

HOUSE BILL NO. 212
INTRODUCED BY SESSO
BY REQUEST OF THE DEPARTMENT OF ENVIRONMENTAL QUALITY

A BILL FOR AN ACT ENTITLED: "AN ACT AUTHORIZING CERTAIN LOCAL GOVERNMENTS TO ENTER INTO ENERGY PERFORMANCE CONTRACTS; PROVIDING PROCEDURES AND CRITERIA FOR SOLICITING AND AWARDING ENERGY PERFORMANCE CONTRACTS; SETTING THE TERM OF ENERGY PERFORMANCE CONTRACTS; REQUIRING MONITORING AND REPORTING OF CONSERVATION MEASURES; PROVIDING THAT LOCAL GOVERNMENT STATUTORY PROCUREMENT REQUIREMENTS DO NOT APPLY TO THE PROCUREMENT OF AN ENERGY PERFORMANCE CONTRACT; PROVIDING THAT ENERGY PERFORMANCE CONTRACTS ARE NOT A GENERAL OBLIGATION OF A LOCAL GOVERNMENT UNIT; AUTHORIZING THE DEPARTMENT OF ENVIRONMENTAL QUALITY TO QUALIFY ENERGY PERFORMANCE CONTRACTORS AND PROVIDE ASSISTANCE TO LOCAL GOVERNMENTS; AMENDING SECTIONS 20-9-204 AND 20-15-104, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. Section 1. Legislative findings and policy. (1) The legislature finds that:

(a) conserving energy in local government buildings and vehicles will have a beneficial effect on the overall supply of energy and can result in cost savings for taxpayers;

(b) conserving water can result in cost savings for taxpayers; and

(c) energy performance contracts are a means by which local government units can achieve energy and water conservation without an initial capital outlay.

(2) It is the policy of the state of Montana to promote efficient use of energy and water resources in local government buildings and energy conservation in vehicles by authorizing local government units to enter into energy performance contracts.

NEW SECTION. Section 2. Definitions. As used in [sections 1 through 9], the following definitions apply:

(1) "Conservation measure" means a study, audit, improvement, equipment, alternative energy system, or change in operating practices that is designed to provide energy, water, or operational cost savings at least

equivalent to the amount expended by a local government unit for the study, audit, improvement, or equipment.

(2) "Conservation-related cost savings" means cost savings in the operating budget of a local government unit that are a direct result of conservation measures implemented pursuant to an energy performance contract.

(3) "Department" means the department of environmental quality provided for in 2-15-3501.

(4) "Energy performance contract" means a contract between a local government unit and a qualified provider for evaluation, recommendation, and implementation of one or more conservation measures, evaluation of conservation-related cost savings, and a guarantee of cost savings.

(5) "Investment grade energy audit" means a comprehensive building energy systems audit, performed by a professional engineer licensed in the state of Montana, for the purpose of identifying and documenting conservation measures, cost savings factors, and estimated conservation-related cost savings from the conservation measures identified.

(6) "Local government unit" means a county, an incorporated city or town, a city-county consolidated government, a school district, a special district, or a community college district.

(7) "Person" means an individual, corporation, partnership, firm, association, cooperative, limited liability company, limited liability partnership, or any other similar entity.

(8) "Qualified provider" means a person that:

(a) is experienced in the design, implementation, and installation of conservation measures and building improvement measures;

(b) has the technical capabilities to ensure that the conservation measures and building improvement measures generate conservation-related cost savings; and

(c) has the financial ability to guarantee performance.

NEW SECTION. Section 3. Authority to enter into energy performance contracts. (1) A local government unit may enter into an energy performance contract with a qualified provider under the procedures provided in [section 4 or 5].

(2) Nothing in [sections 1 through 9] prevents a local government unit from contracting for conservation measures under any other legal authority.

NEW SECTION. Section 4. Selection of qualified providers for energy performance contracts. (1) A local government unit may solicit submissions of qualifications to enter into an energy performance contract and proposals for investment grade energy audits. The local government unit shall give at least 14 days' public

notice of a request for qualifications and proposals. The notice must be published at least once a week for 2 consecutive weeks in a newspaper of general circulation in the area where the local government unit intends to institute the conservation measures, and requests for proposals must be sent to at least three vendors known to be offering energy performance contracts. The notice must invite qualified providers to submit qualifications and proposals for investment grade energy audits.

