

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 271

Contracting for Efficiency or Conservation Measures by State

Agencies

SPONSOR(S): Government Efficiency & Accountability Council, McKeel and others

TIED BILLS: **IDEN./SIM. BILLS:** SB 1164

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) <u>Committee on Audit & Performance</u>	<u>6 Y, 0 N</u>	<u>Strickland</u>	<u>De La Paz</u>
2) <u>Government Efficiency & Accountability Council</u>	<u>13 Y, 0 N, As CS</u>	<u>Strickland</u>	<u>Cooper</u>
3) <u>Policy & Budget Council</u>	<u></u>	<u></u>	<u></u>
4) <u></u>	<u></u>	<u></u>	<u></u>
5) <u></u>	<u></u>	<u></u>	<u></u>

SUMMARY ANALYSIS

CS/HB 271 amends the Guaranteed Energy Performance Savings Contracting Act by expanding the authority of state agencies, municipalities, or political subdivisions to contract for water and wastewater efficiency and conservation measures. The Guaranteed Energy Performance Savings Contracting Act currently permits agencies to enter into a guaranteed energy performance savings contracts merely based upon energy savings, under specified circumstances. Specifically, the bill makes the following changes to current statutory law:

- Adds conservation and efficiency measures for both water and wastewater to the Guaranteed Energy Performance Savings Contracting Act.
- Adds water and wastewater efficiency and conservation measures to the types of guaranteed performance savings contracts that may be entered into by agencies.
- Expands the express list of conservation measures that may be contemplated.
- Adds water and wastewater efficiency and conservation measures to the law relating to consolidated financing of deferred-payment purchases, to conform to the changes in the bill.
- Removes the requirement that a business organization serving as a qualified contractor for a Guaranteed Energy Performance Savings contract, pursuant to s. 489.145, F.S., or an Energy Performance-Based Contract, pursuant to s. 1013.23, F.S., be certified to practice or offer to practice engineering.
- Provides that a design-build contract may include either a single individual or a business organization and does not necessarily have to be a licensed engineer.

The bill may have a positive fiscal impact on state and local governments.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

This bill does not appear to implicate any of the House Principles.

B. EFFECT OF PROPOSED CHANGES:

Present Situation

Guaranteed Energy Performance Savings Contracting Act

In 1994, the Legislature enacted the Guaranteed Energy Savings Program,¹ later amended to become the Guaranteed Energy Performance Savings Contracting Act.² The program permits agencies, defined as “the state, a municipality, or a political subdivision,”³ to enter into a guaranteed energy performance savings contract, under specified circumstances.⁴

The purpose of a guaranteed energy savings contract is to allow a properly-licensed contractor to create or install energy conservation measures that will reduce the energy or operating costs of an agency facility. The Guaranteed Energy Performance Savings Contracting Act contains a number of contract requirements to ensure that the measures will result in a savings to the agency over time, and to ensure that the contractor is financially liable for any failure to achieve such savings.

An “energy conservation measure” is a training program, facility alteration, or equipment purchase to be used in new construction, including an addition to an existing facility, which reduces energy or operating costs.⁵ Examples of such measures include insulation, storm windows and doors, automatic energy control systems, and cogeneration systems.

Current law requires that, before the installation of conservation measures, agencies obtain from a qualified provider a report that summarizes the costs of the conservation measures and provides the amount of cost savings.⁶ The qualified provider must be selected in compliance with s. 287.055, F.S., which provides for competitive bidding requirements for state agencies wanting to procure professional architectural, engineering, or surveying and mapping services.

A guaranteed energy performance contract must contain the following provisions:

- A written energy guarantee by the qualified provider that the energy or operating cost savings will meet or exceed the cost of energy conservation measures.
- A provision that all payments may be made over time, but may not exceed 20 years from the date of installation and acceptance by the agency.
- A requirement that the qualified provider provide a 100 percent project value bond to the state for its faithful performance, as required by s. 255.05, F.S.
- Provisions for an allocation of any excess savings among the parties.
- The qualified provider must provide an annual reconciliation of the cost savings and if there is a shortfall, the provider must be liable.
- A statement that the contract does not constitute a debt, liability, or obligation of the state.

¹ Ch. 94-112, L.O.F., codified at s. 489.145, F.S.

² Ch. 2001-81, L.O.F.

³ Section 489.145(3)(a), F.S.

⁴ See Section 489.145(4), F.S.

⁵ Section 489.145(3)(b), F.S.

⁶ Section 489.145(4), F.S.

