MESSAGE FROM THE CHAIR
Holli Feichko

First and foremost, I would like to thank our contributing authors and vice chairs, Deonne Cunningham and Gary Gengel, whose diligent work has produced an excellent and timely newsletter. This issue covers a wide variety of topics ranging from current environmental and energy issues (such as EPA’s narrowing use of its audit policy, the controversy over Startup, Shutdown, and Malfunction provisions in state implementation plans, and energy-savings performance contracts) to practical guidance on common and emerging issues (such as good practices for government inspections, tips for preserving legal privileges, and a primer on “green” procurement).

My hope is that our newsletters are not only interesting and useful to In-House Counsel Committee members, but that they also may serve as a springboard for conversations on benchmarking over the next year. For example, how are companies responding to EPA’s signals that it will limit the use of its self-policing policy? Have they changed practices, policies, or approaches to internal environmental compliance reviews? What are best practices for conducting internal environmental audits? How do attorneys ensure that we have adequately preserved legal privileges when working with nonlawyers? What are best practices for government inspections? How do we, as in-house EHS counsel, engage outside counsel and help them better understand our roles within a company so that they may provide us better service? By participating in these discussions and sharing ideas, we can work toward developing more effective environmental policies and practices, providing better service to our clients, and improving environmental and business outcomes.

On behalf of the Committee’s leadership, I encourage and welcome your ideas for additional articles, programs, and other mechanisms to engage in these critical discussions. I also invite you to join us for the Fall Conference in Baltimore, Maryland, October 9–12 and hope that you will enjoy the programming, particularly those organized or sponsored by the Committee. www.ambar.org/EnvironFall.

Visit the In-House Counsel Committee Website:
http://apps.americanbar.org/dch/committee.cfm?com=NR506000

Join the In-House Counsel Committee LinkedIn group:
http://www.linkedin.com/groups?gid=4586229

www.ambar.org/EnvironSocialMedia
In-House Counsel Committee Newsletter
Vol. 14, No. 1, August 2013
Deonne Cunningham and Gary Gengel, Editors

In this Issue:

Message from the Chair
Holli Feichko ................................................... 1

Preserving the Attorney-Client Privilege and Attorney Work Product Protection When Working with Environmental Consultants
Sarah E. Albert .................................................. 3

EPA Proposes to Reject Most Startup, Shutdown, and Malfunction Provisions in State Implementation Plans
David M. Friedland and Linda Tsang ........................................... 5

Knock, Knock. Who’s There? Government Inspections Are No Joke—Be Prepared or Pay the Price
Benjamin Grawe and Michael Stoelton ........................................... 9

A Primer on Green Procurement in the Federal Government
Jehmal Hudson .................................................. 12

Michael C. Jensen .................................................. 16

U.S. EPA Contemplates Narrowing the Use of “Audit Policy”
Edward B. Witte .................................................. 24

Copyright © 2013. American Bar Association. All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise, without the prior written permission of the publisher. Send requests to Manager, Copyrights and Licensing, at the ABA, by way of www.americanbar.org/reprint.

Any opinions expressed are those of the contributors and shall not be construed to represent the policies of the American Bar Association or the Section of Environment, Energy, and Resources.
Environmental law practitioners commonly retain environmental consultants for a variety of reasons, including (1) assisting with company internal investigations, or self-audits, (2) providing advice relating to a regulatory agency’s investigation of the company’s environmental practices, and (3) conducting a due diligence investigation in preparation for a corporate transaction, such as a merger or acquisition. Many attorneys and clients wish to prevent disclosure of environmental consultants’ reports and other communications through use of the attorney-client privilege or attorney work product doctrine. This article identifies best practices for, when appropriate, protecting communications with environmental consultants.

Application of the Attorney-Client Privilege and Attorney Work Product Doctrines

Understanding the limits to the protections of the attorney-client and work product privileges is vital to protecting privileged information. The attorney-client privilege applies to any communication that satisfies the following elements: it must be “(1) a communication (2) made between privileged persons (3) in confidence (4) for the purpose of obtaining or providing legal assistance for the client.” In re Teleglobe Commc’ns Corp., 493 F.3d 345, 359 (3d Cir. 2007) (quoting Restatement (Third) of the Law Governing Lawyers § 68 (2000)). “Privileged persons” is deemed to include the client, the attorney(s), and any of their agents that help facilitate legal representation. Id. The attorney-client privilege protects only communications, not facts and data underlying the communications. Id.

The attorney work product immunity protects an attorney’s mental impressions, conclusions, or legal theories concerning prospective litigation and prevents disclosure of documents prepared “in anticipation of litigation.” Fed. R. Civ. Pr. 26(b)(3); Logan v. Comm’l Union Ins. Co., 96 F.3d 971, 976 (7th Cir. 1996). Because “attorneys often must rely on the assistance of investigators and other agents in the compilation of material in preparation for trial,” it is “necessary” that the work product doctrine “protect materials prepared by agents for the attorney as well as those prepared by the attorney himself.” United States v. Nobles, 422 U.S. 225, 238–39 (1975).

Courts consider all facts when determining whether a consultant’s work is privileged. A key question is whether an environmental consultant is being retained for the primary purpose of assisting counsel to provide legal advice. An environmental consultant’s work that is not specifically prepared for a legal purpose will not be protected. See Coastline Terminals of Conn., Inc. v. U.S. Steel Corp., 221 F.R.D. 14, 16 (D. Conn. 2003) (determining that privilege did not apply because consultant was hired to assist in site preparation and not primarily to assist counsel in providing legal services).

Counsel should understand and agree upon the purpose of a consultant’s role at the start of a relationship with a consultant. A consultant’s work product is more likely to be protected from disclosure if created in response to a specific legal threat, such as a government investigation or enforcement action, than a routine annual investigation. When outside counsel retain a consultant to assist in the provision of legal advice, courts are more likely to find that a consultant is being retained for legal purposes. See, e.g., Sandra T.E. v. S. Berwyn Sch. Dist. 100, 600 F.3d 612, 616 (7th Cir. 2009) (finding that attorney-client privilege protected outside law firm’s investigation of allegations of misconduct).

Retaining a consultant through outside counsel is not enough to protect documents from disclosure, however. Counsel must be able to demonstrate that the primary purpose of the consultant’s work is to assist with the provision of legal advice, as opposed to business reasons. Diversified Indus. v. Meredith, 572 F.2d 596, 603 (8th Cir. 1977) (finding outside counsel’s interview reports not privileged because...
interviews conducted solely for business purposes). If attorneys are only tangentially involved in a consultant’s work, it is unlikely that a court would find the consultant’s work product to be privileged. See U.S. Postal Serv. v. Phelps Dodge Ref. Corp., 852 F. Supp. 156, 163-64 (E.D.N.Y. 1994) (“A corporation cannot be permitted to insulate its files from discovery simply by sending a ‘cc’ to in-house counsel.”).

**Recommendations for Best Practices**

All counsel can take specific steps to preserve the privileges for materials arising from work with environmental consultants. The following list provides some suggested steps.

- An engagement letter that specifically states that outside counsel is retaining an environmental consultant for legal purposes may be key to establishing the attorney-client privilege. Jaffee Pension Plan v. Household Int’l, 244 F.R.D. 412, 420 (N.D. Ill. 2006) (relying upon an engagement letter to find that an accounting company was retained to assist in providing legal advice and the accounting company’s documents were protected by the attorney-client privilege).

- All environmental reports and other written communication should have a header that reads: “Privileged and Confidential: Attorney Client Communication; Attorney Work Product.”

- All environmental reports and other written communication should be kept by the environmental consultant in a separate folder that is identified as “privileged.”

- Legal counsel, whether in-house or outside counsel, should be closely and meaningfully involved in the environmental consultant’s work. See Claude P. Bamberger Int’l v. Rohm and Haas Co., No. 96-1041, 1997 U.S. Dist. LEXIS 22770 at *6–8 (D.N.J. August 12, 1997) (finding investigative materials discoverable when in-house attorney merely ordered a nonattorney to conduct an investigation).

