Construction Briefings

WEST®

October 2011

practical tight-knit briefings including action guidelines on construction contract topics

In brief...

About the Author...

Aaron P. Silberman is a shareholder at Rogers Joseph O'Donnell in San Francisco, California, where he specializes in government contracts and construction law.

THE FUTURE IS BRIGHT FOR ENERGY SAVINGS PERFORMANCE CONTRACTS

By Aaron P. Silberman

I. INTRODUCTION

The federal Government annually incurs billions of dollars in energy and water costs. Recent statutory mandates compel Government agencies to conserve energy and water to reduce these costs. While the Government has various measures available to accomplish this, many of them would be prohibitively expensive if appropriated funds were to be used. Many agencies are increasingly resolving this dilemma by using Energy Savings Performance Contracts (ESPCs). The use of ESPCs by state and local governments' as well as by commercial owners is also growing.

ESPCs are creatures of statute and regulation. They enable the Government to obtain the benefit of energy and water saving measures through private investment. The Government only pays the contractor, or Energy Savings Company (ESCO), to the extent that promised savings are realized. So, what are the downsides? What role are ESPCs likely to play in the Government's future energy and water savings efforts? While it does not take ESP to see that the future of ESPCs is quite bright, these contracts also pose many challenges—some unusual or unique—that may lead to disputes between project participants, some of which are discussed herein.

II. WHAT ARE ESPCS?

ESPCs are a special type of contract, under which the Government hires an energy savings contractor (ESCO) to perform a "Detailed Energy Survey" that identifies areas in which a Government facility can reduce its energy and/or water usage and cost and, based on that survey, design, procure, construct, install,

and arrange financing for energy/water conservation measures (ECMs). Common examples of ECMs include energy-efficient windows and doors, improved insulation, automated controls (e.g., for lights and thermostats), reduced flow plumbing fixtures, updated HVAC equipment, and even on-site energy generation (e.g., solar, photovoltaic and geothermal).

ECMs may either be self-funded by the ESCO or financed by a third party under a separate financing agreement (either through separate construction and operations loans or through escrow financing). Until recently, a defining characteristic of ESPC projects was that they were never financed by the Government,[1] but the Energy Independence and Security Act of 2007 (EISA) authorized mixed-funded ESPCs under which ESCOs are paid in part with appropriated funds.[2] For the nonappropriated portion of an ESPC, the ESCO provides in its proposal to the Government a Certified Selection Memorandum and Financing Offer, describing how it and/or a third party will provide financing for the project.

Under the National Energy Conservation Policy Act of 1978 (NECPA), the ESPC must specify cost savings expected as a result of the ECMs, and the ESCO must guarantee those savings as a term of the ESPC.[3] The NECPA defines "energy savings" as a reduction in the agency's cost of energy as compared to a base cost established through a methodology set forth in the contract.[4] The expectation is that the ECMs implemented by the ESCO will lower the agency's utility bills so the agency will spend less appropriated funds on utilities after the construction, thus freeing up those funds for other uses.[5]

Unless it is mixed-funded, the ESPC does not obligate the Government to commit any appropriated funds or to pay any of the project's capital costs up front. Rather, the ESPC provides that the contracting agency will pay the ESCO a specified share of the energy cost savings guaranteed under the ESPC.[6] Usually, the ESPC provides that the Government will pay the ESCO an "annual-in-advance" payment at the start of each year in the amount of the ESCO's share of the guaranteed savings for that year. The ESCO in turn uses these payments for the project financing (i.e., debt service) and for funding any performance period services, such as operations and maintenance (O&M), repair and replacement (R&R), measurement and verification (M&V), and training.

ESPCs are long-term contracts, lasting up to a maximum of 25 years.[7] While they may be shorter, agencies may not establish policies to limit ESPC projects to less than the maximum 25-year term.[8] After the contract ends, all subsequent savings accrue to the Government.

