



US DEPARTMENT OF VETERANS AFFAIRS OFFICE OF INSPECTOR GENERAL

Office of Audits and Evaluations

DEPARTMENT OF VETERANS AFFAIRS

VA Should Validate Contractor Energy Baseline and Savings Estimates and Ensure Payments Are Legally Compliant

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Executive Summary

The Consolidated Omnibus Budget Reconciliation Act of 1985 amended the National Energy Conservation Policy Act of 1978 to authorize federal agencies to enter into contracts for the purpose of achieving energy savings.¹ These contracts were designed to help federal agencies reduce energy consumption and operating costs, in addition to advancing federal sustainability goals. These contracts later became known as “energy savings performance contracts” due to a 1992 amendment to the National Energy Conservation Policy Act.² This and other legislation established the US Department of Energy’s Federal Energy Management Program to provide guidance and services to other federal agencies implementing projects using energy savings performance contracts.³

VA partners with energy service companies using energy savings performance contracts to implement energy conservation measures without paying direct capital costs up front. The energy service companies finance the capital costs of implementing these energy upgrades and in return are compensated for their efforts through the energy cost savings received by VA. The energy conservation measures help reduce energy or water usage at VA medical facilities—for example, by replacing heating, ventilation, and air-conditioning systems and installing low-energy-consumption lighting and low-flow bathroom fixtures. VA is then able to use the energy cost savings to repay the contractor for total project costs.⁴

During this process, VA selects a contractor for a potential award of an energy savings performance contract. The contractor conducts an investment grade audit of the facility and identifies improvements to save energy. An investment grade audit is a thorough, calculated, and detailed analysis to identify potential cost-effective energy conservation measures to save energy. In consultation with VA, the contractor designs and installs energy conservation measure upgrades, such as replacing fluorescent light fixtures with LED units that meet VA’s needs, and arranges financing. VA must validate the contractor’s energy baseline and savings estimates to ensure future payments are based on reasonable energy savings. An energy baseline is calculated or measured energy use or demand by a piece of equipment or a site before implementation of the project. The contractor’s savings estimate is the difference between the cost of utilities, operating, and maintenance for new equipment they plan to install and the energy baseline

¹ Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, 42 U.S.C. § 8287.

² Agencies’ authority was further extended under the Energy Policy Act of 1992, Pub. L. No. 102-486, which authorized them to use energy savings performance contracts as a tool to improve energy efficiency.

³ “Energy Savings Performance Contracts for Federal Agencies” (web page), Department of Energy, Office of Energy Efficiency & Renewable Energy, accessed June 20, 2023, <https://www.energy.gov/eere/femp/energy-savings-performance-contracts-federal-agencies>.

⁴ 42 U.S.C. § 8287(a)(1)–(2).

amount of the existing equipment.⁵ If the contractor's estimates are overstated, VA may be locked into a payment schedule that exceeds its actual energy savings. After validating the contractor's energy baseline and cost savings estimates, a VA contracting officer negotiates a guaranteed cost savings amount with the contractor. Payments from the government cannot exceed this amount over the life of the contract, which is limited to 25 years.⁶ This negotiated cost savings amount serves as a performance measure that is evaluated annually to determine if the contractor is delivering the promised savings. If not, VA can deduct the savings not realized from annual payments.

The VA Office of Inspector General (OIG) conducted this audit to assess VA's oversight of energy savings performance contracts awarded from 2012 through 2021. The OIG sought to determine the extent to which VA evaluated the contractor's energy baseline and estimated cost savings calculations.⁷

What the Audit Found

The OIG found that VA did not independently review the contractor's energy baseline or estimated savings calculations at four VA medical facilities randomly selected from the 13 that were using energy savings performance contracts. Moreover, VA did not have effective policies or quality control procedures to ensure the contractor's estimated energy baseline and savings estimates were independently reviewed and determined to be reasonable and that payments complied with federal laws and Federal Energy Management Program guidance. Specifically, the OIG found problems in these areas:

- **Veterans Health Administration (VHA) energy managers did not witness the contractors collecting the data used in the calculation of the energy baseline and savings estimates.** VA energy savings performance contract provisions state that VA should witness baseline measurements and review calculations to confirm the contractor's energy baseline and savings estimates. The VA personnel responsible for witnessing measuring and validation are energy managers who serve as contracting officer's representatives.⁸ The energy managers interviewed currently serve at all four medical facilities and are responsible for validating postconstruction measurements and contract performance, but they were not involved in the preinstallation phase of the

⁵ Federal Energy Management Program, *M&V Guidelines: Measurement and Verification for Performance-Based Contracts*, ver. 4.0, sec. 2.2.3, November 2015.

⁶ 42 U.S.C. § 8287.

⁷ Appendix A provides information on the project's scope and methodology.

⁸ VHA energy managers are delegated as the contracting officer's representative to perform the review measurement and verification reports and provide other development support as required. VA's Program Contracting Activity Central (PCAC) supervisor stated energy managers are relied on to validate the energy baseline and savings estimates.

projects because they were not in their current roles at that time. They also could not produce documentation showing that their predecessors witnessed the contractors taking baseline measurements.⁹ The energy managers who were responsible for reviewing contractor estimates during the preinstallation phase were no longer VA employees. Without witnessing contractor measurements, VA is relying on contractor data exclusively to negotiate the contract's guaranteed energy savings and annual savings performance targets.

- **VHA energy managers did not validate the contractor's assumptions or calculations used to create the energy baseline or estimate energy savings.** Energy managers at all four medical facilities lacked required evidence that facility engineers validated the contractor's assumptions or calculations. Both the VA task order and the Federal Energy Management Program require evaluation of the energy savings assumptions and calculations. These elements are essential to determining the starting point for measurement and the expected performance of the installed upgrades. Without validating the assumptions and calculations used to create the energy baseline and savings estimates, VA has little assurance that the guaranteed energy savings in the energy savings performance contract are achievable.
- **VA lacked policies to guide contracting officials and engineers on how to evaluate contractor energy savings estimates.**¹⁰ VA did not have policy and procedures for validating contractor energy baseline and savings estimates. The Energy, Environment, and Fleet Program Service (EEF) under VA's Office of Asset Enterprise Management is responsible for VA-wide policy, training, direction, oversight, and guidance for VA's Energy Savings Performance Contracting Program. EEF provided various documents and pointed the team to pertinent VA directives.¹¹ None of these documents or policies provided guidance on evaluating and validating energy baseline and savings estimates, which the Office of Asset Enterprise Management should establish to ensure that a contractor's energy savings estimates are reasonable before contracting officials negotiate a guaranteed savings amount the energy upgrades must achieve.

⁹ Energy Savings Performance Contract Numbers VA701-16-F-0067 and VA701-14-F-0116. Witnessing and reviewing calculations should occur before the negotiation as part of determining the reasonableness of the contractor's energy savings estimates.

¹⁰ The Federal Energy Management Program is authorized by statute to establish appropriate procedures and methods for federal agencies using the energy savings performance contracts program. VA policy or procedures could reference these materials to guide the evaluation of energy savings estimates.

¹¹ VA Directive 0055, *VA Energy and Water Management Program*, December 10, 2014; VA Directive 0012, *VA Investments in Energy and Water Efficiency and Renewable Energy*, July 6, 2015.

- **VHA made prepayments that did not comply with criteria in federal law and Federal Energy Management Program guidance.** VA’s Program Contracting Activity Central (PCAC) executed one-time prepayments that exceeded the annual guaranteed energy savings amounts, contrary to federal law and Federal Energy Management Program guidance.¹² The prepayments totaled \$10 million in fiscal year (FY) 2020 and approximately \$58 million in FY 2022 using surplus medical facility funds.¹³ A PCAC supervisory contract specialist stated that one-time prepayments are typically unplanned and begin with the facility identifying available funds and deciding to make additional one-time payments to buy out or buy down the contract balance, which will save interest cost over the life of the contract. One-time payments can be acceptable for shortening the term of an energy savings performance contract if they comply with requirements set forth in Federal Energy Management Program guidance. One such requirement is that energy cost savings must exceed payments in each contract year.¹⁴ PCAC officials stated there is currently no VA payment policy, and the Office of Asset Enterprise Management confirmed that statement. Subsequently, on February 23, 2023, a program manager from the Office of Asset Enterprise Management’s EEF provided the OIG with a new policy to guide buy-outs and buy-downs.¹⁵ However, after reviewing the new policy, the OIG determined it does not ensure one-time prepayments comply with federal law and Federal Energy Management Program guidance.

In July 2023, VA provided the OIG with emails between attorneys from VA and the Department of Energy’s Office of the General Counsel on the use of one-time payments for energy savings performance contracts. Without further information from VA, it does not appear that the discussion in these emails has any impact on the findings in this audit report.

VA is taking on significant risk by not ensuring that a contractor’s energy baseline and savings estimates are validated before awarding the contract and by not adhering to federal payment restrictions. VHA energy managers need to witness contractor energy baseline measurements, check assumptions, and review calculations to ensure the estimates are reasonable. Once contracts have been awarded and energy upgrades installed, there is no way to retroactively determine baseline measurements for these projects. Baseline measurements are the starting

¹² 42 U.S.C. § 8287(a); Federal Energy Management Program, *Practical Guide to Savings and Payments in FEMP ESPC [Energy Savings Performance Contract] Task Orders*, January 2009.

¹³ Appendix B details the OIG’s calculation of \$68 million in better use of funds.

¹⁴ Federal Energy Management Program, *Practical Guide to Savings and Payments in FEMP ESPC Task Orders*, app. 2.

¹⁵ Executive director, Office of Asset Enterprise Management (OAEM), “Policy on Buy-downs and Buy-outs of Energy Performance Contracts (VIEWS #9503669),” memorandum to under secretaries, assistant secretaries and other key officials, February 21, 2023.

point for validating energy savings over the life of the contract. Without performing its due diligence up front, VA has no way of measuring contractor performance and ensuring guaranteed cost savings are achievable.

What the OIG Recommended

The OIG made four recommendations. Two are to the executive director of the Office of Asset Enterprise Management to develop policy and procedures to ensure the contractor's energy baseline and savings estimates are witnessed and validated, and to issue criteria for payments that align with federal law and guidance.¹⁶ The other two recommendations are to the director of contracting for PCAC to develop procedures to ensure the contractor's energy baseline and savings estimates have been independently witnessed and validated by VHA energy managers prior to negotiating the guaranteed energy savings amount, and to maintain documentation that demonstrates that the contractor's energy baseline and energy savings estimates were witnessed and validated.

VA Management Comments and OIG Response

The executive director for VA's Office of Asset Enterprise Management concurred with one of the two recommendations made to that office and provided an explanation of nonconcurrence for the other. The under secretary for health concurred with both recommendations made to the PCAC director. The OIG considers the executive director's and the under secretary for health's planned corrective actions to be responsive to recommendations 1, 3, and 4. The OIG will monitor execution of planned actions and will close the recommendations when VA provides sufficient evidence demonstrating progress addressing the issues identified. Appendixes C and D provide the full text of the executive director's and the under secretary for health's responses, respectively.

