

SENATE BILL NO. 249

INTRODUCED BY J. COHENOUR

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4 A BILL FOR AN ACT ENTITLED: "AN ACT GENERALLY REVISING ENERGY PERFORMANCE CONTRACTS;  
5 ESTABLISHING CRITERIA FOR THE DEPARTMENT OF ENVIRONMENTAL QUALITY TO USE IN THE  
6 ADMINISTRATION OF AN ENERGY PERFORMANCE CONTRACT PROGRAM; ESTABLISHING CRITERIA  
7 FOR QUALIFIED ENERGY SERVICE PROVIDERS; PROVIDING FOR INVESTMENT-GRADE ENERGY  
8 AUDITS; ESTABLISHING CRITERIA FOR GOVERNMENTAL ENTITIES TO USE IN THE ADMINISTRATION  
9 AND FUNDING OF ENERGY PERFORMANCE CONTRACTS; GRANTING RULEMAKING AUTHORITY;  
10 EXEMPTING ENERGY PERFORMANCE CONTRACTS FROM CERTAIN CONSOLIDATED CITY-COUNTY  
11 GOVERNMENT AND SPECIAL DISTRICT CONTRACT REQUIREMENTS; AMENDING SECTIONS 20-9-471,  
12 90-4-1101, 90-4-1102, 90-4-1103, AND 90-4-1109, MCA; REPEALING SECTIONS 90-4-1104, 90-4-1105,  
13 90-4-1106, 90-4-1107, AND 90-4-1108, MCA; AND PROVIDING AN APPLICABILITY DATE."

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

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17 **NEW SECTION. Section 1. Duties of department -- rulemaking.** (1) The department shall establish  
18 an energy performance contract program for governmental entities. The department shall:  
19 (a) solicit, evaluate, and maintain a list of qualified energy service providers;  
20 (b) pursuant to rules adopted by the department, disqualify and remove from the list energy service  
21 providers who do not comply with qualifications established;  
22 (c) enter into agreements with qualified energy service providers and require qualified energy service  
23 providers to contract and provide services in accordance with this part;  
24 (d) establish guidelines for awarding energy performance contracts;  
25 (e) develop a standardized energy performance contract process and documents;  
26 (f) assist governmental entities interested in pursuing energy performance contracts by providing  
27 technical assistance and educational programs and by maintaining a website;  
28 (g) establish a process for measuring and verifying guaranteed cost savings and cost-effectiveness; and  
29 (h) establish reporting requirements for qualified energy service providers.  
30 (2) The department may adopt rules for:

- 1 (a) the review of investment-grade energy audits; and  
2 (b) implementation of this part.  
3 (3) The department may adopt rules establishing criteria for:  
4 (a) the amount of project costs covered by guaranteed cost savings;  
5 (b) guaranteed cost savings;  
6 (c) measurement of energy cost savings and verification; and  
7 (d) use in determining cost-saving measure cost-effectiveness of an unguaranteed utility unit price  
8 escalation rate determined in the rules.

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10 **NEW SECTION. Section 2. Selection of qualified energy service providers for energy performance**

11 **contracts.** (1) At least every 5 years, the department shall issue a request for qualifications for energy service  
12 providers interested in entering into energy performance contracts with governmental entities. An energy service  
13 provider may submit qualifications to the department at any time, and the department shall review the submission  
14 for potential inclusion on its list of qualified energy service providers.

15 (2) The department shall evaluate qualifications for qualified energy service providers on the basis of:

- 16 (a) knowledge and experience with:  
17 (i) design, engineering, installation, maintenance, and repairs associated with energy performance  
18 contracts;  
19 (ii) conversion to a different fuel source associated with a comprehensive energy efficiency retrofit;  
20 (iii) postinstallation project monitoring, data collection, and reporting of guaranteed cost savings;  
21 (iv) overall project management; and  
22 (v) projects of similar size and scope;  
23 (b) ability to guarantee cost-effectiveness and to access long-term financing;  
24 (c) financial stability; and  
25 (d) other factors determined by the department.

