Energy Savings Performance Contract Energy Sales Agreements

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

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

ESPC ESA Requirements

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

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

2. **Office of Management and Budget (OMB) Requirements**
   - In order for the ESPC ESA to be scored annually, it must be consistent with the requirements under the OMB Memo M-12-21, including the requirement that the federal government retain title to the ESA ECM by the end of the contract.

3. **Tax Incentive 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). The 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 as a service under 26 U.S.C. § 7701(e)(3). Section 4 specifies safe harbor requirements, including a maximum contract length of 20 years. Section 5 contains details regarding the intention of tax incentives.

4. **Why ESPC ESAs?**
   - A federal agency should consider an ESPC ESA if they:
     - Are interested in a cost-effective on-site distributed energy ECM (i.e., renewable energy, battery storage, and combined heat and power)
     - Have limited long-term contracting authority options
     - Lack upfront capital for a project
     - Think the intended project would benefit from tax incentives.

5. **Act Soon to Maximize the ITC**
   - The solar ITC will decline from 30% to 10% between 2019 and 2022. Solar developers can still qualify for a tax credit higher than 10% if the ESA ECM meets commence construction requirements.

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an example ESPC ESA project. Tax incentive eligibility due diligence is the responsibility of the ESCO (not the government).

**ESPC ESA Contract Structure Recommendations**

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

- The ESA ECM contract length must be less than or equal to 20 years. The contract length for other ECMs could be up to 25 years, as allowed by the ESPC authority, if the ESCO determines that this would not jeopardize their eligibility for federal tax incentives.
- The title retention requirement is satisfied through an ESA ECM title transfer by the end of the contract term. The title transfer must be at fair market value (FMV), as appraised at the time of title transfer. The ESCO will transfer a portion of the payments it receives from the agency each year into a reserve account held by the ESCO and will use these funds for the FMV title transfer.
- Initially, the amount transferred to the reserve account is calculated based on an appraisal (or estimate) of the ESA ECM’s FMV at the end of the contract. The reserve account payments will be adjusted periodically (as needed and through a contract modification) during the contract term based on updated FMV estimates/appraisals. This will ensure that the reserve account has sufficient funds for the title transfer at FMV by the end of the contract. Any reserve account funds remaining after the title transfer can be applied by the ESCO to offset final ESA ECM payment(s).
- The ESPC ESA electricity price is based on a fixed cents-per-kilowatt-hour rate, which may escalate annually and must be paid for by the federal agency from generated energy cost savings. The electricity price does not change if operating costs diminish, and the ESCO bears all financial risk for nonperformance. The amount charged for each payment period includes the price of electricity and an amount for the reserve account that is separate and in addition to the price of electricity (see Figure 2).
- Only the ESCO can operate and maintain the ESA ECM during the ESPC ESA.

**ESPC ESA Resources**


**ESPC ESA Project Assistance**


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

- Request assistance through the FEMP Assistance Portal at www7.eere.energy.gov/femp/assistance/
- Email Rachel Shepherd at Rachel.Shepherd@ee.doe.gov.

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**Baseline**

<table>
<thead>
<tr>
<th>Agency Costs ($/kWh)</th>
<th>Utility electricity costs (kilowatt-hours displaced by ESA ECM)</th>
<th>Electricity cost savings</th>
<th>Reserve account payment</th>
<th>Total ESPC ESA payment to ESCO ($/kWh)</th>
<th>ESA payment</th>
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</thead>
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*Either the blended rate or a rate that only considers cost offset by the ESA ECM

Figure 2. Electricity cost savings achieved through an ESPC ESA

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