

August 1, 2013

The Honorable Paul Broun  
Chairman  
House Committee on Science,  
Space, and Technology  
Subcommittee on Oversight  
2321 Rayburn House Office Building  
Washington, DC 20515

The Honorable Cynthia Lummis  
Chairman  
House Committee on Science,  
Space, and Technology  
Subcommittee on Energy  
2321 Rayburn House Office Building  
Washington, DC 20515

Chairman Broun and Chairman Lummis,

On behalf of the Federal Performance Contracting Coalition (FPCC), I want to thank you again for extending an invitation to testify before the joint committee hearing held on June 27, 2013.

Enclosed, please find answers to the supplementary questions posed by you and Congressman Peters from California. Should you require additional clarification, do not hesitate to contact me.

Sincerely,



Jennifer Schafer  
Executive Director  
Federal Performance Contracting Coalition

cc: Rep. Dan Maffei  
Ranking Member  
Subcommittee on Oversight

Rep. Eric Swalwell  
Ranking Member  
Subcommittee on Energy

Enclosure: Responses to questions for the record

**FEDERAL PERFORMANCE CONTRACTING COALITION  
JENNIFER SCHAFER, EXECUTIVE DIRECTOR**

**RESPONSES TO QUESTIONS FOR THE RECORD**

**HOUSE COMMITTEE ON SCIENCE, SPACE AND TECHNOLOGY  
SUBCOMMITTEES ON OVERSIGHT AND ENERGY**

**“Green Buildings- An Evaluation of Energy Savings Performance Contracts”**

Responses to questions submitted by Chairman Paul Broun and Chairman Cynthia Lummis

**Question 1)** In 2009, DOE prequalified 16 ESCOs for Super ESPC Contracts of \$5 billion each. When do you think that ESCOs will reach that cap?

- a. Is this about the timeline that was expected when the 2009 contracts were formed?
- b. If one ESCO reaches the cap, will it have to wait for all other ESCOs to do the same before being able to enter into future Super ESPC contracts?

**FPCC Answer:** Historically, federal agency use of performance-based contracting for energy savings has varied annually. Even with the December 2011 Presidential Memorandum for energy savings which calls for \$2B of ESPC and UESC (Utility Energy Service Contracts) over two years, it is difficult to estimate the amount of contracts which could be awarded in a future year or group of years. Federal ESPC use is affected by legislative action, executive action, availability of appropriated funds, expiring contracting authority and/or issuance of a new IDIQ contract. In addition, the long cycle time (up to 24 months) can have a large impact on subsequent years. For example, according to the *DOE IDIQ ESPC Awarded Project Summary*, in FY03 approximately \$531M of ESPC was contracted by federal agencies compared to just \$63M of ESPC in FY04 due to expiring legislative authority for ESPC at the end of 2003. Once ESPC legislative authority was restored by Congress, annual awarded contracts fluctuated greatly:

- \$201M in FY05
- \$404M in FY06
- \$366M in FY07
- \$734M in FY08
- \$1.3B in FY09
- \$1.1B in FY10
- \$916M in FY11
- \$336M in FY12

The FPCC believes that increased use in years 2008 and 2009 was due partly to the expiring DOE ESPC contract at that time which resulted in agencies seeking to award task orders prior to its deadline. A new competition for contractors and award in December 2008 led to the selection of 16 qualified Energy Service Companies (ESCOs) with \$5 B of contracting authority each. Agencies were permitted, however, by the DOE Secretary to utilize the prior ESPC master contract for projects which had been developed prior to the award of the new IDIQ contract; and this in turn contributed to increased utilization of ESPC in years FY09 and FY10.

The onset of a new contract and influx of funds from the American Recovery and Reinvestment Act (ARRA)—which provided an increase in appropriated funds to federal agencies for energy conservation—negatively impacted the use of ESPCs in recent years. The utilization of ESPCs continues to be affected by the need to educate and train agency contracting officers, which takes time, and an abundance of appropriated dollars, which tend to reduce an agency’s need for private sector financing.

