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A BILL TO BE ENTITLED

AN ACT

relating to the procurement by local governments of energy savings performance contracts for certain conservation measures; creating criminal offenses; authorizing a fee.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Subtitle C, Title 9, Local Government Code, is amended by adding Chapter 302A to read as follows:

CHAPTER 302A. ENERGY SAVINGS PERFORMANCE CONTRACTS

SUBCHAPTER A. GENERAL PROVISIONS

Sec. 302A.001. DEFINITIONS. In this chapter:

(1) "Capital cost avoidance savings" means money spent by a local government to pay for a conservation measure:

(A) that has been identified as a permanent equipment replacement or repair by an investment grade audit of a performance contract under Section 302A.108; and

(B) the cost of which has been documented and discounted by any additional utility cost savings or any operation and maintenance cost savings generated from another conservation measure identified in the performance contract when compared with an established baseline.

(2) "Conservation measure" means the installation or implementation of an item, equipment, modification, alteration, improvement, or system for, or any employee training program or architectural or engineering consulting service related to the

operation of, a conservation technique in a new or existing facility, other than a conservation technique for the design or new construction of a water supply project, water plant, wastewater plant, water and wastewater distribution or conveyance facility, or drainage project.

(3) "Conservation technique" means:

(A) the insulation of a building structure or a system within the building;

(B) a storm window or door, any caulking or weather stripping, a multiglazed window or door, a heat-absorbing or heat-reflective glazed and coated window or door system, or another window or door system modification that reduces energy consumption;

(C) an automatic energy control system, including computer software and technical data licenses;

(D) a heating, ventilating, or air-conditioning system modification or replacement that reduces energy or water consumption;

(E) the replacement or retrofitting of a lighting fixture that increases energy efficiency;

(F) an energy recovery system;

(G) an electric system improvement;

(H) a water-conserving fixture, appliance, or equipment or the substitution of a non-water-using fixture, appliance, or equipment;

(I) a water-conserving landscape irrigation equipment;

(J) a landscaping measure that reduces watering demands and captures and holds applied water and rainfall, including:

(i) landscape contouring, including the use of a berm, swale, and terrace; and

(ii) use of a soil amendment that increases the water-holding capacity of the soil, including compost;

(K) any rainwater harvesting equipment or equipment to make use of water collected as part of a storm-water system installed for water quality control;

(L) any equipment for recycling or reusing water originating on the premises or from other sources, including treated municipal effluent;

(M) any equipment needed to capture water from nonconventional, alternate sources, including air-conditioning condensate or graywater, for nonpotable uses;

(N) any metering or related equipment or systems that:

(i) reduces utility costs;

(ii) increases operation and maintenance cost savings; or

(iii) increases in billable revenues resulting from increased accuracy of water measurement by identifying utility errors, optimizing rate schedules, or increasing meter accuracy;

(O) an alternative fuel program resulting in energy cost savings and reduced emissions for local government

vehicles, including fleet vehicles;

(P) a program resulting in utility cost savings by reducing utility errors and optimizing existing rate schedules under which service is provided; or

(Q) another energy or water conservation-related improvement or equipment, including an improvement or equipment relating to renewable energy or nonconventional water sources or water reuse that produces cost savings or increases in billable revenues for their appointed function.

(4) "Debt service" means the total amount spent or to be spent by a local government from property tax revenues to pay:

(A) the principal of and interest on debts;

(B) another payment required by contract to secure debts; and

(C) if the local government is created under Section 52, Article III, or Section 59, Article XVI, Texas Constitution, a payment on debts that the local government anticipates incurring in the next calendar year.

(5) "Increase in billable revenues" means a projected increase in billable revenues when compared with an established baseline of billable revenues.

(6) "Increase in meter accuracy" means a guaranteed increase in efficiency or accuracy of utility metering or related equipment or systems that is calculated or determined in accordance with procedures established by the International Performance Measurement and Verification Protocol or succeeding standards of the United States Department of Energy.

(7) "Local government" means a county, municipality, school district, or other political subdivision of this state.

(8) "Measurement and verification" means a method of confirming whether a guaranteed savings increase in billable revenues or an increase in meter accuracy resulting from a conservation measure is being met as specified under a performance contract and this chapter.

(9) "Meter guarantee" means a stipulated or agreed to increase in billable revenues to result from the guaranteed increase in meter accuracy, based on stipulated or agreed to components of a billable revenues calculation for a conservation measure.

(10) "Operation and maintenance cost savings" means a measurable reduction in operating or maintenance costs on a long-term basis that is a direct result of the installation of new equipment or the implementation of a new service in connection with one or more conservation measures when compared with an established baseline. The term does not include any savings that are realized solely because of a shift in the cost of personnel or other similar short-term cost savings related to or generated by outsourcing or using contract workers to perform tasks previously performed by employees.

(11) "Performance contract" means a contract between a local government and a qualified provider for the evaluation, recommendation, or implementation of a conservation measure in a new or existing facility that is identified by an investment grade audit performed in accordance with Section 302A.108 and that is

designed to result in annual savings, an increase in billable revenues, or an increase in meter accuracy guaranteed by the provider in accordance with Section 302A.052(a) over a specified period prescribed by Section 302A.051(a)(1), which includes both the construction and repayment phases. The term includes a contract related to the pilot program.

(12) "Pilot program" means a pilot program operated by the Energy Systems Laboratory at the Texas A&M Engineering Experiment Station, in consultation with the Texas Facilities Commission and the State Energy Conservation Office, that:

(A) establishes and implements energy efficiency improvements to state-owned buildings maintained by the commission;

(B) generates savings in utility costs resulting from the improvements described by Paragraph (A) resulting in at least a 30 percent annual return on the costs of the improvements;

(C) provides for the participation of not fewer than two companies selected by the commission; and

(D) provides for any money attributable to utility cost savings resulting from the pilot program to be appropriated only to the commission.

(13) "Provider" means an entity or an affiliate of the entity that:

(A) has experience in the design, acquisition, implementation, installation, and where appropriate, construction, engineering, operation, maintenance, and repair of a conservation measure;

(B) has the technical capability to verify that such conservation measure generates savings, an increase in billable revenues, or an increase in meter accuracy; and

(C) has the ability to secure or arrange the financing necessary to satisfy the guarantee required by a performance contract entered into by the provider.

(14) "Request for qualifications" means a competitive selection process achieved by a multistep negotiated procurement process that involves sequential steps for the evaluation of submissions by prospective providers.

(15) "Savings" means the reduction in expenditures, resulting from the implementation of one or more conservation measures under a performance contract that are:

(A) generated from the date the conservation measures become fully operational;

(B) calculated in accordance with the terms of the performance contract and the requirements of this chapter;

(C) guaranteed by the provider; and

(D) measured and verified in accordance with Sections 302A.055, 302A.301, and 302A.302 for each of the following categories:

(i) utility cost savings;

(ii) operation and maintenance cost savings; and

(iii) capital cost avoidance savings.

(16) "Subcontractor" means a person, other than an employee of a provider, who contracts with the provider to furnish

labor or materials to fulfill an obligation to the provider who is acting as a general contractor or prime contractor for any of the authorized work, including installation, required by a performance contract. The term includes a subcontractor of any tier, supplier, vendor, fabricator, or manufacturer.

