HCTC on their Federal income tax returns.

SECTION 3. GUIDANCE

The Treasury Department and the Internal Revenue Service have determined that, pursuant to the authority granted by § 35(g)(11)(B), it is appropriate to extend the transition rule provided in the Act with respect to the deadline for electing to claim the HCTC through 2016. Accordingly, an election to claim the HCTC for an eligible coverage month in a taxable year beginning on or after June 29, 2015, and before January 1, 2017, may be made before the end of the 3-year period of limitation prescribed in § 6511(a), and may be made on an amended return. This period of limitation is generally three years from the due date of the return (including extensions). Thus, for example, a calendar year taxpayer who files his or her 2016 Federal income tax return by April

18, 2017, without electing the HCTC must file a return with a Form 8885 by April 15, 2020, to elect the HCTC for coverage provided in 2016.

SECTION 4. DRAFTING INFORMATION

The principal author of this notice is James Beatty of the Office of the Associate Chief Counsel (Income Tax and Accounting). For further information regarding this notice, contact Mr. Beatty at (202) 317-4613 (not a toll-free number). For further information about the HCTC, go to <https://www.irs.gov/hctc>.

Rev. Proc. 2017-19

SECTION 1. PURPOSE

This revenue procedure provides a safe harbor under which the Internal Revenue Service (Service) will not challenge the treatment of an Energy Savings Performance Contract (ESPC) Energy Sales Agreement (ESA) between an Energy Service Company (ESCO) and a Federal Agency (FA) as a service contract under § 7701(e)(3) of the Internal Revenue Code (Code). The revenue procedure also provides an example of an ESPC ESA.

SECTION 2. BACKGROUND

.01. 42 U.S.C § 8287 authorizes FAs to enter into ESPC ESAs with ESCOs for the purpose of achieving energy savings and benefits ancillary to energy savings. It also sets forth certain requirements for such ESPC ESAs. The ESPC ESA project structure is intended to facilitate onsite renewable energy generation projects.

.02. The Office of Management and Budget (OMB) issued OMB Memorandum M-12-21 to provide further guidance to FAs regarding ESPCs that include third-party owned and operated onsite renewable energy generation assets and how they will be treated for Federal budgeting purposes. Specifically, OMB Memorandum M-12-21 requires title to the renew-

¹For more information about the reinstated HCTC, see Notice 2016-2, 2016-2 L.R.B. 265. Notice 2016-2 provides guidance on various issues relating to the HCTC, including information about eligibility for the HCTC, the types of coverage eligible for the HCTC, and guidance for those who claim the HCTC for a qualified health plan purchased through a Health Insurance Marketplace (also known as an Exchange) in 2014 and 2015.

able energy generation asset to transfer to the FA at the end of the ESPC term.

.03. The ESPC ESA is a type of ESPC that facilitates third-party owned and operated onsite energy generation projects in compliance with ESPC authority and OMB Memorandum M-12-21. An ESPC ESA may also include the implementation of other energy and water conservation measures as part of a comprehensive project.

.04. The example in Section 5 of this revenue procedure illustrates a typical ESPC ESA that would satisfy the requirements of 42 U.S.C § 8287 and OMB Memorandum M-12-21.

.05. Section 48(a) provides for an investment tax credit for certain energy property, including solar energy property described in § 48(a)(3)(A)(i).

.06. Section 50(b)(4)(A)(i) disallows the investment tax credit if the property is used by the United States, any State or political subdivision thereof, any possession of the United States, or any agency or instrumentality of any of the foregoing. This disallowance applies to property used under a lease unless the term of such lease is less than 6 months.

.07. Section 7701(e) provides rules to determine, for federal income tax purposes, whether a contract that purports to be a service contract should be treated as a lease of property. Section 7701(e)(1) generally provides that a service contract will be treated as a lease of property if it is properly treated as a lease of property, taking into account all relevant factors including whether or not:

the service recipient is in physical possession of the property;

the service recipient controls the property;

the service recipient has a significant economic or possessory interest in the property;

the service provider does not bear any risk of substantially diminished receipts or substantially increased expenditures if there is nonperformance under the contract;

the service provider does not use the property concurrently to provide significant services to entities unrelated to the service recipient; and

the total contract price does not substantially exceed the rental value of the property for the contract period.

.08. Notwithstanding the general rule of § 7701(e)(1), § 7701(e)(3) provides special rules for contracts or arrangements involving solid waste disposal, a cogeneration or alternative energy facility, and clean water facilities. Section 7701(e)(3)(D) provides that an “alternative energy facility” means a facility producing electrical or thermal energy if the primary energy source for the facility is not oil, natural gas, coal or nuclear power. Section 7701(e)(3)(A) provides that a purported service contract with respect to this type of facility will be treated as a service contract.

.09. Section 7701(e)(4) provides that the special rule in § 7701(e)(3) will not apply, and thus the general rule in § 7701(e)(1) will apply, to any contract with respect to the facilities described in § 7701(e)(3) if:

the service recipient (or a related entity) operates the facility;

the service recipient (or a related entity) bears any significant financial burden if there is nonperformance under the contract, unless this burden is due to (i) reasons beyond the control of the service provider, (ii) a temporary shut-down for repairs, maintenance, or capital improvements, or (iii) the bankruptcy or other financial difficulty of the service provider; the service recipient (or a related entity) receives any significant financial benefit if the operating costs of such facility are less than the standards of performance or operation under the contract, unless the benefit arises from reduced payments by the service recipient because of increased production or efficiency or the recovery of energy or other products; and

the service recipient (or a related entity) has an option or obligation to purchase all or part of the facility at a fixed and determinable price, other than for the fair market value of the facility.

SECTION 3. SCOPE

.01. The safe harbor in section 4 of this revenue procedure applies to any ESPC ESA between an ESCO and a FA for the provision of electricity through an alternative energy facility, as defined in

§ 7701(e)(3)(D), that satisfies the requirements of 42 U.S.C § 8287 and OMB Memorandum M-12-21. It may not be relied upon, in whole or part, for any other kind of transaction.

.02. The safe harbor provided in section 4 of this revenue procedure applies only if all the requirements of section 4 are satisfied.

.03. The safe harbor provided in section 4 of this revenue procedure provides guidance to ESCO taxpayers that are establishing or participating in an ESPC ESA with a FA in lieu of providing a letter ruling to those ESCO taxpayers. Therefore, the Service will not rule on whether an ESPC ESA between an ESCO and FA will be considered a service contract under § 7701(e)(3).

SECTION 4. SAFE HARBOR

.01 *Safe harbor.* If an ESPC ESA entered into between an ESCO and a FA satisfies all of the requirements of section 4.02 of this revenue procedure, the Service will not challenge the treatment of the ESPC ESA as a service contract under § 7701(e)(3).

.02 *Requirements.* The ESPC ESA must satisfy the following requirements:

(1) *Term.* The total term of the ESPC ESA cannot exceed 20 years in length. The term must be consistent with and appropriate for the scope and scale of the renewable project.

(2) *Other Federal guidance.* The ESPC ESA must satisfy the requirements of 42 U.S.C § 8287 and OMB Memorandum M-12-21.

(3) *Operation of Alternative Energy Facility.* Under no circumstances will the FA attempt to operate the renewable energy generation asset. In the event of a shut-down or mechanical issue, FA will immediately notify the ESCO or its designated contractor.

(4) *Risk.* The ESCO bears all financial risk for non-performance, except to the extent such non-performance is attributable to a temporary shut-down of the facility for repairs, maintenance, or capital improvements.

(5) *Reduced Costs.* The contract price for electricity will not be reduced if operating costs should diminish.

(6) *Equipment Purchase.* The FA may have the option to purchase, or may be

required to purchase, the renewable energy generation asset at the end of the contract term, for its fair market value (FMV) at the time of the purchase.

SECTION 5. EXAMPLE

ESCO contracts with FA under an ESPC ESA to install, maintain ownership of (until the end of the contract), and provide operation and maintenance of a renewable energy generation asset at a federal site. The FA will purchase all of the electricity generated onsite at a rate that is less than the FA's current and forecasted electricity rate.

- The contract term is 20 years.
- The contract price, including operation and maintenance, is based on a fixed per-kWh basis and must be paid for by the FA from the energy savings provided under the project.
 - The ESCO bears all financial risk for non-performance.
 - The contract price does not vary if the operating costs are lower than expected.
- The FA will purchase the renewable energy generation asset at FMV as appraised at the time of the sale by the end of the contract term, consistent with OMB Memorandum 12–21.
 - The ESCO will transfer a portion of the payments it receives from the FA into a reserve account held by the ESCO for the FA's future purchase of the onsite renewable energy assets. The amount charged for each payment period will include both the price of power and an amount for the reserve account (separate and in addition to the price of power).
 - The ESCO's deposit into the reserve account will be based on the estimated future FMV of the on-site renewable energy generation assets. To ensure that the reserve account has sufficient funds for the FMV purchase by the FA at the end of the contract term, there may be periodic re-appraisals of the onsite renewable assets and contract modifications (if and as necessary). Any excess reserve account

funds after the onsite renewable asset purchase may be used to offset the final ESPC ESA payments. Alternatively, in the event of termination, funds in the reserve account at that time may be used to satisfy any termination liability of the FA, and any excess amounts will be returned to the FA.