26 (3) The department shall maintain a list of qualified energy service providers who meet the requirements  
27 of subsection (2).

28 (4) The department shall notify energy service providers who submitted qualifications in accordance with  
29 subsection (1) whether they meet the requirements of this part and are qualified energy service providers.

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1            **NEW SECTION. Section 3. Selection of qualified energy service providers.** (1) Before entering into  
2 an energy performance contract, a governmental entity shall solicit a request for proposals from a minimum of  
3 three qualified energy service providers. The governmental entity may award the performance contract to the  
4 qualified energy service provider determined by the governmental entity to best meet the needs of the  
5 governmental entity. The qualified energy service provider selected is not required to have submitted the proposal  
6 with the lowest cost.

7            (2) In selecting a qualified energy service provider, a governmental entity shall consider:

8            (a) experience with:

9            (i) design, engineering, and installation of cost-saving measures;

10           (ii) overall project management;

11           (iii) projects of similar size and scope;

12           (iv) postinstallation measurement and verification of guaranteed cost savings;

13           (v) in-state projects and Montana-based subcontractors;

14           (vi) commissioning of projects;

15           (vii) training of building operators; and

16           (viii) conversions to a different fuel source; and

17           (b) quality of technical approach.

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19           **NEW SECTION. Section 4. Investment-grade energy audits.** (1) An energy performance contractor  
20 selected by a governmental entity in accordance with [section 3] shall prepare an investment-grade energy audit.  
21 The audit must be incorporated into an energy performance ~~contract~~ CONTRACT.

22           (2) An investment-grade energy audit must include estimates of all costs and guaranteed cost savings  
23 for the proposed energy performance contract including:

24           (a) design;

25           (b) engineering;

26           (c) equipment;

27           (d) materials;

28           (e) installation;

29           (f) maintenance;

30           (g) repairs;

- 1 (h) monitoring and verification;
- 2 (i) commissioning;
- 3 (j) training; and
- 4 (k) debt service.
- 5 (3) (a) A qualified energy service provider and the governmental entity must agree on the cost of an
- 6 investment-grade energy audit before it is conducted.
- 7 (b) If an investment-grade energy audit is completed and the governmental entity does not execute an
- 8 energy performance contract, the governmental entity shall pay the full cost of the investment-grade energy audit.
- 9 (c) If the governmental entity executes the energy performance contract, the cost of the investment-grade
- 10 energy audit may be included in the costs of an energy performance contract or, at the discretion of the
- 11 governmental entity, be paid for by the governmental entity.
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- 13 **NEW SECTION. Section 5. Energy performance contracts.** (1) A governmental entity may pay for
- 14 an energy performance contract with:
- 15 (a) funds designated for operating costs, capital expenditures, utility costs, or lease payments;
- 16 (b) installment payment contracts or lease purchase agreements;
- 17 (c) bonds issued in accordance with other bonding provisions as provided by law; or
- 18 (d) other financing through a third party, including tax-exempt financing.
- 19 (2) Utility incentives, grants, operating costs, capital budgets, or other permissible sources may be used
- 20 to reduce the amount of financing.
- 21 (3) (a) An energy performance contract may extend beyond the fiscal year for which the contract is
- 22 effective.
- 23 (b) An energy performance contract may not exceed 20 years, the cost-weighted average useful life of
- 24 the cost-saving measure, or the term of financing, whichever is shortest.
- 25 (4) During the guarantee period, a qualified energy service provider shall:
- 26 (a) measure and verify reductions in energy consumption and costs attributable to cost-saving measures
- 27 implemented pursuant to an energy performance contract; and
- 28 (b) not less than annually, prepare and provide a measurement and verification report to the
- 29 governmental entity and to the department documenting the performance of cost-saving measures.
- 30 (5) (a) Costs for measurement and verification must be included in an energy performance contract and

1 paid by the governmental entity during an initial monitoring period that is not less than 3 years.

