



Guidance on Modifying Energy Savings Performance Contract Task Orders

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Federal Energy Management Program (FEMP)

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List of Acronyms

CICA	Competition in Contracting Act
DOE	Department of Energy
ECM	Energy Conservation Measure
ESCO	Energy Service Company
ESPC	Energy Savings Performance Contracting
FEMP	Federal Energy Management Program
IDIQ	Indefinite Delivery Indefinite Quantity
NOO	Notice of Opportunity
SBQ	Selection by Qualifications

Executive Summary

Modifications to energy savings performance contract (ESPC) task orders that remain within scope of the original competitive procurement generally will not be subject to competitive requirements under the Competition in Contracting Act (CICA). FEMP best practices can result in an original procurement process with a broad scope that would include a modification to add an energy or water conservation measure or building. However, whether competition is required is fact specific. Accordingly, when considering modifications to an awarded task order, agency Contracting Officers may want to consult with their legal counsel.

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1 Background and Introduction

This guidance is provided to federal agencies for consideration when determining whether to modify ESPC task orders for the purpose of adding additional energy or water conservation measures (collectively ECMs) or buildings to a previously awarded project. This guidance addresses only task orders awarded under DOE’s ESPC indefinite delivery indefinite quantity (IDIQ) master contracts that also relied on the FEMP best-practice method for energy service company (ESCO) selection, i.e., Selection by Qualifications (SBQ), or similar down selection method^{1,2}. There are several additional methods of selecting an ESCO for an ESPC project. If a federal agency issued a task order using a different selection method, it should consider the characteristics of the method employed to the characteristics of the SBQ method as described below to determine the applicability of this guidance.

With minor exceptions, contract modifications for ESPCs are bilateral, supplemental agreements signed by the ESCO and the federal Contracting Officer which modify the terms of the task order contract.³ When modifying a task order, agencies must consider whether the modifications would change the contract to such an extent as to subject the modification to the competition requirements of CICA (see 41 U.S.C. § 3301).

CICA requires agencies, when procuring property or services, to “obtain full and open competition through the use of competitive procedures[.]” (41 U.S.C. § 3301(a)(1)) CICA, however, does not prevent modification of a contract by requiring a new bid procedure for every change. Only modifications outside the scope of the original competed contract fall under CICA’s statutory competition requirement.

An analysis of whether a modification to a task order is subject to the statutory competition requirement focuses on the scope of the entire original procurement (e.g., the IDIQ, the notice of opportunity (NOO), the method of contractor selection, the original task order) in comparison to the scope of the contract as modified. A modification to a task order generally would not require further competition so long as the modification is within the scope of the original competitive procurement.⁴

¹ The Selection by Qualifications method is defined in Section H.3 of the DOE ESPC IDIQ master contract.

² For information about modifying awards based on Selection by Preliminary Assessment or any other method, contact FEMP.

³ Modifications are authorized by FAR 52.243-1 (Alt II), which is incorporated into the DOE ESPC IDIQ master contract. The authority flows down from the IDIQ master contract to the task orders under the contract.

⁴ *ATT & T Communications, Inc. v. Wiltel, Inc.*, 1 F.3d 1201, Fed. Cir. (1993).

2 General Considerations for Determining the Scope of the Original Competitive Procurement

In evaluating whether modifications are within scope of the original competitive procurement, the agency should generally consider:

1. Whether the solicitation adequately advised potential offerors of the potential for the type of change found in the modification, and the change could have been reasonably anticipated prior to award, and
2. Whether the modification changes the contract in a way that would have changed the original field of competition.⁵

Modifications that substantially increase the size of the original task order in of themselves may not change the scope of the original competitive procurement. A substantial increase in cost resulting from the modifications may provide evidence of a change of scope. However, if the nature and purpose of the contract have not changed and the field of competition for the task order remains unchanged, a substantial price increase alone does not establish that the modifications constitute a change in the scope of the original competitive procurement.⁶

⁵ See e.g., *Am. Apparel, Inc. v. United States*, 108 Fed. Cl. 11 (2012); [Matter of Defense Systems Group; Warren Pumps, Inc.; Dresser Industries, Inc.](#); B-240295, B-240295.2; B-240295.3, Comptroller General of the United States, GAO (Nov. 6, 1990).

⁶ See [Matter of Defense Systems Group; Warren Pumps, Inc.; Dresser Industries, Inc.](#), B-240295, B-240295.2; B-240295.3.

3 Determining the Scope of the Original Competitive Procurement of a Task Order Awarded Under a DOE ESPC IDIQ Master Contract

In applying the two elements discussed above, whether a modification to a task order issued under the DOE ESPC IDIQ master contract is within the scope of the original competitive procurement is based on the terms of the IDIQ master contract, the terms of the agency's NOO, and the method of contractor selection. Following FEMP best practices generally results in a broad scope allowing for a wide range of potential task order modifications.

The terms of the DOE ESPC IDIQ master contract and the NOO inform whether a solicitation adequately advised potential offerors of the possibility for the type of change found in the modification and whether potential offerors could have reasonably anticipated the changes prior to award. FEMP's recommended best practices⁷ regarding issuance of an NOO suggest that agencies:

1. Keep the NOO as broad as possible to allow the ESCO to propose comprehensive and innovative solutions,
2. Specify that all the ECMs listed in the DOE ESPC IDIQ master contract will be considered and potentially included in the awarded task order,
3. Specify all possible facilities and buildings to be included, and
4. Provide summary information on facility energy and water usage.

