

Amendment No. 326

Assembly Amendment to Assembly Bill No. 192

(BDR 27-245)

Proposed by: Assembly Committee on Government Affairs**Amends:** Summary: No Title: No Preamble: No Joint Sponsorship: No Digest: Yes

ASSEMBLY ACTION				Initial and Date	SENATE ACTION				Initial and Date
Adopted	<input type="checkbox"/>	Lost	<input type="checkbox"/>	_____	Adopted	<input type="checkbox"/>	Lost	<input type="checkbox"/>	_____
Concurred In	<input type="checkbox"/>	Not	<input type="checkbox"/>	_____	Concurred In	<input type="checkbox"/>	Not	<input type="checkbox"/>	_____
Receded	<input type="checkbox"/>	Not	<input type="checkbox"/>	_____	Receded	<input type="checkbox"/>	Not	<input type="checkbox"/>	_____

EXPLANATION: Matter in (1) *blue bold italics* is new language in the original bill; (2) *green bold italic underlining* is new language proposed in this amendment; (3) ~~red strikethrough~~ is deleted language in the original bill; (4) ~~purple double strikethrough~~ is language proposed to be deleted in this amendment; (5) orange double underlining is deleted language in the original bill that is proposed to be retained in this amendment; and (6) *green bold dashed underlining* is newly added transitory language.

HAC/MSM



Date: 4/17/2009

A.B. No. 192—Revises provisions governing certain performance contracts for operating cost-savings measures. (BDR 27-245)



ASSEMBLY BILL NO. 192—ASSEMBLYMEN KIRKPATRICK, CONKLIN,
HARDY; AIZLEY, BOBZIEN, DENIS, KOIVISTO AND PIERCE

FEBRUARY 18, 2009

Referred to Committee on Government Affairs

SUMMARY—Revises provisions governing certain performance contracts for operating cost-savings measures. (BDR 27-245)

FISCAL NOTE: Effect on Local Government: May have Fiscal Impact.
Effect on the State: No.

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EXPLANATION – Matter in *bolded italics* is new; matter between brackets [omitted material] is material to be omitted.

AN ACT relating to local government purchasing; making various changes to the provisions governing performance contracts entered into by local governments for operating cost-savings measures; and providing other matters properly relating thereto.

Legislative Counsel's Digest:

Existing law authorizes and sets forth the requirements for local governments to enter into performance contracts for the purchase and installation of operating cost-savings measures to reduce costs related to such matters as energy, water and the disposal of waste, and related labor costs. (NRS 332.300-332.440) Existing law sets forth the procedures by which a local government will compile a list of the qualified service companies that it determines have a record of established projects or have demonstrated technical, operational, financial and managerial capabilities to design and carry out operating cost-savings measures. Under existing law, the local government must solicit proposals for a performance contract from such companies. (NRS 332.350, 332.360) **Sections 2-5, 11 and 12** of this bill provide that a company must apply to the local government, meet certain qualifications and be preapproved by a local government before it may submit a proposal for a performance contract.

Section 6 of this bill requires that performance contracts for operating cost-savings measures identify the specific dollar amount and units or percentages of consumption that will be eliminated or avoided as a result of the operating cost-savings measures.

Section 6.5 of this bill requires a local government that enters into a performance contract for operating cost-savings measures to submit a report annually to the Legislature or, when the Legislature is not in session, the Interim Finance Committee.

Section 8 of this bill amends the definition of "building" to provide that performance contracts apply only to existing buildings. (NRS 332.310)

Section 9 of this bill adds ground source systems of heating and cooling to the list of operating cost-savings measures that may be included in a performance contract. (NRS 332.330)

Section 13 of this bill eliminates the option for a performance contract to be structured as a shared-savings contract. (NRS 332.370)

Section 14 of this bill provides that the bonding requirements set forth in the provisions of chapter 339 of NRS apply to performance contracts that exceed \$100,000. (NRS 332.390)

Existing law authorizes a local government to reinvest any savings realized under a performance contract into operating cost-savings measures. (NRS 332.410) **Section 15** of this

bill requires that such reinvestment comply with the provisions of NRS 332.300-332.440 and sections ~~2-6~~ 2-6.5 of this bill.