The NECPA requires that ESPCs provide that, at least once per year, the ESCO will submit an M&V report to the agency showing whether the guaranteed cost savings for the year have been realized. If such cost savings have not been attained, then the ESCO is required to pay the difference to the Government. Moreover, the aggregate annual amount of agency payments to the ESCO and for utilities cannot exceed the amount the agency would have paid for utilities without an ESPC.[9]

Construction *Briefings*

This publication was created to provide you with accurate and authoritative information concerning the subject matter covered; however, this publication was not necessarily prepared by persons licensed to practice law in a particular jurisdiction. The publisher is not engaged in rendering legal or other professional advice and this publication is not a substitute for the advice of an attorney. If you require legal or other expert advice, you should seek the services of a competent attorney or other professional.

Construction *Briefings* (USPS 466-830) is issued monthly, 13 times a year with two issues in January; published and copyrighted 2011 by Thomson Reuters • 601 Opperman Drive, P.O. Box 64526 • St. Paul, MN 55164-0526 ■ http://www.west.thomson.com ■ (ISSN 0162-3176) ■ For subscription information: call (800) 221–9428, or write West, Credit Ordering Processing • 620 Opperman Drive, P.O. Box 64833 • St. Paul, MN 55164-9753 ■ Periodical Postage Paid at St. Paul, MN ■ Postmaster: Send address changes to Construction Briefings • 610 Opperman Drive • P.O. Box 64526 • St. Paul, MN 55164-0526.

Federal Government ESPCs are regulated by the Federal Acquisition Regulation ("FAR")[10] and Department of Energy ("DoE") regulations.[11] DoE regulations trump any inconsistent FAR provisions. The DoE has established the Federal Energy Management Program ("FEMP"), which has issued qualified contractors lists, implementation procedures, standard terms and conditions, and conditions of payment.[12]

The DoE and other Government agencies, including the Army and Air Force, have awarded indefinite-delivery, indefinite quantity ("IDIQ") ESPCs, dubbed "Super-ESPCs."[13] Like other Government IDIQ contracts, Super ESPCs allow agencies to award delivery orders without a full-blown contract competition, and they establish general terms and conditions that apply to all orders issued under them.[14] In December 2008, DoE awarded 16 Super ESPCs for up to $80 billion in projects at federal facilities. As with traditional ESPCs, many states have also authorized use of Super ESPCs.

Prior to 2007, agencies got to keep only 50% of the measured energy savings they realized from ESPCs (after paying the ESCO) to credit appropriations that fund energy and water conservation activities at the agency's facilities. Agencies were required to transfer an amount equal to the remaining 50% of the agency's savings to the General Fund of the Treasury. Section 516 of EISA changed that in 2007, allowing agencies to retain 100% of savings on site. The savings retained by the agency remains available to it until expended, and those funds are available for "additional specific energy efficiency or water conservation projects or activities, including improvements and retrofits, facility surveys, additional or improved utility metering, and employee training and awareness programs."[15]

III. ESPC CONTRACTS: A BRIEF HISTORY

The use of ESPCs by the Government began in 1986 as a consequence of authorization by amendments to the NECPA in the 1985 Deficit Reduction Act.[16] This authorization invoked a sunset requirement of October 2003. Congress further amended the NECPA in the Energy Policy Act of 1992, expanding agency authority to use ESPCs and charging the Department of Energy (DoE) with developing rules for agencies' use of ESPCs.[17] In 1994, the President issued Executive Order (E.O.) 12902, requiring that executive agencies use ESPCs to meet the goals of the NECPA.

DoE first enacted regulations for ESPCs in 1995 in 10 C.F.R. Part 436. DoE created a five-year pilot program to accelerate the installation of ECMs by using ESPCs and provided model solicitations that agencies could use to procure ESPCs. The program established the Federal Energy Management Program (FEMP), which provided for qualified contractors lists,[18] implementation procedures,[19] standard terms and conditions,[20] and conditions of payment.[21] Subpart B of the regulations added water conservation to ESPC authority. As noted, in the event of a conflict between FAR provisions and the DoE regulations, the latter control.

In 1999, following congressional reauthorization of ESPCs in the Energy Conservation Reauthorization Act of 1998,[22] the President mandated in E.O. 13123 that all Executive Agencies reduce their energy consumption from 1985 amounts 20% by 2005 and 35% by 2010. The order also directed agencies to maximize their use of ESPCs and other alternative financing contracting mechanisms to reduce their energy usage and costs.