We believe this has been reflected during recent years as there has been a downturn in the number of projects awarded under the DOE IDIQ contract. For example, approximately 23 projects were awarded in FY09, 37 in FY10, seven in FY11 and nine projects in FY12.

Because of the above, it is difficult to anticipate when each ESCO will fully contract their DOE ESPC IDIQ authority. However, it is clear that even under the most aggressive scenarios, it is unlikely that the total contracting authority for the contract of \$80 B will fully utilized. A 2011 Oak Ridge National Laboratory Study assumed that if all of the authority were to be used, it would have to include expansion of ESPCs beyond their current authorization and into new markets. Energy audits performed by the Federal government indicate approximately \$10B in opportunity over the next several years. Therefore, at this potential rate of utilization we do not expect that there is danger of reaching the limit of the existing contracting authority by the expiration of the current DOE ESPC IDIQ contract.

- a. The DOE ESPC master IDIQ contract has a period of performance of five years and has two option periods of three years each. Therefore the IDIQ contract, should DOE exercise its two options, could have a total duration of eleven years beginning on December 17, 2008 and ending on December 16, 2019. Contractors may work during this period towards contracting up to \$5B of ESPCs.
- b. Each contractor has been provided a contracting authority of \$5B under the DOE IDIQ contract. In theory and considering the function of multiple-award IDIQ type of contracts, should an ESCO fully meet its IDIQ contracting cap prior to the conclusion of the IDIQ’s duration (per DOE’s exercise of its two options), it would need to wait for the next competitive selection process for the next master IDIQ contract to be provided additional contracting authority.

**Question 2)** A 2005 GAO report raised concerns about the limited number of financiers available to ESCOs and the resulting lack of competitive financing available to agencies. What is your reaction to the concern?

- a. Is there a set group of financial institutions that invest in ESPCs? If so, who are they?
- b. Are there certain financial institutions that ESCOs would prefer to work with in comparison to others?

**FPCC Answer:** The FPCC believes that the matters referenced in the 2005 GAO Report have been addressed and resolved through the continued development of the ESPC program. The GAO report specifically focused on contracts federal agencies undertook in fiscal years 1999 through 2003. The FPCC believes that the federal practices for utilizing ESPC is significantly more mature since the early iterations of the program and has evolved over the past decade. Regarding the matter raised by GAO regarding a lack of competitive financing, this matter was resolved following a DOE contract modification in 2004 which required ESCOs to obtain competitive financing offers for Super ESPC delivery orders. According to an August 28, 2007, DOE news memo titled “*Lower Interest Rates Reduce Average Super ESPC Payments by Agencies*” this requirement resulted in lenders’ premiums on ESPC projects dropping significantly. DOE reports that during FY1998 through FY 2004 interest rates averaged 7.63 percent, and following the implementation of competitive financing from FY2005-April 2007,

interest rates averaged 5.96 percent. The FPCC has included as an attachment to this submission the referenced 2007 DOE FEMP review of implementing competitive financing.

Today, the current DOE IDIQ contract for federal ESPCs includes in its recitals, Section H.7 titled “Requirements for Competitive Financing Acquisition for Task Orders” which requires within Section H.7.2 A. that the contractor shall “solicit and select financing offers through a competitive selection process.” The FPCC has included as an attachment to this submission page 47 of the ESPC IDIQ Contract which outlines such competitive financing requirements.

a. Yes, there are several companies currently active in originating the financing of Energy Savings Performance Contracts. They include, among others:

- Banc of America Public Capital Corp.
- Bostonia Partners LLC
- Dominion Federal
- FSM Leasing
- Green Campus Partners
- Hannon Armstrong Sustainable Infrastructure Capital, Inc.
- United Financial of Illinois, Inc.

Many of these companies also specialize in placing ESPC financing opportunities with institutional lenders such as insurance companies and large money center banks. Banc of America and Hannon Armstrong both originate and invest in ESPCs. It is our understanding that the predominant lenders to ESPCs are insurance companies as they typically lend for longer financing terms compared to banks. ESPCs are by design longer-term contracts which may extend up to 25 years.

