MODEL ENERGY PERFORMANCE CONTRACTING LEGISLATION

The Energy Services Coalition offers a collection of Best Practices documents for state energy offices (SEOs) to launch and administer programs to increase energy efficiency through energy performance contracting. The documents draw from successful programs in various states and are continually updated to incorporate the latest strategies. They can be easily customized to meet the needs of any SEO or similar government department.

DESCRIPTION:

This model energy performance contracting (EPC) legislation was developed under a grant from the U.S. Department of Energy by the ESC in conjunction with the National Association of Energy Service Companies (NAESCO). It includes recommended legislative language as well as descriptive notes to clarify the intent or suggest modifications. It can be used as enabling legislation or as a reference for updating existing legislation.

MODEL ENERGY PERFORMANCE CONTRACTING (EPC) LEGISLATION

Purpose. The purpose of this act is to obtain long-term energy and cost savings for governmental units by facilitating prompt incorporation of energy conservation improvements or energy production equipment, or both, in connection with buildings or facilities owned, operated or under the supervision and control of governmental units, in cooperation with providers of such services and associated materials from the private sector. Such arrangements will improve and protect the health, safety, security, and welfare of the people of the state by promoting energy conservation and independence, developing alternate sources of energy, and fostering business activity. (NY)

Section 1. Definitions.

In this Act:
"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:

Replacement or modification of lighting components, fixtures and/or systems;

Renewable energy and alternate energy systems;

Cogeneration systems that produce steam or forms of energy, such as heat or electricity, for use primarily within a building or complex of buildings;

Devices that reduce water consumption or sewer charges including:

Water-conserving fixtures, appliances, and equipment or the substitution of non-waterusing fixtures, appliances, and equipment; water-conserving landscape irrigation equipment;

Landscaping measures that reduce watering demands and capture and hold applied water and rainfall, including: landscape contouring, including the use of berms, swales, and terraces; the use of soil amendments that increase the water-holding capacity of the soil, including compost; rainwater harvesting equipment and equipment to make use of water collected as part of a storm-water system installed for water quality control;

Equipment for recycling or reuse of water originating on the premises or from other sources, including treated municipal effluent;

Equipment needed to capture water from nonconventional, alternate sources, including air conditioning condensate or graywater, for non-potable uses;

Metering equipment needed to segregate water use in order to identify water conservation opportunities or verify water savings;

Changes in operation and maintenance practices;

Indoor air quality improvements that conform to applicable building code requirements;

Daylighting systems;

Insulating the building structure or systems in the building;

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;

Automated or computerized energy control systems;

Heating, ventilation or air conditioning system modifications or replacements;

Indoor air quality improvements that conform to applicable building code requirements;

Energy recovery systems;

Steam trap improvement programs that reduce operating costs;

Building operation programs that reduce utility and operating costs including, but not limited to, computerized energy management and consumption tracking programs, staff and occupant training, and other similar activities;

Any life safety measures that provide long-term operating cost reductions and are in compliance with state and local codes;

Any life safety measures related to compliance with the Americans With Disabilities Act, 42 U.S.C. Section 12101, et seq., that provide long-term operating cost reductions and are in compliance with state and local codes;

A program to reduce energy costs through rate adjustments, load shifting to reduce peak demand, and/or use of alternative energy suppliers, such as, but not limited to:

(i) changes to more favorable rate schedules;

(ii) negotiation of lower rates, same supplier or new suppliers, where applicable; and
(iii) auditing of energy service billing and meters.

Services to reduce utility costs by identifying utility errors and optimizing existing rate schedules under which service is provided; and

Any other installation, modification of installation, or remodeling of building infrastructure improvements that produce utility or operational cost savings for their appointed functions in compliance with applicable state and local building codes.

"Cost-effective" means that the present value to a governmental unit of the energy reasonably expected to be saved or produced by a facility, activity, measure, or piece of equipment over its useful life, including any compensation received from a utility, is greater than the net present value of the costs of implementing, maintaining, and operating such facility, activity, measure, or piece of equipment over its useful life, when discounted at the cost of public borrowing.

