

Assembly Bill No. 398—Assemblymen Geddes, Hettrick, Hardy, Beers, Knecht, Anderson, Andonov, Arberry, Buckley, Carpenter, Chowning, Christensen, Collins, Conklin, Gibbons, Giunchigliani, Goicoechea, Goldwater, Grady, Griffin, Gustavson, Horne, Koivisto, Leslie, Mabey, Manendo, Marvel, Mortenson, Parks, Perkins, Pierce, Sherer and Weber

Joint Sponsors: Senators Townsend and Amodei

CHAPTER.....

AN ACT relating to purchasing; establishing an alternative procedure pursuant to which certain performance contracts for the installation or purchase of cost-savings energy measures in buildings occupied by state and local governmental entities are bid; providing the types and terms of such performance contracts; providing limitations on such performance contracts entered into by state agencies; and providing other matters properly relating thereto.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Chapter 332 of NRS is hereby amended by adding thereto the provisions set forth as sections 2 to 14, inclusive, of this act.

Sec. 2. *As used in sections 2 to 14, inclusive, of this act, unless the context otherwise requires, the words and terms defined in sections 3 to 7, inclusive, of this act, have the meanings ascribed to them in those sections.*

Sec. 3. *“Building” means any structure, building or facility, including any equipment, furnishings or appliances within the structure, building or facility, that is owned or operated by a local government. The term includes, without limitation, occupied and unoccupied structures, buildings and facilities, and any other improvements owned or operated by a local government that incur operating costs.*

Sec. 4. *“Operating cost savings” means any expenses that are eliminated or avoided on a long-term basis as a result of the installation or modification of equipment, or services performed by a qualified service company. 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.*

Sec. 5. *“Operating cost-savings measure” means any improvement, repair or alteration to a building, or any equipment, fixture or furnishing to be added or used in a building that is designed to reduce operating costs, including those costs related to*

electrical energy and demand, thermal energy, water consumption, waste disposal and contract-labor costs, and increase the operating efficiency of the building for the appointed functions that are cost-effective. The term includes, without limitation:

1. Procurement of low-cost energy supplies, including electricity and natural gas.

2. Procurement of cost savings as a result of outsourcing energy needs for electrical power, heating and cooling.

3. Operational or maintenance labor savings resulting from reduced costs for maintenance contracts as provided through reduction of required maintenance or operating tasks, including, without limitation, replacement of filters and lighting products, and equipment failures.

4. Investment in equipment, products and materials, and strategies for building operation, or any combination thereof, designed to reduce energy and other utility expenses, including, without limitation:

(a) Costs for materials and labor required to replace old equipment with new, more efficient equipment.

(b) Storm windows or doors, caulking or weather stripping, multiglazed windows or doors, heat-absorbing or heat-reflective glazed or coated windows or doors, reductions in glass area, and other modifications to windows and doors that will reduce energy consumption.

(c) Automated or computerized energy control systems.

(d) Replacement of, or modifications to, heating, ventilation or air-conditioning systems.

(e) Replacement of, or modifications to, lighting fixtures.

(f) Improvements to the indoor air quality of a building that conform to all requirements of an applicable building code.

(g) Energy recovery systems.

(h) Systems for combined cooling, heating and power that produce steam or other forms of energy, for use primarily within the building or a complex of buildings.

(i) Installation of, or modifications to, existing systems for daylighting, including lighting control systems.

(j) Installation of, or modification to, technologies that use renewable or alternative energy sources.

(k) Programs relating to building operation that reduce operating costs, including, without limitation, computerized programs, training and other similar activities.

(l) Programs for improvement of steam traps to reduce operating costs.

(m) Devices that reduce water consumption in buildings, for lawns and for other irrigation applications.

(n) Any additional improvements to building infrastructures that produce energy and operating cost savings, significantly reduce energy consumption or increase the operating efficiency of the buildings for their appointed functions, provided that such improvements comply with applicable building codes.

(o) Trash compaction and waste minimization.

5. Investment in educational programs relating to occupational behavior that are designed to reduce the consumption of energy or water, or both, and the generation of waste.

Sec. 6. "Performance contract" means a contract between a local government and a qualified service company for the evaluation, recommendation and implementation of one or more operating cost-savings measures.