As current Federal ESPC contracts require ESCOs to competitively solicit financing proposals from multiple financial institutions and to submit a Selection Memorandum to the Contracting Officer (CO) detailing the bids and the rationale for the ESCO’s lender selection, it is the FPCC’s understanding that ESCOs, with customer approval, base their selection on the lender who provides the best overall value to the project.

**Question 3)** Are contract re-negotiations restricted by contract language? For example, if an ESPC is bundled and sold to a secondary source, could an agency potentially lose the ability to renegotiate to take advantage of a lower interest rate?

a. Would FPCC support a modification to the program to allow ESPC re-negotiations for lower interest rates at any and all times?

**FPCC Answer:** When considering the refinancing or re-negotiation of an ESPC, it is important to recognize that the financing arrangement of an ESPC is between the ESCO and a third-party lender, and that for financing *the Government is not a contractual party*. Although a renegotiation could occur between the ESCO and its financier, a federal agency may not direct an ESCO to refinance or modify the ESCO’s debt agreement without the consenting agreement of its financier. Agencies are encouraged to explore the potential for refinancing, and ESCOs have taken the initiative to work with their lenders to provide opportunities for refinancing when it is feasible. In cases where it is contractually feasible, this could benefit the Government client, provide opportunities to reduce the contract payment term, and/or provide needed additional energy conservation measures.

In addition, contract re-negotiations can be restricted by contract terms and conditions between the Energy Services Companies (ESCOs) and their lenders. Pursuant to the Assignment of Claims Act of 1940, and as prescribed in the Federal Acquisition Regulation (FAR) Subpart 32.8—Assignment of Claims, whereby, a contractor may assign monies due, or to become due under a contract, to a bank, trust company, or other financing institution. Per the Assignment of Claims, ESPCs are financed by the contractor (ESCO) assigning to a third party lender its rights to receive the Government’s payments. Once the payments are assigned to a lender, the contractor gives up its rights to such payments. Typically, ESCOs are required to get their lender’s prior written consent for any renegotiations that would alter the amount or timing of the government’s payments under an ESPC, but are permitted to re-negotiate scope, administrative, or technical matters that won’t impact the Government’s payments without their lender’s consent. Given that these contracts have a third-party financing component, and given that those agreements are pursuant to the Assignment of Claims Act, the financiers reserve the ability with these financing agreements—as with many financial instruments—to offer secondary investment opportunities in whole or in part. These general financial practices may affect a financial instrument’s ability to be refinanced.

The U.S. Department of Energy, Federal Energy Management Program (FEMP) has issued official guidance regarding refinancing of ESPCs, titled “*Guidance Regarding Refinancing, Restructuring, or Modifying Loan Agreements Entered into by an Energy Services Company Under a Federal Energy Savings Performance Contract*”. It further clarifies that refinancing is not a straightforward undertaking and that the contractual relationship for financing is between the ESCO and the financial institution. The FPCC would suggest a discussion with one or more financiers for additional information. .

- a. Regarding whether the FPCC would support a modification to the program (i.e. contract) to allow ESPC renegotiation for lower rates at any and all times, the FPCC hopes that after the Committee has reviewed the unique nature of financing these types of projects as outlined in this submission, that the Committee will share in our view that such a modification to the ESPC program is not favorable.

The FPCC believes that such a restriction on a lender to provide refinancing at any and all times during the life of the contract would actually result in fewer investors and lenders interested in financing these types of contracts, and/or much higher rates due to the additional risk to the financial institution. This would dissuade financing for ESPCs and ultimately result in less competitive financing (because of the availability of fewer lenders). ESPC investors value the long-term fixed-price repayment nature of these types of projects and their associated energy savings guarantee. We believe that such a requirement to require refinancing at any and all times during the life of the contract alters the inherent attributes which currently attract third-party lenders to ESPCs.

The FPCC believes this would also result in financiers offering shorter financing terms and that this would result in less comprehensive projects. For some projects, it would affect their viability all together as ESPCs rely on long-term amortization of annual energy savings to pay back the capital investment. Additionally, the FPCC believes that such a requirement would, because of the risk, immediately result in lenders proposing higher upfront financing costs to the Government.

