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SENATE BILL NO. 312

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the Senate Committee on General Laws and Technology
on February 5, 2018)

(Patron Prior to Substitute—Senator Edwards)

A BILL to amend and reenact §§ 11-34.2 and 11-34.3 of the Code of Virginia and to amend the Code of Virginia by adding a section numbered 11-34.3:1, relating to contracts to provide solar services.

Be it enacted by the General Assembly of Virginia:

1. That §§ 11-34.2 and 11-34.3 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding a section numbered 11-34.3:1 as follows:

§ 11-34.2. Definitions.

As used in this chapter:

"Contracting entity" means any public body as defined in § 2.2-4301.

"Energy conservation measures and facility technology infrastructure" means the methods, techniques, application of knowledge, installation of devices, including an alteration or betterment to an existing facility, that reduce energy consumption or operating costs, and includes, but is not limited to:

1. Insulation of the facility structure and systems within the facility.

2. Storm windows and doors, caulking or weatherstripping, multiglazed windows and doors, heat-absorbing, or heat-reflective, glazed and coated window and door systems, additional glazing, reductions in glass area, and other window and door system modifications that reduce energy consumption.

3. Automatic energy control systems including related software. Required network communication wiring, computer devices, wiring, and support services. Additionally, designing and implementing major building technology infrastructure with operational improvements.

4. Heating, ventilating, or air-conditioning system modifications or replacements.

5. Replacement or modifications of lighting fixtures to increase the energy efficiency of the lighting system which, at a minimum, shall conform to the applicable provisions of the Uniform Statewide Building Code (§ 36-97 et seq.).

6. Energy recovery systems.

7. Cogeneration systems that produce steam or forms of energy such as heat, as well as electricity, for use primarily within a facility or complex of facilities.

8. Energy conservation measures that provide long-term operating cost reductions and significantly reduce the BTUs consumed.

9. Building technology infrastructure measures that provide long-term operating cost reductions and reduce related operational costs.

10. Renewable energy systems, such as solar, biomass, and wind.

11. Devices that reduce water consumption or sewer charges.

"Energy cost savings" means a measured reduction in fuel, energy, or operation and maintenance costs created from the implementation of one or more energy conservation measures when compared with an established baseline for previous fuel, energy, or operation and maintenance costs. When calculating "energy cost savings" attributable to the services performed or equipment installed pursuant to a performance-based efficiency contract, maintenance savings shall be included.

"Energy performance-based contract" means a contract for the evaluation, recommendation, and implementation of energy conservation measures and facility technology infrastructure upgrades and modernization that includes, at a minimum:

1. The design and installation of equipment to implement one or more of such measures, and if applicable, operation and maintenance of such measures.

2. The amount of any actual annual savings. This amount must meet or exceed total annual contract payments made by the contracting entity for such contract.

3. Financing charges to be incurred by the contracting entity for such contract.

"Maintenance savings" means the operating expenses eliminated and future capital replacement expenditures avoided as a result of new equipment installed or services performed by the performance contractor.

"Performance guarantee bond" means for each year of the energy program, the energy performance contractor shall provide a performance bond in an amount equal to, but no greater than, the guaranteed measured and verifiable annual savings set forth in the program.

"Solar developer" means a business that finances, installs, owns, operates, and maintains solar energy equipment used to generate solar power and that is located on the property of a contracting entity.

60 *"Solar services agreement" means a performance-based solar power purchase agreement or a*
61 *performance-based self-generation agreement where the solar developer is the owner of the solar energy*
62 *equipment and provides the energy or services to a contracting entity with no debt obligation to the*
63 *contracting entity.*

64 **§ 11-34.3. Energy Performance-Based Contract Procedures; required contract provisions.**

65 A. Any contracting entity may enter into an energy performance-based contract with an energy
66 performance contractor to significantly reduce energy costs to a level established by the public body or
67 operating costs of a facility through one or more energy conservation or operational efficiency measures.
68 For the purposes of this chapter, energy conservation or operational efficiency measures shall not include
69 roof replacement projects.

70 B. The energy performance contractor shall be selected through competitive sealed bidding or
71 competitive negotiation as set forth in § 2.2-4302.1 or 2.2-4302.2. The evaluation of the request for
72 proposal shall analyze the estimates of all costs of installation, maintenance, repairs, debt service, post
73 installation project monitoring and reporting. Notwithstanding any other provision of law, any
74 contracting entity may purchase energy conservation or operational efficiency measures under an energy
75 performance-based contract entered into by another contracting entity pursuant to this chapter even if it
76 did not participate in the request for proposals if the request for proposals specified that the procurement
77 was being conducted on behalf of other contracting entities.

78 C. Before entering into a contract for energy conservation measures and facility technology
79 infrastructure upgrades and modernization measures, the contracting entity shall require the performance
80 contractor to provide a payment and performance bond relating to the installation of energy conservation
81 measures and facility technology infrastructure upgrades and modernization measures in the amount the
82 contracting entity finds reasonable and necessary to protect its interests.

