

MODEL PERFORMANCE CONTRACTING LEGISLATION

Energy Savings Performance Contracting

Section 1. Definitions. In this Act:

1. "Cost-savings measure" means any facility improvement, repair or alteration, or any equipment, fixture or furnishing to be added or used in any facility that is designed to reduce energy consumption and operating costs or increase the operating efficiency of facilities for their appointed functions that are cost effective. "Cost savings measure" includes, but is not limited to, one or more of the following:
 1. Procurement of low-cost energy supplies of all types, including electricity, natural gas and water.
 2. Insulating the building structure or systems in the building.
 3. Storm windows or doors, caulking or weather stripping, multi-glazed windows or door systems, heat-absorbing or heat-reflective glazed and coated window and door systems, additional glazing, reductions in glass area, or other window and door system modifications that reduce energy consumption.
 4. Automated or computerized energy control systems.
 5. Heating, ventilation or air conditioning system modifications or replacements.
 6. Replacing or modifying lighting fixtures to increase the energy efficiency of the lighting system.
 7. Indoor air quality improvements that conform to applicable building code requirements.
 8. Energy recovery systems.
 9. Cogeneration systems that produce steam or forms of energy such as heat, as well as electricity, for use primarily within a building or complex of buildings.
 10. Installing new or modifying existing day-lighting systems.
 11. Installing or modifying renewable energy and alternate energy technologies.
 12. Building operation programs that reduce operating costs including, but not limited to, computerized programs, training, and other similar activities.
 13. Steam trap improvement programs that reduce operating costs.
 14. Devices that reduce water consumption.
 15. Any additional building infrastructure improvements that produce energy and operational cost savings, improve safety, significantly reduce energy consumption or increase the operating efficiency of the facilities for their appointed functions and are in compliance with applicable state and local building

codes.

2. "Qualified energy service company" means a person with a record of established projects or a person with demonstrated technical, operational, financial and managerial capabilities to implement performance contracts.
3. "Energy and operational cost-savings" means any expenses that are eliminated or avoided on a long-term basis as a result of equipment installed or modified, or services performed by a qualified energy service company or a qualified provider, but does not include merely shifting personnel costs or similar short-term cost-savings.
4. "Governmental unit" means any state agency, authority, or any political subdivision of state or local government, including, but not limited to, county, city, township, village or municipal government, local school districts and institutions of higher education, any state-supported institution, or a joint action agency composed of political subdivisions.
5. "Performance contract" means a contract between the governmental unit and a qualified energy service company or qualified provider for evaluation, recommendation and implementation of one or more cost-savings measures. A performance contract may be structured as either a:
 1. Guaranteed energy savings performance contract, which shall include, at a minimum, the design and installation of equipment, and, if applicable, operation and maintenance of any of the measures implemented; guaranteed annual savings which must meet or exceed the total annual contract payments made by the governmental unit for such contract, including financing charges to be incurred by the governmental unit over the life of the contract; or
 2. Shared savings contract, which shall include provisions mutually agreed upon by the governmental unit and the qualified provider or qualified energy service company as to the negotiated rate of payments based upon energy and operational cost-savings and a stipulated maximum energy consumption level over the life of the contract.
6. "Person" means any corporate or non-corporate entity or individual of any type.
7. "Public building" means any structure, building or facility, including its equipment, furnishings or appliances that is owned or operated by a governmental unit.
8. "Qualified provider" means a person who is experienced in the design, implementation and installation of energy efficiency and facility improvement

measures and who has the ability to secure necessary financial measures to support energy savings guarantees and the technical capabilities to ensure such measures generate energy and operational cost-savings.

Section 2. Authorization.

1. Any governmental unit may enter into a performance contract with a qualified provider or qualified energy service company to reduce energy consumption or operating costs. Cost-savings measures implemented under such contracts shall comply with state or local building codes. Any governmental unit may implement other capital improvements in conjunction with a performance contract so long as the measures which are being implemented to achieve energy and operational cost-savings are a significant portion of an overall project.

Section 3. Selection of Qualified Provider.

1. Before entering into a performance contract under this section, a governmental unit shall solicit qualifications and proposals from qualified energy service companies or qualified providers. A governmental unit may thereafter award the performance contract to the qualified energy service company or qualified provider that best meets the needs of the governmental unit, which need not be the lowest cost provider.
2. Request for Qualifications. The governmental unit shall first issue a request for qualifications. The governmental unit shall attempt to use objective criteria in the selection process. The criteria for evaluation shall include the following substantive factors to assess the capability of the qualified energy service company or qualified provider in the areas of: design, engineering, installation, maintenance and repairs associated with performance contracts; experience in conversions to a different energy or fuel source, so long as it is associated with a comprehensive energy efficiency retrofit; post-installation project monitoring, data collection and reporting of savings; and overall project experience and qualifications; management capability; ability to access long-term financing; experience with projects of similar size and scope; and other factors determined by the governmental unit to be relevant and appropriate and relate to the ability to perform the project.
3. Up to three qualified providers or qualified energy service companies shall be selected, as a result of the process set forth in subsection (B) to receive a request for proposals. A cost-effective feasibility analysis shall be prepared in response to the request for proposals. The feasibility analysis included in the response to the request for proposals shall serve as the selection document for purposes of selecting a qualified energy service company or a qualified provider to engage in final contract negotiations. Factors to be included in selecting among the three persons include contract terms, comprehensiveness of the proposal, comprehensiveness of cost-savings measures, experience,

quality of technical approach and overall benefits to the governmental unit.

