

## HOUSE BILL NO. 98

INTRODUCED BY D. BARRETT

BY REQUEST OF THE DEPARTMENT OF ENVIRONMENTAL QUALITY

A BILL FOR AN ACT ENTITLED: "AN ACT AUTHORIZING STATE AGENCIES TO ENTER INTO ENERGY PERFORMANCE CONTRACTS; AND AMENDING SECTIONS 18-2-101, 18-4-132, 90-4-1101, 90-4-1102, 90-4-1103, 90-4-1104, 90-4-1105, 90-4-1106, 90-4-1107, 90-4-1108, AND 90-4-1109, MCA."

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

NEW SECTION. **Section 1. State agency performance contracts -- exempt.** Energy performance contracts entered into by state agencies pursuant to Title 90, chapter 4, part 11, are exempt from this part.

**Section 2.** Section 18-2-101, MCA, is amended to read:

**"18-2-101. Definitions of building, costs, and construction.** In part 1 of this chapter, with the exception of 18-2-104, 18-2-107, 18-2-113, 18-2-114, 18-2-122, and 18-2-123:

(1) (a) "building" includes a building, facility, or structure:

~~(a)~~(i) constructed or purchased wholly or in part with state money;

~~(b)~~(ii) at a state institution;

~~(c)~~(iii) owned or to be owned by a state agency, including the department of transportation; or

~~(d)~~(iv) constructed for the use or benefit of the state with federal or private money as provided in 18-2-102(2)(d);

~~(2)~~(b) "building" does not include a building, facility, or structure:

~~(a)~~(i) owned or to be owned by a county, city, town, school district, or special improvement district;

~~(b)~~(ii) used as a component part of an environmental remediation or abandoned mine land reclamation project, a highway, or a water conservation project, unless the building will require a continuing state general fund financial obligation after the environmental remediation or abandoned mine land reclamation project is completed; or

~~(c)~~(iii) leased or to be leased by a state agency;

~~(3)~~(2) (a) "construction" includes the construction, alteration, repair, maintenance, and remodeling of a building and the equipping and furnishing of a building during construction, alteration, repair, maintenance, and

remodeling;

(b) "construction" does not include work performed under an energy performance contract entered into pursuant to Title 90, chapter 4, part 11;

~~(4)~~(3) "costs" means those expenses defined in 17-5-801."

**Section 3.** Section 18-4-132, MCA, is amended to read:

**"18-4-132. Application.** (1) This chapter applies to:

(a) the expenditure of public funds irrespective of their source, including federal assistance money, by this state acting through a governmental body under any contract, except a contract exempted from this chapter by this section or by another statute;

(b) a procurement of supplies or services that is at no cost to the state and from which income may be derived by the vendor and to a procurement of supplies or services from which income or a more advantageous business position may be derived by the state; and

(c) the disposal of state supplies.

(2) This chapter or rules adopted pursuant to this chapter do not prevent any governmental body or political subdivision from complying with the terms and conditions of any grant, gift, bequest, or cooperative agreement.

(3) This chapter does not apply to:

(a) either grants or contracts between the state and its political subdivisions or other governments, except as provided in part 4;

(b) construction contracts;

(c) expenditures of or the authorized sale or disposal of equipment purchased with money raised by student activity fees designated for use by the student associations of the university system;

(d) contracts entered into by the Montana state lottery that have an aggregate value of less than \$250,000;

(e) contracts entered into by the state compensation insurance fund to procure insurance-related services;

(f) employment of:

(i) a registered professional engineer, surveyor, real estate appraiser, or registered architect;

(ii) a physician, dentist, pharmacist, or other medical, dental, or health care provider;

(iii) an expert witness hired for use in litigation, a hearings officer hired in rulemaking and contested case

proceedings under the Montana Administrative Procedure Act, or an attorney as specified by executive order of the governor;

(iv) consulting actuaries;

(v) a private consultant employed by the student associations of the university system with money raised from student activity fees designated for use by those student associations;

(vi) a private consultant employed by the Montana state lottery;

(vii) a private investigator licensed by any jurisdiction;

(viii) a claims adjuster; or

(ix) a court reporter appointed as an independent contractor under 3-5-601;

(g) electrical energy purchase contracts by the university of Montana or Montana state university, as defined in 20-25-201. Any savings accrued by the university of Montana or Montana state university in the purchase or acquisition of energy must be retained by the board of regents of higher education for university allocation and expenditure.

(h) the purchase or commission of art for a museum or public display; ~~or~~

(i) contracting under 47-1-216 of the Montana Public Defender Act; or

(j) contracting under Title 90, chapter 4, part 11.

