

the duty to the Secretary of Energy by Memorandum of June 23, 1993, 58 F.R. 34519) to report annually to Congress on activities carried out under this subchapter and on other efforts to coordinate Federal energy conservation programs, terminated, effective May 15, 2000, pursuant to section 3003 of Pub. L. 104-66, as amended, set out as a note under section 1113 of Title 31, Money and Finance. See, also, the 15th item on page 19 of House Document No. 103-7.

#### SUBCHAPTER VII—ENERGY SAVINGS PERFORMANCE CONTRACTS

##### § 8287. Authority to enter into contracts

###### (a) In general

(1) The head of a Federal agency may enter into contracts under this subchapter solely for the purpose of achieving energy savings and benefits ancillary to that purpose. Each such contract may, notwithstanding any other provision of law, be for a period not to exceed 25 years. Such contract shall provide that the contractor shall incur costs of implementing energy savings measures, including at least the costs (if any) incurred in making energy audits, acquiring and installing equipment, and training personnel, in exchange for a share of any energy savings directly resulting from implementation of such measures during the term of the contract.

(2)(A) Contracts under this subchapter shall be energy savings performance contracts and shall require an annual energy audit and specify the terms and conditions of any Government payments and performance guarantees. Any such performance guarantee shall provide that the contractor is responsible for maintenance and repair services for any energy related equipment, including computer software systems.

(B) Aggregate annual payments by an agency to both utilities and energy savings performance contractors, under an energy savings performance contract, may not exceed the amount that the agency would have paid for utilities without an energy savings performance contract (as estimated through the procedures developed pursuant to this section) during contract years. The contract shall provide for a guarantee of savings to the agency, and shall establish payment schedules reflecting such guarantee, taking into account any capital costs under the contract.

(C) Federal agencies may incur obligations pursuant to such contracts to finance energy conservation measures provided guaranteed savings exceed the debt service requirements.

(D) A Federal agency may enter into a multi-year contract under this subchapter for a period not to exceed 25 years beginning on the date of the delivery order, without funding of cancellation charges before cancellation, if—

(i) such contract was awarded in a competitive manner pursuant to subsection (b)(2), using procedures and methods established under this subchapter;

(ii) funds are available and adequate for payment of the costs of such contract for the first fiscal year; and

(iii) such contract is governed by part 17.1 of the Federal Acquisition Regulation promulgated under section 1303 of title 41 or the applicable rules promulgated under this subchapter.

(E) FUNDING OPTIONS.—In carrying out a contract under this subchapter, a Federal agency may use any combination of—

(i) appropriated funds; and

(ii) private financing under an energy savings performance contract.

(F) PROMOTION OF CONTRACTS.—In carrying out this section, a Federal agency shall not—

(i) establish a Federal agency policy that limits the maximum contract term under subparagraph (D) to a period shorter than 25 years; or

(ii) limit the total amount of obligations under energy savings performance contracts or other private financing of energy savings measures.

(G) MEASUREMENT AND VERIFICATION REQUIREMENTS FOR PRIVATE FINANCING.—

(i) IN GENERAL.—In the case of energy savings performance contracts, the evaluations and savings measurement and verification required under paragraphs (2) and (4) of section 8253(f) of this title shall be used by a Federal agency to meet the requirements for the need for energy audits, calculation of energy savings, and any other evaluation of costs and savings needed to implement the guarantee of savings under this section.

(ii) MODIFICATION OF EXISTING CONTRACTS.—Not later than 18 months after December 19, 2007, each Federal agency shall, to the maximum extent practicable, modify any indefinite delivery and indefinite quantity energy savings performance contracts, and other indefinite delivery and indefinite quantity contracts using private financing, to conform to the amendments made by subtitle B of title V of the Energy Independence and Security Act of 2007.

###### (b) Implementation

(1)(A) The Secretary, with the concurrence of the Federal Acquisition Regulatory Council established under section 1302(a) of title 41, not later than 180 days after October 24, 1992, shall, by rule, establish appropriate procedures and methods for use by Federal agencies to select, monitor, and terminate contracts with energy service contractors in accordance with laws governing Federal procurement that will achieve the intent of this section in a cost-effective manner. In developing such procedures and methods, the Secretary, with the concurrence of the Federal Acquisition Regulatory Council, shall determine which existing regulations are inconsistent with the intent of this section and shall formulate substitute regulations consistent with laws governing Federal procurement.

