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U.S. Department of Energy
Office of the General Counsel
1000 Independence Avenue SW.,
Room 6A245
Washington, DC 20585

Re: Regulatory Burden RFI

Dear Sir or Madam:

The Federal Performance Contracting Coalition (FPCC) appreciates the opportunity to comment on reducing regulatory burdens on the Federal government, specifically as they pertain to federal energy actions. Our coalition is comprised of many of the world's leading Energy Service Companies (ESCOs), including twelve of the sixteen DOE Super-ESPC IDIQ Contract holders and those ESCOs approved by the Army Corps of Engineers IDIQ contract for implementing Energy Savings Performance Contracts (ESPCs) within the Federal government. As a coalition, we are solely focused on ensuring that the Federal use of performance-based contracting for energy savings grows. Our comments today are meant to complement those of the National Association of Energy Service Companies, who is also submitting comments in response to this Request for Information.

BACKGROUND

Since the inception of the Department of Energy's Energy Savings Performance Contracting program, over \$6 Billion of cumulative energy savings have been achieved through the implementation of comprehensive ESPCs. More than 90% of these nearly 300 projects have been implemented by FPCC member ESCOs. These energy efficiency and renewable energy project, continue to assist agencies in meeting federally mandated energy and sustainability goals.

Our current efforts pertain almost exclusively to ensuring the success of President Obama's Presidential Directive to Federal Agencies requiring that agencies enter into \$2 Billion of performance-based contracts for energy savings by December 31, 2013. The FPCC is currently working with the White House Council on Environmental Quality, the Office of Management and Budget, Congressional Committees and Federal agencies to ensure the pace of Federal ESPCs continues following this initial \$2 Billion private sector investment. Collectively, our coalition brings \$60 billion in private sector financing and the expertise to develop, implement and maintain energy efficiency and renewable energy projects through the DOE Super ESPC program.

With that said, the FPCC remains satisfied with the current activities of both the DOE and the White House to consolidate reporting requirements related to energy efficiency, renewable energy and sustainability mandates and goals. The use of the Sustainability Executive Order to organize reporting requirements and activities has been very helpful. Additionally, the public availability of agency sustainability scorecards is also helpful in understanding where agencies are in meeting their goals and mandates. Prior to this Administration's requirement to make those scorecards publicly available, there persisted a lack of information related to agency progress towards Federal energy and environment

requirements. The FPCC is encouraged by this change and looks forward to the availability of additional information related to how agencies utilize performance-based contracting towards meeting these goals. The FPCC is also encouraged by how FEMP is assisting agencies in meeting the President's \$2 Billion Directive and is seeking to work with the FPCC in monitoring agency progress over the next 18 months.

COMMENTS:

In response to this Request for Information, we would like to provide comments on two items in particular. First, we would like to comment on the implementing rules and policies around the Energy Savings Performance Contracting Program as authorized in 42 USC 8287. Second, we would like to comment on how draft regulations currently being considered () would layer on additional regulatory barriers to increasing energy efficiency and adding renewable capacity in federal facilities.

DISCUSSION: Energy Savings Performance Contracting (42 USC 8287, DOE Final Implementing Rule: 10 CFR 436 Subpart B)

In response to question (3): The current ESPC Notice of Opportunity process has created a serious burden and cost on energy services companies (ESCOs) to respond. Resourcing this and the additional steps associated with the selection process is expensive, adding both time and unrecoverable costs to a company's overhead. The involved notice of opportunity process was originally implemented to satisfy the FY 2008 National Defense Authorization Act (NDAA) but was later reversed in section 828 of the FY 2011 NDAA. The fact that many agencies have not "caught up" with the new law has resulted an increase in unrecoverable costs. The government would get a lot more buy-in from industry partners and more efficiency upgrades at their facilities if the cost associated with the contractor selection process were lower or reimbursable some way. We could consider the design build industry practice of an "Honorarium" to defer the added burden.

