

Energy Management Services: FREQUENTLY ASKED QUESTIONS

1. What is Energy Management Services?

Energy Management Services (EMS), defined in section three of M.G.L. 25A, is a type of Energy Savings Performance Contracting (ESPC) that provides a performance guarantee from the company that installs the equipment. EMS is an alternative public procurement method used to purchase energy conservation measures, energy efficiency measures, and water conservation measures.

2. What is the maximum term for an Energy Management Services Agreement (EMSA)?

The maximum term for an EMS contract is 20 years.

3. What is an Energy Service Company or ESCO?

An Energy Service Company (known as an ESCO) is a firm that coordinates all of the activities of an EMS project, including: technical audits, design, engineering, equipment installation, construction management, staff training, equipment maintenance, and project monitoring. ESCOs must be DCAMM certified. A list of certified ESCOs is available online. For more information on DCAMM certification, awarding authorities should refer to DCAMM's *Certification Guidelines and Procedures for Prime Contractors and Awarding Authorities* <<http://www.mass.gov/anf/docs/DCAMM/dlforms/certification/cr-certguideproc-gc-aa-2008-12-04.pdf>>.

4. Why should I consider EMS contracting instead of a regular construction project?

You may want to consider EMS contracting to reduce your energy bills and obtain new capital equipment with little or no up-front capital investment. Most public agencies consider EMS contracting when they have identified energy and water conservation potential in their buildings but do not have sufficient funding to make the improvements.

In addition, EMS contracting offers significant benefits that are not usually associated with standard construction projects, such as a performance guarantee or staff training for preventative maintenance. Over the contract term, an ESCO may train facility staff to optimize the performance of installed equipment.

EMS contracting also allows the contracting entity to minimize risks related to the recouping of costs associated with new efficiency equipment. When an ESCO guarantees a specified amount of energy savings attributable to the installation and operation of the energy conservation measures, the ESCO pays the difference (shortfall) if those guaranteed savings do not materialize.

5. What sort of measure may I fund with an EMSA?

Public agencies may procure any equipment that saves energy or water or generates onsite electricity, including, but not limited to: energy controls, lighting retrofits, HVAC upgrades, fuel switching, high

efficiency motors, and pumps, heat recovery systems, cogeneration, and renewable energy systems such as solar and wind power.

6. I need a custodian. Can I get one through EMS contracting?

No. EMS is used to provide a program of services, including energy audits, energy conservation measures, energy conservation projects, or a combination thereof, and building maintenance and financing services primarily intended to reduce the cost of energy and water in operating buildings.

7. EMS contracting allows the same contractor to perform both design and construction. Does that conflict with M.G.L. c.149?

No. One may undertake EMS contracting as specified in 225 CMR 10.00 or 225 CMR 19.00. EMS authorizes a limited exemption to G.L. c.149 and provides for the procurement of a “program of services,” including design and construction work that is primarily intended to reduce energy and water consumption.

8. We are planning major renovations to our buildings in the next few years. Should we still consider EMS contracting?

You should consider EMS contracting only if reliable energy and water baselines can be established. EMS is a viable financing option if you are planning to improve your energy and water systems; however, if renovations would increase utility costs, you should reconsider or delay implementing an EMS contract.

9. Our town hall needs a lot of work, but it is not big enough for an EMS contract. What can we do to develop a viable project?

Expand the scope of the project by including more buildings or evaluating additional conservation improvements. The buildings in a project should cost enough in annual utility bills, including gas, electricity, water, and oil to generate sufficient savings to cover the investment. Usually a single building is not big enough to support a successful EMS contracting project. For example, consider expanding the project to include schools, libraries, and water treatment plants over which the city or town has jurisdiction, or consider joining with another municipality in a combined bid.

Smaller towns may want to explore advertising their projects with others. For successful projects, determine the evaluation criteria, the method of allocating savings, and the contract monitoring before advertising the project. To date, five regional groups have aggregated advertising a solicitation: Franklin Regional Council of Government (FRCOG), Pioneer Valley Planning Commission (PVPC), Merrimack Valley Planning Commission (MVPC), Metropolitan Area Planning Council (MAPC), Cape, and Vineyard Electric Cooperative (CVEC).

10. Have other municipalities implemented Energy Management Services projects?

Yes, many [communities and k-12 schools](#) have used this method. Contact DOER for a list of current contracts.

11. What is the difference between M.G.L. c.25A, §11C and §11I. Which section do I use?

Local governmental bodies may use either a Request for Proposal (RFP) or a Request for Qualifications (RFQ) for their solicitations. DOER’s model contract is identical for both methods.