Sec. 7. "Qualified service company" means a person with a record of established projects or a person with demonstrated technical, operational, financial and managerial capabilities to design and carry out operating cost-savings measures and other similar building improvements, and who has the ability to secure necessary financial measures to ensure related guarantees for operating cost savings.

Sec. 8. 1. Notwithstanding any provision of this chapter and chapter 338 of NRS to the contrary, a local government may enter into a performance contract with a qualified service company for the purchase and installation of an operating cost-savings measure to reduce costs related to energy, water and the disposal of waste, and related labor costs. Such a performance contract may be in the form of an installment payment contract or a lease-purchase contract. Any operating cost-savings measures put into place as a result of a performance contract must comply with all applicable building codes.

2. The local government shall determine those companies that satisfy the requirements of qualified service companies for the purposes of sections 2 to 14, inclusive, of this act. The local government shall prepare and issue a request for qualifications to not less than three potential qualified service companies.

3. In sending out a request for qualifications, the local government:

(a) Shall attempt to identify at least one potential qualified service company located within this state; and

(b) May consider whether and to what extent the companies to which the request for qualifications will be sent will use local contractors.

4. The local government shall use objective criteria to determine those companies that satisfy the requirements of qualified service companies. The objective criteria for evaluation

must include the following areas as substantive factors to assess the capability of such companies:

- (a) Design;*
- (b) Engineering;*
- (c) Installation;*
- (d) Maintenance and repairs associated with performance contracts;*
- (e) Experience in conversions to different sources of energy or fuel and other services related to operating cost-savings measures provided that is done in association with a comprehensive energy, water or waste disposal cost-savings retrofit;*
- (f) Monitoring projects after the projects are installed;*
- (g) Data collection and reporting of savings;*
- (h) Overall project experience and qualifications;*
- (i) Management capability;*
- (j) Ability to access long-term financing;*
- (k) Experience with projects of similar size and scope; and*
- (l) Such other factors determined by the local government to be relevant and appropriate to the ability of a company to perform the project.*

In determining whether a company satisfies the requirements of a qualified service company, the local government shall also consider the financial health of the company as evidenced by its financial statements and ratings and whether the company holds the appropriate licenses required for the design, engineering and construction to be completed.

5. The local government shall compile a list of those companies that it determines satisfy the requirements of qualified service companies. If the local government is interested in entering into a performance contract, the local government shall notify each appropriate qualified service company and coordinate an opportunity for each such qualified service company to:

- (a) Perform a preliminary and comprehensive audit and assessment of all potential operating cost-savings measures that might be implemented within the buildings of the local government, including any operating cost-savings measures specifically requested by the local government; and*
- (b) Submit a proposal and make a related presentation to the local government for all such operating cost-savings measures that the qualified service company determines would be practicable to implement.*

6. The local government shall:

- (a) Evaluate the proposals and presentations made pursuant to subsection 5; and*
- (b) Select a qualified service company,*

pursuant to the provisions of this chapter for evaluating and awarding contracts.

7. The qualified service company selected by the local government pursuant to subsection 6 shall prepare a financial-grade operational audit. Except as otherwise provided in this subsection, the audit prepared by the qualified service company becomes, upon acceptance, a part of the final performance contract and the costs incurred by the qualified service company in preparing the audit shall be deemed to be part of the performance contract. If, after the audit is prepared, the local government decides not to execute the performance contract, the local government shall pay the qualified service company that prepared the audit the costs incurred by the qualified service company in preparing the audit if the local government has specifically appropriated money for that purpose.

8. The local government shall retain the professional services of a third-party consultant with the requisite technical expertise to assist the local government in reviewing the operating cost-savings measures proposed by the qualified service company and may procure sufficient funding from the qualified service company, through negotiation, to pay for the third-party consultant. Such a third-party consultant must be certified by the Association of Energy Engineers as a "Certified Energy Manager" or hold similar credentials from a comparable nationally recognized organization. A third-party consultant retained pursuant to this subsection shall work on behalf of the local government in coordination with the qualified service company.

Sec. 9. 1. A performance contract may be financed through a person other than the qualified service company.

