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ENERGY SAVINGS THROUGH PUBLIC-PRIVATE PARTNERSHIPS ACT OF 2017

MAY 24, 2017.—Ordered to be printed

Ms. MURKOWSKI, from the Committee on Energy and Natural
Resources, submitted the following

R E P O R T

[To accompany S. 239]

The Committee on Energy and Natural Resources, to which was referred the bill (S. 239) to amend the National Energy Conservation Policy Act to encourage the increased use of performance contracting in Federal facilities, and for other purposes, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

PURPOSE

The purpose of this measure is to amend the National Energy Conservation Policy Act (NECPA) to encourage the increased use of performance contracting in Federal facilities.

BACKGROUND AND NEED

The Committee on Energy and Natural Resources has long recognized the significant benefits of energy efficiency efforts in conserving domestic resources, saving American consumers money, strengthening economic competitiveness, and reducing environmental impacts. The energy efficiency “resource” plays an increasingly important role in the nation’s energy strategy. The advancement of cost-effective efficiency programs and technologies can contribute to the nation’s goal of energy independence by reducing demand and using supplies in a more effective manner. S. 239 seeks to increase energy efficiency and water conservation measures in the Federal Government.

According to the Energy Information Administration (EIA), the Federal Government is the single largest energy consumer in the

nation. Congress therefore expects the government to pursue its own energy efficiency efforts vigorously—not only to conserve energy resources and taxpayer dollars, but to lead by example. To that end, S.239 further encourages the federal agencies to enter into energy savings performance contracts (ESPCs) and utility energy service contracts (UESCs).

ESPCs and UESCs are proven methods by which Federal agencies can increase efficiency, thereby reducing energy costs. In both cases, an approved contractor designs and installs systems and equipment to reduce the energy consumption of a Federal facility and gets paid back through savings on utility bills that result from the project over a stipulated period of time. By law, and on a negotiated basis, the government never pays more than it would have paid for utilities if it had not entered into the contract. Using an ESPC or UESC in the Federal Government eliminates the need for appropriated dollars for equipment replacement and for operations and maintenance of such energy consuming equipment.

For over 20 years, performance-based contracts for energy savings have provided upgrades to Federal buildings, including the House and Senate Office Buildings and the U.S. Capitol. According to the Federal Energy Management Program, approximately 650 performance contracts worth \$8 billion have been awarded throughout 25 Federal agencies and in all 50 States. These projects have resulted in energy savings valued at nearly \$15 billion, of which approximately \$11 billion went to repay project investments, accruing a net savings of \$4 billion to the Federal Government.

Greater use of ESPCs has been impaired by administrative delay and process issues within Federal agencies, some of which are the result of ambiguity in the underlying law. S. 239 seeks to eliminate administrative roadblocks by clarifying certain provisions of the law to reduce confusion resulting from statutory ambiguities. In addition, the legislation requires additional reporting requirements, thus ensuring improved transparency.

LEGISLATIVE HISTORY

S. 239 was introduced by Senators Gardner, Coons, Portman, and Shaheen on January 30, 2017.

Companion legislation, H.R. 723, was introduced in the House by Representatives Kinzinger, Cartwright, Cole, Grijalva, Love, Perlmutter, and Welch on January 30, 2017.

In the 114th Congress, a similar bill, S. 858, was introduced by Senators Gardner, Coons, Portman, and Shaheen on March 25, 2015. The Committee on Energy and Natural Resources held a hearing on S. 858 on April 30, 2015.

The measure was included in Amendment No. 2970, which the Senate agreed to on February 1, 2016, as an amendment to S. 2012, the Energy Policy Modernization Act of 2016, which the Senate passed, as amended, on April 20, 2016.

Companion legislation, H.R. 1629, was introduced in the House by Representatives Kinzinger, Peters, Valadao, and Welch on March 25, 2015.