(2) The local government unit shall evaluate qualifications and proposals according to the following capabilities and criteria:

(a) knowledge of design, engineering, installation, maintenance, and repairs associated with energy performance contracts;

(b) experience in postinstallation project monitoring, data collection, and reporting of savings;

(c) ability to guarantee conservation savings;

(d) management capability;

(e) ability to arrange long-term financing or to integrate existing financial resources, such as utility rebates and intercap loans, into projects; AND

(f) experience with projects of similar size and scope;

~~(g) cost information provided, including but not limited to rates, overhead, markup, profit, per diem, and the proposed fee for the investment grade energy audit; and~~

~~(h) other factors determined by the local government unit to be relevant and appropriate relating to the ability of a qualified provider to perform the project.~~

~~(3) THE LOCAL GOVERNMENT UNIT SHALL NEGOTIATE A CONTRACT WITH THE MOST QUALIFIED PROVIDER AT A PRICE THAT THE LOCAL GOVERNMENT UNIT DETERMINES FAIR AND REASONABLE, TAKING INTO ACCOUNT THE SCOPE OF THE SERVICES RENDERED. IF THE LOCAL GOVERNMENT UNIT IS UNABLE TO NEGOTIATE A SATISFACTORY CONTRACT WITH THE MOST QUALIFIED PROVIDER, NEGOTIATIONS WITH THAT FIRM MUST BE FORMALLY TERMINATED AND THE LOCAL GOVERNMENT UNIT SHALL SELECT THE NEXT MOST QUALIFIED PROVIDER UNTIL AN AGREEMENT IS REACHED OR THE PROCESS IS TERMINATED.~~

NEW SECTION. **Section 5. Alternative selection process.** The department may solicit requests for qualifications and proposals for qualified providers to offer energy performance contracts to local government units. The department shall give at least 14 days' public notice of a request for qualifications and proposals. The notice must be published at least once a week for 2 consecutive weeks in at least two major daily newspapers in Montana, posted on the department's website, and sent to vendors known by the department to be offering

energy performance contracts. The department shall evaluate the qualifications on the basis of the capabilities and criteria contained in [section 4(2)]. The department may then select qualified providers and negotiate energy performance contract terms with each qualified provider that may be used by a local government unit as the basis for its energy performance contract with that qualified provider without following the process provided in [section 4].

NEW SECTION. Section 6. Award of energy performance contracts. (1) A local government unit may select and negotiate with a qualified provider identified through the processes provided in [section 4 or 5].

(2) Upon selection of a qualified provider, the local government unit shall enter into a contract with the qualified provider. If this qualified provider does not employ a professional engineer licensed in the state of Montana, the qualified provider shall hire one to prepare an investment grade energy audit. The investment grade energy audit serves as the basis for the terms of an energy performance contract. The investment grade energy audit becomes the property of the local government unit.

(3) If the local government unit determines that the investment grade energy audit does not provide sufficient conservation-related cost savings, it shall PAY THE COST OF THE INVESTMENT GRADE ENERGY AUDIT AND decline to enter into the energy performance contract.

(4) If the local government unit determines that the investment grade energy audit provides sufficient conservation-related cost savings, it shall notify the qualified provider. The qualified provider shall provide the local government unit with plans for the proposed conservation measures that have been prepared by an engineer licensed to practice in Montana and that comply with applicable building and safety codes.

(5) Upon receipt of the information required by subsection (4), the local government unit may negotiate the conservation measures to be included in the energy performance contract and enter into the energy performance contract. The energy performance contract may include THE OPTION OF payment of the costs of the investment grade energy audit and plans provided pursuant to subsection (4) THROUGH PROJECT FINANCING.

NEW SECTION. Section 7. Term and conditions of energy performance contracts. (1) The term of an energy performance contract must be A MINIMUM OF 3 YEARS AND MAY BE UP TO the useful life of the conservation measures or 20 years, whichever is less.

(2) An energy performance contract must require the qualified provider to:

(a) guarantee the conservation-related cost savings to the extent necessary to pay for the conservation measures, including financing charges incurred over the life of the contract;

(b) monitor the reductions in energy consumption and the cost savings attributable to the conservation measures installed pursuant to the energy performance contract; and

(c) annually prepare and provide a report to the local government unit, documenting the performance of the conservation measures.

NEW SECTION. Section 8. Assistance to local governments. The department may develop model documents and provide technical assistance to local government units in the procurement of energy performance contracts and related services.

NEW SECTION. Section 9. Contracts and agreements not general obligation of local government unit. Payment obligations of a local government unit pursuant to an energy performance contract are not general obligations of the local government unit and are collectible only from conservation-related cost savings provided in the energy performance contract and other revenue, if any, pledged in the energy performance contract.

Section 10. Section 20-9-204, MCA, is amended to read:

"20-9-204. Conflicts of interests, letting contracts, and calling for bids. (1) It is unlawful for a trustee to:

(a) have any pecuniary interest, either directly or indirectly, in any contract made by the trustee while acting in that official capacity or by the board of trustees of which the trustee is a member; or

(b) be employed in any capacity by the trustee's own school district.

(2) For the purposes of subsection (1):

(a) "pecuniary interest" does not include holding an interest of 10% or less in a corporation; and

(b) "contract" does not include:

(i) merchandise sold to the highest bidder at public auctions;

(ii) investments or deposits in financial institutions that are in the business of loaning or receiving money when the investments or deposits are made on a rotating or ratable basis among financial institutions in the community or when there is only one financial institution in the community; or

(iii) contracts for professional services, other than salaried services, or for maintenance or repair services or supplies when the services or supplies are not reasonably available from other sources if the interest of any board member and a determination of the lack of availability are entered in the minutes of the board meeting at which the contract is considered.

