

**U.S. House of Representatives  
Committee on Science, Space, and Technology  
Subcommittees on Oversight & Energy**

**HEARING CHARTER**

*Green Buildings – An Evaluation of Energy Savings Performance Contracts*

Thursday, June 27, 2013  
10:00 a.m. – 12:00 p.m.  
2318 Rayburn House Office Building

**Purpose**

On June 27, 2013, the Subcommittees on Oversight and Energy will hold a hearing titled, “Green Buildings – An Evaluation of Energy Savings Performance Contracts.” The hearing will evaluate the benefits and shortfalls of Energy Savings Performance Contracts (ESPCs). Federal agencies, such as the National Aeronautics and Space Administration (NASA) and U.S. Department of Energy (DOE), engage in ESPCs with energy service companies (ESCOs) in order to achieve energy efficiency improvements at government-owned facilities. The hearing will also explore how frequently labs, centers and other facilities in the Committee’s jurisdiction use these contracts, to better understand their advantages and limitations.

**Witnesses**

- Dr. Kathleen Hogan, Deputy Assistant Secretary for Energy Efficiency, U.S. Department of Energy
- Dr. Woodrow Whitlow, Jr., Associate Administrator, Mission Support Directorate, National Aeronautics and Space Administration
- Ms. Jennifer Schafer-Soderman, Executive Director, Federal Performance Contracting Coalition
- Mr. Ron King, President Advisor, National Insulation Association

**Background**

Congress authorized ESPCs in 1986 through amendments to the National Energy Conservation Policy Act (NECPA) of 1978.<sup>1</sup> In doing so, it introduced a mutually beneficial performance-based contracting mechanism to encourage private sector involvement in increasing federal building energy efficiency with limited exposure to taxpayers.

Energy Savings Performance Contracts help agencies upgrade buildings to achieve greater energy efficiency and perform major renovations without Congressional appropriations or upfront capital costs to the federal agency. ESPCs “cover a wide range of energy

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<sup>1</sup> 42 U.S.C. § 8287, Pub. L. No. 95-619, Title VIII, § 801, as added Pub. L. No. 99-272, Title VII, § 7201(a) (Apr. 7, 1986).

conservation measures (ECMs)<sup>2</sup> that can include lighting improvements; heating, ventilating, and air conditioning improvements; energy efficient windows and doors; reduced flow plumbing fixtures; updated HVAC equipment; and updated and improved insulation, among others.

The ESPC process has changed in many ways since its creation in 1986. Agencies were initially hesitant to engage in ESPCs because negotiating such contracts was a technical and difficult process. In 1998, DOE's Federal Energy Management Program (FEMP), which oversees the ESPC program, created umbrella contracts known as "Super ESPCs" to simplify and reduce the negotiation process. FEMP-implemented Super ESPCs are:

"indefinite-delivery, indefinite-quantity contracts subject to specific rules that standardize the negotiation process. Agencies can use the Super ESPC process to take advantage of some pre-negotiated terms and conditions. These 'umbrella' contracts are competitively awarded to preapproved energy savings companies that have demonstrated their ability to provide energy projects to federal customers."<sup>3</sup>

Today, there are 16 such ESCOs pre-approved by DOE.<sup>4</sup>

During a typical ESPC project, an agency completes a number of steps prior to awarding a contract to an ESCO. The ESCO then conducts a comprehensive energy audit of the federal facility and identifies improvements to save energy. In consultation with the federal agency, the ESCO designs and constructs a project that meets the agency's needs and arranges the necessary funding. The ESCO guarantees that facility modifications will generate cost savings sufficient to pay back its upfront investment in the project over the term of the contract. After the contract ends, all additional cost savings belong to the agency.<sup>5</sup>

The ESCO receives payment from the federal agency out of the energy savings resulting from energy efficiency improvements. By law, the federal agency cannot pay more as a result of its involvement with the ESPC than it previously paid for its energy bills. Agencies may use appropriated funds to supplement ESPCs, which reduce the amount to be funded by ESCOs. Because financing rates are typically higher through ESCOs than direct federal government rates, it is cheaper for agencies to pay off these contracts expeditiously.

## **Laws and Regulations**

There have been several revisions to the laws and regulations surrounding ESPCs that have shaped the program into what it is today. The Energy Policy Act of 1992 extended agency authority relative to ESPCs by authorizing federal agencies to execute guaranteed-savings

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<sup>2</sup> Federal Energy Management Program Overview, "Energy Savings Performance Contracts: Frequently Asked Questions," available at: [http://www1.eere.energy.gov/femp/pdfs/espc\\_faqs.pdf](http://www1.eere.energy.gov/femp/pdfs/espc_faqs.pdf).

