



The Legislative Auditor's Summary of Louisiana's Energy Efficiency Law for Local Political Subdivisions

The Louisiana Legislature has provided that local political subdivisions and state agencies may enter into performance-based energy efficiency contracts for services and equipment. The purpose behind the energy efficiency law is to allow public entities to upgrade their physical plants to a more modern and efficient condition, while at the same time ensuring that the guaranteed savings thereby achieved actually pay for the upgrades themselves. In other words, the entity must save as much money as the new upgrades cost.

These contracts are considered a contract for services and are exempt from the provisions of the Public Bid Law, [R.S. 38:2212](#), et seq. for the purposes of the equipment procured and utilized under the energy efficiency contract. However, the public entity must follow the requirements under the statutes authorizing the use of energy efficiency contracts for the exception to apply. There are separate statutes authorizing use of energy efficiency contracts by local political subdivisions and state agencies.

This Summary addresses the requirements and procedures for energy efficiency contracts by local political subdivisions

The following statutes govern the use of energy efficiency contracts by local political subdivisions:

- 1) [R.S. 33:4547.1–Authorization](#);
- 2) [R.S. 33:4547.2–Procedures](#); and
- 3) [R.S. 33:4547.3–Term; Guarantee of Energy Savings](#)

Authority to Contract for Performance-based Energy Efficiency Contracts [R.S. 33:4547.1](#)

The Legislature, through R.S. 33:4547.1, et seq., has authorized political subdivisions to enter into performance-based energy efficiency contracts for services and equipment.

A performance-based energy efficiency contract is defined as a contract for energy efficiency services and equipment in which the payment obligation for each year of the contract is:

- (a) Set as a percentage of the annual energy cost savings attributable to the services or equipment under the contract; or
- (b) Guaranteed by the person under contract to be less than the annual energy cost savings attributable to the services or equipment under the contract.

Purposes for Which Energy Efficiency Contracts May Be Used

[R.S. 33:4547.1\(B\)\(2\)](#), provides a list of various purposes for which energy efficiency contracts are meant to be used. Though not meant to be exhaustive, the list includes the most commonly undertaken upgrades:

-  Insulation and reduced air infiltration of the building structure, including walls, ceilings, and roofs or systems within the building.
-  Storm windows or doors, caulking or weather-stripping, multi-glazed windows or doors, heat absorbing or heat reflective glazed and coated window or 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, including computer software and technical data licenses.
-  Heating, ventilating, or air conditioning system modifications or replacements.



Replacement or modification of lighting fixtures to increase the energy efficiency of the lighting system without increasing the overall illumination of a facility, unless an increase in illumination is necessary to conform to the applicable state or local building code for the lighting system after the proposed modifications are made.



Energy recovery systems.



Electric system improvements.



Building operation programs that reduce operating costs.



Other energy conservation-related improvements or equipment, including improvements or equipment related to renewable energy.



Water and other natural resource conservation, including accuracy and measurement of water distribution and consumption.



An alteration or measure identified through a comprehensive audit or assessment of new or existing facilities.

Definitions

Important definitions for the terms used in the law can be found in [R.S. 33:4547.1\(B\)\(3\)](#) and [R.S. 33:4547.1\(C\) and \(D\)](#).



“Energy efficiency” means an alteration to an existing facility that is designed for the reduction of the consumption of energy or natural resources or the reduction of operating costs as a result of changes that meet the following criteria:

(i) They do not degrade the level of service or working conditions below recognized acceptable standards.

(ii) They are measurable and verifiable under the International Performance Measurement and Verification Protocol as it existed on January 1, 2006, or subsequently amended verification protocols or alternative protocols and verification standards and methodologies acceptable to political subdivisions. [R.S. 33:4547.1\(B\)\(3\)\(a\)\(i\)\(ii\)](#)



“Reduction of operating costs” means the elimination of operating expenses or the avoidance of future capital replacement expenditures as a result of new equipment installed or services performed by the performance contractor. A contract may satisfy the requirements allowing use of a performance-based energy efficiency contract even if the sole cost being eliminated or reduced is cost related to maintenance, or as otherwise defined as “Annual energy savings”.