The FAR council then adopted regulations for ESPCs, which became effective on February 19, 2002.[23] These require that agencies make maximum use of the authority provided them under the NECPA to use ESPCs to reduce their energy use and costs.[24] They also provide that FAR Part 17.1 requirements for multiyear contracting apply to ESPCs, except for ESPCs awarded under 10 C.F.R. § 436.34. Section 436.34 requires competitive procurement procedures and available funding for the scheduled energy costs in the first fiscal year of the contract.[25] (It also required

congressional notification for larger awards, but that was eliminated by § 511 of EISA in 2007.)

By 2003, the Government was using ESPCs for almost 40% of its energy infrastructure upgrades, and the Office of the Secretary of Defense reported that the DoE used ESPCs for 70% of its energy infrastructure improvements. Although Congress allowed the Government's ESPC authority to lapse in October 2003, the Defense Authorization Act revived and extended this authority for two years, starting in November 2004, and the Energy Policy Act of 2005[26] further extended it to 2016. In 2004, Congress amended NECPA to revise the definition of energy savings to include water conservation measures.[27]

The President set new goals for executive agencies' energy use in E.O. 13423, and Congress mandated reductions in agencies' energy and water use in the Energy Policy Act of 2005[28] and EISA. Among the required reductions for Federal facilities were a 30% reduction in energy intensity and a 16% reduction in water use by 2015, and an increase of renewable energy to 7.5% of electricity needs by 2013.

In 2007, § 514 of the EISA made agencies' ESPC authority permanent. As of May 2011, more than 570 ESPC projects worth $3.9 billion had been implemented by 25 different federal agencies in 49 states and Washington, D.C.[29] The Department of Defense has done the lion's share of the ordering under ESPCs (about 60% of the projects and 70% of the investment dollars). Approximately $2.3 billion has been invested in Government facilities through ESPCs, saving over 18 trillion Btu annually, the equivalent energy use of a city of over half a million people, with a projected overall savings to the taxpayers of $7.1 billion in energy costs ($5.7 billion of which will go to finance project investment).

All State and many local governments have adopted legislation authorizing some form of ESPCs, largely modeled after federal ESPCs. State and local government ESPC projects have included public office buildings, courthouses, universities, schools, and hospitals. Of the record $3.6 billion in ESPCs in 2006, $2 billion were for state and local government projects. Among the states that have most successfully utilized ESPCs are Alabama, Alaska, California, Colorado, Florida, Hawaii, Illinois, Kansas, Missouri, Maryland, Massachusetts, Nevada, New York, Oregon, Pennsylvania, Tennessee, Texas, Virginia, Washington, and Wyoming.

IV. LOOK, UP IN THE SKY. IT IS A BIRD. IT IS A PLANE. NO, IT IS SUPER ESPCS!

In 1994, Congress authorized the Secretary of Defense to develop a simplified method of awarding ESPCs to accelerate the use of ESPCs and to reduce the administrative effort and cost to award those contracts.[30] To this end, the Secretary was authorized to request statements of qualifications, including financial and performance information, from firms engaged in providing shared energy savings contracting; to designate from the statements received, with an update at least annually, those firms that are presumptively qualified to provide shared energy savings services; to select at least three firms from the qualifying list with which to conduct discussions concerning a particular project; to request technical and price proposals from each of the firms selected; and, to select from among these firms, the one most qualified for award.[31]

In 1997, FEMP established the DoE's Qualified List of ESCOs in accordance with the Energy Policy Act of 1992 and 10 C.F.R. § 436. This list is comprised of private industry firms that have submitted an application and been qualified by the Qualification Review Board. This board consists of representatives from the Federal Interagency Energy Management Task Force and the DoE staff.[32]

Also in 1997, FEMP awarded the first indefinite-delivery, indefinite quantity (IDIQ) ESPC, dubbed "Super-ESPC."[33] Since then, several other Government agencies, including the

Army and Air Force, also have awarded their own IDIQ ESPCs.[34] These contracts have been competitively awarded to prequalified ESCOs. Like other Government IDIQ contracts, Super ESPCs allow agencies to award delivery orders without a full-blown contract competition, and they establish general terms and conditions that apply to all orders issued under them.[35]

Until 2008, there were two types of Super ESPCs: Regional Super ESPCs and Technology Specific Super ESPCs. Regional Super ESPCs covered all 50 states and all U.S. territories and were not technology specific. Technology Specific Super ESPCs could be used for federal facilities worldwide. They emphasized four advanced technologies: geothermal heat pumps, photovoltaics, biomass and alternative methane fuels, and solar thermal. Agencies could only utilize Technology Specific Super ESPCs where one of these technologies was central to the project. However, bundling of other technologies into these projects was allowed and encouraged.