- To the extent that an environmental consultant’s work involves employee interviews, such interviews should be conducted by lawyers and preferably outside counsel. At the outset of each interview, counsel should inform the interviewee that the primary purpose of the interview is to enable counsel to provide legal advice to the corporation. See Admiral Ins. Co. v. U.S. Dist. Ct. for Dist. of Ariz., 881 F.2d 1486, 1492–93 (9th Cir. 1989) (applying privilege and noting that counsel instructed interviewees that primary purpose of interview was to enable providing legal advice).

- Counsel should integrate their opinions, thoughts, impressions, and legal strategies into memoranda, interview summaries, and e-mails with the environmental consultant. Doing so can strengthen an argument that the work product privilege applies and strengthens an argument that the attorney-client privilege applies because the primary purpose of the environmental consultant’s work is to assist in the provision of legal advice.

- An environmental consultant’s materials should be distributed on a “need-to-know basis” and should not be widely distributed to prevent waiving the privilege.

**Conclusion**

Corporate counsel should take steps at the outset of establishing a relationship with an environmental consultant to establish that the primary purpose of the relationship is to obtain legal advice. However, corporate and outside counsel must continue to be meaningfully involved in an environmental consultant’s work in order to maintain the privilege for the duration of the working relationship.

Sarah E. Albert is a principal at Beveridge & Diamond PC in Baltimore.
Clean Air Act (CAA) regulations in most states (known as State Implementation Plans (SIPs)) contain Startup, Shutdown, and Malfunction (SSM) provisions that allow for exceptions to otherwise applicable emission limitations that occur during planned and unplanned periods of startup, shutdown, and malfunction. The concept behind such provisions is (1) regarding malfunction, even the best pollution control technologies will fail on occasion, and the CAA must allow an affirmative defense for such failure if it is to be consistent with due process; and (2) some industrial processes, even with pollution controls installed, cannot meet the same emission limitations when the process is starting up and shutting down as during normal steady state operations. Industry and states have long relied on such provisions. Over the past thirty years, EPA has issued a series of guidance documents approving SSM provisions in SIPs within boundaries established in the guidance.

Sierra Club and other environmental advocacy groups have argued that SSM provisions and affirmative defenses for SSM events allow violations of emission limitations and prevent states from maintaining compliance with National Ambient Air Quality Standards (NAAQS). Sierra Club recently petitioned EPA to invalidate longstanding state SSM provisions and affirmative defenses for SSM events, and EPA proposed to do so on February 22, 2013. Proposed Rule, State Implementation Plans: Response to Petition for Rulemaking; Findings of Substantial Inadequacy; and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown, and Malfunction, 78 Fed. Reg. 12,460 (Feb. 22, 2013). This article first describes EPA’s proposal and then explains its implications for companies and their in-house environmental counsel.

Historically, EPA Has Granted Enforcement Discretion to States for SSM Excess Emissions

Excess emissions have been considered violations of CAA regulations since SIPs were approved in 1977. However, EPA provided guidance in 1982, 1983, 1999, and 2001 that allowed states some enforcement discretion in order to balance the objectives of the CAA with the reality of unavoidable excess emissions from periods of SSM. Those guidance documents set forth EPA’s position on SSM provisions in SIPs and enforcement of excess emissions during SSM events as follows:

- automatic exemptions for emissions above applicable emission limitations during malfunctions are impermissible;
- an enforcement discretion approach for violations during malfunctions is permissible based on certain criteria incorporated into a SIP;
- a state could elect to include in the SIP a narrowly drawn affirmative defense to monetary penalties in an enforcement action for violations of emission limitations in the SIP. The state could create an affirmative defense provision for malfunctions based on ten enumerated criteria. For affirmative defense provisions for startup and shutdown events, EPA established nine enumerated criteria comparable to those for malfunctions;
- state air agencies should rely on a traditional enforcement discretion approach where the nature of the source or the averaging period of the NAAQS would be of concern;
- No SIP can have an enforcement discretion provision that could legally bar enforcement against violations of emission limitations by EPA or citizens;
- and state air agencies could require special emission limitations or control measures during startup and shutdown at facilities.

Most states have SIPs that contain SSM provisions for excess emissions limitations that EPA has approved. Some SIP-approved SSM provisions include
exemption from penalties at the discretion of state agency personnel and affirmative defenses based on the criteria specified in EPA’s guidance.

**Sierra Club Demands That EPA Invalidate Approved SSM Provisions in SIPs**

In a petition filed on June 30, 2011, Sierra Club demanded that EPA rescind its policy allowing states to include in their SIPs affirmative defenses to excess emissions during SSM events. Sierra Club made no distinction between startup/shutdown periods and malfunction events. In addition, Sierra Club requested that EPA find that all SIPs containing (1) an affirmative defense to penalties for excess emissions; (2) automatic or discretionary exemptions for excess emissions during SSM events; or (3) a SIP provision that could be interpreted to preclude enforcement by the state, EPA, or citizens are substantially inadequate to comply with the requirements of the CAA and issue a SIP call that would require each of the states with such a SIP to remove the affirmative defenses, exemptions, or provisions. Further, Sierra Club requested that EPA require all terms, conditions, limitations, and interpretations of the various SSM provisions be reflected in the unambiguous language of the SIPs themselves.

**EPA’s Proposed Rule**

In response to the petition, EPA proposes to grant in part the Sierra Club’s demands and find that thirty-six states have approved SIPs that include SSM provisions that do not meet the requirements of the CAA. EPA must make this “inadequacy” finding before requiring a state to revise and resubmit its SIP. EPA proposes to issue a “SIP Call” that would require the thirty-six states to correct and submit revised SSM SIP provisions no later than eighteen months after EPA makes its final findings of inadequacy. If the rule is finalized, EPA will issue a SIP Call for the District of Columbia and the following states: Alabama, Alaska, Arizona, Arkansas, Colorado, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Michigan, Minnesota, Mississippi, Missouri, Montana, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Virginia, Washington, West Virginia, and Wyoming. Some local jurisdictions within Arizona, Kentucky, Nebraska, North Carolina, and Tennessee are also impacted.

The challenged SSM provisions that EPA finds substantially inadequate to meet CAA requirements fall into several categories:

- **Automatic Exemption Provisions.** EPA determined that exemptions to emissions limitations, discretionary or otherwise, during SSM periods are impermissible under the CAA because compliance with emissions limitations must be continuous. EPA contends that these provisions are “artifacts of the early phases of the SIP program, approved before state and EPA regulators recognized the implications of such exemptions,” which it now considers inconsistent with the CAA’s requirements. 74 Fed. Reg. at 12,489.

- **Director’s Discretion Exemption Provisions.** EPA interpreted the CAA to generally forbid exemptions for excess emissions during SSM periods that, while not automatic, are granted at the discretion of state regulatory personnel. According to EPA, all exceedances of emissions limitations must be considered violations to allow for enforcement by EPA and citizens.

- **State-Only Enforcement Discretion Provisions.** EPA determined that a state may elect not to exercise its own enforcement discretion with regard to excess emissions but may not define violations in a way that interferes with effective enforcement by EPA or citizens.

- **Adequacy of Affirmative Defense Provisions.** Because EPA is revising its previous SSM Policy in this proposed rule, affirmative defense provisions are no longer applicable to startup and shutdown periods because such periods are part of normal
source operation. Any affirmative defense must be narrowly drawn, consistent with the CAA requirements as interpreted in EPA’s new SSM Policy as set forth in the proposed rule.

In addition, EPA is denying several parts of the Sierra Club petition. EPA proposes to deny the petition’s request to prohibit affirmative defenses to SSM violations in SIPs. Instead, EPA proposes to revise its previous policy to continue to allow affirmative defenses in SIPs for excess emissions that occur when a facility is experiencing a malfunction but not for excess emissions that occur during a planned startup or shutdown. EPA also proposes to deny the request in the petition that EPA discontinue reliance on interpretive letters from states to clarify any potential ambiguity regarding a state’s SSM provision. EPA proposes that it may rely on adequate explanations from the state to determine that the SSM provision is sufficiently clear and complies with applicable CAA and regulatory requirements.