2. A performance contract may be structured as:

(a) A performance contract that guarantees operating cost savings, which includes, without limitation, the design and installation of equipment, the operation and maintenance, if applicable, of any of the operating cost-savings measures and the guaranteed annual savings which must meet or exceed the total annual contract payments to be made by the local government, including any financing charges to be incurred by the local government over the life of the performance contract. The local government may require that these savings be verified annually or over a sufficient period that demonstrates savings.

(b) A shared-savings contract which includes provisions mutually agreed upon by the local government and qualified service company as to the negotiated rate of payments based upon operating cost savings and a stipulated maximum consumption level of energy or water, or both energy and water, over the life of the contract.

Sec. 10. 1. *A performance contract must provide that all payments, other than any obligations that become due if the contract is terminated before the contract expires, must be made over time.*

2. Except as otherwise provided in this subsection, a performance contract, and the payments provided thereunder, may extend beyond the fiscal year in which the performance contract becomes effective for costs incurred in future fiscal years. The performance contract may extend for a term not to exceed 15 years. The length of a performance contract may reflect the useful life of the operating cost-savings measure being installed or purchased under the performance contract.

3. The period over which payments are made on a performance contract must equal the period over which the operating cost savings are amortized. Payments on a performance contract must not commence until the operating cost-savings measures have been installed by the qualified service company.

Sec. 10.3. *If a performance contract entered into pursuant to sections 2 to 14, inclusive, of this act requires the employment of skilled mechanics, skilled workmen, semiskilled mechanics, semiskilled workmen or unskilled labor to perform the performance contract, the performance contract must include a provision relating to the prevailing wage as required pursuant to NRS 338.020 to 338.090, inclusive.*

Sec. 10.7. *Notwithstanding any provision of sections 2 to 14, inclusive, of this act to the contrary, a performance contract entered into pursuant to sections 2 to 14, inclusive, of this act must include a clause that sets out the rights of the local government and the qualified service company if the local government does not appropriate sufficient money for payments to be continued under the performance contract.*

Sec. 11. *A local government may reinvest any savings realized under a performance contract whenever practical into operating cost-savings measures provided the local government is satisfying all its other obligations under the performance contract.*

Sec. 12. 1. *During the term of a performance contract, the qualified service company shall monitor the reductions in energy or water consumption and other operating cost savings attributable to the operating cost-savings measure purchased or installed under the performance contract, and shall, at least once a year or at such other intervals specified in the performance contract, prepare and provide a report to the local government documenting the performance of the operating cost-savings measures.*

2. *A performance contract must identify the methodology that the local government will use to validate the cost savings identified by the qualified service company.*

3. *A qualified service company and the local government may agree to make modifications in the calculation of savings based on:*

(a) *Subsequent material changes to the baseline consumption of energy or water identified at the beginning of the term of the performance contract.*

(b) *A change in utility rates.*

(c) *A change in the number of days in the billing cycle of a utility.*

(d) *A change in the total square footage of the building.*

(e) *A change in the operational schedule, and any corresponding change in the occupancy and indoor temperature, of the building.*

(f) *A material change in the weather.*

(g) *A material change in the amount of equipment or lighting used at the building.*

(h) *Any other change which reasonably would be expected to modify the use of energy or the cost of energy.*

Sec. 13. *A qualified service company shall provide to the Office of Energy within the Office of the Governor information concerning each performance contract which the qualified service company enters into pursuant to sections 2 to 14, inclusive, of this act, including, without limitation, the name of the project, the local government for which the project is being carried out and the expected operating cost savings. The Office of Energy may report any energy savings realized as a result of such performance contracts to the United States Department of Energy pursuant to 42 U.S.C. § 13385.*

Sec. 14. *A performance contract must include appropriate financial mechanisms determined to be necessary by the city or county treasurer, as appropriate, to guarantee that operating cost savings are realized by the local government if the actual cost savings do not meet the predicted cost savings.*

Sec. 15. Chapter 333 of NRS is hereby amended by adding thereto the provisions set forth as sections 16 to 29, inclusive, of this act.

