

## ACT 144

H.B. NO. 401

A Bill for an Act Relating to Contracting for Public Facilities.

*Be It Enacted by the Legislature of the State of Hawaii:*

SECTION 1. The legislature finds that energy performance contracting for energy efficiency retrofits at public facilities has saved taxpayers in the State hundreds of millions of dollars over the last decade. Energy performance contracts allow public agencies to leverage private sector partnerships and provide financing to implement capital-intensive projects that offer guaranteed energy savings over the term of a contract.

In addition to promoting public sector energy efficiency, the State has established ambitious goals to adopt renewable energy and clean transportation technologies and is actively developing opportunities for public agencies and facilities to contribute to these goals.

The legislature also finds that allowing public agencies to use innovative public-private partnership tools, such as energy performance contracting, to procure and use additional distributed energy resources, including solar, batteries, electric vehicles, and electric vehicle charging stations, will enhance the public sector's ability to support state energy goals while saving taxpayer dollars on energy and fuel costs.

The legislature notes that both the United States armed forces and Colorado have already expanded the use of energy performance contracting to support their energy and transportation goals. Furthermore, the legislature finds that public facilities will increasingly incorporate electric vehicle charging infrastructure to support public vehicle fleets. The legislature further finds that this infrastructure will interact with the public facilities' electrical systems. Accordingly, the legislature believes that the procurement of electric vehicles and facility infrastructure should be coordinated to maximize synergies and energy savings.

SECTION 2. Chapter 36, Hawaii Revised Statutes, is amended by adding a new section to be appropriately designated and to read as follows:

**“§36- Vehicle fleet performance contracts for vehicle fleet energy efficiency programs.** (a) All agencies shall identify and evaluate vehicle fleet energy efficiency programs that the agency may implement using vehicle fleet performance contracts.

(b) Any agency may enter into a multi-year vehicle fleet performance contract for the purpose of undertaking or implementing a vehicle fleet energy efficiency program and acquiring vehicles, vehicle fleets, necessary vehicle charging or fueling infrastructure, and renewable energy systems that supply charging or fueling infrastructure.

(c) Any agency evaluating and implementing an energy performance contract under section 36-41 may incorporate vehicle fleet operational and fuel cost-savings measures into that energy performance contract; provided that these measures comply with the contracting provisions for vehicle fleet performance contracts provided for in subsection (e)(6), (7), and (8).

(d) A vehicle fleet performance contract for vehicle fleet energy efficiency may include financing options, including leasing, lease-purchase, financing agreements, third-party joint ventures, guaranteed-savings plans, vehicle or vehicle fleet service contracts, or any combination thereof. Except as otherwise provided by law, the agency that is responsible for a particular vehicle fleet shall review and approve vehicle fleet performance contract arrangements.

(e) Notwithstanding any law relating to the award of public contracts to the contrary, any agency desiring to enter into a vehicle fleet performance contract, pursuant to this section, shall comply with the following:

- (1) The agency shall issue a public request for proposals, advertised in the same manner as provided in chapter 103D, concerning the provision of the vehicle fleet or the design, operation, and maintenance of a vehicle fleet energy efficiency program, fleet vehicles, necessary charging or fueling infrastructure, or renewable energy systems that supply charging or fueling infrastructure; provided that the request for proposals shall contain terms and conditions relating to the submission of proposals, evaluation and selection of proposals, financial terms, legal responsibilities, and any other matters as may be required by law or determined by the agency to be appropriate;
- (2) Upon receiving responses to the request for proposals pursuant to paragraph (1), the agency may select the most qualified proposal or proposals on the basis of the experience and qualifications of the proposers, technical approach, financial arrangements, overall benefits to the agency, and any other factors determined by the agency to be relevant and appropriate;
- (3) The agency may negotiate and enter into a vehicle fleet performance contract with the person or company whose proposal is selected as the most qualified based on the criteria established by the agency pursuant to paragraph (2);
- (4) The term of the vehicle fleet performance contract shall not exceed twenty years;
- (5) The vehicle fleet performance contract shall contain the following annual allocation dependency clause: "The continuation of this contract is contingent upon the appropriation of funds to fulfill the requirements of the contract by the applicable funding authority. If that authority fails to appropriate sufficient funds to provide for the continuation of the contract, the contract shall terminate on the last day of the fiscal year for which allocations were made";
- (6) The agency may include in the vehicle fleet performance contract a requirement that the agency shall ultimately receive title to the vehicles, vehicle charging and fueling infrastructure, and renewable energy systems that supply charging or fueling infrastructure being financed under the contract;
- (7) The agency shall include in the vehicle fleet performance contract a requirement that the total annual payments for vehicle fleet operational and fuel cost-savings measures shall not exceed total vehicle fleet operational and fuel cost savings achieved by the implementation of the measures;

