

SUMMARY OF STATE CONSENSUS NEEDS FOR AN EFFECTIVE ESPC STATE-WIDE PROGRAM

As part of an effective state program promoting guaranteed energy savings performance contracting, consensus from several key administrative positions is extraordinarily beneficial.

To assist this program's success, broad based perspectives from each of the state divisions are presented here for consideration.

Consensus Legal

It is not inconsistent that state legislators and administrators develop programs clearly intentioned for the public good, but without acquiring full support from the state's legal department. That office and subsequently those individuals are tasked with providing and protecting the state agencies from legal entanglement, contradictions of existing laws or concerns may cause these individuals to call into question the very program designed to implement those legislative good intentions.

Well intentioned individuals call into question the processes involved in this new legislative endorsement of energy savings performance contracting from a variety of perspectives. These include, but are not limited to, fair and equitable competition which is generally the purview of procurement, the ability to enter into financial agreements as specified by the programmatic design or enabling legislation, calling into question the framer or sponsor's intent, multi-year obligations by cash basis entities, even the very contracting instruments that become a part of a program.

The most effective programs appear to have in common the review, approval, and support of the state's legal department. Anytime any area of a program or state obligation of this kind is called into question by the state's legal department, additional reviews, and interpretations come into play that may delay or derail the effectiveness of the program altogether.

To ensure an effective program, we suggest providing information early and often to the state's legal department and requesting written review and support. This should include all instruments, the enabling legislation, sample reports and any programmatic designs upon their availability. In addition, it may prove helpful to provide as a resource the Earnest Orlando Lawrence Berkley National Laboratory report (LBNL-62679) *A survey of the U.S. ESCO Industry: Market Growth and Development from 2000 to 2006*.

In addition, these reviews at the state level, while not intended to replace agency legal review, go a long way toward providing agency confidence in programmatic design, contracting instruments, and obligations that may be required to enter into a successful guaranteed energy savings performance contract.

Consensus Procurement

State procurement departments ensure that agency decisions are well informed and well guided to comply with the state law, regulations, and sound practices of procurement and therefore provide an invaluable resource.

When a new program is introduced like this one, they may be burdened with calls regarding the applicability of the processes and procedures that have been ordained programmatically or embodied within the enabling legislation.

It's important to recognize that this procurement vehicle, guaranteed energy savings performance contracting, is different. To slight or overlook the need to engage and inform the agency responsible for state procurement generally has led to questions regarding applicability,

compliance with existing rules, guidelines, and procurement regulations, and how this new program aligns with the longstanding efforts of their office.

Programmatic managers have shared the value of working alongside the departments responsible for procurement in the development of the programs that offer performance contracting. This allows the department to recognize the enabling legislation has fundamentally sponsored a negotiated procurement vehicle for an energy services provider (ESCO) for a multi-term obligation typically respecting by statute the language of non-appropriations. In addition, this methodology of infrastructure improvement holds to the premise that quality and value may be separate and removed from lowest, first cost. It is the foundation of guaranteed savings energy performance contracting that the best value comes from the investment in technologies and strategies that have not only been justified based upon their value, but for which a guarantee of performance has been provided. As a state program is being developed, bringing light to any and all objections that may come from the department of procurement allows the best opportunity to generate support and consensus of the extraordinary values of guaranteed energy savings performance contracting from the procurement group.

Consensus Finance

The very foundation of guaranteed energy savings performance contracting has to do with the redirection of dollars previously planned to pay utility bills. Those dollars will be guaranteed to be available in the future by the vary efficiencies provided by the technological investment. Without complete agreement from the finance authorities within a state, considerable challenges arise regarding the lack of available budget dollars for these investments, the inability to enter into long term financial agreements, the question or challenge of best available rates for the financing terms, and the fiduciary responsibility of entering into an agreement that appears to be the generation of debt.

The federal government raised the question for years regarding the office of management and budget's assumption that only those dollars that existed in a capital improvement budget could be allocated for the repayment of an energy savings performance contract, which in fact defeats the very principal of infrastructure modernization through the redirection of utility dollars.

Finance should understand where the money is coming from initially (generally through 3rd party municipal lease or available state revolving funds) to fund these projects and how the repayment will occur. It should be shared with them how the program was empowered and a plan should be constructed for how the money will flow internal to the state and be accounted for in future budgeting. Lease instruments and the typical procedures engaged in rate acquisition and terms should be discussed with finance to insure that each state is using methodologies and practices, terms and instruments consistent with those previously reviewed and approved by state finance.

State administrations employ trusted, responsible resources in positions like finance, legal, and procurement that should be congratulated and encouraged for the oversight that they provide day to day. Significant value can be obtained by sharing clear and definitive responses to the questions that these authorities raise in fulfilling their responsibilities to the patrons of the state.

Written opinions crafted in support of this important vehicle generally serve to expedite the concerns and questions that arise with these programs are in their infancy or when new individuals are added to the staff of these governmental divisions. While those written opinions may not stand the test of change of administration or of personnel, they go a long way toward a clear understanding that the issues that have been considered and supported.