(17) "Third-party engineer" means a professional engineer who is selected or designated by a local government under Section 302A.004.

(18) "Total cost" includes the sum of the costs of a conservation measure, investment grade audit, construction, financing and debt services, measurement and verification services, and maintenance and training during the term of the performance contract. The term does not include any obligations that have not been fulfilled on termination of the contract before the end of the contract term, provided that those obligations are disclosed when the performance contract is executed.

(19) "Utility cost savings" means a measured and verified reduction in net fuel costs, energy costs, water costs, stormwater fees, or other utility costs, on a long-term basis resulting from the implementation of one or more conservation measures when compared with an established baseline of usage of those previous costs. The term does not include an estimated reduction due to a decrease in energy rates that is not derived from increased conservation or reduced usage.

Sec. 302A.002. INAPPLICABILITY OF LAW GOVERNING CONTRACT PROCEDURES FOR CONSTRUCTION PROJECTS. Except as provided by Section 302A.106(a)(1), Chapter 2269, Government Code, does not

apply to this chapter.

Sec. 302A.003. CONTRACTS VOIDABLE. A contract entered into or an arrangement made in violation of this chapter is voidable as against public policy.

Sec. 302A.004. THIRD-PARTY ENGINEER. (a) A local government shall select or designate a third-party engineer to:

(1) act as the local government's representative, and serve as the local government's consultant, throughout the performance contract procurement process and the duration of the measurement and verification services;

(2) assist the local government in evaluating the qualifications, proposals, and change orders of, and related presentations by, a provider;

(3) provide to the local government written reports under Section 302A.103(c) and written opinions under Section 302A.110 and submit the written reports and written opinions to the appropriate state agencies as specified under Section 302A.111;

(4) perform the measurement and verification review of the meter guarantee under Section 302A.055;

(5) monitor the performance of the provider's measurement and verification services required under Section 302A.301; and

(6) review measurement and verification reports and the provider's annual reconciliation statement under Sections 302A.301 and 302A.302.

(b) The third-party engineer must be a professional engineer licensed under Chapter 1001, Occupations Code, and must:

(1) have a minimum of three years of specialized experience with performance contracts;

(2) have demonstrated technical competence in relation to, and working knowledge of, the procurement process of performance contracts;

(3) not be an officer or employee of:

(A) a provider for the performance contract; or

(B) a wholly owned subsidiary, majority-owned subsidiary, parent company, or affiliate of the provider for the contract; and

(4) not be otherwise associated with the performance contract.

(c) A local government:

(1) if the third-party engineer is not a full-time employee of the local government, shall procure the third-party engineer's services in accordance with the procedures prescribed for procuring the professional services of an engineer under Section 2254.004, Government Code; and

(2) shall pay a third-party engineer described by Subdivision (1) a pre-negotiated fee based on the work completed if the local government does not enter into a performance contract that was reviewed by the third-party engineer under Section 302A.110.

(d) A provider selected to perform an investment grade audit and propose a performance contract is prohibited from suggesting, recommending, or arranging a third-party engineer.

(e) Before the local government selects or designates a

third-party engineer, the third-party engineer shall certify in writing to the local government that the engineer meets the qualifications required under Subsection (b) and that there is no conflict of interest with regard to the local government and the proposals the third-party engineer is to evaluate that result from the request for qualifications.

(f) A third-party engineer who reviews a performance contract shall maintain the confidentiality of any proprietary information the third-party engineer acquires while reviewing the contract.

(g) A local government may require a provider to include in the calculation of the cost of a proposal for a performance contract any fees payable by the local government for use of a third-party engineer who is not a full-time employee of the local government. A fee charged by a third-party engineer described by this subsection may not exceed 2.5 percent of the total value of the performance contract at the time that a contract is executed by that provider.

SUBCHAPTER B. ENERGY SAVINGS PERFORMANCE CONTRACT

Sec. 302A.051. PERFORMANCE CONTRACT. (a) The governing body of a local government may enter into a multiyear performance contract, structured as an installment payment contract or lease-purchase contract, for the implementation of one or more conservation measures in accordance with this chapter if:

(1) the term of the contract, beginning on the final date on which all the conservation measures become fully operational, does not exceed the lesser of:

(A) 20 years;

(B) the average useful life of the conservation measures; or

(C) the term of financing;

(2) after review of the investment grade audit report prepared in accordance with Section 302A.108, the local government determines that the savings, increase in billable revenues, or both, that result from the conservation measures which are identified by the audit report and guaranteed by the provider will equal or exceed the total cost of the contract;

(3) the contract includes the provisions required by Sections 302A.052(a), (c), and (d); and

(4) the local government receives approval for the contract from the appropriate state agency under Section 302A.111.

(b) Each conservation measure to be installed or implemented under the performance contract must comply with current local, state, and federal construction, plumbing, and environmental codes and regulations.

(c) A performance contract may not include an improvement or equipment that allows or causes 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.

Sec. 302A.052. REQUIRED PERFORMANCE CONTRACT PROVISIONS. (a) A performance contract must include a provision that requires the provider to:

(1) provide a written guarantee or meter guarantee, or, if applicable, both, that:

(A) the savings, increase in billable revenues, or increase in meter accuracy resulting from the conservation measures implemented or installed under the performance contract will at least equal the cost of the contract during the term of the contract, including both the construction and repayment phases; and

(B) the guaranteed annual savings and increase in billable revenues will at least equal the local government's annual contractual obligations, including annual measurement and verification costs, costs for third-party engineer services, annual maintenance costs, repair costs, costs of design and engineering services, installation costs, and costs for debt service, and any financing charges incurred by the local government in any one year period during the term of the contract beginning after the final date of installation of all the conservation measures; and

(2) provide to the local government an annual reconciliation statement of the written guarantee under Section 302A.302.

(b) The written guarantee described by Subsection (a)(1) must require the provider to pay the local government for any shortfall amounts based on the results of the measurement and verification review required under Section 302A.055. If the savings, increase in billable revenues, or both, resulting from a performance contract fall short of the savings and increase in billable revenues projected under the contract and all required shortfall payments to the local government have not been made, the local government may terminate the contract without incurring any

additional obligation to the provider.

(c) A performance contract and any other contract entered into by the local government with a provider under this chapter must contain a prohibition against contingent fees as follows: "The provider warrants that he or she has not employed or retained any company or person, other than a bona fide employee working solely for the provider to solicit or secure this agreement and that he or she has not paid or agreed to pay any person, company, corporation, individual, or firm, other than a bona fide employee working solely for the provider any fee, commission, percentage, gift, or other consideration contingent upon or resulting from the award or making of this agreement."

(d) A performance contract and any other contract entered into by the local government with a provider must contain the following provision: "The provider agrees that through the term of the performance contract and contract amendment thereafter the provider will maintain a compliance program and internal controls designed to detect and deter fraudulent and corrupt conduct through, among other things: policies and procedures to create redundancy in the subcontractor bid review, bid normalization, bid revision, subcontractor selection, and savings and cost review processes."

(e) The provision required by Subsection (c) cannot be waived in a contract.

(f) The performance contract must contain a provision stating that the contract is not executory until approval is obtained under Section 302A.111.