- (8) For any guaranteed-savings plan, the payment obligation for each year of the contract, including the year of acquisition, shall be guaranteed by the private sector person or company to be less than the annual vehicle fleet operational and fuel cost savings attributable under the contract to the vehicles and necessary charging or fueling infrastructure; provided that this guarantee, at the option of the agency, shall be a bond or insurance policy, or other type of guarantee determined by the agency to be sufficient to provide a similar level of assurance to that of a bond or insurance policy; and provided further that, if the actual annual verified savings are less than the annual amount guaranteed by the vehicle fleet company, the vehicle fleet company, within thirty days of being invoiced, shall pay the agency, or cause the agency to be paid, the difference between the guaranteed amount and the actual verified amount; and
- (9) No vehicle, vehicle fleet, vehicle charging or fueling infrastructure, or renewable energy system contracted for or procured under a vehicle fleet performance contract shall qualify for or claim a state tax credit, state rebate, or other state financial incentive of any kind.
- (f) For the purposes of this section:

“Agency” means any executive department, independent commission, board, bureau, office, or other establishment of the State or any county government, the judiciary, the University of Hawaii, or any quasi-public institution that is supported in whole or in part by state or county funds.

“Energy performance contract” shall have the same meaning as in section 36-41.

“Financing agreement” shall have the same meaning as in section 37D-2.

“Guaranteed-savings plan” means an agreement under which a private sector person or company undertakes to design, operate, and maintain a vehicle fleet energy efficiency program and related vehicle fleet operational and fuel cost-savings measures for an agency and the agency agrees to pay a contractually specified amount of verified vehicle fleet operational and fuel cost savings.

“Vehicle” means every device in, upon, or by which any person or property is or may be transported or drawn upon a highway.

“Vehicle fleet operational and fuel cost savings” means a measurable decrease in the operational and maintenance costs of vehicles that is associated with fuel or maintenance based on higher efficiency ratings or alternative fueling methods, including but not limited to savings from the reduction in maintenance requirements and a reduction in or the elimination of projected fuel purchase expenses as a direct result of investment in electric or alternative fuel vehicles, vehicle charging or fueling infrastructure, and renewable energy systems that supply vehicle charging or fueling infrastructure.

“Vehicle fleet operational and fuel cost-savings measure” means any acquisition, installation, modification, or service that is designed to reduce energy consumption and related operating costs in vehicles and includes the following:

- (1) Vehicle purchase or lease costs, either in full or in part; and
- (2) Charging or fueling infrastructure, including renewable energy systems that supply this infrastructure, necessary to charge or fuel alternative fuel vehicles included in a vehicle fleet performance contract.

“Vehicle fleet performance contract” means an energy performance contract, shared-savings contract, or any other agreement in which vehicle fleet operational and fuel cost savings are used to pay for the cost of vehicles or associated capital investments in charging or fueling infrastructure.

“Verified” means the technique used in the determination of baseline vehicle fleet operational and fuel costs, post-vehicle fleet energy efficiency program

vehicle fleet operational and fuel costs, and vehicle fleet operational and fuel cost savings, including engineering calculations, metering and monitoring, meter analysis, computer simulations, mathematical models, and agreed-upon stipulations by the customer and the vehicle fleet company.”