Comments and Concerns from States/Industry

So far, EPA has received over 49,000 comments on the proposed rule. State air agencies and industry agree that EPA’s proposed rule violates the CAA’s cooperative federalism scheme and is impracticable. Most of the thirty-six states whose SSM provisions EPA proposes to find inadequate have submitted comments to the proposed rule that explain:

- EPA has misinterpreted that the CAA requires that emission limitations be “continuous.” States interpret “continuous” emission requirements to allow the use of work practice standards and operational requirements for SSM periods.

- EPA lacks the authority to issue the SIP call under the CAA because EPA has failed to show that the EPA-approved SSM provisions in their SIPs have exceeded or will contribute to exceedance NAAQS.

- The proposed rule is inconsistent with existing EPA regulations such as New Source Performance Standards in 40 C.F.R. Part 60 that provide SSM exemptions from emission limitations.

- Opacity is not a pollutant as defined in the CAA so EPA cannot find that SSM provisions that regulate opacity during SSM periods are “substantially inadequate.”

- The SSM provisions at issue have been approved by EPA, are in compliance with the CAA, and are enforceable by citizens, the state, and EPA.

- EPA has failed to evaluate the additional costs and burdens associated with reviewing and revising permits that may result in little, if any, measurable air quality benefits.


In general, most industry comments align with those of the states and emphasize that the SSM provisions and affirmative defenses are necessary for equipment and control technology to operate properly and safely. Comments from industry groups and manufacturers highlight the following issues in addition to those made by the states:

- Running pollution control devices during SSM periods is not technically feasible without causing damage to that equipment.

- It is impossible for certain industrial facilities with long startup periods to comply with continuous emission rates. To illustrate, an aluminum processing facility needs to warm up for days for startup.
• States should be able to provide an affirmative defense for startup and shutdown periods as well as for malfunction events. Startup and shutdown periods are not normal operations and cannot always be predicted. For example, restart and associated excess emissions following an unexpected, unavoidable malfunction or as the result of weather-related circumstances are likely unpredictable.

• The affirmative defense criteria outlined by EPA are too narrowly drawn and vague and present an impossible burden to prove.

Based on the comments submitted by the states and industry, it is likely that the final rule will be judicially challenged. States and industry groups could challenge EPA’s interpretation that startup and shutdown periods represent “normal operations” by pointing to existing EPA regulations that allow for exemptions during SSM periods.

_Id._

**Practical Implications**

If this proposed rule becomes final, state agencies and regulated entities will face various practical and enforcement issues. Because running pollution control devices during startup and shutdown periods may not be technically feasible, facilities may have to install and operate new control technology designed for these periods or install redundant pollution controls for malfunction events. Furthermore, monitoring and operational costs will likely increase if states revise regulations and permits to contain special startup and shutdown emission limits. Facilities may have to install additional monitoring devices to prove compliance with these specific limits.

Furthermore, environmental groups have begun pursuing enforcement against excess emissions from SSM periods. In April 2013, the Environmental Integrity Project submitted a letter to EPA seeking an inspector general investigation on the use of affirmative defenses to excuse SSM emissions in Texas.
Roger is about to have a bad day. Recently promoted, Roger will face his first real test as the new Environmental Manager at WonderWidget’s largest manufacturing facility. The facility is also one of WonderWidget’s oldest and most complex, employing hundreds of people and operating subject to several environmental permits.

Having just returned from the break room with his morning coffee, the day takes a turn for the worse when Roger’s assistant informs him that three federal environmental inspectors are at the front desk. They intend to inspect the facility and interview several employees, and they are eager to get started.

Roger loses his appetite. For a moment, he panics. Is this serious? Why are they here? What should he do? Does he need help?

Fortunately for Roger, WonderWidget recently conducted a companywide training seminar on what steps to take when government inspectors pay a visit. The seminar taught Roger that while surprise inspections are not uncommon, budget-conscious regulators are now forced to do more with fewer resources and so may scrutinize large facilities like his more closely.

Roger also learned that federal agencies such as the Environmental Protection Agency (EPA) and the Occupational Health and Safety Administration (OSHA) now issue larger and more severe penalties. EPA’s penalties are notoriously high ($37,500 per day, per violation under the Clean Air Act, for instance) and can add up quickly. 42 U.S.C. § 7413(b). Roger has heard that EPA is moving beyond traditional single-facility inspections through the introduction of advanced monitoring technologies and increased electronic reporting—any of which could apply to his facility. See EPA Office of Enforcement and Compliance Assurance Draft National Program Manager Guidance (Apr. 2, 2013), p. 2, http://www2.epa.gov/sites/production/files/documents/draftfy14oceanpmgdnce.pdf. Likewise, over the last several years, OSHA has adopted a more aggressive enforcement posture, issuing more citations, more penalties, more findings of significant and egregious conduct, and repeat and willful violations. OSHA has also increased the scope of its investigations, doubled its minimum penalties, increased its look-back time for repeat violations from three to five years, cut in half its size-based penalty reduction, and capped its informal settlement conference reduction to 30 percent. See OSHA Administrative Penalty Information Bulletin (Oct. 1, 2010), https://www.osha.gov/dep/enforcement/admin_penalty_oct2010.html.

Roger knows that the inspectors’ presence is serious. His training kicks in.

Being Prepared

Although he is new to his job title, Roger is no novice. He knows that the most important part of successfully navigating a government inspection is preparation. He takes comfort in knowing that WonderWidget has made compliance a priority, driven by its upper management and integrated into the everyday practices at its facilities. The environmental, health, and safety (EHS) culture of awareness and responsibility at WonderWidget is designed to keep employees generally healthier and safer and reduce regulatory problems. Roger believes the EHS culture is having the intended effect, but WonderWidget is an old and diverse company, and the culture is still changing. Has it done enough? Is it ready for this type of scrutiny?

Roger’s predecessor had carefully adhered to the EHS regulations applicable to his facility but had not audited the facility and the EHS team’s preparedness as he should have. Therefore, Roger doesn’t have a clear idea of where he stands. Had the facility documented its EHS training? Had they kept maintenance records, performance tests, and information on recent capital improvements? Roger hasn’t been on the job long enough to know.

Roger felt some trepidation as he approached the front desk to greet the inspectors. He tried his best to
remain calm and to be friendly. He focused on following eight simple steps from his training.

**Step 1. Control the situation.** For safety and security reasons, Roger knows that an inspector should never be allowed to wander alone in his facility. As a first step, Roger makes available a secure room for the inspectors to wait in and asks his assistant to escort them to that location. Roger is characteristically professional, polite, and courteous with the inspectors and sets a cooperative tone for the meeting.

**Step 2. Gather information.** Roger exchanges business cards (to verify credentials) and asks the inspectors about the purpose of the visit. Roger knows that inspections can be the result of a complaint, a report that was filed with the investigating agency, a special program (such as EPA's High Priority Violator Program or OSHA's Severe Violator Enforcement Program), or simply pursuant to the terms of a permit or a follow-up investigation. He asks whether the inspectors intend to collect any samples or review records and what areas of the facility they intend to inspect. Roger is careful to be polite but clear in his inquiry, as he knows inspections can be localized in one area of the facility and focus specifically on one medium (e.g., air, water, or waste), or they can be facilitywide and involve multiple media. He needs to prepare his team accordingly and assemble the necessary records.

**Step 3. Follow protocol.** Roger carefully follows WonderWidget’s internal EHS communication protocol and advises the inspectors that he must contact his EHS advisor and legal counsel regarding the inspection before they proceed. Roger also summons several key personnel at the facility to free up his day to focus on the inspection. Roger asks the inspectors if they are familiar with the facility and informs them that they will need to comply with the same safety protocols (including the use of personal protective equipment) and training, if necessary, that all visitors do.

**Step 4. Hold an opening conference and determine the scope.** Once all the necessary parties are present, and before the inspection begins, Roger provides introductions and an overview of the facility and its operations. When questioned, Roger sticks to the facts and resists the temptation to make admissions without first consulting with his counsel. Roger also takes the opportunity to dig deeper into the purpose of the investigation, the scope, what the inspectors hope to accomplish, and whether they intend to perform or schedule any tests.

