

WELCOME

This edition of AHC's Client Alert is dedicated to public owners and a new Georgia law that promotes their green initiatives. Public owners that desire to make their facilities more energy efficient will not only reap the intangible benefits of going green, they will also find that the new law addresses a budget-neutral mechanism to finance such projects. We hope you enjoy this edition of AHC's Client Alert. If you have any comments or questions, please feel free to contact the attorneys in our construction law group. You can view our website and other resources at www.ahclaw.com.

THE GUARANTEED ENERGY SAVINGS PERFORMANCE CONTRACTING ACT

Georgia voters have spoken, and they want a more efficient government – at least with respect to energy consumption. Senate Bill 194, in conjunction with a successful constitutional amendment, enacted the Guaranteed Energy Savings Performance Contracting Act (the "GESPC Act"), which expressly authorizes state and local governments to enter into multi-year contracts for "energy conservation measures." The best part is that energy savings performance ("ESP") contracts are funded entirely by energy savings. Thus, they are a budget-neutral method of making governmental facilities operate more efficiently and environmentally friendly.

A) What Does the GESPC Act Do?

The Georgia constitution has been interpreted to prohibit multi-year public contracts that create future unfunded obligations. This restriction caused problems for governmental entities that sought long-term solutions to achieve energy efficiency. For instance, before the new law passed, many would have argued that an energy-efficiency project that obligated funds beyond the current fiscal year violated the Georgia constitution. To end the debate on this issue, the GESPC Act, along with the constitutional amendment, now permits state and local governments to enter into multi-year ESP contracts.

B) What is an ESP Contract?

An ESP contract is simply an arrangement in which an ESP contractor (sometimes called an ESCo) performs or installs certain energy-savings measures in a facility to achieve a set amount of energy and cost savings. Qualifying measures include programs, facility alterations, or technology upgrades that reduce the consumption of energy, water, or wastewater, or reduce operating costs. Examples include:

- Renewable energy generation;
- Geothermal HVAC systems;
- Insulation, caulking, and weather stripping;
- Storm doors and windows;
- Automated computer energy control systems;
- HVAC modifications or replacement;
- Lighting upgrades;
- Energy-savings training program;
- Demand reduction and load shifting;
- Energy information and control systems;
- Indoor air quality improvements; and
- Daylight system

C) How Do ESP Contracts Work?

An ESP contractor evaluates a governmental facility and installs or performs certain energy-saving measures. The ESP contractor also guarantees that the measures will result in a minimum amount of cost savings or revenue increase, and that the savings or revenue increase will meet or exceed the annual contract payments for the life of the contract. Typically the contract price is financed through lease-purchase agreements, which are expressly authorized by the GESPC Act.

The measures result in a set level of savings that reduce the government's operating cost (or increase its revenue). At first the government uses the savings as necessary to pay the ESP contract costs. Eventually, when the payment obligations are satisfied, the government will reap the benefits from permanent energy savings. The result is that all capital costs to the government are financed by the ESP contractor or a third party.

D) What Other Issues Arise With ESP Contracts?

As any public contract, ESP contracts should be carefully drafted. Various other rules may apply, depending on the type of governmental entity. A few points are worth considering in connection with any energy-savings project:

- Applicability of GESPC Act: Governmental entities must first consider whether the project is subject to the Act. Certain projects that are related to energy savings might be subject to the Act even if they are incidentally related to energy savings. The statute should be considered with regard to any public contract.
- Procurement and Award: The GESPC Act provides that governmental entities may award the contract in accordance with its provisions or another applicable statutory system. The procedures under the GESPC Act permit GEFA to issue a list of pre-qualified ESP contractors. State agencies must issue a request for proposal to at least three ESP contractors on the GEFA list. The government will select the ESP contractor that "best meets the needs of the governmental unit," which need not be the contractor with the lowest cost. A list of factors is provided in the Act.
- Mandatory Contract Provisions: The GESPC Act requires certain provisions in the ESP contract, such as provisions concerning annual reconciliation of savings, liability of the contractor for any deficiency, required guaranty for any deficiency, and measurement and verification requirements.
- Reporting Obligations: Upon execution, the governmental entity must notify its utility providers of the energy-saving measures. In addition, it must publish an annual list of ESP contracts signed during each year.
- Payment and Performance Bonds: Governments should also consider whether payment and performance bonds are required or are simply preferable. The GESPC Act permits the government to require payment and performance bonds for the contract amount.



OTHER PUBLIC OWNER ARTICLES

Read other articles concerning construction issues that affect public owners and others in the construction industry at our [Newsletter Archives](#). For example, public owners may find the following articles of interest.

- [Owners and Contractors Beware: Policy Endorsement Diminishes Commercial General Liability Coverage for Defective Construction](#).

- [SB 447 For Public Owners: New Legislation Affects Public Owners Local Government Requests For Proposals](#).

For additional information on green energy incentives and financing alternatives, visit AHC's [Resources](#) page.

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