
**Model
State Enabling Legislation
for
Green Performance Contracting**

**A
White Paper
by
Leonardo Academy Inc.**

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White Paper**

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Preface

This is the April 27, 2007, working draft of the Leonardo Academy white paper on model state enabling legislation for green performance contracting.

Objectives

This white paper is being prepared and issued as a working draft with several goals in mind:

- (1) To provide states that are updating their performance contracting enabling legislation with guidance on how to explicitly include overall sustainability in the scope of performance contracting for state and local governments.
- (2) To gather input on how to improve this model green performance contracting enabling legislation.

Please contact Leonardo Academy if you have any comments or suggestions for this white paper.

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Appendix A: Model Green Performance Contracting Enabling Legislation for State and Local Government Buildings

Section 1: How State and Local Governments Can Use Performance Contracting to Accelerate Sustainability Achievements

Buildings are a major cause of environmental impacts, so buildings provide major opportunities for reducing these environmental impacts and increasing sustainability. Many government and private organizations at the international, national, state, and local levels are setting sustainability goals for themselves. To reach these sustainability goals all the traditional tools for implementing energy efficiency improvements in buildings need to be upgraded and expanded to address overall sustainability. One very important tool for delivery of energy efficiency improvements in buildings, particularly in the public sector, is performance contracting.

Performance contracting is an approach to upgrading building operating performance that allows state and local governments to use expense funding to pay for capital improvements needed to improve building performance. Because state and local government buildings frequently have difficulty making capital improvement funds available for their buildings, performance contracting removes a major barrier to state and local government entities making needed upgrades of their facilities.

Performance contracting can be used to implement building sustainability improvements in both existing buildings and buildings being newly designed and constructed.

In most states, expanding the scope of performance contracting from its traditional energy focus to a broader focus on overall building and site sustainability can be achieved under current states laws covering performance contracting. In other states, the legislation may need to be modified to cover this expanded scope.

This white paper discusses and provides model state enabling legislation for green performance contracting.

Model state enabling legislation for green performance contracting is included in Appendix A.

Section 2: Model State Enabling Legislation for Green Performance Contracting

Most states have performance contracting enabling legislation in place that provides for the use of performance contracting for building upgrades by state and local government entities. Frequently these statutes are focused on the use of performance contracting to implement energy-saving and water-saving measures.

In many cases, state enabling legislation is flexible enough so that overall sustainability can be included in performance contracting. This is particularly true when taking into account the fact that most of the sustainability measures beyond energy efficiency and water efficiency are low-cost and no-cost measures and the higher-cost measures are usually energy efficiency improvement measures which are often explicitly allowed in current state performance contracting enabling legislation. However, state and local government statutes that address performance contracting range from being extremely open to being extremely narrow in their focus.

This section provides guidance for state energy offices and others on how, where existing legislation is too narrow, state performance contracting enabling legislation can be updated to explicitly cover overall sustainability. This will clearly communicate the important role these statutes can play in achieving the efficiency and sustainability goals of state and local government.

Expanding Scope of Performance Contracting to Explicitly Cover Overall Sustainability

There are four scope issues that need to be addressed to expand traditional performance contracting enabling legislation to clearly support green performance contracting:

- Expand the scope of actions that can be included in a performance contract to include all credible sustainability actions.
- Expand the achievement metrics to cover the full range of sustainability achievements.
- Expand the performance verification to cover the full range of sustainability achievements.
- Expand the scope of the performance guarantees to cover the full range of sustainability achievements.

Language addressing each of these issues is included in the model enabling legislation in Appendix A.

Accelerating Sustainability Funding

Performance contracting enabling legislation can allow for acceleration of the achievement of sustainability beyond the level of what can be accomplished through traditional self-funding projects. By creating performance contracting enabling legislation that allows users to specify in RFPs and performance contracting agreements how much they are willing to invest in sustainability improvements beyond what is self-funding, state enabling legislation creates opportunities for building owners or organizations to accelerate the achievement of their sustainability objectives.

Language allowing sustainability acceleration funding has been added to the model enabling legislation in Appendix A.

Each state that is expanding its performance contracting enabling legislation to explicitly encompass sustainability will need to decide whether to include this language, and create the necessary flexibility to turn performance contracting into a more powerful tool for sustainability achievement.

Model Green Performance Contracting Enabling Legislation

The model green performance contracting enabling legislation included in Appendix A addresses the four scope issues listed above, as well as the sustainability acceleration option described in the previous paragraph.

