

**COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF ENERGY RESOURCES**

**GUIDANCE ON APPLICATION OF  
SECTION 44 OF THE GREEN COMMUNITIES ACT OF 2008  
(ENACTED AS G.L. c.25A, § 14)  
Issued 10/16/09**

Background

Section 44 of the Green Communities Act of 2008 (Acts 2008, Chapter 169) created section 14 of G.L. c. 25A, which authorizes a state agency, building authority or local governmental body (“public entity”) to contract directly with their gas or electric utility supplier for “energy conservation projects” having a “total project cost” of \$100,000 or less.

The spirit of G.L. c.25A, §14 is to provide a limited exemption from the competitive requirements of the public construction bid laws for energy conservation projects with a total project cost of \$100,000 or less. G.L. c. 149, the public building construction law, and G.L. c. 30, §39M, the public works construction law, do not apply to contracts entered into under G.L. c. 25A, §14.

G.L. c. 149, §§44A-M governs all contracts for the construction, reconstruction, installation, demolition, maintenance, or repair of a building. Although the statutes do not define “building,” court decisions have indicated that the word is to be taken in its common and ordinary sense. If a structure has walls and a roof and encloses space that is to be used for some purpose, it is a building. Size is irrelevant, as is the fact that it may be part of a larger non-building project. If a building is included, the contract for an energy conservation project must be procured under G.L. c. 149, unless it falls under G.L. c. 25A, §14, or is an energy management service for a public building that may be procured pursuant to G.L. c. 25A, §§11(C) or 11(I). M.G.L. c. 30, §39M governs all contracts for the construction, reconstruction, alteration, remodeling, or repair estimated to cost more than \$10,000 that does not include work on a building.

The law contains severe civil and criminal penalties for those public officials who seek to evade the requirements of the public construction laws by failing to publicly advertise contracts or by splitting contracts into smaller contracts. [G.L. c. 149, §44J(7)] Contracts awarded in violation of these requirements may be held unenforceable by a court, whether or not the contract was executed in good faith. Any questions about whether an energy conservation project involves bid splitting or otherwise fails to comply with the public construction bid law should be directed to the Fair Labor Division of the Attorney General at (617) 727-2200.

## Questions Presented Regarding G.L. c. 25A, §14

Because a public entity may own numerous buildings or facilities, and each such building or facility might warrant numerous and different energy conserving measures, questions have arisen regarding what constitutes an “energy conservation project” and how G.L. c. 25A, §14 should be interpreted. Those questions may be summarized as follows:

- 1) Is an “energy conservation project” limited to a single building or facility, or can it include multiple buildings or facilities?
- 2) Does an “energy conservation project” consist of an aggregate of all energy conserving measures, or can it be limited to an individual conservation measure?
- 3) Does “total project cost” refer to the cumulative cost of all energy conservation measures, or can it refer to the cumulative cost of an individual energy conservation measure?
- 4) Is “total project cost” net of any rebates or other monetary incentives that may be available for the energy conservation project?
- 5) How frequently may a public entity contract with their gas or electric utility supplier to provide an “energy conservation project” to a specific building?

## Applicable Law

MGL, c. 25A, section 14 provides in part:

(a) A state agency, building authority or local governmental body may contract for **energy conservation projects** that have a total project cost of \$100,000 or less, directly and without further solicitation, with electric and gas utilities, their subcontractors and other providers of such energy conservation projects authorized under sections 19 and 21 of chapter 25 and section 11G.

(b) For purposes of this section, "total project cost" shall mean all construction costs of an energy conservation project, whether borne by the utility, agency, authority or body including, without limitation, the costs associated with equipment purchase and installation of such equipment. Ancillary services provided at no cost by utilities, such as auditing and design, shall not be considered part of project cost.

The term "***energy conservation projects***", is defined in M.G.L. c. 25A, section 3 as follows:

projects to promote energy conservation, including but not limited to energy conserving modification to windows and doors; caulking and weatherstripping; insulation, automatic energy control systems; hot water systems; equipment required to operate variable steam, hydraulic and ventilating systems; plant and distribution system modifications, including replacement of burners, furnaces or boilers; devices for modifying fuel openings; electrical or mechanical furnace ignition systems; utility plant system conversions; replacement or modification of lighting fixtures; energy recovery systems; on-site electrical generation equipment using new renewable generating sources as defined in section 11F; and cogeneration systems.

## Interpretation of Law

With respect to the questions posed above, we interpret the law as follows:

- 1) Is an “energy conservation project” limited to a single building or facility, or can it include multiple buildings or facilities?

Answer: The statute does not refer to individual buildings, multiple buildings, or facilities, but rather to “projects” which, as we observe in the definition above, does not limit its scope to an individual building. Because there is no such limitation, and given that the purpose of the statute is to promote the installation of energy conservation measures in public buildings, we do not see any reason or rationale for limiting the scope of an “energy conservation project” to a single building. However, there are limited circumstances in which a group of buildings may reasonably be thought of as a single facility, such as a public school with several detached buildings (i.e., a gymnasium, library, auditorium, etc.) In instances where an individual facility such as a school or water treatment plant may incorporate several buildings, such a facility must be regarded as one building for purposes of the statute.