[R.S. 33:4547.1\(B\)\(3\)\(b\)](#)



“Annual energy savings” means, when calculating annual energy cost savings attributable to the services or equipment installed pursuant to a performance-based energy efficiency contract as defined in [R.S. 39:1556\(35\)](#), the savings in electricity, gas, water, propane, oil, diesel, steam or other like utility costs increased revenues obtained from upgrades or modifications to a water, wastewater, gas or electric utility infrastructure, systems or accounting and billing systems and must include future capital expenditures avoided and maintenance savings. Capital replacement expenditures avoided and maintenance savings must be itemized separately.

[R.S. 33:4547.1\(C\)](#)



“Performance contracting” means all programs designed to save energy that are guaranteed by a company or contractor for the political subdivision. The company or contractor guaranteeing the programs may include, but is not limited to, lighting, water conservation, water management companies, or contractors that specialize in servicing energy savings equipment such as mechanical or electrical systems and **energy services companies (hereinafter referred to as ESCO)**.

[R.S. 33:4547.1\(D\)](#)

Independent Third-Party Evaluators

[R.S. 33:4547.1\(E\)](#)

Because of the technical nature of these contracts, the Legislature provided for experts to evaluate the proposals of energy services companies (“ESCO”). Prior to the award of any performance-based energy efficiency contract, the political subdivision should select an independent third-party evaluation consultant to review and evaluate submitted proposals.

To ensure the third-party’s independence, no person, entity, or ESCO that assists the political subdivision in the development of the request for proposals is allowed to be a respondent to those request for proposals.

An independent third-party evaluation consultant must, at a minimum, be licensed by the state of Louisiana as a professional engineer or a professional architect with experience in energy efficiency contracting. Each political

subdivision is responsible for verifying the credentials of the consultant selected to ensure that he or she possesses the minimum qualifications and has no conflict of interest as to the political subdivision or the proposers.

Before being chosen, the independent third-party consultant must certify the absence of a conflict of interest as to the political subdivision, the proposals to be evaluated, or to any proposer.

The independent third-party consultant submits the results of the evaluation in an open meeting to the political subdivision for its review. The political subdivision must require that the consultant selected participate on its behalf in the negotiation of the contract.

In order to fund the cost of the independent third-party consultant, evaluation, review, approval, oversight (and required performance audits), the request for proposals for the award of a performance-based energy efficiency contract shall require the proposer to pay a sum not to exceed two and one-half percent of the total value of the performance-based energy efficiency contract at the time that a contract is executed by that proposer.

Contract Terms

The Legislature has mandated that certain Terms and Clauses be included within performance-based energy efficiency contracts including those addressing and restricting the length of time for the contract and addressing appropriation of funds, savings and costs.

Time

A performance-based energy efficiency contract can bind the political subdivision only for (1) a period equal to the lesser of twenty years or (2) the average life of the equipment installed by the performance contractor. The contract also must contain a guarantee of energy savings. The guarantee of energy savings must, at a minimum, ensure total annual savings sufficient to fully fund any financing arrangement entered into to fund the contract. In other words, if the equipment and work under the contract will be funded through bond proceeds, the contract must include sufficient guaranteed annual energy savings sufficient to cover debt service payments on the bonds.

[R.S. 33:4547.1\(F\)\(1\)](#)

Clauses

[R.S. 33:4547.1\(F\)\(1\)](#)

Certain clauses must be included in energy efficiency contracts. Every performance-based energy efficiency contract must contain the following clause:

“The continuation of this contract is contingent upon the appropriation of funds by the political subdivision to fulfill the requirements of the contract. If the political subdivision fails to appropriate sufficient monies to provide for the continuation of the contract, the contract shall terminate on the last day of the fiscal year for which funds have been appropriated. Such termination shall be without penalty or expense to the political subdivision except for payments which have been earned prior to the termination date.”

Every performance-based energy efficiency contract must also include the total units of energy saved, the method, device or financial arrangement to establish a firm amount for the savings, the cost per unit of energy, and, if applicable, the basis for any adjustment in the stated cost for the term of the contract.