Roger knows that his first real task is to agree on the scope of the investigation and to stick to it during the walk-through. The scope of an investigation is usually tied to the basis for the visit, and so Roger asks the inspectors whether the inspection is based specifically on a complaint or a report. If so, he knows that the areas to be inspected will usually be limited to the identified areas. If the facility has been in a specific program, the scope of the investigation would generally be limited to those areas that put it in the program. Wall-to-wall inspections are rare, and Roger knows that counsel should generally be consulted before agreeing to such a broad scope.

In the back of his mind, Roger knows that if he is unable to agree on the scope of the inspection, he can consider requesting a warrant. But he knows that doing so will certainly change the tone of the investigation and could result in greater scrutiny. A more reasonable step would be to speak with the inspector’s supervisor, who has more experience and authority to tailor the investigation. Today there is no need, however, as Roger and the inspectors agree on the scope and move on.

Roger quietly reminds himself and his staff that no matter the scope, if there is an obvious instance of noncompliance identified by the inspectors during the walk-through, it will be written up in their report and investigated further.

Roger also takes the opportunity at the opening conference to ask which employees the inspectors intend to interview. The inspectors provide the names and ask that the interviews be conducted in private. Roger calls Sara, WonderWidget’s director of human resources, for a quick refresher on the employees’ rights.
Sara reminds Roger that while inspectors may ask to interview employees without management present, it is the employee’s choice as to who is present during the interview. See OSHA’s Field Operations Manual (Nov. 9, 2009), p. 3–25, https://www.osha.gov/OshDoc/Directive_pdf/CPL_02-00-148.pdf. It is also the employee’s right to know the reason for the interview, to refuse the interview altogether, and to make no comments on the matter being investigated. If interviewed, the employee has the right to have management, a labor union representative, or a personal representative (either a personal attorney or WonderWidget’s attorney) present.

Sara notes that in addition, the employee has the right to answer or refuse any question asked, and to end the interview at any time. She emphasizes that the employee should stick to the facts, and that it is okay to answer “I don’t know.” Employee interviews are frequently the inspectors’ best evidence in enforcement cases, particularly in regard to health and safety violations. The employee also can ask to have any recording devices turned off and refuse to sign statements or notes taken during the interview.

Sufficiently refreshed, Roger proceeds with the inspection.

Step 5. Staff key personnel. Roger knows from experience that it is important to always have employees knowledgeable with the EHS compliance program (two or more) meet with and accompany inspectors through the facility. Simply knowing the facility operations, the EHS practices, and the terms of applicable permits is not enough. It is critical to have those closest to the actual operations present to answer specific questions (and if necessary, discuss solutions to any problems). If these people are not present, the inspection may simply be unproductive. It may make sense under those circumstances to postpone the inspection until such time as those people are available. Moreover, in the absence of clear responses to questions, an inspector’s doubt can result in alleged violations and more follow-up.

Roger instructs his staff to mimic the actions of the inspectors, to listen carefully, to take detailed notes, to take the same pictures as the inspectors do, and to request split samples (or take contemporaneous samples) if taken during the inspection. Roger reminds his staff what documents can be requested (such as injury logs, policy, training, maintenance and malfunction records, and performance tests) (see 29 C.F.R. § 1904.40 and 42 U.S.C. § 6927) and informs the inspectors that any trade secret or confidential business information provided to them is protected from public disclosure.

Step 6. Hold a closing conference. Once the inspection is over, Roger gathers his team and the inspectors for a recap. He wants to do this the same day if possible, because he knows that in some cases the closing conference can take place days or weeks after the inspection, and as with any compliance matter, timing is crucial. Roger asks the inspectors for their findings and any concerns they might have in regard to compliance. The inspectors provide preliminary comments and identify some violations that they feel need to be addressed. Roger attempts to identify ways to address the concerns and discusses them at the conference, as he knows WonderWidget’s response time will be a factor in the assessment of any penalties.

Step 7. Control records. Although the inspectors reviewed records during the inspection, they have requested that Roger produce additional documentation. Roger knows that this will likely lead to follow-up questions. As a precaution, and to avoid the possibility of incurring a penalty, Roger suspends WonderWidget’s document destruction protocols and places a hold on documents related to the areas that were inspected. 18 U.S.C. § 1519.

Step 8. Next steps. Unfortunately, despite WonderWidget’s preparation and Roger’s careful management of the inspection, the company receives a preenforcement notice indicating that the facility has violated a number of recordkeeping and reporting requirements. It also proposes a small penalty. Roger immediately forwards the notice to WonderWidget’s director of environment and legal counsel and begins to identify what can be done to correct or abate the issues raised by the inspectors. He also evaluates the need for conducting additional internal investigations, as he does not want a repeat violation.
Roger is upset, as he feels he placed WonderWidget’s compliance record in jeopardy. His director of environment reassures him, however, that changing the EHS compliance culture within a large organization is a process and that despite best efforts there are no guarantees. Human error and equipment failure can result in noncompliance, and those can be difficult to track.

WonderWidget decides to pursue informal settlement negotiations with the environmental agency and will have the opportunity to contest the case formally as it develops. It will also review the lessons learned from the inspection and adjust its practices accordingly. After all, another inspection is never far off.

Most permitted facilities are subject to inspections by EHS regulators with little or no advance warning, and most major sources under the Clean Air Act receive a full compliance evaluation at least once every two years. See U.S. EPA, Performance and Trends: What Are Expectations Related to Compliance Monitoring within States? http://www.epa-echo.gov/echo/stateperformance/compliance_monitoring_requirements.html (last visited Aug. 1, 2013). Whether planned or unplanned, formal or informal, the regulated community needs to be prepared to respond to and weather a detailed government inspection. This begins with a companywide emphasis on EHS compliance, complimented by careful management of the details at the facility level: EHS protocols, training, records, and permitting requirements. No company is immune from violations, but the number and severity of those violations often will be proportional to its level of preparation.

Although it was a tough day for Roger, he knows it could have been much worse.

Benjamin Grawe is a partner at Gonzalez Saggio & Harlan LLP in Milwaukee. Michael Stoelton is a Certified Professional Geologist and is the Director of Environmental Affairs for Johnson Controls Inc., in Plymouth, Michigan.

---

A PRIMER ON GREEN PROCUREMENT IN THE FEDERAL GOVERNMENT
Jehmal Hudson

Background

According to the Federal Acquisition Regulation (FAR), the federal procurement system’s mission is to timely deliver the best-value product or service to the customer, while maintaining the public’s trust and fulfilling public policy objectives. Many factors, including environmental objectives, are considered in the federal procurement process. This article gives an overview of how agencies consider environmental factors when acquiring goods and services under the law and how it is applied in practice.

Environmental Attributes and the Constitution

Currently, there are legal authorities that require agencies to acquire products based on their environmental attributes. When the government buys goods and services, contractors are not deprived of due process because they lack property rights in prospective government contracts. Absent a suspect classification or fundamental right, a party challenging a government program on equal protection grounds must show that the program is not rationally related to a legitimate government objective by “negativ[ing] every conceivable basis which might support” the program. Such challenges frequently fail because rational basis review is a deferential standard of review and “serves to invalidate only ‘wholly arbitrary acts.’”

Environmental Attributes and the Competition in Contracting Act

Certain legal authorities allow agencies to purchase goods with certain environmental attributes when they have genuine requirements for such goods. While the Competition in Contracting Act (CICA) would not allow agencies to prefer certain products or vendors across the board without statutory authority, it provides explicit statutory authority for agencies to define their requirements based on their needs. So, when an
agency requires a product with specific environmental attributes, it can draft its solicitation so as to obtain that product because the CICA provides them with explicit statutory authority to do so.\textsuperscript{8} Additionally, agencies are prohibited by statute from contracting with vendors who have been debarred from federal contracts by the administrator of the Environmental Protection Agency for certain violations of the Clean Air and Clean Water Acts.\textsuperscript{9}

Federal Acquisition Regulation and the Competition in Contracting Act

Subpart 3.1 of the FAR requires that “[g]overnment business shall be conducted in a manner above reproach and, except as authorized by statute or regulation, with complete impartiality and with preferential treatment for none.”\textsuperscript{10} However, certain preferences for products with desired environmental attributes could violate procurement regulations and the CICA if authority for any preference expressed by the agency is not based in statute.