2 (b) The energy performance contract must provide that, if guaranteed cost savings are not achieved  
3 during any year in the initial monitoring period, the qualified energy service provider shall pay the costs for  
4 measurement and verification reports until guaranteed cost savings are achieved for all years in a term of  
5 consecutive years equal to the initial monitoring period.

6 (6) (a) Except as provided in subsection (6)(b), the qualified energy service provider shall pay the  
7 governmental entity the amount of any verified annual guaranteed cost savings shortfall each year until  
8 guaranteed cost savings are achieved for all years in an initial monitoring period established in accordance with  
9 subsection (5). The amount of cost savings achieved during a year must be determined using the mutually agreed  
10 on baseline rates referenced in guaranteed cost savings and any unguaranteed energy cost savings attributable  
11 to utility unit price escalation rates allowed pursuant to rules adopted by the department pursuant to [section  
12 1(3)(d)].

13 (b) In the case of a shortfall, the governmental entity and qualified energy service provider may negotiate  
14 the terms of measurement and verification reports and the shortfall payment for the remainder of the energy  
15 performance contract finance term.

16 (c) If an excess in guaranteed cost savings in any year of the guarantee period is revealed in a  
17 measurement and verification report, the guaranteed cost savings remain with the governmental entity.  
18 Guaranteed cost savings may not be used to cover potential shortfalls in subsequent years or actual guaranteed  
19 cost savings shortages in previous years of a guarantee period.

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21 **NEW SECTION. Section 6. Energy performance contracts exempt.** This part does not apply to  
22 solicitation and award of an investment-grade energy audit or energy performance contract pursuant to Title 90,  
23 chapter 4, part 11, or to the construction or installation of conservation measures pursuant to the energy  
24 performance contract.

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26 **Section 7.** Section 20-9-471, MCA, is amended to read:  
27 **"20-9-471. Issuance of obligations -- authorization -- conditions.** (1) The trustees of a school district  
28 may, without a vote of the electors of the district, issue and sell to the board of investments obligations for the  
29 purpose of financing all or a portion of:

30 (a) the costs of vehicles and equipment;

1 (b) the costs associated with renovating, rehabilitating, and remodeling facilities, including but not limited  
2 to roof repairs, heating, plumbing, electrical systems, and ~~conservation measures~~ cost-saving measures as  
3 defined in 90-4-1102;

4 (c) any other expenditure that the district is otherwise authorized to make, subject to subsection (4),  
5 including the payment of settlements of legal claims and judgments; and

6 (d) the costs associated with the issuance and sale of the obligations.

7 (2) The term of the obligation, including an obligation for a qualified energy project, may not exceed 15  
8 fiscal years. For the purposes of this subsection, a "qualified energy project" means a project designed to reduce  
9 energy use in a school facility and from which the resulting energy cost savings are projected to meet or exceed  
10 the debt service obligation for financing the project, as determined by the department of environmental quality.

11 (3) At the time of issuing the obligation, there must exist an amount in the budget for the current fiscal  
12 year available and sufficient to make the debt service payment on the obligation coming due in the current year.  
13 The budget for each following year in which any portion of the principal of and interest on the obligation is due  
14 must provide for payment of that principal and interest.

15 (4) Except as provided in 20-9-502 and 20-9-503, the proceeds of the obligation may not be used to  
16 acquire real property or construct a facility unless:

17 (a) the acquisition or construction project does not constitute more than 20% of the square footage of  
18 the existing real property improvements made to a facility containing classrooms;

19 (b) the 20% square footage limitation may not be exceeded within any 5-year period; and

20 (c) the electors of the district approve a proposition authorizing the trustees to apply for funds through  
21 the board of investments for the construction project. The proposition must be approved at a special or regular  
22 election in accordance with all of the requirements of 20-9-428, except that the proposition is considered to have  
23 passed if a majority of the qualified electors voting approve the proposition.