~~{ Existing law requires that performance contracts guarantee that operating cost savings are realized by the local government if actual cost savings do not meet the predicted cost savings. Section 16 of this bill provides that a local government may reduce the payments on a performance contract that is an installment payment contract if the actual operating cost savings do not meet the predicted operating cost savings. (NRS 332.440) }~~

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN
SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Chapter 332 of NRS is hereby amended by adding thereto the provisions set forth as sections 2 to ~~6.1~~ 6.5, inclusive, of this act.

Sec. 2. 1. *Except as otherwise provided in section 5 of this act, a person who wishes to qualify as a qualified service company and submit a proposal for a performance contract with a local government must file an application with the local government.*

2. *Upon receipt of an application pursuant to subsection 1, the local government shall:*

(a) Investigate the applicant to determine whether he is qualified to bid on a performance contract; and

(b) After conducting the investigation, determine whether the applicant is qualified to bid on a performance contract. ~~{The determination must be made within 45 days after receipt of the application.}~~

3. *The local government shall notify each applicant in writing of its determination. ~~{If an application is denied, the notice must set forth the reasons for the denial and inform the applicant of his right to a hearing pursuant to section 4 of this act.}~~*

4. *The local government may determine an applicant is qualified to bid:*

(a) On a specific project; or

(b) On more than one project over a period of time to be determined by the local government.

5. *Except as otherwise provided in section 5 of this act, the local government shall ~~{not use any criteria other than}~~ use only the criteria described in section 3 of this act in determining whether to approve or deny an application.*

6. *Except as otherwise provided in NRS 239.0115, financial information and other data pertaining to the net worth of an applicant which is gathered by or provided to a local government to determine the financial ability of an applicant to perform a contract is confidential and not open to public inspection.*

Sec. 3. 1. *Except as otherwise provided in section 5 of this act, a local government shall use the following criteria for determining whether a person satisfies the requirements to be a qualified service company pursuant to NRS 332.360:*

~~{1-}~~ (a) *Whether the applicant possesses a business license issued pursuant to NRS 360.780;*

~~{2-}~~ (b) *Whether the applicant possesses a valid contractor's license issued pursuant to chapter 624 of NRS of a class corresponding to the work required by the local government and, if engineering work is required, whether the applicant possesses a valid license as a professional engineer issued pursuant to chapter 625 of NRS;*

~~{3-}~~ (c) *Whether the applicant has the ability to obtain the necessary bonding for the work required by the local government;*

~~44~~ (d) Whether the applicant has successfully completed an appropriate number of projects as determined by the local government, but not to exceed five projects, during the 5 years immediately preceding the date of application of similar size, scope or type as the work required by the local government;

~~55~~ (e) Whether the principal personnel employed by the applicant have the necessary professional qualifications and experience for the work required by the local government;

~~66~~ (f) Whether the applicant has breached any contracts with a public agency or person in this State or any other state during the 5 years immediately preceding the date of application;

~~77~~ (g) Whether the applicant has been disqualified from being awarded a contract by any governing body in the State of Nevada;

~~88~~ (h) Whether the applicant has been convicted of a violation for discrimination in employment during the 2 years immediately preceding the date of application;

~~99~~ (i) Whether the applicant has the ability to obtain and maintain insurance coverage for public liability and property damage within limits sufficient to protect the applicant and all the subcontractors of the applicant from claims for personal injury, accidental death and damage to property that may arise in connection with the work required by the local government;

~~100~~ (j) Whether the applicant has established a safety program that complies with the requirements of chapter 618 of NRS;

~~111~~ (k) Whether the applicant has been disciplined or fined by the State Contractors' Board or another state or federal agency for conduct that relates to the ability of the applicant to perform the work required by the local government;

~~122~~ (l) Whether, during the 5 years immediately preceding the date of application, the applicant has filed as a debtor under the provisions of the United States Bankruptcy Code;