The Office of Asset Enterprise Management did not concur with recommendation 2, which was to issue payments criteria that aligns with federal law and guidance. The office disputes the OIG's finding that the \$68 million in prepayments exceeded amounts allowable under federal law and the Department of Energy's Federal Energy Management Program guidance. VA believed it had legal authority to issue the prepayments because it had previously sought the opinion of the VA Office of General Counsel, which had consulted with the Department of Energy's Office of General Counsel before advising Office of Asset Enterprise Management officials. However, the Department of Energy's general counsel memorandum, which VA

¹⁶ Although substantial Federal Energy Management Program guidance exists as well as regulation citing to Federal Energy Management Program, VA-specific guidance referring to Federal Energy Management Program procedures and resources would assist VA personnel responsible for executing energy savings performance contracts in areas such as validating the contractors' energy baseline and estimated energy savings. The OIG found that other federal agencies, such as the Departments of the Army and the Air Force, have their own specific energy savings performance contract guidance.

provided the OIG to support the prepayments, only addressed questions regarding funding sources allowable for energy savings performance contract payments. It did not expand the limits to annual aggregate payments that the OIG contends VA exceeded, and the prepayments therefore fall outside the law. In fact, the memorandum specifically states that “The ESPC authority as amended, still limits aggregate annual payments under an ESPC to no more than the amount that the agency would have paid for utilities without an ESPC.” Therefore, the OIG stands by its conclusion that the prepayments did not comply with Title 42 of the *United States Code*, section 8287, and Federal Energy Management Program guidance. An OIG legal opinion, prepared in response to VA’s nonconcurrency, can be found in appendix E.



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Abbreviations

EEF	Energy, Environment, and Fleet Program Service
FY	fiscal year
GAO	Government Accountability Office
OIG	Office of Inspector General
PCAC	Program Contracting Activity Central
VHA	Veterans Health Administration
VISN	Veterans Integrated Service Network



Introduction

Energy savings performance contracts are contracts entered into by federal agencies solely for the purpose of achieving energy savings and providing federal agencies with an alternative way to finance energy-saving upgrades when maintenance budgets are insufficient to cover the costs of replacing aging equipment.¹⁷ Energy savings performance contracts allow VA facilities to improve energy efficiency levels with the benefit of no up-front capital costs, while still meeting mission requirements.¹⁸ Specifically, the contracts use an energy service company's expertise to design and finance the installation of energy conservation measures, allowing VA to spread the cost of large-scale equipment replacement projects over multiple budget years.¹⁹ In exchange for the contractor's up-front financing, VA uses the contract's guaranteed energy cost savings to pay the contractor over a period not to exceed 25 years.²⁰ From 2011 through September 2021, VA awarded \$1.1 billion to contractors to perform energy-efficient infrastructure upgrades at 88 VA medical facilities.²¹ These improvements are expected to translate into \$1.66 billion of savings over the life of the contracts according to VA's 2023 budget submission.

Before an energy savings performance contract is awarded, a contractor conducts an investment grade audit to evaluate cost-saving opportunities resulting from installing energy conservation measures. An investment grade audit created by the contractor establishes an energy baseline that is the starting point for measuring total energy cost savings the contractor is promising to deliver through the installation of one or more energy conservation measures.²² An energy baseline is the calculated or measured energy use or demand by a piece of equipment or a site before

¹⁷ The Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, amended the National Energy Conservation Policy Act of 1978 to authorize the head of a federal agency to enter into a contract solely for the purpose of achieving energy savings. The Energy Policy Act of 1992, Pub. L. No. 102-486, authorized agency heads to use energy savings performance contracts as a tool to improve energy efficiency and provided further guidance for these contracts, and refers to them as "energy savings performance contracts."

¹⁸ "Energy Savings Performance Contracts for Federal Agencies" (web page), Federal Energy Management Program, accessed June 20, 2023, <https://www.energy.gov/eere/femp/energy-savings-performance-contracts-federal-agencies>.

¹⁹ An energy conservation measure is an energy-saving upgrade. One example is upgrading fluorescent lighting by replacing with more efficient LED lights. The contractor will take energy measurements for the existing lighting as an energy baseline and then create an estimated energy usage for the efficient lighting based on manufacturer specifications. The estimated energy reduction between the baseline measurement and the upgrade energy estimate is multiplied by local utility rates to estimate the cost savings for the energy conservation measure.

²⁰ 42 U.S.C. § 8287.

²¹ Approximately \$668 million of the \$1.1 billion in expenditures represents energy savings performance contracts. The remaining amount results from utility energy savings contracts, which are agreements between a federal agency and the serving utility company and do not require guaranteed savings.

²² An investment grade audit is a thorough, calculated, and detailed analysis to identify potential cost-effective energy conservation measures to save energy. The investment grade audit's scope of work is based on VA's preliminary energy assessment of its facilities and requirements.

implementation of the project.²³ The contractor's savings estimate is the difference between the cost of utilities, operating, and maintenance for the new equipment it plans to install and the energy baseline amount of the existing equipment. VA energy managers are responsible for ensuring both the energy baseline and the contractor savings estimates are reasonable prior to contracting officers negotiating a guaranteed savings amount.²⁴ The savings estimates are dependent on the validity of the energy baseline from which they are measured.

According to the Department of Energy's Federal Energy Management Program guidance, after equipment upgrades have been installed, it is impossible to go back and reevaluate the energy baseline measurements.²⁵ VA and the contractor agree to a measurement and verification plan to monitor the contractor's ability to meet guaranteed savings targets over the life of the contract. The plan requires VA and the contractor to measure energy usage after the new equipment has been installed and compare that amount to the energy baseline each year to determine if guaranteed cost-saving targets are being met. If the contractor fails to meet annual energy-saving targets established in the measurement and verification plan, the VA retains the right to deduct the amount of guaranteed savings not met from VA's annual payments to the contractor.

The Office of Inspector General (OIG) conducted this audit to assess VA's oversight of energy savings performance contracts awarded from 2012 through 2021. Specifically, the OIG assessed the extent to which VA evaluated the contractor's energy baseline and estimated cost savings calculations because of the critical role they play in the award value of energy savings performance contracts and VA's ability to measure contractors' performance in achieving their savings guarantee.

Energy Savings Performance Contract Program

In 1998, the US Department of Energy created indefinite-delivery, indefinite-quantity energy savings performance contracts to make procurements as practical and cost-effective as possible. These contracts were designed to help federal agencies reduce energy consumption and operating costs, in addition to advancing federal sustainability goals to reduce energy use.²⁶ The Department of Energy's Federal Energy Management Program established procedures and

²³ Federal Energy Management Program, *M&V Guidelines: Measurement and Verification for Performance-Based Contracts*, ver. 4.0, sec. 2.2.3, November 2015.

²⁴ According to the Program Contracting Activity Central (PCAC) supervisory contracting officer, contracting officers rely on energy managers to provide a technical review of the energy baseline and energy savings estimates. In addition, a Customer Service Agreement between PCAC, the Energy, Environment, and Fleet Program Service (EEF), the Veterans Integrated Service Network (VISN), and the medical facility lists responsibilities of the energy managers to include serving as technical representative, reviewing and approving contractor submittals, and providing other support as needed.

²⁵ Federal Energy Management Program, *M&V Guidelines*.

²⁶ 42 U.S.C. § 8253(a)(1).

methods for federal agencies’ energy conservation programs and provides agencies with assistance, guidance, and training to help implement energy-saving projects.²⁷

VA used the Department of Energy’s energy savings performance contracts to partner with private sector contractors to install energy conservation measures at VA medical facilities.²⁸ These energy conservation measures included replacing heating, ventilation, and air-conditioning systems; installing low-flow bathroom fixtures; adding lighting or thermostat controls; and installing other infrastructure upgrades that reduce the facility’s energy or water use. After VA selects a contractor for a potential award, the contractor conducts a comprehensive facility energy audit and identifies improvements to save energy. In consultation with VA, the contractor designs and constructs a project that meets VA’s needs and arranges financing to pay for the project.

Energy savings performance contracts can consist of one or more energy conservation measures. The cost savings achieved by each energy conservation measure is calculated through reduced electric, gas, or water usage multiplied by expected utility rates agreed on by the contractor and VA. The estimated savings may also include any reduction in maintenance and operations costs VA may receive from installing the new equipment. Figure 1 illustrates how energy savings estimates are determined.

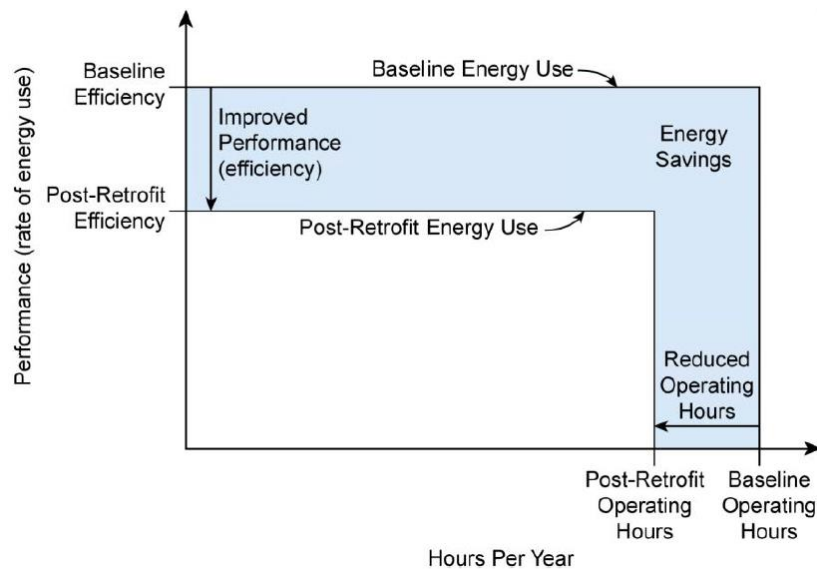


Figure 1. Energy savings estimation process.

Source: M&V Guidelines: Measurement and Verification for Performance-Based Contracts, ver. 4.0.

²⁷ 42 U.S.C. § 8287(b)(1)(A); 10 C.F.R. § 436.30(a).

²⁸ Historically, VA implemented projects using the energy savings performance contracts reviewed in this audit through task orders under the Department of Energy’s indefinite-delivery, indefinite-quantity energy savings performance contracts. However, to benefit service-disabled, veteran-owned small businesses, VA began awarding task orders under a new VA indefinite-delivery, indefinite-quantity energy savings performance contract in 2020.