- The FMV will be determined at the time of sale by a mutually agreed upon independent appraiser with expertise in the relevant onsite renewable energy asset industry. The valuation made by the appraiser shall be binding upon the parties in the absence of fraud or error.
- The ESPC ESA includes a schedule for each year which establishes the maximum termination liability of the FA in the event of termination prior to the end of the contract term. This ESPC ESA satisfies the requirements of the safe harbor in section 4 of this revenue procedure and the Service will not challenge the treatment of the ESPC ESA as a service contract under § 7701(e)(3).

SECTION 6. EFFECTIVE DATE

This revenue procedure is effective for transactions entered into on or after the date of publication in the Internal Revenue Bulletin. If an ESPC ESA entered into between an ESCO and a FA prior to this date satisfies all of the requirements of the safe harbor provided in section 4 of this revenue procedure, the Service will not challenge the treatment of the ESPC ESA as a service contract under § 7701(e)(3).

SECTION 7. DRAFTING INFORMATION

The principal author of this revenue procedure is Philip Tiegerman of the Office of Associate Chief Counsel (Pass-throughs & Special Industries). For further information regarding this revenue procedure contact Philip Tiegerman at (202) 317-6853.

Rev. Proc. 2017–23

SECTION 1. PURPOSE AND SCOPE

This revenue procedure describes the process for filing Form 8975, *Country-by-Country Report*, and accompanying Schedules A, *Tax Jurisdiction and Constituent Entity Information* (collectively, Form 8975), by ultimate parent entities of U.S. multinational enterprise (MNE) groups for reporting periods beginning on or after January 1, 2016, but before the applicability date of § 1.6038–4 (early reporting periods).

SECTION 2. BACKGROUND

.01 On June 30, 2016, the Department of the Treasury (Treasury Department) and the Internal Revenue Service (IRS) published in the Federal Register final regulations (T.D. 9773) (CbC reporting regulations) that require certain U.S. business entities that are the ultimate parent entity of a U.S. MNE group to file Form 8975 annually with the IRS. See § 1.6038–4. Form 8975 requires the ultimate parent entity of a U.S. MNE group to report information, on a country-by-country basis, related to the group's income and taxes paid, together with certain indicators of the location of the group's economic activity. The CbC reporting regulations apply to reporting periods of ultimate parent entities of U.S. MNE groups that begin on or after the first day of the first taxable year of the ultimate parent entity that begins on or after June 30, 2016.

.02 Some jurisdictions have adopted country-by-country (CbC) reporting requirements for annual accounting periods beginning on or after January 1, 2016, that would require a constituent entity resident in the jurisdiction to report CbC information if the constituent entity is part of an MNE group with an ultimate parent entity resident in a jurisdiction that does not have a CbC reporting requirement (including pursuant to parent surrogate filing) for the same annual accounting period (local CbC filing). Consequently, constituent entities of a U.S. MNE group may be subject to local CbC filing for early reporting periods, unless the ultimate parent entity files a Form 8975, or reports CbC information to another jurisdiction that accepts surrogate filing, for

Appendix D: Small Business Sources Sought Template

Click [here](#) to download an editable version of this template.

[Throughout this template, fill-in-the-blank areas are indicated with the symbols <> and notes are indicated by [].

Disclaimer: This template is intended to be used as a resource. This template should be carefully reviewed by agency counsel, agency contracting staff, and other appropriate agency staff, as applicable. Agency staff should adhere to their agency's policies and requirements, and should use their agency's templates and forms, as appropriate.]

The <agency> is considering an on-site photovoltaic (PV) energy sales agreement (ESA, also known as power purchase agreement) contract at <site>, with an estimated size of <x> MW. The ESCO would design, install, own, operate and maintain the PV system. The contract will utilize the Government's 25 year Energy Savings Performance Contract (ESPC) authority. The project will be implemented using the North American Industry Classification System (NAICS) Code 221114 – Solar Electric Power Generation. The applicable classification code is S - Utilities and Housekeeping Services.

Specific objectives for such a project may include:

Development of the project at no up-front cost to the Government.

Purchase electricity at a lower cost than current cost.

<Sale or Agency purchase> of the Renewable Energy Certificates (RECs).

The <agency> is conducting this Sources Sought to identify small business contractors who possess the capabilities to provide services as specified above and to determine their availability, capability and adequacy. If your firm may be interested in this requirement, is a qualified small business for the NAICS code 221114 (250 employees according to https://www.sba.gov/sites/default/files/files/Size_Standards_Table.pdf), and has performed similar projects, we request the information shown below. An organization that is not considered a small business under the applicable NAICS code should not submit a response to this notice.

As permitted by FAR Part 10, this is a market research tool being utilized for informational and planning purposes. Your responses will assist the Government in the development of its acquisition strategy for a possible Request for Proposal (RFP), to be issued at a later date, and in determining whether any type of small business set-aside is possible for this procurement or whether full and open competitive procedures should be utilized. If full and open competition is ultimately pursued, responses to this synopsis will be used to aid in establishing small business subcontracting goals.

This notice shall not be construed as a RFP or as any commitment or obligation on the part of the Government to issue a solicitation. The Government does not intend to award a contract on the basis of this request, so proposals will not be considered. No reimbursement will be made for any costs associated with providing information in response to this synopsis or any follow-up information requests.

Response is strictly voluntary - it is not mandatory to submit a response to this notice to participate in any formal RFP process that may take place in the future. However, it should be noted that information gathered through this notice may significantly influence our acquisition strategy. All interested parties will be required to respond separately to any solicitations posted as a result of this sources sought notice.

Submission Instructions: Responses via <email/fax/mail> are due <date/time> to <name/ phone/email> and must include the information requested below. Responses greater than <x> double-sided pages (including all attachments) will not be considered. Late responses will not be accepted. This is strictly market research and the Government will not entertain any questions.

Respondents will not be notified of the results of the evaluation. We appreciate your interest and thank you in advance for responding to the Sources Sought.

Qualified firms shall submit a statement of interest on company letterhead demonstrating the firm’s qualifications to perform the defined work. Responses must be complete and sufficiently detailed to address the specific information. The documentation shall address, at a minimum, the following:

A. Company Profile to include:

1. Company name and address;
2. Affiliate information: parent company, joint venture partners, and potential teaming partners;
3. Year the firm was established and number of employees;
4. Two points of contact (names, titles, phone numbers and email addresses);
5. DUNS number and CAGE Code, as registered in the System for Award Management (SAM) at <http://www.sam.gov/>;
6. Small Business designation/status (must correlate with SAM registration):
 - Small business HUBZone WOSB
 - 8(a) VOSB
 - SDVOSB
 - Small Disadvantaged Business
7. Is the firm currently on the Department of Energy’s (DOE’s) or the agency’s Qualified List of Energy Service Companies? (The ESPC statute requires a company to be on a qualified list in order to be awarded an ESPC contract; however firms not currently on the list can generally get qualified for DOE’s list roughly 3 months after submission of a complete and satisfactory application). See: <http://energy.gov/eere/femp/doe-qualified-energy-service-companies>

B. Documentation of the company’s ability to obtain financing for a contract valued between *<list estimated project cost range>*.

C. Bonding capability.

D. List at least *<x>* current commercial PV ESAs in the last 5 years of similar size and scope.

These PV systems must be designed, installed, owned and operated by your company, with payment from the client solely for kWh production. Please use the table below.

Location of PV Project (company name, city, state)	POC (name, phone #, email)	Serving Utility	PV System Capacity (MW)	Type of System (Rooftop, carport, ground-mounted)	First year of commercial operation

Include a brief statement as to why each project is relevant to this sources sought notice and other relevant information such as any teaming or joint venture partners, whether the company was responsible for selling the SRECs, responsibility for interconnection studies and/or agreement. In addition, include proof of satisfactory past performance on the referenced projects.

Additional comments: _____

This information is true and correct to the best of my knowledge.

Signature

Date

Name

Title

Appendix E: Sample RFI

Click [here](#) to download an editable version of this template.

[Throughout this template, fill-in-the-blank areas are indicated with the symbols <> and notes are indicated by [].

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A. Background

The goal of this RFI is to solicit information from industry to assist the <agency, site name and location> in structuring a future solicitation for a proposed <x> MW on-site solar array that will be implemented using an energy savings performance contract energy sales agreement (ESPC ESA).³¹ An ESPC ESA is a project structure that allows federal agencies to utilize the ESPC long-term multiyear contracting authority to implement cost-saving renewable energy conservation measures (ECMs) on federal buildings/land that support domestic energy production and leverage private sector investment. Under an ESPC ESA, just as with a traditional ESPC,³² an energy service company (ESCO) incurs the costs of implementing an ECM (in this case the ECM is an onsite renewable energy generation system) and is repaid by the federal agency from a share of the resulting energy savings.

