

# Local Government Law Bulletin

## A Summary of Recent Legislation Authorizing “Guaranteed Energy Savings Contracts” (Chapter 775, 1994 Session Laws, Senate Bill 94)

by Frayda S. Bluestein

The 1993 General Assembly in its 1994 session authorized local governments to enter into contracts for energy saving improvements to existing buildings in which the contractor guarantees that the savings will, over the period of the contract, pay for the cost of the improvements. The substance of the new law is contained in G.S. 143-64.17 through 143-64.17E (Chapter 143, Article 3B, Part 2). The law defines “guaranteed energy savings contracts,” establishes a “request for proposals” procedure for procuring these contracts and exempts them from otherwise applicable bidding requirements, authorizes installment purchase and lease purchase financing for these contracts (including for schools and community colleges which do not have general installment or lease-purchase authority), and assigns to the Local Government Commission responsibility for compiling information on and reporting to the legislature about these contracts.

### **Guaranteed Energy Savings Contracts (GESCs)—Key Terms Defined.**

According to the new law, a “guaranteed energy savings contract,” (GESC) is “a contract for the evaluation, recommendation, or implementation of *energy conservation measures*, including the design and installation of equipment or the repair or replacement of existing equipment, *in which all payments, except obligations on termination of the contract before its expiration, are to be made over time, and in which energy savings are guaranteed to exceed costs.*” G.S. 143-64.17(3)(emphasis added).

An “energy conservation measure” as used in this definition is a “*facility alteration or training* related to the operation of the facility that reduces energy consumption or operating costs.” These measures may include insulation, storm windows or doors, caulking, weather-stripping, and

other window or door system modifications that reduce energy consumption, automatic energy control systems, heating, ventilating, or air-conditioning system modifications or replacements, replacement or modification of lighting fixtures, energy recovery systems, cogeneration systems that produce energy for use in a building or complex of buildings, or other long term energy reducing or cost saving measures. G.S. 143-64.17(1)(emphasis added).

The act defines “energy savings” as “a measured reduction in fuel, energy, or operating costs created from the implementation of one or more energy conservation measures when compared with an established baseline of previous fuel, energy, or operating costs developed by the local governmental unit.” G.S. 143-64.17(2). The act does not define operating costs.

The act applies to local governmental units, defined to include any board or governing body of a political subdivision of the State *including a community college or school board.* G.S. 143-64.17(4). The act amends various statutes in Chapter 115C (local school boards) and Chapter 115D (community colleges) to specifically authorize these units to enter in to GESCs under the new statute.

### **Procedure for Procuring GESCs**

The new statute describes in detail the steps a local governmental unit must take before it may enter into a GESC. It also states that with the exception of the minority and women-owned business “good faith efforts” requirements contained in G.S. 143-128(c), only those procedures set forth in the new statute must be complied with in procuring GESCs. G.S. 143-129.4 Thus, except for the good faith effort requirement, both the GESC contract itself, and contracts for equipment that might be purchased by the unit under a GESC

are exempt from all statutory bidding requirements that would otherwise apply to purchase of equipment or construction and repair. Presumably, for schools and community colleges, this means that the requirement to purchase through the Department of Administration does not apply to GESCs. See, G.S. 115C-522(a); 115D-58.5.

GESCs must be solicited using a “request for proposals” (RFP) procedure. Notice of the request must be published in a newspaper of general circulation at least 15 days before the time set for opening the proposals. G.S. 143-64.17A(a). The RFP must (1) state that the unit is requesting qualified providers to propose energy conservation measures through a GESC, (2) contain specified identifying information about the unit and a contact person in the unit, (3) list the date and time where proposals may be received, (4) list the evaluation criteria (described below), (5) reserve to the unit the right to reject any or all proposals, and may contain any other stipulations the unit deems appropriate. G.S. 143-64.17(6).

At least two proposals must be received in order for a contract to be awarded on the first advertisement. However, if less than two proposals are received, the notice may be published again, and after the second notice, a contract may be awarded even if only one proposal is received. G.S. 143-64.17A(a).

