



**House
Legislative
Analysis
Section**

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SCHOOL ENERGY CONTRACTS

House Bill 4634

Sponsor: Rep. William R. Keith

Committee: Education

Complete to 5-6-93

A SUMMARY OF HOUSE BILL 4634 AS INTRODUCED 4-23-93

The bill would amend the School Code to govern the use by school districts of performance-based contracts for energy conservation projects. Districts, including intermediate districts and consortiums of districts, would be able to enter into such contracts or packages of contracts without obtaining competitive proposals if they chose to. If they did obtain competitive proposals, they would be permitted to negotiate with those making proposals after the proposals were opened, and changes could be made to a proposal before a contract was awarded. The provisions of the bill would supersede those in the School Code that require competitive bidding for projects above certain dollar amounts. (Districts could still choose to use traditional competitive bidding methods in awarding energy conservation contracts.)

The bill would apply to performance-based contracts for energy conservation measures. The term "energy conservation measures" would mean goods and services to reduce energy consumption or operating costs of school facilities and includes insulation; window and door modifications; automatic energy control systems, including licenses for computer software; heating, ventilation, and air-conditioning systems, modifications, or replacements; energy-efficient lighting systems; energy recovery systems; and cogeneration systems that produce energy for the private use of a school district or consortium. The term "performance-based contract" would refer to an agreement under which energy conservation measures are provided to a school district or consortium of districts and the provider guarantees specific levels of comfort and guarantees that the total costs for project design, equipment, servicing, and financing will not exceed the savings realized over the term of the agreement. The board of a school district, intermediate school district, local act school district, or a consortium consisting of any of those could enter into such contracts. The board of an intermediate district could enter into such a contract on its own behalf or on the behalf of one or more of its constituent school districts at their request.

Contract Requirements. If a district wanted to be able to enter into an energy conservation contract without obtaining competitive proposals it would first have to obtain from the Michigan Public Service Commission (PSC), no earlier than a year before entering the contract, a list of potential energy service providers developed by the PSC. Whether competitive proposals were sought or not, a contract would have to meet the following criteria:

-- The contract would have to cover a period of no more than ten years after the completion of installation.

House Bill 4634 (5-6-93)

-- The contract would have to contain a written guarantee of a specific minimum amount of money to be saved in energy costs, including electrical, gas, and other utility costs, and a written guarantee by the provider to perform necessary services to ensure that at least those savings were realized. A similar guarantee would be required for operating costs.

-- The provider would have to file with the board or consortium a performance bond, insurance policy, or other acceptable guaranty instrument guaranteeing the faithful execution of the contract in an amount at least equal to 110 per cent of the savings guarantee and to be effective at least for the term of the guarantee. An additional instrument could be required for the installation of energy conservation measures.

-- The provider would have to agree to monitor the results of conservation measures.

A board or consortium, before it could enter into a contract, would have to make a finding that the amount spent on the measures would not exceed the amount guaranteed to be saved and that the district's or consortium's contractual obligation in any one year of the contract would not exceed 95 percent of the annual savings guarantee specified in the contracts. In making these findings, a board or consortium would have to consider all costs of the energy conservation measures, including costs of design, engineering, installation, maintenance, repairs, operations, and debt service. A contract or package of contracts could include a lease with an option to buy if the lease term did not exceed ten years and the contract met federal tax requirements for tax-exempt municipal leasing or long-term financing.

Regardless of whether competitive proposals were sought, contracts would have to comply with the prevailing wage provisions of Public Act 166 of 1965 as if the provider were selected by competitive bidding (for contracts exceeding the \$12,500 competitive bidding threshold). For a first class school district (i.e., Detroit), if the district entered into a performance-based contract for which it obtained competitive proposals, the contract would have to comply with prevailing wage requirements of P.A. 166 as if the provider were selected by competitive bidding.

Competitive Proposals. If a school board or consortium chose to obtain competitive proposals, it would be required to advertise and specify in the notice the relative importance of guaranteed savings, price, financial performance and stability, quality, technical ability, experience, and other factors to be used in evaluating proposals and those making the proposals. The notice would have to state whether or not the proposals were subject to negotiation. (Only if the notice said the proposals would be subject to negotiation could they be subject to negotiation.) The contract would have to be awarded based on savings guarantees and the evaluation factors specified in the proposal notice.

A board or consortium could, with the proper notice, negotiate with those making proposals after the proposals had been opened and could allow proposal revisions before a contract was awarded. If provided for in the notice, proposals would be opened so as to avoid disclosure of trade secrets to competitors during negotiations. All proposals would be open for public inspection after the contract was awarded, although districts could enter

into software licensing agreements and nondisclosure agreements to protect a provider's computer software or trade secrets. Then such software or trade secrets would not be open for public inspection and would be exempt from the Freedom of Information Act. The term "trade secret" is defined in the bill as a confidential formula, pattern, device, or compilation of information used in the provider's business that gives the provider an opportunity to obtain advantage over competitors who do not know or use it.

Similar provisions would apply to cases where competitive bids were not obtained (so-called sole sourcing). All information provided to the board or consortium would be open for public inspection after the contract had been awarded, but as above, there could be software and nondisclosure agreements.

The bill says a board or consortium could pay for energy conservation contracts from operating funds of the district or districts or from the proceeds of bonds or notes issued for energy conservation measures. Bonds issued for purposes authorized by the bill would be considered as issued for capital expenditures for all purposes, including for purposes of the state-loans-to-school-district provisions in the state constitution.

Public Service Commission List. The bill would require the Public Service Commission (PSC) to develop and maintain a list of potential providers that would be made available to school districts that desired to enter into energy conservation contracts without seeking competitive proposals. The bill specifies that the list would be intended for use only for informational purposes and would have to contain a disclaimer that a provider's appearance on the list was not an indication of competence. The PSC would not be liable for inaccuracies in the list. The PSC would have to determine the specific energy conservation measures that were part of performance-based contracts and indicate for each measure which providers were willing to provide it. The commission would also be required to establish and implement procedures for including in the list all potential providers who want to be in the list; for adding providers to the list and amending the list to update which services providers can perform; and for making the list available to anyone upon request. A provider who did not request at least once every 24 months to be kept on the list would be automatically removed.

MCL 380.623a et al.