The CICA requires that contracts be awarded through “full and open competition” unless (1) a small business set-aside is used; (2) one of seven circumstances exist that permit other than full and open competition (e.g., sole-source, urgent, and compelling need); (3) the simplified procedures for “small purchases” (generally, less than $150,000) are used; or (4) agencies use procedures “otherwise expressly authorized by statute.”\textsuperscript{11}

Thus, while Subpart 3.1 of the FAR permits “preferential treatment” under the authority of a regulation, the CICA prohibits such treatment if it results in other than “full and open competition.” These two provisions, taken together, could effectively require that certain proposed “preferences” for products or vendors based on environmental considerations originate in statute (e.g., set-asides and, potentially, price evaluation preferences).\textsuperscript{12}

Bid Protest Decisions

Certain evaluation factors based on environmental considerations have been upheld by the Government Accountability Office (GAO) in bid protests. For instance, in \textit{Sunshine Kids Service Supply Company}, the GAO upheld an agency’s award of a contract based, in part, on consideration of the vendors’ “environmental stewardship,”\textsuperscript{13} while in \textit{Future Solutions, Inc.}, it upheld a similar award based, in part, on consideration of the vendors’ recycling programs for toners and cartridges, use of green delivery vehicles, and implementation of environmental management systems.\textsuperscript{14}

Although agencies’ use of evaluation factors tied to environmental considerations has been generally upheld,\textsuperscript{15} agencies are subject to certain limitations in the use of such factors, the most significant of which is arguably that evaluation factors must “represent [a] key [area] of importance and emphasis. . . and [s]upport meaningful comparison and discrimination between and among competing proposals.”\textsuperscript{16}

Implementation

Agencies generally use bilateral contracts, the Federal Supply Schedules, and governmentwide commercial purchase cards to buy goods and services with certain environmental attributes. Government contracting officers consider the nature or type of the agency’s requirements, the anticipated cost, and the complexity of the procurement when making these decisions.

Bilateral Contract

Bilateral contracts are “a mutually binding legal relationship obligating the seller to furnish the supplies or services (including construction) and the buyer to pay for them.”\textsuperscript{17} These contracts are the product of agency solicitations identifying requirements to procure goods or services meeting these requirements. The solicitations identify what agencies want to buy and may include applicable information that addresses environmental considerations and attributes.\textsuperscript{18} Case in point, an agency that uses the tradeoff source selection method (“Tradeoff Source Selection Process”) for a specific procurement could include environmental considerations as a noncost, or nonprice, evaluation factor provided that they have a genuine need for goods or services with specific environmental attributes. This process allows for a tradeoff between noncost factors and cost/price and allows the government to accept other than the lowest-priced
proposal or other than the highest technically rated proposal to achieve a best-value contract award.\textsuperscript{19}

**Federal Supply Schedules**

The General Services Administration’s (GSA) Federal Supply Schedules is an online catalogue that contains goods or services offered by multiple vendors.\textsuperscript{20} Each schedule focuses on a particular category of goods and services. GSA has established and maintains over forty schedules, covering goods and services such as advertising and integrated marketing solutions and professional engineering services.\textsuperscript{21} However, GSA leaves it up to vendors to determine and identify the environmental attributes of the products or services they provide. GSA notes that, for some products, “vendors denote whether the product meets the specifications and determine which environmental criteria to display.”\textsuperscript{22}

**Governmentwide Commercial Purchase Card**

When using a governmentwide commercial purchase card, agency personnel may generally buy any commercially available supply or service not prohibited by either federal or agency-specific procurement regulations.\textsuperscript{23} However, the May 2011 amendments to the FAR expressly provide that federal environmental policies pertaining to energy, water efficiency, and renewable energy extend to all acquisitions, including those at or below the micropurchase threshold (not greater than $3,000) and made with governmentwide commercial purchase cards.

In procurements not covered by the May 2011 amendments, agency personnel could retain substantial discretion in determining what to purchase. Personnel could select goods or services based on their environment attributes, although they would not necessarily be required to do so.\textsuperscript{24} The May amendments generally rely upon, rather than expand, existing legal authorities requiring or permitting agencies to prefer certain products based upon their environmental attributes.

**Conclusion**

While agencies do not have authority to prefer certain contractors over others based on environmental considerations, they are required to avoid dealings with environmentally irresponsible contractors in certain circumstances. With increasing concerns about the environment, many will continue to explore and examine the role of environmental considerations in the federal procurement system.

**Jehmal Hudson** is a congressional liaison/intergovernmental affairs liaison with the Federal Energy Regulatory Commission in Washington, D.C.

---

**Endnotes**

1 The FAR, which comprises Parts 1–53 of Title 48 of the Code of Federal Regulations (CFR), is “the primary regulation for use by all Federal Executive agencies in their acquisition of supplies and services with appropriated funds.” FAR “Foreword.”

2 48 C.F.R. § 1.102(a) (emphasis added). Although “best value” is not defined in this context, the FAR further provides that: “[a]ll participants in the [Federal Acquisition] System are responsible for making acquisition decisions that deliver the best value product or service to the customer. Best value must be viewed from a broad perspective and is achieved by balancing the many competing interests in the System.”

3 See, e.g., Perkins v. Lukens Steel Co., 310 U.S. 113, 127 (1940) (holding that the federal government “enjoys the unrestricted power . . . to determine those with whom it will deal[,] and fix the terms and conditions upon which it will make needed purchases.”); Chamber of Commerce of the United States of Am. v. Napolitano, 648 F. Supp. 2d 726, 736 (S.D. Md. 2009) (“[T]he decision to be a government contractor is voluntary and . . . no one has a right to be a government contractor.”).


5 Abdulah v. Comm’n of Insurance, 907 F. Supp. 13, 16 (D. Mass. 1995). This is in contrast to “strict scrutiny,” which requires the government to show that a challenged program is necessary to meet a compelling government interest. Compare United States v. Virginia, 518 U.S. 515 (1996) (heightened scrutiny with a classification based on sex); Dunn v. Blumstein, 405 U.S. 330, 342 (1972) (strict scrutiny when a classification based on length of residency in a state...

6 See 48 C.F.R. § 11.303(a)(2) (generally requiring agencies to obtain “uncoated printing and writing paper containing at least 30 percent postconsumer fiber”).

7 10 U.S.C. § 2305(a)(1)(A) (iii) (agencies to “develop specifications in such a manner as is necessary to obtain full and open competition with due regard to the nature of the property or services to be acquired”); 41 U.S.C. § 3306(a)(1)(C) (same).

8 See, e.g., Crewzers Fire Crew Transport, Inc., B-402530; B-402530.2 (May 17, 2010) (“An agency has the discretion to determine its needs and the best way to meet them.”); James C. Babin, Federal Source Selection Procedures in Competitive Negotiated Acquisitions, 23 AIR FORCE L. REV. 318, 326 (1982/1983) (“Agency discretion enjoys its greatest latitude perhaps in the initial phase of the creation of a source selection system or, indeed, in the initial step of any procurement. That initial step is simply the identification of the minimum requirements or needs that will satisfy the Government’s desires”).

9 See, e.g., The Moreland Corporation, B-283685 (Dec. 17, 1999) (denying a protest of an award that the agency made based, in part, on extra points given to offers who exceeded a certain technical requirement).

10 48 C.F.R. § 3.101-1 (emphasis added).


13 B-292141 (June 2, 2003).

14 B-293194 (Feb. 11, 2004).

15 See also King Constr. Co., Inc., B-298276 (July 17, 2006) (“Agency acquisition officials have broad discretion in selecting evaluation factors that will be used in an acquisition, and we will not object to the absence or presence of particular evaluation factors or an evaluation scheme so long as the factors used reasonably relate to the agency’s needs in choosing a contractor that will best serve the government’s interests”).

16 48 C.F.R. § 15.304(b); 48 C.F.R. § 15.304(c).