(B) The procedures and methods established pursuant to subparagraph (A) shall be the procedures and contracting methods for selection, by an agency, of a contractor to provide energy savings performance services. Such procedures and methods shall provide for the calculation of energy savings based on sound engineering and financial practices.

(2) The procedures and methods established pursuant to paragraph (1)(A) shall—

(A) allow the Secretary to—

(i) request statements of qualifications, which shall, at a minimum, include prior ex-

perience and capabilities of contractors to perform the proposed types of energy savings services and financial and performance information, from firms engaged in providing energy savings services; and

(ii) from the statements received, designate and prepare a list, with an update at least annually, of those firms that are qualified to provide energy savings services;

(B) require each agency to use the list prepared by the Secretary pursuant to subparagraph (A)(ii) unless the agency elects to develop an agency list of firms qualified to provide energy savings performance services using the same selection procedures and methods as are required of the Secretary in preparing such lists; and

(C) allow the head of each agency to—

(i) select firms from the list prepared pursuant to subparagraph (A)(ii) or the list prepared by the agency pursuant to subparagraph (B) to conduct discussions concerning a particular proposed energy savings project, including requesting a technical and price proposal from such selected firms for such project;

(ii) select from such firms the most qualified firm to provide energy savings services based on technical and price proposals and any other relevant information;

(iii) permit receipt of unsolicited proposals for energy savings performance contracting services from a firm that such agency has determined is qualified to provide such services under the procedures established pursuant to paragraph (1)(A), and require agency facility managers to place a notice in the Commerce Business Daily announcing they have received such a proposal and invite other similarly qualified firms to submit competing proposals; and

(iv) enter into an energy savings performance contract with a firm qualified under clause (iii), consistent with the procedures and methods established pursuant to paragraph (1)(A).

(3) A firm not designated as qualified to provide energy savings services under paragraph (2)(A)(i) or paragraph (2)(B) may request a review of such decision to be conducted in accordance with procedures to be developed by the board of contract appeals of the General Services Administration.

**(c) Task or delivery orders**

(1) The head of a Federal agency may issue a task or delivery order under an energy savings performance contract by—

(A) notifying all contractors that have received an award under such contract that the agency proposes to discuss energy savings performance services for some or all of its facilities and, following a reasonable period of time to provide a proposal in response to the notice, soliciting from such contractors the submission of expressions of interest in, and contractor qualifications for, performing site surveys or investigations and feasibility designs and studies, and including in the notice summary information concerning energy use for any fa-

cilities that the agency has specific interest in including in such task or delivery order;

(B) reviewing all expressions of interest and qualifications submitted pursuant to the notice under subparagraph (A);

(C) selecting two or more contractors (from among those reviewed under subparagraph (B)) to conduct discussions concerning the contractors' respective qualifications to implement potential energy conservation measures, including—

(i) requesting references and specific detailed examples with respect to similar efforts and the resulting energy savings of such similar efforts; and

(ii) requesting an explanation of how such similar efforts relate to the scope and content of the task or delivery order concerned;

(D) selecting and authorizing—

(i) more than one contractor (from among those selected under subparagraph (C)) to conduct site surveys, investigations, feasibility designs and studies, or similar assessments for the energy savings performance contract services (or for discrete portions of such services), for the purpose of allowing each such contractor to submit a firm, fixed-price proposal to implement specific energy conservation measures; or

(ii) one contractor (from among those selected under subparagraph (C)) to conduct a site survey, investigation, feasibility design and study, or similar assessment for the purpose of allowing the contractor to submit a firm, fixed-price proposal to implement specific energy conservation measures;

(E) providing a debriefing to any contractor not selected under subparagraph (D);

(F) negotiating a task or delivery order for energy savings performance contracting services with the contractor or contractors selected under subparagraph (D) based on the energy conservation measures identified; and

(G) issuing a task or delivery order for energy savings performance contracting services to such contractor or contractors.

(2) The issuance of a task or delivery order for energy savings performance contracting services pursuant to paragraph (1) is deemed to satisfy the task and delivery order competition requirements in section 2304c(d) of title 10 and section 4106(d) of title 41.

(3) The Secretary may issue guidance as necessary to agencies issuing task or delivery orders pursuant to paragraph (1).