In the 113th Congress, a similar bill, S. 1308, was introduced by Senator Coons on July 16, 2013. Companion legislation, H.R. 2689, was introduced in the House by Representative Gardner and 55 cosponsors on July 16, 2013. The Committee on Energy and Com-

merce favorably reported H.R. 2689, as amended, on November 19, 2014 (H. Rept. 113–627).

The Committee met in an open business session on March 30, 2017, and ordered S. 239 favorably reported.

COMMITTEE RECOMMENDATION

The Senate Committee on Energy and Natural Resources, in an open business session on March 30, 2017, by a majority voice vote of a quorum present, recommends that the Senate pass S. 239, as described herein.

SECTION-BY-SECTION ANALYSIS

Section 1. Short title

Section 1 provides a short title.

Section 2. Use of energy and water efficiency measures in Federal buildings

Section 2(a) amends section 543(f)(4) of NECPA (42 U.S.C. 8253(f)(4)) to revise requirements for ESPCs and UESCs (performance contracts). It further requires federal agencies to implement measures to increase energy and water efficiency in federal facilities so long as they are cost-effective.

Subsection (b) amends section 548(b) of NECPA (42 U.S.C. 8258(b)) to require the Department of Energy to report to the President and Congress on each agency's performance contracts, including their investment value, their guaranteed compared to actual energy savings from the previous year, the plan for entering into new contracts in the coming year, and information explaining why any previously submitted plans for contracts were not implemented.

Subsection (c) amends section 551(4) of NECPA (42 U.S.C. 8259(4)) to expand the definition of energy conservation measures that may be contained in performance contracts to include those involving energy consuming devices and required support structures.

Subsection (d) amends section 801(a)(2)(F) of NECPA (42 U.S.C. 8287(a)(2)(F)) to state that agencies may not limit the recognition of operations and maintenance savings associated with energy systems that were modernized or replaced with energy and water conservation measures.

Subsection (e) amends section 801 of NECPA (42 U.S.C. 8287(a)(2)) to allow agencies to sell or transfer energy savings and apply the proceeds to fund a performance contract.

Subsection (f) amends section 802 of NECPA (42 U.S.C. 8287a) to expand the category of funds a Federal agency can use to make payments pursuant to any contract entered into to include funds made available for the payment of related operations and maintenance expenses.

Subsection (g) amends section 551(6) of NECPA (42 U.S.C. 8259(6)) to exclude dams, reservoirs, and hydropower facilities owned or operated by a Federal agency from the definition of a Federal building.

Subsection (h) amends section 804(2) of NECPA (42 U.S.C. 8287c(2)) to expand the definition of energy savings that may be contained in performance contracts to include the use, sale, or

transfer of energy incentives, rebates, or credits from governments or utilities, and any revenue generated from a reduction in energy or water use, more efficient waste recycling, or additional energy generated from more efficient equipment.

COST AND BUDGETARY CONSIDERATIONS

The Congressional Budget Office estimate of the costs of this measure has been requested but was not received at the time the report was filed. When the report is available, the Chairman will request it to be printed in the Congressional Record for the advice of the Senate.

REGULATORY IMPACT EVALUATION

In compliance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee makes the following evaluation of the regulatory impact which would be incurred in carrying out the bill.

The bill is not a regulatory measure in the sense of imposing Government-established standards or significant economic responsibilities on private individuals and businesses.

No personal information would be collected in administering the program. Therefore, there would be no impact on personal privacy.

Little, if any, additional paperwork would result from the enactment of the bill, as ordered reported.

CONGRESSIONALLY DIRECTED SPENDING

S. 239, as reported, does not contain any congressionally directed spending items, limited tax benefits, or limited tariff benefits as defined in rule XLIV of the Standing Rules of the Senate.

EXECUTIVE COMMUNICATIONS

Executive Communications on S. 239 were not requested by the Committee on Energy and Natural Resources for the 115th Congress.

CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the original bill, as ordered reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

NATIONAL ENERGY CONSERVATION POLICY ACT

Public Law 95–619, as amended

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TITLE V—FEDERAL ENERGY INITIATIVES

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PART 3—FEDERAL ENERGY MANAGEMENT

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SEC. 543. ENERGY MANAGEMENT REQUIREMENTS.