The ESPC ESA must meet all ESPC legal requirements (*See, e.g., 42 U.S.C. § 8287 et seq.*), including the requirement that the agency pay for the cost of the ESPC ESA from energy savings generated each year over the life of the contract. The ESCO must be on the U.S. Department of Energy's (DOE) Qualified List of Energy Service Companies (DOE Qualified List) available at <http://energy.gov/eere/femp/doe-qualified-energy-service-companies> or an agency's list of qualified contractors (consistent with 42 U.S.C. § 8287(b)(2)(A)-(B) requirements) prior to contract award.

In order for the ESPC ESA contract to be scored annually, it must be consistent with the requirements under the OMB "Addendum to OMB Memorandum M-98-13 on Federal Use of Energy Savings Performance Contracts (ESPCs) and Utility Energy Service Contracts (UESCs)" (M-12-21, dated September 28, 2012, available at https://www.gsa.gov/portal/mediaId/189419/fileName/Environmental_Programs_Addendum_to_OMB_Memo_m-12-21.action), including the requirement that the federal government retain title to the onsite renewable energy generation system at the conclusion of the contract.

The intent is for the ESPC ESA to meet the safe harbor requirements of IRS Revenue Procedure 2017-19 (see <https://www.irs.gov/pub/irs-irbs/irb17-07.pdf>),³³ including the requirements that the ESPC ESA contract length be 20 years or less, that the ESCO will own, operate, and maintain the renewable energy generation system at all times, and title transfer of the renewable energy generation asset will be at fair market value as appraised by a third party at the time of the sale.

The ESCO will transfer a portion of the payments it receives from <site> each year into a reserve account held by the ESCO. These funds will be allocated to the future FMV purchase of the renewable energy generation asset. Any

³¹ These types of agreements are often pursued as power purchase agreements (PPAs), but pursuing such projects under the ESPC authority is attractive because it allows for a long term contract. (The ESPC authority allows a 25 year contract, however IRS Revenue Procedure 2017-19 limits ESPC ESA contracts to 20 years or less.)

³² See <https://www.energy.gov/eere/femp/energy-savings-performance-contracts-federal-agencies> for general information regarding ESPCs.

³³ Tax incentive eligibility due diligence is the responsibility of the ESCO.

reserve account funds in excess of the renewable energy generation FMV purchase price can be applied by the ESCO to offset the final ESPC payment(s).

The <agency> is considering a solar project at the <site> for the following reasons *[possible goals listed below]*:

1. To reduce costs
2. To protect against volatile energy prices
3. Local economic benefits
4. Energy resiliency *[If this is a goal, the solar project must be configured to operate when there is a grid outage. The project could be configured to be microgrid-ready, see <http://www.nrel.gov/docs/fy15osti/64582.pdf>]*
5. Education
6. To increase renewable use

<Site> <is/is not> currently considering other non-solar ECMs under this RFI.

B. Description

[Include pertinent details regarding the site and the proposed solar array, such as the following:

Roof PV systems: roof type and installation date, warranty information, whether penetrations should be limited, whether ballasted systems are allowed or preferable.

Ground-mounted systems: slope, type of vegetation, tree removal, landscaping, road and/or fence requirements.

Carport systems: parking lot size, what areas are to be covered, storm water management, freeze protection and/or lighting requirements.

Electrical system and planned interconnection.]

Below is additional solar project information and important considerations:

1. The solar project shall include the photovoltaic modules, inverters, electrical connections, disconnects and all other electrical components necessary to provide a fully functional system. The system shall be operated and maintained, including all inverter and other equipment replacement for the life of the contract *[Add information regarding the electrical distribution system and expected interconnection point.]*
2. An *<environmental assessment or other>* is required to meet National Environmental Policy Act. This assessment will be conducted by *<agency, Contractor, other>* by *<date>* *[preferably before the RFP is issued]*. Other regulatory requirements and considerations include: *[list other applicable requirements such as cultural, archeological and/or those related to the National Historic Preservation Act and how these requirements will be met]*.
3. The Buy American Act/Trade Agreement Act *<will/will not>* apply.
4. Davis Bacon Act/Service Contract Act *<will/will not>* apply for PV system installation/operations and maintenance.
5. *[List other pertinent requirements or information, such as safety requirements.]*

C. Electricity Consumption and Rate Information

Below is *<site>* electricity consumption and rate information *[At a minimum include annual electricity consumption, peak demand and average blended electricity rate. It may be beneficial to include monthly electricity*

consumption, monthly peak demand and/or interval data; demand charge information, peak/off-peak rates and/or other rate information that will be used to determine if the ESPC statutory savings requirement will be met.]

D. Questions

<Agency> requests the following information:

[Below are sample questions that should be edited to meet agency RFI objectives.]

1. Please provide the following information about your company: A short (1 page or less) summary of the company's qualifications and a list of similar solar project contracts that are completed or currently in progress, with a special emphasis on projects at a Federal site and/or in the same utility service territory. Include customer information and location, number of megawatts installed, and type of contract.
2. Have you worked with the federal government before? If so, have you completed any solar projects for federal clients? What roadblocks did you encounter during that process, especially related to solar?
3. Provide a non-binding, indicative estimate of the ESPC ESA price (¢/kWh) and escalation rate, keeping in mind that the price must be lower than the current and forecasted electric rates. The forecasted escalation rate is estimated at <x>%, based on *[use the Energy Escalation Rate Calculator <https://energy.gov/eere/femp/building-life-cycle-cost-programs> or other method]*.
4. What is the estimated future FMV of the proposed PV system (assuming the FMV purchase is made at the end of the 20 year contract) and what assumptions were used for the FMV calculation?
5. What types of incentives – tax credits, rebates, etc. – can be monetized, in order to reduce the ESPC ESA price, considering that the PV systems will be installed on federal property?
6. Do you recommend that the solar renewable energy certificates (SRECs) be sold to improve the project economics? If so, how long would it be beneficial to sell the SRECs and what is the typical contract length in <state where the site is located>? What is the estimated SREC price/year? Any other comments on the <state> SREC market?
7. Do you have any other suggestions or comments?

E. Responses

Responses are limited to <x> pages *[if desired add details regarding allowable margins and/or font type and size]*. Please include contact names(s), address, phone number, and email. Submission of information does not commit a responding party to submit a proposal to any subsequent solicitation. Commenters are advised that <agency> is under no obligation to acknowledge receipt or provide feedback with respect to any comments received under this announcement.

<Agency> may use responses to structure future solicitations. Responses will not be considered confidential. <Agency> 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.

The requested information is for preliminary planning purposes only and does not constitute an obligation by <agency> to enter into a contractual agreement. Nor does it constitute a commitment, implied or otherwise, that the <agency> will issue an RFP in the future. The <agency> will not be responsible for any costs incurred by offerors in furnishing this information.

Due Date for Responses and Submission Method:

[Include details regarding how responses should be submitted, such as email with a specified email title.]

Appendix F: Site Access Agreement Template

Click [here](#) to download an editable version of this template.

[Throughout this template, fill-in-the-blank areas are indicated with the symbols <> and notes are indicated by [].

Disclaimer: This template is intended to be used as a resource. This template should be carefully reviewed by agency counsel, agency contracting staff, and other appropriate agency staff, as applicable. Agency staff should adhere to their agency's policies and requirements, and should use their agency's templates and forms, as appropriate.

It is critical to coordinate with the real property group early in the process to get their input and concurrence regarding the planned approach and agreement terms/conditions.

While different legal instruments may be used, there will be different legal consequences. For example, an easement will require recording, and the type of instrument could have different environmental consequences. Check with your agency's counsel for the appropriate legal instrument and the resulting modifications throughout the document (for example, for a lease, use Grantor/Grantee and for a license, use the terms Licensor/Licensee)

The site access instrument used should be compared to the RFP to ensure compatibility. There may be some provisions in the site access (instrument used) that should be moved to the RFP and vice-versa (examples: environmental provisions, O&M). Contracting/legal staff should coordinate with real property staff to determine the appropriate location for each clause. Avoid duplication when possible to avoid language conflicts that may occur due to document edits.

Some agencies, Department of Defense in particular, may require payment/in-kind consideration for use of the land. Check with your agency's legal counsel.

Some of the provisions are specific to ground-mounted systems, although may be applicable if there is concern regarding impact to land surrounding a roof-top or carport system.]