The proposals must contain estimates of all costs of installation, modification, or remodeling, including costs of design, engineering, maintenance, repairs, and debt service, and estimates of energy savings. Proposals must be opened in public by an elected official or employee of the unit and the contents of the proposals must be announced and recorded in the minutes of the governing body. (This would suggest that proposals must be opened at a meeting of the public body, although it is possible that they could be entered into the minutes of a meeting held after the opening.) The proposals must be evaluated by a licensed architect or engineer to determine that they contain the information required by the statute and that they meet the criteria in the RFP. The unit can require that the cost of this evaluation be included in the proposal cost unless the architect is employed by the unit or the bidder. G.S. 143-64.17A(b), (c). The statute also provides that it does not affect the provisions of Article 3D of Chapter 143 which contains the selection procedures for architects, engineers, and surveyors. G.S. 143-64.17A(e).

The standard for awarding GESCs allows the unit to select the provider that it determines to “best meet the needs of the local government unit” by evaluating (1) price, (2) proposed cost of construction, financing, maintenance, and training, (3) quality of the products proposed, (4) amount of energy savings, (5) general reputation and performance capabilities of the providers, (6) substantial conformity with the specifications and conditions in the RFP, (7) time specified in the proposals for performance, (8) and any other factors the unit deems necessary and that is makes a matter of record.

G.S. 143-64.17A(d). The unit must provide 15 days published notice of the meeting at which it proposes to award the contract and must identify the names of the parties to the proposed contract and “the contract’s purpose.” G.S. 143-64.17B(b).

## GESC Contract Terms

A GESC may not be entered into for a term longer than eight years from the date that the energy saving measures are installed and accepted by the unit. The energy saving measures must be for an *existing building*, and the unit must find that the energy savings provided for in the contract will equal or exceed the “total cost of the contract.” G.S. 143-64.17B(a). The statute defines “total cost” as including costs of construction, financing, maintenance and training during the term of the contract, and “any obligations on termination of the contract before its expiration.” G.S. 143-64.17C(d). In an earlier definition, the statute provides that a contract can not require the unit to contract for maintenance from the provider under a GESC if the unit uses its own forces for maintenance or can contract for maintenance on its own from another provider at a lower cost. G.S. 143-64.17(3). It is not clear how costs are to be calculated if the unit uses its own forces for maintenance work.

The “guarantee” encompassed in a GESC must be secured by a bond equal to 100% of the total cost of the contract. G.S. 143-64.17B(c). The bond is subject to the statutory bonding provisions otherwise applicable to public construction projects contained in Article 3A of Chapter 44A. It is not clear how this bond works, however. The statute provides that if the savings are not as great as projected under the contract, the unit may terminate the contract without incurring any additional obligation to the provider. Since payments are to be made over time, it would appear that the unit does not have to wait until the end of the contract to terminate it if savings are not as projected. However, it is not clear if the bond guarantees simply the completion of the improvements, or the promise of savings as well. If it guarantees the savings, the provider would either be required to improve the energy saving measures or refund the amount not recovered.

## Financing

As noted above, the new statute specifically allows units that are authorized to enter into GESCs to finance these contracts under installment or lease-purchase agreements under G.S. 160A-19 and 20. Although cities and counties already have general authority to finance construction or equipment through installment purchase or lease purchase contracts, schools and community colleges do not. The

statute specifically authorizes these units to finance GESCs using these methods and provides that they are subject to the procedures in G.S. 160A-20(a)-(g). G.S. 143-64.17C.

By definition, GESCs must extend beyond a single fiscal year, and the statute specifically authorizes this and requires that GESCs stipulate that they do not constitute a debt or pledge of the faith and credit of the unit. G.S. 143-64.17D. (Presumably, this means that they must contain a nonappropriation clause. See, G.S. 160-20(f). In addition, the statute provides that the unit may use any funds not otherwise restricted by law to pay for GESCs and that the State can not reduce appropriations to any unit as a result of a GESC. G.S. 143-64.17E.

### **Reporting of GESCs and Expiration of Authority**

All units entering in GESCs must report the contract and its terms to the Local Government Commission. The LGC is to compile the information and report it every other year to the Joint Legislative Commission on Governmental Operations. The LGC's compilation is to include information on the energy savings expected. The statute also directs the LGC, with the assistance of the Office of State Construction, to evaluate whether expected savings have been realized. The authority to enter into GESCs under the provisions described above expires after July 1, 1997.