24 See, e.g., 48 C.F.R. § 23.400(a)–(b) (only purchases of goods valued at over $10,000, per item or in the aggregate, are subject to the preferences under the Resource Conservation and Recovery Act); 48 C.F.R. § 13.201(f).
ENERGY SAVING S PERFORMANCE CONTRACTS: PUBLIC-PRIVATE PARTNERSHIPS TO IMPLEMENT ENERGY AND WATER PROJECTS AT FEDERAL FACILITIES
Michael C. Jensen

Introduction

As the largest single energy consumer in the United States, the federal government has both a tremendous opportunity and a clear responsibility to lead by example with smart energy management. One of the mechanisms available to federal agencies in fulfilling these obligations, and in adhering to numerous federal requirements regarding energy and water conservation and emissions reduction, is the use of energy savings performance contracts (ESPCs). First authorized by Congress in 1986 as an alternative financing method to traditional federal procurement requirements, ESPCs allow federal agencies to engage with private sector energy services companies (ESCOs) to implement energy and water efficiency improvements, renewable energy projects, and new equipment and systems in federal buildings and facilities with limited to no upfront capital costs, thereby minimizing the need for congressional appropriations.

The ESPC process involves collaboration between federal agencies and ESCOs to identify potential improvements to federally owned buildings and facilities that would result in energy savings to the agency upon implementation. The ESCO designs, constructs, and installs a project that meets the federal agency’s needs and arranges for the necessary financing, all at no initial cost to the agency. The ESCO also provides a guarantee to the federal agency that the installed equipment and systems will generate energy savings sufficient to pay for project costs over a maximum contract term of twenty-five years. In exchange for assuming the risk of upfront project financing, the ESCO is paid over the term of the contract from the resulting energy savings, which are calculated based on periodic measurement and verification. The ESCO thus bears the risk of assuming the upfront project development costs and is paid only if energy savings, as guaranteed under the ESPC, are realized by the federal agency. When the contract term is complete, the recurring energy and cost savings from these improvements accrue to the federal agency.

The following provides a brief overview of the ESPC process and discusses recent developments and opportunities that are available to federal agencies and private energy firms alike. Part I summarizes the processes and requirements for ESCO qualification, selection, and contract award. Part II discusses recent legislation, federal sustainability requirements, and agency initiatives that serve as the backdrop for increased engagement and cooperation between federal agencies and private energy firms in ESPC project implementation.

I. ESPC Process

The following section provides a general overview of the ESPC authority and ESCO selection process for use by private energy firms and federal agencies that are interested in exploring potential opportunities for financing and implementing energy and water projects.

A. Qualification

Before discussions between a federal agency and a private energy firm can take place regarding a potential ESPC, the firm must be approved as qualified to undertake an ESPC. In order to receive approval, an interested firm must apply for inclusion on a federal agency’s list of qualified contractors. The existing application process requires at a minimum the submission of a statement of qualifications and two client questionnaires. The federal agency then determines, through comparison against a set of criteria established by regulations, whether an applicant is qualified for inclusion on its list of qualified contractors. The existing application process requires at a minimum the submission of a statement of qualifications and two client questionnaires. The federal agency then determines, through comparison against a set of criteria established by regulations, whether an applicant is qualified for inclusion on its list of qualified contractors. Each ESCO listed on a federal agency’s list of qualified contractors is required to maintain and recertify its qualifications on a periodic basis, and an ESCO may be removed from a federal agency’s list if it is determined that such ESCO is no longer qualified to provide ESPC services.
B. ESCO Selection
If a federal agency is contemplating whether to undertake an ESPC, it may consider several avenues of ESCO selection, including procedures for competitive selection of ESCOs based on both solicited and unsolicited proposals and the use of an agency “indefinite delivery, indefinite quantity” (IDIQ) contract. Under each option, a federal agency must issue a public solicitation for proposals. Based on the federal agency’s evaluation of ESCO qualifications and technical and/or price proposals submitted in response to the solicitation, the agency may request that an ESCO prepare a preliminary assessment, an investment grade audit, and a measurement and verification plan. Although not required for all ESPCs, a preliminary assessment often is necessary to provide an overview of the merits, technical feasibility, level of projected energy savings, economics, and price of complex projects. The investment grade audit constitutes a more robust analysis of a federal building or facility to substantiate the ESCO’s ability to achieve the estimated energy savings as evaluated in its technical and price proposals. The ESCO also obtains financing quotes during the investment grade audit phase. Finally, the measurement and verification plan defines how energy savings will be demonstrated and calculated and specifies any ongoing activities that will take place during the contract term. Upon review of these materials, the federal agency may negotiate and award an ESPC. As noted above, the ESCO bears the risk of assuming the upfront project development costs and is paid only if energy savings, as guaranteed under the ESPC, are realized by the federal agency.

C. Requirements for Contract Award
Final award of an ESPC is subject to internal agency review and must comply with numerous statutory and regulatory mandates. One of the central requirements is corroboration that the ESPC is “solely for the purpose of achieving energy savings and benefits ancillary to that purpose.” An ESPC also must serve the purpose of implementing one or more energy or water conservation measures. An energy conservation measure is defined by statute to mean a measure that is applied to a federally owned building, improves energy efficiency, is lifecycle cost-effective, and involves energy conservation, cogeneration facilities, renewable energy sources, improvements in operation and maintenance efficiencies, or retrofit activities. A water conservation measure is defined as a measure that improves the efficiency of water use, is life-cycle cost-effective, and involves water conservation, water recycling or reuse, more efficient treatment of wastewater or stormwater, improvements in operation or maintenance efficiencies, retrofit activities, or other related activities and that is not implemented at a federal hydroelectric facility. Examples of common energy or water conservation measures include boiler and chiller plant improvements, lighting improvements, building envelope modifications, and renewable measures.

Other key requirements are the limitation on contract terms to twenty-five years, confirmation that the federal agency has funds available and adequate for payment of the scheduled energy cost for the first year of the ESPC, and the ESCO’s obligation to incur all initial upfront costs and maintenance in exchange for payment over the term of the ESPC from the resulting energy savings. Moreover, the terms of each ESPC must set forth the guaranteed energy savings and establish a payment schedule reflecting such guarantee. Finally, the terms of the ESPC must specify the preinstallation energy baseline, a procedure to adjust the baseline if necessary, and procedures for the installation, commissioning, and postinstallation verification of energy or water conservation measures and related equipment and systems.

II. Recent ESPC Developments and Opportunities
Although ESPCs have been available for use by federal agencies for over twenty-five years, significant potential remains for the widespread use of ESPCs in the federal government. Moreover, the program has received increased attention as a result of recent legislative action, an increased focus on reducing building energy intensity, and agency initiatives. The following section provides a general overview of recent ESPC developments representing potential...
opportunities for cooperation among federal agencies and ESCOs.

A. Legislation
After the initial eighteen years of the ESPC program’s existence, there was uncertainty over whether ESPCs were available to federal agencies after September 2003, the original sunset date of the underlying statute. Any ambiguity was resolved in August 2005, however, upon reauthorization of the ESPC program authority, which subsequently was permanently authorized in December 2007 upon the enactment of the Energy Independence and Security Act of 2007 (EISA). EISA also set forth a series of amendments to the underlying authority designed to create more flexibility in the use of ESPCs. EISA amended the definition of “energy savings” to encompass savings from heat recovery and cogeneration, the sale or transfer of energy generated at federal sites from renewable energy sources or cogeneration facilities in excess of federal needs, and increased efficiencies in use of existing water sources. EISA also expressly allowed federal agencies to enter into ESPCs financed using any combination of appropriations and private funds.

B. Federal Sustainability Requirements
In recent years, the federal government has experienced a renewed effort to achieve cost-effective solutions in reducing building energy and water intensity. In 2005, Congress developed legislation requiring federal agencies to source no less than 7.5 percent of total energy consumed from renewable energy. Two years later, EISA required federal agencies to reduce energy intensity in their facilities by 30 percent by the end of fiscal year 2015. EISA also required federal agencies to complete comprehensive energy and water evaluations of their facilities every four years and to implement energy and water efficiency measures identified therein. Finally, the legislation set forth mandatory reductions in fossil fuel-generated energy consumption for new federal buildings and federal buildings undergoing major renovations.