Site Access <insert instrument to be used; License, Easement, or Lease> Agreement **For Photovoltaic System Installation and Operation**

<Agency>

<Location details>

THIS SITE ACCESS <instrument used> OUTGRANT <Site Access Instrument used> which is effective as of the date of execution, is pursuant to the authority of (40 U.S.C. Section 1314, 10 USC 2668 or other); by the <agency>, hereinafter referred to as GRANTOR, and <PV Contractor name>, with its principal offices located at <address>, hereinafter referred to as GRANTEE. When used in this Site access <Instrument used>, unless the context specifies otherwise, "Grantor" shall include the successor in function of the Grantor, and "Grantee" shall include its successors and assignees, and their duly authorized representatives. The Grantor and the Grantee may be referred to jointly as the "Parties" and each separately as a "Party."

WHEREAS, the GRANTOR and the GRANTEE desire to execute this Site Access <Instrument used> to allow and encourage the performance by <agency> of the Energy Savings Performance Contract Energy Sales Agreement (ESPC ESA) dated <date> between GRANTEE and GRANTOR;

WHEREAS, the U.S. Government owns in fee simple that certain real property described in Exhibit B, attached hereto and made a part hereof, and the *<agency>* has custody and control of such property;

WHEREAS, the GRANTOR desires to receive electricity generated on-site at the *<agency site name>* for the purpose of meeting national goals regarding the generation and use of renewable energy at government-owned installations, which goals are set forth in Section 203 and other sections of the Energy Policy Act of 2005, P.L. 109-58;

WHEREAS, the GRANTOR desires to establish a fixed rate for electrical power purchased from an on-site photovoltaic (PV) system for a term of *<x>* years, pursuant to the ESPC ESA;

WHEREAS, the GRANTEE desires to use the property described in Exhibit B for the purpose of generating solar electricity for on-site use and the GRANTOR agrees to grant an Site Access *<Instrument used>* to the GRANTEE to use the property described in Exhibit B for this purpose;

WHEREAS, the GRANTEE, in its capacity as the ESCO may enter into collateral agreements with third parties for installation, operation, and maintenance of a PV system;

WHEREAS, the GRANTOR and the GRANTEE desire to establish protocols to coordinate site activities and assure that access to the site for the installation, operation, and maintenance of a PV system conforms to GRANTOR'S standards;

WHEREAS, the GRANTEE, in its capacity as the ESCO, is subject to all standard environment, safety, and health requirements applicable to non-federal entities as defined by federal, state, and local law;

WHEREAS, the GRANTOR in its capacity as site owner and manager is obligated to ensure that the site is managed to minimize the impact on its neighbors;

WHEREAS, the GRANTOR plans to purchase the PV system at fair market value, at the end of the ESPC ESA contract, per the terms specified in the ESPC ESA;

WHEREAS, the GRANTOR acknowledges and accepts the rights and obligations set forth in the aforementioned ESPC ESA is hereby granting the property rights contained herein to induce the GRANTEE to develop, design, construct, operate and maintain a PV system for the benefit of GRANTOR; and

NOW, THEREFORE in consideration of the mutual agreements and covenants hereinafter contained, the GRANTOR hereby grants to the GRANTEE and to its successors and assigns, a Site Access *<Instrument used>* to install, construct, alter, repair, replace, reconstruct, operate and maintain a *<x>* MW PV system, hereinafter referred to as the "System," on the premises described in Exhibit B, hereinafter referred to as the "Premises," and which is attached hereto and made a part hereof, subject to any and all existing outgrants and encumbrances.

The rights conveyed to the Grantee under this Site Access *<Instrument used>* are solely for the purposes of installing, operating and maintaining the System. Grantor reserves for itself and its successors, and assigns, any and all rights not otherwise conveyed to Grantee under this Site Access *<Instrument used>*, and any and all uses of, or activities on, the Premises that are not inconsistent with the terms of this Site Access *<Instrument used>*, and that are not prohibited herein.

The GRANTOR has determined that the granting of this Site Access *<Instrument used>* will not be adverse to the interests of the UNITED STATES and is compatible with the public interest; subject to the following covenants, conditions and restrictions:

Notices

All correspondence and notices to be given pursuant to this Site Access *<Instrument used>* shall be addressed to the Authorized Representative listed in Section 6. Notice shall be deemed to have been duly given and received: (i) if hand delivered to a party at the regular mail address of the party specified above, against receipted copy, or (ii) if given by a nationally recognized and reputable overnight delivery service at the regular mail address of the party specified above, the day on which the notice is actually received by the party. If a copy is required above, then Notice shall not be deemed received until the last of the Notice and the copy of the Notice is deemed received as provided above. If Notice is tendered under the provisions of this Section and is refused by the intended recipient of the Notice, the Notice shall nonetheless be considered to have been given and shall be effective as of the date provided herein.

1. Authorized Representatives and Points of Contact

The GRANTOR's Authorized Representative shall be:

<Name, title>

<Agency>

<Address, phone, email, fax>

The GRANTEE'S Authorized Representative shall be:

<Name, title>

<Company>

<Address, phone, email, fax>

GRANTOR and GRANTEE each will assign a single point-of-contact (POC) to ensure coordinated and efficient communication between the GRANTOR and GRANTEE.

GRANTOR's POC shall be:

<Name, title>

<Agency>

<Address, phone, email, fax>

GRANTEE'S POC shall be:

<Name, title>

<Company>

<Address, phone, email, fax>

GRANTOR and GRANTEE shall promptly notify each other with any change to the individuals identified above or their contact information. Such changes shall be effective upon receipt of written notice.

Upon receipt of written notice, such change shall be incorporated into this Site Access *<Instrument used>* and no formal modification shall be required.

No notice, order, clarification, direction, determination, requirement, consent, agreement, or approval under this Site Access (Instrument used) shall be of any effect unless provided in writing to the authorized representatives at the address set out above.

2. Limitations

- A. *[For Dept of Defense projects]* This Site Access *<Instrument used>* *<is/is not>* subject to 10 USC 2662 Real Property Transactions: Reports to Congressional Committees, as amended.
- B. This instrument is effective only insofar as the rights of the United States in the property are concerned, and the GRANTEE shall obtain such permission as may be required on account of any other existing rights. The granting of this Site Access *<Instrument used>* does not eliminate the necessity of obtaining any permit which may be required pursuant to the provisions of *[list laws such as Section 10 of the Rivers and Harbors Act of 3 March 1899 (30 Stat. 1151; 33 U.S.C. § 403) Section 404 of the Clean Water Act (33 U.S.C. § 1344)]* or any other permit or license which may be required by Federal, state or local statute in connection with use of the Premises.

3. Failure of the Grantor to Insist on Compliance

The failure of the GRANTOR to insist, in any one or more instances, upon performance of any of the terms, covenants or conditions of this Site Access *<Instrument used>*, shall not be construed as a waiver or relinquishment of the GRANTOR's right to the current or future performance of any such terms, covenants or conditions and the GRANTEE's obligations in respect to such performance shall continue in full force and effect.

4. Term

This Site Access *<Instrument used>* shall be effective upon execution by GRANTOR and shall continue for a period of *<x, no greater than 25>* years from the effective date of this Site Access *<Instrument used>*.

5. Termination and Non-Compliance

- A. **Termination:** This Site Access *<Instrument used>* shall terminate, in whole or in part as provided herein:
 - 1. Upon fair market value purchase of the PV System by the Grantor;
 - 2. Upon GRANTEE's noncompliance with the terms of the Site Access *<Instrument used>*;
 - 3. Upon expiration of two (2) consecutive years of non-use of the Site Access *<Instrument used>* for the purpose or purposes granted;
 - 4. Upon abandonment of the Site Access *<Instrument used>* by GRANTEE;
 - 5. At any time by mutual consent of the GRANTOR and GRANTEE, expressed in writing; or
 - 6. No later than *<x>* days after the termination of the ESPC ESA.
- B. In the event of a termination for any reason other than noncompliance, the GRANTOR shall provide a written termination notice, with *<x>* days written notice, to the GRANTEE or its successors or assigns and the termination shall be effective as of the date of such notice.

- C. All or any part of this Site Access (Instrument used) may be terminated by the GRANTOR upon sixty (60) days written notice to GRANTEE if the GRANTOR determines that all or any such part of the Premises have been abandoned or not used for a period of two (2) years by the GRANTEE. If GRANTOR has made a good faith effort to locate GRANTEE to provide Notice to Terminate, but GRANTEE cannot be located or no longer exists as a corporate entity, the GRANTOR may proceed with termination, and provide notice, as necessary, in the land records by any appropriate method required to clear title.
- D. **Noncompliance:** The GRANTEE is charged at all times with full knowledge of all the limitations and requirements of this Site Access *<Instrument used>*, the necessity for correction of deficiencies, and with compliance with the terms and conditions. The GRANTOR will notify the GRANTEE of any noncompliance with this Site Access *<Instrument used>*, which notice shall be in writing or shall be confirmed in writing, giving a period of time in which to correct the noncompliance.