Sec. 302A.053. CONTINGENCY CLAUSE FOR RELATED CONTRACT REQUIRING SAME PROVIDER TO PERFORM CERTAIN SERVICES. (a) This section applies to a multiyear contract that requires a local government to retain the same provider subject to the written guarantee to perform annual measurement and verification review services under Section 302A.301.

(b) A multiyear contract to which this section applies must contain the following contingency clause: "The continuation of this contract is contingent upon the annual budget and appropriation of funds by the local government to fulfill the requirements of the contract. If the local government fails to appropriate sufficient money for payments to be continued under the contract, the contract shall terminate on the last day of the fiscal year for which funds have been allocated. Such termination shall be without penalty or expense to the local government except for payments which have been earned prior to the termination date."

(c) If a local government fails to allocate sufficient money for payments to be continued under a multiyear contract to which this section applies, the contract terminates on the last day of the fiscal year for which funds have been allocated. The local government may not incur a penalty or be charged an expense as a result of a termination of the contract described by this subsection except for payments that have been earned before the date on which the contract is terminated.

Sec. 302A.054. BASELINE CALCULATION. (a) A provider shall calculate the baseline in a performance contract based on:

(1) historical costs, revenues, accuracy, or related

components for the preceding three years for:

(A) an existing facility before the installation or implementation of the conservation measures; or

(B) a new facility using a comparative existing facility with a similar floor plan and identical uses; or

(2) documentation of avoided anticipated costs of a capital improvement or an item of equipment the local government is:

(A) currently spending at the time of the calculation; or

(B) has budgeted to spend in the future.

(b) The baseline calculations of a provider may be used for determining:

(1) the costs for energy or water usage and related net operation and maintenance costs;

(2) the billable revenues from providing energy, water, or other utilities to users; or

(3) the efficiency or accuracy of metering or related equipment or systems.

(c) The provider's baseline calculations:

(1) must identify the specific dollar amount and units or percentages of consumption that the provider projects will be eliminated or avoided on a long-term basis as a result of the conservation measures that the local government is implementing; and

(2) if the calculation is for savings, must use and reference as a benchmark the actual demand and energy components of

the utility rate applicable to the local government in effect at the time of an investment grade audit, and may not use and reference a blended rate that aggregates, combines, or restates in any manner the distinct demand and energy components of the utility rate into a single combined or restated utility rate.

(d) The local government and provider may agree to make modifications to the calculation of utility cost savings based only on a subsequent material change to:

(1) the baseline consumption of energy or water identified at the beginning of the term of the performance contract;

(2) the utility rates;

(3) the number of days in the utility billing cycle;

(4) the square footage of the facility;

(5) the operational schedule, and any corresponding change in the occupancy and indoor temperature, of the facility;

(6) the facility temperature;

(7) the weather;

(8) the amount of equipment or lighting used in the facility; or

(9) the nature or intensity of energy use such as the change of classroom space to laboratory space.

(e) Predetermined escalation rates may not be used in a baseline calculation.

Sec. 302A.055. MEASUREMENT AND VERIFICATION OF GUARANTEE. (a) Any guaranteed savings, increase in billable revenues, and, if applicable, efficiency or accuracy of metering equipment must:

(1) be consistent with the investment grade audit report under Section 302A.108; and

(2) be determined using one of the measurement and verification methodologies listed in:

(A) the United States Department of Energy's Measurement and Verification Guidelines for Energy Savings Performance Contracts;

(B) the International Performance Measurement and Verification Protocol maintained by the Efficiency Valuation Organization; or

(C) Guideline 14-2022 of the American Society of Heating, Refrigerating, and Air-Conditioning Engineers.

(b) If none of the methodologies described by Subsection (a)(2) are sufficient for measuring guaranteed savings due to the existence of data limitations or the nonconformance of specific project characteristics, the provider shall develop an alternate method that is compatible with one of the methodologies described by Subsection (a)(2) and mutually agreeable to the local government. The alternate method must be:

(1) subject to approval under Section 302A.111; and

(2) thoroughly documented and substantiated through records showing that the expenses claimed are real.

Sec. 302A.056. PAYMENT AND PERFORMANCE BOND. (a) Notwithstanding any other law, before entering into a performance contract, the governing body of the local government shall require the provider of the conservation measures to file with the governing body a payment and performance bond relating to the

installation of the conservation measures in accordance with Chapter 2253, Government Code.

(b) In addition to the bond required by Subsection (a), the governing body may require the provider to file a separate bond to cover the value of the guarantee.

Sec. 302A.057. METER GUARANTEES. (a) This section applies to any performance contract that:

(1) provides for any metering or related equipment or systems; and

(2) includes a meter guarantee by the provider, regardless of whether the meter guarantee is a part of a broader guarantee applicable to other conservation measures.

(b) Not later than the fifth anniversary of the effective date of a performance contract, the third-party engineer under Section 302A.004 shall test a statistically relevant sample of the meters installed or implemented under the contract to determine or calculate the actual average accuracy and shall compare the actual average accuracy to the baseline average accuracy of those tested meters.

(c) A meter guarantee applies if the third-party 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.

(d) The amount payable under the meter guarantee, based on the results of the third-party engineer's measurement and verification report under Section 302A.301, must be determined for

each year subject to the provider's annual reconciliation statement under Section 302A.302 and is equal to the difference between:

(1) the agreed increase in billable revenues based on the projected accuracy of all of the meters for each year, according to the performance contract; and

(2) the actual revenues for the same year that would result from applying the third-party engineer's reported actual average accuracy of the tested meters to all of the meters subject to the performance contract, using the same contract components that were used to calculate the agreed increase in billable revenues for that year, assuming the annual decrease in actual average accuracy of all the meters was a pro rata percentage of the reported total decrease in actual average accuracy.

(e) Notwithstanding Subsection (d), if the meter guarantee in the contract is part of a broader guarantee applicable to other conservation measures that is greater in value under the contract, the amount payable under the meter guarantee for any year during the measurement and verification period is subtracted from the difference between:

(1) the actual sum of the savings and the increase in billable revenues resulting from the other conservation measures for that year during the measurement and verification period; and

(2) the guaranteed amount of the savings and the increase in billable revenues from the other conservation measures for that year during the measurement and verification period.

(f) A test conducted under this section must 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.

(g) A third-party engineer conducting a test under this section shall:

(1) verify that the tested meters have been properly maintained and are operating properly; and

(2) comply with Sections 302A.110(b) and 302A.004(d).

(h) A provider shall select both old and new meters to test when performing an investment grade audit and developing baseline average accuracy of existing meters to include in the investment grade audit report. In developing the baseline average accuracy, the provider may not include within its guarantee calculation meters that were inactive or out of service at the time of the investment grade audit. The meter guarantee may not include an escalation factor that assumes water will increase by a certain percentage each year.

Sec. 302A.058. MAINTENANCE SERVICES. (a) Subject to Subsection (c), a local government may solicit and negotiate maintenance services for proposed conservation measures as a component of a request for qualifications.

(b) Additional maintenance services:

(1) are subject to budget appropriations of the local government on an annual basis; and

(2) may be discontinued at any time over the guaranteed period with no negative impact to the performance contract.