Since the inception of DoE's Super ESPC program in 1998, 195 Super ESPC Delivery Orders have been awarded. The private sector has invested $1.23 billion in Federal energy efficiency improvements resulting in $3.03 billion of cumulative energy cost savings for the Government. Super ESPC projects cumulatively save the Government more than 174.8 trillion Btu in energy usage.

In May 2007, DoE issued RFPs for new Super ESPCs and, in December 2008, awarded sixteen new Super ESPCs for up to $80 billion in projects at federal facilities. Each of the new contracts provides for a maximum individual contract value of $5 billion over the life of the contract, eliminates technology specific restrictions, and allows federal agencies to use the contracts in federal buildings worldwide. In addition, they provide greater emphasis on renewable energy and water conservation projects.

As with traditional ESPCs, many states have also authorized use of Super ESPCs.

V. PROTESTING ESPC AWARDS

Like other Government contract awards, awards of ESPCs and Super ESPCs are subject to agency-level protests and protests at the Government Accountability Office (GAO) or the Court of Federal Claims (COFC).[36] Prior to May 2008, protests were unavailable for virtually all delivery orders awarded under Super ESPCs.[37] The 2008 National Defense Authorization Act changed that by authorizing the GAO to hear protests of delivery orders in excess of $10 million under IDIQ contracts awarded since May 23, 2008.[38] Since then, an agency award of a delivery order of over $10 million under a Super ESPC may be challenged by any other ESCO with a DoE Super ESPC via a GAO protest. That remains true for delivery orders issued under Department of Defense contracts,[39] but whether the award of civilian agency contracts may be protested is unclear.[40]

In any event, the burden on the protestor in such challenges is a heavy one, as Government agencies have broad discretion in selecting the firms with which it will negotiate delivery orders.[41]

VI. CONTRACTING ISSUES

1. Contract Formation and Negotiation

Many issues critical to the success and risk allocation of ESPC projects are left to the parties' discretion in negotiating the contract or deliver order. The ESCO ultimately will be responsible for the selection, design, installation, and performance of the equipment it installs. However, the parties can decide, and the contract should make clear, whether the ESCO will carry out these responsibilities only through construction and Government acceptance, for a limited trial performance period, or for the entire contract term.

The parties may also negotiate their respective responsibilities for operation and maintenance (O&M) and equipment repair and replacement

(R&R). Typically, the agency will operate the equipment with ESCO oversight, and the ESCO will be responsible for R&R. A significant issue is whether the ESCO assumes R&R responsibility under contract warranty provisions, which typically expire after one year, or instead extends to the end of the energy performance period, which may last 20 years or more.

2. Changes

Since ESPCs cover such long periods, the Government often changes its use of subject facilities in ways that affect its energy usage and savings, the equipment it needs, and the ESCO's ongoing service obligations. The most extreme examples occur when the Government decides to demolish the facility. In those cases, the ESPC should provide that the ESCO will be entitled to continuing payment based on savings achieved before demolition, and ideally should provide details on which savings will be used for that calculation (e.g., those achieved in the year before demolition, the most recent three-year average, or the average over the energy performance period up to demolition).

More frequently, the Government will make significant changes to its facilities during the ESPC term, and those changes will impact ESCO performance obligations and/or achieved energy savings. Again, the ESPC should provide that, to the extent that Government changes reduce energy savings, the ESCO remains entitled to payment based on the savings achieved before the changes. With a traditionally funded, fixed-price Government contract, to the extent that Government-imposed changes increase the contractor's cost of performing its obligations, the "Changes" clause provides for an equitable adjustment to the contract price. This approach usually will not work under ESPCs due to the lack of contract funding. Instead, ESPCs will typically provide that, when the Government adds or changes equipment to the facility, it will award a sole source service contract, called a "Companion Service Contract," to the ESCO for the O&M and R&R of the new or changed equipment.