The total cost savings for all energy conservation measures in the contract must exceed total payments made to the contractor, but there is no requirement for the savings for each individual energy conservation measure to exceed its cost. This gives VA flexibility to use larger savings realized by some energy conservation measures to offset other energy conservation measures for which the savings may not exceed the investment.

The Veterans Integrated Service Network (VISN) 6 energy savings performance contract reviewed by the OIG provides a good example of energy conservation measures with a wide range of payback periods.²⁹ VISN 6 is utilizing this contract to pay \$146.5 million over a 23-year period for the implementation of 14 different energy conservation measures at seven VA medical centers.³⁰ The \$146.5 million covered costs relating to the implementation of energy conservation measures, financing, preventive maintenance on new equipment, and annual measurement and verification of energy savings.

Table 1 lists the energy conservation measures implemented in VISN 6, along with their estimated first-year savings, implementation costs, and simple payback period. The length of the contract is 23 years, but the combined energy cost savings measures have a simple payback period of 15.3 years. The simple payback period is calculated by dividing the implementation costs by the year one estimated savings, and in this instance, it is well within the required 25-year period even though some energy conservation measures have excessive repayment periods. For example, the air-handling unit upgrade has a 256.5-year payback period since it saves only \$12,681 per year but costs \$3.3 million to implement.

**Table 1. Energy Conservation Measures Implemented
in VISN 6 Energy Savings Performance Contract**

Energy conservation measure	Number implemented	Year 1 estimated savings	Implementation costs*	Simple payback years for implementation costs†
Boiler blowdown treatment	2	\$3,597	\$113,076	31.4
Chiller upgrades	6	\$342,118	\$18,926,627	55.3
Heating, ventilation, and air-conditioning and exhaust controls	8	\$108,756	\$905,560	8.3
Air-handling unit upgrades	2	\$12,681	\$3,252,944	256.5
Interior lighting upgrades	7	\$1,183,434	\$15,898,817	13.4

²⁹ The United States is divided into 18 VISNs—regional systems of care.

³⁰ Not all medical facilities implemented all 14 energy conservation measures.

Energy conservation measure	Number implemented	Year 1 estimated savings	Implementation costs*	Simple payback years for implementation costs†
Building envelope exfiltration reduction	1	\$4,026	\$81,481	20.2
Steam piping insulation and repairs	9	\$407,528	\$8,007,969	19.7
Heating, ventilation, and air-conditioning chiller and motor upgrades	2	\$10,691	\$478,620	44.8
Combined heat and power equipment	3	\$1,432,252	\$14,984,456	10.5
Solar hot water heater	1	\$520	\$296,036	569.3
Transformer replacement	5	\$79,487	\$3,295,322	41.5
Plumbing fixture upgrades	8	\$575,869	\$2,636,260	4.6
Heating, ventilation, and air-conditioning control optimization	3	\$556,644	\$3,259,250	5.9
TV controls	1	\$129	\$7,727	59.9
Total		\$4,717,732	\$72,144,145	15.3

Source: Contractor’s Final Investment Grade Audit, October 21, 2016.

* Implementation costs include direct and indirect costs related to project installation and profit margin allowed under the contract. Costs do not include any postinstallation costs, such as financing charges, annual measurement and validation of energy savings, or equipment maintenance costs borne by the contractor.

† Simple payback years is a calculation using the implementation costs divided by the year one estimated savings.

Contractors Prepare Investment Grade Audits and VA Validates Energy Cost Estimates

VA selects contractors from a group already approved under a Department of Energy indefinite-delivery, indefinite-quantity energy savings performance contract.³¹ The selection of a contractor is based on an evaluation of each contractor’s preliminary assessment of energy

³¹ Historically, VA selected contractors from a group already approved by the Department of Energy. However, following the Supreme Court’s *Kingdomware* decision, VA developed its own indefinite-delivery, indefinite-quantity energy savings performance contract to benefit service-disabled veteran-owned small energy service companies.

conservation measures proposed by VA.³² Once VA has issued a notice of intent to award, it requests a proposal from the contractor. The contractor then evaluates the locations where energy conservation measures will be implemented and creates the interim investment grade audit, which expands on the contractor's preliminary assessment. This interim investment grade audit provides VA with detailed baseline measurements and energy cost savings estimates and outlines a plan for measuring and validating these estimates after the contractor upgrades have been installed.³³ Once all parties have reviewed and commented on the contents of the interim investment grade audit report, the report will be modified to become the final investment grade audit.

The Veterans Health Administration (VHA) energy manager who serves as VA's contracting officer's representative validates these baseline estimates by witnessing contractor energy measurements, determining if assumptions or engineering models used are reasonable, and checking contractor calculations.³⁴ The contracting officer's representative is also responsible for making sure the measurement and verification plan used to assess contractor performance after implementation adequately balances risk between VA and the contractor. Included in the measurement and verification plan are the contract's agreed-upon energy baseline and guaranteed cost savings estimate. Figure 2 illustrates the roles of the parties involved in the energy savings estimation and validation process.

³² [Federal Energy Management Program, Federal Energy Saving Performance Contract Process Phase 2](#): [Energy Service Company] Selection and Preliminary Assessment.

³³ [Federal Energy Management Program, Federal Energy Saving Performance Contract Process Phase 3](#): Project Development.

³⁴ VA, *Energy Management Guidebook*, September 14, 2018. The guidebook states that a VA energy manager requires a diverse background in facilities engineering, incorporating multiple disciplines of engineering and maintenance to execute an energy management program. The guidebook also states that all new energy managers are required to take the Association of Energy Engineers Certified Energy Manager training course within one year of employment. In addition, VA obtains assistance from the Department of Energy's approved project facilitators; these experienced advisers provide technical and financial advice through the project development and implementation process, including the investment grade audit.

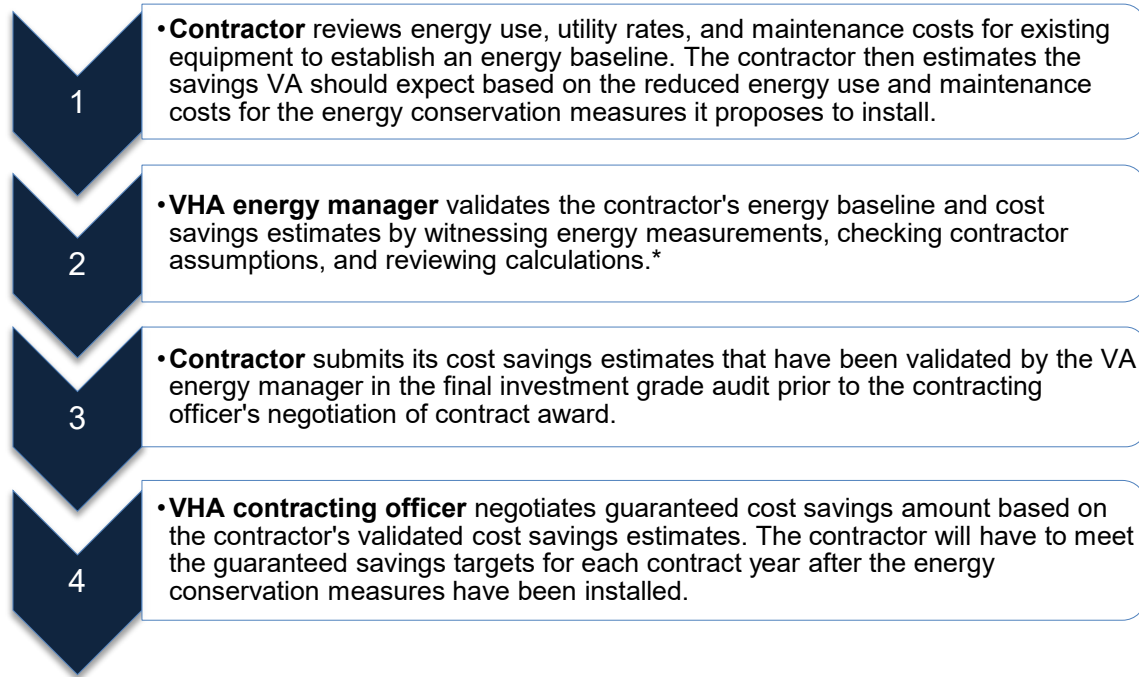


Figure 2. Energy baseline and cost savings estimation and validation process.

Source: VA OIG's summary of the energy baseline and cost savings estimation and validation process.

* A VISON or medical center energy manager is delegated as the contracting officer's representative.

Once the energy baseline and cost savings estimates have been validated and determined to be reasonable, the contracting officer negotiates a guaranteed cost savings amount with the contractor. This amount sets a cost ceiling for the energy savings performance contracts. After these steps are completed, the contracting officer awards the contractor a task order under the Department of Energy indefinite-delivery, indefinite-quantity contract.³⁵

After installing energy conservation measures, it is impossible to retroactively reevaluate the contract's energy baseline to determine if the energy conservation measures implemented by the contractor are meeting energy savings targets. Therefore, it is critical for VA to carefully review the contractor's investment grade audit to ensure energy savings estimates for energy conservation measures are reasonable. Without thoroughly vetting this information, VA cannot have assurance these savings are achievable.

Offices That Oversee Energy Savings Performance Contracts

VA's Energy Savings Performance Contracting Program requires coordination between the Energy, Environment, and Fleet Program Service (EEF), under the Office of Asset Enterprise

³⁵ FAR 2.1 (2023) defines a task order as "an order for services placed against an established contract or with Government sources." The subject task orders allowed VA medical facilities to use the Department of Energy's energy savings performance contracts.

Management, and VHA’s Program Contracting Activity Central (PCAC) and energy managers located at VISNs or medical centers. Figure 3 shows how these offices align.