Some agencies have unnecessary policies against mixing Energy Conservation Investment Program funds (ECIP) and other appropriated dollars with ESPC funding. There is a wide difference among agencies on this practice. Leveraging appropriations with ESPCs would create more efficiency gains and renewable acquisitions at lower costs, increasing project economics regardless of the funding source. Policies that prohibit mixing these funds further create internal agency resistance to implementing alternative financing for conservation and renewable energy projects, thus limiting project awards and investment.

Agencies have mixed intent or philosophy when it comes to simple conservation projects vs. deep savings --- agencies should strongly emphasize the Net Zero concept to make their projects truly "transformational".

The Preliminary Assessment (PA) step in the ESPC process was not contemplated to include a redundant "competitive" step. The PA was always intended to be a "low cost" snapshot of the potential of an ESPC Project, since the approved ESCOs have already competed vigorously. If these additional expectations" being placed on the ESCO continue, companies should be allowed to recover these costs going forward, either as an honorarium or if selected, incorporate as part of the IGA fee.

In response to question (5): Because of the brief application of the enhanced competition requirements of the Federal government, the selection process for ESPCs has become very onerous. Agencies, while not required, still feel as though they should get three bids before awarding a Task Order. This does not represent fairly the "risks" between the ESCO and the Agency. While competition for financier selection is purposeful, it is not necessary or useful among the pre-approved energy service companies.

We fully support the value of competition in light of the price reasonableness test and must compete robustly to be included as a approved ESCO. Some agencies have taken additional competition to the extreme adding requirements, cost and risk to the ESCO. Meanwhile, statute has passed us by: section 828 of the 2008 National Defense Authorization Act (NDAA) exempts ESCOs from the original enhanced competition requirements.

Cycle Time – there is little focus or consideration given to agency approval timelines which causes a significant impact on the time it take for a project to be developed and Task Order to be award.

Agency practices or policies that restrict an ESCO from engaging agencies or facilities early in the process of ESPC selection should be reviewed reduced. Ensuring ESCO involvement from the beginning will allow industry expertise to help identify and guide opportunities, providing the government with additional resources to meet their objectives. Policies that either ban or discourage early engagement create a restrictive situation that is not in the Governments best interest.

In response to question (10): The FPCC would suggest that the government expand the agency scorecard will reducing other reporting mechanisms. There are significant benefits associated with reporting compliance with regulation(s). In addition, agencies should be held accountable for not meeting their stated goals.

Agencies could standardize their ESPC procurement process and staff up for throughput by implementing “Project Pipeline Management” strategies. All agencies have been required to submit their pipeline of potential projects to meet their reduction goals, but they have not always increased their staff or capabilities to meet and achieve their project implementation expectations. This practice should continue beyond 2013.

DISCUSSION: Addition of the Fossil Fuel Energy Consumption Reduction Rule (Implementing Section 433 of the Energy Independence and Security Act of 2007):

Specifically, the FPCC has identified definitions included in the *DOE Proposed Rule, 10 CFR Parts 433 and 435, Docket No. EERE-2010-BT-STD-0031, RIN 1904-AB96, Fossil Fuel-Generated Energy Consumption for New Federal Buildings and Major Renovations of Federal Buildings*, as problematic. DOE has an opportunity to address this. The Coalition views considered DOE implementation critical to ensure that such pending regulations are not burdensome to the Federal government in the area of energy efficiency. In our view, these definitions as provided in Section 433 of EISA and within the DOE Proposed Rule will hinder agency efforts to meet their sustainability goals through comprehensive energy efficiency projects at existing Federal buildings. Typically, such projects are designed and financed through Energy Savings Performance Contracts (ESPCs) which bundle buildings and a variety of Energy Conservation Measures (ECMs) to achieve significant gains in reducing energy and water intensity at Federal buildings.