In October 2009, President Obama established through executive order additional requirements for federal energy efficiency and sustainability. Specifically, federal agencies were directed to reduce their greenhouse gas emissions by 28 percent; increase their use of renewable energy; and achieve significant reductions in potable water consumption intensity as well as reductions in industrial, landscaping, and agricultural water consumption. In December 2011, federal agencies were directed to implement and prioritize energy and water conservation measures in federal buildings with a payback time of less than ten years. President Obama also challenged federal agencies to meet a goal of entering into a minimum of $2 billion in performance-based contracts by the end of 2013. This undertaking has served the dual purpose of increasing the awareness and visibility of the use of ESPCs and providing assistance to federal agencies in complying with statutory and executive order goals and requirements.

C. Recent Initiatives
DOE, in conjunction with the General Services Administration (GSA), recently developed a new ESPC approach, known as the ESPC ENABLE Program, which builds off of the success of the traditional ESPC approach by allowing federal agencies to implement in six months or less certain types of ESPCs in small federally owned buildings and facilities. The ESPC ENABLE Program provides a standardized and streamlined process to install specific types of measures in buildings and facilities smaller than 200,000 square feet with measurement and verification appropriate for the size and scope of the project. The program is intended to target energy and water conservation measures that can be implemented without difficulty and that typically result in predictable and easily identifiable energy savings (e.g., lighting; water; and heating, ventilation, and air conditioning controls).

The ESPC ENABLE Program’s streamlined five-phase procurement process uses either GSA Award Schedule 84, Special Identification Number 246-53 or a site-specific approach that consists of an accelerated and simplified process for (1) acquisition planning, (2) ESCO selection, (3) investment-grade audit preparation, (4) installation, and (5) measurement and verification. In addition to the benefits that accrue
Conclusion

The use of ESPCs has proven to be an effective and attractive mechanism for implementing energy and water projects aimed at reducing energy and water costs and decreasing greenhouse gas emissions, especially during times of budgetary constraint. Given that the federal government owns and operates nearly 3 billion square feet of building space—and that this space will continue to be updated to address ongoing mission needs and energy, environmental, security, and structural requirements—there are considerable opportunities available to both federal agencies and the private sector to evaluate and implement energy and water projects using the ESPC process.

Michael C. Jensen is an attorney with the U.S. Department of Energy (DOE), where he serves as program counsel for the Office of Energy Efficiency and Renewable Energy and oversees matters related to performance-based contracting.

Endnotes


5 See 42 U.S.C. § 8287(a)(1) (“Each such contract may, notwithstanding any other provision of law, be for a period not to exceed 25 years.”); id. § 8287(a)(2)(B) (“The contract shall provide for a guarantee of savings to the agency, and shall establish payment schedules reflecting such guarantee. . .”).

6 ESPCs are exempted from the federal Anti-Deficiency Act, 31 U.S.C. § 1341 et seq. As such, federal agencies are authorized to waive the standard federal requirements for up-front capital funding of infrastructure projects and one-year federal contract financing and may enter into contracts for up to twenty-five years for the purpose of achieving energy savings in federal buildings. See 42 U.S.C. § 8287(a)(1); see also H.R. Conf. Rep. No. 102-1018, 102d Cong., 2d Sess., 385, reprinted in 1992, U.S. Code Congressional and Administrative News 2476 (“Under these contracts, the contractor is expected to bear the risk of performance, make a significant initial capital investment, guarantee significant energy savings to the government agency, and from these savings, the agency, in effect, makes payment to the contractor.”).


9 See ESPC Intro., supra note 5.

10 See 42 U.S.C. § 8287(b)(2); 10 C.F.R. § 436.32(a)–(b).
See 42 U.S.C. § 8287(b)(2)(A)(i); 10 C.F.R. § 436.32(a). The ESPC authority requires each federal agency to use the qualification procedures developed by the DOE unless the federal agency develops its own qualification procedures consistent with the DOE approach. The U.S. Department of Defense (DOD) is the only other federal agency that has elected to develop its own qualification procedures. Further information on the documentation required for the applicant process is located on the DOE website. See U.S. Dep’t of Energy, Office of Energy Efficiency and Renewable Energy, Qualified List of Energy Service Companies, available at www1.eere.energy.gov/femp/financing/espcs_qualifiedescos.html (last visited June 11, 2013).

The applicant is selected for inclusion on a federal agency’s list of qualified contractors if: “(1) [i]t has provided [ESPC] services or services that save energy or reduce utility costs for not less than two clients, and the firm possesses the appropriate project experience to successfully implement the technologies which it proposes to provide; (2) [p]revious project clients provide ratings which are ‘fair’ or better; (3) [t]he firm or any principal of the firm has neither been insolvent nor declared bankruptcy within the last five years; (4) [t]he firm or any principal of the firm is not on the list of parties excluded from procurement programs under 48 CFR Part 9, Subpart 9.4; and (5) [t]here is no other adverse information which warrants the conclusion that the firm is not qualified to perform [ESPCs].” 10 C.F.R. § 436.32(b); see 42 U.S.C. § 8287(b)(2)(A)(ii).

An ESCO may be removed from a federal agency’s list of qualified contractors “after notice and an opportunity for comment if (1) [t]here is a failure to update its statement of qualifications; (2) [t]here is credible information warranting disqualification; or (3) [t]here is other good cause.” 10 C.F.R. § 436.32(c); see 42 U.S.C. § 8287(a)(2)(A).


See 10 C.F.R. § 436.33.

See 42 U.S.C. § 8287(c); U.S. Dep’t of Energy, Office of Energy Efficiency and Renewable Energy, Energy Savings Performance Contracts, at http://www1.eere.energy.gov/femp/financing/espcs.html (last visited June 11, 2013). IDIQ contracts are designed to streamline traditional procurement procedures by providing prenegotiated terms and conditions to preapproved ESCOs that have demonstrated their ability to provide energy services to federal agencies. These so-called “umbrella” contracts represent a simplified ESPC procurement process that allows federal agencies to negotiate site-specific task orders and delivery orders.

See 42 U.S.C. § 8287(c)(1)(A) (requiring a Federal agency to notify all ESCOs under an IDIQ contract of a potential ESPC); 10 C.F.R. § 436.33(a) (requiring a federal agency to publish a notice in Commerce Business Daily if it is contemplating soliciting ESCOs for an ESPC); id. § 436.33(b) (providing that if a federal agency receives an unsolicited proposal for an ESPC, it must publish a notice in Commerce Business Daily acknowledging receipt of the proposal and inviting other ESCOs to submit competing proposals).


24. 42 U.S.C. § 8287(a)(1). Generally, energy savings are demonstrated through a reduction in the cost of energy, water, or wastewater treatment, and related operation and maintenance expenses in an existing federally owned building. See id. § 8287a, 8287c(2)(A). Energy savings also are achieved through “the increased efficient use of an existing energy source by cogeneration or heat recovery;” “the sale or transfer of electrical or thermal energy generated on-site from renewable energy sources or cogeneration, but in excess of Federal needs, to utilities or non-Federal energy users;” and “the increased efficient use of existing water sources in interior or exterior applications.” Id. § 8287c(2)(B)–(D).

25. See id. § 8287c(3).

26. See id. §§ 8259(4), 8287c(4)(A). For purposes of the aforementioned definitions, the phrase “improves energy efficiency” is not limited in scope to more efficient conversion of energy; rather, when renewable energy is substituted for conventional energy fuels and thereby reduces the government’s usage of conventional energy sources, such a substitution constitutes “improved energy efficiency.” See U.S. Dep’t of Energy, Office of Energy Efficiency and Renewable Energy, Energy Savings Performance Contract (ESPC) Indefinite Delivery Indefinite Quantity (IDIQ) Frequently Asked Questions (FAQs), 4, http://www1.eere.energy.gov/femp/pdfs/1_2_idiqfaq.pdf.