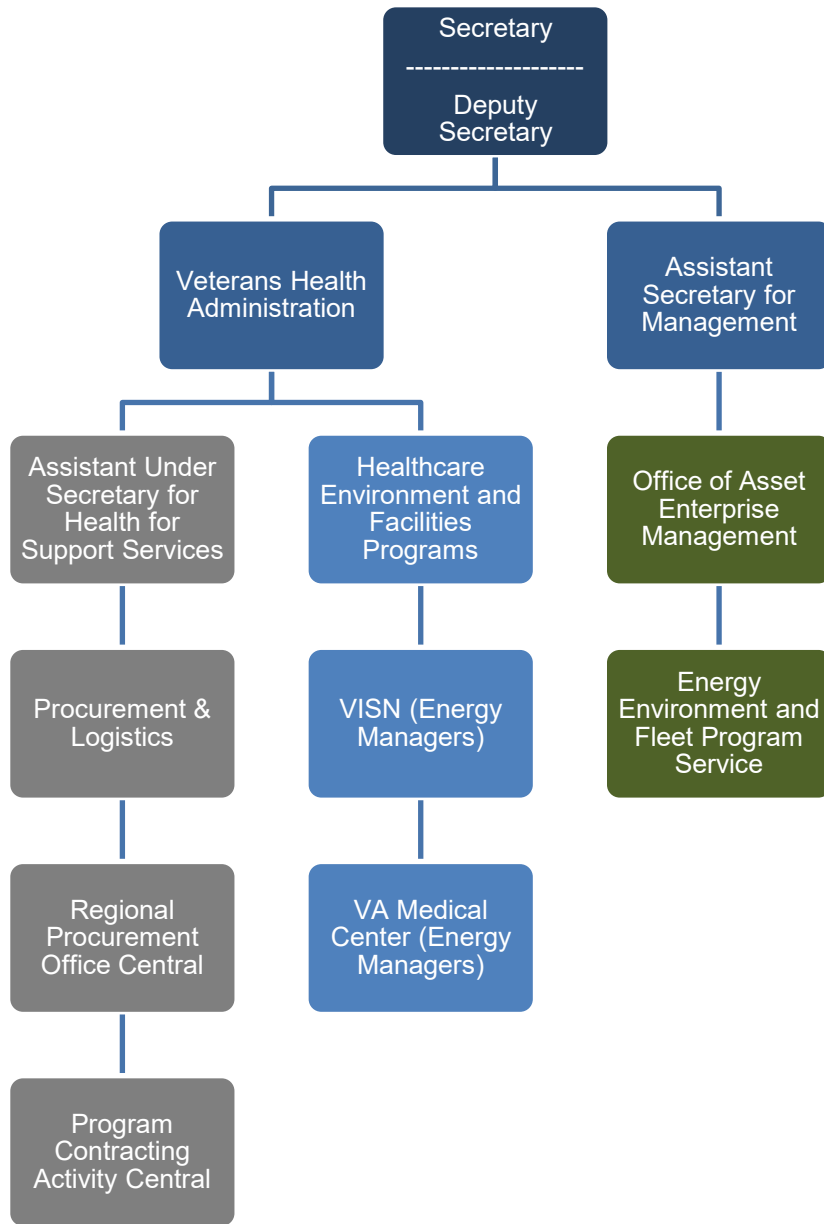


Figure 3. Energy Savings Performance Contracting Program structure.
Source: VA OIG’s summary of various VA and VHA organizational charts.

These offices and roles have specific responsibilities and duties:

- **Energy, Environment, and Fleet Program Service** was established in 2003 within the Office of Asset Enterprise Management to oversee and coordinate operations, policy,

training, direction, and guidance for VA's Energy Savings Performance Contracting Program. EEF also completes required agency reporting on the program.

- **Program Contracting Activity Central** is the contracting office responsible for all VA energy savings performance contracting activity. It delegates contracting officer's representative duties to VHA engineers at VISNs and medical facilities.
- **VISN energy managers or facility energy engineers** act as the contracting officer's representatives. They provide technical assistance that may include reviewing energy baselines and validating energy savings estimates, and monitoring the contractor's performance to ensure compliance with contract requirements. They are expected to support the Healthcare Environment and Facilities Program through committee participation and updates, data analysis and projections, national policy and position description development, and other energy issues.

Results and Recommendations

Finding: VA Needs to Validate That Contractors' Baseline Measurements and Energy Savings Estimates Are Reasonable Prior to Contract Award

The provisions of the energy savings performance contract related to measurement and verification state that VA should witness measurements and review calculations, records such as utility bills, operating conditions, assumptions, and other elements of the baseline to confirm contractor savings estimates are reasonable and measurement methodologies are sound for monitoring contractor performance.³⁶ These actions are also recommended by the Federal Energy Management Program. In addition, the EEF director and PCAC supervisor stated that VHA energy managers who serve as contracting officer's representatives are expected to validate a contractor's energy baseline and savings estimates prior to the contracting officer negotiating a guaranteed cost savings amount and awarding an energy savings performance contract. VA should validate the contractor-estimated energy baseline and savings estimates because of the important role they play in limiting the amount VA is allowed to reimburse the contractor.

The OIG expected to find documentation of the VA energy managers' analysis determining that contractor energy baselines and savings estimates were reasonable.³⁷ After an extensive review of contract files and interviews with VISN and medical facility energy managers, the OIG did not find evidence that VA adequately validated contractors' baseline measurements, calculations, or assumptions used to estimate energy savings to verify that they were reasonable. The audit team determined that this occurred because VA had not developed policies or procedures to guide VHA energy managers through the validation of contractors' energy savings estimates. As a result, VA risks that the contractor's energy savings estimates are overstated, which could lead to overpaying the contractors for energy savings that may never be achieved.

The OIG made the following determinations to form the basis for its audit recommendations:

- VHA energy managers did not witness contractor baseline measurements that were used to calculate the energy savings estimates.
- VHA energy managers did not validate key variables, assumptions or calculations used to create the contractor's energy baseline and savings estimates.

³⁶ Energy Savings Performance Contract Numbers VA701-16-F-0067 and VA701-14-F-0116; FEMP, *Guide to Government Witnessing and Review of Measurement and Verification Activities*, rev. March 28, 2014.

³⁷ The Federal Energy Management Program, *Reviewing Measurement & Verification Plans for Federal ESPC [Energy Savings Performance Contract] Projects*, February 2007 guidance. Step 7 states that the agency archives the measurement and verification plan review in the project records. In prior steps, the review includes the energy baseline and energy savings estimates.

- VA has not developed specific policies or procedures to guide VHA energy managers through the validation of contractors' investment grade audit energy savings estimates.
- VA made \$68 million in prepayments for energy savings performance contracts that did not comply with criteria in federal law and Federal Energy Management Program guidance.

What the OIG Did

From a universe of 13 medical facilities that used energy savings performance contracts, the audit team randomly selected four VA medical facilities located in Beckley, West Virginia; Fayetteville, North Carolina; Little Rock, Arkansas; and Palo Alto, California.

The audit team reviewed the energy savings performance contracts and associated contract files, the final investment grade audit reports, and supporting documentation provided by the energy manager, PCAC, and EEF. For audit criteria, the OIG used Federal Energy Management Program guidance for energy savings performance contract projects and Government Accountability Office (GAO) cost-estimating guidance since they are considered best practices for federal agencies.³⁸ Finally, the audit team conducted in-person interviews with energy managers, chief engineers, and VISN engineers and conducted online interviews with contracting officials and the directors of EEF and the Office of Asset Enterprise Management.

VHA Energy Managers Need to Witness Contractors' Energy Baseline Measurements Used to Calculate Energy Savings

The energy savings performance contract provisions related to measurement and verification state that VA should witness the contractor taking energy baseline measurements to confirm contractor savings estimates are reasonable and to confirm that methods are consistent with the approved measurement and verification plan, as described in Federal Energy Management Program guidelines.³⁹ Included in these guidelines is a suggested Measurement & Verification Witnessing template that documents the type of measurements taken by the contractor, the date and time, and the names (signatures) of both the contractor and government staff serving as witnesses.

Despite the contract provision (and the Federal Energy Management Program recommendation), VA could not produce evidence that confirmed its energy managers witnessed the contractor

³⁸ Federal Energy Management Program, "Reviewing Measurement & Verification Plans for Federal ESPC Projects," February 2007; GAO, *GAO Cost Estimating and Assessment Guide*, GAO-09-3SP, March 2009 and GAO-20-195G, March 2020. The GAO guide outlines the four characteristics of a reliable cost estimate.

³⁹ FEMP, *Guide to Government Witnessing and Review of Post-Installation and Annual Measurement and Verification Activities*, rev. March 28, 2014.

taking baseline measurements. The VA personnel responsible for witnessing measuring and verification are energy managers who serve as contracting officer's representatives.⁴⁰ The energy managers interviewed were those that currently serve as contracting officer's representatives at all four medical facilities and are responsible for validating postconstruction measurement and contract performance. They were not involved in the preinstallation phase when the project's energy baseline was established because they were not serving in their current roles at that time. They could not produce documentation showing that witnessing of energy baseline measurements had been performed by their predecessors during the investment grade audit preinstallation phase or verify the reasonableness of cost savings calculations done by the contractors. The OIG was unsuccessful in its attempts to contact prior energy managers who were no longer employed by VA to determine the reasons the witnessing documentation of contractor energy baseline measurements did not exist.

The VISN 6 energy manager who was serving as the contracting officer's representative during the course of the OIG's audit engagement was able to provide baseline witnessing forms. However, the forms were not signed by the contracting officer's representative who was in place at the time the contractor's baseline measurements were taken. The current VISN 6 energy manager said that witnessing contractor energy measurements is critical and he would have made himself available to witness the contractor's measurements had he been assigned during the investment grade audit development period.

Example 1 highlights the importance of an energy manager witnessing contractor baseline measurements.

Example 1

In VISN 16, the John L. McClellan Memorial Veterans Hospital's energy savings performance contract included over \$2.1 million to upgrade its interior lighting with LED lights and occupancy sensors. This energy conservation measure was estimated to generate \$168,126 in annual energy savings and cover the cost of the upgrade in approximately 12.2 years.⁴¹ The \$168,126 in estimated energy savings represented 37 percent of the \$459,643 in annual savings the contract's five energy conservation measures were expected to produce. Table 2 shows the baseline and postinstallation energy estimates and related cost savings.

The final investment grade audit indicated the contractor had conducted a comprehensive lighting survey in 2018. The contractor calculated the energy

⁴⁰ VHA energy managers are delegated as the contracting officer's representative to perform the review measurement and verification reports and provide other development support as required. VA's Program Contracting Activity Central supervisor stated they rely on the energy managers to validate the energy baseline and savings estimates.

⁴¹ Simple repayment of energy conservation measure implementation costs does not include financing or other costs.

savings by performing a room-by-room inventory of fixtures and energy consumption of all existing lighting equipment by location. The hours of operation were measured by sampling different types of rooms using time-of-use lighting loggers. Then the average operating hours for each room type were used to project the energy savings facility wide.

The OIG team requested evidence that the energy manager had witnessed the contractor collecting the energy use data, such as the measurement of the time-of-use lighting loggers. The baseline witnessing form provided to the OIG was signed by the energy manager in April 2022, long after the lighting energy conservation measure was installed. Witnessing the energy use measurements is critical to validating that the contractor’s savings estimates are reasonable prior to negotiation of a guaranteed cost savings amount that limits the contract award value and is used to measure contractor performance.

Table 2. Contractor Energy Savings Estimates from the John L. McClellan Memorial Veterans Hospital Interior Lighting Energy Conservation Measure

Year 1 savings	Electric energy cost	Electric demand cost	Gas energy cost	Operation and maintenance costs	Total costs
Baseline use	\$115,641	\$121,137	(\$11,916)	\$27,318	\$252,179
Post-installation use	\$39,945	\$48,919	(\$4,812)	\$0	\$84,052
Savings	\$75,695	\$72,218	(\$7,104)	\$27,318	\$168,126

Source: VISN 16 final investment grade audit report.