Sec. 16. *As used in sections 16 to 29, inclusive, of this act, unless the context otherwise requires, the words and terms defined in sections 17 to 21.5, inclusive, of this act, have the meanings ascribed to them in those sections.*

Sec. 17. *“Building” means any structure, building or facility, including any equipment, furnishings or appliances within the structure, building or facility, that is owned or operated by a using*

agency. The term includes, without limitation, occupied and unoccupied structures, buildings and facilities, and any other improvements owned or operated by a using agency that incur operating costs.

Sec. 18. *“Operating cost savings” means any expenses that are eliminated or avoided on a long-term basis as a result of the installation or modification of equipment, or services performed by a qualified service company. 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.*

Sec. 19. *“Operating cost-savings measure” means any improvement, repair or alteration to a building, or any equipment, fixture or furnishing to be added or used in a building that is designed to reduce operating costs, including those costs related to electrical energy and demand, thermal energy, water consumption, waste disposal and contract-labor costs, and increase the operating efficiency of the building for the appointed functions that are cost-effective. The term includes, without limitation:*

1. Procurement of low-cost energy supplies, including electricity and natural gas.

2. Procurement of cost savings as a result of outsourcing energy needs for electrical power, heating and cooling.

3. Operational or maintenance labor savings resulting from reduced costs for maintenance contracts as provided through reduction of required maintenance or operating tasks, including, without limitation, replacement of filters and lighting products, and equipment failures.

4. Investment in equipment, products and materials, and strategies for building operation, or any combination thereof, designed to reduce energy and other utility expenses, including, without limitation:

(a) Costs for materials and labor required to replace old equipment with new, more efficient equipment.

(b) Storm windows or doors, caulking or weather stripping, multiglazed windows or doors, heat-absorbing or heat-reflective glazed or coated windows or doors, reductions in glass area, and other modifications to windows and doors that will reduce energy consumption.

(c) Automated or computerized energy control systems.

(d) Replacement of, or modifications to, heating, ventilation or air-conditioning systems.

(e) Replacement of, or modifications to, lighting fixtures.

(f) Improvements to the indoor air quality of a building that conform to all requirements of an applicable building code.

(g) Energy recovery systems.

(h) Systems for combined cooling, heating and power that produce steam or other forms of energy, for use primarily within the building or a complex of buildings.

(i) Installation of, or modifications to, existing systems for daylighting, including lighting control systems.

(j) Installation of, or modification to, technologies that use renewable or alternative energy sources.

(k) Programs relating to building operation that reduce operating costs, including, without limitation, computerized programs, training and other similar activities.

(l) Programs for improvement of steam traps to reduce operating costs.

(m) Devices that reduce water consumption in buildings, for lawns and for other irrigation applications.

(n) Any additional improvements to building infrastructures that produce energy and operating cost savings, significantly reduce energy consumption or increase the operating efficiency of the buildings for their appointed functions, provided that such improvements comply with applicable building codes.

(o) Trash compaction and waste minimization.

5. Investment in educational programs relating to occupational behavior that are designed to reduce the consumption of energy or water, or both, and the generation of waste.

Sec. 20. *“Performance contract” means a contract between a using agency and a qualified service company for the evaluation, recommendation and implementation of one or more operating cost-savings measures.*

Sec. 21. *“Qualified service company” means a person with a record of established projects or a person with demonstrated technical, operational, financial and managerial capabilities to design and carry out operating cost-savings measures and other similar building improvements, and who has the ability to secure necessary financial measures to ensure related guarantees for operating cost savings.*

Sec. 21.5. *“Using agency” means all officers, departments, institutions, boards, commissions and other agencies in the Executive Department of the State Government which derive their support from public money in whole or in part, whether the money is provided by the State of Nevada, received from the Federal Government or any branch, bureau or agency thereof, or derived from private or other sources. The term includes the University and Community College System of Nevada, but does not include the Nevada Rural Housing Authority, local governments as defined in NRS 354.474, conservation districts and irrigation districts.*

Sec. 22. 1. *Notwithstanding any provision of this chapter and chapter 338 of NRS to the contrary, a using agency may enter into a performance contract with a qualified service company for the purchase and installation of an operating cost-savings measure to reduce costs related to energy, water and the disposal of waste, and related labor costs. Such a performance contract may be in the form of an installment payment contract or a lease-purchase contract that is subject to the provisions of NRS 353.500 to 353.630, inclusive. Any operating cost-savings measures put into place as a result of a performance contract must comply with all applicable building codes.*