For each energy saving measure included in the contract, the political subdivision must also provide the following: [**R.S. 33:4547.1\(F\)\(2\)**](#)

-  Detailed scope of work.
-  Price to be paid by the political subdivision as the initial cost.
-  Annual energy cost savings.
-  Annual maintenance savings including any maintenance and operational savings associated with installation, including but not limited to services, parts, materials, labor, and equipment.
-  Annual new maintenance cost including operating expenses added as a result of new equipment installed or services performed by the contractor.
-  Total annual savings, which shall be determined by adding annual energy cost savings to annual maintenance savings and subtracting any annual new maintenance costs.
-  All savings shall be guaranteed and measured on an annual basis.
-  A schedule for submission of the annual savings audit reports.

Procedures for Establishing Energy Efficiency Contracts

[R.S. 33:4547.2](#)

Advertising

A political subdivision must provide adequate public notice of the request for proposals for performance-based energy efficiency contracts by advertising in its official journal at least once a week for three different weeks. The first advertisement must appear at least forty-two days before the last day that proposals will be accepted.

In addition, written notice must be mailed at least forty-two days before the last day that proposals will be accepted to persons, firms, or corporations that are known to be in a position to furnish such services.

Request For Proposals

The request for proposals must: (1) indicate the relative importance of price and other evaluation factors; (2) clearly define the criteria to be used in evaluating the proposals and (3) specify the time frames within which the work must be completed. Fifty percent of the total weighted evaluation criteria of the proposal shall be determined by shortest payback, maximum savings, scope of the work, quality of the product, cost of maintenance, and quoted amount of the **energy conservation measure (ECM)** selected.

Every request for proposals must include the following mandatory provisions:

[R.S. 33:4547.2\(C\)](#)

- (1) Each ECM shall be listed separately and for each such proposed ECM the energy savings, operational savings, total savings, cost and payback shall be provided separately. Energy Conservation Measure (ECM) also means measures that are applied to existing buildings that improve energy efficiency and are life cycle cost effective. Operational savings means reduction of actual budget line items currently being expended or savings realized from the implementation or installation of energy cost savings measures.
- (2) Detailed scope shall be provided for each ECM proposed, which describes each piece of equipment proposed and provides details for all services proposed.
- (3) The required maintenance that must be performed to guarantee the savings forecast shall be described in detail for each ECM proposed and the cost of maintenance, if included in the proposed contract.

Awards

[R.S. 33:4547.2\(D-F\)](#)

The contract must be awarded to the responsible offerer whose proposal is determined by the using agency of the governing authority of the political subdivision to be the most advantageous, when considering price and the evaluation factors set forth in the request for proposals.

Written or oral discussions must be conducted with all responsible offerers who submit proposals determined to be reasonably susceptible of being selected for award.

A request for proposals or other solicitation may be cancelled or all proposals may be rejected if the political subdivision finds that such action is in its best interest.

Other Requirements

[R.S. 33:4547.2\(G,H\)](#)

For any proposed systems such as facility automation and control systems, the contractor must provide full capabilities and make them available to the using political subdivision or its designee. The political subdivision or its designee must be able to operate, maintain, repair, update, reconfigure and engineer changes necessary to accommodate facility or operational changes or incorporate new energy savings control strategies. Access to the operating system of the contractor is not required, but the user interface software must provide for all capabilities mentioned.

Further, each proposal must clearly identify under the guarantee for each Energy Conservation Measure (ECM) any responsibility of the political subdivision, including, but not limited to, operating hours, maintenance requirements, and operating protocols.

Guarantee of Energy Savings

[R.S. 33:4547.3](#)

Every performance-based energy efficiency contract must be for a period equal to the lesser of (1) twenty years, or (2) the average life of the equipment installed by the performance contractor. The contract must contain a guarantee of energy savings for at least the term of the bonds sold or the financing arrangement of the political subdivision to support the terms of the energy performance contract.

When calculating “annual energy cost savings attributable to the services or equipment” installed pursuant to a performance-based energy efficiency contract maintenance savings must be included.

“Maintenance savings” means operating expenses that are eliminated and future capital replacement expenditures that are avoided as a result of new equipment installed or services performed by the performance contractor.

PROBLEMS WITH STIPULATED SAVINGS

The Legislature in carving out an exception from the Public Bid Law for energy efficiency related procurement requires that the costs of equipment and work performed for the purposes of energy efficiency be offset by savings under the contract.