**Question 4)** What is the FPCC’s position on the 2007 law requiring an end to fossil fuel use in federal buildings by 2030? How much, if at all, does this affect your member companies, particularly for those who may be in contracts with the government that expire after 2030?

**FPCC Answer:** Regarding the referenced section, the FPCC is specifically concerned by the part of Section 433 of EISA pertaining to major renovations of existing federal buildings. The FPCC does not take a position on the requirements regarding the design of new buildings. As enacted, this Section requires that if a building undergoes a major renovation which exceeds \$2.5M, the building will need to achieve the same fossil-fuel reductions as set forth in the Section for new buildings.

The FPCC believes that the \$2.5M threshold would be dissuade building and energy managers from implementing an energy efficiency retrofit, as a comprehensive retrofit would in most cases exceed \$2.5M. An ESPC financing vehicle alone is not designed to be able to fully enable a building to achieve these requirements under Section 433. There are certain restrictions regarding on-site generation of energy, and given the cash flow requirements of financing an ESPC (considering ESPCs have to generate energy savings) it is unlikely an ESPC could afford to finance the type of on-site renewable energy which would be required to support the Section's requirements if it were triggered by implementing an ESPC.

Therefore, the FPCC is concerned that this Section may prevent an agency from seeking to do energy efficiency work on specific buildings or within a group of buildings (as ESPCs typically bundle work within multiple buildings) if they cannot meet the 433 mandate. Additionally, given that cost is not deemed a prevailing factor for agencies to opt-out of the Section's requirements if triggered, the FPCC believes in today's constrained budget environment that building and energy managers may forego needed-improvements within existing buildings to avoid triggering the new requirements. The FPCC also believes the Section would remove an agency's ability to install highly-efficient Combined Heat and Power (CHP) systems or other high efficiency natural gas equipment. Several FPCC member ESCOs have installed such systems throughout the federal government and have yielded significant energy reductions. Therefore, the FPCC believes this Section if implemented as it pertains to existing federal buildings has the potential to discourage deploying energy efficiency improvements in existing buildings.

**Question 5)** On one hand, your testimony states that since 2007, with energy audits conducted of half of all federal facilities, approximately \$9 billion worth of energy conservation measures have been identified with relatively short payback times. On the other hand, you imply federal agencies may fall short of meeting the President's goal from a 2011 memo of entering into \$2 billion worth of performance contracts by the end of 2013. What are some of the challenges facing agencies in their attempts to meet the President's target?

**FPCC Answer:** The FPCC commends the White House and Congressional advocates for supporting the 2011 Presidential Memo requiring agencies to enter into \$2B of performance-based contracts for energy savings in two years. This commitment has reinvigorated agency utilization of ESPC. The FPCC believes that even if the target is not fully met by its deadline, the program has been a successful and commendable initiative across the federal government. Prior to such a directive, agencies have not been required through legislative or Administrative action to achieve a certain benchmark regarding utilization of ESPC.

The FPCC believes that broader programmatic challenges still face agencies, primarily related to project award cycle time and varying interpretations of ESPC-related statutes by different agencies. ESPCs by nature vary greatly from traditional types of procurements for goods and services, and take a longer time to develop and procure. Some agencies require multiple types of internal approvals and additional processes outside of the DOE IDIQ requirements, and this typically results in excessive delays which could cause an ESPC to be delayed in excess of 6-12 months. In this case, it may take an agency between 24-36 months to identify, develop, award and start construction on an ESPC.

For this reason, the White House has worked closely with the Office of Management and Budget (OMB) and the Department of Energy Federal Energy Management Program (FEMP) to monitor agencies' progress towards meeting their individual commitments for the President's goal. Still, some agencies

approach the ESPC contracting process and timeline differently. This affects the project award cycle time from the period of the Notice of Opportunity (NOO) to the Task Order (TO) award, and varying interpretations of the needed process can cause excessive delays. Excessive delays can jeopardize an agency's ability to take advantage of lower interest rates and ultimately cause an agency to unnecessarily continue to pay more for their energy and water each day an ESPC is delayed.

