



SPONSOR: Sen. McDowell;
Sens. Blevins, Cloutier, Copeland, Henry, Marshall,
Peterson; Reps. B. Ennis, D. Ennis, George, Keeley,
Lavelle, Mulrooney, Roy, Van Sant, Viola

DELAWARE STATE SENATE
142nd GENERAL ASSEMBLY
SENATE SUBSTITUTE NO. 1

FOR

SENATE BILL NO. 322

AN ACT TO AMEND TITLE 29 OF THE DELAWARE CODE RELATING TO THE ENERGY PERFORMANCE CONTRACTING ACT.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE:

1 Section 1. Amend Chapter 69, Title 29 of the Delaware Code, by redesignating Subchapter V thereof as “Subchapter VI”.

2 Section 2. Amend Chapter 69, Title 29 of the Delaware Code, by inserting therein a new Subchapter V as follows:

3 “Subchapter V. The Energy Performance Contracting Act.

4 § 6970. Short title; Declaration of Policy.

5 (a) This subchapter shall be known and may be cited as the Energy Performance Contracting Act.

6 (b) The General Assembly finds that investment in energy conservation measures in agency facilities can
7 reduce the amount of energy consumed and produce immediate and long-term savings. It is the policy of
8 this State to encourage agencies to invest in energy conservation measures that reduce energy
9 consumption, produce a cost savings for the agency, and improve the quality of indoor air in public
10 facilities and to operate, maintain, and when economically feasible, build or renovate existing agency
11 facilities in such a manner as to minimize energy consumption and maximize energy savings. It is
12 further the policy of this state to encourage agencies to reinvest any energy savings resulting from
13 energy conservation measures in additional energy conservation efforts.

14 § 6971. Definitions.

15 As used in this subchapter:

16 (1) “Agency” means any state agency, authority, or any political subdivision of state or local
17 government, including, but not limited to, county, city, township, village or municipal government,

18 local school districts, and institutions of higher education, any state-supported institution, or a joint
19 action agency composed of political subdivisions.

20 (2) “Energy conservation measure” means a training program, facility alteration, facility improvement,
21 or equipment purchase to be added or used in any facility that is designed to reduce energy or
22 operating costs and includes, but is not limited to:

- 23 a. Insulation of the facility structure and systems within the facility;
- 24 b. Storm windows and doors, caulking and weather-stripping, multi-glazed windows and doors,
25 heat-absorbing, or heat-reflective, glazed and coated window and door systems, additional
26 glazing, reductions in glass area, and other window and door system modifications that reduce
27 energy consumption;
- 28 c. Automatic energy control systems;
- 29 d. Heating, ventilating, or air-conditioning system modifications or replacements;
- 30 e. Replacement or modifications of lighting fixtures to increase the energy efficiency of the lighting
31 system;
- 32 f. Day-lighting systems;
- 33 g. Energy recovery systems;
- 34 h. Cogeneration systems that produce steam or forms of energy such as heat, as well as electricity,
35 for use primarily within a facility or complex of facilities;
- 36 i. Renewable energy systems, such as solar, biomass or wind systems;
- 37 j. Devices that reduce water consumption or sewer charges;
- 38 k. Storage systems, such as fuel cells and thermal storage;
- 39 l. Generating technologies, such as micro turbines; and
- 40 m. Any other repair, replacement or upgrade of existing equipment that produces energy and
41 operational cost savings, improves safety, significantly reduces energy consumption or increases
42 the operating efficiency of the facilities and which must conform to the applicable state or local
43 building code.

44 (3) “Energy and operational cost savings” means a measured reduction in the cost of fuel, energy
45 consumption, and stipulated operation and maintenance created from the implementation of one or

46 more energy conservation measures when compared with an established baseline for the previous
47 cost of fuel, energy consumption, and stipulated operation and maintenance.

48 (4) “Guaranteed energy performance contract” means a contract between the agency and a qualified
49 provider for the evaluation, recommendation, and implementation of energy conservation measures,
50 which, at minimum, shall include:

- 51 a. The design and installation of equipment to implement one or more of such measures and, if
52 applicable, operation and maintenance of such measures;
- 53 b. That the amount of guaranteed actual savings must meet or exceed the total annual contract
54 payments made by the contracting agency for the guaranteed performance contract and that the
55 contracting agency shall not be required to pay the qualified provider more than the savings that
56 accrue during any defined period in the contract; and
- 57 c. The finance charges incurred by the agency over the life of the contract.

