

*Energy***House, Senate Energy Policy Bills Include Provisions to Boost Performance Contracting**

**D**irectives in the House and Senate energy policy bills (H.R. 8, S. 2012) for widening use of performance-based contracts will “put some additional teeth” into the president’s push to make the government more energy efficient, Donald Gilligan, president of the National Association of Energy Service Companies (NAESCO), told Bloomberg BNA Dec. 7.

There’s been “substantial progress” on agencies’ use of performance-based contracts because of executive initiatives boosting performance contracting over the last few years, according to Gilligan, whose group represents energy services companies that implement independent projects such as energy savings performance contracts (ESPCs), as well as utility-sponsored projects such as utility energy service contracts (UESCs).

H.R. 8, passed by the House Dec. 3, and S. 2012, placed on the Senate calendar last September, require agencies to consider energy savings performance contracting and utility energy services contracting to meet new performance goals related to energy information technology systems.

The proposed goals are part of a strategy for fixing problems with agency purchases, use and maintenance of energy-efficient and energy-saving IT systems, particularly for data centers.

**Federal Building Efficiency Initiatives.** The original bills take a similar approach to making federal buildings more energy efficient by encouraging, but not mandating, agency use of ESPCs and UESCs to meet energy efficiency goals.

They also would require annual reports from agencies updating the status of energy contracts, including their investment value, a comparison of guaranteed energy savings to actual savings achieved in the previous year, and year-ahead projections for new performance-based contracts.

The reports also are to include the rationale for failing to implement previous plans for these contracts.

Asking agencies why “they didn’t do these projects” could prove to be “really interesting,” Gilligan said, particularly in light of the 2009 federal building audits

identifying \$8 billion to \$9 billion in energy cost savings over a 10-year period.

**CBO Scoring a Hurdle.** The reporting requirements, however, were stripped from the House bill before it went to the floor.

All bill language that would explicitly increase use of ESPCs was removed after being reviewed by the Congressional Budget Office, Jennifer Schafer, executive director of the Federal Performance Contracting Coalition (FPCC), told Bloomberg BNA Dec. 7.

CBO scores legislation related to ESPCs and UESCs on a mandatory basis that doesn’t account for the long-term discretionary savings guaranteed under the contracts, according to the coalition.

However, Senate legislation triggering use of ESPCs is now scored as budget-neutral — the same approach the administration takes — under changes in the joint budget resolution passed earlier this year, Schafer said.

This allows for the provisions in S. 2012 clarifying ESPC statutory requirements and extending federal energy reduction goals without providing for offsets, she said.

As far as FPCC members are concerned, the new 10-year, energy reduction goals for federal buildings in the Senate bill are key changes, Schafer said.

The coalition lobbies for increased federal use of ESPCs on behalf of its energy services company (ESCO) members and advocated for a number of related changes in both versions of the energy bill.

**Performance-Based Contracting Model.** The performance-based contracting model calls for an ESCO or a utility to negotiate with a federal agency on the specific amount of energy savings it will achieve through retrofits and other measures. The ESCO or utility is paid for its work under the contract out of the savings it achieves.

The contracting vehicle alleviates the budget strain agencies face when initiating such projects because it allows for private, third-party financing up-front and recovery of costs from energy savings over the long run, Justin Ganderson, special counsel in Covington & Burling LLP’s Washington, D.C., office, told Bloomberg BNA Dec. 7.

Even though some of the ESPC provisions were taken off the table, congressional deliberations on facilitating use of ESPCs is a “really positive” development, he said.

One legislative change — allowing an agency to sell or transfer energy savings and apply the proceeds to fund its performance contract — is particularly critical, Scott Freling, a partner with Covington & Burling, told Bloomberg BNA Dec. 7.

The provision effectively would overturn a 2013 Armed Services Board of Contract Appeals decision invalidating the compensation provisions related to the sale of Solar Renewable Energy Certificates (SRECs) that were included in an Army contract with Honeywell International's contract with the Army, he said.

The ASBCA concluded that proceeds from the sale of SRECs cannot constitute "energy savings" for purposes of an ESPC (100 FCR 199, 8/20/13).

Another important legislative change, Freling said, expands covered work under energy performance contracts to include "energy consuming devices and required support structure."

There are a lot of federal buildings in need of modernization that would benefit from this change, he said.

The bill also incorporates provisions from a stand-alone bill (S. 723) specifying that UESCs can span up to 25 years and that savings must be measured and verified (103 FCR 271, 3/17/15).

**Legislative Outlook.** The House bill, which passed by a 249-174 vote, faced almost unanimous opposition by Democrats and a veto threat. Among the administration's objections was the bill's language watering down requirements for reduced federal building use of fossil fuel-generated energy, according to a Nov. 30 policy statement.

In contrast, the Energy and Natural Resources Committee easily approved the Senate omnibus energy bill last July by an 18-4 vote.

A Senate vote is unlikely before year's end and consideration of the bill in an election year could be tricky, Cheryl Wilson, a Bloomberg Intelligence government analyst, told Bloomberg BNA.

However, Robert Dillon, spokesman for Sen. Lisa Murkowski (R-Alaska), chairman of the Senate Energy and Natural Resources Committee and the bill's author, expressed optimism the measure could still see floor action in 2016. It's "doable in an election year," Dillon said in an e-mail.

President Barack Obama in December 2011 issued a presidential memorandum directing federal agencies to invest \$2 billion in energy efficiency projects using performance-based contracts. In May 2014, he announced another \$2 billion goal for investments in energy efficiency upgrades in federal buildings through ESPCs over three years.

More recently, a March 2015 executive order on federal sustainability called on agencies to set new annual performance contracting goals for federal building energy savings from fiscal 2017 through 2025.

The U.S. Energy Information Administration announced Dec. 7 that the federal government's total energy consumption was at a 40-year low in fiscal 2014.

Energy consumed per square foot inside federal buildings has been steadily declining since fiscal 1975, when collection of the data began, according to Energy Department statistics.

The Energy Independence Act of 2007 included energy reduction goals for federal agencies, including targets for reducing energy intensity, water intensity and fossil fuel consumption in federal buildings. Last March's executive order established additional energy consumption goals to be achieved by increasing federal buildings' use of renewable and alternative energy sources.

— With assistance from Ari Natter

By DEBORAH BILLINGS

To contact the reporter on this story: Deborah Billings in Washington at [dbillings@bna.com](mailto:dbillings@bna.com)

To contact the editor responsible for this story: Jeff Kinney at [jeffkinney@bna.com](mailto:jeffkinney@bna.com)

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