In the event the GRANTOR initiates termination for noncompliance, the GRANTOR shall provide the GRANTEE, or its successors or assigns, written notice of its intent to terminate the Site Access *<Instrument used>*. GRANTEE shall have thirty (30) days, or such additional time as provided by the GRANTOR, after receipt of the notice of intent to terminate to come into compliance with the terms hereof, to the reasonable satisfaction of the GRANTOR. If GRANTEE fails to come into compliance within the cure period, this Site Access *<Instrument used>* shall terminate at the expiration of the period provided for cure.

If the GRANTEE fails to satisfactorily correct, or reach agreement on the corrective action necessary to reach compliance, the GRANTOR may elevate the GRANTEE's noncompliance to a default upon delivery to the GRANTEE of a written notice of default, giving a period of time in which to correct the default, subject to Section 4 on Cure, unless otherwise provided in this Site Access *<Instrument used>*.

If the GRANTEE fails to satisfactorily correct, or reach agreement on the corrective action necessary to stop such default, GRANTOR may terminate this Site Access *<Instrument used>*. In the event of such a termination, the GRANTOR may send GRANTEE a notice to terminate this Site Access *<Instrument used>*, or, alternatively, may stay the sending of such notice to terminate, and may seek damages, specific future measures to prevent the reoccurrence of such default, and/or pursue any other remedy available under law or equity.

6. Cure

Grantee shall be deemed to have violated or neglected to perform under this Site Access *<Instrument used>* if it fails to comply with any provision herein, where such failure to comply continues uncured for sixty (60) days after delivery of written notice by the GRANTOR to the GRANTEE. If, however, the time required to cure exceeds the sixty (60) day period, the Grantee shall not be deemed to be in default if the GRANTEE within such period shall begin the actions necessary to bring it into compliance with this Site Access *<Instrument used>* in accordance with a compliance schedule acceptable to the GRANTOR.

7. Liens

- A. Other than Lender or System Lessor's security interest in, or ownership of, the System, GRANTEE shall not directly or indirectly cause, create, incur, assume or suffer to exist any mortgage, pledge, lien (including mechanics', labor or materialman's lien), charge, security interest, encumbrance or claim of any nature (Liens) on or with respect to the Premises or any interest therein. GRANTEE also shall pay promptly before a fine or penalty may attach to the System or Premises any taxes, charges or fees of whatever type of any relevant Governmental Authority, relating to any work performed hereunder by GRANTEE or its agents and subcontractors on the System or Premises. If GRANTEE breaches its obligations under this Section, it shall (i) immediately notify GRANTOR in writing, (ii) promptly cause such Lien to be discharged and

released of record without cost to GRANTOR, and (iii) defend and hold harmless GRANTOR against all costs and expenses (including reasonable attorneys' fees and court costs at trial and on appeal) incurred in discharging and releasing such Lien.

- B. GRANTOR shall not directly or indirectly cause, create, incur, assume or suffer to exist any Liens on or with respect to the System or any interest therein. If GRANTOR breaches its obligations under this Section, it shall immediately notify GRANTEE in writing and shall promptly cause such Lien to be discharged and released of record without cost to GRANTEE.

8. Compliance with Applicable Laws and Regulations

- A. The GRANTEE shall at all times observe and comply, at its sole cost and expense, with the provisions of all federal, state, and local laws, regulations, and standards, and in particular those provisions concerning the protection of the environment and pollution control and abatement and occupational safety and health that are or may become applicable to the Premises or the GRANTEE's activities on the Premises.
- B. In addition, GRANTEE shall at all times comply with certain technical requirements for the installation and operation of the System, to include the specific requirements pertaining to installation access, operational security, and cyber security, as more specifically provided and approved from time to time by the GRANTOR.
- C. Additional compliance conditions are included in section 29 Compliance with Environmental Laws.

9. Condition of Premises

The GRANTOR and GRANTEE acknowledge that they have inspected the Premises, knows the condition, and understand that the property is granted without any representation or warranties, other than representations made in Section 29, Warranty of Authority and Representations of this Site Access *<Instrument used>*, and without obligation on the part of the GRANTOR to make any alterations, repairs, or additions.

An Environmental Condition of Property ("ECP") Report, *<date>*, documenting the known history of the Premises with regard to environmental and other conditions; including the storage, release or disposal of hazardous substances thereon, is incorporated herein by reference. Upon expiration, revocation or termination of this Site Access *<Instrument used>*, another ECP Report shall be prepared, at the GRANTEE's expense, which will document the environmental condition of the Premises at that time. A comparison of the two ECP Reports will assist the *<agency>* in determining any necessary adjustments to the fairmarket value purchase.

10. Inspection and Protection of Property

- A. All portions of the Premises shall at all times be protected and maintained in good order and condition by and at the expense of the GRANTEE. The Grantee shall be responsible for any damage that may be caused to the property of the United States by the activities of the Grantee under this Site Access Agreement and shall exercise due diligence in the protection of all property located on the Premises against fire or damage from any and all other causes.
- B. Any property of the GRANTOR damaged or destroyed by the GRANTEE incident to the use and occupation of the Premises shall be promptly repaired or replaced by the GRANTEE to the reasonable satisfaction of the GRANTOR or in lieu of such repair or replacement the GRANTEE shall, if so required by the GRANTOR, pay to the GRANTOR money in an amount sufficient to compensate for the loss sustained by the GRANTOR by reason of damages to or destruction of the GRANTOR's property.
- C. GRANTOR shall have the right to issue warnings and bar from the Premises violators of construction, operation, environment, safety, and health, and security performance standards.

- D. GRANTOR and GRANTEE will collaborate to conduct routine inspections of the installation, operation, and maintenance activities to ensure construction, operation, environment, safety, and health performance standards are met and risks to employees, the public, and the environment are minimized. GRANTOR and GRANTEE will promptly provide each other all inspection reports and any findings and corrective actions.

11. Boundary or Survey Monument

The GRANTEE shall not disturb, obliterate or destroy any land boundary or survey monument on the Premises without prior written approval of the GRANTOR's authorized representative.

12. Alterations

No additions to or alterations of the Premises other than those specifically provided for under the terms of this Site Access Agreement shall be made without the prior written consent of the GRANTOR.

13. Protection of Existing Vegetation, Structures, Equipment, Utilities, and Improvements

GRANTEE shall employ reasonable methods to protect from damage existing vegetation, structures, utilities, and improvements:

1. At or near the Premises, and
2. On adjacent property, including property of a third-party, the locations of which are made known to or should be known by GRANTEE.

14. Site Access, Access Control, and Security

- A. The GRANTEE shall have the right to enter the *<federal site>* to exercise its rights under this Site Access Agreement, subject to certain restrictions and/or special conditions required by the *<agency>*. Access shall be limited to *<list hours, example 7- 5 M-F>* for regular operations, excluding federal holidays. Access outside of these time periods will be allowed, with approval from GRANTOR's authorized representative, for emergency situations. The GRANTEE acknowledges and recognizes that:
1. Premises are located on an active U.S. site and, as such, access may be subject to temporary closings and/or other activities. It is expressly understood that the GRANTOR may limit or restrict the right of access granted in any manner considered necessary, in the GRANTOR's sole discretion.
 2. GRANTOR, acting by and through his duly authorized *<agency leadership name/title>*, exercises command and control over and with respect to the Premises, including traffic control, security, force protection, law enforcement, fire protection, activities performed thereon and command and control matters.
- B. Security requirements are as follows: *<list requirements/restrictions>*.
- C. GRANTEE shall make emergency access to the site available to the local fire department through appropriate means.
- D. GRANTEE shall ensure the security of the facility. It is expressly understood that GRANTOR has no responsibility to provide any security measures to protect GRANTEE's interests within the Premises.

- E. GRANTEE shall affirmatively control access to the Premises by *<fence or other depending upon PV system type>* to prevent public access to the site to ensure public safety and health.
- F. GRANTEE shall ensure any lighting design and operation reduces nuisance to the lowest level achievable with safety and security considerations. All lighting will be directed and will be motion-activated.
- G. The right is reserved to the United States, its officers, agents, employees or representatives ("Government Officials") to enter upon the Premises for the purpose of inspection and when otherwise deemed necessary for the protection of the interests of the GRANTOR, including for purposes related to compliance with environmental, safety, and occupational health laws and regulations, whether or not the GRANTOR is responsible for enforcing them. The GRANTOR normally will give the GRANTEE twenty-four (24) hours prior notice of its intention to enter the Premises, unless it determines the entry is required for safety, environmental, operations, or security purposes. In which case GRANTOR will give such notice as is practicable under the circumstances. If requested, Government Officials inspecting the Premises shall comply with such reasonable internal safety procedures of the GRANTEE. GRANTEE shall have no claim for damages on account thereof against the United States or any officer, agent, or employee thereof in connection with the exercise of such right of entry. Provided, however, that nothing in this section shall be considered as a waiver by the GRANTEE of any remedy available to it under the Federal Tort Claims Act.

