

BILL ANALYSIS

C.S.S.B. 831
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Regulated Industries
Committee Report (Substituted)

BACKGROUND AND PURPOSE

An energy savings performance contract (performance contract) allows a political subdivision, public school, public college or university, or state agency to use the guaranteed benefits from enhanced energy or water conservation or usage improvements to pay for the same. Such contracts are used by public entities across the state. Under current law, there is an apparent conflict in the performance contract statutory language. Chapter 302, Local Government Code, expressly includes metering equipment among permissible performance contract improvements. However, the overarching definition of performance contract requires that performance contracting improvements be paid for through increased savings rather than the increased revenue capture that results from more accurate utility meters, which is inconsistent in the manner meters provide benefits. In addition, periodic reviews are not currently required to be conducted by independent professional engineers to ensure that the increase in metering equipment accuracy is equal to or exceeds the provider's guarantee.

Also, other state laws on performance contracts currently have a 15-year maximum term, which can be too short to allow public entities an opportunity to finance larger pay-for-themselves energy or water savings or usage projects. For this reason, the majority of states have increased the maximum term for such contracts to 20 years. In addition, the current statutory language does not require engineers to have experience in energy calculation and review.

C.S.S.B. 831 defines and redefines the statutory terms in Chapter 302, Local Government Code, related to performance contracts to include increased revenue capture resulting from more accurate water, electricity, and other utility metering equipment. This bill also amends Chapter 302, Local Government Code, to require the equipment's accuracy to be reviewed periodically by an independent professional engineer.

Furthermore, this bill extends the maximum duration of performance contracts from 15 years to 20 years from the final date of installation or the average useful life of the energy or water conservation or usage measures. This bill requires professional engineers who review performance contracts to have a minimum of three years of experience in energy calculation and review, is not an officer or employee of an offeror for the contract under review, and is not otherwise associated with the performance contract under review. According to this bill, in conducting the review, the engineer shall focus primarily on the proposed improvements from an engineering perspective, the methodology and calculations related to cost savings, increases in revenue, and, if applicable, efficiency or accuracy of metering equipment. This bill explains meter guarantees applicable to energy savings performance contracts in Chapter 302, Local Government Code. Finally, the bill clarifies how meter and metering services may be provided on a competitive basis as part of an energy savings performance contract for a non-residential customer.

RULEMAKING AUTHORITY

This bill does not expressly grant any additional rulemaking authority to a state officer, institution, or agency.

ANALYSIS

C.S.S.B. 831 amends Sections 44.901, Education Code, to authorize an energy savings performance contract (performance contract) to be financed under a lease/purchase contract not to exceed 20, rather than 15, years from the final date of installation and that meets federal tax

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requirements for tax-free municipal leasing or long-term financing. The bill authorizes a performance contract to be financed under a contract with the provider of the energy or water conservation measures that has a term not to exceed the lesser of 20 years from the final date of installation or the average useful life of the energy or water conservation or usage measures, rather than 15 years from the final date of installation. Requires the board of trustees of a school district, before entering into a performance contract, to require that the cost savings projected by an offeror be reviewed by a licensed professional engineer who has a minimum of three years of experience in energy calculation and review, is not an officer or employee of an offeror for the contract under review, and is not otherwise associated with the contract. Requires the engineer, in conducting the review, to focus primarily on the proposed improvements from an engineering perspective, the methodology and calculations related to cost savings, increases in revenue, and, if applicable, efficiency or accuracy of metering equipment.