(4) (a) Food products produced in Montana may be procured by either standard procurement procedures or by direct purchase. Montana-produced food products may be procured by direct purchase when:

(i) the quality of available Montana-produced food products is substantially equivalent to the quality of similar food products produced outside the state;

(ii) a vendor is able to supply Montana-produced food products in sufficient quantity; and

(iii) a bid for Montana-produced food products either does not exceed or reasonably exceeds the lowest bid or price quoted for similar food products produced outside the state. A bid reasonably exceeds the lowest bid or price quoted when, in the discretion of the person charged by law with the duty to purchase food products for a governmental body, the higher bid is reasonable and capable of being paid out of that governmental body's existing budget without any further supplemental or additional appropriation.

(b) The department shall adopt any rules necessary to administer the optional procurement exception established in this subsection (4).

(5) As used in this section, the following definitions apply:

(a) "Food" means articles normally used by humans as food or drink, including articles used for components of articles normally used by humans as food or drink.

(b) "Produced" means planted, cultivated, grown, harvested, raised, collected, processed, or manufactured."

**Section 4.** Section 90-4-1101, MCA, is amended to read:

**"90-4-1101. Legislative findings and policy.** (1) The legislature finds that:

(a) conserving energy in local government and state agency 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 and state agencies 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 and state agency buildings and energy conservation in vehicles by authorizing local government units and state agencies to enter into energy performance contracts."

**Section 5.** Section 90-4-1102, MCA, is amended to read:

**"90-4-1102. Definitions.** As used in this part, 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 or state agency for the study, audit, improvement, or equipment.

(2) "Conservation-related cost savings" means cost savings in the operating budget of a local government unit or state agency 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 or a state agency 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.

(9) "State agency" has the meaning provided in 90-4-602."

**Section 6.** Section 90-4-1103, MCA, is amended to read:

**"90-4-1103. Authority to enter into energy performance contracts.** (1) A local government unit or a state agency may enter into an energy performance contract with a qualified provider under the procedures provided in 90-4-1104 or 90-4-1105.

(2) Nothing in this part prevents a local government unit or a state agency from contracting for conservation measures under any other legal authority."

**Section 7.** Section 90-4-1104, MCA, is amended to read:

**"90-4-1104. Selection of qualified providers for energy performance contracts.** (1) A local government unit or a state agency may solicit submissions of qualifications to enter into an energy performance contract and proposals for investment grade energy audits. The local government unit or the state agency 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 or the state agency 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 or the state agency 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.

(3) The local government unit or the state agency shall negotiate a contract with the most qualified provider at a price that the local government unit or the state agency determines fair and reasonable, taking into account the scope of the services rendered. If the local government unit or the state agency 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 or the state agency shall select the next most qualified provider until an agreement is reached or the process is terminated."

**Section 8.** Section 90-4-1105, MCA, is amended to read:

**"90-4-1105. Alternative selection process.** The department may solicit requests for qualifications and proposals for qualified providers to offer energy performance contracts to local government units or state agencies. 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 90-4-1104(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 or a state agency as the basis for its energy performance contract with that qualified provider without following the process provided in 90-4-1104."

**Section 9.** Section 90-4-1106, MCA, is amended to read:

**"90-4-1106. Award of energy performance contracts.** (1) A local government unit or a state agency may select and negotiate with a qualified provider identified through the processes provided in 90-4-1104 or 90-4-1105.

(2) Upon selection of a qualified provider, the local government unit or state agency 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 or the state agency.

(3) If the local government unit or the state agency 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 or the state agency 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 or the state agency 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 or the state agency 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."

**Section 10.** Section 90-4-1107, MCA, is amended to read:

**"90-4-1107. 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 or the state agency, documenting the performance of the conservation measures."

**Section 11.** Section 90-4-1108, MCA, is amended to read:

**"90-4-1108. Assistance to local governments and state agencies.** The department may develop model documents and provide technical assistance to local government units and state agencies in the procurement of energy performance contracts and related services."

**Section 12.** Section 90-4-1109, MCA, is amended to read:

**"90-4-1109. Contracts and agreements not general obligation of local government unit or state.** Payment obligations of a local government unit or a state agency pursuant to an energy performance contract are not general obligations of the local government unit or the state 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."

NEW SECTION. **Section 13. Codification instruction.** [Section 1] is intended to be codified as an integral part of Title 18, chapter 2, part 3, and the provisions of Title 18, chapter 2, part 3, apply to [section 1].

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