3. Scheduling and Delay Issues

The pricing structure of ESPCs places on ESCOs higher schedule risks than do traditional contracts. An ESCO's recovery under an ESPC depends on the Government's realization of guaranteed cost savings during the postconstruction energy performance period. Where the term of an ESPC is the statutory maximum of 25 years (as is often the case), these savings may be projected out over 20 or more years. Any delay in completion of construction will necessarily shorten the energy performance period (which the parties are legally precluded from extending), and consequently reduce the Government's energy cost savings and the ESCO's compensation.

All of this puts a premium on scheduling. If the ESCO is too ambitious in its planning and proposal, or if the party responsible for scheduling after contract award gets it wrong, the consequences of delay may be severe. Even a modest delay may quickly put the ESCO in an overall loss position. In addition, unlike contractors under traditional contracts, which may find extra time to be an adequate remedy for nondisruptive delay, ESCOs under ESPCs will almost always suffer monetary damage due to lost energy cost savings from any critical path delay.

One way to lower the ESCO's schedule risk is for the ESPC to allow the commissioning of individual ECMs prior to the completion of the entire installation. This provides the agency earlier savings and the ESCO earlier cash flow. This method was used, for example, on the delivery order issued by NASA under a DoE Super ESPC for the Johnson Space Center.

4. Termination Issues

Special issues also arise when the Government terminates an ESPC for default or convenience.

The standard default termination clause in fixed-price federal construction contracts provides that, in the event of a contractor default, the Government is entitled to take over the work and recover or offset against the contract balance all resulting damages, including its excess reprocurement costs.[42] ESPCs are different because there is no "contract balance." Does this mean that, in the event the Government terminates the ESPC for default, the Government has no further obligation to pay the ESCO? Such a rule would often lead to inequitable results, as the Government's post-termination energy savings in many cases will exceed its excess reprocurement costs for the O&M and R&R services the ESCO would have provided, effectively handing the Government a windfall.

In *Enron Federal Solutions, Inc. v. United States*,[43] the COFC denied a default-terminated contractor's claim for its pretermination expenses under a similar type of contract. In that case, the Army Corps of Engineers terminated a utility privatization contract. Like an ESPC, that contract required the contractor to pay substantial upfront costs and to provide ongoing O&M services, and entitled it to payments that would amortize the initial costs over an extended term (10 years). The Corps terminated the contract after less than three years, at which point the contractor had spent about $11.6 million and been paid about $4.2 million. The court denied the contractor's claim for the asserted value of the improvements, which reverted to the Corps. The court found that, because the contract allocated the risk of the capital improvement costs to the contractor, its default entitled the Government to enjoy those improvements without paying for them. While it is unclear whether a court would reach the same result in an ESPC default termination case, this is a risk the parties should take into account.

With regard to convenience terminations, the parties should, and typically do, tailor ESPCs to account for any special issues they present. For example, the ESPC should include prenegotiated terms for retirement of the ESCO's financing debt in the event the Government terminates the ESPC for convenience.

If the Government terminates an ESPC for convenience, it might argue that, since the contract does not entitle the ESCO to payment unless and until guaranteed energy cost savings are realized, the ESCO will only be entitled to recover its costs under a termination settlement if and when, and to the extent that, the work performed prior to the termination generates those savings. This argument likely would fail. *Jacobs Eng'g Group, Inc. v. United States*[44] is instructive on that point, even though it involved a cost reimbursement development and construction contract with a cost sharing provision, rather than an ESPC. In *Jacobs Eng'g*, the Federal Circuit held that the cost sharing provisions in Jacobs' contract, which obligated the Government to pay Jacobs only 80% of its actual costs during performance, did not apply in the context of a termination for convenience. Under the termination for convenience clause, Jacobs was entitled to recover "all costs reimbursable under the contract." In the case below, the COFC granted summary judgment for the Government, concluding that the contract's termination for convenience and cost-sharing provisions, read together, meant that Jacobs was only entitled to 80% of its costs incurred as of the termination. The Federal Circuit reversed, holding that the "all costs reimbursable" language in the termination for convenience clause described the type, rather than the amount, of costs Jacobs could recover. Thus it was entitled to all, rather than 80%, of the types of costs that were specified as reimbursable under the contract (e.g., fabricated parts, WIP, supplies procured for the work, special tooling, costs allowable under FAR 31.2, etc.).