(f) USE OF ENERGY AND WATER EFFICIENCY MEASURES IN FEDERAL BUILDINGS.—

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(4) IMPLEMENTATION OF IDENTIFIED ENERGY AND WATER EFFICIENCY MEASURES.—Not later than 2 years after the completion of each evaluation under paragraph (3), each energy manager **[may]** *shall*—

(A) implement any energy- or water-saving measure that the Federal agency identified in the evaluation conducted under paragraph (3) that is life cycle cost-effective; and

(B) bundle individual measures of varying paybacks together into combined projects.

(5) FOLLOW-UP ON IMPLEMENTED MEASURES.—For each measure implemented under paragraph (4), each energy manager shall ensure that—

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SEC. 548. REPORTS.

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(b) REPORTS TO THE PRESIDENT AND CONGRESS.—The Secretary shall report, not later than April 2 of each year, with respect to each fiscal year beginning after November 5, 1988, to the President and Congress—

(1) on all activities carried out under this part and on the progress made toward achievement of the objectives of this part, including—

(A) a copy of the list of the exclusions made under sections 8253(a)(2) and 8253(c)(3);

(B) the information required under section 8253(b)(2); and

(C) a statement detailing the amount of funds awarded to each agency under section 8256(b), the energy and water conservation measures installed with such funds, the projected energy and water savings to be realized from installed measures, and, for each installed measure for which the projected energy and water savings reported in the previous year were not realized, the percentage of such projected savings that was not realized, the reasons such savings were not realized, and proposals for, and projected costs of, achieving such projected savings in the future; and

(2) the number of contracts entered into by all agencies under title VIII of this chapter, the difficulties (if any) encountered in attempting to enter into such contracts, and proposed solutions to those difficulties;

(3) the extent and nature of interagency exchange of information concerning the conservation and efficient utilization of energy; **[and]**

(4) the information required under section 8262g(d)**[.]** ; and

(5)(A) *the status of the energy savings performance contracts and utility energy service contracts of each agency;*

(B) *the investment value of the contracts;*

(C) *the guaranteed energy savings for the previous year as compared to the actual energy savings for the previous year;*

(D) *the plan for entering into the contracts in the coming year; and*

(E) *information explaining why any previously submitted plans for the contracts were not implemented.*

(c) OTHER REPORT.—The Secretary, in consultation with the Administrator of General Services, shall—

(1) conduct a study and evaluate legal, institutional, and other constraints to connecting buildings owned or leased by the Federal Government to district heating and district cooling systems; and

(2) not later than 18 months after the date of the enactment of this subsection, transmit to the Congress a report containing the findings and conclusions of such study, including recommendations for the development of streamlined processes for the consideration of connecting buildings owned or leased by the Federal Government to district heating and cooling systems.

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SEC. 551. DEFINITIONS.

For the purposes of this part—

(1) the term “agency” has the meaning given it in section 551(1) of title 5;

(2) the term “construction” means new construction or substantial rehabilitation of existing structures;

(3) the term “cogeneration facilities” has the same meaning given such term in section 3(18)(A) of the Federal Power Act (16 U.S.C. 796(18)(A));

(4) the term “energy conservation measures” means measures that are applied to a Federal building that improve energy efficiency and are life cycle cost effective and that involve energy conservation, cogeneration facilities, renewable energy sources, improvements in operations and maintenance efficiencies, ~~or retrofit activities~~ *retrofit activities, or energy consuming devices and required support structures;*

(5) the term “energy survey” means a procedure used to determine energy and cost savings likely to result from the use of appropriate energy related maintenance and operating procedures and modifications, including the purchase and installation of particular energy-related equipment and the use of renewable energy sources;