(Pub. L. 95-619, title VIII, §801, as added Pub. L. 99-272, title VII, §7201(a), Apr. 7, 1986, 100 Stat. 142; amended Pub. L. 102-486, title I, §155(a), Oct. 24, 1992, 106 Stat. 2852; Pub. L. 104-106, div. E, title LVI, §5607(e), Feb. 10, 1996, 110 Stat. 702; Pub. L. 104-316, title I, §122(s), Oct. 19, 1996, 110 Stat. 3838; Pub. L. 105-388, §4(a), Nov. 13, 1998, 112 Stat. 3477; Pub. L. 106-291, title III, §335, Oct. 11, 2000, 114 Stat. 997; Pub. L. 106-469, title IV, §401, Nov. 9, 2000, 114 Stat. 2037; Pub. L. 108-375, div. A, title X, §1090(a), Oct. 28, 2004, 118 Stat. 2067; Pub. L. 109-58, title I, §105(a), Aug. 8, 2005, 119 Stat. 611; Pub. L. 110-140, title V, §§511(a), 512-514, Dec. 19, 2007, 121 Stat. 1658, 1659; Pub. L. 111-383, div. A, title VIII, §828(a), Jan. 7, 2011, 124 Stat. 4271.)

## REFERENCES IN TEXT

The Energy Independence and Security Act of 2007, referred to in subsec. (a)(2)(G)(ii), is Pub. L. 110-140, Dec. 19, 2007, 121 Stat. 1492. Subtitle B of title V of the Act enacted part A (§17131) of subchapter IV of chapter 152 of this title and amended this section and sections 8256, 8258, and 8287c of this title and section 2913 of Title 10, Armed Forces. For complete classification of this Act to the Code, see Short Title note set out under section 17001 of this title and Tables.

## CODIFICATION

The following substitutions were made on authority of Pub. L. 111-350, §6(c), Jan. 4, 2011, 124 Stat. 3854, which Act enacted Title 41, Public Contracts:

In subsec. (a)(2)(D)(iii), “section 1303 of title 41” substituted for “section 25 of the Office of Federal Procurement Policy Act (41 U.S.C. 421)”.

In subsec. (b)(1)(A), “section 1302(a) of title 41” substituted for “section 25(a) of the Office of Federal Procurement Policy Act”.

In subsec. (c)(2), “section 4106(d) of title 41” substituted for “section 303J(d) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253j(d))”.

## AMENDMENTS

2011—Subsec. (c), Pub. L. 111-383 added subsec. (c).

2007—Subsec. (a)(2)(D), Pub. L. 110-140, §513(1), inserted “beginning on the date of the delivery order” after “25 years” in introductory provisions.

Subsec. (a)(2)(D)(iii), (iv), Pub. L. 110-140, §511(a), re-designated cl. (iv) as (iii) and struck out former cl. (iii) which read as follows: “30 days before the award of any such contract that contains a clause setting forth a cancellation ceiling in excess of \$10,000,000, the head of such agency gives written notification of such proposed contract and of the proposed cancellation ceiling for such contract to the appropriate authorizing and appropriating committees of the Congress; and”.

Subsec. (a)(2)(E), Pub. L. 110-140, §512, added subpar. (E).

Subsec. (a)(2)(F), (G), Pub. L. 110-140, §513(2), added subpars. (F) and (G).

Subsec. (c), Pub. L. 110-140, §514, struck out subsec. (c). Text read as follows: “The authority to enter into new contracts under this section shall cease to be effective on October 1, 2016.”

2005—Subsec. (c), Pub. L. 109-58 substituted “2016” for “2006”.

2004—Subsec. (c), Pub. L. 108-375 substituted “2006” for “2003”.

2000—Subsec. (a)(2)(D)(iii), Pub. L. 106-291 and Pub. L. 106-469 amended cl. (iii) identically, substituting “\$10,000,000” for “\$750,000”.

1998—Subsec. (c), Pub. L. 105-388 substituted “on October 1, 2003” for “five years after the date procedures and methods are established under subsection (b)”.

1996—Subsec. (b)(3), Pub. L. 104-106 struck out at end “Procedures developed by the board of contract appeals under this paragraph shall be substantially equivalent to procedures established under section 759(f) of title 40.”

Subsec. (c), Pub. L. 104-316 struck out par. (1) designation before “The authority to” and struck out par. (2) which required Comptroller General of the United States to report annually for five years on implementation of this section, including an assessment of various energy issues.

1992—Pub. L. 102-486 inserted subsec. (a) designation and heading, designated existing provisions as par. (1), and added par. (2) and subsecs. (b) and (c).