<sup>3</sup> Jeff Belkin and Lydia Jones, "Energy Savings Performance Contracts: A Critical Look," Government Contract, June 2, 2008, available at: [http://www.alston.com/files/docs/govcom\\_energy\\_savings.pdf](http://www.alston.com/files/docs/govcom_energy_savings.pdf); (hereinafter Government Contract Article).

<sup>4</sup> DOE ESCOs, available at: [http://www1.eere.energy.gov/femp/financing/espcs\\_doeescos.html](http://www1.eere.energy.gov/femp/financing/espcs_doeescos.html).

<sup>5</sup> DOE Federal Energy Management Program website, "Energy Savings Performance Contracts," available at: <http://www1.eere.energy.gov/femp/financing/espcs.html>.

ESPCs. The act also required ESCOs to not increase costs, required measurement and verification of cost savings, and limited the maximum contract term to 25 years.<sup>6</sup> The Energy Policy Act of 2005 “extended agency authority to enter into ESPCs until Sept. 30, 2016.”<sup>7</sup> Most recently, the Energy Independence and Security Act of 2007 made the federal ESPC authority permanent, authorized the use of any combination of appropriated funds and private financing in federal ESPCs, and called for a study of non-building applications of ESPCs.<sup>8</sup>

During the 1990s, executive orders were issued to require federal agencies to significantly reduce their consumption of energy in federal facilities. For example, Executive Order 13123, issued in 1999, required agencies to reduce energy consumption by 35 percent by 2010 from a 1985 baseline.<sup>9</sup> Further, in January 2007, Executive Order 13423 required agencies to “improve energy efficiency through reduction of energy use by (1) 3 percent annually through the end of fiscal year 2015, or (2) 30 percent by the end of fiscal year 2015, relative to the agency’s energy use in fiscal year 2003.”<sup>10</sup>

The Obama Administration has encouraged greater use of ESPCs by agencies through the issuance of an executive order in 2009 that established energy reduction goals by increasing agency use of renewable energy projects.<sup>11</sup> Additionally, in December 2011, the President issued a memorandum committing the federal government to enter into a combined \$2 billion in ESPCs and utility energy savings contracts (UESCs) by the end of 2013.<sup>12</sup>

## **ESPC Caucus**

In December 2012, Reps. Cory Gardner (R-CO) and Peter Welch (D-VT) formed a bipartisan caucus to help promote ESPC use in government buildings across the country. At the time of its announcement, the Caucus consisted of ten Members and its founders hoped that the “formation of their caucus can move the process [of taking advantage of energy savings through the implementation of ESPCs] along a bit faster by getting executive branch departments to evaluate their own facilities and identify potential savings through ESPCs, Utility Energy Service Contracts (UESCs) and performance contracts that promote energy efficiency at the federal, state, and local level.”<sup>13</sup>

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<sup>6</sup> DOE Federal Energy Management Program website, “Energy Savings Performance Contracts Laws and Regulations,” available at: [http://www1.eere.energy.gov/femp/financing/espcs\\_regulations.html](http://www1.eere.energy.gov/femp/financing/espcs_regulations.html); (hereinafter DOE FEMP Website).

<sup>7</sup> Government Contract Article, *supra*, note 3.

<sup>8</sup> DOE FEMP Website, *supra*, note 6.

<sup>9</sup> GAO Report, “Performance Contracts Offer Benefits, but Vigilance Is Needed to Protect Government Interests,” GAO-05-340, June 2005, available at: <http://www.gao.gov/new.items/d05340.pdf>; (hereinafter GAO Report).

<sup>10</sup> NASA IG Audit Report, “NASA’s Management of Energy Savings Contracts,” Report No. IG-13-014, April 8, 2013, available at: <http://oig.nasa.gov/audits/reports/FY13/IG-13-014.pdf>; (hereinafter NASA IG Report).

<sup>11</sup> Presidential Executive Order, “Federal Leadership in Environmental, Energy, and Economic Performance,” Oct. 5, 2009, available at: [http://www.whitehouse.gov/assets/documents/2009fedleader\\_eo\\_rel.pdf](http://www.whitehouse.gov/assets/documents/2009fedleader_eo_rel.pdf).