5. Bonding Issues

One bonding issue for ESPCs is whether and to what extent the Miller Act applies. The Miller Act requires contractors to obtain performance and payment bonds on all projects

for "the construction, alteration, or repair of any public building or public work of the Federal Government."[45] Miller Act bonds are not required, however, for service contracts. Since the scope of work on ESPC projects includes both construction and services (i.e., the initial energy audit and postconstruction O&M, M&V, and R&R), the application of the Act to such contracts is unclear.

If a Federal agency chooses to treat an ESPC as a service contract, rather than a construction contract, this may deprive subcontractors of Miller Act protections. *Dept. of Army v. Blue Fox*[46] is instructive here. In that case, the Army contracted for the installation of a telephone switching system at an Army depot, including construction of a concrete block building to house the telephone system and installation of certain safety and support systems. The Army treated the contract as a service contract and thus did not require the general contractor to obtain a Miller Act bond. The Supreme Court held that the subcontractor was not entitled to an equitable lien on the Government property, leaving the subcontractor without an effective remedy. Subcontractors under ESPCs should be aware of the risk that, as in *Blue Fox*, the Government might treat an ESPC as a service contract, and if it does so, the ESCO will not be required to obtain a payment bond for the protection of its subcontractors.

Even if the Miller Act applies, how should the required bond amount be calculated? The Act provides that the prime contractor (here, the ESCO) must obtain a bond for 100% of "the total amount payable by the terms of the contract" for any project over $100,000.[47] However, under an ESPC, no one will know the contract price until the end of the energy performance period—up to 25 years after the contract term started. Typically, the agency will require a bond in the amount of the ESCO's share of the total guaranteed cost savings under the ESPC, even though this will include the amount payable for services.

Another issue regarding application of Miller Act requirements to ESPCs is how long the ESCO should be required to maintain the bond. It is unclear whether agencies must require bonding through the energy performance period or only through the construction period, i.e., until the agency accepts the installed ECMs. While agencies certainly may do so, especially if the ESCO will be subcontracting out any of its M&V, O&M, or R&R work, typically they do not. Miller Act bonds should not be required for that work because it is not predominantly construction, alteration, and repair.

Where ESCOs obtain performance and payment bonds, ESPCs present several other issues. First, ESPC subcontractors and suppliers face a dilemma regarding the statute of limitations for payment bond claims. The Miller Act provides that a bond claimant may not maintain an action on the bond unless (a) it "has not been paid in full within 90 days after [it] did or performed the last of the labor or furnished or supplied the material for which the claim is made" and (b) the action is filed within one year "after the day on which the last of the labor was performed or material was supplied by [it]."[48] However, what triggers the statute if a subcontractor performs services after construction is completed, such as M&V? A subcontractor that performs both construction and postconstruction work could end up in a position where it will be unclear whether it should sue before it has completed its postconstruction work and risk being premature, or wait until it completes that work and risk being too late.

Second, where the surety has to either take over under the performance bond or pay a subcontractor or supplier under the payment bond, the general indemnity agreement in the bond will entitle the surety to recoup its costs from any remaining balance on the ESPC. But, since the ESPC does not state a firm contract price, how will the surety determine the contract balance? To obtain the protections it would enjoy under bonds for traditional projects, the surety often will require an escrow agreement with the

ESCO's financing company that will ensure the surety access to the project funds.

Finally, with the substantial investment that financing companies provide on ESPCs, they typically want to be protected under the ESCO's bonds. While the standard bond only protects the owner (i.e., the Government) as an obligee, the financing company will often require that the surety agree to name it as a dual obligee (along with the owner).