(c) The local government may not be required under the terms

of a performance contract to purchase a maintenance contract or other maintenance agreement from the provider if the local government takes appropriate action to budget for its own forces or another provider to maintain new systems installed pursuant to and existing systems affected by the performance contract. The provider shall provide proper training and a sufficient number of operation and maintenance manuals for all equipment replacements or upgrades at each facility location.

(d) A provider shall provide to the local government the full capabilities to operate, maintain, repair, update, reconfigure, and engineer changes necessary to accommodate facility or operational changes or to incorporate new energy savings control strategies for any system, including a facility automation and control system, proposed under this chapter. A provider is not required under this subsection to provide the local government with access to the operating system of the provider, but the user interface software must provide for all capabilities described by this subsection.

Sec. 302A.059. USEFUL LIFE OF CERTAIN EQUIPMENT OR SYSTEM. (a) The useful life of an equipment or system that is to be installed as part of a conservation measure and is acquired through a performance contract may not exceed the useful life of the equipment or system as determined by the maximum asset depreciation range guidelines in effect for the Class Life Asset Depreciation Range System established by the Internal Revenue Service under the United States Internal Revenue Code.

(b) If an equipment or system described by Subsection (a) is

not covered by the asset depreciation range guidelines described by that subsection, the useful life of the equipment or system may not exceed the useful life according to the equipment or system manufacturer's standards.

Sec. 302A.060. CERTAIN SAVINGS TO OFFSET COSTS OF CONSERVATION MEASURE. Operation and maintenance cost savings realized as the result of a performance contract may be used to offset the costs of a conservation measure under a performance contract, provided that the savings indicate a direct reduction within a local government's operating and maintenance budget. Any projected operation and maintenance cost savings must be limited to only those that can be thoroughly documented and substantiated through invoices showing that the expenses claimed are real.

Sec. 302A.061. PERFORMANCE CONTRACT CONCURRENT WITH CONSTRUCTION CONTRACT. If a performance contract is to be executed concurrently with one or more conventional construction contracts, the performance contract must be separate and distinct from the other contracts.

Sec. 302A.062. REQUIRED PROVISION FOR CHANGE ORDER OR CONTRACT ADDENDUM. The change order or contract addendum must contain a provision that the change order or contract addendum, as applicable, is not executory until approval is obtained under Section 302A.111.

SUBCHAPTER C. PROCUREMENT PROCEDURES FOR PERFORMANCE CONTRACTS

Sec. 302A.101. PROCUREMENT OF PERFORMANCE CONTRACT. A local government must procure a performance contract under this chapter in accordance with the procedures prescribed by this

subchapter.

Sec. 302A.102. REQUEST FOR QUALIFICATIONS. (a) A local government shall issue a request for qualifications when selecting a provider to perform any work related to a performance contract or perform a service in connection with a performance contract. The request for qualifications must be open to all providers before the local government enters into an agreement for an investment grade audit under Section 302A.108 or a performance contract.

(b) Before issuing a request for qualifications, a local government shall select or designate a third-party engineer to serve as the representative and consultant in accordance with Section 302A.004.

(c) A person that assists the local government in preparing a request for qualifications may not submit a response to the request.

(d) A prospective respondent or a prospective respondent's representative may not communicate with a member of the governing body or an employee of a local government who has influence in the evaluation or selection process regarding the request for qualifications from the time the request is published until the request has been acted on by the governing body, except for contacting the person identified in the request as the designated point-of-contact. The occurrence of an act prohibited by this subsection will result in the prospective respondent's disqualification from consideration.

(e) In submitting a response to the request for qualifications, a responding provider shall certify in writing to

the local government that neither the provider nor any of the provider's affiliates or subcontractors or the employees of the provider or of any of the provider's affiliates or subcontractors have:

(1) bribed or attempted to bribe an officer or employee of the local government in connection with the performance contract; and

(2) not participated in the creation of the request for qualifications.

(f) A local government shall publish notice of the request for qualifications in the same manner the local government would publish notice of the request for a competitive bid under the law applicable to the local government for the procurement of contracts. In addition, the local government may send notice of the request for qualifications by the means most likely to reach providers interested in responding to the request, including by direct mail solicitation or electronic mail, or posting notice of the request on a government Internet website.

(g) A local government shall review, evaluate, and rank all properly submitted responses to the request for qualifications based on the provider's:

(1) business qualifications;

(2) personnel qualifications, including a list of any subcontractors to be used by the provider;

(3) financial qualifications, including information that documents the sources of proposed financing and specific projects that have used those proposed financing sources;

(4) construction management qualifications for all project phases;

(5) project track record, including references from past clients similar to the local government with respect to project size and the project's scope; and

(6) demonstrated ability to accomplish a performance contract.

Sec. 302A.103. REQUEST FOR PROPOSALS. (a) To ensure only qualified and capable providers are invited to submit proposals, the local government shall create a short list of not more than five providers who submitted responses to the request for qualifications, ranked on the basis of demonstrated competence and qualifications. If, after the request for qualifications is published, fewer than two providers have responded, the local government may select the one respondent to conduct a preliminary utility audit and negotiate an agreement for an investment grade audit report.

(b) After selecting the qualified providers from the short list as described by Subsection (a), the local government shall require each of the selected providers to perform a preliminary utility audit under Section 302A.104 and to submit a written proposal and make a presentation based on the audit. If a provider submits a proposal that does not calculate projected savings in the manner required by Section 302A.054, the local government shall reject the proposal.

(c) During the procurement process, the third-party engineer selected or designated under Section 302A.004 shall

provide to the local government a written report containing both a qualitative and quantitative evaluation of a provider's qualifications and proposal. The written report must include a recommendation for selecting a provider, but the local government is not obligated to follow the recommendation.

Sec. 302A.104. PRELIMINARY UTILITY AUDIT. (a) As provided under Section 302A.103, each qualified provider selected from the short list must complete a preliminary utility audit in accordance with this section and submit a written report and proposal based on the audit. The preliminary audit proposal shall form the basis for a qualified provider's investment grade audit proposal under Section 302A.108.

(b) The preliminary utility audit must show for each proposed conservation measure, at a minimum, a comparison of the estimated costs and estimated project savings, increase in billable revenues, and, if applicable, efficiency or accuracy of metering equipment to support justification for each proposed conservation measure.

(c) To prepare a preliminary utility audit report, each qualified provider selected under Section 302A.103 must be given an equal opportunity to conduct an on-site survey of the facilities identified in the published request for qualifications. A site visit must be scheduled after the date on which a request for qualifications is issued, but not before the date the responses are due. During this period, the local government:

(1) shall assist the selected qualified providers in support of their responses through the collection of necessary

facility technical information, including by providing to each qualified provider:

(A) at least three years of utility bills;

(B) floor plans as needed; and

(C) maintenance records as needed; and

(2) may require that each selected qualified provider attend a pre-proposal conference, conducted for the purpose of discussing contract requirements and answering questions from prospective providers.

(d) A preliminary utility audit:

(1) must be performed on a representative sample of existing facilities; or

(2) if the local government is considering constructing a new facility, must be completed using comparative existing facilities with similar floor plans and identical uses.