4. Financial Grade Audit and Contract Execution. One person selected as a result of the process set forth in subsection (C) shall prepare a financial grade energy audit which, upon acceptance, shall be part of the final performance contract which shall be executed with the governmental unit. Notwithstanding the foregoing, if after preparation of the financial grade energy audit the governmental unit decides not to execute a performance contract, then the costs incurred in preparing such financial grade energy audit shall be paid to the qualified provider or qualified energy service company by the governmental unit, otherwise the costs of the financial grade energy audit shall be deemed part of the costs of the performance contract.

Section 4. Installment Payment and Lease-Purchase Agreements.

A governmental unit may enter into a performance contract structured as an installment payment contract or lease-purchase agreement for the purchase and installation of cost-savings measures. Financing implemented through another person other than the qualified provider or qualified energy service company is authorized.

Section 5. Payment Schedule and Savings.

Each performance contract shall provide that all payments between parties, except obligations on termination of the contract before its expiration, shall be made over time and the objective of such performance contracts is implementation of cost-savings measures and energy and operational cost-savings.

Section 6. Term of Contracts.

1. A performance contract, and payments provided thereunder, may extend beyond the fiscal year in which the performance contract became effective, subject to appropriation of moneys, if required by law, for costs incurred in future fiscal years. The performance contract may extend for a term not to exceed twenty-five years. The allowable length of the contract may also reflect the useful life of the cost-savings measures.
2. Performance contracts may provide for payments over a period of time not to exceed deadlines specified in the performance contract from the date of the final installation of the cost-saving measures.

Section 7. Allocation of Obligations.

Subject to appropriations as provided in sections 5 and 6, each governmental unit shall allocate sufficient moneys for each fiscal year to make payment of any amounts payable by the governmental unit under performance contracts during that fiscal year.

Section 8. Use of Moneys/Reconciliation.

1. The governmental unit engaging in the performance contract shall retain the savings achieved by entering into such performance contract. In no event shall the governmental unit utilize such savings to supplant otherwise appropriated funds for the governmental unit.
2. Unless otherwise provided by law or ordinance, a governmental unit may use funds designated for operating and capital expenditures or utilities for any performance contract, including, without limitation, contracts entered into subject to section 4 of this Act.
3. The performance contract may provide that reconciliation of the amounts owed under a performance contract shall occur in a period beyond one year with final reconciliation occurring within the term of the performance contract.

Section 9. Monitoring and Reports.

1. During the term of each performance contract, the qualified energy service company or qualified provider shall monitor the reductions in energy consumption and cost-savings attributable to the cost-savings measures installed pursuant to the performance contract, and shall, no less than annually, prepare and provide a report to the governmental unit documenting the performance of the cost-savings measures to the governmental unit.
2. The qualified provider or qualified energy service company and governmental unit may agree to make modifications in calculating savings based on any of the following occurrences:
 1. Subsequent material change to the baseline energy consumption identified at the beginning of the performance contract.
 2. Changes in utility rates.
 3. Changes in the number of days in the utility billing cycle.
 4. Changes in the total square footage of the building.
 5. Changes in the operational schedule of the facility.
 6. Changes in facility temperature.
 7. Material change in the weather.
 8. Material changes in the amount of equipment or lighting used at the facility.
 9. Any other change which reasonably would be expected to modify energy use or energy costs.
3. For all projects carried out under this Act, the governmental unit shall report the name of the project, the project host, the investment on the project and the expected energy savings to the state energy office, as defined by 42 U.S.C. § 6325(g)(1)(A). The state energy office may report energy savings from these

projects to the U.S. Department of Energy, Energy Information Agency under the Energy Policy Act of 1992, 1605(b) reporting standards.

Section 10. Contingency Provisions.

Performance contracts shall include contingency provisions in the event that actual savings do not meet predicted savings.

Section 11. Use of Savings from Performance Contracts.

Governmental units may direct savings realized under the performance contract to contract payment and other expenses as they deem necessary. Governmental units are encouraged to reinvest savings whenever practical into cost-savings measures, so long as the governmental unit is satisfying all obligations under the performance contract.

Section 12. Repeal of Prior Conflicting Statutes.

Provisions of any statute enacted prior to this Act which are inconsistent with this Act are hereby repealed. In cases where there is a question as to the degree of inconsistency, this Act is intended to control. The Attorney General shall consult with the state energy office in construing this section.