The bill amends 51.927, Education Code, by authorizing the governing board of an institution of higher education (board) to enter into a performance contract for a period of more than one year only if the board finds that the amount the institution would spend on the energy or water conservation measures will not exceed the amount to be saved in energy, water, wastewater, and operating costs over 20, rather than 15, years from the date of installation. Authorizes a performance contract with respect to existing buildings or facilities to be financed under a lease/purchase contract not to exceed 20, rather than 15, years from the final date of installation and that meets federal tax requirements for tax-free municipal leasing or long-term financing, including a lease/purchase contract under the master equipment lease purchase program administered by the Texas Public Finance Authority under Chapter 1232. The bill authorizes a performance contract to be financed under a contract with the provider of the energy or water conservation measures that has a term not to exceed the lesser of 20 years from the final date of installation or the average useful life of the energy or water conservation or usage measures, rather than 15 years from the final date of installation. Requires the guidelines established by the Texas Higher Education Coordinating Board, in consultation with the State Energy Conservation Office (conservation office), for awarding performance contracts, to require that the cost savings projected by an offeror be reviewed by a licensed professional engineer who has a minimum of three years of experience in energy calculation and review, is not an officer or employee of an offeror for the contract under review, and is not otherwise associated with the contract. Requires the engineer, in conducting the review, to focus primarily on the proposed improvements from an engineering perspective, the methodology and calculations related to cost savings, increases in revenue, and, if applicable, efficiency or accuracy of metering equipment.

The bill amends Section 2166.406, Government Code, by authorizing a state agency to enter into a performance contract for a period of more than one year only if the state agency finds that the amount the state agency would spend on the energy or water conservation measures will not exceed the amount to be saved in energy, water, wastewater, and operating costs over 20, rather than 15, years from the date of installation. Authorizes a performance contract with respect to existing buildings or facilities to be financed under a lease/purchase contract not to exceed 20, rather than 15, years from the final date of installation and that meets federal tax requirements for tax-free municipal leasing or long-term financing, including a lease/purchase contract under the master equipment lease purchase program administered by the Texas Public Finance Authority under Chapter 1232. Authorizes a performance contract to be financed under a contract with the provider of the energy or water conservation measures that has a term not to exceed the lesser of 20 years from the final date of installation or the average useful life of the energy or water conservation or usage measures, rather than 15 years from the final date of installation. Requires the guidelines adopted by the conservation office for awarding performance contracts to require that the cost savings projected by an offeror be reviewed by a licensed professional engineer who has a minimum of three years of experience in energy calculation and review, is not an officer or employee of an offeror for the contract under review, and is not otherwise associated with the contract. Requires the engineer, in conducting the review, to focus primarily on the proposed improvements from an engineering perspective, the methodology and calculations related to cost savings, increases in revenue, and, if applicable, efficiency or accuracy of metering equipment.

The bill amends Section 302.001, Local Government Code, to define "baseline", "energy or water conservation or usage measures", "energy savings", "guarantee", "increase in billable

revenues", "increase in meter accuracy", "meter guarantee", and "provider". The bill redefines "energy savings performance contract".

The bill amends Section 302.002, Local Government Code, to include each energy or water usage measure as required to comply with current local, state, and federal construction, plumbing, and environmental codes and regulations. Prohibits a performance contract from including 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, notwithstanding Section 302.001, rather than any provision of Section 302.001(1).

The bill amends Section 302.003, Local Government Code, to require the governing body of a local government, before entering into a performance contract, to require the provider of the energy or water usage measures to file with the governing body a payment and performance bond relating to the installation of the measures in accordance with Chapter 2253 (Public Work Performance and Payment Bonds), Government Code, notwithstanding any other law. Authorizes the governing body of the local government to also require a separate bond to cover the value of the guarantee, rather than the guaranteed savings on the contract.

The bill amends Section 302.004, Local Government Code, to authorize a performance contract to be financed under a lease/purchase contract not to exceed 20, rather than 15, years from the final date of installation and that meets federal tax requirements for tax-free municipal leasing or long-term financing. The bill authorizes a performance contract to be financed under a contract with the provider of the energy or water conservation or usage measures that has a term not to exceed the lesser of 20 years from the final date of installation or the average useful life of the energy or water conservation or usage measures, rather than 15 years from the final date of installation. Requires a performance contract to contain provisions requiring the provider of the energy or water conservation or usage measures to provide a guarantee, rather than requiring the provider of the energy or water conservation measures to guarantee the amount of the savings to be realized by the local government under the contract. Prohibits the local government's contractual obligations in any one year during the term of the contract beginning after the final date of installation, if the term of the contract exceeds one year, from exceeding the total energy and water savings, the net operating cost savings, and the stipulated or agreed upon increase in billable revenues resulting from the estimated increase in meter accuracy, divided by the number of years in the contract term. Deletes existing text that provides electrical, gas, water, wastewater, or other utility cost savings and certain operating cost savings to be included in the calculation.