(e) The preliminary utility audit must be provided at no cost to the local government and with no obligation to select the qualified provider to perform an investment grade audit.

(f) For a preliminary utility audit required under this section and before an agreement for an investment grade audit under Section 302A.108 is executed, a local government may not require a provider to submit:

(1) a full engineering evaluation of the facilities;

(2) a detailed scope of construction; or

(3) any architectural or engineering designs.

Sec. 302A.105. EVALUATION AND RANKING OF WRITTEN PROPOSALS. (a) The local government shall evaluate and rank each written

proposal submitted under Section 302A.103(b) and select the qualified provider that submits the written proposal that offers the best value for the local government based on the published selection criteria and on its ranking evaluation.

(b) Not later than the seventh business day after the date the performance contract that is the subject of the proposal is awarded under Section 302A.112, the local government shall make the evaluations, including any scores, public and provide them to all providers that were not selected.

Sec. 302A.106. REQUIRED EVALUATION BY CERTAIN LOCAL GOVERNMENTS BEFORE ENTERING INTO INVESTMENT GRADE AUDIT AGREEMENT. (a) Before entering into an agreement for an investment grade audit:

(1) a school district shall evaluate and determine whether the audit or any other work reasonably required or contemplated under a performance contract would be in compliance with:

(A) Section 44.031, Education Code;

(B) Section 2269.056, Government Code;

(C) Section 271.004; and

(D) Subchapter B, Chapter 271;

(2) a municipality shall evaluate and determine whether the audit or any other work reasonably required or contemplated under a performance contract would be in compliance with Chapter 252; and

(3) a county shall evaluate and determine whether the audit or any other work reasonably required or contemplated under a

performance contract would be in compliance with Subchapter C, Chapter 262, and Subchapter B, Chapter 271.

(b) A school district, municipality, or county shall make the appropriate determination required by Subsection (a) before proceeding with the procurement process under this subchapter.

Sec. 302A.107. NEGOTIATIONS FOR INVESTMENT GRADE AUDIT AGREEMENT. (a) The local government shall first attempt to negotiate the scope of work and price for an investment grade audit agreement with the highest ranked qualified provider under Section 302A.105.

(b) If the local government and the highest ranked qualified provider cannot enter into an agreement for an investment grade audit, the local government shall, formally and in writing, end all negotiations with that provider and proceed to negotiate with the qualified provider in the order of the selection ranking until an agreement is reached or negotiations with all ranked qualified providers ends.

(c) During the negotiation of an investment grade audit agreement, the local government shall request the selected qualified provider to submit to the local government the provider's costing methodology, which:

(1) means the provider's:

(A) policy on subcontractor markup;

(B) definition of general conditions;

(C) range of costs for general conditions;

(D) policy on retainage;

(E) policy on contingencies;

(F) discount for prompt payment; and

(G) expected staffing for administrative duties; and

(2) does not include a guaranteed maximum price or bid for overall design or construction.

(d) An agreement for the performance of an investment grade audit under Section 302A.108 is the first of two contracts with the selected qualified provider. The subsequent contract is described by Section 302A.108(a).

Sec. 302A.108. INVESTMENT GRADE AUDIT; REPORT. (a) Following successful negotiations of an investment grade audit agreement under Section 302A.107, the selected qualified provider shall perform an investment grade audit to establish the exact scope of work to be performed under a proposed performance contract. The results of the audit will form the basis for negotiating the performance contract with the local government after presenting the audit report to the local government.

(b) The scope of work for an investment grade audit must include:

(1) collecting facility information, such as data and background information on:

(A) facilities;

(B) equipment;

(C) operations; and

(D) utility use and costs;

(2) conducting an inventory of existing systems and equipment, which requires a physical inspection of the facility and

an interview with a facility manager to log information on major energy and water-using equipment;

(3) establishing the current baseline and base year consumption and reconciling those with end-use consumption projections;

(4) identifying and assessing a list of potential conservation measures with a detailed projection of savings, increase in billable revenues, or accuracy of metering equipment to be obtained at the facilities as a result of the implementation of the recommended conservation measures; and

(5) preparing a detailed investment grade audit report that includes:

(A) a proposed measurement and verification plan;

(B) a sample periodic utility savings report; and

(C) the items described by Subsection (c).

(c) The investment grade audit report under Subsection (b)(5) must:

(1) specify the total and itemization cost of each recommended conservation measure that will comprise a proposed performance contract, including projected costs associated with:

(A) the investment grade audit;

(B) the design of the measure;

(C) any engineering services;

(D) any financing and debt services;

(E) the third-party engineer services;

(F) annual measurement and verification

services;

(G) annual maintenance services;

(H) training of employees; and

(I) repairs;

(2) identify the methods for measurement and verification, in accordance with Section 302A.055, of the savings or increase in billable revenues, or both, for each recommended conservation measure;

(3) identify all design and compliance issues that require the professional services of an architect or engineer, and identify the architect or engineer who will provide those services;

(4) include a schedule of all costs, showing a calculation of each cost of implementing the proposed conservation measures and the projected savings, increase in billable revenues, or increase in meter accuracy that could be realized and maximized;

(5) list the subcontractors and vendors to be used by the qualified provider with respect to the proposed performance contract; and

(6) identify maintenance requirements necessary to ensure continued savings, an increase in billable revenues, or an increase in meter accuracy that could be realized and maximized, and describe how those requirements will be fulfilled.

(d) The outcome of an investment grade audit cannot be predetermined. The provider may not make up losses or inefficiencies to make the cost of the performance contract project appear budget neutral.

(e) The cost for an investment grade audit must be based on

the cost per square footage actually audited and is intended to be the market rate for a technical energy audit. The cost may then be adjusted by mutual written agreement of the parties in the event that the audited square footage is changed by either party.

(f) If the investment grade audit report prepared by a provider offers a guaranteed savings or increase in billable revenues that is not materially less than the savings or revenues estimated in the preliminary audit, the investment grade audit report becomes, on execution of the performance contract, part of the final performance contract, and the costs incurred by the provider in preparing the investment grade audit report are considered to be part of the performance contract.

(g) If a local government decides not to enter into a performance contract after an investment grade audit report is prepared and the results of the audit are within 10 percent of both the guaranteed savings and increase in billable revenues contained in the preliminary utility audit proposal and the total proposal amount, the local government shall reimburse the provider that prepared the investment grade audit report the reasonable documented costs incurred by the provider in preparing the investment grade audit report if the local government has specifically appropriated money for that purpose.

(h) The results of an investment grade audit become the property of the local government.

(i) On completion of the investment grade audit, the qualified provider shall submit the investment grade audit report prepared under this section to the local government.

Sec. 302A.109. SUBMISSION OF PROPOSAL FOR PERFORMANCE CONTRACT; NEGOTIATIONS. (a) After acceptance by the local government of an investment grade audit report submitted by the qualified provider under Section 302A.108, the qualified provider may submit a proposal for a performance contract to the local government. The local government may then negotiate a performance contract with the qualified provider.

(b) On successful negotiation of a performance contract, the local government shall require the third-party engineer to review the investment grade audit report and supporting documentation in accordance with Section 302A.110.

(c) Prior to the award of any performance contract, the local government shall submit the required documents and obtain approval in accordance with Section 302A.111.