2. *The State Public Works Board shall determine those companies that satisfy the requirements of qualified service companies for the purposes of sections 16 to 29, inclusive, of this act. In making such a determination, the State Public Works Board shall enlist the assistance of the staffs of the Office of Energy within the Office of the Governor, the Buildings and Grounds Division of the Department of Administration and the Purchasing Division. The State Public Works Board shall prepare and issue a request for qualifications to not less than three potential qualified service companies.*

3. *In sending out a request for qualifications, the State Public Works Board:*

(a) Shall attempt to identify at least one potential qualified service company located within this state; and

(b) May consider whether and to what extent the companies to which the request for qualifications will be sent will use local contractors.

4. *The State Public Works Board shall use objective criteria to determine those companies that satisfy the requirements of qualified service companies. The objective criteria for evaluation must include the following areas as substantive factors to assess the capability of such companies:*

(a) Design;

(b) Engineering;

(c) Installation;

(d) Maintenance and repairs associated with performance contracts;

(e) Experience in conversions to different sources of energy or fuel and other services related to operating cost-savings measures provided that is done in association with a comprehensive energy, water or waste disposal cost-savings retrofit;

(f) Monitoring projects after the projects are installed;

(g) Data collection and reporting of savings;

(h) Overall project experience and qualifications;

(i) Management capability;

- (j) Ability to access long-term financing;*
- (k) Experience with projects of similar size and scope; and*
- (l) Such other factors determined by the State Public Works Board to be relevant and appropriate to the ability of a company to perform the project.*

In determining whether a company satisfies the requirements of a qualified service company, the State Public Works Board shall also consider the financial health of the company as evidenced by its financial statements and ratings and whether the company holds the appropriate licenses required for the design, engineering and construction which would be completed pursuant to a performance contract.

5. The State Public Works Board shall compile a list of those companies that it determines satisfy the requirements of qualified service companies. The Purchasing Division shall work directly with any using agency interested in entering into a performance contract, using the list of qualified service companies compiled by the State Public Works Board. The Purchasing Division, in conjunction with the using agency, shall ensure that each appropriate qualified service company is notified of the using agency's interest in entering into a performance contract and coordinate an opportunity for each such qualified service company to:

(a) Perform a preliminary and comprehensive audit and assessment of all potential operating cost-savings measures that might be implemented within the buildings of the using agency, including any operating cost-savings measures specifically requested by the using agency; and

(b) Submit a proposal and make a related presentation to the using agency for all such operating cost-savings measures that the qualified service company determines would be practicable to implement.

6. The using agency shall:

(a) Evaluate the proposals and presentations made pursuant to subsection 5; and

(b) Select a qualified service company, pursuant to the provisions of this chapter, and any regulations adopted pursuant thereto, for evaluating and awarding contracts.

7. A qualified service company selected by a using agency pursuant to subsection 6 shall prepare a financial-grade operational audit. Except as otherwise provided in this subsection, the audit prepared by the qualified service company becomes, upon acceptance, a part of the final performance contract and the costs incurred by the qualified service company in preparing the audit shall be deemed to be part of the performance contract. If, after the audit is prepared, the using agency decides not to execute

the performance contract, the using agency shall pay the qualified service company that prepared the audit the costs incurred by the qualified service company in preparing the audit, if the Legislature has specifically appropriated money for that purpose. An appropriation by the Legislature for the purchase and installation of an operating cost-savings measure creates no presumption that the using agency for which the money was appropriated is required to enter into such a contract.

8. The using agency shall retain the professional services of a third-party consultant with the requisite technical expertise to assist the using agency in reviewing the operating cost-savings measures proposed by the qualified service company. The Purchasing Division may procure sufficient funding from the qualified service company, through negotiation, to pay for the third-party consultant. Such a third-party consultant must be certified by the Association of Energy Engineers as a "Certified Energy Manager" or hold similar credentials from a comparable nationally recognized organization. A third-party consultant retained pursuant to this subsection shall work on behalf of the using agency in coordination with the qualified service company.