M.G.L. 11C uses an RFP requiring price data on each proposed energy conservation measure (ECM) and, if applicable, water conservation measure (WCM) that includes a breakdown of each ECM cost structure, mark-ups, overhead, and profit and a request for estimated Guarantee of Savings or Energy Savings based on the specified savings calculation methodology identified in the most recent version of the Federal Energy Management Program (FEMP) Guide for Measurement and Verification.

There is no such requirement for M.G.L. c.25A, §11I, which uses an RFQ. This method allows for subsequent price discovery during contract negotiations. However, DOER guidance and model RFQ requires responses to provide markups.

12. May we negotiate a different contract price from the one that was proposed in response to our RFP?

One may not alter a response after the proposals are opened. 225 CMR 10.05 requires, among other things, that the "EMS contract shall conform to the terms included in the RFP, utilize the terms and conditions set forth in Guidelines established by DOER, and conform to other terms required by law and by the Local Governmental Body."

M.G.L. c.25A, §11C makes clear that, subject to a local governmental body's authority to reject, in whole or in part, any and all proposals... "a local governmental body shall unconditionally accept a proposal without alteration or correction, except as provided in this paragraph. An offeror may correct, modify, or withdraw a proposal by written notice received in the office designated in the request for proposals prior to the time and date set for opening the proposals. After proposal opening, an offeror may not change any provisions of the proposal in a manner prejudicial to the interests of the local governmental body or fair competition"

13. In the RFQ process, are you locked into the ESCO markups? Are the markups negotiable?

Part of the bid response evaluation is rating the ESCO based on the criteria set out in the solicitation, one of which is markups. Once the selection process is complete, the markup may not be adjusted. Since all pricing must be competitive, awarding authorities should use due diligence during the price discovery and negotiation period.

14. Does the state have examples of model RFPs, RFQs, and contracts?

DOER provides model documents, procurement assistance, and procurement enforcement to support public officials in contracting under 225 CMR 10.00 and 225 CMR 19.00. The EMS web page has a wealth of information, including model documents.

15. When and where do I file the EMS documents?

Instructions may be found on DOER's EMS web page. There are several filing requirements:

- a. First, file the RFP/RFQ with DOER 15 business days before submitting the document to the Secretary of the Commonwealth for publishing in the *Central Register*. Once you receive DOER's acknowledgement, then publish the document, as you would for any other public procurement. To file electronically, email it to EMS.DOER@state.ma.us.

All signed agreements, including Investment Grade Audit Agreements and the EMS Agreement must be filed with DOER. Awarding authorities must also file an annual savings report.

- b. Second, publish the RFP or RFQ in the [Central Register](#). All EMS bids must be published in the Register. State law (Ch.9, section 20A) and state regulations (950 CMR 21.00) mandate that state, county, and local government agencies place their bid notices for certain design, construction-related, and real estate projects in the Central Register.
- c. Third, you have the option to publish the bid on CommBuys at <http://www.mass.gov/anf/budget-taxes-and-procurement/procurement-info-and-res/conduct-a-procurement/commbuys/>.

16. We would like to expedite this process. How long do I need to advertise?

Allow at least two weeks between initial advertising and the proposal submission deadline. However, good business practices would indicate that at least six weeks is a more realistic period, given the level of complexity of these projects. Giving firms at least six weeks to respond to the RFP/RFQ decreases the likelihood of a person filing a complaint based on the perception that one firm had prior or preferential access to the site before the brief two-week interval. A six-week timeframe will also give more firms time to learn about the project, thus increasing the competition and quality of responses.

17. I understand the community needs someone on staff to oversee the life of this project. What percentage of the person's time would oversee this after construction?

Resource needs will change over time. The municipality's project manager would dedicate a good deal of time to the project during the audit, contract negotiations, construction, commissioning, and acceptance of the work. Once the project guaranteed savings period starts, the time dedicated to the project would diminish. The person would need to understand and monitor the measurement and verification reports provided by the ESCO. He/she would also want to be mindful of whether the equipment is operating as designed, and that all operations and maintenance requirements are being met.

18. How can I develop a baseline?

DOER offers MassEnergyInsight **free** to cities, towns, and other local and regional governmental entities such as school districts, drinking water districts, and regional wastewater treatment plants. This web-based tool provides access to energy information for multiple uses.