~~133~~ (m) Whether the application is truthful and complete; and

~~144~~ (n) Whether, during the 5 years immediately preceding the date of the application, the applicant has, as a result of causes within the control of the applicant or a subcontractor or supplier of the applicant, failed to perform any contract:

~~155~~ (1) In the manner specified by the contract and any change orders initiated or approved by the person or governmental entity that awarded the contract or its authorized representative;

~~166~~ (2) Within the time specified by the contract unless extended by the person or governmental entity that awarded the contract or its authorized representative; or

~~177~~ (3) For the amount of money specified in the contract or as modified by any change orders initiated or approved by the person or governmental entity that awarded the contract or its authorized representative.

↳ Evidence of the failures described in this subsection may include, without limitation, the assessment of liquidated damages against the applicant, the forfeiture of any bonds posted by the applicant, an arbitration award granted against the applicant or a decision by a court of law against the applicant.

2. Except as otherwise provided in section 5 of this act, in addition to the criteria described in subsection 1, the local government may use any other relevant criteria that are necessary to determine whether a person satisfies the requirements to be a qualified service company pursuant to NRS 332.360.

~~Sec. 4. 1. If, within 10 days after receipt of the notice denying an application pursuant to section 2 of this act, the applicant files a written request for a hearing with the local government, the governing body shall set the matter~~

~~for a hearing within 20 days after receipt of the request. The hearing must be held not later than 45 days after the receipt of the request for a hearing unless the parties, by written stipulation, agree to extend the time.~~

~~2. The hearing must be held at a time and place prescribed by the local government. At least 10 days before the date set for the hearing, the local government shall serve the applicant with written notice of the hearing. The notice may be served by personal delivery to the applicant or by certified mail to the last known business or residential address of the applicant.~~

~~3. The applicant has the burden at the hearing of proving by substantial evidence that the applicant is entitled to be qualified to bid on a performance contract.~~

~~4. In conducting a hearing pursuant to this section, the governing body may:~~

~~(a) Administer oaths;~~

~~(b) Take testimony;~~

~~(c) Issue subpoenas to compel the attendance of witnesses to testify before the governing body;~~

~~(d) Require the production of related books, papers and documents; and~~

~~(e) Issue commissions to take testimony.~~

~~5. If a witness refuses to attend or testify or produce books, papers or documents as required by the subpoena issued pursuant to subsection 4, the governing body may petition the district court to order the witness to appear or testify or produce the requested books, papers or documents.~~

~~6. The governing body shall issue a decision on the matter during the hearing. The decision of the governing body is a final decision for purposes of judicial review. (Deleted by amendment.)~~

Sec. 5. Notwithstanding the provisions of section 3 of this act, a governing body may deem a person a qualified service company if the person has been determined by:

1. The State Public Works Board or a local government pursuant to NRS 338.1379 to be qualified to bid on a public work; or

2. Another local government pursuant to section 2 of this act to be qualified as a qualified service company.

Sec. 6. A performance contract that guarantees operating cost savings must identify the specific dollar amount and units or percentages of consumption that the qualified service company anticipates will be eliminated or avoided on a long-term basis as a result of the operating cost-savings measures that the local government is implementing.

Sec. 6.5. 1. Each local government that enters into a performance contract pursuant to NRS 332.300 to 332.440, inclusive, and sections 2 to 6.5, inclusive, of this act, shall, on or before February 1 of each year, prepare and submit a report to the Director of the Legislative Counsel Bureau for transmittal to the Legislature if the Legislature is in session, or to the Interim Finance Committee if the Legislature is not in session.

2. The report required pursuant to subsection 1 must include, without limitation:

(a) The status of the construction and financing of the operating cost-savings measures described in the performance contract.

(b) The cumulative amount of operating cost-savings that have resulted from the operating cost-savings measures.

(c) The amount of operating cost-savings that are projected for the future.

(d) Any other information required by the Legislature or Interim Finance Committee.