In response to questions (3) and (7): We are concerned about the potential negative impacts and confusion that could come from implementing this draft rule. The Fossil Fuel Energy Consumption Reduction Rule implements Section 433 of the Energy Independence and Security Act (EISA.) How the law, and in fact, how broadly it applies to retrofit applications, could increase the regulatory burden significantly while having the unintended consequence of reducing energy efficiency retrofits in the federal government, which are required under separate statute and executive order. Our interest is simply to ensure that energy efficiency retrofits continue to apace or increase within the Federal government.

First, we want to be clear that the FPCC supports the mandates and goals of the Federal government regarding energy use, renewable energy and sustainability, and as mentioned, feel that the regulatory burden on the Federal energy managers has been reduced recently by actions of DOE and the White House, in particular, the Office of Management and Budget (OMB.) We also support reducing fossil fuel use in federal facilities, which we do as a matter of course in our ESPCs contracts. We are concerned, however, that as drafted, the regulations around section 433 of EISA will have the unintended consequence of actually reducing federal energy efficiency activities and increasing the regulatory burden for those who implement federal energy projects.

The exemptions that are allowable by the rule are on a building by building basis and will, unfortunately, lead to delay and in many cases, resistance in implementing comprehensive retrofit projects in the Federal building stock. As companies that work most closely with government personnel, we have found that energy managers and contracting officers are reticent to seek high level approvals for their projects such as required for exemptions under EISA 433. Such approvals are indication that they are doing something that is out of the norm. In the Coalition's view, we should avoid promulgating rules that will elicit general resistance towards implementing comprehensive retrofit projects in the Federal building stock.

Because ESPC's primary purpose is to reduce energy intensity and increase the use of renewable energy, we would propose that Energy Savings Performance Contracting, authorized by 42 U.S.C. 8287 be specifically exempted from the requirements of the Fossil Fuel Consumption Reduction Rule. As precedent for ESPC exemption we cite the fact that EPSCs:

- Are exempt from other federal statutes and implement regulations, acquisition regulations and competition requirements.
 - 42 U.S.C. 8287 b(1)(A) exemption from FAR regulations
 - DOE Final Implementing Rule: 10 CFR 436 Subpart B
 - Fiscal Year 2011 National Defense Authorization Act (P.L.111-383,Section 828) exempting from government enhanced competition requirements (42 U.S.C. 8287 c(2))
- Already significantly reduce fossil fuel energy consumption in federal facilities
- Are funded by private sector and do not require Federal funding as does, presumably, section 433.
- Are in jeopardy of elimination or restriction because of the added burden of the fossil fuel energy consumption energy reduction rule
- Precede the fossil fuel energy consumption reduction rule

ESPCs are developed for the sole purpose of reducing energy intensity and increase renewable energy at Federal facilities and therefore, are directly responsive to the direction and spirit of the 433 mandate. In fact, the Energy Service Companies are currently working with both GSA and the Department of the Army on taking energy efficiency to the next level and doing deep retrofits. This is a step-by-step process to reach net zero and/or zero fossil fuel use. We are, currently on step one: getting more efficient and developing envelope retrofit techniques that will bring us beyond 50% reductions in energy intensity. There are costs involved in envelope retrofit that cannot necessarily be absorbed in the energy conservation measures bundle for a cost effective efficiency package. Who will pay for those items? This is merely step one followed by control systems (beyond individual buildings), multi-campus combined heat and power systems that run on natural gas and then, eventually, replacement of such fueling with renewable alternatives.

The regulatory burden of adding the Fossil Fuel Energy Consumption Reduction rule is significant and will, in fact, lead to fewer deep retrofits as the a level being sought is more than what is technologically

feasible in retrofit without significant additional costs. ESPCs are a highly used contracting method that support federal agencies to meet the existing mandates for energy intensity reduction, increase in renewable energy use and, as well as the sustainability requirements.