6. Disputes

Federal ESPCs, like other procurement contracts, must include the standard "Disputes" clause.[49] Even where the Government omits this clause, because it reflects fundamental procurement policy, it will be read into the contract under the Christian Doctrine.[50] The clause requires that all claims under the Contract Disputes Act[51] must be certified,[52] and appeals brought in either the Court of Federal Claims or the applicable Board of Contract Appeals ("BCA").[53] Even though Super ESPCs are awarded by the Department of Energy, disputes arising from task orders issued under those ESPCs are under the jurisdiction of the BCA for the agency issuing the order, i.e., the Civilian Board (CBCA) for nonmilitary agencies.[54]

VII. CONCLUSION

The federal budget deficit and the environment are two of the most pressing and difficult issues facing the Government today, and that is not going to change any time soon. ESPCs are well suited to addressing the Government's environmental concerns, and they work within the fiscal confines of even the most cash-strapped agencies. For these reasons, it is hard to see ESPCs going away in the near future. To the contrary, the use of ESPCs is rising and likely will keep on doing so for some time to come. Thus counsel for participants in ESPC projects need to be aware of the unusual issues and risks these unique contracts present.

VIII. PRACTICE POINTS CHECKLIST

- Under the right circumstances, ESPCs provide a vehicle for the Government (and other owners) to get important, worthwhile projects under contract and built with no or limited appropriations and front-end investment.
- Under the wrong circumstances, ESPCs provide a "short cut" making it all too easy for the Government to enter commitments that ultimately cost more (for example, due to the financial costs and risks borne by the ESCO) than would more traditional contract vehicles.
- Prequalified ESCOs have been able to compete for awards of IDIQ contracts, dubbed "Super ESPCs," under which Government agencies can issue to them delivery orders utilizing a streamlined competitive process.
- Disappointed bidders wishing to challenge ESPC awards will have a difficult time overcoming the Government's broad discretion to award such contracts, and especially, to issue delivery orders under Super ESPCs. In the latter case, the ability to protest orders from civilian agencies (although not from the Department of Defense) is currently in question.
- Despite extensive regulation, the parties to ESPCs remain free to negotiate many critical contract terms beyond just price (i.e., shared savings), most notably the duration of the contractor's obligations (through construction or beyond) and warranty.
- ESPCs pose special issues when the Government makes changes to the facility affecting energy or water usage and savings. The parties should address these issues through provisions

for adjustment to shared savings and "Companion Service Contracts."

- ESPCs place higher schedule risks on ESCOs than do traditional contracts. These risks counsel greater attention to schedule planning and maintenance and the consideration of mitigation measures, such as triggering shared savings for individual ECMs as they are completed.
- Traditional termination provisions, for both default and convenience, do not fit ESPCs very well. The parties should craft these provisions to account for the lack of a "contract balance," the ESCO's substantial upfront costs, and use of outside financing.
- Due to the mix of construction and services work performed under ESPCs, the applicability of the Miller Act bond requirements may be unclear. The parties should address this in their agreement.
- Finally, disputes under federal ESPCs will be subject to the Contract Disputes Act and the FAR Disputes clause, with their certification requirements and appeal procedures.

