

## Introductory Memorandum and Model State Legislation for Guaranteed Conservation Performance Contracting

*This document has been prepared as part of the implementation project of Legal Pathways to Deep Decarbonization (Michael B. Gerrard and John C. Dernbach, eds. Environmental Law Institute [2019]) (LPDD). For background information on the project, see <https://lpdd.org>*

### **Introductory Memorandum**

Pursuant to Legal Pathways to Deep Decarbonization Chapter 6 (“Financing at the Grid Edge”), we are providing a model state law for conservation – energy, environment, and water – performance contracting.<sup>1</sup>

Employing energy-efficiency retrofits can improve the energy-efficiency of existing buildings by approximately 30-50%. One model for financing and installing such retrofits is the guaranteed energy savings agreement (also sometimes called an energy performance contract). Pursuant to such contracts, energy service companies (ESCOs) install retrofits to buildings and contractually guarantee energy, water, and sometimes other environmental savings over time, and the savings often exceed the cost of the upgrades.

While private entities already may have the financial and social incentives to upgrade existing buildings with energy-efficient retrofits, government entities face a procurement challenge. Because public owners must finance retrofits on the front end, they cannot take advantage of the performance contracting model unless enabling procurement legislation is in place.

The model legislation set forth below makes a variety of suggested improvements as compared to existing legislation. The proposed model state law authorizes public entities to enter into Guaranteed Conservation Performance Contracts which address a broad range of energy, water, and environmental improvements. The model legislation was prepared based on various existing procurement laws from several states. It will be a good starting point for states that wish to implement new, update, or broaden existing laws.

### **Model State Legislation**

#### **Section 1 – Short Title; Declaration of Policy**

- (a) This [subchapter] shall be known and may be cited as the “Guaranteed Conservation Performance Contracting Act”.
- (b) The [legislative body] finds that investment in energy, environment, and water conservation measures in Governmental Unit facilities can reduce the amount of energy and water consumed, produce immediate and long-term savings, and reduce greenhouse gas (GHG) emissions. It is the policy of this [State] to encourage Governmental Units to

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<sup>1</sup> This document was drafted principally by Mark Riedy, Siegmund Pohl, and Dongyu “Eddie” Wang of Kilpatrick Townsend & Stockton, LLP for peer review by the Sabin Center. Guaranteed Conservation Performance Contracting, as provided in this model state legislation, addresses energy, environment, and water as measures of conservation.

invest in energy, environment, and water conservation measures that reduce energy and water consumption, produce a cost savings for the Governmental Unit, reduce GHG emissions, and/or improve the quality of indoor air in public facilities and to operate, maintain, and when economically feasible, build or renovate existing Governmental Unit facilities in such a manner as to minimize energy and water consumption, maximize energy and water savings, and reduce GHG emissions. Such investments will result in the creation of new jobs and economic development, along with the reduction in government and societal costs such as healthcare expenses from air pollution.

## **Section 2 – Definitions**

The following words and phrases when used in this subchapter shall have the meanings given to them in this section unless the context clearly indicates otherwise:

“Contractor” - A Qualified Provider selected by a Governmental Unit pursuant to Section 3 of this statute.

“Conservation Measure” or “CM” - Any measure that improves Facility conservation performance by reductions in energy or water use, or reducing wastewater, stormwater, air emissions (including GHG emissions), ground or groundwater contamination, or solid waste, so as, together with other CMs, to produce Operating Cost Savings or Increase Functionally-Related Net Revenues for the Government Unit, including without limitation:

- (a) Improvements to buildings and building or building systems:
  - (1) Insulation of the building structure or systems within the building.
  - (2) Storm windows or doors, caulking or weather stripping, multi-glazed windows or doors, heat-absorbing or heat-reflective glazed and coated window or door systems, additional glazing, reductions in glass area or other window and door system modifications that reduce energy consumption.
  - (3) Heating, ventilating or air-conditioning system modifications or replacements.
  - (4) Replacement or modification of lighting fixtures to increase the energy efficiency of the lighting system.
  - (5) Facility alterations that are required to properly implement other CMs.
  - (6) Indoor air quality improvements.
  - (7) Day-lighting systems.
  - (8) Reduction of airborne contaminants, including pathogens.
- (b) Energy generation, distribution, and storage:
  - (1) Energy recovery systems.
  - (2) Systems that produce thermal energy as well as electricity, for use within a building or complex of buildings.
  - (3) Energy or water conservation measures that provide Operating Cost Savings or Increased Functionally-Related Net Revenues based on life-cycle cost analysis.
  - (4) Renewable energy systems, such as solar, biomass or wind systems and/or other on-site distributed power generation systems including fuel cells.
  - (5) Storage systems, such as thermal storage, and battery storage.
- (c) Other environmental systems:

- (1) Stormwater retention and reduction systems.
- (2) Water and sewer conservation measures, including, without limitation, plumbing fixtures and infrastructure.
- (d) Maintenance and repair cost reductions:
  - (1) Programs to reduce energy costs through rate adjustments, load shifting to reduce peak demand, and/or use of alternative energy suppliers, such as, but not limited to: (i) changes to more favorable rate schedules; (ii) negotiation of lower rates, same supplier or new suppliers, where applicable; and (iii) auditing of energy service billing and meters.
  - (2) Other energy, environment, water or wastewater measures as may provide measurable, long-term Operating Costs Savings or billable revenue increases.
- (e) Controls:
  - (1) Automated or computerized energy control systems.
  - (2) Installation of energy information and control systems that monitor consumption, redirect systems to optimal energy sources, and manage energy-using equipment.
  - (3) Equipment upgrades that improve accuracy of billable revenue generating systems.
  - (4) Automated, electronic or remotely controlled systems or measures that reduce operating costs.
- (f) Training and behavior modification:
  - (1) Training programs or Facility alterations that reduce energy consumption or produce Operating Cost Savings based on (i) future reductions in labor costs or costs for contracted services or (ii) changes in the behavior of building users.

“Facility” – Any real property (including leases and easements) of a Governmental Unit including buildings, other structures, equipment, and systems located on or appurtenant to such property, including streetlights.

“Increased Functionally-Related Net Revenues” – Increased net revenues resulting from increased output or fee-based usage in connection with the implementation of CMs.

“Guaranteed Conservation Performance Contract” or “GCPC” - A contract between a Governmental Unit and a Contractor for the evaluation, recommendation, and implementation of CMs, including power purchase agreements, other fuel or utility purchase arrangements, and energy, environment, and water savings as service agreements. GCPCs shall include, at a minimum:

- (1) The design and installation of equipment to implement one or more CMs and, if applicable, operation and maintenance of such measures;
- (2) That the amount of guaranteed savings must be equal to or greater than the total annual contract payments made by the contracting Governmental Unit for the GCPC; and
- (3) The finance charges incurred by the Governmental Unit over the life of the GCPC.

“Governmental Unit” – Any officer, employee, authority, board, bureau, commission, department, agency or institution of a government agency, including, but not limited to, any [State] agency, state-aided institution or any county, city, district, municipal corporation, municipality, municipal authority, political subdivision, school district, educational institution, borough, incorporated town, township, poor district, county institution district, other incorporated district or other public instrumentality which has the authority to contract for the construction, reconstruction, alteration or repair of any public building or other public work or public improvement, including, but not limited to, highway work.

“Industry Engineering Standards” - Industry Engineering Standards may include the following:

- (1) Life cycle costing.
- (2) The R.S. Means estimated method developed by the R.S. Means Company.
- (3) Historical data.
- (4) Manufacturer's data.
- (5) American Society of Heating, Refrigeration, and Air-Conditioning Engineers (ASHRAE) standards.

“Operating Cost Savings” - Any saving that results from implementing a CM, including, but not limited to:

- (1) Reductions in energy, environment, and water expenses;
- (2) Reductions in charges for wastewater, stormwater, waste disposal or other emissions such as GHG emissions;
- (3) Reductions in repair and maintenance costs; and
- (4) Cost savings as a result of avoided current or planned capital expenses, including costs avoided as a result of replacing old and/or unreliable equipment and systems.

“Qualified Provider” - A person or business which is responsible and capable of evaluating, recommending, designing, implementing, and installing CMs as determined by the Governmental Unit’s own inquiry or investigation, or in reliance on lists of qualified contractors maintained by other government entities or independent evaluators.

### **Section 3 – Procurement**

- (a) A Governmental Unit may enter into a GCPC with a Qualified Provider to produce Operating Cost Savings or Increased Functionally-Related Net Revenues, including reduction of energy, environment, water, or other operational costs of a Governmental Unit Facility through one or more CMs. Work to implement CMs shall comply with state or local building codes.
- (b) A Governmental Unit may enter into a GCPC structured as an installment payment contract or lease-purchase agreement for the purchase and installation of cost-saving measures. GCPCs may be financed by arrangements including, without limitation, tax-exempt financings, leases, loan agreements, or other installment payment arrangement, whether included as installment payments in the GCPC, under a separate agreement with the Contractor or an affiliate, or from an independent third party. However, the term of any such financing shall not exceed the term of the GCPC.