(6) the term “Federal building” means any building, structure, or facility, or part thereof, including the associated energy consuming support systems, which is constructed, renovated, leased, or purchased in whole or in part for use by the Federal Government and which consumes energy; such term also means a collection of such buildings, structures, or facilities and the energy consuming support systems for such collection~~;~~ *the term does not include a dam, reservoir, or hydropower facility owned or operated by a Federal agency;*

(7) the term “life cycle cost” means the total costs of owning, operating, and maintaining a building over its useful life (including such costs as fuel, energy, labor, and replacement components) determined on the basis of a systematic evaluation and comparison of alternative building systems, except that in the case of leased buildings, the life cycle costs shall be calculated over the effective remaining term of the lease;

(8) the term “renewable energy sources” includes, but is not limited to, sources such as agriculture and urban waste, geothermal energy, solar energy, and wind energy; and

(9) the term “Secretary” means the Secretary of Energy.

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TITLE VIII—ENERGY SAVINGS PERFORMANCE CONTRACTS

SEC. 801. AUTHORITY TO ENTER INTO CONTRACTS.

(a) IN GENERAL.—(1) The head of a Federal agency may enter into contracts under this subchapter solely for the purpose of achieving energy savings and benefits ancillary to that purpose. Each such contract may, notwithstanding any other provision of law, be for a period not to exceed 25 years. Such contract shall provide that the contractor shall incur costs of implementing energy savings measures, including at least the costs (if any) incurred in making energy audits, acquiring and installing equipment, and training personnel, in exchange for a share of any energy savings directly resulting from implementation of such measures during the term of the contract.

(2)(A) Contracts under this subchapter shall be energy savings performance contracts and shall require an annual energy audit and specify the terms and conditions of any Government payments and performance guarantees. Any such performance guarantee shall provide that the contractor is responsible for maintenance and repair services for any energy related equipment, including computer software systems.

(B) Aggregate annual payments by an agency to both utilities and energy savings performance contractors, under an energy savings performance contract, may not exceed the amount that the agency would have paid for utilities without an energy savings performance contract (as estimated through the procedures developed pursuant to this section) during contract years. The contract shall provide for a guarantee of savings to the agency, and shall establish payment schedules reflecting such guarantee, taking into account any capital costs under the contract.

(C) Federal agencies may incur obligations pursuant to such contracts to finance energy conservation measures provided guaranteed savings exceed the debt service requirements.

(D) A Federal agency may enter into a multiyear contract under this subchapter for a period not to exceed 25 years beginning on the date of the delivery order, without funding of cancellation charges before cancellation, if—

(i) such contract was awarded in a competitive manner pursuant to subsection (b)(2), using procedures and methods established under this subchapter;

(ii) funds are available and adequate for payment of the costs of such contract for the first fiscal year; and

(iii) such contract is governed by part 17.1 of the Federal Acquisition Regulation promulgated under section 1303 of title 41 or the applicable rules promulgated under this subchapter.

(E) FUNDING OPTIONS.—In carrying out a contract under this subchapter, a Federal agency may use any combination of—

(i) appropriated funds; and

(ii) private financing under an energy savings performance contract.

(F) PROMOTION OF CONTRACTS.—In carrying out this section, a Federal agency shall not—

(i) establish a Federal agency policy that limits the maximum contract term under subparagraph (D) to a period shorter than 25 years; **[or]**

(ii) limit the total amount of obligations under energy savings performance contracts or other private financing of energy savings measures~~...~~; or

(iii) *limit the recognition of operation and maintenance savings associated with systems modernized or replaced with the implementation of energy conservation measures, water conservation measures, or any combination or energy conservation measures and water conservations measures.*

(G) MEASUREMENT AND VERIFICATION REQUIREMENTS FOR PRIVATE FINANCING.—

(i) IN GENERAL.—In the case of energy savings performance contracts, the evaluations and savings measurement and verification required under paragraphs (2) and (4) of section 8253(f) shall be used by a Federal agency to meet the requirements for the need for energy audits, calculation of energy savings, and any other evaluation of costs and savings needed to implement the guarantee of savings under this section.