REFERENCES

1. 42 U.S.C.A. § 8287(a)(1) (2011).
2. Pub. L. No. 110-140, § 512 (2007).
3. 42 U.S.C.A. § 8287(a)(2)(B) (2007).
4. 42 U.S.C.A. § 8287c (2007).
5. "Issues related to share-in-savings contract authorities of the [NECPA] and the Clinger-Cohen Act," B-287488, 2001 U.S. Comp. Gen. LEXIS 217, 2001 WL 34063716 (June 19, 2001) (citing 42 U.S.C.A. § 8287; Pub. L. No. 104-52, § 625, 109 Stat. 468, 502-503 (1995)).
6. 2001 U.S. Comp. Gen. LEXIS 217; FAR 23.205(b)(1).
7. 42 U.S.C.A. § 8287(a)(1); FAR 23.205(b)(1).
8. EISA, § 513.
9. 42 U.S.C.A. § 8287(a)(2)(B).
10. 48 C.F.R. § 23.205 (2011).
11. 10 C.F.R. Part 436 (1999).
12. 10 C.F.R §§ 436.32, 436.33, 436.35, and 436.36.
13. *See Johnson Controls, Inc.*, B-282326, 99-2 CPD ¶ 6 (Comp. Gen. 1999); *Strategic Resource Solutions Corporation*, B-278732, 98-1 CPD ¶ 74 (Comp. Gen. 1998).
14. FAR 16.505 (2011).
15. FAR 16.505 (2011).
16. Pub. L. No. 99-272 (1986), 42 U.S.C.A. § 8287 (2007).
17. Pub. L. No. 102-486 (1992).
18. 10 C.F.R. § 436.32.
19. 10 C.F.R. § 436.33.
20. 10 C.F.R. § 436.35.
21. 10 C.F.R. § 436.36.
22. Pub. L. No. 105-388 (1998).
23. FAR 23.205 (48 C.F.R. § 23.205) (2011).
24. FAR 23.205(a).
25. 10 C.F.R. § 436.34(a).
26. Pub. L. No. 109-58, 119 Stat. 594 (2005).
27. Defense Authorization Act of 2004, Pub. L. No. 108-375, § 1090 (2004).
28. Pub. L. No. 109-58 (2005).
29. http://www1.eere.energy.gov/femp/pdfs/espc_intro.pdf.
30. 10 U.S.C.A. § 2865(c)(1) (1994) (repealed in 2006).
31. 10 U.S.C.A. § 2865(c)(2)(A) (repealed in 2006).
32. http://www1.eere.energy.gov/femp/financing/superespcs_qualifiedescos.html.
33. *See Johnson Controls, Inc.*, B-282326, 99-2 CPD ¶ 6 (Comp. Gen. 1999).
34. *See Strategic Resource Solutions Corporation*, B-278732, 98-1 CPD ¶ 74 (Comp. Gen. 1998) (re Air Force Super ESPCs award).
35. FAR 16.505 (2011).
36. *See, e.g., Johnson Controls,* 99-2 CPD ¶6, 1999 WL 491904.
37. Federal Acquisition Streamlining Act of 1994 ("FASA"), 41 U.S.C.A. § 253(j) (2008) (prohibiting most delivery order protests).
38. "Enhanced Competition Requirements for Task and Delivery Order Contracts," Pub. L. No. 110-181, 122 Stat. 3, § 843 (2008).
39. Defense Authorization Act of 2011, Pub. L. No. 111-383, § 825 (2011).
40. Compare *Matter of: Technatomy Corporation*, B-405130, 2011 CPD ¶ 107 (Comp. Gen. 2011) (stating GAO has jurisdiction over such protests) with FAR 16.505 and commentary at 76 Fed. Reg., No. 128, at 39238, 2011 WL 2606907 (July 5, 2011) (stating it does not).
41. *Strategic Resource Solutions*, 98-1 CPD ¶74 at 4-5, 1998 WL 101539; *see also Intellectual Properties, Inc.*, B-280803.2, 99-1 CPD ¶ 83 (Comp. Gen. 1999).
42. FAR 52.249-10(a).
43. 80 Fed. Cl. 382 (2008).

44. *Jacobs Engineering Group, Inc. v. U.S.*, 434 F.3d 1378 (Fed. Cir. 2006).

45. 40 U.S.C.A. § 3131 (2006).

46. *Department of Army v. Blue Fox, Inc.*, 525 U.S. 255, 257-58, 119 S. Ct. 687, 142 L. Ed. 2d 718 (1999); *see also Arvanis v. Noslo Engineering Consultants, Inc.*, 739 F.2d 1287, 1289-90, 38 Cont. Cas. Fed. (CCH) ¶ 76459 (7th Cir. 1984).

47. 40 U.S.C.A. § 3131(b).

48. 40 U.S.C.A. § 3133(b)(1).

49. FAR 33.215 (2004)(requires clause); 52.233-1 (clause).

50. *Appeal of Fireman's Fund Ins. Co.*, A.S.B.C.A. No. 38284, 91-1 B.C.A. (CCH) ¶ 23439, 1990 WL 174338 (Armed Serv. B.C.A. 1990); *Appeal of Poindexter*, H.U.D.B.C.A. No. 77-6, 78-1 B.C.A. (CCH) ¶ 12904, 1977 WL 2521 (H.U.D.B.C.A. 1977).

51. 41 U.S.C.A. §§ 601-13 (2007).

52. 41 U.S.C.A. § 605(c)(1); FAR 52.233-1(c), (d)(2)(i).

53. 41 U.S.C.A. §§601(6)-(8), 606, 607, 609(a)(1).

54. *Appeals of Ameresco Solutions, Inc.*, A.S.B.C.A. No. 56824, 11-1 B.C.A. (CCH) ¶ 34705, 2011 WL 870238 (Armed Serv. B.C.A. 2011), at 170,905-07.