Sec. 7. NRS 332.300 is hereby amended to read as follows:

332.300 As used in NRS 332.300 to 332.440, inclusive, **and sections 2 to ~~6.7~~ 6.5, inclusive, of this act**, unless the context otherwise requires, the words and terms defined in NRS 332.310 to 332.350, inclusive, have the meanings ascribed to them in those sections.

Sec. 8. NRS 332.310 is hereby amended to read as follows:

332.310 "Building" means any **existing** structure, building or facility, including any equipment, furnishings or appliances within the **existing** structure, building or facility, that is owned or operated by a local government. The term includes, without limitation, occupied and unoccupied **existing** structures, buildings and facilities, and any other **existing** improvements owned or operated by a local government that incur operating costs.

Sec. 9. NRS 332.330 is hereby amended to read as follows:

332.330 "Operating cost-savings measure" ~~means~~:

1. Means any improvement, repair or alteration to a building, or any equipment, fixture or furnishing to be added or used in a building that is designed to reduce operating costs, including **, without limitation**, those costs related to electrical energy and demand, thermal energy, water consumption, waste disposal and contract-labor costs, and increase the operating efficiency of the building for the appointed functions that are cost-effective. ~~{The term includes,}~~

2. Includes, without limitation:

~~{1. Procurement of low-cost energy supplies, including electricity and natural gas;~~

~~— 2. Procurement of cost savings as a result of outsourcing energy needs for electrical power, heating and cooling;~~

~~— 3.} (a)~~ Operational or maintenance labor savings resulting from reduced costs for maintenance contracts as provided through reduction of required maintenance or operating tasks, including, without limitation, replacement of filters and lighting products, and equipment failures.

~~{4.} (b)~~ Investment in equipment, products and materials, and strategies for building operation, or any combination thereof, designed to reduce energy and other utility expenses, including, without limitation:

~~{(a)} (1)~~ Costs for materials and labor required to replace old equipment with new, more efficient equipment.

~~{(b)} (2)~~ Storm windows or doors, caulking or weather stripping, multiglazed windows or doors, heat-absorbing or heat-reflective glazed or coated windows or doors, reductions in glass area, and other modifications to windows and doors that will reduce energy consumption.

~~{(c)} (3)~~ Automated or computerized energy control systems.

~~{(d)} (4)~~ Replacement of, or modifications to, heating, ventilation or air-conditioning systems.

~~{(e)} (5)~~ Replacement of, or modifications to, lighting fixtures.

~~{(f)} (6)~~ Improvements to the indoor air quality of a building that conform to all requirements of an applicable building code.

~~{(g)} (7)~~ Energy recovery systems.

~~{(h)} (8)~~ Systems for combined cooling, heating and power that produce steam or other forms of energy, for use primarily within the building or a complex of buildings.

~~{(i)} (9)~~ Installation of, or modifications to, existing systems for daylighting, including lighting control systems.

~~(f)~~ (10) Installation of, or modification to, technologies that use renewable or alternative energy sources.

~~(k)~~ (11) Programs relating to building operation that reduce operating costs, including, without limitation, computerized programs, training and other similar activities.

~~(h)~~ (12) Programs for improvement of steam traps to reduce operating costs.

~~(m)~~ (13) Devices that reduce water consumption in buildings, for lawns and for other irrigation applications.

~~(n)~~ (14) Any additional improvements to building infrastructures that produce energy and operating cost savings, significantly reduce energy consumption or increase the operating efficiency of the buildings for their appointed functions, provided that such improvements comply with applicable building codes.

~~(o)~~ (15) Trash compaction and waste minimization.

~~(5)~~ (16) *Ground source systems for heating and cooling.*

(c) Investment in educational programs relating to ~~occupational behavior that are designed to reduce the consumption of energy or water, or both, and the generation of waste.~~ *the operation and maintenance of any equipment installed to reduce operating costs.*

3. Does not include the construction of a new building or any addition to a building that increases the square footage of the building.

Sec. 10. NRS 332.340 is hereby amended to read as follows:

332.340 "Performance contract" means a *written* contract between a local government and a qualified service company for the evaluation, recommendation and implementation of one or more operating cost-savings measures.