The model green performance contracting enabling legislation documents for all the options were created drawing on the National Association of State Energy Officials (NASEO) model legislation for energy savings-focused performance contracting and the energy savings performance contracting enabling legislation of individual states.

Section 3: Conclusions

Buildings are a major cause of environmental impacts, so buildings provide major opportunities for reducing these environmental impacts and increasing sustainability. Many government and private organizations at the international, national, state, and local levels are setting sustainability goals for themselves. To reach these sustainability goals all the traditional tools for implementing energy efficiency improvements in buildings need to be upgraded and expanded to address overall sustainability. One very important tool delivery of energy efficiency improvements in building, particularly in the public sector, is performance contracting.

This white paper provides guidance for states that want to update their performance contracting enabling legislation so that it explicitly includes overall sustainability in the scope of performance contracting.

Expanding traditional energy efficiency-focused tools like performance contracting to address overall sustainability provides two key benefits:

1. It puts these tools to work on promoting and delivering overall sustainability.
2. It puts the issue of overall sustainability to work on increasing the delivery of energy efficiency. Because overall sustainability is a big issue closely connected to image and brand for both government entities and private sector companies, selling the leadership of government entities and private sector companies on taking action to implement sustainability is frequently easier than selling them on taking action to increase energy efficiency, which is frequently viewed as a technical issue not associate with organizational brand and image.

Leonardo Academy is available to help both state and local governments incorporate sustainability into their performance contracting initiatives. Also please give Leonardo Academy your input on your experience with using performance contracting to implement overall sustainability and let us know what you learn along the way so that we can share it with others.

Appendix A: Model Green Performance Contracting Legislation for State and Local Government Buildings

Overview

This model green performance contracting enabling legislation expands performance contracting from its prior focus on energy and water savings to cover the overall sustainable performance of buildings.

Section 1: Definitions in this Act

1. "Sustainability area" means any specific domain of building and site activities, such as energy use or water use.
2. "Sustainability measures" can include any appropriate action related to building and site maintenance and improvement for each sustainability area included in the green performance contract, and must at a minimum include:
 - a. Green site management
 - b. Green building exterior management
 - c. Water use reduction
 - i. Building
 - ii. Site
 - d. Energy use reduction
 - i. Building
 - ii. Site
 - e. Building and site performance measurement and tracking
 - f. Sustainability and building and site operation education
 - i. Site and facility management staff
 - ii. Building occupants
 - g. Building systems upgrades and maintenance
 - h. Renewable energy and emissions offsets
 - i. Green purchasing
 - j. Source reduction and recycling
 - k. Indoor environmental quality
 - l. Other sustainability measures
3. "Person" means any corporate or non-corporate entity or individual of any type.
4. "Public building" means any structure, building, or facility, including its equipment, furnishings, or appliances, that is owned or operated by a governmental unit.
5. "Qualified green service provider" means a person with a record of established projects or a person with demonstrated technical, operational, financial, and managerial capabilities to implement green performance contracts. Such persons have experience in the design, implementation, and installation of sustainability measures and have the ability to secure necessary financial measures to support the required guarantees and the technical capabilities to ensure such sustainability measures deliver the guaranteed sustainability achievements.

6. "Energy use" is the amount of energy used by the building and site.
7. "Energy costs" are the costs of operating the building and site that relate to energy.
8. "Non-energy operating costs" are the costs of operating the building and site, with the exception of energy costs.
9. "Total operating costs" means the cost of energy and non-energy operating costs for the building and site.
10. "Annual costs" means the cost of servicing the debt for the project or making lease payments for the project plus any other costs of the performance contract on an annual basis.
11. "Governmental unit" means any state agency, authority, or any political subdivision of state or local government, including, but not limited to, county, city, township, village or municipal government, local school districts and institutions of higher education, any state-supported institution, or a joint-action agency composed of political subdivisions.
12. "Green performance contract" means a contract between the governmental unit and a qualified green service provider for evaluation, recommendation, and implementation of one or more sustainability measures.
13. "Incentive payment" means an annual payment by the governmental unit to the qualified green service provider per point above the guaranteed level of performance.
14. "Disincentive payment" means an annual payment by the qualified green service provider to the governmental unit per point below the guaranteed level of performance.
15. "Sustainability implementation plan" means a plan detailing the sustainability measures to be implemented and a schedule for doing so.
16. "Sustainability achievements" means cost savings, energy or water savings, prolonged equipment life, or any other definable and measurable good achieved as a result of sustainability measures taken in accordance with the performance contract.
17. "Sustainability achievement metrics" are methods defined by the governmental unit for measuring sustainability achievements.
18. "Sustainability achievement verification" is the method used to verify that the qualified green service provider's claims about reaching sustainability achievements are accurate.