19. When soliciting for Energy Management Services, the sole purpose of which is to install a specific type of energy conservation project (e.g., on-site electrical generation equipment using new renewable generating sources, outdoor lighting, etc.), may I use a DCAMM certification category other than Energy Management (e.g., "Electrical")?

Please refer to the answers to frequently asked questions 3, 19, 20, and 21. In accordance with DOER EMS regulations, 225 CMR 10.00 and 225 CMR 19.00, public agencies must require that firms obtain DCAMM certification as a prime contractor. However, a company needs only one certification.

Historically, DOER advised awarding authorities to use DCAMM's Energy Management Systems (a.k.a. Energy Management) certification category for all Energy Management Services solicitations. With the addition of onsite electrical generation equipment to the definition of Energy Conservation Projects,

awarding authorities, with DOER's concurrence, began to utilize DCAMM's "Electrical" certification category, which includes the "Installation, renovation, repair and maintenance of electrical wiring, circuits, panel boards, fixtures and equipment within a building, including such incidental or related work as is customarily performed by those in the electricians' trade. Certification in this category requires possession of a Massachusetts Master Electrician's License." However, it has come to DOER's attention that this approach has resulted in confusion on the parts of vendors and awarding authorities alike, which has necessitated a reexamination of DCAMM certification requirements. ***Therefore, as of the date of this FAQ, DOER has reaffirmed its prior long-standing guidance to local governmental body awarding authorities so that all EMS solicitations should utilize DCAMM's certification category of Energy Management Systems.***

While awarding authorities retain discretion on how best to fashion DCAMM certification requirements within a given solicitation, DOER issues this guidance to local governmental bodies for several reasons including, but not limited to, the following: (1) limiting the aforementioned vendor and awarding authority confusion; (2) with more than 60 companies now certified under the Energy Management Systems category, this should provide awarding authorities with sufficient vendor competition for their solicitations; (3) companies certified under the Energy Management Systems category are in a better position to guarantee the energy savings over the performance term of the contract; and (4) as allowed under 810 CMR 4.03(3), awarding authorities may request DCAMM to establish special categories of work when there is good reason to limit bidding to contractors possessing skills or abilities not covered by the Energy Management Systems category.

20. Will I get contractors that are more qualified if I require several DCAMM certifications?

Requiring additional certifications, such as electrical or HVAC, will unnecessarily limit competition to those few firms that possess the combination of certifications that you are requesting. Firms that meet the criteria for Energy Management Systems are fully capable of performing extensive electrical, heating, and ventilation services.

21. Under Chapter 25A, can the firm be a joint venture?

Yes, however, the joint venture needs to be certified with DCAMM. For more information on certification of joint ventures, awarding authorities should refer to DCAMM's *Certification Guidelines and Procedures for Prime Contractors and Awarding Authorities*.

22. Who is responsible for choosing sub-contractors?

The Prime Contractor on the project is responsible for choosing its sub-contractors. Under Chapter 25A, the subcontractors do not have to be certified by DCAMM.

23. A contractor claimed that our buildings have great potential for energy and water efficiency improvements. The contractor offered to perform an audit and provided sample bid documents. Should I accept?

No, EMS is a competitive public procurement process.

DOER provides model documents published on the EMS web page. Do not rely on a contractor to develop your RFP or RFQ. Working with an ESCO either before or during the procurement process may

create a perception of giving unfair preference and hindering fair competition. You might face bid protests, legal protests, or, at a minimum, be forced to re-bid the project.

However, hiring a consultant to conduct an energy audit of the premises, assist in establishing measurement and verification standards, and monitor the actual energy savings achieved, could prove to be very helpful, so long as the consultant (and any ESCOs associated with the consultant) is prohibited from responding to an RFP or RFQ.

24. Is the ESCO required to provide a performance bond to cover the performance guarantee for the entire term of the contract?

No. Do not confuse the construction bond with the performance guarantee. The performance and payment bonds are a type of construction bond that are in force for the installation period only.

A performance bond guarantees satisfactory completion of a project during the implementation period (the installation and testing of the energy conservation measures or onsite electricity generation). The contractor is required to provide a performance bond to protect the awarding authority in the event the contractor fails to complete the project.

Another type of contract bond is a payment bond. The contractor provides a payment bond that guarantees the awarding authority that subcontractors and suppliers be paid the monies they are due for labor and materials necessary for construction of a project.

Once the owner accepts the installation as complete and operational, according to the specifications and design in the contract, then the owner releases the performance and payment bonds. The cost for the performance bond is typically 1-2 percent of the total project cost.

