

DEB Notice 010505 – Performance Contracting

To: Virginia State Agencies and Institutions

Subject: Performance Contracting by Commonwealth Agencies

Several issues regarding state agency use of energy savings performance contracting have been raised. The first issue involves agencies' need to comply with additional provisions of law beyond the Performance Contracting statute. The second is concern over the potential magnitude of the projects and the overall impact on the state's debt capacity. This notice attempts to clarify these issues and inform agencies of proposed changes that will be considered by the 2005 Session of the General Assembly.

A popular method for implementing performance contracting involves executing two contracts, one for the improvements and savings guarantee and a second for financing the cost of the improvements (which may include the cost of the initial energy audit). This second contract is typically executed with or through a financial institution. The financing arrangement creates debt under Generally Accepted Accounting Principles (GAAP) and triggers the requirement for Treasury Board approval of the financing terms under §2.2-2417 of the Code of Virginia. Further, agencies should also be aware of existing requirements for energy efficiency projects that are set out in §4-4.01(w) of the Appropriation Act. Amendments to this section have been proposed in the 2005 budget bill. The key points are as follows:

1. Energy savings performance contracts are allowed through an approved vendor.
2. DMME must review the scope of work.
3. Treasury Board must approve financing contracts, if any.
4. If total project cost exceeds \$3,000,000 it is subject to the capital budget process.
5. If the project exceeds \$250,000 the Director, Department of Planning and Budget must be notified. The DPB Director will then notify the Chairman of the House Appropriations and Senate Finance Committees.

We do not know whether these amendments will be approved, or whether other changes will be made to the process for energy savings performance contracts. In the meantime, it is our goal to identify contracts that are ready to be signed before the new budget is enacted (in April, 2005) so that they may be "grandfathered" in, and allowed to proceed without being subject to the capital outlay process, so long as they comply with existing legal requirements (e.g., are recommended by DMME and Treasury Board, and if over \$250,000 are reported to the DPB). To help identify projects and to manage these changes, agencies are asked to notify DGS and DMME about the projects they have in process. Please submit the following information as soon as possible to Shirley McNutt at Shirley.McNutt@dgs.virginia.gov and Tommy Thompson at thomas.thompson@dmme.virginia.gov:

1. Agency contact information
2. Performance Contractor contact information
3. Total project cost

4. Names of buildings involved
5. Description of ECM's
6. Payback period

DMME's review of the scope of the work will be for reasonableness and not a check of engineering. The following items will be the basis of the review:

1. Does the Energy Conservation Measure (ECM) make sense for the building
2. Are the types of ECM's and savings reasonable
3. Are the ECM payback periods reasonable
4. A statement confirming that the required bond guaranteeing savings is included

The following information, taken from the technical audit, should be submitted to DMME for review:

1. Summary of ECM's including ECM description, cost, annual savings, and simple payback.
2. Description of each ECM.
3. Building description and square footage of area affected by improvements.
4. Contact information for the responsible contractor and agency personnel.

Contracts executed after the legislative session must conform to any changes in the energy contracting legislation or the budget bill that are approved during the session. More information about the process to use energy savings performance contracts may be found at the Department of General Services Web site at <http://deb.dgs.virginia.gov/contracts/contracts.asp>.

You also can contact the following people for more information:

Tommy Thompson at DMME: Thomas.Thompson@dmme.virginia.gov,
Shirley McNutt at DGS: Shirley.McNutt@dgs.virginia.gov, or
Evie Whitley at Treasury: Evie.Whitley@trs.virginia.gov.

cc: Energy Savings Performance Contractors