24 (5) The school district may not submit for a vote of the electors of the district a proposition to impose a  
25 levy to pay the principal or any interest on an obligation that is payable from the ~~conservation-related~~ guaranteed  
26 cost savings under energy performance contracts as defined in 90-4-1102.

27 (6) The obligation must state clearly on its face that the obligation is not secured by a pledge of the  
28 school district's taxing power but is payable from amounts in its general fund or other legally available funds.

29 (7) An obligation issued is payable from any legally available fund of the district and constitutes a general  
30 obligation of the district.

1 (8) The obligation may bear interest at a fixed or variable rate and may be sold to the board of  
 2 investments at par, at a discount, or with a premium and upon any other terms and conditions that the trustees  
 3 determine to be in the best interests of the district.

4 (9) The principal amount of the obligation, when added to the outstanding bonded indebtedness of the  
 5 district, may not exceed the debt limitation established in 20-9-406."

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7 **Section 8.** Section 90-4-1101, MCA, is amended to read:

8 **"90-4-1101. Legislative findings and policy.** (1) The legislature finds that:

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

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

12 (c) energy performance contracts are a means by which ~~local government units and state agencies~~  
 13 governmental entities can economically and expeditiously achieve energy and water conservation ~~without an~~  
 14 ~~initial capital outlay.~~

15 (2) It is the policy of the state of Montana to promote efficient use of energy and water resources in ~~local~~  
 16 ~~government and state agency~~ public buildings and energy conservation in vehicles by authorizing ~~local~~  
 17 ~~government units and state agencies~~ governmental entities to enter into energy performance contracts."

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19 **Section 9.** Section 90-4-1102, MCA, is amended to read:

20 **"90-4-1102. Definitions.** As used in this part, the following definitions apply:

21 ~~(1) "Conservation measure" means a study, audit, improvement, equipment, alternative energy system,~~  
 22 ~~or change in operating practices that is designed to provide energy, water, or operational cost savings at least~~  
 23 ~~equivalent to the amount expended by a local government unit or state agency for the study, audit, improvement,~~  
 24 ~~or equipment.~~

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

28 (1) "Cost-effective" or "cost-effectiveness" means that the sum of guaranteed cost savings and, if and  
 29 to the extent allowed by rules adopted pursuant to [section 1(3)(d)], unguaranteed energy cost savings  
 30 attributable to utility unit price escalation are equal to or exceed any financing repayment obligation each year

1 of a finance term.

2 (2) "Cost-saving measure" means a cost-effective facility improvement, repair, or alteration or equipment,  
 3 fixtures, or furnishings added to or used in a facility and designed to reduce energy or water consumption or  
 4 operation and maintenance costs. The term also includes vehicle acquisitions, changes to utility rate or tariff  
 5 schedules, or fuel source changes that result in cost savings.

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

7 (4) "Energy performance contract" means a contract between a ~~local government unit or a state agency~~  
 8 governmental entity and a qualified energy service provider for evaluation, recommendation, and implementation  
 9 of one or more ~~conservation~~ cost-saving measures, evaluation of ~~conservation-related cost savings~~  
 10 cost-effectiveness, and ~~a guarantee of guaranteed~~ cost savings.

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

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

17 (5) "Finance term" means the length of time for repayment of funds borrowed for an energy performance  
 18 contract.

19 (6) "Governmental entity" means:

20 (a) a department, board, commission, institution, or branch of state government;

21 (b) a county, consolidated city-county government, city, town, or school district;

22 (c) a special district, as defined in 2-2-102;

23 (d) the university system or a unit of the university system; or

24 (e) a community college district.

25 (7) "Guarantee period" means the period of time from the effective date of the contract until guaranteed  
 26 cost savings are achieved in accordance with [section 5(5)].