Note: Amounts in the table were rounded.

VA Needs to Validate Key Variables, Assumptions, and Calculations Used to Create the Energy Baseline and Energy Savings Estimates

In addition to the VA contract provision stating that VA should review calculations, records (such as utility bills), operating conditions, assumptions, and other elements of the baseline and energy savings estimates, the Federal Energy Management Program also recommends review of the contractors’ savings calculations.⁴² However, energy managers at all four medical facilities surveyed could not produce evidence to show that key variables, assumptions, or calculations used to establish the contractor’s energy baseline and savings estimates were validated. These elements are essential since the baseline establishes both the starting point for measurement and the expected performance of the installed upgrades. Without validating the assumptions and

⁴² Energy Savings Performance Contract Numbers VA701-16-F-0067 and VA701-14-F-0116; [Federal Energy Management Program, Federal Energy Saving s Performance Contract Process Phase 3: Project Development.](#)

calculations used to create the energy savings estimate, VA has little assurance that the postinstallation guaranteed energy savings are achievable.

VA is required to follow Federal Energy Management Program guidance for reviewing the investment grade audit and performing its own independent analysis of the contractor's estimates to determine their reasonableness:⁴³

- Evaluate the quality of the baseline development for each energy conservation measure.
 - Were key variables measured?
 - Are all assumptions and stipulations reasonable?
 - Were system performance characteristics recorded?
- Evaluate soundness and reasonableness of energy conservation measure savings estimates.
 - Were energy calculation methodologies closely reviewed?
 - Did the reviewer check the math in the energy calculations?
 - Were utility or weather-based models validated?
 - Were energy conservation measure savings compared to system usage? Are they reasonable?
- Evaluate overall project assumptions.
 - Are contracted energy rates based on actual rates, including time-of-use rates and peak demand ratchets? Are marginal (not blended) energy rates used?
 - Are proposed escalation rates based on latest data?

The OIG team requested the contractor's investment grade audit reports and supporting documentation for each of the energy savings performance contracts reviewed for this project. The team also requested any documentation demonstrating that energy managers had reviewed or validated key variables, assumptions, and models or checked the contractor calculations for accuracy. The contracting officer's representatives and energy managers provided comment logs that documented requests for information between contracting personnel, engineering officials, and the contractor during the contractor's investment grade audit review.

The OIG reviewed comment logs and contractor responses that documented questions from EEF program office officials, the contracting officer, the contracting officer's representative, the

⁴³ Federal Energy Management Program, "Reviewing Measurement and Verification Plans for Federal Energy Savings Performance Contract Projects," dated February 2007.

project facilitator (engineering consultant), and other VA medical center engineering staff during the investment grade audit review process. Apart from these few limited inquiries within these comment logs, neither contracting officers nor local medical facility energy managers could produce any documentation showing VA had performed an independent analysis of the contractor's energy baseline or savings estimates to determine if they were reasonable.

The OIG's review of the Palo Alto medical center's energy savings performance contract comment log found only two questions for all six energy conservation measures under the section for energy conservation measure calculations. The two questions were specific to energy savings calculations for a chiller plant upgrade and window film applied to a building. For these two questions, the contractor clarified that cooling loads were not adjusted for the new chillers, and that a "model" was calibrated to the monthly utility data for the second question. The two energy conservation measures about which questions were raised were estimated to produce \$242,960 (approximately 37 percent) of the energy savings performance contract's total energy savings. The comment log did not indicate if the contractor responses were acceptable for either question.

The comment log also included other general questions related to construction, staff training, assignment of risk and responsibilities, measurement and verification plans, a small business subcontracting plan and pricing, and financing. Often, these inquiries yielded little information, and VA did not document in the log if they reviewed the responses and found them acceptable. The Palo Alto energy manager interviewed by the OIG audit team reviewed the contractor's final investment grade audit and questioned if the contractor's savings estimate could have been validated by the previous energy manager based on the documentation she had available on site.

The OIG could not find any evidence that VA energy managers validated contractor energy baselines and cost savings estimates for any of the energy savings performance contracts reviewed during the course of this audit. The OIG also found no documented evidence that the energy managers reviewed key variables the contractor used to calculate energy savings. In the few instances where energy managers raised questions about the estimates, they relied solely on the contractor to verify its own baseline measurements, assumptions, methodologies, and calculations. Without VA energy managers' independent analysis of the contractor energy baselines and savings estimates prior to implementation of energy conservation measures, there is little assurance that energy baselines can be relied upon to assess whether annual energy-saving targets are being achieved. Example 2 shows where an energy manager did not validate the key variables and assumptions used to estimate energy baseline and savings estimates for installing new energy-efficient plumbing fixtures.

Example 2

In VISN 6, at the Fayetteville VA medical center, the contractor replaced its plumbing fixtures with low-flow ones to save water, gas, and electricity. The contractor estimated the medical facility would receive \$35,501 in energy savings

the first year (\$27,685 for water, \$5,545 for gas, and \$2,271 for electric) following installation. This energy conservation measure was expected to recoup its \$195,821 in implementation costs in approximately 5.5 years if the estimated savings were achieved.

To calculate the energy and water savings for the upgrades, the contractor collected key variables such as fixture count, type, and flow rates and average water temperatures. The contractor also made assumptions such as the number of times a faucet is used per year, the amount of water used per occurrence, and the amount of hot water used to calculate the natural gas energy savings. Using the various variables and assumptions, the contractor calculated the energy baseline and future energy use to estimate the energy savings.

The VISN 6 energy manager interviewed by the OIG could not provide documented evidence that the former energy manager verified the key variables, assumptions, or calculations used to estimate the energy savings produced by this energy conservation measure. The only documentation provided was a single comment logged during the review of the contractor's investment grade audit. The comment questioned a rounding error made on the report, noting that it did not match the contractor's supporting spreadsheets.⁴⁴

Federal Energy Management Program guidance states that federal agencies' reviews of contractor assumptions and calculations should be documented. The review should establish that contractor assumptions are based on sound engineering principles and that calculations are correct to ensure estimated energy savings are reasonable. According to the guidance, federal agencies should first review the engineering calculations and then subsequently review operations-related assumptions such as the number of times a faucet is used per year, amount of water used per occurrence, and temperature set points. VA was unable to provide the OIG team with any documented evidence that it reviewed or validated any of the underlying data, assumptions, or calculations that were used to estimate the energy savings for the plumbing fixture project.

Plumbing fixture upgrades were installed at seven medical facilities within VISN 6 and were estimated to produce \$575,869 in energy savings in the first year, or approximately 12 percent of the \$4,717,732 million in total estimated savings for the 58 energy conservation measures contained in the contract. Without energy managers or other agency representatives independently verifying the contractor's assumptions, models, or calculations, VA has little assurance that contractor's baseline measurement and savings estimates are reasonable.

⁴⁴ Although the comment log indicates that the contractor will address and correct the bottom-line rounding error, there was no indication that VA performed a comprehensive validation of the energy savings calculations.

Because the OIG was unable to obtain sufficient documentation of the validation of the energy savings calculations and government witnessing of the energy baseline measurements, the OIG recommended that the director of contracting for PCAC develop procedures for contracting officer's representatives, or other contracting officer designees, to independently witness and validate the contractors' energy baselines and savings estimates prior to negotiating energy savings performance contracts' guaranteed savings amounts.⁴⁵ The OIG also recommended developing oversight procedures to ensure documentation that demonstrates the contractor energy baseline and estimated energy savings were witnessed and validated is maintained in the official contracting records.

VA Lacked Specific Policies to Guide Contracting Officials and Engineers on Validating Contractors' Energy Savings Estimates

The Federal Energy Management Program is authorized by statute to establish appropriate procedures and methods for use by federal agencies regarding the energy savings performance contracts program.⁴⁶ EEF is responsible for VA-wide policy, training, direction, oversight, and guidance for VA's Energy Savings Performance Contracting Program. However, EEF lacked specific policy or procedures to guide VHA energy managers' validation of contractors' baselines and energy savings estimates during the review of the contractors' investment grade audit.

The OIG requested VA policy for evaluating and validating baseline and energy savings estimates. EEF provided a slide presentation file that described the energy savings performance contract process, illustrated a customer service agreement, and included a site development package checklist. EEF pointed the audit team to relevant VA directives.⁴⁷ None of these documents or policies provided guidance on evaluating and validating baseline and energy savings estimates. The EEF director stated VHA energy managers have oversight responsibility to validate the energy baseline and savings estimates, and the EEF program manager stated that the Federal Energy Management Program has guidance for federal agencies to use. However, not

⁴⁵ On December 16, 2022, the director of EEF identified steps taken to address the lack of witnessing during the investment grade audit that the OIG identified. EEF provided VA's PCAC energy savings performance contract investment grade audit content checklist that includes a requirement for baseline witnessing forms. This step appears to address the lack of witnessing documents; however, witnessing only addresses part of the OIG's recommendation.

⁴⁶ 42 U.S.C. § 8287(b)(1)(A); 10 C.F.R. § 436.30(a). FAR 23.205 (2022), "Energy-savings performance contracts," also references Federal Energy Management Program. Although substantial Federal Energy Management Program guidance exists as well as regulation citing to Federal Energy Management Program, VA-specific guidance referring to Federal Energy Management Program procedures and resources would assist VA personnel executing energy savings performance contracts in areas such as validating the contractors' energy baseline and estimated energy savings. The OIG found that other federal agencies such as the Departments of the Army and the Air Force have their own specific energy savings performance contract guidance.

⁴⁷ VA Directive 0055, *VA Energy and Water Management Program*, December 10, 2014; VA Directive 0012, *VA Investments in Energy and Water Efficiency and Renewable Energy*, July 6, 2015.

one energy manager could provide the OIG VA-specific policy or procedures on how to interpret Federal Energy Management Program guidance applicable to the validation of contractor energy baselines and savings estimates. VA's lack of agency specific policy or procedures significantly increases the risk of energy managers not determining if contractor estimates are reasonable prior to VA negotiating contract pricing and energy savings guarantees.

The EEF director said that VA Directive 0055 was being updated and would incorporate the Energy Act of 2020 and Executive Order 14057, along with a rescinded VA Directive 0012. In addition, EEF provided a draft copy of a new project facilitator agreement, which would more clearly define the project facilitator role in evaluating and validating baseline energy and estimated energy usage. VA policy and procedures should define clear steps an energy manager can take to validate that contractor energy savings estimates are reasonable.

A contracting officer's representative for the energy savings performance contracts said that a lack of internal guidance and subject matter expertise makes it difficult to ensure contractor savings estimates are reasonable and that contract risk is balanced fairly between VA and the contractor. Not having written policy available makes it difficult to ensure validation practices are consistent across facilities as well. This guidance is especially needed due to the frequent turnover observed among energy managers and the limited experience of employees new to that role.