(3) Except for district needs that must be met because of an unforeseen emergency, as defined in 20-3-322(5), or as provided in ~~subsection~~ subsections (4) and (7) of this section, whenever the estimated cost of any building, furnishing, repairing, or other work for the benefit of the district or purchasing of supplies for the district exceeds the sum of \$25,000, the work done or the purchase made must be by contract. Each contract must be let to the lowest responsible bidder after advertisement for bids. The advertisement must be published in the newspaper that will give notice to the largest number of people of the district as determined by the trustees. The advertisement must be made once each week for 2 consecutive weeks, and the second publication must be made not less than 5 days or more than 12 days before consideration of bids. A contract not let pursuant to this section is void. The bidding requirements applicable to services performed for the benefit of the district under this section do not apply to:

- (a) a registered professional engineer, surveyor, real estate appraiser, or registered architect;
- (b) a physician, dentist, pharmacist, or other medical, dental, or health care provider;
- (c) an attorney;
- (d) a consulting actuary;
- (e) a private investigator licensed by any jurisdiction;
- (f) a claims adjuster; or
- (g) an accountant licensed under Title 37, chapter 50.

(4) A district may enter into a cooperative purchasing contract for the procurement of supplies or services with one or more districts. The award of a contract to a successful bidder must comply with the requirements of subsection (5). The request for bids must be advertised in a daily newspaper of general circulation in each county in which a district participating in the cooperative purchasing contract is located. The advertisement must be made once each week for 2 consecutive weeks, and the second publication must be made not less than 5 days or more than 12 days before consideration of bids.

(5) Whenever bidding is required, the contract must be awarded to the lowest responsible bidder, except that all bids may be rejected.

(6) This section may not require the board of trustees to let a contract for any routine and regularly performed maintenance or repair project or service that can be accomplished by district staff whose regular employment with the school district is related to the routine performance of maintenance for the district.

(7) Subsection (3) does not apply to the solicitation or award of a contract for an investment grade energy audit or an energy performance contract pursuant to [sections 1 through 9], including construction and installation of conservation measures pursuant to the energy performance contract."

Section 11. Section 20-15-104, MCA, is amended to read:

"20-15-104. Pecuniary interest and letting contracts. (1) It ~~shall be~~ is unlawful for any community college district trustee to:

(a) have ~~any a~~ a pecuniary interest, either directly or indirectly, in the erection of any community college building in ~~his~~ the trustee's district; ~~or~~

(b) have a pecuniary interest, either directly or indirectly, in furnishing or repairing the same a community college building; or

(c) be in any manner connected with the furnishing of supplies for the maintenance of the college; ~~or to~~

(d) receive or accept any compensation or reward for services rendered as trustee, except as ~~herein~~ provided in this section.

(2) ~~The~~ Except for the letting of an investment grade energy audit or energy performance contract pursuant to [sections 1 through 9], including construction or installation of conservation measures pursuant to an energy performance contract, the board of trustees shall let contracts for building, furnishing, repairing, or other work or supplies for the benefit of the district according to the following rules and procedures:

(a) The board of trustees need not meet requirements relating to advertising or bidding if a proposed contract for building, furnishing, repairing or other work or supplies is for less than \$5,000.

(b) Whenever the proposed contract costs are less than \$25,000 but more than \$5,000, the board of trustees shall procure at least three informal bids, if reasonably available, from contractors licensed in Montana.

(c) Whenever the proposed contract costs are more than \$25,000, the board of trustees shall solicit formal bids and advertise once each week for at least 2 weeks in a newspaper published in each county ~~wherein~~ in which the area of the district lies, calling for bids to perform ~~such the~~ work or furnish ~~such the~~ supplies. If advertising is required, the board shall award the contract to the lowest responsible bidder. However, the board of trustees has the right to reject any ~~and all~~ bids."

NEW SECTION. **Section 12. Energy performance contracts exempt.** This part does not apply to solicitation and award of an investment grade energy audit or energy performance contract pursuant to [sections 1 through 9] or to the construction or installation of conservation measures pursuant to the energy performance contract.

NEW SECTION. **Section 13. Codification instruction.** (1) [Sections 1 through 9] are intended to be codified as an integral part of Title 90, chapter 4, and the provisions of Title 90, chapter 4, apply to [sections 1

through 9].

(2) [Section 12] is intended to be codified as an integral part of Title 7, chapter 5, part 23, Title 7, chapter 5, part 43, Title 7, chapter 12, part 21, ~~and~~ Title 7, chapter 12, part 41, AND TITLE 18, CHAPTER 8, PART 2, and the provisions of Title 7, chapter 5, part 23, Title 7, chapter 5, part 43, Title 7, chapter 12, part 21, ~~and~~ Title 7, chapter 12, part 41, AND TITLE 18, CHAPTER 8, PART 2, apply, respectively, to [section 12].

NEW SECTION. **Section 14. Effective date.** [This act] is effective on passage and approval.

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