

# Regulatory Barriers in the USA

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# What is a regulatory barrier in the USA?

- Any government-led effort or government-created rule that hampers the efficacy of ESCO work. Generally it is associated with impacting many different projects and/or ESCOs at the same time.
- Forms it can take
  - Legislation from elected officials
  - Rules created by administrative personnel (bureaucrats)
  - Re-interpretations of long-standing rules by legal or other staff
  - Changes of opinions when personnel in government change
  - Staff who express dismay or dislike for ESCO work and hamper the process
  - Standard contracts that offer inappropriate risk or conditions
  - Requirements for insurance that are difficult or impossible to achieve
  - Requirements for hazardous materials that inappropriately shifts responsibility
- Where can you find such barriers:
  - Barriers can arise at any level of client, as many jurisdictions have multiple levels of legislation, process, and personnel
  - Federal – State – Local/County/City – University – Elementary-Senior High School



# Review of Past Regulatory Barriers

- Barrier 1 – No Supporting Legislation
  - Energy savings that funded capital improvements was not specifically allowed by law
  - In the US, often the thought is:
    - Public Sector – Laws specifically enable something happening
    - Private Sector – Laws specifically ban something from happening
  - While some jurisdictions proceeded, regular “business as usual” was not possible
- Barrier 1 – Solution – Enabling Legislation
  - Enabling legislation needed to be created and passed
  - 50 States + Federal
  - In some cases, separate legislation for State Buildings, City/County/Local Buildings, K-12 School Buildings and Universities
  - NAESCO, along with others began and sustained an effort to create and pass enabling legislation in all 50 states
- Benefits
  - The ESCO market – knowing its work is established in law – can develop divisions to develop and deliver work
  - Financing has become more available as laws support the work
  - Market growth

# Review of Past Regulatory Barriers

- Barrier 2 – Lack of Standard Contracts
  - With 50 States + 1 Federal – No program standardization across the country
  - Unique terms for the same entity arose
    - Investment Grade Audit (IGA) – Detailed Design Audit
    - Energy Savings Performance Contract (ESPC) – GESPC (Guaranteed) – GESA – ESA
  - Contracts and Terms in each jurisdiction are unique
- Barrier 2 – Partially Solved – Model Documents
  - There have been three iterations of a standard model contract created
  - US Department of Energy with the Energy Services Coalition and NAESCO
  - A few states adopted the contracts ‘as is’
  - A few states adopted a modified version of the model contract
  - Some states use their own contract
  - In some cases, local areas may adopt a contract found from another project or an ESCO
- Benefits
  - Even when the contract is not adopted, some ideas from it are used
  - Has helped to standardize the ‘general process’ and requirements for a project

# Review of Past Regulatory Barriers

- Barrier 3 – Trust in the ESCO Delivery Model
  - Early projects lacked consistency and may not have protected the customer fully
  - Some entrants into the market did not understand the delivery model well
  - Shortcuts on energy savings verification led to skepticism in the market about ESCO products
- Barrier 3 – Solution – ESCO Accreditation
  - NAESCO created an ESCO Accreditation System
  - Formed an independent committee to develop the rules and enforce the accreditation scheme
  - Accreditation validates ESCO performance, but also validates energy project delivery and post project savings verification
  - An Ethics Policy is included in accreditation
- Benefits
  - Growth of confidence in the ESCO market
  - Many customers now require ESCO accreditation to participate in RFP submittals
  - ESCOs perform work recognizing that quality performance is required to maintain accreditation

# Remaining Regulatory Barriers

- Barrier 4 – Legislative Re-interpretation
  - A long-standing law is re-read by a new attorney for the jurisdiction
    - May decide the law is unconstitutional
    - Could determine that certain types of savings are not allowed (Demand savings for example)
    - Might invalidate the procurement methodology
  - Existing legislation is challenged by industries that are opposed to ESCO work
    - Propose legislation that hinders or stops ESCO work
    - Creates a local issue that local contractors are not getting their fair share of the work
  - An elected official overly scrutinizes the program
    - May cause career government officials to freeze or delay work
    - May cause a restructure of the fulfillment program



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# Some Examples



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- A law passed over 10 years ago is being re-read and new rules are being applied to a state. No longer will certain energy conservation measures be allowed, essentially ending ESCO work for state buildings
- One agency took over a site from another agency. The attorneys for the new agency examined the contract for work and determined that the existing contract for a project nearly 100% built was not legal.
- A legislator, prompted by interest groups in their state, proposed legislation that would stop all ESCO work in the state. We have found that certain engineering, architect and/or unions sometimes support and sometimes oppose ESCO work.
- A state has an approved list of ESCOs that are allowed to do work in a state. The administrators running the program have failed to renew the list when it expired. As ESCOs must be selected from the list, ESCO work has been hampered due to the lack of a current non-expired list.
- A state employee does not believe that projects should be financed. That employee stands as a reviewer in the process for project approval. By creating hurdles for project approval, the employee stifles ESCO work in that state.