Sec. 11. NRS 332.350 is hereby amended to read as follows:

332.350 "Qualified service company" means a person ~~[with a record of established projects or a person with demonstrated technical, operational, financial and managerial capabilities to design and carry out operating cost savings measures and other similar building improvements, and who has the ability to secure necessary financial measures to ensure related guarantees for operating cost savings.]~~ *who is qualified to bid on a performance contract pursuant to section 2 or 5 of this act.*

Sec. 12. NRS 332.360 is hereby amended to read as follows:

332.360 1. Notwithstanding any provision of this chapter and chapter 338 of NRS to the contrary, a local government may enter into a performance contract with a qualified service company for the purchase and installation of an operating cost-savings measure to reduce costs related to energy, water and the disposal of waste, and related labor costs. Such a performance contract may be in the form of an installment payment contract or a lease-purchase contract. Any operating cost-savings measures put into place as a result of a performance contract must comply with all applicable building codes.

2. ~~[The local government shall determine those companies that satisfy the requirements of qualified service companies for the purposes of NRS 332.300 to 332.440, inclusive. The local government shall prepare and issue a request for qualifications to not less than three potential qualified service companies.~~

~~— 3. In sending out a request for qualifications, the local government:~~

~~— (a) Shall attempt to identify at least one potential qualified service company located within this state; and~~

~~— (b) May consider whether and to what extent the companies to which the request for qualifications will be sent will use local contractors.~~

~~4. The local government shall use objective criteria to determine those companies that satisfy the requirements of qualified service companies. The~~

objective criteria for evaluation must include the following areas as substantive factors to assess the capability of such companies:

- (a) Design;
- (b) Engineering;
- (c) Installation;
- (d) Maintenance and repairs associated with performance contracts;
- (e) Experience in conversions to different sources of energy or fuel and other services related to operating cost-savings measures provided that is done in association with a comprehensive energy, water or waste disposal cost savings retrofit;
- (f) Monitoring projects after the projects are installed;
- (g) Data collection and reporting of savings;
- (h) Overall project experience and qualifications;
- (i) Management capability;
- (j) Ability to access long-term financing;
- (k) Experience with projects of similar size and scope; and
- (l) Such other factors determined by the local government to be relevant and appropriate to the ability of a company to perform the project.

→ In determining whether a company satisfies the requirements of a qualified service company, the local government shall also consider the financial health of the company as evidenced by its financial statements and ratings and whether the company holds the appropriate licenses required for the design, engineering and construction to be completed.

5. The local government shall compile a list of those companies that it determines satisfy the requirements of qualified service companies. If [the] a local government is interested in entering into a performance contract, the local government shall notify each appropriate qualified service company and coordinate an opportunity for each such qualified service company to:

(a) Perform a preliminary and comprehensive audit and assessment of all potential operating cost-savings measures that might be implemented within the buildings of the local government, including any operating cost-savings measures specifically requested by the local government; and

(b) Submit a proposal and make a related presentation to the local government for all such operating cost-savings measures that the qualified service company determines would be practicable to implement.

~~[6:]~~ 3. The local government shall:

(a) Evaluate the proposals and presentations made pursuant to subsection ~~[5:]~~ 2; and

(b) Select a qualified service company,

↪ pursuant to the provisions of ~~[this chapter for evaluating and awarding contracts.]~~

~~[7:]~~ NRS 332.300 to 332.440, inclusive, and sections 2 to 6.5, inclusive, of this act.

4. The local government may retain the professional services of a third-party consultant with the requisite technical expertise to assist the local government in evaluating the proposals and presentations pursuant to subsection 3. Such a third-party consultant must possess a business license issued pursuant to NRS 360.780 and any other applicable licenses issued by a licensing board in this State in the same discipline in which the consultant will be advising the local government.