- 2) Does an “energy conservation project” consist of an aggregate of all energy conserving measures or can it be limited to one individual conservation measure?

Answer: The definition of “energy conservation project” sets forth a long list of specific measures, each set apart with a semi-colon. The definition does not indicate whether these measures are to be aggregated for purposes of calculating the “total project cost” or whether each measure can be regarded separately as a discrete “total project.” Given this ambiguity, we apply rules of proper statutory construction to ascertain a reasonable interpretation of the law. We note that punctuation is regarded as a part of the law, and it may be considered in its interpretation. (Sutherland Statutory Construction, sec. 47.15). By setting off each energy conservation measure with a semi-colon, we can infer that the law accommodates the possibility for each measure to be packaged into a separate “project.” As such, we interpret the statute’s reference to a “total project” as the installation of one clearly identifiable energy efficiency measure. For example, the installation of high efficiency lighting fixtures may be regarded as one “total project” in a building, and installation of new high-efficiency HVAC equipment in that same building may be regarded as a separate and distinct “total project.” Each “total project” would require a separate contract with the vendor of each service.

- 3) Does “total project cost” refer to the cumulative cost of all energy conservation measures, or can it refer to the cumulative cost of an individual energy conservation measure?

Answer: Continuing from the previous answer, because the installation of one identifiable category of energy efficiency measure may be considered a “total project,” then the “total project cost” is the cost of installing that measure alone.

- 4) Is “total project cost” net of any rebates or other monetary incentives that may be available for the energy conservation project?

Answer: As cited in the statute, "total project cost" means all construction costs of an energy conservation project, whether borne by the utility, agency, authority or body including, without limitation, the costs associated with equipment purchase and installation of such equipment. We note that utility rebates are ultimately funded by the ratepayer, which in this case might be the "agency, authority or body." Consequently, any rebates or other monetary incentives that are ultimately provided by the utility, agency, authority or body cannot be subtracted from the "total project cost."

5) How frequently may a public entity contract with their gas or electric utility supplier to provide an "energy conservation project" to a specific building?

Answer: The statute is silent with respect to this issue. We observe that the utility companies are required to develop three-year efficiency plans pursuant to M.G.L. c. 25, sec. 21, but the DPU and the Joint Committee on Telecommunications, Utilities and Energy review annual reports on the "descriptions of the programs, expenditures, cost-effectiveness and savings and other benefits during the previous year." (see M.G.L. c. 25, sec. 22(d)). Essentially then, the costs and benefits of these "energy conservation projects" are reviewed annually. We believe it is reasonable to apply this annual review increment to the application of MGL, c. 25A, section 14. In other words, a public entity may contract with its gas or electric utility supplier annually (once per calendar year), over a period of years if necessary, to provide "energy conservation projects" to a specific building. We think it unlikely that such efficiency work would be contracted in a piecemeal fashion over a period of years, but we believe the statute accommodates that possibility. We do anticipate that a public entity may have several buildings undergoing energy efficiency improvements over the course of a single calendar year, each pursuant to an agreement with its utility supplier; this would be an acceptable practice.

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Examples:

The following Q &A addresses the application of this Guidance. We assume a public entity owns two facilities.

Building #1: a single stand-alone library building. The building requires:

- \$90,000 of HVAC work
- \$50,000 of lighting retrofit. The utility company offers \$30,000 funded from the ratepayer system benefit charge as an incentive for the lighting.

**Question:** Can Building #1 have a separate "HVAC energy conservation project" with a "total project cost" of \$90,000?

**Answer:** Yes, and it can also execute a second contract with the utility company for a “lighting energy conservation project” of \$50,000. The \$30,000 rebate does not reduce the “total project cost” of the lighting work.

**Building #2:** a school consisting of 3 detached buildings. Each building requires:

- \$30,000 insulation and building envelope improvements
- \$50,000 of lighting retrofit. The utility company offers \$30,000 funded from the rate-payer system benefit charge as an incentive for the lighting.
- \$90,000 of HVAC work

**Question:** How should this facility be treated?

**Answer:** Buildings comprising a single facility such as a school must be treated as an individual project. We note that if a municipality has numerous schools (elementary, middle, high schools, for example), each school is a discrete project.

**Question:** How should each building in this facility be treated?

**Answer:**

- With respect to insulation and envelope improvements, the school could execute one contract with the utility for \$90,000 covering all three buildings.
- With respect to lighting, the school could execute one contract for \$100,000 covering two buildings.
- With respect to HVAC, the school could execute one contract for \$90,000 covering one building.
- Note that the public entity may execute contracts with the utility for both building #1 and building #2 in the same calendar year.

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