15 .Construction, Installation, Use, Operation and Maintenance

- A. All work incident to the design, construction, installation, use, maintenance and operation of the System on the Premises shall be performed by the GRANTEE without cost or expense to the GRANTOR and to the reasonable satisfaction of the GRANTOR. GRANTEE shall submit final plans and specifications of proposed construction to the GRANTOR's authorized representative and obtain his/her approval prior to commencement of construction, which approval shall not be unreasonably withheld or delayed.
- B. All work connected with the construction, installation, use, maintenance and operation by the GRANTEE as contemplated by this Site Access Agreement shall be performed in accordance with applicable federal, state, and local laws and regulations governing worker health and safety.
- C. The System will be owned and operated by GRANTEE at its sole cost and expense. Any repair or maintenance of the System will be completed by or for GRANTEE, at its sole cost and expense, for GRANTEE'S benefit as legal and beneficial owner or lessee of the System.
- D. GRANTOR and GRANTEE each shall notify the other within twenty-four (24) hours following their discovery of any material malfunction in the operation of the System or of their discovery of an interruption in the supply of electricity. GRANTOR and GRANTEE shall each designate personnel and establish procedures such that both may provide notice of such conditions requiring GRANTEE's repair or alteration at all times, twenty-four (24) hours per day, including weekends and holidays. GRANTOR and GRANTEE each shall notify the other upon the discovery of an emergency condition in the System. If an emergency condition exists, GRANTEE shall immediately dispatch the appropriate personnel to perform the necessary repairs or corrective action in an expeditious and safe manner.
- E. The GRANTEE may authorize use of the Premises by its agents and contractors in connection with the installation, operation and maintenance of the System, subject to the approval *<agency>* and subject to the terms and conditions of this Site Access Agreement. Use of the Premises by the GRANTEE's agents and contractors shall not relieve the GRANTEE of any of its obligations under this Site Access Agreement.

16. Project Planning and Execution

- A. GRANTEE shall collaborate with GRANTOR to define and execute a comprehensive and efficient project management and execution plan. The plan will address the construction, commissioning, interconnection,

operations, and maintenance phases including a risk-graded approach to address hazards, hazard mitigation and inspections.

- B. GRANTOR shall make available to GRANTEE all relevant technical schematics, drawings, and specifications necessary for the interconnection of the System to the existing *<agency site name>* electrical system.
- C. GRANTEE shall take all reasonable steps necessary to reduce the impact on GRANTOR's neighbors during construction and operation.
- D. GRANTOR must approve the final project management and execution plan prior to the start of construction and GRANTOR must approve the final interconnection of the System to GRANTOR's infrastructure at *<agency site name>*, approval not to be unreasonably withheld.
- E. GRANTEE is responsible for all work performed on the Premises and the delivery, storage, security, and disposition of all materials delivered to the Premises until completion of the installation and during maintenance and operation of the System.

17. Operations and Storage Areas

- A. GRANTEE shall confine all operations *<including storage of materials>* on the Premises to areas authorized or approved by the GRANTOR's Authorized Representative, which site shall be reasonably accommodating for staging purposes.
- B. Temporary buildings (e.g., storage sheds, shops, offices) and utilities may be erected by GRANTEE only with the approval of the GRANTOR's Authorized Representative (whose approval shall not be unreasonably withheld) and shall be built with labor and materials furnished by GRANTEE without expense to GRANTOR. The temporary buildings and utilities shall remain the property of GRANTEE and shall be removed by GRANTEE at its expense upon completion of installation of the System.
- C. GRANTEE shall use only established roadways; or use temporary roadways constructed by GRANTEE when and as authorized by the GRANTOR's Authorized Representative. When it is necessary to cross curbs or sidewalks, GRANTEE shall protect them from damage. GRANTEE shall repair or pay for the repair of any damaged curbs, sidewalks, roads, fences or other structures.

18. GRANTOR's Right to Stop Work

- A. Employees, officials, agents, and contractors of GRANTOR shall have the right, at any time, to require GRANTEE and its employees, officials, agents, and contractors to stop all, or any part, of the installation, operation and maintenance of the System on the Premises when, in the judgment of the GRANTOR's Authorized Representative, an imminent hazard to employees, the public, or the environment exists.
- B. Upon verbal direction or receipt of a stop work order, GRANTEE shall immediately comply with its terms. The GRANTOR's Contracting Officer will contact GRANTEE to resolve the stop work order.
- C. GRANTEE shall not be entitled to and GRANTOR shall not be liable for any damages, losses, or claims of any nature arising from or associated with such stop work order.
- D. GRANTOR will work with GRANTEE to promptly address and mitigate the hazard, and to resume System installation, operation, or maintenance activities.

19. Cleaning Up

- A. GRANTEE shall at all times keep the Premises, including storage areas, free from accumulations of waste materials. Before completing the Installation Work, GRANTEE shall remove from the Premises any rubbish, tools, scaffolding, equipment, and materials that are not the property of GRANTOR and leave the area in a clean, neat, and orderly condition, satisfactory to the GRANTOR's Authorized Representative.
- B. During the maintenance and operation of the System, good grounds keeping practices shall be followed at all times and the Premises shall be maintained in clean, neat, and orderly condition to the reasonable satisfaction of the GRANTOR.

20. GRANTEE's Indemnity

[Modify based on agency indemnification policy.]

GRANTEE agrees that it shall indemnify and hold harmless GRANTOR from and against any and all Losses incurred by the GRANTOR's Indemnified Parties to the extent arising from or out of the following:

1. Any claim for or arising out of any injury to or death of any Person or loss or damage to property of any Person to the extent arising out of GRANTEE'S negligence or willful misconduct, or
2. Any infringement of patents or the improper use of other proprietary rights by GRANTEE or its employees or representatives that may occur in connection with the performance of the PV System installation and operations and maintenance

GRANTEE shall not, however, be required to reimburse or indemnify any GRANTOR Indemnified Party for any Loss to the extent such Loss is due to the negligence or willful misconduct of any GRANTOR Indemnified Party. The indemnification procedures are specified in [\[list here or refer to ESPC ESA Section\]](#).

21. GRANTEE Performance

The failure of the GRANTOR to insist in any one or more instances upon strict performance of any of the terms, covenants or conditions of this Site Access Agreement shall not be construed as a waiver or relinquishment of the GRANTOR'S right to the future performance of any such terms, covenants, or conditions and the GRANTEE'S obligations with respect to such future performance shall continue in full force and effect.

22. Covenant Against Contingent Fees

The GRANTEE warrants that no Person or selling agency has been employed or retained to solicit or secure this Site Access Agreement upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the GRANTEE for the purpose of securing business. For breach or violation of this warranty the GRANTOR shall have the right to annul this Site Access Agreement without liability or, in its discretion, to require the GRANTEE to pay the full amount of such commission, percentage, brokerage, or contingent fee.

23. Transfers and Assignments

- A. The conditions of this Site Access Agreement shall extend to and be binding upon and shall inure to the heirs, representatives, successors, and assigns of the GRANTEE. The GRANTEE shall neither transfer nor assign this Site Access Agreement or any property on the Premises, nor sublet the Premises or any part of the property, nor grant any interest, privilege, or Site Access Agreement whatsoever in connection with this Site Access Agreement without the express written permission of the GRANTOR which permission shall not be unreasonably withheld, provided, however, that GRANTEE shall be permitted to transfer or assign

this Site Access Agreement, without such express written permission, to any entity to whom GRANTEE assigns the ESPC ESA

- B. The GRANTOR acknowledges that it provides this Site Access Agreement as one component of a bi-party arrangement between GRANTOR and GRANTEE which arrangement is memorialized in two: this Site Access Agreement, and the ESPC ESA between GRANTOR and GRANTEE. In accordance with this bi-party arrangement, if GRANTEE assigns its interests in the ESPC ESA to a third-party including a Lender or System Lessor, GRANTOR agrees to the assignment of this Site Access Agreement to such third-party if that party is a Qualified Assignee under the ESPC ESA between GRANTOR and GRANTEE.
- C. In the event of any transfer or Assignment of the ESPC ESA by the GRANTEE to a third-party including a System Lessor or Lender, GRANTOR agrees that either the third-party, System Lessor or Lender may take the place of GRANTEE for purposes of enjoying the benefits and performing the obligations specified in this Site Access Agreement.
- D. Notwithstanding any other provision of this Site Access Agreement, GRANTOR agrees to provide Lender or System Lessor with a copy of any notice of noncompliance GRANTOR may send to GRANTEE pursuant to the terms of this Site Access Agreement. GRANTOR agrees that Lender or System Lessor shall have the opportunity and period of time to cure any noncompliance by GRANTEE as provided pursuant to the terms of [<enter RFP Section>](#).
- E. In furtherance of the purposes of this Site Access Agreement, GRANTOR agrees to provide an Acknowledgement and Confirmation as Exhibit A to the ESPC ESA indicating that the PV System installed on its Premises is considered to be personal property and not a fixture. GRANTOR acknowledges that GRANTEE's Lender or System Lessor may have a security interest in the System.