- (c) A Governmental Unit may require that each preliminarily selected Qualified Provider prepare a preliminary audit that estimates the savings of each proposed CM. A Governmental Unit may enter into a GCPC with a Qualified Provider if the Governmental Unit finds that the amount the Governmental Unit would spend on the CMs will not exceed the amount to be saved in energy, environment, water, and operational costs for up to [35<sup>2</sup>] years from the date of installation.
- (d) Notwithstanding any state or local law to the contrary, a Governmental Unit may select a Contractor pursuant to the procedure set forth in this Guaranteed Conservation Performance Contracting Act. A Governmental Unit may also utilize any other available procurement procedure available under state or local law.
- (e) The Contractor shall prepare an investment grade audit (IGA) that specifies the pricing and guaranteed savings for each proposed CM. If the IGA offers a guaranteed savings not materially less than those estimated in the preliminary audit, such IGA, upon acceptance, shall be part of the final GCPC which shall be executed with the Governmental Unit. Notwithstanding the foregoing, if after preparation of the IGA, the Governmental Unit decides not to execute a performance contract, then the costs incurred in preparing such IGA (or other contractually agreed termination fee) shall be paid to the Contractor by the Governmental Unit, otherwise the costs of the IGA shall be deemed part of the costs of the GCPC.
- (f) Simultaneous with the execution of a contract for CMs, the Governmental Unit shall require the Contractor to provide a payment and performance bond relating to the installation of CMs in the amount equal to 100% of the value of the GCPC.
- (g) Where appropriate, Governmental Units shall determine cost-effectiveness based on the life-cycle costs of combinations of conservation measures, particularly to encourage, but not limit projects to, bundling of energy efficiency projects with onsite generation and renewable energy projects.

#### **Section 4 – Contract Terms**

- (a) General rule -- A GCPC may provide that all payments, except obligations on termination of the contract before its scheduled expiration, shall be made over a period of time. Every GCPC that requires payments over a period of time shall provide that, after the initial year of the contract, the savings in every subsequent year are guaranteed to the extent necessary to make payments under the contract during that year.
- (b) Written guarantee – A GCPC shall include a written guarantee that savings will meet or exceed the cost of the CMs to be evaluated, recommended, designed, implemented or installed under the contract. Such written guarantee shall provide for reimbursement to the Governmental Unit for any shortfall amounts. Methods for measurement and verification of energy savings, including monitoring and reporting, shall conform to the most recent standards established by the International Measurement and Verification Protocol.
- (c) Payments – A GCPC may provide for payments over a period of time, not to exceed [35] years, and for the evaluation, recommendation, design, implementation, and installation of CMs on an installment payment or lease purchase basis.

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<sup>2</sup> Legislatures should endeavor to set this cap as high as possible, ideally at least 25 years given the nature of certain CMs.

- (d) Contract Term - Notwithstanding any other provision of law, a Governmental Unit may enter into a GCPC for up to [\_\_\_\_] years.<sup>3</sup>
- (e) Improvements not causally connected to a CM – An improvement that is not causally connected to a CM may be included in a GCPC if:
  - (1) The total value of the improvement does not exceed 15% of the total value of the GCPC; and
  - (2) Either:
    - i. The improvement is necessary to conform to a law, a rule or an ordinance; or
    - ii. An analysis provided to the Governmental Unit demonstrates that there is an economic advantage to the Governmental Unit implementing an improvement as part of the GCPC; and the savings justification for the improvement is documented by Industry Engineering Standards.
- (f) GCPCs may not include improvements or equipment that allow or cause water from any condensing, cooling, or industrial process or any system of nonpotable usage over which public water supply system officials do not have sanitary control to be returned to the potable water supply.
- (g) Other expenditures – A Facility alteration which includes expenditures that are required to properly implement other CMs may be included as part of a GCPC. In such case, notwithstanding any other provision of law, a Governmental Unit may procure such alterations under this Guaranteed Conservation Performance Contracting Act to be performed by the Contractor.

## **Section 5 – Appropriation**

- (a) General rule -- GCPCs which have terms which extend beyond one fiscal year of the Governmental Unit must include a provision which allows the Governmental Unit to terminate the contract if in any fiscal year during the term of the contract the Governmental Unit does not receive sufficient funds in its annual appropriations to make the payments required under the contract.<sup>4</sup> [No obligation of the [State or] Governmental Unit under a GCPC shall constitute or create a debt of the [State or] Governmental Unit nor a tax supported obligation or a bond or a note of the [State or] Governmental Unit.]
- (b) Funds -- A Governmental Unit may use funds designated for operating, utilities, or capital expenditures for any GCPC, including, without limitation, for purchases on an installment payment or lease purchase basis.
- (c) Grants, subsidies or other payments – Appropriations, grants, subsidies, or other payments from the [State] and/or other governmental entities to a Governmental Unit shall not be reduced as a result of energy savings obtained as a result of GCPCs during the life of the contract.<sup>5</sup>

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<sup>3</sup> This provision is intended to exempt GCPCs from other provisions of law which restrict the term of public contracts. Each state should select a term greater than the local state term restrictions if such restrictions would not allow for sufficiently long GCPCs.

<sup>4</sup> An “appropriations” requirement may result in lower credit ratings and/or higher interest rates. States may have restrictions on debt – consider replacing this section with the language in brackets, revising to reference any such state restrictions, as GCPCs explicitly finance projects with cost-savings.

<sup>5</sup> This provision is intended to reward and incentivize Governmental Units to maximize usage of GCPCs by preventing reductions of funding due to savings.