Problems arise in situations where parties to an energy efficiency contract seek to stipulate to an amount of savings rather than establish guaranteed savings in the contract, which can be measured and verified. These savings in any performance-based energy efficiency contract must be guaranteed and subject to measurement and verification. *Siemens Building Technologies, Inc. v. Iberville Parish School Board*, 978 So.2d 328, 2008 WL 1765598 (La.), 2008-0336 (La. 4/4/08) *writs denied*.

The failure to strictly comply with this statutory exemption invalidates the contract and mandates compliance with the Public Bid Law. [Revised Statute 38:2220](#) provides that any contract for public works that is contrary to the law is "null and void."

The Attorney General has also examined the issue of stipulated savings clauses for operation and maintenance savings and whether they are tantamount to the guarantees required by [R.S. 33:4547.1](#) – 4547.3. In [AG Op. No. 07-0002](#), the AG opined that in order for the operational savings under an energy efficiency contract to be "guaranteed", the contract would have to provide for some type of measurement and/or verification of the operational savings, and require the contractor to reimburse the public entity for any deficiency.

Public Records

[R.S. 33:4547.1\(F\)\(3\)](#)

The Legislature ensured that except for proprietary company financial information, the responses to a request for proposals are public records under the Public Records Law, R.S. 44:1-44:41.

AG Opinions

Because the stipulated savings in the contract at issue are not guaranteed, the contract does not meet the statutory definition of a performance-based energy efficiency contract. [AG Op. No. 07-0002](#).

Parish project to replace existing water meters with new water meters that will contain automatic reading technology and leak detection equipment, increase billable water usage, and eliminate operating expenses for the functions involved, but which will not result in the direct reduction of energy consumption is not a "performance-based energy efficiency contract." [AG Op. No. 05-0024](#).

The requirements to form a valid performance-based energy efficiency contract are set by statute. Pursuant to statute, the annual energy cost savings must be guaranteed. There is no prohibition against having stipulated savings. However, these stipulated savings must be measured and verified, and the contract must contain a mechanism to require a reimbursement for any deficiency and/or default. [AG Op. No. 10-0138](#).

The same opinion also says the parties of the contract are free to include their understanding as to the measurement and verification of any savings not previously measured or verified in the contract. [AG Op. No. 10-0138](#).

The AG's latest opinion on energy efficiency contracts, La. [AG Op. No. 11-0079](#) provides some clarifications;

1. "Following the specific language found in the statute, it is our opinion that the annual energy cost savings in each year of the contract must be sufficient to allow for the repayment of the corresponding annual financial/payment obligation undertaken in the contract in order to be considered a valid performance-based energy efficiency contract executed pursuant to the provisions of La. Rev. Stat. 33:4547.1."
2. "Thus, at the time the contracts at issue in [AG Op. No. 07-0002](#) and [AG Op. No. 10-0138](#) were executed, the law was silent on the prescribed method of measurement and verification. As such, we opined that the use of stipulated savings clauses was not prohibited and the parties to such contracts were free to agree on a mutually acceptable method of measuring and verifying savings. Nevertheless, we also opined that for such contracts, all savings must be guaranteed. Thus, in essence, such stipulated savings are really estimated savings. In all instances, savings must be subject to some type of contractual measurement and verification on a recurring annual basis as provided for by the law applicable at the time such contracts were executed. Further, all contracts must contain some sort of a mechanism to require a reimbursement for any deficiency and/or default."
3. [La. Rev. Stat. 33:4547.1](#) provides that a performance-based energy efficiency contract is considered a contract for services and shall be exempt from the provisions of La. Rev. Stat. 38:2212. Thus, pursuant to La. Rev. Stat. 33:4547.1 and the applicable jurisprudence, it is our opinion that performance-based energy efficiency contracts are exempt from the provisions of Louisiana's Public Bid Law. Any contract that fails to meet the statutory definition of a performance-based energy efficiency contract as defined by La. Rev. Stat. 33:4547.1 cannot take advantage of the exemption contained in La. Rev. Stat. 33:4547.1. Pursuant to La. Rev. Stat. 38:2220 any contract entered into contrary to the provisions of the Louisiana Public Bid Law shall be null and void.