Sec. 23. *1. A performance contract may be financed through a person other than the qualified service company.*

2. A performance contract may be structured as:

(a) A performance contract that guarantees operating cost savings, which includes, without limitation, the design and installation of equipment, the operation and maintenance, if applicable, of any of the operating cost-savings measures and the guaranteed annual savings which must meet or exceed the total annual contract payments to be made by the using agency, including any financing charges to be incurred by the using agency over the life of the performance contract. The using agency may require that these savings be verified annually or over a sufficient period that demonstrates savings.

(b) A shared-savings contract which includes provisions mutually agreed upon by the using agency and qualified service company as to the negotiated rate of payments based upon operating cost savings and a stipulated maximum consumption level of energy or water, or both energy and water, over the life of the contract.

Sec. 24. *1. Notwithstanding any provision of sections 16 to 29, inclusive, of this act to the contrary, a performance contract entered into pursuant to sections 16 to 29, inclusive, of this act does not create a debt for the purposes of Section 3 of Article 9 of the Nevada Constitution.*

2. Except as otherwise provided in this section, the term of a performance contract may extend beyond the biennium in which

the contract is executed, provided that the performance contract contains a provision which states that all obligations of the State under the performance contract are extinguished at the end of any fiscal year if the Legislature fails to provide an appropriation to the using agency for the ensuing fiscal year for payments to be made under the performance contract. If the Legislature fails to appropriate money to a using agency for a performance contract, there is no remedy against the State, except that if a security interest in any property was created pursuant to the performance contract, the holder of such a security interest may enforce the security interest against that property. The term of a performance contract must not exceed 15 years.

3. The length of a performance contract may reflect the useful life of the operating cost-savings measure being installed or purchased under the performance contract.

Sec. 25. *1. A performance contract must provide that all payments, other than any obligations that become due if the contract is terminated before the contract expires, must be made over time.*

2. The period over which payments are made on a performance contract must equal the period over which the operating cost savings are amortized. Payments on a performance contract must not commence until the operating cost-savings measures have been installed by the qualified service company.

Sec. 26. *If a performance contract entered into pursuant to sections 16 to 29, inclusive, of this act requires the employment of skilled mechanics, skilled workmen, semiskilled mechanics, semiskilled workmen or unskilled labor to perform the performance contract, the performance contract must include a provision relating to the prevailing wage as required pursuant to NRS 338.020 to 338.090, inclusive.*

Sec. 27. *1. During the term of a performance contract, the qualified service company shall monitor the reductions in energy or water consumption and other operating cost savings attributable to the operating cost-savings measure purchased or installed under the performance contract, and shall, at least once a year or at such other intervals specified in the performance contract, prepare and provide a report to the using agency documenting the performance of the operating cost-savings measures.*

2. A qualified service company and the using agency may agree to make modifications in the calculation of savings based on:

(a) Subsequent material changes to the baseline consumption of energy or water identified at the beginning of the term of the performance contract.

- (b) A change in utility rates.*
- (c) A change in the number of days in the billing cycle of a utility.*
- (d) A change in the total square footage of the building.*
- (e) A change in the operational schedule, and any corresponding change in the occupancy and indoor temperature, of the building.*
- (f) A material change in the weather.*
- (g) A material change in the amount of equipment or lighting used at the building.*
- (h) Any other change which reasonably would be expected to modify the use of energy or the cost of energy.*

Sec. 28. *A qualified service company shall provide to the Office of Energy within the Office of the Governor information concerning each performance contract which the qualified service company enters into pursuant to sections 16 to 29, inclusive, of this act, including, without limitation, the name of the project, the using agency for which the project is being carried out and the expected operating cost savings. The Office of Energy may report any energy savings realized as a result of such performance contracts to the United States Department of Energy pursuant to 42 U.S.C. § 13385.*

Sec. 29. *A performance contract must include appropriate financial mechanisms determined to be necessary by the State Treasurer to guarantee that operating cost savings are realized by the using agency if the actual cost savings do not meet the predicted cost savings.*

Secs. 29.3-29.7. (Deleted by amendment.)

Sec. 30. This act becomes effective on July 1, 2003.