Sec. 302A.110. REVIEW BY THIRD-PARTY ENGINEER; REPORT. (a) Before obtaining approval of a proposed performance contract as required by Section 302A.111, the local government shall require the third-party engineer selected or designated under Section 302A.004 to review the investment grade audit report and supporting documentation as well as any subsequent change order, contract addendum, or other amendment to the proposed contract. The third-party engineer must verify that the proposed performance contract, the investment grade audit report, and the measurement and verification plan present a cohesive package that fully describes the intended scope of services.

(b) In conducting the review under Subsection (a), the third-party engineer shall provide the local government with a

written opinion evaluating and validating the methodology and calculations related to cost savings, increase in billable revenues, and, if applicable, efficiency or accuracy of metering equipment associated with each proposed conservation measure identified in the investment grade audit report that will become part of the final performance contract. The third-party engineer may recommend that the local government not enter into the contract.

(c) In identifying and developing potential utility cost reduction projects, the third-party engineer must certify that the documents described by Subsection (a) have been reviewed and are complete.

Sec. 302A.111. REVIEW BY STATE AGENCY. (a) Before awarding a performance contract, a contract for third-party financing, or a combination of both, a local government shall submit the proposed contract to the Texas Water Development Board and the State Energy Conservation Office for review and approval in accordance with this section. The Texas Water Development Board and the State Energy Conservation Office shall review the documents submitted and evaluate the economic assumptions that purportedly support the implementation of each conservation measure.

(b) The Texas Water Development Board shall evaluate the technical and economic feasibility of each proposed water-related conservation measure in the proposed performance contract, including any metering or related equipment, system, or process or procedure, and either approve or disapprove each of those proposed conservation measures.

(c) The State Energy Conservation Office shall evaluate the technical and economic feasibility of each conservation measure in the proposed contract that is not water related and either approve or disapprove each of those proposed conservation measures.

(d) In addition to the submission of a final proposed performance contract under Subsection (a), the local government must submit:

(1) the final investment grade audit report under Section 302A.108;

(2) a proposed measurement and verification plan;

(3) a sample periodic utility savings report;

(4) the written certifications listed under Subsection (f); and

(5) any other relevant documents determined necessary by the Texas Water Development Board or the State Energy Conservation Office, as applicable, to streamline the review.

(e) In conducting an evaluation under this section, the Texas Water Development Board and the State Energy Conservation Office shall make their determination on the basis of a review of:

(1) the project's scope and whether it is appropriate for a performance contract, including a conservation measure's use of capital cost avoidance savings in accordance with state law;

(2) the project's compliance with applicable provisions of this chapter;

(3) the written certifications of the following that are required under Subsection (f) and other provisions of this chapter:

(A) members of the governing body of the local government;

(B) the provider;

(C) any subcontractors of the provider; and

(D) the third-party engineer;

(4) the methodology and calculations related to cost savings, increase in billable revenues, and, if applicable, efficiency or accuracy of metering equipment; and

(5) the financing mechanism and proper financing documentation, and the availability of local funds to pay for conservation measures that will use capital cost avoidance savings.

(f) To obtain approval for the proposed performance contract, the local government shall submit the following written certifications for review as provided by this section:

(1) each member of the governing body shall certify that in lieu of competitive bidding or competitive sealed proposals for construction services under a public work contract, the performance contract was procured under a request for qualifications process in accordance with this subchapter;

(2) the provider shall certify that neither the provider nor any of the provider's affiliates or subcontractors, employees of the provider or the provider's affiliates, or subcontractors has bribed, or attempted to bribe, an official or employee of the local government in connection with the performance contract and has not participated in the creation of the request for qualifications for the performance contract;

(3) the provider or any third-party engineer

contracted to perform a measurement and verification review shall certify that the methodologies for determining savings, increase in billable revenues, and, if applicable, efficiency or accuracy of metering equipment will be performed in accordance with Section 302A.055; and

(4) the third-party engineer shall certify that the engineer is free from financial interest in the provider of the performance contract that conflicts with the proper completion of work associated with the performance contract.

(g) The Texas Water Development Board and the State Energy Conservation Office shall complete their review and provide their approval or disapproval not later than the 30th business day after the date of receiving a complete proposed performance contract. Submission of an incomplete contract may result in delayed review and approval.

(h) The Texas Water Development Board and the State Energy Conservation Office may charge a reasonable fee for conducting a review under this section, and the payment of the fee may be included in the financing for the performance contract.

(i) A local government that fails to provide documentation required by the State Energy Conservation Office or the Texas Water Development Board in accordance with this section may not engage in further performance contracts until the documentation has been provided.

(j) The Texas Water Development Board and the State Energy Conservation Office may adopt rules necessary to implement this section.

Sec. 302A.112. AWARDING OF PERFORMANCE CONTRACT. (a) On receiving notice of approval from the state under Section 302A.111 and subject to Section 302A.113, a local government shall enter into the performance contract with the qualified provider for the work, including any construction work, identified in the investment grade audit report.

(b) The local government shall provide a copy of the executed performance contract and corresponding addendums to the State Energy Conservation Office not later than the 30th day after the effective date of the contract.

Sec. 302A.113. MEETING TO ANNOUNCE AWARD OF PERFORMANCE CONTRACT; NOTICE. A local government shall hold a meeting to announce the awarding of a performance contract. Public notice of the meeting must be provided before the design and implementation of the conservation measures begin. The notice must include:

(1) the names of all potential parties to the proposed performance contract;

(2) a description of the conservation measures included in the performance contract; and

(3) an explanation of how the conservation measures will:

(A) be financed; and

(B) generate savings or increase billable revenues sufficient to pay for the cost of the conservation measures.

Sec. 302A.114. CHANGE ORDER AND CONTRACT ADDENDUM SUBJECT TO SAME REVIEW PROCESS. Each change order or contract addendum to a

performance contract is subject to the same review and approval requirements of the performance contract under Sections 302A.110 and 302A.111.

Sec. 302A.115. PROCUREMENT OF SUPPLIES, EQUIPMENT, AND MATERIAL. (a) This subsection does not apply to the purchase of construction-related goods in an amount greater than $50,000, which must comply with Section 791.011(j), Government Code.

(b) A local government may contract for the purchase of supplies, materials, or equipment by using contracts that are available through the state's cooperative purchasing program under Subchapter D, Chapter 271.

Sec. 302A.116. PROCUREMENT OF CERTAIN CONSTRUCTION-RELATED SERVICES. (a) This section applies to the purchase of a construction-related service from a provider under a performance contract in an amount that exceeds $50,000.

(b) A local government may not use a purchasing cooperative under Chapter 791, Government Code, or a local cooperative organization under Subchapter F, Chapter 271, of this code for the purchase of a preliminary utility audit, investment grade audit, architectural services, design services, or engineering services from a provider under a performance contract.

SUBCHAPTER D. METHOD OF FINANCING; PAYMENTS; USE OF FUNDS

Sec. 302A.151. METHOD OF FINANCING. (a) The financing of a performance contract may be provided by the provider or an independent third-party. The contract for third-party financing may be separate from the performance contract.