## EFFECTIVE DATE OF 2011 AMENDMENT

Pub. L. 111-383, div. A, title VIII, §828(b), Jan. 7, 2011, 124 Stat. 4272, provided that: “The amendment made by subsection (a) [amending this section] is inapplicable to task or delivery orders issued before the date of enactment of this Act [Jan. 7, 2011].”

## EFFECTIVE DATE OF 2007 AMENDMENT

Amendment by Pub. L. 110-140 effective on the date that is 1 day after Dec. 19, 2007, see section 1601 of Pub. L. 110-140, set out as an Effective Date note under section 1824 of Title 2, The Congress.

## EFFECTIVE DATE OF 1996 AMENDMENT

Amendment by Pub. L. 104-106 effective 180 days after Feb. 10, 1996, see section 5701 of Pub. L. 104-106, Feb. 10, 1996, 110 Stat. 702.

ARCHITECT OF THE CAPITOL AS AGENCY ELECTING TO DEVELOP LIST OF FIRMS QUALIFIED TO PROVIDE ENERGY SAVING SERVICES AND AS AGENCY HEAD SELECTING FROM LIST

Pub. L. 103-211, title III, §402, Feb. 12, 1994, 108 Stat. 40, provided that: “The Architect of the Capitol shall be considered the agency for the purposes of the election in section 801(b)(2)(B) of the National Energy Conservation Policy Act [42 U.S.C. 8287(b)(2)(B)] and the head of the agency for purposes of subsection (b)(2)(C) of such section.”

## REVIEW

Pub. L. 108-375, div. A, title X, §1090(f), Oct. 28, 2004, 118 Stat. 2068, provided that: “Not later than 180 days after the date of the enactment of this Act [Oct. 28, 2004], the Secretary of Energy shall complete a review of the Energy Savings Performance Contract program to identify statutory, regulatory, and administrative obstacles that prevent Federal agencies from fully utilizing the program. In addition, this review shall identify all areas for increasing program flexibility and effectiveness, including audit and measurement verification requirements, accounting for energy use in determining savings, contracting requirements, including the identification of additional qualified contractors, and energy efficiency services covered. The Secretary shall report these findings to Congress and shall implement identified administrative and regulatory changes to increase program flexibility and effectiveness to the extent that such changes are consistent with statutory authority.”

## EXTENSION OF AUTHORITY

Pub. L. 109-58, title I, §105(b), Aug. 8, 2005, 119 Stat. 611, provided that: “Any energy savings performance contract entered into under section 801 of the National Energy Conservation Policy Act (42 U.S.C. 8287) after October 1, 2003, and before the date of enactment of this Act [Aug. 8, 2005], shall be considered to have been entered into under that section.”

Pub. L. 108-375, div. A, title X, §1090(g), Oct. 28, 2004, 118 Stat. 2068, provided that: “Any energy savings performance contract entered into under section 801 of the National Energy Conservation Policy Act (42 U.S.C. 8287) after October 1, 2003, and before the date of enactment of this Act [Oct. 28, 2004], shall be deemed to have been entered into pursuant to such section 801 as amended by subsection (a) of this section.”

## ENERGY EFFICIENCY INCENTIVE

Pub. L. 100-456, div. A, title VII, §736, Sept. 29, 1988, 102 Stat. 2006, as amended by Pub. L. 101-189, div. A, title III, §331, Nov. 29, 1989, 103 Stat. 1417, provided that:

“(a) ENERGY CONSERVATION INCENTIVE.—In order to provide additional incentive for the Secretary of a military department to enter into contracts under title VIII of the National Energy Conservation Policy Act (42 U.S.C. 8287 et seq.), the Secretary may use the energy cost savings realized by the United States during the first five years under any such contract in the manner provided in subsection (b). The amount of savings available for use under subsection (b) shall be determined as provided in subsection (c) and shall remain available for obligation until expended.

“(b) AUTHORIZED USES OF SAVINGS.—The energy cost savings realized by the United States in each of the first five years under a contract may be used as follows:

“(1) One-half of the amount of such savings may be used for the acquisition of energy conserving measures for military installations, and such measures may be in addition to any such energy conserving measures acquired for military installations under contracts entered into under title VIII of the National Energy Conservation Policy Act.

“(2) One-half of the amount of such savings may be used for any morale, welfare, or recreation facility or service that is normally provided with appropriated funds, or for any minor military construction project (as defined in section 2805(a) of title 10, United States Code), that will enhance the quality of life of members of the Armed Forces at the military installation at which the energy cost savings were realized.