(ii) MODIFICATION OF EXISTING CONTRACTS.—Not later than 18 months December 19, 2007, each Federal agency shall, to the maximum extent practicable, modify any indefinite delivery and indefinite quantity energy savings performance contracts, and other indefinite delivery and indefinite quantity contracts using private financing, to conform to the amendments made by subtitle B of title V of the Energy Independence and Security Act of 2007.

(H) MISCELLANEOUS AUTHORITY.—*Notwithstanding any other provision of law, a Federal agency may sell or transfer energy savings and apply the proceeds of the sale or transfer to fund a contract under this title.*

(b) IMPLEMENTATION.—(1)(A) The Secretary, with the concurrence of the Federal Acquisition Regulatory Council established under section 1302(a) of title 41, not later than 180 days after October 24, 1992, shall, by rule, establish appropriate procedures and methods for use by Federal agencies to select, monitor, and terminate contracts with energy service contractors in accordance with laws governing Federal procurement that will achieve the intent of this section in a cost-effective manner. In developing such procedures and methods, the Secretary, with the concurrence of the Federal Acquisition Regulatory Council, shall determine which existing regulations are inconsistent with the intent of this section and shall for-

mulate substitute regulations consistent with laws governing Federal procurement.

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SEC. 802. PAYMENT OF COSTS. Any amount paid by a Federal agency pursuant to any contract entered into under this subchapter may be paid only from funds appropriated or otherwise made available to the agency for fiscal year 1986 or any fiscal year thereafter for the payment of energy, water, or wastewater treatment expenses [(and related operation and maintenance expenses)] *including related operations and maintenance expenses*.

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SEC. 804. DEFINITIONS. For purposes of this title, the following definitions apply:

(1) The term “Federal agency” means each authority of the Government of the United States, whether or not it is within or subject to review by another agency.

(2) The term “energy savings” means—

(A) a reduction in the cost of energy, water, or wastewater treatment, from a base cost established through a methodology set forth in the contract, used in an existing [federally owned building or buildings or other federally owned facilities] *Federal building* (as defined in section 551) as a result of—

(i) the lease or purchase of operating equipment, improvements, altered operation and maintenance, or technical services;

(ii) the increased efficient use of existing energy sources by cogeneration or heat recovery, excluding any cogeneration process for other than a [federally owned building or buildings or other federally owned facilities] *Federal building* (as defined in section 551); or

(iii) the increased efficient use of existing water sources in either interior or exterior applications;

(B) the increased efficient use of an existing energy source by cogeneration or heat recovery;

(C) if otherwise authorized by Federal or State law (including regulations), the sale or transfer of electrical or thermal energy generated on-site from renewable energy sources or cogeneration, but in excess of Federal needs, to utilities or non-Federal energy users[; and];

(D) the increased efficient use of existing water sources in interior or exterior applications[.];

(E) the use, sale, or transfer of energy incentives, rebates, or credits (including renewable energy credits) from Federal, State, or local governments or utilities; and

(F) any revenue generated from a reduction in energy or water use, more efficient waste recycling, or additional energy generated from more efficient equipment.

(3) The terms “energy savings contract” and “energy savings performance contract” mean a contract that provides for the performance of services for the design, acquisition, installation, testing, and, where appropriate, operation, maintenance, and repair, of an identified energy or water conservation measure

or series of measures at 1 or more locations. Such contracts shall, with respect to an agency facility that is a public building (as such term is defined in section 3301 of title 40), be in compliance with the prospectus requirements and procedures of section 3307 of title 40.

(4) The term “energy or water conservation measure” means—

(A) an energy conservation measure, as defined in section 8259 of this title; or

(B) a water conservation measure that improves the efficiency of water use, is life-cycle cost-effective, and involves water conservation, water recycling or reuse, more efficient treatment of wastewater or stormwater, improvements in operation or maintenance efficiencies, retrofit activities, or other related activities, not at a Federal hydroelectric facility.