ESPCs and the Energy Service Companies (ESCOs) approved to execute ESPC projects with the Federal government are prequalified, as of December 2008 and therefore precede contemplation of the Fossil Fuel Energy Consumption Reduction Rule. Each approved ESCO spent two year and upwards of a million dollars to be approved under the contracting process. It was a very rigorous process according to the rules of the Federal government. The contracts themselves are quite detailed and carefully crafted to ensure reduced energy use and the implementation of renewable energy, both of which address the direction and spirit of Section 433 of Energy Independence and Security Act (EISA).

ESPC capital construction costs are financed through private sector investment and do not require appropriated funds. This ESCO model that alleviates the requirement for appropriated government funding, should be exempted from the \$2.5 M level in the statute and regulations. The government pays only when it verifies the annual energy savings. Payment comes directly from the avoided energy bill costs on an annual basis.

ESPCs are in a unique position when it comes to implementation of section 433 of EISA. Projects that depend on appropriated dollars could very well consider the implementation of Section 433 an unfunded mandate and therefore not comply. ESPCs are financed and performed by the private sector and therefore cannot claim this same status. Applying the 433 mandate to an ESPC will negatively impact the pay from savings capability of a project. The additional costs will not be the kind that generate energy and cost savings, and therefore will result in termination of the project.

In response to question (4): The reporting that is currently done with the Sustainability Executive Order could detail fossil fuel generated electricity reduction as well as emissions reductions. This would be a way to clearly delineate what agencies and the actions within them, are seriously reducing fossil fuel use and how. It would also provide a clearer view of the correlation between greenhouse gas emissions and certain fossil fuels.

In response to question (7): We are concerned about how the Administration might chose to implement rules around section 433 of EISA. In particular, we would discourage any effort to exempt individual technologies that do not have a path towards achieving such mandates by 2030. We believe that such a technology-by-technology approach would be extremely confusing for Federal energy managers and would reduce sustainability efforts government-wide. Instead, we propose that DOE provide a straightforward, automatic, broad exemption for energy savings performance-based projects at existing Federal buildings.

In addition, we are concerned by 'layering on' regulations that will lead to inaction. Our members, with their vast experience with Federal energy projects and sustainability managers, know well that the relatively risk-averse federal employee will be reticent to enter into energy efficiency retrofits if they cannot achieve the fossil fuel reduction levels as required by Section 433 - at little or no cost. Additionally, these individuals may be reticent to implement such projects if they require certain exclusion approvals in order to proceed. In our view, such resulting inaction would thereby reduce overall energy efficiency gains across the Federal government building stock: a result that is directly at odds with the contemplated Fossil Fuel Energy Generation Consumption Rule.

In response to question (10): The FPCC suggests that the current regulations related to energy efficiency, renewable energy and sustainability be strengthened in lieu of, or in addition to, the Fossil

Fuel-generated Energy Consumption Reduction Rule for Major Renovations of Federal buildings. The FPCC, which supports net zero goals, efficiency and renewable mandates, and the October 2009 sustainability Executive Order (13514), seeks to work with the DOE, Congress and the White House to strengthen these requirements.

In response to question (1): When implementing the Fossil Fuel-Generated Energy Consumption Reduction Rule, the government could implement the rule to include an exemption for performance-based energy savings projects and other such retrofit applications that exceed the \$2.5 Million statute as provided by Congress. The Administration could then plan a supplemental rule to reevaluate such implementation definitions in 2020 based on technological changes which will occur over the next decade.

CONCLUSION:

In closing, the Federal Performance Contracting Coalition applauds the DOE and the President for welcoming the public's recommendation on how best to identify and remove burdensome regulatory requirements at the nation's Federal agencies, including the U.S. DOE. As an industry coalition comprised of the leading energy service companies working with the Federal government, we hope the DOE will take our recommendations and further improve and protect the Federal government's ability to implement comprehensive energy efficiency retrofits at agencies, installations and buildings through performance-based energy savings contracts. For more information on the FPCC, its priorities and member projects, please visit www.federalperformancecontracting.com.