Energy Savings Performance Contracts (ESPCs)
A Different Kind of Contract Animal

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Why ESPCs?

- Congress and the President have encouraged Federal agencies to use private sector financing through ESPCs to achieve their energy efficiency and renewable energy goals
- ESPCs enable energy efficiency and renewable energy improvements with no upfront cost to the Government

What is an ESPC?

- Statutory authority:
  42 U.S.C. §§ 8287 – 8287d

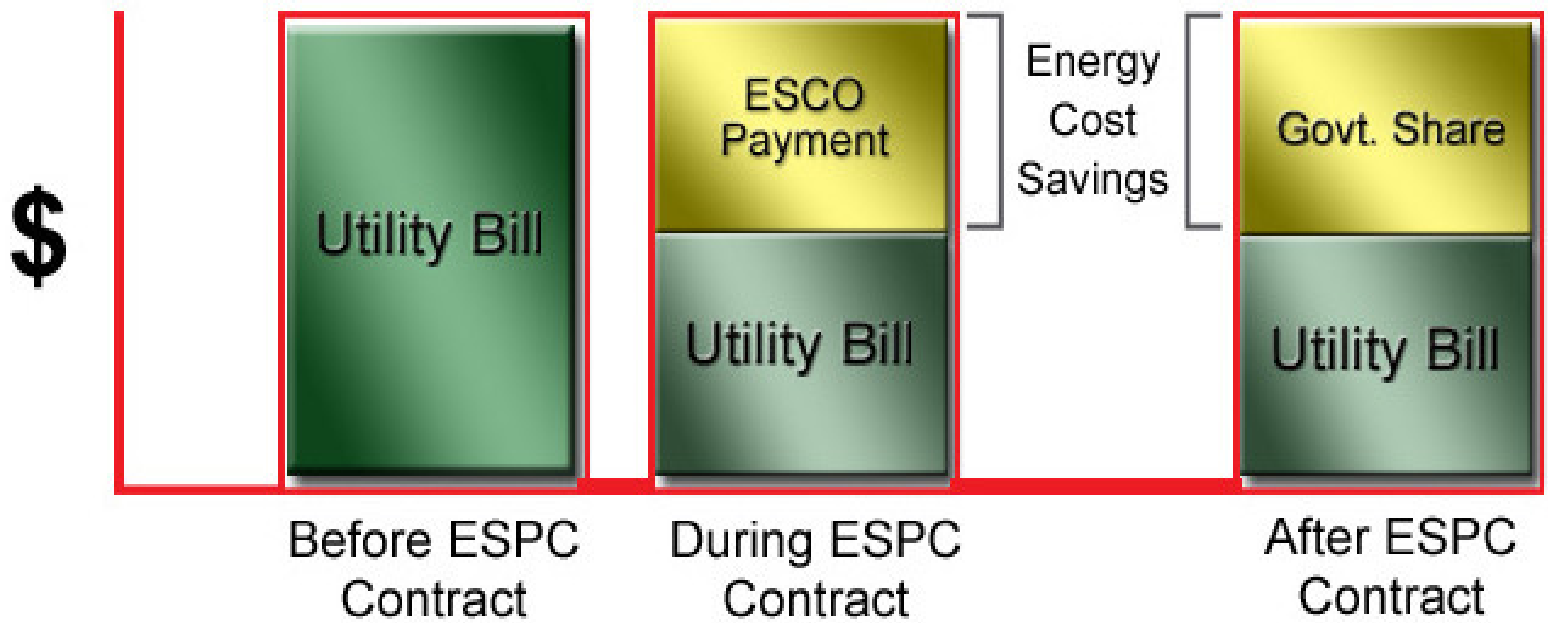
- Implementing regulations:
  10 C.F.R. Part 436, Subpart B
  and takes precedence over general FAR provisions
  10 C.F.R. 436.30

What is an ESPC? (in 50 words or less)