FEMP also recommends that an agency's NOO identify two or three site-specific needs or priorities for the project (e.g., implementing renewable energy conservation measures). Identifying such priorities serves to solicit information that will better help agencies match ESCO capabilities with site needs. However, specifying priorities is not intended to limit the potential scope and should not be drafted as such.

A broad NOO should adequately advise potential offerors of the potential for a task order to include any of the ECMs listed in the DOE ESPC IDIQ master contract and for implementation across a range of buildings. Significantly, an agency's initial selection of an ESCO is made without the government requiring the ESCO to identify specific ECMs or project size. As a result, potential offerors should reasonably anticipate circumstances such as the pre-award inclusion of an ECM listed in the DOE IDIQ master contract as part of a task order implemented in a building identified in the NOO.

When competing a task order under DOE's ESPC IDIQ master contract, FEMP recommends the SBQ method as a best practice. The SBQ method is described in the DOE ESPC IDIQ master

⁷ FEMP provides comprehensive guidance for agencies on writing the Notice of Opportunity, and an on-line ESCO Selector to produce an NOO and evaluation forms. (Find FEMP ESPC resources related to the NOO and ESCO selection on FEMP's ESPC Resources web page.)

contract and complies with the procedures for ESCO selection set forth in the ESPC authorizing statute (42 U.S.C. § 8287(c)). The SBQ method of ESCO selection is outlined in Figure 1.

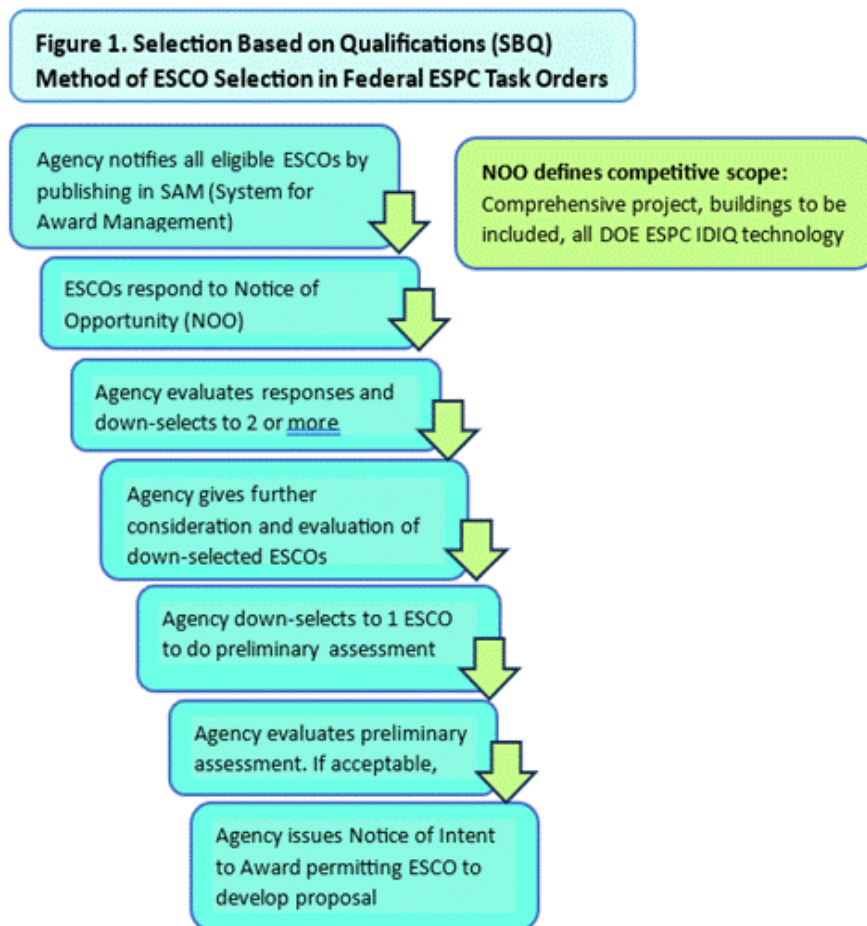


Figure 1. Selection based on qualifications (SBQ) method of ESCO selection in federal ESPC task orders

Because the SBQ method notifies all eligible ESCOs of the broad nature of the NOO, subsequent task order modifications generally would not change the contract in a way that would have changed the original field of competition. Through the NOO, all eligible ESCOs should have received notice that any resulting task order may include any of the ECMs identified in the DOE ESPC IDIQ master contract and be performed at any of the facilities or buildings identified in the NOO.

While the practice of issuing a comprehensive NOO in combination with the SBQ selection method supports a broad scope, agencies will also need to consider whether any terms included by the agency in the original task order could otherwise limit the scope of the original competitive procurement. As noted, the scope of the original competitive procurement is fact specific. **Accordingly, when considering modifications to an awarded task order, agency Contracting Officers may want to consult with their legal counsel.**

4 Contacts

For further information, including assistance with an ESPC modification that your agency is contemplating, please contact FEMP at any of the following:

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energy.gov/femp

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