

**SUBJECT:** Local government energy conservation contracts

**COMMITTEE:** Energy Resources — committee substitute recommended

**VOTE:** 6 ayes — Holzheuser, Hawley, Davis, Merritt, Moffat, Smithee  
0 nays  
3 absent — Driver, Torres, Wilson

**WITNESSES:** For — Glen Opel, Andrew J. Salen, Central & Southwest; Joe Ramos, Texas Association of School Boards; Jon Swanson, Honeywell Inc. Energy Conservation; Michael Osborne, Texas Renewable Energy Industries Association; Klip Weaver, Control Systems International  
Against — None  
On — Dan Wittliff, Texas Natural Resource Conservation Commission

**BACKGROUND :** In 1991, the Legislature authorized higher education institutions to enter into performance contracts for energy conservation measures to reduce energy consumption and operating costs at institutional facilities. In 1995, the Legislature authorized such contracts for school districts.

**DIGEST:** CSHB 1243 would allow local governments to enter into contracts for energy conservation measures to reduce energy consumption or operating costs of governmental facilities. The bill would require all energy conservation measures to comply with local, state and federal construction and environmental codes and regulations.  
  
Local governments could require the provider of the energy conservation measures to file a payment and performance bond in an amount it found to be reasonable and necessary. Local governments also could enter into lease-purchase contracts not to exceed 10 years. The contract would have to contain provisions guaranteeing the amount of savings to be realized. If the contract exceeded one year, the contractual obligations could not exceed the total energy and cost savings.

Local governments could follow competitive bidding procedures and, after negotiations, award a contract to the offeror with the most advantageous proposal. A local government could conduct discussions with offerors who submitted proposals and could revise proposals after submissions but before the contract was awarded. The bill would require all offerors to be treated fairly and equally with respect to proposal revisions.

Proposals would be kept secret during negotiations. Trade secrets could not be disclosed to competitors when bids were opened. Proposals would be kept open for public inspection after the contract was awarded unless an exception under the Texas Public Information (Open Records) Act applied.

CSHB 1243 would take immediate effect if finally approved by a two-thirds record vote of the membership in each house.

**SUPPORTERS  
SAY:**

CSHB 1243 would provide a cost-effective way to fund energy improvements for local government facilities without increasing state appropriations or relying on limited state-funded loan programs. Performance contracts for energy conservation measures are an excellent way to reduce energy consumption and operating costs that do not require local governments to put any money up front. The contractor pays for all project engineering, equipment and construction and is paid back from annual energy cost savings within a 10-year period.

The contractor also guarantees that a certain level of energy savings will be achieved, and if not achieved, the contractor must return the difference. Another benefit of energy conservation performance contracts is that at the end of the contract term all materials and equipment installed becomes government owned property. Institutions of higher education and school districts have been entering into energy conservation performance contracts with great success and without a single reported incidence of failure.

CSHB 1243 would give local governments the flexibility to enter into the most advantageous contract by providing an alternative to the normal bidding process whereby the selection of the lowest bidder is not required if another bidder's proposal would provide better energy savings or terms. The bill would also allow local governments to continue negotiations once they selected a provider. Normal bidding rules are incompatible with these type

of situations, and this two-step bidding process has been very effective with performance contracts for energy conservation used by school districts and institutions of higher education.

The bill would not mandate performance bonds because sometimes this precludes smaller providers from bidding on a project. Performance bonds also can increase the total cost of the project. Furthermore, with multi-million dollar bidders, a performance bond is unnecessary because they usually can make good on the contract. Local governments do not need performance bonds in these situations because elected officials have a fiduciary duty to taxpayers and can decide whether or not a performance bond is in the public's best interest. Local government officials also have a duty not to award contracts based on improper reasons and it would be impossible to legislate for every type of possible abuse.

**OPPONENTS  
SAY:**

Local governmental agency should not be exempted from competitive bidding laws required on all contracts for amounts greater than \$15,000. Absent normal competitive bidding laws, contracts could be awarded to friends rather than to the bidder with the best proposal. Furthermore, it would be risky to eliminate the need for a performance bond on large contracts; performance bonds reduce the risk of noncompliance with the contract.

**NOTES:**

The committee substitute changed the performance bond provision from a mandatory requirement to an optional provision, excluded school districts from the definition of local government, required that the lease-purchase provision contract guarantee the amount of savings to be realized by the government, required that offerors be treated fairly and equally with respect to discussions for proposal revisions, and specified that proposals would be opened in a manner to avoid disclosing trade secrets to competitors and to ensure compliance with the open records law.

The companion bill, SB 868 by Cain, has been referred to the Senate Intergovernmental Relations Committee.

A related bill, HB 3530 by Holzheuser, which would allow state agencies to enter into performance contracts for energy conservation measures, was reported favorably as substituted by the House Energy Resources Committee on April 1.