<sup>12</sup> Presidential Memorandum, “Implementation of Energy Savings Projects and Performance-Based Contracting for Energy Savings,” Dec. 2, 2011, available at: <http://www.whitehouse.gov/the-press-office/2011/12/02/presidential-memorandum-implementation-energy-savings-projects-and-perfo>.

<sup>13</sup> Rep. Gardner Press Release, “Gardner, Welch Announce Creation of Bipartisan Energy Efficiency Caucus,” Dec. 5, 2012, available at: <https://gardner.house.gov/press-release/gardner-welch-announce-creation-bipartisan-energy-efficiency-caucus>.

## **Issues**

### **Reports**

A 2005 GAO report,<sup>14</sup> the most recent one on this subject, and 2013 NASA IG report,<sup>15</sup> both identified concerns about the ESPC program. Concerns in the GAO report include:

- lack of a comprehensive database on federal agencies' use of ESPCs;
- inconclusive data on savings generated from ESPCs;
- complexity and costs of ESPCs sometimes resulted in agencies relying on ESCOs for guidance, raising questions about whether the agency negotiated the best possible contract;
- limited number of financiers available to ESCOs raise questions about competition and whether ESCOs spend enough time trying to acquire the best financing rate for agencies in ESPCs;
- whether or not Super ESPCs should be put out for competition more frequently.

The NASA IG report focused on contracts at Johnson Space Center (Johnson) and Ames Research Center (Ames) “in an effort to provide ‘lessons learned’ for contracts underway or planned at other Centers.”<sup>16</sup> Concerns identified in the NASA IG Report include:

- NASA should improve guidance and training for NASA employees regarding ESPCs;
- Johnson did not require the ESCO to submit annual reports verifying that the energy conservation measures continue to generate savings;
- Johnson did not adjust the contract for changed circumstances that affected energy savings generated by conservation measures;
- Johnson failed to incorporate cost savings measures to the contract modifications for additional work.

It should be noted that the GAO report is eight years old and the ESPC program has changed in the interim. Similarly, some of the concerns raised in the NASA IG report were in regard to NASA's first contracts, at a time when ESPC requirements differed than today.

### **Use of appropriated funds**

The Energy Independence and Security Act of 2007 authorized the use of any combination of appropriated funds and private financing in ESPCs. While this helps agencies reduce the amount that has to be funded by ESCOs, therefore helping to lower payments and potentially the duration of the contracts as well, it dilutes the ‘budget neutral’ principle of these innovative contracts. According to DOE, 167 of 281 projects across the federal government utilized some level of appropriations for a total of \$357.6 million, representing 13 percent of the total project investment of \$2.72 billion.

### **Budget Scoring**

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<sup>14</sup> GAO Report, *supra*, note 9.

<sup>15</sup> NASA IG Report, *supra*, note 10.

<sup>16</sup> *Ibid.*

Currently, ESPCs are not “scored” upfront in an agency’s budget at the time the contract is finalized. However, the “Congressional Budget Office believes that the obligation to make payments for the energy-efficiency improvements and the financing costs is incurred when the government signs the ESPC...[and] that the budget reflect this commitment as a new obligation at the time of signing.”<sup>17</sup> On the other hand, the Office of Management and Budget treats the scoring issue differently as it “includes the costs of ESPCs in the budget on an annual basis as they are incurred.”<sup>18</sup>

## Legislation

Although there is general, bipartisan support for ESPCs, legislation to modify current ESPC law has stalled due to CBO scoring concerns. Senators Jeanne Shaheen (D-NH) and Rob Portman (R-OH) introduced legislation<sup>19</sup> containing a provision that would authorize the use of ESPCs to upgrade vehicle fleets to run on alternative fuels or electricity. The CBO scored that specific provision at \$350 million.<sup>20</sup>

In the House, Representatives Cory Gardner and Peter Welch have considered introducing energy efficiency legislation intended to expand the use of ESPCs at federal agencies, but CBO scoring has raised concerns.<sup>21</sup>

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<sup>17</sup> GAO Report, *supra*, note 9.

<sup>18</sup> *Ibid.*

<sup>19</sup> S.761, “Energy Savings and Industrial Competitiveness Act of 2013,” available at: <http://www.govtrack.us/congress/bills/113/s761/text>.

<sup>20</sup> Nick Juliano, “Energy Efficiency: CBO Continues to Bedevil Efficiency Advocates,” *E&E News*, June 20, 2013, available at: <http://www.eenews.net/eedaily/stories/1059983172/search?keyword=juliano>.

<sup>21</sup> *Ibid.*