

## **Enhanced Competition Requirements in the FY 2008 NDAA and Application to Energy Savings Performance Contracting**

### Background:

The National Defense Authorization Act of 2008 Section 843 (P.L. 110-181) passed January 28, 2008 included provisions that strengthened competition in contracting with the Federal government as a result of sole source contracting abuses in the Department of Defense. One effect has been changes to the statute governing task and delivery order contracts (10 U.S.C. section 2304a; 41 U.S.C. section 253h). The section applies government-wide and limits single award task and delivery order contracts greater than \$100 M, enhances competition for orders in excess of \$5 M, and provides for protests of orders in excess of \$10 M.

This change, which is intended to ensure enhanced competition is, on balance, a positive one that ensures that the Federal government gets the best deal that it can when contracting with the private sector. However in one instance, with Energy Savings Performance Contracting, the private sector is already fully competed and application of this provision significantly delays and increases cost of ESPCs.

Energy Savings Performance Contracts are authorized under EPACT 1992. The program is set up so that energy service companies compete up front to qualify to do energy efficiency upgrades for the Federal government. Once approved under the rigorous "SuperESPC" process, approved ESCOs are authorized to go forth and work with agencies throughout the federal government to improve their energy efficiency. ESCOs do so by auditing facilities, installing energy conservation measures, paying for these measures, supplying measurement and verification of energy savings and guaranteeing a savings to the Federal customer. The projects take no upfront funding from the government and are paid for out of energy bill savings over time and with a guarantee that aggregate payments will not be more than energy bill would have been without the EPSC.

### Impact

Section 843 of the 2008 NDAA has been interpreted very conservatively by the Department of Energy legal counsel. This is problematic throughout the Federal government, since DOE runs the contract for all Federal agencies. The impact is significant. Under the new Super ESPC contract, not only are companies required to have competed vigorously to participate in the ESPC program, they are also required to compete at every site and for every task order. Because ESPCs take a long time to complete and are the result of intense negotiations between the agency customer and the ESCO, the task order level competition is a major deterrent.

For example, Company X may have spent a year working with Federal Facility A to develop a project on which they both agree. When they do reach agreement, the DOE interpretation of the NDAA requirements then require that the Agency give every other qualified ESCO an opportunity to compete for the project. Even though Company X potentially has millions of dollars invested in a process of back and forth with the Federal customer, other companies can now come in and see if they can do it better. The

ESCOS agree: the work will cost the same regardless of who does it. An ESCO might tell an agency they can do a project for less money, but when they too, spend significant time and money at the site and really dig into the issues, they will come up with very similar pricing.

This re-competition will lead to delays in getting ESPCs completed of at least 30 days, and in some cases upwards of a year. These delays have the added deterrent of increasing financing costs. Additionally, the provision makes ESCOs very wary of spending significant time and money at any one site to develop a comprehensive project. This could seriously impact the amount of efficiency we are able to gain in the Federal government through this program.

### Solution

ESPCs are authorized under section 801 of the National Energy Conservation Policy Act (42 U.S.C. 9297(b)(1)(A)), as amended by section 155 of the Energy Policy Act of 1992 (P.L. 102-586). Competition requirements therein, and in the Final Rule, are arduous. In fact, some argue that ESPCs are the most scrutinized contracts that the Federal government undertakes.

Since the underlying statute and final rule include rigorous competition, ESPCs should not be subjected to the requirements of Section 843 of the NDAA for Fiscal Year 2008 (PL 110-181)

### Legislative Fix in Defense Authorization

For ESPCs only:

- Section 843 of the National Defense Authorization Act for Fiscal Year 2008 (PL 110-181) does not apply to Energy Performance Contracting, competition for which shall continue to be guided by section 801 of the National Energy Conservation Policy Act (42 U.S.C. 9297(b)(1)(A)), as amended by section 155 of the Energy Policy Act of 1992 (P.L. 102-586)
- Fix within Energy Bills (ACES and ACELA) negotiated with House and Senate Armed Services Committee, House Energy and Commerce Committee, Senate Energy and Natural Resources Committee and House Government Operations Committee

## American Clean Energy and Security Act (H.R. 2454)

### SEC. 251. ENERGY SAVINGS PERFORMANCE CONTRACTS.

(a) Competition Requirements for Task or Delivery Orders Under Energy Savings Performance Contracts-

(1) COMPETITION REQUIREMENTS- Subsection (a) of section 801 of the National Energy Conservation Policy Act (42 U.S.C. 8287(a)) is amended by adding at the end the following paragraph:

`(3)(A) The head of a Federal agency may issue a task or delivery order under an energy savings performance contract by--

`(i) notifying all contractors that have received an award under such contract that the agency proposes to discuss energy savings performance services for some or all of its facilities, soliciting an expression of interest in performing site surveys or investigations and feasibility designs and studies and the submission of qualifications from such contractors, and including in such notice summary information concerning energy use for any facilities that the agency has specific interest in including in such contract;

`(ii) reviewing all expressions of interest and qualifications submitted pursuant to the notice under clause (i);

`(iii) selecting two or more contractors (from among those reviewed under clause (ii)) to conduct discussions concerning the contractors' respective qualifications to implement potential energy conservation measures, including requesting references demonstrating experience on similar efforts and the resulting energy savings of such similar efforts;

`(iv) selecting and authorizing--

`(I) more than one contractor (from among those selected under clause (iii)) to conduct site surveys, investigations, feasibility designs and studies or similar assessments for the energy savings performance contract services (or for discrete portions of such services), for the purpose of allowing each such contractor to submit a firm, fixed-price proposal to implement specific energy conservation measures; or

`(II) one contractor (from among those selected under clause (iii)) to conduct a site survey, investigation, a feasibility design and study or similar for the purpose of allowing the contractor to submit a firm, fixed-price proposal to implement specific energy conservation measures;

`(v) negotiating a task or delivery order for energy savings performance contracting services with the contractor or contractors selected under clause (iv) based on the energy conservation measures identified; and

`(vi) issuing a task or delivery order for energy savings performance contracting services to such contractor or contractors.

`(B) The issuance of a task or delivery order for energy savings performance contracting services pursuant to subparagraph (A) is deemed to satisfy the task and delivery order competition requirements in section 2304c(d) of title 10, United States Code, and section 303J(d) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253j(d)).

`(C) The Secretary may issue guidance as necessary to agencies issuing task or delivery orders pursuant to subparagraph (A).'

(2) EFFECTIVE DATE- The amendment made by paragraph (1) is inapplicable to task or delivery orders issued before the date of enactment of this section.