32. See 10 C.F.R. § 436.35(a)(5).

33. See M&V Guidelines, supra note 22.

35 See M&V Guidelines, supra note 22.

36 One of the reasons that ESPCs are not used universally within the federal government is the belief that ESPC projects deliver minimal cost savings to the federal agency, given that most of the guaranteed energy savings are paid to the ESCO. The federal agency does realize significant cost savings in excess of the amount paid to the ESCO, however, as a result of four principal sources of cost savings that are not captured in the calculation of guaranteed energy savings: (1) the ESCO does not guarantee all of the energy savings it estimates; (2) the useful life of the equipment often extends beyond the performance period of the ESPC; (3) the National Institutes for Standards and Technology and the Energy Information Administration have set forth conservative projections for energy price escalation rates; and (4) guaranteed energy savings are based on baseline scenarios in which existing equipment maintains the same level of efficiency with no increase in required operation and maintenance over its useful life. Accordingly, the additional cost savings that accrue to the Federal Government in excess of guaranteed savings can be significant. See John Shonder, U.S. Dep’t of Energy, Oak Ridge National Laboratory, Beyond Guaranteed Savings: Additional Cost Savings Associated with ESPC Projects, 1 (2013), available at http://www.ornl.gov/sci/ees/etsd/btric/publications/Publication%2041816.pdf.


40 See id. § 515 (codified at 42 U.S.C. § 8287c(2)(B)–(D)).

ECMs with the greatest return on investment, leveraging both direct appropriations and performance contracting, consistent with guidance by the Office of Management and Budget (OMB).”


55 See id.

56 See Presidential Memorandum, supra note 50.

57 ESPCs entered into under DOE’s IDIQ contract in 2012 and 2013 alone are projected to save the federal government almost 900 billion Btu annually and result in over $430 million in guaranteed energy savings. See U.S. Dep’t of Energy, Office of Energy Efficiency and Renewable Energy, Awarded ESPC Projects, at http://www1.eere.energy.gov/femp/financing/espcs_awardedcontracts.html (last visited June 11, 2013). The ESPC ENABLE Program also represents an opportunity to implement projects in smaller-sized buildings that previously had not been considered under the traditional ESPC process.
Recent actions and statements by the United States Environmental Protection Agency (EPA) have suggested that the agency is contemplating significant changes to, if not the abandonment of, EPA’s “Audit Policy.” This policy, effective May 11, 2000, and formally titled “Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations,” provides regulated companies with the opportunity to voluntarily discover, promptly disclose to the EPA, expeditiously correct, and prevent recurrence of future environmental violations. For companies, the benefits of the Audit Policy are that the regulated entity may avoid some or all “gravity-based penalties,” which are civil penalties under environmental laws assessed based upon the severity or “gravity” of the violation. The disclosing entity usually remains responsible for a penalty equal to the amount of economic benefit the violator received from failing to comply with the law. Disclosing parties also can be protected from referral for criminal prosecution. The criteria to qualify for these projections are detailed—with minor exceptions, failure to meet all nine criteria of the Audit Policy (including, among others, voluntary and systematic discovery, disclosure to EPA within twenty-one days, and remediation within sixty days) renders a disclosing entity ineligible for the Audit Policy’s benefits.

Commencing with the “FY 2013 Office of Enforcement and Compliance Assurance (OECA) National Program Manager (NPM) Guidance” (Apr. 30, 2012), its 2013 tool for forecasting enforcement priorities and budgets to achieve these priorities, U.S. EPA OECA began to equivocate on its commitment to the Audit Policy:

Since implementation of the Audit Policy began in 1995, EPA’s enforcement program has increased its understanding of environmental compliance auditing, and believes that internal reviews of compliance have become more widely adopted by the regulated community, as part of good management. In addition, EPA has found that most violations disclosed under the [Audit] Policy are not in the highest priority enforcement areas for protecting human health and the environment. EPA believes it can reduce investment in the program to a limited national presence without undermining the incentives for regulated entities to do internal compliance reviews to find and correct violations. As we reduce investment in this program, EPA is considering several options, including a modified Audit Policy program that is self-implementing.

OECA NPM Guidance (emphasis added). Andrew Stewart, who is acting director of the Special Litigation and Projects Division of OECA, indicated during an April 2013 Environmental Law Institute conference that while the Audit Policy is still in effect, OECA is effectively trying to deliver a greater return on investment from the cost of administering the Audit Policy. Stewart suggested that EPA is considering an online disclosure function while retaining the labor-intensive role of the Audit Policy for more significant or “serious” violations.

The future of and agency commitment to the Audit Policy was also a topic during the confirmation hearings of current EPA Administrator Gina McCarthy, when Senator David Vitter (R-LA) asked McCarthy whether she would be committed “to preserve the Audit Policy so that the beneficial effects of this Policy continue to be achieved.” In response, McCarthy further muddied the waters on the fate of the Audit Policy, stating that “[c]ompanies are increasingly aware that good environmental management is part of overall sound business management. This general corporate acceptance of auditing enables EPA to better align the Audit Policy with Agency resources and compliance priorities, and apply it where it can be most effective. If confirmed, I commit to applying compliance incentives in a manner that best advances the goals of good environmental management.” (emphasis added)

In a February 8, 2013, letter to Cynthia Giles, EPA assistant administrator with OECA, the Corporate Environmental Enforcement Council (CEEC), a cross-
industry coalition of corporate counsel and environmental professionals from a wide range of industrial sectors that focuses on civil and criminal environmental enforcement issues, laid out a compelling case for retaining the Audit Policy, stating that “CEEC believes that the Audit Policy is one of the most successful programs that the Agency has implemented.” The CEEC letter cited a study by Michael Toffel (Harvard Business School) and Jodi Short (Georgetown University Law Center), which concluded that

firms that voluntarily disclosed regulatory violations and committed to self-policing improved their regulatory compliance and environmental performance. Specifically, they were subsequently cited for fewer regulatory violations by agency inspectors and subsequently experienced fewer accidental releases of toxic chemicals than a matched set of non-disclosers. These results suggest that, on average, firms that self-reported to the Audit Policy also engaged in effective self-policing.


Though challenging to qualify for and potentially time- and cost-intensive in its application, EPA’s Audit Policy has been a magnet for success in reducing the disincentives that otherwise inhibit regulated entities from voluntarily discovering conditions of noncompliance and “coming clean.” Interested parties should keep a close eye on EPA’s and, specifically, OECA’s actions as the Agency contemplates perceived cost-saving measures, including trimming the scope and application of the Audit Policy, to achieve its goal of more efficiently executed environmental enforcement.

Edward B. Witte is the environmental law team leader at Gonzalez Saggio & Harlan LLP in Milwaukee.
21st Fall Conference 2013

October 9-12, 2013
Hilton Baltimore
Baltimore, MD

Early Bird Registration Deadline: Wednesday, August 28, 2013
Housing Deadline: Tuesday, September 17, 2013

For the most up-to-date information visit our website at
www.ambar.org/EnvirnFall

SESSION TITLES:

Wednesday, October 9, 2013
How to Get Hired by In-House Counsel
Keynote Address: Kenneth B. Feinberg, Feinberg Rozen, LLP, Washington, DC

Thursday, October 10, 2013
Plenary Session 1—News from the Capitol: Administration and Congressional Priorities for Energy and Environmental Law and Policy
The Corporate Supply Chain Goes Global: What You Need to Know to Counsel Your Multinational Client
Reacting to Coastal Disasters: Response and Future Preparedness
Less is More? The Expanding Universe of Low-Level Toxic Tort Claims
Clean Air Developments Every Lawyer Should Know
Going Back to the Wet: the Next Generation of Fracking Challenges
Clash of the Titans: Live Litigation
Road Warriors - A Hands-On Practical Demonstration of Technology and Ethical Perils

State Authority on Climate Change: Where are the Commerce Clause Boundaries?
Environmental Markets 20: The Evolving Use of Market-Based Mechanisms

Friday, October 11, 2013
Plenary Session 2—From the Top: Second Term Priorities and Perspectives from Senior EPA Officials
Renewable Energy Development: Challenges, Opportunities and Pay-Offs
TMDL Regulation: How EPA’s Chesapeake Bay Initiative May Spread to Your Watershed
CERCLA Case Studies and Lessons Learned—Novel Approaches and Noteworthy Outcomes
Cooperative Federalism: Under Assault or In Balance?
Hot Topics in Environmental Enforcement and Compliance
Transaction Jeopardy! Getting the Deal Done
Today’s Ethics: More Complicated Than You Thought?
Managing Conflicts & Virtual Reality in Today’s Environmental, Energy and Natural Resources Law Practices

ABA Section of Environment, Energy, and Resources

The premier forum on environment, energy, and resources law.