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# What Does NAESCO do?

- How does a trade association handle barriers like this that are placed in the way of its members?
- First – learn about the issue
  - NAESCO is not a large organization and does not have ‘watchers’ for every market and every avenue a project could be performed under
  - NAESCO depends upon its members to inform us about an issue that has arisen
  - Regional meetings of the organization gather local ESCO personnel to help inform NAESCO
  - Creating personal relationships with ESCO personnel to ease communication pathways

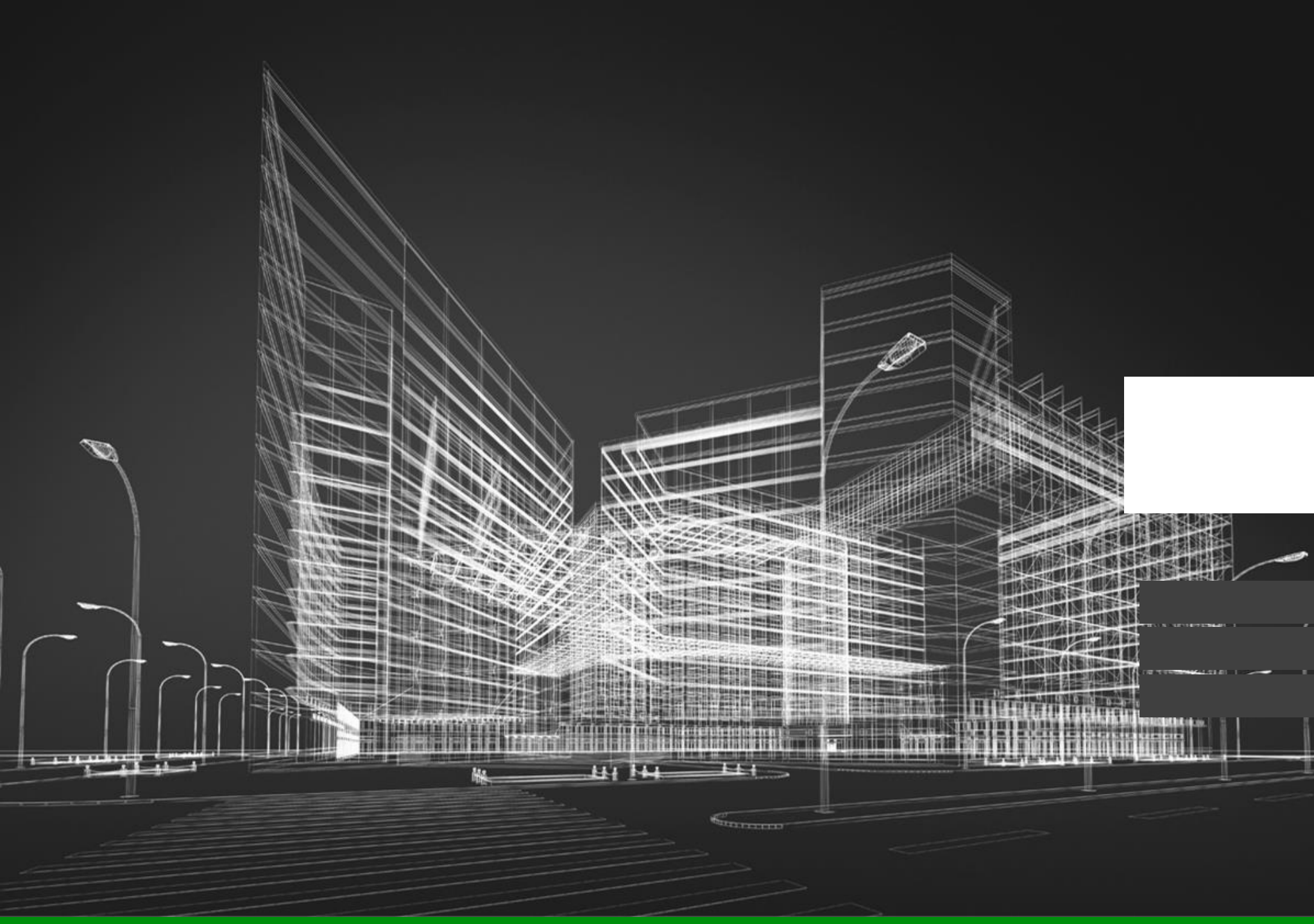




# What Does NAESCO do? (continued)



- Second – react to the issue
  - May involve training state/local employees on how an ESCO works
  - Likely a need for a relationship to be established with government personnel to better understand why a change is proposed
  - Phone calls and meetings with members and government personnel to help understand and resolve problems
  - Hiring a lobbyist to represent ESCOs as a group
  - Proposing new or updated legislation to fix a problem
  - Engaging with other trade groups that may not understand ESCO work or may dislike ESCO work



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