The Department of Management Services and The Office of the Chief Financial Officer have developed model contracts and related documents for use by state agencies and require the agencies to submit them to the Office of the Chief Financial Officer for its approval under the authority granted under s.489.145, F.S. These model documents are the audit agreement between the agency and the qualified provider, the financing agreement, and the performance contract.⁷

Energy Performance-Based Contract for Educational Facilities

Under s. 1013.23, F.S., a district school board, community college board of trustees, or state university board of trustees may enter into an energy performance-based contract with an energy performance contractor to significantly reduce energy or operating costs of an educational facility through one or more energy conservation measures, similar to that of a Guaranteed Energy Performance Savings Contract. Unlike the Guaranteed Energy Performance Savings Contract the required report must be reviewed by either the Department of Education or Department of Management Services, or signed and sealed by a registered professional engineer, rather than the Office of the Chief Financial Officer.

This section authorizes any person or business licensed under the engineering, architectural or contracting statutes to enter into guaranteed energy performance-based contracts as “energy performance contractors.”

Design-Build Projects

A design-build contract is defined as a single contract with a design-build firm for the design and construction of a public construction project. A design-build firm is not required to be a firm certified to practice engineering. Specifically, a design-build firm is defined as a partnership, corporation, or other legal entity that:

- Is certified under s. 489.119, F.S. to engage in contracting through a certified or registered general contractor or a certified or registered building contractor as the qualifying agent; or
- Is certified under s. 471.023, F.S., to practice or to offer to practice engineering; certified under s. 481.219, F.S. to practice or to offer to practice architecture; or certified under s. 481.319, F.S. to practice or to offer to practice landscape architecture.⁸

Under s. 471.003, F.S., any general contractor possessing a certificate of authority under chapter 489, when negotiating or performing services under a design-build contract does not need to be a licensed engineer so long as the engineering services offered or rendered in connection with the contract are offered and rendered by a licensed engineer.

Water and Wastewater Conservation and Efficiency

The Florida Department of Environmental Protection (DEP), each of the state’s water management districts, and the federal Environmental Protection Agency (EPA) has each established programs for the efficient use of and conservation of water and wastewater. According to the EPA, water efficiency continues to play an important role not only in protecting water sources and improving water quality, but also in reducing the amount of energy used to treat, pump and heat water – which currently accounts for approximately eight percent of U.S. energy demand.⁹ Further, the EPA reports that water use can have major environmental, public health, and economic benefits by helping to improve water quality, maintain aquatic ecosystems, and protecting drinking water sources.¹⁰ According to the EPA, the efficient use of water, through behavioral, operational, or equipment changes, if practiced broadly, can help mitigate the effects of drought.¹¹

⁷ Interview of Clint Sibille of Department of Management Services, February 23, 2007

⁸ Section 287.055, F.S.

⁹ EPA Promotes Water Efficiency in the Home (http://www.epa.gov/water/water_efficiency.html)

¹⁰ Frequently Asked Questions About Wastewater Management (<http://www.epa.gov/owm/faqall.htm>)

¹¹ Using Water Efficiently: Ideas for Communities (<http://www.epa.gov/watersense/pubs/comm.htm>)

According to the DEP, protecting the amount and quality of our water resources and implementing efficient wastewater management practices is critical to maintaining sufficient and potable water for domestic, industrial, agricultural, and governmental use. Improperly disposing of wastewater can damage drinking water supply, wildlife, and other important environmental resources.¹²

Effect of Proposed Changes

The bill specifically provides that, for the purposes of the exemption from the engineering licensing requirements under s. 471.023, F.S., a design-build contract may either involve a single individual or business organization for the design and construction of a project, including, but not limited to, construction, rehabilitation, and renovation activities.

The bill provides that a design-build firm is not required to obtain a certification of authorization in order to negotiate, enter into, or perform a public or private design-build contract.

The bill expands the scope of the Guaranteed Energy Performance Savings Contracting Act beyond energy conservation to include water and wastewater conservation and efficiency.

The bill adds the following measures to the list of measures within the current definition of an “energy conservation measure:”

- Equipment upgrades that improve the accuracy of billable revenue generating systems.
- Automated electronic or remotely controlled systems or measures that reduce direct personnel costs.
- Such other energy, water, or wastewater efficiency or conservation measures as may provide measurable, long-term operating cost reductions or billable revenue increases.
- Cool roof coating.¹³

The bill provides that the report that is currently required to be submitted to the agency from the performance savings contractor prior to the design and installation of conservation measures must include a summary of the costs associated with “operational improvements” if such improvements are the basis for the proposed cost savings. The bill further provides that the report need not be prepared and submitted by a business organization certified to practice or offer to practice engineering under s.471.023, F.S.

The bill removes the word “energy” from the section heading of s. 489.145, F.S., and changes the short title to the “Guaranteed Performance Savings Contracting Act,” in order to better reflect the additional scope of the act. Similar conforming changes are made throughout the bill. “Water and wastewater” are added to “energy” as the objects of the contracting process, and “efficiency” is added to “conservation” for the types of measures contemplated.