The OIG did not find any guidance providing energy managers with clear direction for reviewing contractor energy savings performance contract energy savings estimates during its review of policies issued by the EEF, the PCAC, and the Healthcare Environment and Facilities Programs. The OIG therefore recommended that the Office of Asset Enterprise Management develop specific policy and procedures to ensure contractors' investment grade audits, which includes energy baselines and cost savings estimates, are witnessed and validated per Federal Energy Management Program guidelines.

VA Made \$68 Million in Energy Savings Performance Contract Prepayments That Did Not Comply with Criteria in Federal Law and Federal Energy Management Program Guidance

The OIG found that PCAC executed approximately \$68 million in one-time prepayments using surplus medical facility funds near the end of fiscal year (FY) 2020 and FY 2022. The PCAC supervisory contract specialist stated that one-time prepayments are typically unplanned and begin with the facility identifying available funds to make additional one-time payments, which will save on interest over the life of the energy savings performance contracts. PCAC stated that there is currently no VA payment policy, which the Office of Asset Enterprise Management also confirmed. A VA payment policy should address how much can be paid toward energy savings performance contracts in compliance with federal law and Federal Energy Management Program guidance. On February 23, 2023, an EEF program manager provided the OIG with a new policy

to guide buy-outs and buy-downs.⁴⁸ Although this policy was not in place at the time the one-time payments were made, the OIG team reviewed this new policy and determined it does not provide assurance one-time prepayments comply with federal law and Federal Energy Management Program guidance. Table 3 outlines the lump-sum payments made with surplus medical facility funding for each energy savings performance contract and guaranteed savings limits for each fiscal year.

Table 3. Lump-sum Payments Exceeding Energy Savings (\$)

Payments including one-time prepayments	VISN 16	VISN 6	Total
	FY 2020	FY 2022	
Total payment for year	10,000,000	63,345,205	73,345,205
Payment limit: guaranteed savings amount	0*	5,369,837	5,369,837
Payment exceeding energy savings	10,000,000	57,975,368	67,975,368

Source: VISN 6 and VISN 16 energy savings performance contracts files.

* *The VISN 16 energy savings performance contract does not have a guaranteed savings amount for FY 2020 since construction was not completed. Guaranteed energy savings begin after the construction of the energy savings equipment is completed.*

42 U.S.C. § 8287(a)(2)(B) states that “aggregate annual payments by an agency to ... energy savings performance contractors, under an energy savings performance contract, may not exceed the amount that the agency would have paid for utilities without an energy savings performance contract ... during contract years.”⁴⁹ The PCAC authorized payment for energy savings performance contracts with VISN 6 and VISN 16 funds in FY 2020 and FY 2022, respectively. In both cases the lump-sum payments exceeded the guaranteed savings amounts for the fiscal year, which were not derived as a direct result of implementing the projects. Since the one-time prepayments exceeded the guaranteed and verified energy costs savings in any contract year, these prepayments did not comply with the law. In addition, Federal Energy Management Program guidance prevents payments to contractors from exceeding the annual guaranteed cost savings and one-time cost savings amounts defined in the energy savings performance contract.⁵⁰ This guidance provides the following requirements that need to be met for one-time payments:

One-time payments are generally acceptable methods for shortening the term of an agency’s energy savings performance contract and/or reducing associated

⁴⁸ VA Office of Asset Enterprise Management, “Policy on Buy-downs and Buy-outs of Energy Performance Contracts (VIEWS #9503669),” February 21, 2023.

⁴⁹ Federal Energy Management Program guidance interprets 42 U.S.C. § 8287(a)(2) to require that energy cost savings must exceed payments under an energy savings performance contract in each contract year.

⁵⁰ Federal Energy Management Program, *Practical Guide to Savings and Payments in FEMP ESPC Task Orders*, January 2009.

financing charges. However, the following energy savings performance contract requirements must be adhered to in determining the appropriate nature of a one-time payment:

- (A) Guaranteed cost savings to the federal agency must exceed payments to the contractor in every year of the energy savings performance contract term. One-time payments must be made in the same contract year in which the underlying energy or energy-related savings occurred. That is, the savings and associated payment must appear in the same year on the task order financial schedules.
- (B) Only “real savings” may be applied to as payments to the contractor. That is, the one-time savings used to make a one-time payment must be reflected as reduced expenses in the agency’s accounts for energy, energy-related O&M [operation and maintenance] or R&R [repair and replacement], or capital accounts intended for these purposes.
- (C) The basis for all one-time savings that underlie any one-time payment, whether energy cost savings or avoided costs, must be fully documented in the contract file.
- (D) All energy savings performance contract payments must be based on cost savings directly resulting from the energy savings performance contract project. One-time savings and payments should be reflected in the financial schedules of the contract.

In July 2023, VA provided the OIG with emails between attorneys from the VA and Department of Energy’s Office of the General Counsel on use of one-time payments for energy savings performance contracts. Without further information from VA, it does not appear that the discussion in these emails has any impact on the findings in this audit report.

The OIG determined that these lump-sum one-time payments authorized by PCAC were not in compliance with federal law or Department of Energy requirements. Instead of prepaying the energy savings performance contracts in amounts that exceed the energy savings received by approximately \$68 million, VA could put this medical facility funding to better use by using the money for projects that address their deferred maintenance backlog.⁵¹ The maintenance backlogs at VISN 6 and 16 are approximately \$1.3 billion and \$1.2 billion respectively.⁵² Additionally,

⁵¹ The deferred maintenance backlog is defined as infrastructure in need of repair or replacement graded D (poor) or F (critical) as identified by the facility condition assessments. Facility condition assessments are used to identify maintenance needs that the program seeks to address. VA uses the facility condition assessment as the starting point for determining the financial liability reported for the deferred maintenance. The cost estimates represent the amount needed to return the assets to their acceptable operating condition.

⁵² VHA estimated maintenance backlog based on VA’s Capital Asset Inventory amount reported on July 23, 2023.

one-time prepayments may limit VA's ability to hold the contractor accountable for achieving guaranteed cost savings over the life of the contract.⁵³ For this reason, the OIG recommended that the director of the Office of Asset Enterprise Management publish criteria for payments for energy savings performance contracts to ensure compliance with federal law and the Department of Energy's Federal Energy Management Program guidance. Subsequently, on February 23, 2023, the Office of Asset Enterprise Management shared with the OIG a policy to guide buy-downs and buy-out payments.⁵⁴ However, the OIG team reviewed this policy and determined the recommendation to incorporate federal law and guidance still applies.

Conclusion

The OIG found that VA did not witness or independently validate contractors' energy baselines and estimated energy savings calculations, and VA did not have effective policies or quality control procedures to ensure that contractors' estimated energy savings are independently reviewed. VA is taking on significant risk by not validating contractors' estimated energy savings before awarding energy savings performance contracts. VA needs to witness contractor energy measurements, check assumptions, and review calculations to ensure the estimates are reasonable. Baseline measurements are critical to establishing the starting point for validating energy savings over the life of the contract. Once contracts have been awarded and energy upgrades installed, it is impossible to retroactively determine baseline measurements for these projects. Without performing due diligence up front, VA has no way of measuring contractor performance and ensuring energy savings performance contracts' guaranteed cost savings are being achieved and paying for upgrades.

Recommendations 1–4

The OIG made two recommendations to the director of the Office of Asset Enterprise Management:

1. Develop specific policy and procedures to ensure the contractor's investment grade audit, which includes the contractor's energy baseline and cost savings estimates, are witnessed and validated per Federal Energy Management Program guidelines.
2. Publish criteria for payments for energy savings performance contracts to ensure compliance with federal law and Department of Energy Federal Energy Management Program guidance.

⁵³ If guaranteed savings are not met, then VA only pays up to the amount of savings realized, with the contractor paying the rest. By prepaying some or all of the contract off early, the payback period and total guaranteed savings amounts are reduced.

⁵⁴ VA Office of Asset Enterprise Management Policy on Buy-downs and Buy-outs of Energy Performance Contracts (VIEWS #9503669).

The OIG also made two recommendations to the director of contracting for the Program Contracting Activity Central:

3. Develop procedures to ensure contracting officer's representatives or other contracting officer designees have independently witnessed and validated the contractor's energy baseline and savings estimates prior to negotiating energy savings performance contracts' guaranteed savings amounts.⁵⁵
4. Develop oversight procedures to ensure documentation that demonstrates the contractor's energy baseline and energy savings estimates were witnessed and validated is maintained in the official contracting records.

VA Management Comments

The executive director for VA's Office of Asset Enterprise Management concurred with recommendation 1 and provided a responsive action plan. The office plans to work with PCAC to update VA's energy savings performance contracts and supporting documents to specifically address witnessing and validation of baseline and cost savings estimates, and the office will update VA Directive 0055 to include policy specifics on these topics. The action plan is expected to be completed by spring 2024.

The Office of Asset Enterprise Management did not concur with recommendation 2 and therefore did not provide a proposed action plan. VA disputes that the \$68 million in prepayments exceeded amounts allowable under federal law and the Department of Energy's Federal Energy Management Program guidance. It also disputes incorporating the findings and recommendations into VA policy because it believes doing so would conflict with legal advice received from VA's Office of General Counsel. The full response from VA's Office of Asset Enterprise Management can be found in appendix C.

The under secretary for health concurred with recommendations 3 and 4 and submitted an action plan for each. In response to these recommendations, VHA modified the energy savings performance contract to include an updated investment grade audit checklist. VHA provided evidence of the modified contract and checklist and requested closure of these recommendations. The under secretary's full response can be found in appendix D.

OIG Response

VA's Office of Asset Enterprise Management and the under secretary for health's comments and planned corrective actions for recommendations 1, 3, and 4 are responsive to the intent of the

⁵⁵ On December 16, 2022, the director of EEF identified steps taken to address lack of witnessing during the investment grade audit that the OIG identified. EEF provided VA's PCAC energy savings performance contract investment grade audit content checklist that includes a requirement for baseline witnessing forms. This step appears to address the lack of witnessing documents; however, witnessing only addresses part of our recommendation.

recommendations. VA provided an updated investment grade audit checklist and requested closure of recommendations 3 and 4; the OIG will monitor execution of planned actions and close the recommendations upon receipt of sufficient evidence demonstrating progress addressing the issues identified.

In response to VA's Office of Asset Enterprise Management's nonconcurrency with recommendation 2, the OIG stands by its conclusion that the prepayments did not comply with 42 U.S.C. § 8287 and the Department of Energy's Federal Energy Management Program guidance. This guidance did not expand the limits to annual aggregate payments that the OIG contends VA exceeded, and the prepayments therefore fall outside the law. In fact, the memorandum specifically states that "The ESPC authority as amended, still limits aggregate annual payments under an ESPC to no more than the amount that the agency would have paid for utilities without an ESPC." An OIG legal opinion, prepared in response to VA's nonconcurrency with recommendation 2, can be found in appendix E.