SECTION 3. Section 36-41, Hawaii Revised Statutes, is amended by amending subsections (c) and (d) to read as follows:

“(c) Notwithstanding any law to the contrary relating to the award of public contracts, any agency desiring to enter into an energy performance contract shall do so in accordance with the following provisions:

- (1) The agency shall issue a public request for proposals, advertised in the same manner as provided in chapter 103D, concerning the provision of energy efficiency services or the design, installation, operation, and maintenance of energy equipment or both. The request for proposals shall contain terms and conditions relating to submission of proposals, evaluation and selection of proposals, financial terms, legal responsibilities, and other matters as may be required by law and as the agency determines appropriate;
- (2) Upon receiving responses to the request for proposals, the agency may select the most qualified proposal or proposals on the basis of the experience and qualifications of the proposers, the technical approach, the financial arrangements, the overall benefits to the agency, and other factors determined by the agency to be relevant and appropriate;
- (3) The agency thereafter may negotiate and enter into an energy performance contract with the person or company whose proposal is selected as the most qualified based on the criteria established by the agency;
- (4) The term of any energy performance contract entered into pursuant to this section shall not exceed twenty years;
- (5) Any contract entered into shall contain the following annual allocation dependency clause:  
 “The continuation of this contract is contingent upon the appropriation of funds to fulfill the requirements of the contract by the applicable funding authority. If that authority fails to appropriate sufficient funds to provide for the continuation of the contract, the contract shall terminate on the last day of the fiscal year for which allocations were made”;
- (6) Any energy performance contract may provide that the agency shall ultimately receive title to the energy system, vehicles, fleet vehicles, and fueling and charging infrastructure being financed under the contract;
- (7) Any energy performance contract shall provide that total payments shall not exceed total savings; and
- (8) For any guaranteed-savings plan:
  - (A) The payment obligation for each year of the contract, including the year of installation, shall be guaranteed by the private sector person or company to be less than the annual energy cost savings attributable under the contract to the energy equipment and services. Such guarantee, at the option of the agency, shall be a bond or insurance policy, or some other guarantee determined sufficient by the agency to provide a level of assurance similar to the level provided by a bond or insurance policy; and

- (B) In the event that the actual annual verified savings are less than the annual amount guaranteed by the energy service company, the energy service company, within thirty days of being invoiced, shall pay the agency, or cause the agency to be paid, the difference between the guaranteed amount and the actual verified amount.

(d) For purposes of this section:

“Agency” means any executive department, independent commission, board, bureau, office, or other establishment of the State or any county government, the judiciary, the University of Hawaii, or any quasi-public institution that is supported in whole or in part by state or county funds.

“Energy performance contract” means an agreement for the provision of energy services and equipment, including but not limited to building or facility energy conservation enhancing retrofits, water saving technology retrofits, electric vehicle charging infrastructure, and alternate energy technologies, in which a private sector person or company agrees to finance, design, construct, install, maintain, operate, or manage energy systems or equipment to improve the energy efficiency of, or produce energy in connection with, a facility or electric vehicle charging system in exchange for a portion of the cost savings, lease payments, or specified revenues, and the level of payments is made contingent upon the verified energy savings, energy production, avoided maintenance, avoided energy equipment replacement, avoided vehicle maintenance or fuel costs associated with the implementation of a vehicle fleet energy efficiency program pursuant to section 36-, or any combination of the foregoing bases. Energy conservation retrofits also include energy saved off-site by water or other utility conservation enhancing retrofits.

“Facility” means a building ~~[or]~~, buildings, infrastructure, or similar structure, including ~~[the]~~ any site owned or leased by, or otherwise under the jurisdiction or control of, the agency.

“Financing agreement” shall have the same meaning as in section 37D-2.

“Guaranteed-savings plan” means an agreement under which a private sector person or company undertakes to design, install, operate, and maintain improvements to an agency’s facility or facilities and the agency agrees to pay a contractually specified amount of verified energy cost savings.

“Verified” means the technique used in the determination of baseline energy use, post-installation energy use, and energy and cost savings by the following measurement and verification techniques: engineering calculations, metering and monitoring, utility meter billing analysis, computer simulations, mathematical models, and agreed-upon stipulations by the customer and the energy service company.”

SECTION 4. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.<sup>1</sup>

SECTION 5. This Act shall take effect upon its approval.

(Approved June 26, 2019.)

#### Note

1. Edited pursuant to HRS §23G-16.5.