Section 2: Authorization

Any governmental unit may enter into a green performance contract with a qualified green service provider to increase the sustainability of a building or buildings and the associated site or sites. Any governmental unit may implement other capital improvements in conjunction with a green performance contract so long as the measures which are being implemented serve to increase the sustainability of the building or buildings and the associated site or sites.

Section 3: Selection of a Qualified Green Service Provider

1. Before entering into a green performance contract under this section, a governmental unit shall solicit qualifications and proposals from qualified green service providers. A governmental unit may thereafter award the green performance contract to the qualified green service provider that best meets the needs of the governmental unit, and which need not be the lowest cost provider.
2. Request for Proposals (RFP)
 - a. The governmental unit shall issue a RFP. The governmental unit shall attempt to use objective criteria in the selection process. The criteria for evaluation shall include the following substantive factors to assess

the capability of the qualified green service providers in the areas of green performance contracting delivery.

- b. The RFP shall include:
 - i. A description of the factors that will be used in the selection process.
 - ii. The governmental unit's target level of overall sustainability achievement being sought and the target levels of sustainability achievements in specific sustainability areas (such as energy efficiency, water efficiency, and waste disposal) being sought in the RFP.
 - c. The RFP issued shall provide access to:
 - i. A description of the building or buildings covered.
 - ii. An opportunity for a walk-through of the building(s) by potential respondents.
 - d. The RFP shall require respondents to provide:
 - i. The following information on the qualifications of the respondent:
 - Design, engineering, installation, operation, maintenance, repairs, and performance documentation for sustainability measures.
 - Overall sustainability project experience and qualifications, management capability, ability to access long-term financing, and experience with projects of similar size and scope.
 - Familiarity with the sustainability achievement metrics specified by the governmental unit.
 - Familiarity with the sustainability achievement verification approach specified by the governmental unit.
 - Other factors determined by the governmental unit to be relevant and appropriate and which relate to the ability of the respondent to perform the project.
 - ii. The following information on the proposed project:
 - Strategies on how to meet or exceed the target sustainability achievement levels, both for overall sustainability and for any specific sustainability areas mentioned in the RFP, at the lowest cost.
 - For each sustainability area included in the metrics for sustainability achievement specified in Section 4.3:
 - 1) A statement of what sustainability achievement guarantees and costs the respondent can commit to at this RFP stage.
 - 2) A statement of which achievement guarantees and costs the respondent will only be able to commit to after carrying out a detailed audit of the building and site.
 - Preliminary language addressing each of the topics identified in Section 4 of this Act.
3. The responses to the RFP shall serve as the selection document for purposes of choosing a qualified green service provider to engage in final contract negotiations for the following actions:

- a. Completion of a detailed building audit and development of a proposed sustainability implementation plan for the building and the site.
 - i. Detailed audit should include baseline energy consumption for all sustainability areas specified in the RFP.
 - ii. This plan shall include detailed information on the costs and benefits of each sustainability measure proposed. Benefits may include cost savings, prolonged equipment lifespan, other measurable benefits, and meeting or exceeding the target sustainability achievements specified in the RFP.
- b. The cost of the detailed audit, both total and per square foot.
- c. Negotiations between the governmental unit and the qualified green service provider on each item in Section 4 of this Act.
- d. What will happen after the negotiations:
 - i. If the governmental unit decides to move forward with the project.
 - How cost of the detailed audit will be rolled in to the total project cost.
 - How the project will proceed.
 - How any other issues will be addressed.
 - ii. If the governmental unit decides not to move forward with the project.
 - How cost of the detailed audit will be paid to the qualified green service providers by the governmental unit.
 - How any other issues will be addressed.

Section 4: Required Components of Green Performance Contracts

A green performance contract shall include each of the following for the entire life of the green performance contract:

1. A list of the sustainability areas covered by the contract.
2. A list of sustainability measures to be implemented for each sustainability area.
3. A guaranteed level of sustainability achievement specified by the governmental unit for each sustainability area covered by the green performance contract. The guaranteed level of sustainability achievement may be fixed or set to increase over time.
4. A defined set of sustainability achievement metrics chosen by the governmental unit for each of the sustainability areas to be covered in the green performance contract.
 - a. List and descriptions of sustainability achievement metrics for each area covered.
5. A defined method sustainability achievement verification chosen by the governmental unit to assess whether sustainability achievement targets have been met by the qualified green service provider for each sustainability area covered by the green performance contract.