5. The qualified service company selected by the local government pursuant to subsection ~~[6:]~~ 3 shall prepare a financial-grade operational audit. Except as otherwise provided in this subsection, the audit prepared by the qualified service

company becomes, upon acceptance, a part of the final performance contract and the costs incurred by the qualified service company in preparing the audit shall be deemed to be part of the performance contract. If, after the audit is prepared, the local government decides not to execute the performance contract, the local government shall pay the qualified service company that prepared the audit the costs incurred by the qualified service company in preparing the audit if the local government has specifically appropriated money for that purpose.

~~§8.1~~ 6. The local government shall retain the professional services of a third-party consultant with the requisite technical expertise to assist the local government in reviewing the operating cost-savings measures proposed by the qualified service company and may procure sufficient funding from the qualified service company, through negotiation, to pay for the third-party consultant. Such a third-party consultant must be *licensed pursuant to chapter 625 of NRS and* certified by the Association of Energy Engineers as a "Certified Energy Manager" or hold similar credentials from a comparable nationally recognized organization. A third-party consultant retained pursuant to this subsection shall work on behalf *and for the benefit* of the local government in coordination with the qualified service company.

Sec. 13. NRS 332.370 is hereby amended to read as follows:

332.370 1. A performance contract may be financed through a person other than the qualified service company.

2. A performance contract ~~{may}~~ *must* be structured ~~{as:~~
~~—(a) A performance contract that guarantees}~~ *to guarantee* operating cost savings, which includes, without limitation, the design and installation of equipment, the operation and maintenance, if applicable, of any of the operating cost-savings measures and the guaranteed annual savings which must meet or exceed the total annual contract payments to be made by the local government, including any financing charges to be incurred by the local government over the life of the performance contract. The local government may require that these savings be verified annually or over a sufficient period that demonstrates savings.

~~{(b) A shared savings contract which includes provisions mutually agreed upon by the local government and qualified service company as to the negotiated rate of payments based upon operating cost savings and a stipulated maximum consumption level of energy or water, or both energy and water, over the life of the contract.}~~

Sec. 14. NRS 332.390 is hereby amended to read as follows:

332.390 1. If a performance contract entered into pursuant to NRS 332.300 to 332.440, inclusive, *and sections 2 to ~~6.1~~ 6.5, inclusive, of this act* requires the employment of skilled mechanics, skilled workmen, semiskilled mechanics, semiskilled workmen or unskilled labor to perform the performance contract, the performance contract must include a provision relating to the prevailing wage as required pursuant to NRS 338.020 to 338.090, inclusive.

2. *Before a qualified service company enters into a performance contract pursuant to NRS 332.300 to 332.440, inclusive, and sections 2 to ~~6.1~~ 6.5, inclusive, of this act, that exceeds \$100,000, the qualified service company must furnish to the contracting body any bonds required pursuant to NRS 339.025. The provisions of chapter 339 of NRS apply to any performance contract described in this subsection.*

Sec. 15. NRS 332.410 is hereby amended to read as follows:

332.410 A local government may reinvest any savings realized under a performance contract whenever practical into *other* operating cost-savings measures provided the local government ~~{is}~~ :

1. *Is* satisfying all its other obligations under the performance contract ~~{}~~ ;
and

1 2. *Complies with the requirements of NRS 332.300 to 332.440, inclusive,*
2 *and sections 2 to ~~6.1~~ 6.5, inclusive, of this act, when reinvesting the savings into*
3 *other operating cost-savings measures.*

4 **Sec. 16.** ~~NRS 332.440 is hereby amended to read as follows:~~
5 ~~332.440 1. A performance contract must include appropriate financial~~
6 ~~mechanisms determined to be necessary by the city or county treasurer, as~~
7 ~~appropriate, to guarantee that operating cost savings are realized by the local~~
8 ~~government if the actual cost savings do not meet the predicted cost savings.~~
9 ~~2. If the performance contract is an installment payment contract, the~~
10 ~~performance contract must authorize the local government to reduce the amount~~
11 ~~of payments if the actual operating cost savings do not meet the predicted~~
12 ~~operating cost savings.~~ **(Deleted by amendment.)**

13 **Sec. 17.** This act becomes effective on July 1, 2009.