"Operation and maintenance cost savings" means a measurable decrease in operation and maintenance costs and or future replacement expenditures that is a direct result of the implementation of one or more utility cost-savings measures. Such savings shall be calculated in comparison with an established baseline of operation and maintenance costs.

"Qualified energy service provider" means a person with a record of successful energy performance contract projects or a person who is experienced in the design, implementation and installation of energy efficiency and facility improvement measures, the technical capabilities to ensure such measures generate energy and operational cost-savings and the ability to secure the financing necessary to support energy savings guarantees.

"Utility cost-savings" means any utility 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 provider; it does not include merely shifting personnel costs or similar short-term costsavings.

"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.

"Investment Grade Audit" means a study by the qualified energy services provider selected for a particular energy performance contract project which includes detailed descriptions of the improvements recommended for the project, the estimated costs of the improvements and

the utility and operations and maintenance cost savings projected to result from the recommended improvements.

"Energy Performance Contract or Energy Services Agreement" means a contract between the governmental unit and a qualified energy service provider for evaluation, recommendation and implementation of one or more cost-savings measures. A performance contract may be structured as either a:

> 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
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> 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.

"Person" means any corporate or non-corporate entity or individual of any type.

"Public building" means any structure, building or facility, including its equipment, furnishings or appliances that is owned or operated by a governmental unit.

NOTES. Section 1: Definitions
Some current state EPC laws have laundry lists of permitted measures, while others have a simple catch-all sentence that broadly defines permitted measures. We suggest including both options, a laundry list that removes all doubt that the common measures are permitted, plus a catch-all clause to permit other measures that save utilities and/or operating costs. The Model Legislation is designed to apply to all "governmental units" in a state – state agencies, state universities and colleges, community colleges, local governments and school districts. The language in this section will have to be customized to include the unique names of some governmental units in some states (e.g., in Louisiana, a local government is a "police jury"). The draft uses the term "qualified energy service provider" throughout.

Section 2. Authorization.
Each governmental unit shall implement cost-effective conservation improvements and maintain efficient operation of its facilities in order to minimize energy consumption and related environmental impacts and reduce operating costs. Each governmental unit shall undertake an energy audit and implement cost-effective conservation measures pursuant to the time schedules and requirements set forth in [xxx]. Energy performance contracting shall be the preferred method for completing energy audits and implementing cost-effective conservation measures.

Any governmental unit may enter into an energy performance contract with a qualified or qualified energy services provider to produce utility savings or operating and maintenance cost savings. 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 that are being implemented to achieve energy and operations and maintenance cost-savings are a significant portion [majority of the value?] of an overall project. A governmental unit may enter into an energy savings performance contract for a period of more than one year only if the governmental unit finds that the amount the governmental unit would spend on the energy or water conservation measures will not exceed the amount to be saved in energy, water, wastewater, and operating costs over 20 years from the date of installation.

NOTES. Section 2: Authorization
Section 2 adopts the language used in some states that mandates all governmental units to perform energy audits and implement cost-effective measures by a date certain, with a direction to governmental units that EPC is the preferred method for financing compliance with the mandate. It also authorizes any governmental unit to enter into an Energy Performance Contract (EPC), and specifically permits the addition of capital improvements that are not energy-related, so long as energy-related measures are a majority portion of the measures in the project. The addition of capital improvements is suggested because it is a feature that is popular with customers and seems to increase the use of EPCs.