25. I do not know how to verify the savings. Should I let the ESCO suggest the best method?

The ESCOs must follow the most recent version of the [Federal Energy Management Program \(FEMP\) Measurement and Verification Guidelines](#) for accepted methods of calculating measurement and verification of energy savings or onsite electric generation. FEMP M&V allows four options (A, B, C, and D) and provides guidelines for their use.

Furthermore, do not rely solely on an ESCO that may be bidding on the project to develop the energy baseline. It is the local governmental agency's responsibility to assure that the baseline accurately reflects the facility's energy consumption patterns.

26. We are using Ch 25A for our solar project. How is a shortfall in the guaranteed electricity generation calculated?

Should a PV system fail to provide the annual electricity generation guaranteed by the ESCO or developer, the payment due the municipality for the shortfall may be calculated as the retail cost of the electricity (energy, distribution, and transmission charges) the municipality paid to its electric utility minus the contract price for all electricity (in kWh) not delivered by the PV systems. For example, (using arbitrary prices) if the retail price of electricity delivered by the electric utility company is 20 cents/kWh and the contract price is 15 cents/kWh, then the ESCO or developer would cover only the difference of 5 cents/kWh. Net metering credits inure to the benefit of the customer and will be assigned to the customer's accounts.

27. What is the difference between an Onsite Energy Generation Energy Management Services Agreement (EMSA) and Power Purchase Agreement (PPA)?

A Power Purchase Agreement (PPA) is a contract between an energy user and renewable energy asset owner through which the energy user buys the electricity generated by the renewable energy project at a predetermined rate. A municipality, as an energy end user, signs an agreement with the project developer to pay a specific rate for every kWh produced by the system.

Power Purchase Agreements may be executed through the following procurements. Each is distinct with individual requirements.

- Municipalities that seek to enter into a land lease (not on a building) with a third-party developer would manage procurement via Chapter 30B, §16, which is applicable to the purchase, sale, lease, or rental of landfills and other real property (including interests in real property). This chapter could also be used if a municipality wants to sell its property to a third party developer. Local governmental authorities should contact the Massachusetts Office of the Inspector General for answers related to Chapter 30B.
- As an alternative, municipalities could enter into an EMSA for Onsite Energy Generation under 225 CMR 10.00 or 225 CMR 19.00. The EMSA provides for the development of renewable onsite energy generating facilities on public property including buildings. Contract elements include; lease or easement terms on municipal property; design, engineering; construction of the asset; the purchase of the energy generated at a specific kWh price; the guarantee of a specified amount of production; energy cost savings; a measurement and verification plan that includes meter accuracy; and may also include a purchase option.

Note, when implementing a project using either 225 CMR 10.00 or 225 CMR 19.00, executing a lease under 30B does not comply with the statute or regulation. If one is using 30B, then one must publish the cancellation of any previously published 25A solicitation for the procurement in the Central Register and conduct another solicitation under the requirements of 30B.

28. What payment arrangements are available for EMS?

There are various types of payment arrangements. Third-party financing is an alternative method of procuring energy and water conservation equipment at little or no up-front cost. Equipment is generally purchased through the energy and water cost savings generated by the conservation equipment installed. This type of arrangement may require a 15- to 20-year contract (20 years is the maximum allowable term) whereby the ESCO guarantees that the energy savings resulting from the improvements will be equal to or greater than the project costs. Municipalities may use a combination of funds including, but not limited to, utility rebates, lease arrangements, municipal bonds, capital funds, operating funds, and grant funds.

Supplying additional funding may allow you to add improvements with longer paybacks, such as windows or insulation. Although you may “subsidize” an EMS contracting project, clearly state the value that the funds add to a project. For instance, if you consider a cost-based approach to the final contract, you could identify the specific equipment installed because of your investment in the project.

29. What can we do if our energy and water bills are high, but we have very limited funds?

If you are short on funds and your annual energy and water utility bills total over \$1,000,000, you may have the potential to develop a successful EMS project, depending on the energy efficiency opportunities

within your facilities. If your energy and water consumption is too small, consider collaborating with other entities (aggregate several projects into one).

The amount you can save on your utility bills depends on many things: the design of your building, how heavily it is used, whether you are already conserving effectively, alternate fuels availability, the amount of capital you can invest, etc.

30. We have insufficient funds to support an EMS contract for all of the efficiency improvements that we would like to make. Can we add bond funds?

Yes, municipalities may provide bond funding. ([See Chapter 44, §7.](#))

31. Can you word the contract to insure that the municipality reaps most of the savings and the ESCO's portion is limited?