In the under secretary for health's memorandum (see appendix D), paragraph 5 states that the report's scope was limited by omitting the substantial contributions from expert project facilitators involved with independent validation of estimates and assessment of baseline assumptions. The OIG did contact the project facilitator for the contracts included in its scope of review. The team met with the project facilitator on October 14, 2022, and discussed their role on the project. The project facilitator agreed with the importance of the baseline since it establishes savings throughout the life of the contract and stated that it was more critical than measurement and verification that occurs after the contract is awarded. The project facilitator also stated there was a lack of guidance from Federal Energy Management Program on how to develop the baseline. While they did have a role in reviewing and validating the baseline assumptions, measurements, and calculations, the project facilitator stated the only record of that review was the investment grade audit comment logs. Those comment logs were discussed in this report and found to be inadequate evidence of a review of the energy baseline and estimated energy savings. In addition, the project facilitator said they were not involved in witnessing the baseline measurements and that the government employee needs to perform the witnessing. When asked who has final approval or ultimate responsibility over the investment grade audit and measurement and verification, the project facilitator responded that the VA did. The project facilitator was unable to provide any additional documentation that would support the review and validation of the energy baseline and estimated energy savings. Therefore, after interviewing the project facilitator, the team's focus remained on VA as the office ultimately responsible for the evaluation of the investment grade audit.

Appendix A: Scope and Methodology

Scope

The audit team conducted its work from July 2022 through August 2023. The scope of the audit focused on the extent to which VA evaluated the contractor's energy baseline and estimated energy savings calculations established in the contractor's investment grade audit for energy savings performance contracts awarded from 2012 through 2021.

Methodology

The audit team reviewed applicable laws, contract requirements, Department of Energy Federal Energy Management Program guidance, and Government Accountability Office (GAO) guidance. The team also coordinated with the Office of the Counselor to the Inspector General for legal guidance. The team gathered evidence from various VA offices, including records held by Veterans Health Administration (VHA) energy managers, Program Contracting Activity Central (PCAC) contracting officers, and managers at the Energy, Environment, and Fleet Program Service (EEF). The audit team conducted in-person interviews with contracting officer's representatives, energy managers, and chief engineers. The team also conducted online interviews with managers and staff from PCAC and the EEF.

From a universe of 13 medical facilities using energy savings performance contracts, the OIG team used a two-stage random selection method: the first stage selected the contracts, the second stage selected facilities within the contract. This method maximized the numbers of Veterans Integrated Service Networks represented in the sample to ensure a broad view of management practices across the country.

The team evaluated the contractor's final investment grade audit for four VA medical facilities located in Beckley, West Virginia; Fayetteville, North Carolina; Little Rock, Arkansas; and Palo Alto, California, to determine the extent to which VA validated the contractor's energy baseline and energy savings estimates used to establish the guaranteed energy savings that limit the amount VA pays the contractor. To determine whether the contractor's energy baseline and energy savings estimates met the contract language to witness and review calculations and the Federal Energy Management Program guidance, the OIG team reviewed any provided calculations and assumptions, examined available energy savings cost models and supporting documentation to understand the methodology used, and traced amounts in the energy estimate back to underlying source data when information was available.

Internal Controls

The audit team assessed the internal controls of the Energy Savings Performance Contract Program significant to the audit objective. This included an assessment of the five internal

control components to include control environment, risk assessment, control activities, information and communication, and monitoring.⁵⁶ In addition, the team reviewed the principles of internal controls as associated with the objective. The team identified the two components and three principles as significant to the objective that are shown in table A.1.⁵⁷ The team identified internal control weaknesses during this audit and proposed recommendations to address the control deficiencies listed in table A.1.

Table A.1. Internal Control Components and Principles Identified as Significant

Component	Principle	Deficiency identified by this report
Control activities	10. Design control activities to achieve objective and respond to risk	Comment logs to document the review of energy savings calculations did not provide assurance that the contractors' estimated energy baseline and energy savings for each energy conservation measure have been reviewed.
	12. Implement control activities through policies	<p>The Energy, Environment, and Fleet Program Service lacked policies and procedures to ensure the contractor's investment grade audit is reviewed and energy baseline and estimated energy savings are validated.</p> <p>The Energy, Environment, and Fleet Program Service lacked policy on one-time payments that comply with federal law and Federal Energy Management Program guidance.</p>
Information and communication	13. Use quality information to achieve objective	PCAC should establish procedures to ensure contracting officers obtain confirmation the contractor's energy savings estimates were reviewed, determined to be reasonable prior to contract award.

Source: OIG Analysis

Fraud Assessment

The audit team assessed the risk that fraud and noncompliance with provisions of laws, regulations, contracts, and grant agreements, significant within the context of the audit objectives, could occur during this audit. The team exercised due diligence in staying alert to any fraud indicators by

- soliciting indicators from the OIG's Office of Investigations, and

⁵⁶ GAO, *Standards for Internal Control in the Federal Government*, GAO-14-704G, September 2014.

⁵⁷ Since the audit was limited to the internal control components and underlying principles identified, it may not have disclosed all internal control deficiencies that may have existed at the time of this audit.

- asking personnel and managers from the Office of Asset Enterprise Management, the EEF, and PCAC whether they were aware of fraudulent activity.

The OIG did not identify any instances of fraud or potential fraud during this audit.

Data Reliability

To assess the reliability of the Energy, Environment, and Fleet Program Service's list of energy savings performance contracts, the OIG team compared the total dollar value of contracts on the list to the dollar amounts identified in the VA fiscal year 2023 budget requests, energy savings performance contracts, and contract files.

Government Standards

The OIG conducted this performance audit in accordance with generally accepted government auditing standards. Those standards require that the OIG plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for the findings and conclusions based on audit objectives. The OIG believes the evidence obtained provides a reasonable basis for the findings and conclusions based on the audit objectives.

Appendix B: Monetary Benefits in Accordance with Inspector General Act Amendments

Recommendation	Explanation of Benefits	Better Use of Funds (In millions)	Questioned Costs
2	One-time payments for energy savings performance contracts exceeded energy savings in noncompliance with federal law and Department of Energy Federal Energy Management Program guidance	\$68.0	\$0
	Total	\$68.0	\$0

Appendix C: VA Management Comments, Executive Director of the Office of Asset Enterprise Management

Department of Veterans Affairs Memorandum

Date: September 18, 2023

From: Executive Director, Office of Asset Enterprise Management (044)

Subj: Draft Report, Audit of VA's Energy Savings Performance Contracts
(project number 2022-02934-AE-0116)

To: Assistant Inspector General for Audits and Evaluations (052)

1. Thank you for the opportunity to review the Office of Inspector General (OIG) draft report on Audit of VA's Energy Savings Performance Contracts. OIG assigned two recommendations to the Executive Director, Office of Asset Enterprise Management (OAEM). OAEM concurs with the finding and recommendation one, and non-concurs with recommendation two in the report. OAEM's action plan is attached.

The OIG removed point of contact information prior to publication.

[Original signed by]

Brett Simms

Attachment

Action Plan
Audit of VA's Energy Savings Performance Contracts
(Project number 2022-02934-AE-0116)

Recommendation 1: The VA Office of Asset Enterprise Management develop specific policy and procedures to ensure the contractor's investment grade audit, which includes the contractor's energy baseline and cost savings estimates, are witnessed and validated per Federal Energy Management Program guidelines.

Concur. The Office of Management's Office of Asset Enterprise Management (OAEM) will work with Program Contracting Activity Central to update VA's Indefinite Delivery, Indefinite Quantity contracts and supporting documents, such as the Investment Grade Audit Checklist, to specifically address witnessing and validation of baselines. OAEM will also update VA Directive 0055, VA Energy and Water Management Program, to incorporate more specific policy relating to these topics by Spring of 2024.

Status: Ongoing Target Completion Date: Spring 2024

Recommendation 2: The VA Office of Asset Enterprise Management publish criteria for payments for energy savings performance contracts to ensure compliance with federal law and Department of Energy Federal Energy Management Program guidance.

Non-concur. The Office of Management's Office of Asset Enterprise Management (OAEM) published a policy to guide buyout and buydowns in February 2023, and will further expand on the policy as part of the VA Directive 0055 updates as mentioned in recommendation one. However, OAEM disputes that the \$68M in prepayments exceeded amounts allowed by federal law and Federal Agency [sic] Management Program (FEMP) guidance. Additionally, OAEM disputes incorporating those findings and recommendations into VA policy because they conflict with legal advice received from VA's Office of General Counsel (OGC).

Prior to moving forward with the referenced payments, VA sought OGC guidance. VA's OGC, in consultation with Department of Energy's (DOE) legal counsel, determined that these payments were allowable in accordance with the law and FEMP guidance. In an Office of Inspector General (OIG) Statement of Findings and Draft Report, OIG raised concerns regarding one-time payments made by VA under Energy Savings Performance Contracts (ESPC). During VA's OGC review of this issue in 2017, they discussed the one-time payments identified in the OIG Draft Report with DOE's legal counsel who advised the Federal Energy Management Program regarding statutory interpretation of 42 U.S.C. 8287, which is the ESPC authorizing statute. DOE's legal counsel advised that one-time payments as proposed by VA were permissible if the funds came from the proper type of funding due to the new language added to the ESPC statutory authority by the Energy Independence and Security Act of 2007 (EISA).

DOE has interpreted the new Funding Options statutory language to expressly authorize payments under an ESPC from funds appropriated for the purpose of energy efficiency improvements. The statutory requirement under 42 U.S.C. 8287(a) can be met by ensuring that the proper type of funding is used for the payment. Energy cost savings are created because the one-time payment reduces the interest that would be paid by VA on the ESPC. Given that DOE is the lead agency for the ESPC statutory authority, VA's OGC deferred to DOE's interpretation of the EISA 2007 Funding Options language and ultimately supported VA's one-time payments made under the circumstances noted in the OIG Draft Report.

OGC notes that the OIG Draft Report frequently refers to Appendix 2 of the FEMP Guidance document in its assessment that VA's one-time payments were improper. Issuance of Appendix 2 predates the enactment of EISA 2007 and subsequent issuance of Appendix 3, and therefore, does not incorporate the additional funding flexibility allowed to federal agencies under the Funding Options statutory language, as interpreted by DOE. In response, OAEM non-concurs with moving forward with a policy that is based on an outdated Appendix. VA OGC's legal opinions on this have been shared with OIG and can be provided again, as needed.