Section 3. Lead Agency
The state Energy Office [or its functional equivalent] as defined by 42 U.S.C. § 6325(g)(1)(A) is hereby designated to be the lead agency for the development and promotion of a program of performance contracts in governmental units. The Energy Office will coordinate its activities with the (insert name of state landlord agency). The Energy Office, under the direction of the Governor, will have the following duties with respect to this program: assistance to the (inset name of appropriate state procurement agency) to assemble a list of qualified energy service providers and to negotiate with such qualified energy service providers master service contracts and pricing schedules; development of a standardized energy performance contract process and standard energy performance contract documents, including request for qualifications (RFQ), request for proposals (RFP), investment grade audit contract, energy services agreement, including the form of the project savings guarantee, and project financing agreement; and, promotion of the energy performance contract program to all governmental units.

The Energy Office shall establish guidelines and an approval process for awarding energy performance contracts. The guidelines adopted under this subsection must require that the cost savings projected by qualified provider be reviewed by a licensed professional engineer who has a minimum of three years of experience in energy calculation and review, is not an officer or employee of a qualified provider for the contract under review, and is not otherwise

associated with the contract. In conducting the review, the engineer shall focus primarily on the proposed improvements from an engineering perspective, the methodology and calculations related to cost savings, increases in revenue, and, if applicable, efficiency or accuracy of metering equipment. An engineer who reviews a contract shall maintain the confidentiality of any proprietary information the engineer acquires while reviewing the contract.

The Governor is encouraged to develop and submit to the legislature a regular or supplemental budget request for the additional funds and staffing required by the Energy Office to fulfill these duties.

The state Energy Office shall assist governmental units in identifying, evaluating, and implementing cost-effective conservation projects at their facilities. The assistance shall include notifying governmental units of their responsibilities under this chapter; apprising governmental units of opportunities to develop and finance energy performance contracting projects; providing technical and analytical support, including procurement energy performance contracting services; reviewing verification procedures for energy savings; and, assisting in the structuring and arranging of financing for energy performance contracting projects.

The Energy Office is authorized to fix, charge and collect reasonable fees, not to exceed two percent of the total cost of the energy performance contract project, for any administrative support and resources or other services provided by the Energy Office, or its designee, under this subsection from the governmental units that use its technical support services. Governmental units are authorized to add the costs of these fees to the total cost of the energy performance contract.

NOTES. Section 3: Lead Agency

Section 3 designates the state Energy Office, or its functional equivalent, to be the lead agency in the state EPC program. The responsibilities of the Energy Office are delineated, and generally include the promotion of the program to all governmental units, the development of standard project process and documents and the provision of technical services to assist governmental units in the development and implementation of EPC projects. The legislation says that the Energy Office must coordinate its activities with the state landlord agency (DGS, Department of Administration, etc.). The legislation also authorizes the Governor to prepare a regular or supplemental budget request for the appropriations and staffing required to operate the EPC program, and authorizes the Energy Office to charge a reasonable fee (defined a not to exceed 2% of project cost) to governmental agencies for the use of the technical services provided by the Energy Office. Studies by NAESO and Lawrence Berkeley National Laboratory (LBNL) document the fact that one of the critical success factors for the best state EPC programs is a lead or "champion" agency for the EPC program. NAESCO suggests the state Energy Office as the logical lead agency, but recognizes that the agency must have the cooperation of the state landlord agency to be successful in its mission. The legislation also recognizes that if the

Energy Office is to be an effective EPC program champion, it must have sufficient staff and budget resources, raised though legislative appropriations and modest project fees. Today, many state Energy Offices have been designated the lead agency for the EPC program, but they simply do not have the staff or budget resources to promote the program and provide technical services.

Section 4. Selection of Qualified Energy Services Provider.
The state process of implementing energy performance contracts for governmental units shall include the following two steps:

A. Request for Qualifications. The (insert name of appropriate state procurement agency) is authorized to assemble a list of qualified energy service providers , as per the provisions of (insert reference to state statute that permits the formulation of a list of qualified bidders). The (appropriate state procurement agency) 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; 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.

B. Request for Proposals. Before entering into a performance contract under this section, a governmental unit shall issue a request for proposals from up to three qualified energy service 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 provided. 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 provider to engage in final contract negotiations. Factors to be included in selecting among the selected energy service providers include contract terms, comprehensiveness of the proposal, comprehensiveness of cost-savings measures, experience, quality of technical approach and overall benefits to the governmental unit.