A contract for a term of up to 25 years under which an Energy Services Company (ESCO) designs, acquires, installs, and finances energy and/or water conservation measures for an existing Federally owned building and is repaid by the agency from the resulting energy, water, and related cost savings

Payments to ESCOs

- ESPCS are paid from guaranteed savings
- No increase in Government spending occurs



Origins of ESPCs

- Originally enacted as “shared energy savings” by amendment to the National Energy Conservation Policy Act (Pub. L. No. 99-272, Title VII, April 7, 1986)

- Redesignated as “energy savings performance contracts” and amended by the Energy Policy Act of 1992 (Pub. L. No. 102-486, Title I, Section 155, Oct. 24, 1992)

Elements of ESPCs

- ESPCs are "solely for the purpose of achieving energy savings and benefits ancillary to that purpose"
- ESPCs *shall* provide that the ESCO incurs the costs of implementing all energy savings measures (including at least the energy audits, acquiring and installing equipment, and personnel training)

Elements of ESPCs (cont'd)

- ESPCs may extend for a period not to exceed 25 years
- ESPCs may be implemented on existing Federally owned buildings and facilities
- ESCOs may be paid only from actual energy savings

Elements of ESPCs (cont’d)

- ESCOs *shall* be responsible for maintenance and repair services for any energy related equipment
- “Aggregate annual payments” by an agency to both utilities and ESCOs may not exceed the amount the agency would have paid for utilities without the ESPC during contract years

Elements of ESPCs (cont'd)

- ESPCs *shall* provide for a guarantee of savings to the agency
- Payments to an ESCO may come only from funds appropriated or otherwise made available for the payment of energy, water, or wastewater treatment expenses and related O&M

Evolution of DOE's Super IDIQs

- Any agency may enter into an ESPC directly with an ESCO – "stand alone"
- Because that wasn't happening, DOE competed and awarded its "Super" ESPC Contracts in the late 1990s
- Six Regional IDIQs and Four Technology-Specific IDIQs

Advantages of Super ESPCs

- Can be used for any eligible building or facility within the geographic scope of the contract
- Provide standardized terms and conditions
- Allow agencies to forego separate full and open competition and go directly to project development and delivery/task order
- Allow for site-specific tailoring

Traditional Legal Issues

- Existing buildings and facilities v. new construction
- Federally owned v. leased buildings and facilities
- Renewable energy systems as ECMs
- One-time, lump sum payments

New Flexibilities (EISA 2007)

- Section 512: "[A] Federal agency may use any combination of (i) appropriated funds; and (ii) private financing"

- Section 515: Defines "energy savings" to potentially allow agencies to sell or transfer excess energy generated on-site from renewable energy sources or cogeneration.

Super ESPC Recompete

- In December 2008, DOE completed a full and open competition resulting in the selection of 16 new ESCOs to perform energy savings and renewable energy services on a world-wide basis.

Aspects of "New" Super ESPCs

- Each IDIQ has a maximum ceiling of $5 billion
- No geographic boundary limitations
- All ECMs – conventional and tech-specific – covered under one contract

“New” Super ESPCs (cont’d)

- Greater focus on use of renewable energy conservation technologies
- Greater emphasis on measurement and verification of savings
- Terminology more consistent with the statute and industry practices

ESPC Quick Facts

- More than 460 ESPC projects have been awarded by 19 different Federal agencies in 47 states
- Approximately $2.3 billion has been invested in Federal facilities through ESPCs, saving more than 18 trillion Btu annually

ESPC Quick Facts (cont'd)

- Energy cost savings of $7.1 billion for the Federal Government ($5.7 billion goes to finance project investments). Net savings to the Federal government is $1.4 billion.

Into the Future

- Approximately 35 new ESPC projects were awarded in the last 6 months of 2009 (preceding the 12/31/09 ordering period deadline); and
- Approximately 45 new projects currently in the pipeline under DOE's "new" IDIQs.

Caveats, Contacts and Thanks!

- I'm your legal ESPC contact, but I don't know everything:
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- ESPC Website:
  http://www1.eere.energy.gov/femp/financing/espcs.html