“(c) DETERMINATION OF AMOUNT OF SAVINGS.—Not more than 90 days after the end of each of the first five years during which energy savings measures have been in operation under a contract entered into by the Secretary of a military department under title VIII of the National Energy Conservation Policy Act, the Secretary of the military department concerned shall determine the amount of energy cost savings realized by the United States under the terms of the contract during that year by reason of the energy savings measures acquired and installed at that installation pursuant to that contract.”

#### § 8287a. Payment of costs

Any amount paid by a Federal agency pursuant to any contract entered into under this subchapter may be paid only from funds appropriated or otherwise made available to the agency for fiscal year 1986 or any fiscal year thereafter for the payment of energy, water, or wastewater treatment expenses (and related operation and maintenance expenses).

(Pub. L. 95-619, title VIII, §802, as added Pub. L. 99-272, title VII, §7201(a), Apr. 7, 1986, 100 Stat. 142; amended Pub. L. 108-375, div. A, title X, §1090(b), Oct. 28, 2004, 118 Stat. 2067.)

#### AMENDMENTS

2004—Pub. L. 108-375 inserted “, water, or wastewater treatment” after “payment of energy”.

#### § 8287b. Reports

Each Federal agency shall periodically furnish the Secretary of Energy with full and complete information on its activities under this subchapter, and the Secretary shall include in the report submitted to Congress under section 8260<sup>1</sup> of this title a description of the progress made by each Federal agency in—

- (1) including the authority provided by this subchapter in its contracting practices; and
- (2) achieving energy savings under contracts entered into under this subchapter.

(Pub. L. 95-619, title VIII, §803, as added Pub. L. 99-272, title VII, §7201(a), Apr. 7, 1986, 100 Stat. 142.)

#### REFERENCES IN TEXT

Section 8260 of this title, referred to in text, was omitted in the general revision of part B (§8251 et seq.) of subchapter III of this chapter by Pub. L. 100-615, §2(a), Nov. 5, 1988, 102 Stat. 3185.

#### § 8287c. Definitions

For purposes of this subchapter, the following definitions apply:

(1) The term “Federal agency” means each authority of the Government of the United States, whether or not it is within or subject to review by another agency.

(2) The term “energy savings” means—

(A) a reduction in the cost of energy, water, or wastewater treatment, from a base cost established through a methodology set forth in the contract, used in an existing federally owned building or buildings or other federally owned facilities as a result of—

(i) the lease or purchase of operating equipment, improvements, altered operation and maintenance, or technical services;

(ii) the increased efficient use of existing energy sources by cogeneration or heat recovery, excluding any cogeneration process for other than a federally owned building or buildings or other federally owned facilities; or

(iii) the increased efficient use of existing water sources in either interior or exterior applications;

(B) the increased efficient use of an existing energy source by cogeneration or heat recovery;

(C) if otherwise authorized by Federal or State law (including regulations), the sale or transfer of electrical or thermal energy generated on-site from renewable energy sources or cogeneration, but in excess of Federal needs, to utilities or non-Federal energy users; and

(D) the increased efficient use of existing water sources in interior or exterior applications.

(3) The terms “energy savings contract” and “energy savings performance contract” mean a contract that provides for the performance of services for the design, acquisition, installation, testing, and, where appropriate, operation, maintenance, and repair, of an identified energy or water conservation measure or series of measures at 1 or more locations. Such contracts shall, with respect to an agency facility that is a public building (as such term is defined in section 3301 of title 40), be in compliance with the prospectus requirements and procedures of section 3307 of title 40.

(4) The term “energy or water conservation measure” means—

(A) an energy conservation measure, as defined in section 8259 of this title; or

(B) a water conservation measure that improves the efficiency of water use, is life-cycle cost-effective, and involves water conservation, water recycling or reuse, more efficient treatment of wastewater or stormwater, improvements in operation or maintenance efficiencies, retrofit activities, or other related activities, not at a Federal hydroelectric facility.

(Pub. L. 95-619, title VIII, §804, as added Pub. L. 99-272, title VII, §7201(a), Apr. 7, 1986, 100 Stat. 143; amended Pub. L. 102-486, title I, §155(b), Oct. 24, 1992, 106 Stat. 2855; Pub. L. 105-388, §4(b), Nov. 13, 1998, 112 Stat. 3477; Pub. L. 108-375, div. A, title X, §1090(c)-(e), Oct. 28, 2004, 118 Stat. 2067; Pub. L. 110-140, title V, §515, Dec. 19, 2007, 121 Stat. 1659.)

<sup>1</sup> See References in Text note below.