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Contracting for Renewable Energy Services P.L. 2008, c. 83

The recently enacted P.L. 2008, c. 83 amended provisions of the Local Public Contracts Law, the Public School Contracts Law, and the County College Contracts Law. The amendments grant those contracting units improved procedures to contract: 1) for energy improvements to public facilities (commonly known as “ESCO” contracts); and, 2) for installation of renewable energy programs owned by third parties (renewable); both changes permit contracts for up to 15 years.

The laws also require that whenever either of the projects are executed through a lease, the lease agreement must contain a clause making them subject to the availability and appropriation annually of sufficient funds as may be required to meet the extended obligation, or contain an annual cancellation clause.

Chapter 83 makes similar amendments to the three laws, and in the case of the Local Public and Public School Contracts Laws, permits the use of competitive contracting to enter into the contracts. The changes are as follows:

First, even with the adoption and immediate effective date of the law, **its provisions do not allow immediate action** by any of the covered contracting units. For both ESCO and renewable contracting, the law requires the Board of Public Utilities to promulgate guidelines to implement methodologies for computing the energy savings and generation costs.

Second, the revised the use of ESCO contracts for making energy improvements to public facilities that are paid for by energy savings. The law now permits the process to be used for “energy efficiency equipment or demand response equipment, including combined heat and power facilities.”

From the time the proposal was passed by the Legislature and then enacted by the Governor, discussions with the Board of Public Utilities, the Governor’s Office, and the Division of Local Government Services considered how the goals of the legislation would best be implemented and the benefits made available to contracting units.

At this time, the following actions are being taken:

1. The Board of Public Utilities is being asked to expedite the promulgation of guidelines that will implement the provisions of authorizing 15 year contracts for the installation of renewable energy production facilities. Commonly known as “power purchase agreements,” it is expected that these guidelines will take 2-3 months to authorize. **Until that time contracting units cannot use the provisions of the new law.** It is also anticipated that by the time the Board promulgates guidelines additional information on contracting for these services will be provided by State agencies.
2. It is expected that the Legislature will soon consider legislation to reform ESCO related laws. The changes should provide an improved process for all contracting units to take advantage of the principle of implementing energy conservation measures and paying for them with the savings from reduced energy use permitted by the improvements. It is hoped that these changes will be made by early next year. If this effort is not successful, regulatory action will be taken to clarify the types of projects that are eligible under the law.

Contracting for Renewable Energy Services, Energy Audits and BPU Grants

With the adoption of these laws and increasing interest in renewable energy, many contracting units are approaching, or may be approached by vendors offering their services to install solar panels or other improvements “at no cost” to the contracting unit. **Contracting officials should know that there is no circumstance under which these contracts can be entered into without a competitive process: competitive contracting or formal public bidding.** The Local Public and Public Schools Contracts Laws already allow competitive contracting for these services.

Officials should also be aware that when it comes to contracting for solar panels under power purchase agreements, there are a myriad of different circumstances, minimum standards, and pricing options that must be considered, as well the use of federal tax credits. Federal tax credits cannot be used by a government agency, but a private company granted a concession to install solar on a government facility, can use them to lower the cost of the installation below the cost that could be obtained if the government pays for the improvement by itself.

Other issues include the fact that the installation of solar panels by the government directly or through a vendor is considered a “public works activity” under state law, and thus requires prevailing wages and other public works related requirements to be followed for their installation. In many cases, the economics of installations may limit their use to facilities that can generate a minimum amount of energy.

Many local units want to implement energy savings practices. In most cases, the most prudent first step will be to conduct an energy audit to identify areas where and how energy can be saved. The BPU recently announced the [Local Government Energy Audit Program](#) a financial incentive program to encourage local units to conduct energy audits, including the use of a recently issued [State contract](#) for firms to conduct the audits.

Notwithstanding the BPU Local Government Energy Audit Program, local units should be aware that hiring energy audit firms requires competition. Energy audits do not fall under the professional services exception for bidding. Though they may be used, the performance of an energy audit does not require the use of a licensed engineer, architect or other professional that meets the definition of a professional service.

Energy auditing requires individuals with experience and knowledge of energy management, conservation, technology, and economics and, while an engineering license may be useful, the subject does not require the type of skills authorized as a professional service. Thus, while some of these individuals may be qualified by experience and training to conduct audits, energy audit contracts are not exempt from public bidding laws.

Recognizing that experience and expertise counts in contracting for energy audits, the Division is authorizing Competitive Contracting as a way to contract for energy audits under the Local Public Contracts Law and the Public School Contracts Law. Contracting agencies may want to review the [State contract](#) for energy audits as a starting point for audits conducted outside of the BPU program.

Consideration of energy conservation contracts must be thoughtful and deliberate. Entering into contracts under unwarranted pressure or an unnecessarily heightened sense of urgency may result in unanticipated long-term costs or unfavorable cost contracts. Over the next few months, local units will see additional initiatives from State government that will recognize and enhance the use of new contracting models and provide the necessary guidance to ensure contract integrity, reduced energy use, and cost savings that accrue from those actions.

Recipients of this Notice are asked to share it with appropriate local officials.

Approved: Susan Jacobucci, Director

Table of Web Links

Page	Shortcut text	Internet Address
1	P.L. 2008, c.83	http://www.njleg.state.nj.us/2008/Bills/PL08/83_.PDF
2	Local Government Energy Audit Program	http://www.njcleanenergy.com/commercial-industrial/programs/local-government-energy-audit/local-government-energy-audit
2	State contract	http://www.state.nj.us/treasury/purchase/noa/contracts/t2545.shtml
3	State contract	http://www.state.nj.us/treasury/purchase/noa/contracts/t2545.shtml

P.L. 2008, c. 83

Changes to the Text of the Laws

The Chapter Law made identical statutory changes to the Public School Contracts Law, the County College Contracts Law, and the Local Public Contracts Law. Existing sections relating to energy contracting were amended, and a new subsection for renewables was added. All three laws were also amended to add those sections to existing requirements for leasing at the end of each section.

The new sections read as follow:

N.J.S.A. 18A:18A-42(j); 18A:64A-25.28(i); and 40A:11-15(12):

The provision or performance of goods or services for the purpose of conserving energy through energy efficiency equipment or demand response equipment, including combined heat and power facilities, in, at, or adjacent to, buildings owned by any local board of education, the entire price of which shall be established as a percentage of the resultant savings in energy costs, for a term not to exceed 15 years; except that these contracts shall be entered into only subject to and in accordance with guidelines promulgated by the Board of Public Utilities establishing a methodology for computing energy cost savings. As used in this subsection, "combined heat and power facilities" means facilities designed to produce both heat and electricity from a single heat source;

The following sub-paragraph was added as 18A:18A-42(o); 18A:64A-25.28(q); and 40A:11-15(45)

The provision or performance of goods or services for the purpose of producing class I renewable energy {for LPCL only: "and class II renewable energy"}, as that term is defined in section 3 of P.L.1999, c.23 (C.48:3-51), at, or adjacent to, buildings owned by any local board of education, the entire price of which is to be established as a percentage of the resultant savings in energy costs, for a term not to exceed 15 years; provided, however, that these contracts shall be entered into only subject to and in accordance with guidelines promulgated by the Board of Public Utilities establishing a methodology for computing energy cost savings and energy generation costs.