The municipality reaps all of the savings. The shared savings model is not used in Massachusetts; instead, the ESCO guarantees a fixed amount that contributes to paying for the energy conservation measures implemented under the program. If the guaranteed savings are not realized (called a shortfall), then the ESCO must make the customer whole. The ESCO covers any shortfall in savings and the awarding authority retains any excess savings. Allowing carry-over provisions negatively impacts the awarding authority's budget and is discouraged.

32. Is Town Meeting approval always required to move project financing forward?

Town meeting approval depends on many factors, including the type of financing used and local requirements. Local governmental agencies may need town meeting approval to appropriate funds or to enter into a contract beyond three years; however, there is no requirement for a two-thirds approval vote related to M.G.L. Chapter 25A §11C or §11I. Municipalities may want to educate stakeholders to set accurate expectations and gain support for EMS projects.

33. Should both parties be able to terminate the EMS Agreement?

It is reasonable to have provisions in the EMSA (as accepted by both parties) that detail causes under which either party may terminate the agreement. The parties may simply terminate or modify the contract by mutual agreement. DOER's model EMSA includes examples of provisions for termination.

34. Is there a specific period in which an ESCO must cure a breach of the EMS Agreement?

There is no requirement in Ch. 25A regarding a specific time in which the ESCO or developer has to cure a breach of the contract. In the agreement, however, there are typically a specified number of days, agreed upon by both parties, within which the ESCO or developer is required to cure a breach of the contract. In certain cases, a specific breach may not be curable in the limited time stated in the contract. If the ESCO or developer diligently pursues a cure, but requires more time, the parties should determine a reasonable time extension.

35. Are we required to include a decommissioning provision for our solar project under an EMSA?

No, a decommissioning provision is not a required. Whether or not to include a decommissioning provision is a business decision for the municipality to make. A municipality may consider including a

decommissioning provision if it does not intend to own a solar PV system at the end of the Power Purchase Agreement and/or intends to have the system removed or include contract terms requiring the owner to remove the system at the owner's cost. Any required decommissioning provisions will likely have costs associated with them.

36. Do municipalities have the ability to indemnify an ESCO or developer?

No. Section 1 of Article 62 of the Amendments to the Massachusetts Constitution (as itself amended by Article 84) states that: “[t]he credit of the Commonwealth shall not in any manner be given or loaned to or in aid of any individual, or of any private association, or of any corporation which is privately owned and managed. A municipality’s liability for damages arising out of its negligent or wrongful acts or the negligent or wrongful acts of its employees is governed by M.G.L. c. 258. M.G.L. c. 258, §2 limits the liability of the municipality to \$100,000.”

37. Is a municipality required to obtain consent from Town Meeting for Assignment/Collateral Assignment of the EMS and PV system under Ch. 25A?

There is no requirement under Ch. 25A for the municipality to obtain consent from town meeting for assignment/collateral assignment. While it is important that the town be notified of a change in assignment of the EMS or PV array to a new entity, requiring the developer to get consent from the town may prevent institutional investors from financing the project. For tax purposes, the tax equity investor must also act as the nominal owner, while the PPA provider remains the actual owner-operator for all other purposes. This condition must be met in order to qualify for the Federal Investment Tax Credit (ITC). The ITC is equal to 30 percent of the value of the PV System, and a critical piece to how a project may be financed, which is why the assignment rights are an important part of the Agreement. Similarly, a term lender needs a collateral assignment of the EMS and the PV system so that it can file a UCC-1 on the personal property (the PV System) in order to have some security for its investment.

38. Do we have to do measurement and tracking after implementation SEPARATE from what the ESCO does?

The concerned parties establish the appropriate level for any savings determination. Where the firm performing the energy savings calculations has more experience than the owner does, the owner may seek assistance in reviewing savings reports. Full review of baseline adjustments requires good understanding of the facility and its operations. In Massachusetts, ESCOs must use the most recent version of the [Federal Energy Management Measurement and Verification Guidelines](#).

DOER provides [MassEnergyInsight](#) (MEI), a web-based energy-tracking tool, free to all municipalities, school departments, and regional schools. Municipalities using MEI and engaging in an EMS project can set up and access an ESCO report to track energy usage. Nevertheless, MEI ESCO reports will not give a dollar-for-dollar comparison; instead, they will provide “ballpark” comparisons and show usage trends over time.

For more information on Energy Management Services in Massachusetts, please contact Eileen McHugh at the Department of Energy Resources, (617) 626-7305.