Status: N/A Target date for completion: N/A

Appendix D: VA Management Comments, Under Secretary for Health

Department of Veterans Affairs Memorandum

Date: October 5, 2023

From: Under Secretary for Health (10)

Subj: Office of Inspector General (OIG) Draft Report, Audit of VA's Energy Savings Performance Contracts (VIEWS 10873339)

To: Assistant Inspector General for Audits and Evaluations (52)

1. Thank you for the opportunity to review and comment on the draft report regarding the Department of Veterans Affairs (VA) Energy Savings Performance Contracts (ESPCs).
2. The Veterans Health Administration (VHA) has a robust, active and highly respected ESPC program. VA was the first and only Agency to transition its entire ESPC program to work exclusively with service-disabled veteran-owned small businesses. These ESPC contracts are public-private partnerships that leverage private sector funding to improve VA medical facilities. VHA has awarded \$1.69 billion of energy performance contracts across 90 VA medical centers, generated \$60.7 million in savings and achieved 3,297,237 million British Thermal Units (BTU)/year of energy savings. VHA is actively developing \$300 million in new energy savings projects across 16 medical facilities located in 10 states (South Dakota, Arizona, Louisiana, Texas, West Virginia, Minnesota, Oklahoma, Colorado and California). These energy saving projects improve Veterans' wellness by increasing operational reliability, safety and efficiency where Veterans get their care. Below are some examples of major accomplishments to date:
 - \$250 million of facility improvements across 11 medical centers in California.
 - \$100 million of facility improvements across 7 medical centers in Kansas and Missouri.
 - \$250 million of facility improvements across 9 medical centers in Indiana, Illinois, and Wisconsin.
 - \$300 million of facility improvements across 10 medical centers in New York and New Jersey.
 - New boiler plants at 5 medical centers.
 - New chilled water plants or improvements to chilled water plants such as new chillers or cooling towers at 22 medical centers.
 - New Energy Center at Overton Brooks VA Medical Center in Shreveport, Louisiana.
3. VHA appreciates OIG's audit of this program and has taken prompt action to resolve the documentation gap and strengthen oversight procedures recommended by OIG. VHA concurred with both recommendations three and four, completed corrective actions and asked OIG to close them.
4. VHA emphasizes its tight partnership with the Department of Energy (DOE) and adherence to DOE procedures, policy, regulation and guidance as essential to VHA's successful negotiation for and effective implementation of energy saving projects. As mentioned within the body of the draft report, OIG, VA and DOE differed on interpretations of ESPC law and obtained legal opinions

from respective General Counsels. VHA acknowledges that Government entities may reasonably encounter differences of opinion. In this case, VHA supports the Department's non-concurrence with recommendation two.

5. VHA has developed a very robust and accountable contracting process for developing energy savings contracts in partnership with DOE and our private sector energy contractors. VHA would like to highlight the important role of project facilitators throughout all phases of ESPCs. Project facilitators are industry experts in ESPCs that DOE requires for VA to use the Indefinite Delivery, Indefinite Quantity contract. Due to the report's limited scope focusing on actions of Contracting Officers' Representatives, the report unfortunately omits substantial contributions from expert project facilitators involved with independent validation of estimates and assessment of baseline assumptions. This type of scope limitation can inadvertently skew interpretations, findings and conclusions.
6. Thank you again for partnering with VHA to ensure Veterans receive the high-quality health care they deserve.

The OIG removed point of contact information prior to publication.

[Original signed by]

Shereef Elnahal, M.D., MBA

Attachments

VETERANS HEALTH ADMINISTRATION (VHA)
Action Plan
VA OIG Audit of VA's Energy Savings Performance Contracts
(2022-02934-AE-0116)

VHA included the response from the executive director of OAEM for recommendations 1 and 2 that is included in appendix C; therefore, the OIG excluded it from the response below.

Recommendation 3. Develop procedures to ensure contracting officer's representatives or other contracting officer designees have independently witnessed and validated the contractor's energy baseline and savings estimates prior to negotiating energy savings performance contracts' guaranteed savings amounts.

VHA Comments: Concur. Shortly after OIG completed its audit, VHA completed updating its procedures to ensure contracting officer representatives (CORs) or other designees document independent witness and validation of contractors' energy baseline and savings estimates prior to negotiating contracts. The updated procedures require CORs or other designees to use an updated checklist that documents certification by the COR, indefinite delivery indefinite quantity (IDIQ) contractor and project facilitator that the energy baselines and estimated energy savings have been independently witnessed and verified. The new checklist is enforced by contract modification. The new checklist is a required deliverable in the official contract file. VHA has completed its work on the recommended procedural revision and asks OIG to consider closing this recommendation. VHA will provide supporting documentation to OIG to support the closure request.

Status: Completed Completion Date: August 2023

Recommendation 4. Develop oversight procedures to ensure documentation that demonstrates the contractor's energy baseline and energy savings estimates were witnessed and validated is maintained in the official contracting records.

VHA Comments: Concur. OIG's finding that documentation regarding witnessing was not readily accessible in contract files led to an assumption that the work had not been done. VHA asserts that CORs performed the required independent validations prior to negotiating energy savings contracts, however, VHA acknowledges that documentation of this work needs to be easier to identify and locate in the contract file. To strengthen informal documentation expectations the Program Contracting Activity Center modified the Energy Savings Performance Contract. The contract now includes an updated Investment Grade Audit Checklist that documents witnessing of independent energy baseline and estimated energy savings validation by the COR, IDIQ contractor and project facilitator. This form containing witnessing documentation is required in the official contract file. The official contract file is reviewed by the supervisor and the Regional Procurement office as well as the Office of General Counsel prior to award. This is a robust oversight procedure with strong internal controls at three points. VHA has completed its work on the recommended procedural revision and asks OIG to consider closing this recommendation. VHA will provide supporting documentation to OIG to support the closure request.

Status: Completed Completion Date: August 2023

Appendix E: Legal Opinion by the OIG Office of the Counselor to the Inspector General in Response to VA's Office of Asset Enterprise Management's Nonconcurrency with Recommendation 2

I. OIG Response to Office of Asset Enterprise Management Objection to the OIG's Finding That the \$68 Million in Prepayments Exceeded Amounts Allowed by Federal Law and Federal Energy Management Program Guidance

The OIG stands by its finding that the \$68 million in prepayments exceeded amounts allowable under federal law and Federal Energy Management Program guidance. The National Energy Conservation Policy Act states that “[a]ggregate annual payments by an agency ... under an energy savings performance contract, may not exceed the amount that the agency would have paid for utilities without an energy savings performance contract ... during the contract years.” (42 U.S.C. § 8287(a)(2)(B) (the Act)). This statutory language is clear, and the OIG found that the one-time payments made by VA did not meet this requirement. Further, applicable guidance by the Department of Energy concerning one-time payments and one-time savings in energy saving performance contracts is found in the Federal Energy Management Program's (FEMP) “Practical Guide to Savings and Payments in FEMP ESPC Task Orders,” rev. 3, January 2009 (FEMP Guide), app. 2 and 3. The OIG's findings are consistent with the Department of Energy's guidance.

Appendix 2 of this guide cites the provisions of 42 U.S.C. § 8287(a)(2)(B). It provides that one-time payments are “generally acceptable methods for shortening the term of an agency's ESPC contract and/or reducing associated financing charges. However, the following ESPC requirements **must be adhered to** in determining the appropriate nature of a one-time payment.” (Emphasis added.) One of the mandatory requirements is that

[g]uaranteed cost savings to the federal agency must exceed payments to the contractor in every year of the ESPC contract term. One-time payments must be made in the same contract year in which the underlying energy or energy-related savings occurred. That is, the savings and associated payment must appear in the same year on the task order financial schedules.

The OIG found that the one-time payments made by VA did not meet this criterion. Appendix 3 of the FEMP guide, which is a memorandum from the Department of Energy's Office of the General Counsel, addresses a question on “the meaning of the new Funding Options provision added to the ... ESPC statute by the Energy Independence and Security Act of 2007 (Pub. L. No. 110-140; EISA 2007) (EISA 2007) (the memo). The memo focuses on the

appropriate source of funds used for payment under energy savings performance contracts, stating, “DOE interprets the new FUNDING OPTIONS provision as expressly authorizing the payments from one-time avoided costs that originate from authorized sources, including appropriations specifically for energy efficiency improvements.” In accordance with the act and germane to the OIG’s findings, the memo states about the EISA 2007 amendments that “The ESPC authority, as amended, still limits aggregate annual payments under an ESPC to no more than the amount that the agency would have paid for utilities without an ESPC.” The OIG did not take issue with VA using appropriations specifically available for energy-efficiency improvements. Instead, the OIG took issue with the fact that VA’s one-time payments did not comply with the statutory limitation that aggregate annual payments under an energy savings performance contract could not exceed the amount that the agency would have paid for utilities without an energy savings performance contract. This position is consistent with the memo.

II. Series of Emails in 2017 between VA’s Office of General Counsel and the Department of Energy’s Office of General Counsel Provided to the OIT after the OIG Provided VA the Statement of Findings

In its response to recommendation 2, the executive director of the Office of Asset Enterprise Management stated that “[p]rior to moving forward with the referenced payments, VA sought OGC guidance. VA’s OGC, in consultation with Department of Energy’s (DOE) legal counsel, determined that these payments were allowable in accordance with the law and FEMP guidance.” The OIG cannot comment on this statement, as the OIG has not received any documentation regarding the specific actions that led to the Office of Asset Enterprise Management’s discussions with the VA’s Office of General Counsel. The OIG notes that the one-time payments identified in the audit were from 2020 and 2022 and the referenced guidance from the Office of General Counsel in a series of emails was in 2017. Those emails contain no specificity regarding the facts surrounding the one-time payments or whether the bases of the communication with OGC involved general discussions on the subject of one-time payments versus an analysis of specific actions. The OIG notes further that based on the discussion in the emails, the overriding issues are dissimilar to the findings in the OIG audit. In this regard, the emails between agency counsel discussed the language in EISA 2007, which authorized “payments from savings that result from avoided costs that would have been paid for from funding authorized or otherwise made available for energy efficiency improvements.” This language is not at odds with the OIG’s findings. VA’s response also states that “DOE’s legal counsel advised that one-time payments as proposed by VA were permissible if the funds came from the proper type of funding due to the new language added to the ESPC statutory authority by the Energy Independence and Security Act of 2007 (EISA).” The OIG does not know the specific one-time payments proposed to the Department of Energy’s legal counsel; however, the OIG contends that only one-time payments that comply with the requirements of the act and Federal Energy Management Program guidance can be paid from “funding authorized or

otherwise made available for energy efficiency improvement.” The problem identified by the
OIG was that the one-time payments audited did not comply with the requirements of federal law
and Federal Energy Management Program guidance.

*For accessibility, the original format of this appendix has been modified
to comply with Section 508 of the Rehabilitation Act of 1973, as amended.*

OIG Contact and Staff Acknowledgments

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