

September 6, 2016

Department of Energy
Federal Energy Management Program
ATTN: Tracy Niro
Tracy.Niro@ee.doe.gov

**RE: Request for Comments on the Tax Treatment of an Energy Savings
Performance Contract Energy Sales Agreement**

Ms. Niro:

The National Association of Energy Service Companies (NAESCO) appreciates the opportunity to offer comments on the potential for an Energy Savings Performance Contract Energy Sales Agreement (ESPC ESA) to qualify as a service contract under 26 U.S.C. § 7701(e) and allow for an eligible renewable energy project to claim the investment tax credit (ITC) under 26 U.S.C. § 48, notwithstanding the mandatory title transfer required under OMB Memorandum 12-21.

Introduction to NAESCO

NAESCO is the leading national trade association of the energy services industry. NAESCO numbers among its members some of the world's leading energy services companies, including: ABM Energy, AECOM Energy, Ameresco, Brady Services, Clark Energy Group, ClearEnergy Solutions, Climatec, CM3 Building Solutions, ConEdison Solutions, Constellation, Control Technologies and Solutions, CTI Energy Services, Energy Solutions Professionals, Energy Systems Group, Entegriety, Excel Energy, GEM Energy, Harshaw Trane, Honeywell, IES, Johnson Controls, Lockheed Martin, McClure Energy, Navitas, NORESKO, Onsite Energy, Opterra Energy Services, Pepco Energy Services, Perfection Group, Performance Services, Schneider Electric, Siemens Industry, Southland Industries, Synergy Companies, Trane, UCONS, Wendel Energy Services and Willdan.

During the past twenty years, NAESCO member companies have implemented several billion dollars' worth of ESPC projects to federal agencies. Nationally, NAESCO member projects have produced:

- \$50 billion in projects paid from savings
- \$55 billion in savings – guaranteed and verified
- 400,000 person-years of direct employment
- \$35 billion in infrastructure improvements in public facilities
- 450 million tons of CO2 savings at no additional cost

Response to the RFC

The mandatory title transfer required under the 2012 OMB memorandum has presented tax ownership questions for an ESPA ESA. This has created uncertainty as to the tax treatment of these projects and whether they will qualify as a service contract and be eligible for the ITC. As such, NAESCO strongly supports the comments of its member ESCO, Ameresco, which we summarize below:

1. For a project to be financeable, lenders and investors must be convinced that the output will be compensated. Under ESPC contracts in general, the energy service company (ESCO) does not bear risk for changing electric loads at the federal energy site. As such, the ESPC contract language should require that the federal agency will purchase but should not require that a federal agency use all of the electricity produced by an on-site renewable energy system. Rather, it should be clarified that the federal agency should be obligated to a “take-or-pay” provision that recognizes that the ESCO has no control over the changing operations of the facility over the term of the contract, and that the federal agency can readily sell the power it has contracted to purchase but does not use through a net metering tariff.
2. The ESPC contract should not require the re-appraisal of the future Fair Market Value of the renewable energy asset every five years, because such re-appraisal would deliver very little value to the government while increasing the perceived financial risk of other parties to the ESPC. Moreover, NAESCO believes that no appraiser can accurately determine today the value of a renewable energy asset in 2036 or 2041, and any appraisal would be so speculative as to be virtually worthless. It would appear that a more meaningful appraisal should occur in the years closer to the conclusion of the contract providing the ESCO sufficient time to adjust the reserve account based on a more precise estimation of the FMV.
3. In order to make explicit that the mandatory title transfer required by the 2012 OMB memo will not disqualify an ESPC ESA project from being termed a service contract, the IRS should issue a revenue ruling, revenue procedure or notice to the effect that,

“A defeased purchase obligation at fair market value determined at time of exercise will not cause the federal agency to be treated as the tax owner of the equipment from inception and will not cause the ESPC ESA to be denied treatment as a “service contract” under the safe harbor in section 7701(e)(3) and that the mandatory title transfer required by the 2012 OMB Memo will not disqualify an ESPC ESA project from being a service contract, so long as the transfer takes place at fair market value, pursuant to 26 U.S.C. § 7701(e)(4)(A)(iv).

“Additionally, the contract period of an ESPC ESA will not adversely affect the eligibility of the service provider to claim the federal income tax benefits associated with its ownership of the project, assuming the term does not exceed 25 years as contemplated by 42 U.S.C. § 8287.”

Sincerely,

A handwritten signature in black ink, appearing to read "Donald Gilligan", with a long horizontal flourish extending to the right.

Donald Gilligan
President