- a. Specification of the methods to be used for sustainability achievement verification for each area covered.
6. A commitment by the qualified green service provider to
 - a. Provide the governmental units with annual documentation of the sustainability achievements relative to the sustainability achievement metrics chosen by the governmental unit in Section 4.3 above.
 - b. Provide annual verification of the level of sustainability achievement following the method selected under Section 4.4 above.
7. Specified annual incentive and/or disincentive payments for annual sustainability achievement above or below the guaranteed level of sustainability achievement.
8. A guaranteed maximum for building improvement costs.
9. A projection of the annual non-energy operating costs.
10. A projection of the annual energy use.
11. A projection of the annual energy costs.
12. Projection of total operating costs for each year of the performance period using a range of energy cost escalation rates agreed on by the governmental unit and the qualified green service provider as covering the plausible range of escalation rates:
 - a. If the green performance contract is not implemented
 - b. If the green performance contract is implemented
 - c. Difference between 4.12.a and 4.12.b
13. Projection of the annual cost of the green performance contract.
14. The level of guaranteed annual energy savings and other operating savings over the performance period. The baseline energy consumption measured during the detailed building audit should be used as the basis for determining the level of guaranteed savings.
15. The amount of investment the governmental unit is willing to make in sustainability beyond what is self-funding by the performance contract. (The drafters of the enabling legislation need to decide whether to allow governmental units the flexibility to use accelerated sustainability funding. Once the decision is made, it should be implemented consistently though out the enabling legislation.)

Section 5: Installment Payment and Lease-Purchase Agreements

A governmental unit may enter into a performance contract structured as an installment payment contract or lease-purchase agreement for the purchase and installation of sustainability measures. Financing implemented through an entity other than the qualified green service provider is authorized.

Section 6: Term of Contracts

A green performance contract, and payments provided there under, may extend beyond the fiscal year in which the performance contract becomes effective, subject to appropriation of moneys, if required by law, for costs

incurred in future fiscal years. The green performance contract may extend for a term not to exceed twenty-five years.

Section 7: Allocation of Obligations

Subject to appropriations as provided in Section 6 of this Act each governmental unit shall allocate sufficient moneys for each fiscal year to make payment of any amounts payable by the governmental unit under performance contracts during that fiscal year.

Section 8: Use of Moneys/Reconciliation

1. The governmental unit engaging in the green performance contract shall retain any savings achieved by entering into such performance contract. In no event shall the governmental unit utilize such savings to supplant otherwise appropriated funds for the governmental unit.
2. Unless otherwise provided by law or ordinance, a governmental unit may use funds designated for operating and capital expenditures or utilities for any green performance contract, including, without limitation, contracts entered into under Section 4 of this Act.
3. The green performance contract shall provide that guaranteed sustainability achievements must be delivered in each year of the performance period with no carry-over from one year to another and reconciliation of the amounts owed under a performance contract must occur annually for each year of the performance period

Section 9: Monitoring and Reports

1. The monitoring and reporting actions required in Section 2 of this Act shall be carried out.
2. The qualified green service provider and governmental unit may agree to make modifications in calculating costs and savings based on any of the following occurrences:
 - a. Subsequent material change to the baseline energy consumption identified at the beginning of the performance contract.
 - b. Changes in utility rates.
 - c. Changes in number of days in the utility billing cycle.
 - d. Changes in total square footage of the building.
 - e. Changes in operational schedule of the facility.
 - f. Changes in facility temperature.
 - g. Material changes in weather.
 - h. Material changes in amount of equipment or lighting used at the facility.
 - i. Any other change which reasonably would be expected to modify energy use or energy costs.

Section 10: Contingency Provisions

Performance contracts shall include contingency provisions specifying procedures for governmental units to take remedial actions to reach target sustainability achievements in the event that guaranteed sustainability achievements are not met within 2 years of falling below contractual targets.

Section 11: Use of Savings from Performance Contracts

Governmental units may direct savings realized under the green performance contracts to contract payment and other expenses as they deem necessary. The governmental unit is encouraged to reinvest savings whenever practical into additional sustainability measures, as long as the governmental unit is satisfying all obligations under the performance contract.

Section 12: Repeal of Prior Conflicting Statutes

Provisions of any statute enacted prior to this Act which are inconsistent with this Act are hereby repealed. In cases where there is a question as to the degree of inconsistency, this Act is intended to control.

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