The bill revises definitions to include the qualifying activity and tasks of “retrofitting or adding to existing facilities or infrastructure,” which was previously identified to include only “new construction” or “additions” to existing facilities. This would extend the range of impact of s. 489.145, F.S., from only new construction or additions, to all existing facilities owned by the state.

The bill amends s. 287.064, F.S. (addressing the consolidated financing of deferred payment purchases) to conform with the changes proposed by this bill by adding “water and wastewater efficiency” to the section within a reference to s. 489.145, F.S. Currently, s. 287.064, F.S., includes the

¹² Domestic Wastewater (<http://www.dep.state.fl.us/water/wastewater/dom/index.htm>)

¹³ According to the EPA a "cool roof" is a roofing material that has high solar reflectance, typically resulting in a release of a large percentage of absorbed heat. This keeps the material cooler and helps to reduce the heat island effect. Heat Island Effect (<http://www.epa.gov/heatisland/strategies/index.html>)

cost of energy conservation measures, and not that of water or wastewater efficiency, as a cost that may be financed pursuant to a master equipment financing agreement.

The bill provides that submittal of the required report setting forth the calculated savings, the design, and installation of the savings measures pursuant to an energy performance-based contract under s. 1013.23, F.S., does not subject the contractor to the engineering certification requirements for business organizations found in s. 471.023, F.S.

C. SECTION DIRECTORY:

Section 1. Amends s. 471.003, F.S., relating to the exemption from qualifications for practice within the field of engineering.

Section 2. Amends s. 471.023, F.S., relating to the certification of business organizations within the field of engineering.

Section 3. Amends s. 489.145, F.S., relating to guaranteed energy performance savings contracting.

Section 4. Amends s. 1013.23, F.S., relating to energy efficiency contracting.

Section 5. Amends s. 287.064, F.S., relating to consolidated financing of deferred payment purchases.

Section 6. Provides an effective date of July 1, 2007.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill does not create, modify, amend, or eliminate a state revenue source.

2. Expenditures:

See fiscal comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not create, modify, amend, or eliminate a local revenue source.

2. Expenditures:

See fiscal comments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Companies that provide energy, water, or wastewater conservation consulting or equipment may have increased business opportunities.

D. FISCAL COMMENTS:

The bill provides an opportunity for agencies to reduce energy, water, and wastewater costs by increasing conservation and efficiency. If the contractor's initial analysis is favorable and conservation measures are installed, the resulting savings are guaranteed by the contractor, pursuant to statute. The bill should have the effect of creating an incentive for agencies to procure guaranteed performance savings contracts and for contractors to maximize the potential savings.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds. The bill does not reduce the percentage of a state tax shared with counties or municipalities. The bill does not reduce the authority that municipalities have to raise revenue.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

A concern has been raised relating to the numerous deletions of the word "energy" in s. 489.145, F.S., making the statute's title a nonspecific reference as to the type of contract the statute addresses.

The Department of Management Services (DMS) has voiced concern that the proposed changes in HB 271 would cause their Purchasing Program to amend, bid, or re-bid existing contracts to secure the services of guaranteed performance savings contractors for the additional water or wastewater efficiency and conservation services. A re-procurement process may affect agencies if there is disruption to services that are currently offered under existing contracts.

In response to the concerns raised above by DMS, absent an express provision stating that the law would be applied retroactively, the law would be applied prospectively.

D. STATEMENT OF THE SPONSOR

This bill expands an already existing energy efficiency program to include water and wastewater. The existing Guaranteed Energy Performance Savings Contracting Act has been extremely successful in improving the efficiency of state, local and other governmental buildings. Rather than taxpayer dollars, retrofit and other conservation and efficiency measures are financed by a private sector contractor who performs the work, assumes all of the risk and who is compensated with a maximum twenty year payout only when actual efficiency savings result from the project.

IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES

On March 14, 2007, the Government Efficiency & Accountability Council adopted four amendments. The amendments made changes to the original filed bill as outlined below:

- provided that a design-build contract may include either a single individual or a business organization as it relates to an exemption from engineer licensing requirement;
- provided that a design-build firm is not required to obtain a certification of authorization in order to negotiate, enter into or perform a public or private design-build contract;
- provided that submittal of the required report setting forth the calculated savings, the design, and installation of the savings measures of the guaranteed energy performance savings contract pursuant to s. 489.145, F.S., does not subject the contractor to the certification requirements for business organizations found in s. 471.023, F.S.; and
- provided that submittal of the required report setting forth the calculated savings, the design, and installation of the savings measures pursuant to an energy performance-based contract under s. 1013.23, F.S., does not subject the contractor to the engineering certification requirements for business organizations found in s. 471.023, F.S.