(b) A performance contract may be financed:

(1) under a lease-purchase contract that has a term not to exceed 20 years from the final date of installation of the conservation measures and that meets federal tax requirements for tax-free municipal leasing or long-term financing;

(2) with the proceeds of bonds; or

(3) under a contract with the provider of the conservation measures that has a term not to exceed the lesser of 20 years from the final date of installation of the conservation measures or the average useful life of the conservation measures.

Sec. 302A.152. REQUIRED PROVISION FOR SEPARATE CONTRACT FOR THIRD-PARTY FINANCING. A separate contract for third-party financing must include a provision that the third-party financier may not be granted rights or privileges that exceed the rights and privileges available to the provider of the performance contract.

Sec. 302A.153. PAYMENTS TO PROVIDERS. (a) Subject to Subsection (b), the governing body of a local government may pay the provider of a conservation measure, including payment of finance charges, solely out of the savings or increase in billable revenues realized by the local government under the performance contract.

(b) A payment to the provider must be based on the percentage of project completion, and not on a pre-established schedule.

Sec. 302A.154. ANNUAL BUDGET AND APPROPRIATIONS; USE OF FUNDS DESIGNATED FOR CERTAIN EXPENDITURES. The governing body of a local government may:

(1) include in its annual budget and appropriations the amounts payable under a performance contract, including the

amount payable under an installment payment contract or lease-purchase contract financing the contract; and

(2) use funds designated for utilities expenditures, operation and maintenance expenditures, and capital expenditures for purchases on an installment payment or lease purchase basis, provided that the use is consistent with the purpose of the appropriation.

Sec. 302A.155. USE OF FUNDS RESULTING FROM EXCESS GUARANTEED SAVINGS OR INCREASE IN BILLABLE REVENUES. A local government may use excess actual guaranteed savings or increase in billable revenues revealed by an annual reconciliation statement under Section 302A.302 throughout the term of a performance contract to reinvest in other conservation measures within the scope of the performance contract through a change order or contract addendum as authorized under this chapter.

Sec. 302A.156. CAPITAL COST AVOIDANCE SAVINGS. (a) The use of capital cost avoidance savings are subject to the limitations specified by Subsection (b).

(b) The amount of expenditures to be paid from capital cost avoidance savings under a performance contract:

(1) may not exceed 50 percent of the total project cost; and

(2) are limited to payment for permanent equipment or retrofits for:

(A) storm windows or doors, multiglazed windows or doors, heat-absorbing or heat-reflective glazed and coated window or door systems, or other window or door system

modifications;

(B) heating, ventilating, or air-conditioning major components or system modifications or replacements;

(C) new lighting fixtures that are required to achieve standards published by the Illuminating Engineering Society of North America, provided the existing light fixtures have been determined to be obsolete and incapable of achieving these standards that increase energy efficiency;

(D) life safety system replacements or upgrades that have been determined to be necessary to conform with existing state and local codes and standards; or

(E) roof retrofits that are part of a larger conservation measure, including solar, where the replacement is necessary for the installation of the conservation measure and the local government determines that replacement of more than 20 percent of the roof is necessary for the installation of the conservation measure.

SUBCHAPTER E. WORK PERFORMED UNDER PERFORMANCE CONTRACT

Sec. 302A.201. SUBCONTRACTORS FOR AUTHORIZED WORK UNDER PERFORMANCE CONTRACT. (a) A provider may be designated as the general contractor or prime contractor for the installation or implementation of any authorized work under a performance contract, including any improvements to be made pursuant to the performance contract, provided that a subcontractor contracting with the provider for that purpose:

(1) is experienced in the design, installation, or implementation of the conservation measures agreed to between the

provider and local government; and

(2) submits to the local government all written certifications required under this chapter.

(b) During the negotiation of a performance contract, the provider shall submit to the local government a list of subcontractors the provider intends to use and disclose whether a subcontractor on the list is a subsidiary or wholly owned or partially owned affiliate of the provider. The provider shall update the disclosure during the term of the performance contract.

(c) A subsidiary or wholly owned or partially owned affiliate of a provider may not be an eligible contractor or subcontractor under a performance contract unless:

(1) an analysis provided to the local government demonstrates that there is an economic advantage to the local government in having such contractor or subcontractor perform work as part of the performance contract; and

(2) the local government determines that having such contractor or subcontractor perform work as part of the performance contract provides the best value for the local government.

Sec. 302A.202. WORK RELATED OR ANCILLARY TO CONSERVATION MEASURES. (a) The governing body of the local government may contract with a provider to perform work that is related to, connected with, or otherwise ancillary to the conservation measures resulting in utility cost savings and in operation and maintenance cost savings as identified in the scope of a performance contract.

(b) Additional work authorized under this section may not increase the square footage of a facility unless the increase is

necessary to make a mechanical, electrical, or plumbing improvement to achieve a reduction in energy consumption or to conserve water resources.

(c) A change order, contract addendum, or other amendment for any additional conservation measures described by Subsection (a) must be reasonably required or contemplated under the investment grade audit under Section 302A.108 used to propose the original performance contract.

Sec. 302A.203. LIMITATION ON MODIFICATION TO SCOPE OF PERFORMANCE CONTRACT. The scope of a performance contract may not be modified by change order, contract addendum, or other method of contract:

(1) to perform work that is not related to, connected with, or otherwise ancillary to the conservation measures described by Section 302A.202;

(2) in a way that increases the price of the original awarded contract by more than 25 percent of the original contract value; or

(3) to perform work that would cause the annual savings and increase in billable revenues resulting from the performance contract to be less than the total annual contract payments made by the local government, including any financing charges or debt service to be incurred by the local government over the term of the contract.

Sec. 302A.204. LAW APPLICABLE TO ENGINEERING SERVICES PERFORMED UNDER PERFORMANCE CONTRACT. Sections 1001.053 and 1001.407, Occupations Code, apply to work performed under a

performance contract.

SUBCHAPTER F. FRAUD DETERRENCE PROGRAM

Sec. 302A.251. COMPLIANCE PROGRAM AND INTERNAL CONTROL TO DETECT AND DETER FRAUD. (a) A provider that enters into a performance contract under this chapter shall maintain a compliance program and internal controls designed to detect and deter fraudulent and corrupt conduct, including:

(1) policies and procedures to create redundancy in the subcontractor bid review, bid normalization, bid revision, and selection process; and

(2) savings and cost review processes.

(b) The policies and procedures described by Subsection (a)(1) must specifically correct or prevent the circumstances that would allow a single employee to control the subcontractor selection process and obtain kickbacks or bribes either directly from subcontractors and vendors or indirectly through intermediaries in connection with the performance contract.

(c) If necessary and appropriate, a provider shall modify an existing compliance contract to ensure that the provider maintains a rigorous compliance program that incorporates relevant internal controls, policies, and procedures designed to effectively detect and deter violation of fraud, anti-corruption, procurement integrity, and anti-kickback laws.

SUBCHAPTER G. ANNUAL REPORTS AND STATEMENTS

Sec. 302A.301. ANNUAL MEASUREMENT AND VERIFICATION REVIEW; REPORT. (a) During the term of a performance contract and at the discretion of the local government, a local government shall retain

the provider or an independent third-party to perform an annual measurement and verification review of, and prepare a report on, savings, increase in billable revenues, and, if applicable, efficiency or accuracy of metering equipment resulting from the conservation measures when compared with the established baseline set forth in the performance contract.