NOTES. Section 4: Selection of Qualified Energy Services Provider
This section prescribes a two-step process for a governmental unit to select a qualified energy services provider (provider) to develop and implement a project. The first step is the assembly of a list of qualified providers by the designated state procurement agency. This

agency will vary by state, but will ideally be the state landlord agency. The draft legislation leaves placeholders for the references to the appropriate state agency and to the section of the state statutes that authorizes the assembly of a list of qualified providers or bidders. The second step is an RFP competition between up to three providers, with a feasibility study as the document required in the RFP response. NAESCO recommends this two-step selection process because it provides the best combination of assurance to the governmental units that they will get a qualified provider for each EPC project and a manageable, competitive process for the final selection of the project ESCO. The first step, the RFQ, allows a team of experts from the state Energy Office, state procurement agency and outside consultants (if required) to review the qualifications of each interested provider one time, rather than having each of the governmental units, which could be in the hundreds in some states and likely have no expertise in the field, try to review provider qualifications individually. The second step, the project RFP, allows a governmental unit to select from the list of qualified providers a small number of providers whose capabilities and experience seem to best fit the unit's needs. The number of providers competing for a project is small enough (maximum of three) that the governmental unit can get a good sense of each provider. The use of a Feasibility Study as the primary submittal in the RFP competition limits the risk to each ESCO, while allowing the governmental unit to get a clear sense of the project approach, the project team and the project economics that each provider offers.

Section 5. Investment Grade Audit and Contract Execution.

One qualified energy service provider selected as a result of the process set forth in Section 4, subsection (B) shall prepare an investment grade energy audit, which, upon acceptance, shall be part of the final energy performance contract or energy services agreement which shall be executed with the governmental unit. Such investment grade energy audit shall include estimates of the amounts by which utility cost savings and operation and maintenance cost savings would increase and estimates of all costs of such utility cost-savings measures or energy-savings measures, including, but not limited to, itemized costs of design, engineering, equipment, materials, installation, maintenance, repairs, and debt service. Notwithstanding the foregoing, if after preparation of the investment grade energy audit the governmental unit decides not to execute an energy services agreement, and the costs and benefits described in the energy audit are not materially different from those described in the feasibility study submitted in response to the request for proposals, then the costs incurred in preparing such investment grade energy audit shall be paid to the qualified energy service provider by the governmental unit. Otherwise the costs of the investment grade energy audit shall be deemed part of the costs of the energy performance contract or energy services agreement.

NOTES. Section 5: Investment Grade Audit and Contract Execution

Section 5 specifies that the selected provider for a project will provide an investment grade energy audit (IGA) to the governmental unit, and that the IGA will become part of the final energy performance contract or energy services agreement, interchangeable

terms). If, after the delivery of an acceptable IGA, the customer decides not to proceed with the project, and the costs and benefits of the IGA do not materially differ from the costs and benefits of the Feasibility Study that the provider submitted in response to the RFP, then the provider will be entitled to the reimbursement of its costs in preparing the IGA.

Section 6. Installment Payment and Lease-Purchase Agreements.
A governmental unit may use designated funds, bonds, or master lease for any energy performance contract including purchases using installment payment contracts or lease purchase agreements, so long as that use is consistent with the purpose of the appropriation.

A guaranteed energy performance savings contract may provide for financing, including tax exempt financing, by a third party. The contract for third party financing may be separate from the energy performance contract. A separate contract for third party financing must include a provision that the third party financier must not be granted rights or privileges that exceed the rights and privileges available to the guaranteed energy performance savings contractor.