27 (8) "Guaranteed cost savings" means a guaranteed annual measurable monetary reduction in utility and  
 28 operating and maintenance costs for each year of a guarantee period resulting from cost-saving measures.  
 29 Guaranteed cost savings for utility cost savings must be calculated using mutually agreed on baseline utility rates  
 30 in use at the time of an investment-grade energy audit. Guaranteed cost savings for operation and maintenance



1 cost savings must be calculated using mutually agreed on baseline operation and maintenance costs at the time  
 2 of an investment-grade energy audit.

3 (9) "Investment-grade energy audit" means a study of energy or water usage of a public building  
 4 performed by a qualified energy service provider utilizing a professional engineer licensed in the state of Montana.  
 5 It includes detailed descriptions of the improvements recommended for the project, the estimated costs of the  
 6 improvements, and the operation and maintenance cost savings and utility cost savings projected to result from  
 7 the recommended improvements. The study must contain all information required pursuant to [section 4(2)].

8 (10) "Measurement and verification" means the methodology, measurements, inspections, and  
 9 mathematical calculations to determine utility consumption before and after an energy performance contract is  
 10 implemented. The measurement and verification report may be for an individual cost-saving measure or an entire  
 11 project.

12 (11) "Operation and maintenance cost savings" means a measurable decrease in operation and  
 13 maintenance costs as a direct result of cost-saving measures calculated using baseline operation and  
 14 maintenance costs. The term does not include the shifting of personnel costs or similar short-term cost savings  
 15 that cannot be definitively measured.

16 ~~(7)(12)~~ "Person" means an individual, corporation, partnership, firm, association, cooperative, limited  
 17 liability company, limited liability partnership, or any other similar entity.

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

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

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

23 ~~—— (c) has the financial ability to guarantee performance.~~

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

25 (13) "Qualified energy service provider" means a person included on the department's list of qualified  
 26 energy service providers.

27 (14) "Utility cost savings" means expenses for utilities that are eliminated or avoided on a long-term basis  
 28 as a result of equipment installed or modified or services performed by a qualified energy service provider. Utility  
 29 cost savings include expenses for natural gas, propane or similar fuels, electricity, water, waste water, and waste  
 30 disposal."

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**Section 10.** 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 governmental entity~~ may enter into an energy performance contract. A governmental entity that enters into an energy performance contract shall do so in accordance with this part, 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 governmental entity~~ from ~~contracting~~ entering into a contract that is not an energy performance contract for conservation measures under any other legal authority."

**Section 11.** Section 90-4-1109, MCA, is amended to read:

**"90-4-1109. Contracts and agreements not general obligation of local government unit or state governmental entity.** ~~Payment~~ Except as provided in [section 5(1)], payment obligations of a ~~local government unit or a state agency governmental entity~~ pursuant to an energy performance contract are not general obligations of the ~~local government unit or the state~~ governmental entity and are collectible only from ~~conservation-related~~ guaranteed cost savings provided in the energy performance contract and other revenue, if any, pledged in the energy performance contract."

**NEW SECTION. Section 12. Repealer.** The following sections of the Montana Code Annotated are repealed:

- 90-4-1104. Selection of qualified providers for energy performance contracts.
- 90-4-1105. Alternative selection process.
- 90-4-1106. Award of energy performance contracts.
- 90-4-1107. Term and conditions of energy performance contracts.
- 90-4-1108. Assistance to local governments and state agencies.

**NEW SECTION. Section 13. Codification instructions.** (1) [Sections 1 through 5] are intended to be codified as an integral part of Title 90, chapter 4, part 11, and the provisions of Title 90, chapter 4, part 11, apply to [sections 1 through 5].

(2) [Section 6] is intended to be codified as an integral part of Title 7, chapter 3, part 13, and the

1 provisions of Title 7, chapter 3, part 13, apply to [section 6].

2 (3) [Section 6] is intended to be codified as an integral part of Title 7, chapter 11, part 10, and the  
3 provisions of Title 7, chapter 11, part 10, apply to [section 6].

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5 **NEW SECTION. Section 14. Applicability.** [This act] applies to contracts entered into on or after [the  
6 effective date of this act].

7 - END -