(b) The measurement and verification review and report must comply with the measurement and verification methodologies described by Section 302A.055(a)(2) that were published or listed on the date the performance contract was entered into between the local government and provider. An independent third-party retained under this section must:

(1) have the qualifications of a third-party engineer as described by Section 302A.004(b); and

(2) be retained under a separate contract from the third-party engineer selected under Section 302A.004.

Sec. 302A.302. ANNUAL RECONCILIATION STATEMENT. (a) Pursuant to Section 302A.052(a)(2), the provider shall provide an annual reconciliation statement of the guaranteed savings or increase in billable revenues based on the results of the measurement and verification review under Section 302A.301. The statement must disclose any shortfall or surplus between guaranteed savings or increase in billable revenues specified in the performance contract and actual, not stipulated, savings incurred during a given guarantee year as described by Subsection (b). If the annual reconciliation statement reveals an excess actual guaranteed savings or excess increase in billable revenues in a

given year, the surplus may not be used to cover any shortfalls in subsequent contract years.

(b) A guarantee year consists of a 12-month term beginning on the date all the conservation measures become fully operational.

(c) A provider shall pay the local government any shortfall amount not later than the 30th day after the date the total year savings have been determined.

SUBCHAPTER H. ENFORCEMENT

Sec. 302A.351. VIOLATION OF PERFORMANCE CONTRACT PROVISION CONTAINING PROHIBITION AGAINST CONTINGENCY FEES. If a provider violates the provision of a performance contract described by Section 302A.052(c), the local government may:

(1) terminate the contract without liability; and

(2) at the local government's discretion, deduct from the contract price, including any finance charges subject to the contract, or otherwise recover, the full amount of the fee, commission, percentage, gift, or consideration.

Sec. 302A.352. CRIMINAL OFFENSES. (a) In this section, "person" means an individual, corporation, association, partnership, firm, or company.

(b) A person, including an employee working for the provider, commits an offense if the person offers, agrees, or contracts to solicit or secure a performance contract or subcontract related to the performance contract for any other person and the person is paid or to be paid any fee, commission, percentage, gift, or other consideration contingent on, or resulting from, the awarding or making of a performance contract.

(c) A person commits an offense if the person offers to pay, or pays, any fee, commission, percentage, gift, or other consideration contingent on, or resulting from, the awarding or making of a performance contract.

(d) A local government official commits an offense if the official offers to solicit or secure, or solicits or secures, a performance contract between the local government and a person and the official is to be paid, or is paid, any fee, commission, percentage, gift, or other consideration contingent on the awarding or making of the performance contract.

(e) A person who is a local government employee or contractor with any influence on the awarding or making of a performance contract commits an offense if the person offers to solicit or secure, or solicits or secures, a performance contract and the person is to be paid, or is paid, any fee, commission, percentage, gift, or other consideration contingent on the awarding or making of a performance contract between the local government and another person.

(f) An offense under this section is a felony of the second degree.

(g) If conduct that constitutes an offense under this section also constitutes an offense under another law, including money laundering under Chapter 34, Penal Code, the actor may be prosecuted under this section, the other law, or both.

Sec. 302A.353. ENFORCEMENT BY ATTORNEY GENERAL AND LOCAL PROSECUTORS. With the consent of the appropriate local county or district attorney, the attorney general has concurrent

jurisdiction with that consenting local prosecutor to prosecute an offense under Section 302A.352.

Sec. 302A.354. DECLARATORY OR INJUNCTIVE RELIEF. This chapter may be enforced through an action for declaratory or injunctive relief filed not later than the 10th day after the date on which the contract is awarded.

SECTION 2. Article 59.01(2), Code of Criminal Procedure, is amended to read as follows:

(2) "Contraband" means property of any nature, including real, personal, tangible, or intangible, that is:

(A) used in the commission of:

(i) any first or second degree felony under the Penal Code;

(ii) any felony under Section 15.031(b), 21.11, or 38.04 or Chapter 29, 30, 31, 32, 33, 33A, or 35, Penal Code;

(iii) any felony under Chapter 43, Penal Code, except as provided by Paragraph (B);

(iv) any felony under The Securities Act (Title 12, Government Code); or

(v) any offense under Chapter 49, Penal Code, that is punishable as a felony of the third degree or state jail felony, if the defendant has been previously convicted three times of an offense under that chapter;

(B) used or intended to be used in the commission of:

(i) any felony under Chapter 481, Health

and Safety Code (Texas Controlled Substances Act);

(ii) any felony under Chapter 483, Health and Safety Code;

(iii) a felony under Chapter 151, Finance Code;

(iv) any felony under Chapter 20A or 34, Penal Code;

(v) a Class A misdemeanor under Subchapter B, Chapter 365, Health and Safety Code, if the defendant has been previously convicted twice of an offense under that subchapter;

(vi) any felony under Chapter 32, Human Resources Code, or Chapter 31, 32, 35A, or 37, Penal Code, that involves a health care program, as defined by Section 35A.01, Penal Code;

(vii) a Class B misdemeanor under Chapter 522, Business & Commerce Code;

(viii) a Class A misdemeanor under Section 306.051, Business & Commerce Code;

(ix) any offense under Section 42.10, Penal Code;

(x) any offense under Section 46.06(a)(1) or 46.14, Penal Code;

(xi) any offense under Chapter 71, Penal Code;

(xii) any offense under Section 20.05, 20.06, 20.07, 43.04, or 43.05, Penal Code;

(xiii) an offense under Section 326.002,

Business & Commerce Code; or

(xiv) a Class A misdemeanor or any felony under Section 545.420, Transportation Code, other than a Class A misdemeanor that is classified as a Class A misdemeanor based solely on conduct constituting a violation of Subsection (e)(2)(B) of that section;

(C) the proceeds gained from the commission of a felony listed in Paragraph (A) or (B) of this subdivision, a misdemeanor listed in Paragraph (B)(vii), (ix), (x), (xi), or (xii) of this subdivision, or a crime of violence;

(D) acquired with proceeds gained from the commission of a felony listed in Paragraph (A) or (B) of this subdivision, a misdemeanor listed in Paragraph (B)(vii), (ix), (x), (xi), or (xii) of this subdivision, or a crime of violence;

(E) used to facilitate or intended to be used to facilitate the commission of a felony under Section 15.031 or Chapter 43, Penal Code; [~~or~~]

(F) used to facilitate or intended to be used to facilitate the commission of an offense under Section 20.05, 20.06, or 20.07 or Chapter 20A, Penal Code; or

(G) the proceeds gained from the commission of an offense under Section 302A.352(b), (c), (d), or (e), Local Government Code.

SECTION 3. The following laws are repealed:

(1) Section 44.901, Education Code; and

(2) Chapter 302, Local Government Code.

SECTION 4. The changes in law made by this Act apply to a

contract entered into or amended or modified on or after the effective date of this Act. A contract entered into or amended or modified before the effective date of this Act is governed by the law in effect on the date the contract was entered into or amended or modified, and the former law is continued in effect for that purpose.

SECTION 5. This Act takes effect September 1, 2023.