83 D. Prior to the design and installation of the energy conservation measure, the contracting entity shall
84 obtain from the energy performance contractor a report disclosing all costs associated with the energy
85 conservation measure and providing an estimate of the amount of the energy cost savings. After
86 reviewing the report, the contracting entity may enter into an energy performance-based contract if it
87 finds (i) the amount the entity would spend on the energy conservation measures and facility and
88 technology infrastructure upgrades and modernization measures recommended in the report will not
89 exceed the amount to be saved in energy and operation costs more than 20 years from the date of
90 installation, based on life-cycle costing calculations, if the recommendations in the report were followed
91 and (ii) the energy performance contractor provides a written guarantee that the energy and operating
92 cost savings will meet or exceed the costs of the system. The contract may provide for payments over a
93 period of time not to exceed 20 years.

94 E. The term of any energy performance-based contract shall expire at the end of each fiscal year but
95 may be renewed annually up to 20 years, subject to the contracting entity making sufficient annual
96 appropriations based upon continued realized cost savings. Such contracts shall stipulate that the
97 agreement does not constitute a debt, liability, or obligation of the contracting entity, or a pledge of the
98 faith and credit of the contracting entity. Such contract may also provide capital contributions for the
99 purchase and installation of energy conservation and facility and technology infrastructure upgrades and
100 modernization measures that cannot be totally funded by the energy and operational savings.

101 F. An energy performance-based contract shall include the following provisions:

102 1. A guarantee by the energy performance contractor that annual energy and operational cost savings
103 will meet or exceed the amortized cost of energy conservation measures. The guaranteed energy savings
104 contract shall include a written guarantee of the qualified provider that either the energy or operational
105 cost savings, or both, will meet or exceed within 20 years the costs of the energy and operational
106 savings measures. The qualified provider shall reimburse the contracting entity for any shortfall of
107 guaranteed energy savings projected in the contract.

108 2. A requirement that the energy performance contractor to whom the contract is awarded provide a
109 100 percent performance guarantee bond to the contracting entity for the installation and faithful
110 performance of the installed energy savings measures as outlined in the contract document.

111 3. A requirement that the energy performance contractor provide to the contracting entity an annual
112 reconciliation of the guaranteed energy cost savings. The energy performance contractor shall be liable
113 for any annual savings shortfall that may occur.

114 G. The Department of Mines, Minerals and Energy (the Department) shall make a reasonable effort,
115 as long as workload permits, to:

116 1. Provide general advice, upon request, to local governments that wish to consider pursuit of an
117 energy performance-based contract pursuant to this section;

118 2. Annually compile a list of performance-based contracts entered into by local governments of
119 which the Department may become aware.

120 H. *The provisions of this section shall not apply to solar services agreements entered into pursuant*
121 *to § 11-34.3:1.*

§ 11-34.3:1. Solar services agreements; contract procedures.

A. Any contracting entity may enter into a contract for the provision of solar services by a solar developer to significantly reduce energy costs to a level established by the public body or operating costs of a facility through the use of solar energy measures.

B. The solar developer shall be selected through competitive sealed bidding or competitive negotiation as set forth in § 2.2-4302.1 or 2.2-4302.2. The evaluation of the request for proposal shall analyze the estimates of all costs and benefits of services, including installation, maintenance, repairs, post-installation project monitoring, and reporting. Notwithstanding any other provision of law, any contracting entity may purchase energy or services under a solar services agreement entered into by another contracting entity pursuant to this chapter even if it did not participate in the request for proposals if the request for proposals specified that the procurement was being conducted on behalf of other contracting entities. A solar services agreement shall not include roof replacement projects; however, modifications that are required to erect or install solar equipment shall be permissible.

C. Whenever one or more project agreements for the provision of solar energy include terms and conditions that are defined in a master solar power purchase agreement, regardless of whether the master solar power purchase agreement is still in effect, such terms and conditions shall be treated as wholly binding and effective stand-alone agreements for the life of the project agreements.

D. Nothing in this section shall be construed to affect the ability of nonjurisdictional customers of utilities to negotiate with those utilities. Any contracts effective on or before July 1, 2018, between nonjurisdictional customers and utilities, including but not limited to PPA Pilot Programs in effect, shall remain in full force and effect and shall continue in effect and terminate or expire according to their terms, and shall not be affected by this section.

E. Power purchase agreements entered into pursuant to this section shall be valid only if they conform in all respects with the requirements and limitations of the pilot program conducted under the provisions of Chapters 358 and 382 of the Acts of Assembly of 2013, as amended by Chapter 803 of the Acts of Assembly of 2017, or with the requirements and limitations related to retail competition for the purchase and sale of electric energy pursuant to § 56-577, provided the power purchase agreement is entered into between a licensed supplier and retail customer where such supplier is responsible for serving 100 percent of the load requirements for each retail customer account it serves. The provisions of this section shall apply as long as such pilot program, as may be amended, is in effect. Any electric utility customer entering into a solar services agreement under this section shall take service under a utility rate schedule, including within its nonjurisdictional contract, at the election of the utility, designed to allow the electric utility to recover the portion of the infrastructure costs that are properly associated with serving such customer.

2. That the provisions of this act shall be applicable to any solar services agreement regardless of the date of such agreement.