

Energy Savings Performance Contracting: How to Position Your District for Success

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School district budgets are tight and appear poised to become even tighter in the coming years. In this challenging economic environment, facility maintenance and upgrades often gets deferred as funds are devoted to programs and services that are considered more central to a school district's education mission. For that reason, many school districts are exploring ways in which maintenance and upgrade projects can move forward without a negative impact on the school district's balance sheet or cash flow statement. Energy savings performance contracts, if done properly, can provide the vehicle for a school district to enhance and improve its facilities without a negative impact on the bottom line.

Not all performance contracting companies are created equal and performance contracting is not a "risk free" proposition if care is not taken to establish the appropriate process and contract terms between the contractor and school district. The purpose of this article is to provide an overview of performance contracting for school districts under Wisconsin law, highlight the benefits of performance contracting and provide a guide that puts school districts in the best position to accomplish savings in performance contracting.

A. Overview of Wisconsin's Energy Savings Performance Contracting Law

Energy Savings Performance Contracting in Wisconsin is governed by Wis. Stat. § 66.0133. Every school district engaging in energy savings performance contracting must comply with this statute. The statute contains a few basic requirements in terms of process:

1. Request for Qualifications (the "RFQ") versus Request for Proposal (the "RFP").

One of the most important requirements of the statute is to engage a "Qualified Provider," who is defined as "a person who is experienced in the design, implementation and installation of energy conservation and facility improvement measures and who has the ability to provide labor and material payment and performance bonds equal to the maximum amount of any payments due under a performance contract...." *Wis. Stat. § 66.0133(1)(d)*. Many of the Qualified Providers insist on a RFQ process, where the school district reviews the qualifications of a number of Qualified Providers and selects one to provide a report, inform the school district of the costs, and to do the work. The major problem with this approach is that the school district obtains no competitive bidding on costs between providers on the recommended Energy Conservation Measures, as defined in *Wis. Stat. § 66.0133(1)(a)*. In many cases, a Qualified Provider will do the required report for free but will charge a high fee if it is not selected to do the work. This discourages further bidding.

Although many Qualified Providers will not bid when a RFP is issued, it is the best process to get the most value for the cost. The school district has the most leverage over the Qualified Providers when it issues a well-crafted RFP. The statute requires competitive bids or sealed proposals, although the school district is not obligated to choose the least expensive proposal.

2. The Report

A school district seeking a performance contract must first obtain a report on recommended Energy Conservation Measures from a Qualified Provider that includes estimates of all costs of installation, modifications, or remodeling, including costs of design, engineering, maintenance, repairs and financing. Importantly, the report must also contain a guarantee of the cost savings. *Wis. Stat. § 66.0133(2)(b)*. After reviewing the report, the school district must make a finding that the costs would not likely exceed the savings over the remaining useful life of the facility.

B. From the Trenches – Myth vs. Reality in Performance Contracts

Myth #1: Performance contracts are nothing but moneymakers for companies and extra costs for school districts.

Reality: The old school performance contracts of the '90's may have been; however the marketplace has changed with demands for full transparency of costs. Wisconsin school districts should look for an energy company that will bid all costs on a recommended improvement list and share the results with the school. Performance contracts do not require a school district select the lowest bidder, so expect to select the contractors and suppliers that have a proven track record of quality performance with your school district.

Also consider "non-proprietary" equipment so the school district has flexible options on future upgrades and is not locked into a maintenance contract or overpriced "brand" equipment. There is a small cost for measurement and verification of energy savings, which is inherent to a performance contract.

Myth #2: The Revenue Limit Exemption for Energy and Operational Savings Projects (Act 32) is used to avoid the referendum process.

Reality: Act 32 projects are still vetted by the community as the levy must be approved at an annual meeting by the public and the borrowing for it has to pass muster by posting the intent for 30 days with the ability of the community to petition against it. A great approach is to convene a small team of knowledgeable community members to vet the list of potential projects so the community is involved and informed from the start. The cost of borrowing is at historic lows, and with the energy savings, a school district's tax levy may not increase greatly, depending on size of project.

Myth #3: We already have an architect and general contractor on board for our projects so they can handle the mechanical elements.

Reality: Most architects subcontract for Mechanical, Electrical, Plumbing (MEP) and HVAC work. With this subcontract may come another layer of mark-up costs. By segregating out the mechanical and building automation portion of the work to an energy services company, a school district removes layers of potential mark-up cost. Another significant benefit of utilizing an energy service company to design and build the mechanical scope of the project is a holistic approach with singular accountability. Should the building not perform as promised, there is no “finger pointing” and one company to fulfill guarantees. Some examples of projects are HVAC, roofing, windows, solar, lighting, pool work, and mechanical, plumbing and electrical—along with building envelope work. The cost of solar power and LED lighting has plummeted in recent years, making these renewable sources of energy-efficient power cost effective for schools.

Myth #4: I cannot consider using Act 32 at this time – I am too busy to put another thing on the plate!

Reality: Act 32 is a financing tool for you to use to get some long-standing facilities work done and, in the process, make your district more sustainable and green for the long haul, and save large amounts of money spent on utility bills. Wisconsin school buildings constructed 50 or more years ago need upgrading. The process to use performance contracting is spelled out very well in the law and easy to follow.

Myth #5: An RFQ is easier to use than the RFP process, as I don’t need to spell out specific projects.

Reality: An RFQ will not provide the school district with any pricing on your projects. It will address things such as financials of the company, areas of expertise, time in business, work done to date, references, etc. On the other hand, an RFP will provide insight regarding recommended solutions and pricing on the proposed projects without cost or obligation to the school district. School districts should absolutely expect an energy company to provide enough specifics on your energy project survey to bid out the projects without committing you to a fee should the school district not choose them. While you may hear differently, the school market for performance contracts has changed dramatically and there are quality companies that are willing to compete for your business by completing a Request for Proposal—and without obligation.

C. Tips for Putting Your District in the Best Position for Success in Performance Contracting

Tip #1: Consider attaching your own contract to the RFP or have standard language for critical terms that must be inserted into the Qualified Provider’s contract.

Tip #2: The selection of a Qualified Provider should be made subject to negotiating a satisfactory contract.

Tip #3: Require open book accounting that is transparent and allows you to determine the real cost of materials and labor.

Tip #4: Require the disclosure of profit margins (this information would need to be protected from Public Records requests and the school district’s attorney should address the correct procedures for doing so).

Tip #5: The cost of measurement and verification may be reduced by providing for reduced services after a certain number of years, provided that a report must be provided for as long as the guarantee is outstanding.

Performance contracting can be a powerful tool for school districts to address critical facility needs within tight budgets. But as is the case with all construction projects, significant attention must be given to process and review of critical contract terms in performance contracting. This article is no substitute for sound legal and project advice. It’s been spoken before, but bears repeating here: an ounce of prevention is worth a pound of cure. Addressing issues the appropriate way up front will put a school district in a much better position for success with a performance contract.