The bill amends Section 302.005, Local Government Code, by requiring the governing body of a local government, before entering into an energy savings performance contract, to require that the energy savings, increase in billable revenues, or increase in meter accuracy estimated or projected by a provider be reviewed by a licensed professional engineer who has a minimum of three years of experience in energy calculation and review, is not an officer or employee of a provider for the contract under review, and is not otherwise associated with the contract. Requires the engineer, in conducting the review, to focus primarily on the proposed improvements from an engineering perspective, the methodology and calculations related to cost savings, increases in revenue, and, if applicable, efficiency or accuracy of metering equipment.

The bill amends Section 302, Local Government Code, to state that any energy saving performance contract that provides for any metering or related equipment, system, or processor procedure and includes a meter guarantee by the provider, whether or not the meter guarantee is a part of a broader guarantee applicable to other energy or water conservation or usage measures or causally connected work, must adhere to the below. Requires an engineer, not later than the fifth anniversary of the effective date of a performance contract, to test a statistically relevant sample of the meters installed or implemented under the contract to determine or calculate the actual average accuracy and compare the actual average accuracy to the baseline average accuracy of those tested meters. Provides that a meter guarantee applies if the engineer reports to the local government and the provider that the average accuracy of the tested meters as of the testing date is less than the baseline average accuracy of the tested meters as of the testing date. Requires the amount payable under the meter guarantee to be determined for each year subject to the engineer's report and provides the calculation for determining this amount. Requires the

amount payable under the meter guarantee for any year during the measurement period to be reduced or offset by a certain calculated amount if the meter guarantee in the contract is part of a broader guarantee applicable to other energy or water conservation or usage measures or causally connected work under the contract, notwithstanding the above requirement. Requires a test conducted under this section to be performed in accordance with the procedures established by the International Performance Measurement and Verification Protocol or succeeding standards of the United States Department of Energy. Requires an engineer conducting a test under this section to verify that the tested meters have been properly maintained and are operating properly. Requires the engineer, in conducting the review, to focus primarily on the proposed improvements from an engineering perspective, the methodology and calculations related to cost savings, increases in revenue, and, if applicable, efficiency or accuracy of metering equipment.

The bill amends Section 39.107, Utilities Code, to provide that a non-residential customer may have a meter installed and metering services provided on a competitive basis as part of an energy savings performance contract, notwithstanding Section 39.107(b).

Provides that the change in law applies to a performance contract entered into on or after the effective date.

EFFECTIVE DATE

This Act takes effect immediately if it receives a vote of two-thirds or on September 1, 2007, should it not receive the necessary vote.

COMPARISON OF ORIGINAL TO SUBSTITUTE

The original version of the bill did not contain language regarding the contract term start date of performance contracts, in relation to financing energy performance contracts, whereas the substitute includes language clarifying the contract term start date. The original version of the bill limited what engineers may review under performance contracts to the methodology and calculation related to cost savings, increases in revenue, and, if applicable efficiency or accuracy of metering equipment, whereas the substitute allows other criteria to be reviewed while maintaining primary focus on the above mentioned. The original version of the bill used a term in regards to the qualifications of a licensed professional engineer who may review an energy saving performance contract that is inconsistent with language elsewhere in statute; the substitute corrects this deficiency by deleting superfluous language not found elsewhere in statute. The substitute also adds language stating that an engineer, when conducting a review, shall also focus on the proposed improvements from an engineering perspective. The substitute version of the bill refines the definition of “energy savings” by adding that the term of the contract does not include any such reduction because of a decrease in energy rates not derived from increased conservation or reduced usage. The substitute version of the bill clarifies how meter and metering services may be provided on a competitive basis as part of an energy savings performance contract for a non-residential customer when compared to the original version of the bill.