

PUBLIC LAW 102-486
OCT. 24, 1992

ENERGY POLICY ACT OF 1992

SEC.155. ENERGY SAVINGS PERFORMANCE CONTRACTS

(a) In General—Section 801 of the National Energy Conservation Policy Act (42 U.S.C. 8287) is amended—

(1) by striking “The Head” and inserting at the end the following:

“(a) In General—(1) The head”; and

(2) by inserting at the end the following:

“(2) (A) Contracts under this title shall be energy savings performance contracts and shall require an annual energy audit and specify the terms and conditions of any Government payments and performance guarantees. Any such performance guarantee shall provide that the contractor is responsible for maintenance and repair services for any energy related equipment, including computer software systems.

“(B) Aggregate annual payments by an agency to both utilities and 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 (as estimated through the procedures developed pursuant to this section) during contract years. The contract shall provide for a guarantee of savings to the agency, and shall establish payment schedules reflecting such guarantee, taking into account any capital costs under the contract.

“(C) Federal agencies may incur obligations pursuant to such contracts to finance energy conservation measures provided guaranteed savings exceed the debt service requirements.

“(D) A Federal agency may enter into a multiyear contract under this title for a period not to exceed 25 years, without funding of cancellation charges before cancellation, if—

“(i) such contract was awarded in a competitive manner pursuant to subsection (b) (2), using procedures and methods established under this title;

“(ii) funds are available and adequate for payment of the costs of such contract for the first fiscal year;

“(iii) 30 days before the award of any such contract that contains a clause setting forth a cancellation ceiling in excess of \$750,000, the head of such agency gives written notification of such proposed contract and of the proposed cancellation ceiling for such contract to the appropriate authorizing and appropriating committees of the Congress; and appropriate authorizing and appropriating committees of the Congress; and

“(iv) such contract is governed by part 17.1 of the Federal Acquisition Regulation promulgated under section 25 of the Office of Federal Procurement Policy Act (41 U.S.C. 421) or the applicable rules promulgated under this title.

“(b) Implementation—(1) (A) The Secretary, with the concurrence of the Federal Acquisition Regulatory Council established under section 25(a) of the Office of Federal Procurement Policy Act, not later than 180 days after the date of the enactment of the Energy Policy Act of 1992, shall, by rule, establish appropriate procedures and methods for use by Federal agencies to select, monitor, and terminate contracts

with energy service contractors in accordance with laws governing Federal procurement that will achieve the intent of this section in a cost-effective manner. In developing such procedures and methods, the Secretary, with the concurrence of the Federal Acquisition Regulatory Council, shall determine which existing regulations are inconsistent with the intent of this section and shall formulate substitute regulations consistent with laws governing Federal procurement.

“(B) The procedures and methods established pursuant to subparagraph (A) shall be the procedures and contracting methods for selection, by an agency, of a contractor to provide energy savings performance services. Such procedures and methods shall provide for the calculation of energy savings based on sound engineering and financial practices.

“(2) The procedures and methods established pursuant to paragraph (1)(A) shall –

“(A) allow the Secretary to—

“(i) request statements of qualifications, which shall, at a minimum, include prior experience and capabilities of contractors to perform the proposed types of energy savings services and financial and performance information, from firms engaged in providing energy savings services; and

“(ii) form the statements received, designate and prepare a list, with an update at least annually, of those firms that are qualified to provide energy savings services;

“(B) require each agency to use the list prepared by the Secretary pursuant to subparagraph (A) (ii) unless the agency elects to develop and agency list of firms qualified to provide energy savings performance services using the same selection procedures and methods as are required of the Secretary in preparing such lists; and

“(C) allow the head of each agency to—

“(i) select firms from the list prepared pursuant to subparagraph (A) (ii) or the list prepared by the agency pursuant to subparagraph (B) to conduct discussions concerning a particular proposed energy savings project, including requesting a technical and price proposal from such selected firms for such project;

“(ii) select from such firms the most qualified firm to provide energy savings services based on technical and price proposals and any other relevant information;

“(iii) permit receipt of unsolicited proposals for energy savings performance contracting services from a firm that such agency has determined is qualified to provide such services under the procedures pursuant to paragraph (1) (A), and require agency facility managers to place a notice in the Commerce Business Daily announcing they have received such a proposal and invite other similarly qualified firms to submit competing proposals; and

“(iv) enter into an energy savings performance contract with a firm qualified under clause (iii), consistent with the procedures and methods established pursuant to paragraph (1) (A).

“(3) A firm not designated as qualified to provide energy savings services under paragraph (2) (A) (i) or paragraph (2) (B) may request a review of such decision to be conducted in accordance with procedures to be developed by the board of contract appeals of the General Services Administration. Procedures developed by the board of contract appeals under the paragraph shall be substantially equivalent to procedures established under section 111(f) of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 759 (f)).

“(c) Sunset and Reporting Requirements. – (1) The authority to enter into new contracts under this section shall cease to be effective five years after the date procedures and methods are established under subsection (b).

“(2) Beginning one year after the date procedures and methods are established under subsection (b), and annually thereafter, for a period of five years after such date, the Comptroller General of the United States shall report on the implementation of this section. Such reports shall include, but not be limited to, an assessment of the following issues:

“(A) The quality of the energy audits conducted for the agencies.

“(B) The Government’s ability to maximize energy savings.

“(C) The total energy cost savings accrued by the agencies that have entered into such contracts.

“(D) The total costs associated with entering into and performing such contracts.

“(E) A comparison of the total costs incurred by agencies under such contracts and the total costs incurred under similar contracts performed in the private sector.

“(F) The number of firms selected as qualified firms under this section and their respective shares of awarded contracts.

“(G) The number of firms engaged in similar activity in the private sector and their respective market shares.

“(H) The number of applicant firms not selected as qualified firms under this section and the reason for their nonselection.

“(I) The frequency with which agencies have utilized the services of Government labs to perform any functions specified in this section.

“(J) With the respect to the final report submitted pursuant to this paragraph, an assessment of whether the contracting procedures developed pursuant to this section and utilized by agencies have been effective and whether continued use of such procedures, as opposed to the procedures provided by existing public contract law, is necessary for implementation of successful energy savings performance contracts.”

(b) Definition—Section 804 of such Act (42 U.S.C. 8287c) is amended—

(1) in the material preceding paragraph 91), by striking “title—“ and inserting “title, the following definitions apply:”;

(2) in paragraph (1), by striking “the” and inserting “The” and by striking “, and “ and inserting a period;

(3) in paragraph (2), by striking “the term: and inserting “The term”; and

(4) by adding at the end the following:

“(3) The terms ‘energy savings contract’ and ‘energy savings performance contract’ mean a contract which provides for the performance of services for the design, acquisition, installation, testing, operation, and, where appropriate, maintenance and repair, of an identified energy savings conservation measure or series of measures at one or more locations. Such contracts—

“(A) may provide for appropriate software licensing agreements and

“(B) shall, with respect to an agency facility that is a public building as such term is defined in section 13(1) of the Public Buildings Act of 1959 (40 U.S.C. 612(1)), be in compliance with the prospectus requirements and procedures of section 7 of the Public Buildings Act of 1959 (40 U.S.C. 606).

“(4) The term ‘energy conservation measures’ has the meaning given such term in section 551(4).”

(c) Technical and Conforming Amendments—(1) The title heading for title VIII of such Act is amended to read as follows:

“TITLE VIII—ENERGY SAVINGS PERFORMANCE CONTRACTS”

(2) The table of contents of such Act is amended by striking the item relating to title VIII and inserting the following: “energy savings performance contracts”.