24. Mandatory GRANTEE Covenants

Although this Site Access Agreement is not subject to either the Federal Acquisition Regulation or [<add any other applicable regulations such as the Defense Federal Acquisition Regulation Supplement>](#), the [<agency>](#), pursuant to [<applicable authority>](#), the advisability of the inclusion of the requirements set forth in the list contained in Exhibit C (hereafter "Mandatory GRANTEE Covenants"). These Mandatory GRANTEE Covenants are hereby incorporated by reference into this Site Access Agreement as if fully set forth herein and shall be binding upon the GRANTEE, and the GRANTEE's successors in interest or assigns, and any GRANTEE agents, licensees, contractors and their subcontractors or invitees, or their subsidiaries (collectively the "GRANTEE Parties"). The GRANTEE Parties shall comply with the Mandatory GRANTEE Covenants as currently promulgated, or as may be amended from time to time. Failure to comply with these Mandatory GRANTEE Covenants shall be subject to immediate termination of this Site Access Agreement, at the Government's sole discretion.

25. Taxes

GRANTEE shall be responsible for all taxes (i.e., both real property taxes and personal property taxes) levied against the Premises attributable to the establishment of this Site Access Agreement and associated activities by GRANTEE hereunder.

26. Force Majeure

If a force majeure event has occurred which excuses the performance of the Parties to the ESPC ESA, then performance of the GRANTOR's and GRANTEE's obligations specified herein shall also be excused.

27. Warranty of Authority and Representations

The signatories warrant that they have full right and authority to enter into this Site Access Agreement. GRANTOR represents that there are no existing encumbrances related to the Premises, *<if applicable cite any exceptions>*. GRANTOR represents that the Premises are free of Hazardous Materials and further acknowledges its responsibility to mitigate the impacts associated with pre-existing Hazardous Materials.

28. Compliance with Environmental Laws

- A. The term "Environmental Law" means any statute, law, act, ordinance, rule, regulation, order, decree, or ruling of any Federal, State, interstate, and/or local governmental, quasi-governmental, legislative, administrative or judicial body, agency, board, commission or other authority relating to the protection of health and/or the environment or otherwise regulating and/or restricting the use, storage, disposal, treatment, handling, release, and/or transportation of Hazardous Substances, including, without limitation, CERCLA, the Solid Waste Disposal Act, the Federal Water Pollution Control Act, the Clean Air Act, the Hazardous Materials Transportation Act, the Toxic Substances Control Act, the Emergency Planning and Community Right To Know Act, and the environmental control laws of the State of *<state>*, each as now or hereafter amended, and all regulations and interpretive guidelines respectively promulgated thereunder.
- B. The GRANTEE shall comply, at its sole cost and expense, with all Environmental Laws that are or may become applicable to the Premises or the GRANTEE's activities on the Premises, including but not limited to all applicable federal, state, interstate, and local laws, regulations, and other requirements relating to occupational safety and health, the handling and storage of hazardous materials, and the proper generation, handling, accumulation, treatment, storage, disposal, and transportation of hazardous wastes. The GRANTEE shall at its own expense maintain in effect any permits, license or other governmental approvals relating to Hazardous Substances, if any, required for the GRANTEE's use of the Premises. The GRANTEE shall make all disclosures required of the GRANTEE by any such Environmental Laws, and shall comply with all orders, with respect to the GRANTEE's and its employees', agents', contractors' and invitees' use of the Premises, issued by any governmental authority having jurisdiction over the Premises and take all action required by such governmental authorities to bring the GRANTEE's and its employees', agents', contractors' and invitees' activities on the Premises into compliance with all Environmental Laws affecting the Premises.
- C. The GRANTEE shall indemnify and hold harmless the United States, from any and all claims for damages, costs, expenses, liabilities, fines, or penalties, including the United States' cost of defending against such claims, arising from or caused in whole or in part, directly or indirectly, by:
 1. The presence in, on, under, or about the Premises or any discharge or release in or from the Premises of any Hazardous Substance, to the extent that any such presence, discharge, or release is caused by the GRANTEE's activities, or the activities of any of the GRANTEE's employees, agents, contractors or invitees, or
 2. The GRANTEE's failure to comply with its covenants under this Section.

The indemnity obligations created by this Section shall include, without limitation, whether foreseeable or unforeseeable, any and all costs incurred in connection with any site investigation, and any and all costs for repair, cleanup, detoxification or decontamination, or other response action of the Premises. This obligation shall survive the expiration or termination of this Site Access Agreement, and the GRANTEE's obligations hereunder shall apply whenever the United States incurs costs or liabilities for the GRANTEE's actions of the types described in this Section.

- D. Notwithstanding any other provision of this Site Access Agreement, the GRANTEE does not assume any liability or responsibility for environmental impacts and damage caused by the GRANTOR, its agents, employees or contractors on any portion of the Installation, including the Premises, provided such impacts

or damage are not exacerbated by GRANTEE. The GRANTEE has no obligation under this Site Access Agreement to undertake the defense of any claim or action, whether in existence now or brought in the future, solely arising out of the use or release of any Hazardous Substances by the GRANTOR, its agents, employees or contractors, on or from any part of the Installation, including the Premises. Further, the GRANTEE has no obligation under this Site Access Agreement to undertake any environmental response, remediation, or cleanup relating to such use or release.

For the purposes of this Section:

1. The term, "defense" or "environmental response, remediation, or cleanup", include liability and responsibility for the costs of damage, penalties, legal, and investigative services relating to such use or release. "Occupation" or "use" shall mean any activity or presence (including preparation and installation) in or upon such portion of, or such building, facility, or other improvement on, the Premises.
2. This Section does not relieve the GRANTEE of any obligation or liability it might have or acquire with regard to third parties or regulatory authorities by operation of law.
3. This Section shall survive the termination or relinquishment of this Site Access Agreement.

29. Environmental Protection

- A. The disposal of any toxic or hazardous materials within the Premises is strictly prohibited.
- B. If the GRANTEE discovers any hazardous materials or hazardous wastes at the Premises of any kind, in, on, under, about or migrating from or onto the Premises, the GRANTEE shall immediately stop work, take measures to reduce exposure to all GRANTEE site personnel, notify GRANTOR of such condition and location and shall ensure access to the site of discovery is restricted until appropriate response activities have been completed, and any required notifications are made to State and/or federal environmental regulatory agencies. Grantee will not further disturb the site of the discovered hazardous materials or hazardous wastes without the written permission of GRANTOR.
- C. The Grantee shall not discharge waste or effluent from the Premises in such a manner that the discharge will contaminate streams or other bodies of water or otherwise become a public nuisance.
- D. Throughout the term of this Site Access Agreement, GRANTEE shall notify the GRANTOR's Authorized Representative upon discovery of any noxious weed species found on the Premises and GRANTEE is responsible for immediate control and eradication. GRANTEE shall consult with and obtain approval from the GRANTOR's Authorized Representative for acceptable weed control methods such as mechanical or chemical, or by providing funds for treatment.

The use of any pesticides, rodenticides, fungicides, or herbicides within the Premises shall be in conformance with all applicable Federal, state and local laws and regulations. Prior to the use of pesticides, rodenticides, fungicides, or herbicides, GRANTEE shall obtain from the GRANTOR's Authorized Representative written approval of a plan showing the type and quantity of material to be used, pest(s) to be controlled, method of application, location of storage and disposal of containers, and any other information deemed necessary by the GRANTOR's Authorized Representative. Emergency use of pesticides, rodenticides, fungicides, or herbicides shall be approved in writing by the GRANTOR's Authorized Representative prior to such use.

- E. The GRANTEE will use all reasonable means available to protect the environment and natural resources, and where damage nonetheless occurs arising from the GRANTEE's activities, the GRANTEE shall be liable to restore the damaged resources and mitigate any impacts resulting from the damage.

- F. The United States retains and reserves a right of access on, over, and through the Premises, to enter upon the Premises in any case in which an environmental response or corrective action is found to be necessary on the part of the United States, without regard to whether such environmental response or corrective action is on the Premises or on adjoining or nearby lands. Such right of access includes, without limitation, the right to perform any environmental investigation, survey, monitoring, sampling, testing, drilling, boring, coring, test pitting, installing monitoring or pumping wells or other treatment facilities, response action, corrective action, or any other action necessary for the United States to meet its responsibilities under applicable laws, including, with limitation, Environmental Laws. In exercising such right of access, the United States shall provide the Grantee with reasonable notice of its intent to enter upon the Premises and exercise its rights under this clause, which notice may be severely curtailed or even eliminated in emergency situations. In exercising its rights hereunder, the United States shall use reasonable means to avoid and to minimize interference with the GRANTEE's use of the Premises. Government access and other actions hereunder shall be at the expense of the Government, unless such access or other actions are necessitated by the actions of the GRANTEE, its successors and assigns, its employees, agents, contractors, licensees, and invitees.
- G. The GRANTEE shall maintain, in a manner satisfactory to GRANTOR, all soil and water conservation structures that may be in existence upon said Premises at the beginning of or that may be constructed by the GRANTEE during the term of this Site Access Agreement, and the GRANTEE shall take appropriate measures to prevent or control soil erosion within the Premises. Any soil erosion occurring outside the Premises resulting from the activities of the GRANTEE shall be corrected by the GRANTEE as directed by GRANTOR.