58 (5) “Qualified provider” means a person or business with a record of established projects that is
59 experienced in the analysis, design, implementation, or installation of energy conservation measures
60 through guaranteed energy performance contracts.

61 § 6972. Authorization

- 62 (a) An agency may enter into an energy performance contract with a qualified provider to reduce energy or
63 operational costs of an agency facility through one or more energy conservation measures. Cost savings
64 work shall comply with state or local building codes.
- 65 (b) An agency may enter into a performance contract structured as an installment payment contract or lease-
66 purchase agreement for the purchase and installation of cost-saving measures. Financing, including tax
67 exempt financing, implemented through an entity other than the qualified provider is authorized.
- 68 (c) The agency may enter into an energy performance contract with a qualified provider if the agency finds
69 that the amount the agency would spend on the energy conservation measures will not exceed the
70 amount to be saved in both energy and operational costs for up to 20 years from the date of installation.
- 71 (d) The qualified provider shall be selected through pursuant to § 6924 of this title.
- 72 (e) The selected qualified provider shall prepare a financial grade energy audit which, upon acceptance,
73 shall be part of the final performance contract which shall be executed with the agency.
74 Notwithstanding the foregoing, if after preparation of the financial grade energy audit the governmental

75 unit decides not to execute a performance contract, then the costs incurred in preparing such financial
76 grade energy audit shall be paid to the qualified provider by the agency, otherwise the costs of the
77 financial grade energy audit shall be deemed part of the costs of the performance contract.

78 (f) Simultaneous with the execution of a contract for energy conservation measures, the agency shall require
79 the qualified provider to provide a payment and performance bond relating to the installation of energy
80 conservation measures in the amount equal to 100% of the value of the performance contract.

81 (g) Where appropriate, agencies shall determine cost-effectiveness based on the life-cycle costs of
82 combinations of conservation measures, particularly to encourage bundling of energy efficiency projects
83 with onsite generation and renewable energy projects.

84 § 6973. Allocation of Obligations, Use of Moneys & Payment Schedule

85 (a) Each governmental unit shall allocate sufficient moneys for each fiscal year to make payment of any
86 amounts payable by the governmental unit under performance contracts during that fiscal year.

87 (b) The agency engaging in the performance contract shall retain the savings realized by entering into the
88 performance contract. In no event shall the agency utilize such savings to supplant otherwise
89 appropriated funds for the agency.

90 (c) A governmental unit may use funds designated for operating, energy, or capital expenditures for any
91 performance contract, including, without limitation, for purchases on an installment payment or lease
92 purchase basis.

93 (d) Grants, subsidies, or other payments from the State to an agency shall not be reduced as a result of
94 energy savings obtained as a result of a performance contract during the life of the contract.

95 (e) A performance contract, and payments provided there under, may extend beyond the fiscal year in which
96 the performance contract became effective, subject to appropriation of moneys, if required by law, for
97 costs incurred in future fiscal years. The performance contract may extend for a term not to exceed 20
98 years.

99 § 6974. Monitoring and Reporting

100 (a) During the term of each performance contract, the qualified provider shall monitor the reductions in
101 energy consumption and cost-savings attributable to the cost-savings measures installed through the
102 performance contract, and shall, no less than annually, prepare and provide a report to the governmental
103 unit documenting the performance of the cost-savings measures to the governmental unit.

104 (b) The agency and qualified provider may agree to base the measurement and verification of the
105 performance contract on the practices outlined by the International Performance Measurement and
106 Verification Protocol when appropriate.

107 § 6975. Adherence to State Procurement Laws.

108 (a) The qualified provider shall, in the execution of a performance contract, adhere to the requirements of 29
109 Del. C. § 6961 or § 6962.

110 (b) Before an agency enters into a performance contract, the performance contract shall be approved by the
111 Secretary.”

SYNOPSIS

This Substitute modifies the original Act by relocating the provisions of Senate Bill No. 322 within 29 Del. C. Chap. 69.

This Substitute also clarifies that agencies are guaranteed savings when using performance contracts, requires agencies to use state bid laws when entering into performance contracts, requires the bond to be equal to 100% of the value of the performance contract, requires the bond to be executed simultaneously with the performance contract, and requires qualified providers to adhere to the state public works contracting requirement.

Finally, this Substitute provides that performance contracts must be approved by the Secretary of the Department of Administrative Services.

Author: Senator McDowell