Currently, FEMP is examining ways in which it can help agencies streamline this process and reduce the project cycle time across agencies. We are also working to try to get agencies that have not been heavily engaged in ESPCs to step up. The FPCC is hopeful that projects identified and started under the 2011 memorandum which do not meet the deadline at the end of this year, will continue through the development cycle to be awarded in 2014. Regarding the energy conservation measures identified through energy audits since 2007, the FPCC believes there are an abundance of measures which can still be implemented through ESPCs. This is why the FPCC has been advocating for Congress or the White House to legislate or issue a second type of performance contracting goal so that agencies will continue seeking to utilize ESPCs and UESCs.

**Question 6)** One of your suggestions in your written testimony to improve the ESPC process is for clarification from the Administration on "what is allowable under an ESPC." Will you provide some examples of what are and are not allowable under an ESPC?

a. Are there any other ways that you can think of to improve the current ESPC process?

**FPCC Answer:** In recent years, it has come to the FPCC's attention that there are varying interpretations across federal agencies of the types of energy conservation measures allowable under an ESPC. While the FPCC believes that the ESPC authorizing statute, legislative language, and identified permissible ECMs within the IDIQ master contract, some agencies or departments may question the applicability of a particular ECM. The FPCC believes this may be attributable in large part to the rotation and turnover of federal professionals throughout the government, as new individuals may have varying interpretations of existing statute or processes for ESPCs compared to their prior government counterpart in that same position.

The Congress has the ability to clarify what is allowable under and ESPC; however, the Congressional Budget Office will provide a score for any legislation that might increase the use of this private sector funding mechanism. Regarding what is allowable, various agencies, OMB and/or others have questioned the ability to do Federal data center consolidations under an ESPC even though the implement regulations and statute would indicate allowability. Renewable energy is accepted by some agencies and not others, although there is a DOE memo that clearly allows renewables under an ESPC. The Energy Independence and Security Act section 515 allowed the transfer of energy generated on site to others but this has not been allowable under an EPSC. Often, what is and is not allowable under an ESPC is simply left to the discretion of legal counsels, contracting personnel, and in some cases, personal opinions.

### **Responses to questions submitted by Rep. Scott Peters (D-CA)**

**Question 1)** In what specific areas do the goals of energy efficiency and resiliency dovetail? Could an ESPC be used to make building upgrades that both save energy and increase the resiliency of building infrastructure and critical infrastructure? For example, when you think about an ESPC for a federal data center, would the improvements made also improve the data center's ability to withstand extreme weather events?

**FPCC Answer:** ESPCs do represent an opportunity to integrate energy efficiency and resiliency in projects that streamline and modernize facility energy and even IT infrastructure.. Older equipment is vulnerable to extreme weather events, especially if it is not adequately protected. Fault-protection from extreme-weather events is not unique to an ESPC, but Agencies seeking to improve the resiliency of their critical infrastructure can manage the ESPC project development process in a manner that serves the purposes disaster recovery and continuity of operations (COOP) planning. Resiliency is built into the project development process of any ESPC that involves mission critical infrastructure, and is a substantial benefit of projects that have included technologies such as efficient backup power, on-site renewable power generation, combined heat and power systems etc.

**Question 2)** What elements are already in place for ESPCs to incorporate resiliency goals and recommendations so that ESPCs can fully incorporate resiliency as part of the audit or proposed plan?

**FPCC Answer:** For any ESPC, it is important for the government to communicate its project objectives of any end-state solution at the beginning of project development and then partner together with the selected ESCO to customize any proposed improvements in a manner that both reduces energy consumption and serves the key environmental and mission priorities of the Agency, to include resiliency and energy security.

In addition to the actual infrastructure improvements directly related to supporting the resiliency and reliability of building systems, it is import to note that unlike appropriated projects, the ESPC program requires the provision of critical services such as measurement and verification and operations and maintenance, to ensure proper system operation and long term care of the installed systems. By verifying system efficiencies and realized savings, as well as providing long term operations, maintenance, repair and replacement, the ESPC program guarantees that improvements designed to protect critical building systems will remain in good working order throughout the contract term and beyond. All costs associated with these services are paid from the savings generated by the project, reducing the need for additional budgeted expenses.