NOTES. Section 6: Installment Payment and Lease-Purchase Agreements
This section attempts to allow EPC projects to be financed with any of the financing vehicles in common use, and explicitly allows for third party financing. The section also links the rights of financiers to the rights of the ESCO and specifies that the finance vehicles are not debt. This assumes that the savings produced by the EPC are fully guaranteed by the ESCO. The model offers general language in what may be a complex area of state law. Some legislatures have been sensitive to the amount of the total commitments in the EPC contracts, and have tried to limit the total amount of outstanding obligations, either by statute (North Carolina) or by the policies of the state treasurer.

Section 7. 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 energy performance contracts is implementation of cost-savings measures and energy and operational cost-savings.

NOTES. Section 7: Payment Schedule and Savings
No notes required.

Section 8. Term of Contracts.
An energy performance contract, and payments provided thereunder, may extend beyond the fiscal year in which the energy performance contract became effective, subject to appropriation of moneys, if required by law, for costs incurred in future fiscal years. The energy 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. Energy performance contracts may provide for payments over a period of time not to exceed deadlines specified in the energy performance contract from the date of the final installation of the cost-saving measures.

NOTES. Section 8: Terms of Contracts
This section allows for contract terms of up to 25 years, and says that the contract term may be related to the useful life of the measures. Some states limit the term of the contract to the lesser of a specified number of years or the useful life of the measures.

Section 9. 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.

NOTES. Section 9: Allocation of Obligations
No notes required.

Section 10. Use of Moneys/Reconciliation
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.

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.

The energy performance contract may provide that reconciliation of the amounts owed under an energy performance contract shall occur in a period beyond one year with final reconciliation occurring within the term of the performance contract.

The energy performance contract shall require the qualified provider to provide to the governmental unit an annual reconciliation of the guaranteed energy cost savings. If the reconciliation reveals a shortfall in annual energy cost savings, the qualified provider is liable for such shortfall. If the reconciliation reveals an excess in annual energy cost savings, the excess savings may [may not] be used to cover potential energy cost savings shortages in subsequent contract years.

NOTES. Section 10: Use of Moneys/Reconciliation
This section allows the governmental unit to retain the savings produced by the EPC, rather than returning the savings to the state or local government treasury. This provision seems to

motivate governmental units to implement EPC projects. The section also allows the governmental unit to apply either capital or operating funds to the repayment of the financing of the EPC. Some states currently restrict the use of either capital or operating funds; the restrictions limit the ability of the governmental unit to implement an EPC project. Finally, the section requires the ESCO to provide an annual reconciliation of the savings of the EPC project, and makes the ESCO liable for savings shortfalls. This provision does not add to the liabilities that are common in contracts between ESCOs and customers, but provides legislators some reassurance that the ESCOs will stand behind the savings.

Section 11. Monitoring and Reports.
During the term of each energy 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.

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:

Subsequent material change to the baseline energy consumption identified at the beginning of the performance contract.

Changes in utility rates.

Changes in the number of days in the utility billing cycle.

Changes in the total square footage of the building.

Changes in the operational schedule of the facility.

Changes in facility temperature.

Material change in the weather.

Material changes in the amount of equipment or lighting used at the facility.

Any other change which reasonably would be expected to modify energy use or energy costs.

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 and shall file with the state Energy Office a copy of all reconciliation reports delivered pursuant to this subsection. 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.

NOTES. Section 11: Monitoring and Reports
This section specifies that the ESCO will produce an M&V report for each project at least annually, and lists certain factors that might be used in the calculation of the M&V reports. It is a judgment question as to whether we want a laundry list here or a more general statement outlining the factors that will be used in the M&V reports. The section also mandates that all governmental units provide project details and copies of the M&V reports to the Energy Office. It does not currently mandate how the Energy Office will process, store or provide public access to this information. We may want to make some suggestions here, but that may be too detailed for legislation.

Section 12. Contingency Provisions.
Performance contracts shall include contingency provisions in the event that actual savings do not meet predicted savings.

NOTES. Section 12: Contingency Provisions
No notes required.

Section 13. 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 14. 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.

NOTES. Section 14: Repeal of Prior Conflicting Statutes
No notes required.