30. Historic Preservation

The GRANTEE shall not remove or disturb, or cause or permit to be removed or disturbed, any historical, archeological, architectural or other cultural artifacts, relics, remains or objects of antiquity. In the event such items are discovered on the Premises, the GRANTEE shall immediately notify GRANTOR and protect the site and material from further disturbance until GRANTOR gives clearance to proceed.

- A. GRANTOR shall provide for a qualified, designated observer to be present during the initial construction phase for all grading, digging, trenching and excavating activities in the Premises, as determined necessary by GRANTOR. GRANTEE shall suspend all operations in the immediate area of any cultural and/or paleontological resource (historic or prehistoric site or object) discovered on Federal land until written authorization to proceed is issued by the GRANTOR's Authorized Representative. An evaluation of the discovery will be made by the GRANTOR to determine appropriate actions to prevent the loss of items of significant cultural or scientific value. Any decision as to proper mitigation measures will be made by the GRANTOR after consulting with the GRANTEE.
- B. GRANTOR and GRANTEE shall discuss in good faith the impact on GRANTEE's performance obligations and responsibility for costs resulting from compliance with this Section.

31. Environment, Safety and Health Management

- A. GRANTEE warrants that its designated environment, safety and health (ES&H) manager is knowledgeable in applicable federal, state and local ES&H requirements. GRANTEE warrants that its contractors and employees are trained in, familiar with, and comply with GRANTEE's ES&H policies, procedures and standards.
- B. GRANTEE shall notify the GRANTOR's Authorized Representative in writing within two hours of any employee injuries/illnesses at the Premises requiring medical attention in excess of first aid, or incidents at the Premises that result in damage to equipment or facilities, or threats or impacts to the environment.

- C. GRANTEE shall suspend operations at the Premises and immediately notify the GRANTOR's Authorized Representative in writing if conditions are encountered that present a possible ES&H exposure (e.g., imminent danger, suspected hazardous materials, accidental release of hazardous material, possible archaeological sites). GRANTEE must inform all its workers and contractors that they have stop work authority when these conditions are encountered. A hazard assessment must be completed and appropriate controls identified to mitigate the identified hazard(s) prior to beginning work.
- D. GRANTEE shall conduct activities on the Premises within the scope of any environmental assessments and determinations made by GRANTOR pursuant to the National Environmental Policy Act (NEPA). GRANTEE shall not initiate any construction or take any other irreversible actions until GRANTOR issues a NEPA clearance. If changes are anticipated to the scope of activities as described in the applicable NEPA documents and determinations, or if the scope of activities is desired to be expanded, GRANTEE has a continuing notification obligation, and shall notify GRANTOR of any proposed changes. Requirements for additional NEPA documents or determinations shall be determined on a case-by-case basis. GRANTEE shall provide information as requested to support any future NEPA determinations.
- E. GRANTEE shall take all necessary and reasonable safety precautions with respect to providing the System installation, operation and maintenance, and ensuring that work shall comply with all applicable laws pertaining to the health and safety of persons and real and personal property. GRANTEE shall comply with applicable State standards for public health and safety, environmental protection and siting, construction, operation and maintenance, if these State standards are more stringent than Federal standards for similar projects.
- F. GRANTEE shall provide an easily accessible bulletin board or other suitable information center on the Premises, ensuring that employees know its location, and posting the following as a minimum:
 - 1. Emergency telephone numbers.
 - 2. GRANTEE's project management and execution plan or a location where it may be accessed.
 - 3. Any other posting required by law.

32. Introduction, Management, and Disposal of Fuels, Hazardous or Toxic Materials, and Wastes

- A. GRANTEE shall limit the introduction of fuels and hazardous or toxic materials to that required for daily on-site use. GRANTOR shall be provided with written notification prior to these materials being brought onto the Premises. The notification shall include the materials, quantities, intended use and material safety data sheets. All such materials will be stored in approved containers in compliance with federal, state, and local regulatory requirements. Any spills of hazardous, toxic or petroleum-based materials shall be reported immediately to the GRANTOR's Authorized Representative. GRANTEE is responsible for clean-up, disposal and appropriate remediation actions resulting from any spills, leaks or accidental discharges, resulting from its acts or failure to act. These activities must be coordinated with the GRANTOR's Authorized Representative.
- B. GRANTEE shall minimize all wastes produced and shall remove these wastes from the site promptly at their own expense, in compliance with federal, state, and local regulatory requirements.

33. Permits and Responsibilities

Except for the required Storm Water Discharge Permit which shall be obtained by GRANTOR, GRANTEE, without expense to GRANTOR, shall be responsible for obtaining any necessary licenses and permits.

34. Notices of Violation or Alleged Violations, Fines, and Penalties

- A. GRANTEE shall immediately notify the GRANTOR's Authorized Representative, in writing, of any notice it may receive regarding Notice of Violations (NOV) or Notice of Alleged Violations (NOAV) issued by federal, state, or local regulators associated with GRANTEE's installation, operation, and maintenance of the System.
- B. GRANTEE shall submit for GRANTOR approval their proposed actions to correct the conditions that resulted in the NOV/NOAV, consistent with the issuing authority's regulations. Upon GRANTOR approval, these actions shall immediately be implemented by GRANTEE at their expense to the reasonable satisfaction of GRANTOR.
- C. GRANTEE shall accept all responsibility for valid fines and penalties issued by federal, state, or local regulators resulting from the actions of GRANTEE, its agents, representatives, or invitees for acts or failures to act after the effective date of this Site Access Agreement.

35. Nondiscrimination

In the construction, operation, maintenance, and termination of the System authorized by this Site Access Agreement, the GRANTEE shall not discriminate against any person or persons, or applicant for employment because of race, creed, color, sex, or national origin. All subcontracts shall include an identical provision.

36. Miscellaneous

- A. Incorporation By Reference. Certain provisions of the ESPC ESA are incorporated by reference herein, specifically, *<list provisions>*.
- B. Definitions. Any capitalized terms used herein and not expressly defined herein shall be given the meanings specified in the ESPC ESA.

37. Recordation

GRANTEE shall be responsible to record this Site Access Agreement, if required, in the Office of the Recorder of Deeds, (County), and to provide GRANTOR with a recorded copy.

38. Amendment

This Site Access Agreement may not be amended or superseded except by an agreement in writing executed by the GRANTOR and the GRANTEE. Provided, however, if minor technical adjustments or revisions to the legal descriptions or depictions of the Premises are necessary after the execution of this Site Access Agreement and provided the GRANTOR and GRANTEE hereto mutually agree in writing as to such revisions, then revised legal descriptions and depictions may be attached to this Site Access Agreement and this Site Access Agreement shall be re-recorded with the new exhibits, and in such event formal amendment of this Site Access Agreement shall not be necessary.

If circumstances arise under which an amendment to or modification of this Site Access Agreement would be appropriate, the GRANTOR and the Grantee shall use reasonable efforts to cooperate in amending this Site Access Agreement. All amendments and modifications requested by the Grantee hereunder shall be at the sole cost and expense of the Grantee.

Exhibits

- Exhibit A GRANTOR Acknowledgement and Confirmation
- Exhibit B Surveyor's Legal Description of Premises
- Exhibit C Mandatory GRANTEE Covenants

IN WITNESS WHEREOF, the GRANTOR has caused this Site Access Agreement to be executed in its name by *<agency leadership>* on *<date>*:

Department of *<agency name>*

<Name>

<Title – official with real estate approval authority>

ACCEPTANCE

WITNESS the signature of the GRANTEE this *<day month, year>*, and agrees to all acceptance and approval of this Site Access Agreement for itself, its successors and assignees the terms and conditions contained therein.

<Name, title>

Contractor

NOTARY Public

STATE OF _____)

COUNTY OF _____)

Exhibit A – GRANTOR Acknowledgement and Confirmation

The PV system is considered to be personal property and not a fixture.

NOTARY Public

STATE OF _____)

COUNTY OF _____)

Exhibit B– Surveyor’s Legal Description of A Premise

Exhibit C - Mandatory GRANTEE Covenants



U.S. DEPARTMENT OF
ENERGY

Office of
**ENERGY EFFICIENCY &
RENEWABLE ENERGY**

For more information, visit: energy.gov/eere/femp

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