

(S. B. 2372)

(Act 19-2012)

(Approved January 17, 2012)

AN ACT

To promulgate the “Energy Savings Performance Contracts Act”; grant specific powers to the Energy Affairs Administration to coordinate and supervise the implementation and ascertainment of and compliance with this Act; to ensure that Energy Savings Performance Contracts are effectively carried out and thus implement the public policy of the Government of Puerto Rico in connection with energy efficiency; and for other related purposes.

STATEMENT OF MOTIVES

Electric power costs in Puerto Rico double the average cost in the continental United States. This burden adversely affects our competitiveness and our quality of life, since it is a significant hurdle for the economic growth of our Island. It is an undeniable reality that Puerto Rico continues to be too heavily dependent on oil for the generation of electric power.

The Energy Affairs Administration was primarily created to reduce such dependency that has rendered Puerto Rico less competitive, which can be seen in the reduction of local and foreign investments, and the economic activity.

It is noteworthy that, in the continental United States, the Federal Government began to experience difficulties to carry out capital improvements and finance projects aimed to reduce energy consumption—so much so that, due to budget limitations, the Government has been impaired from conducting improvements geared toward achieving energy efficiency. This situation prompted the United States Congress to authorize Energy Savings Performance Contracts, better known as ESPCs, in order to foster energy efficiency in Federal agency facilities and to considerably reduce electric power costs. By means of private

investment, Energy Savings Performance Contracts enable agencies to improve their energy efficiency by reducing electric power consumption and related costs. A large number of states have established Energy Savings Performance Contracts as a vehicle to promote government-wide energy efficiency and the use of renewable energy. These contracts constitute an essential tool to further and achieve the energy efficiency and renewable energy goals and principles set forth by the Government of Puerto Rico.

Act 82-2010 establishes the public policy of energy diversification through renewable, sustainable, and alternative energy. In order to accomplish such diversification, it is necessary to establish a new energy strategy for Puerto Rico.

Energy Savings Performance Contracts have proven to be a practical tool in promoting efficient electric power consumption. These contracts are formal agreements executed between a government entity and a private corporation. Such corporations specialize in services related to efficient electric power consumption and are known as Energy Savings Companies or ESCOs.

Energy Savings Performance Contracts enable government agencies to reduce electric power consumption in their daily operations, which leads to an efficient use of public funds appropriated for the payment of energy costs. Therefore, these contracts promote economic activity by lowering energy and related incidental cost variables. At the same time, Energy Savings Performance Contracts promote compliance with environmental laws by reducing the environmental impact related to the excessive use of oil. Furthermore, these contracts are useful tools to advance the government's public policy and to promote the prompt and effective implementation of energy efficiency and renewable energy vehicles, which would boost the socioeconomic development of

Puerto Rico. From a fiscal standpoint, Energy Savings Companies provide public and private financing alternatives that are necessary to guarantee the proper implementation of electric power conservation and savings methods.

Such contractual agreements offer a wide range of benefits for government agencies, including access to companies specialized in the energy efficiency field. Moreover, these contracts guarantee the reduction of electric power consumption, thus bringing about fiscal relief in terms of government expenses on account of electric power consumption. These savings shall, in turn, mitigate the budgetary vulnerability and uncertainty of the Government of Puerto Rico. As an added benefit, Energy Savings Performance Contracts enable the appropriation of public funds to address other pressing needs of the People of Puerto Rico.

With the primary purpose of promoting a market for renewable energy, energy efficiency, and energy conservation the Office of Management and Budget shall oversee the adequate appropriation of budget items incidental to public utility services for government agencies. Thusly, the private sector shall trust the legal and regulatory frameworks more, which shall encourage the participation of local and United States-based Energy Savings Companies. Within a short-term timeframe, Puerto Rico shall have an unquestionable tool to reduce energy costs at a crucial time, as recognized by an Executive Order to Declare Energy Emergency (OE-2010-034, promulgated by the Governor of Puerto Rico on July 19, 2010).

The generation of net savings and thrift in favor of government units shall allow the allocation of any excess amounts to the optimal rendering of public services to citizens, the purchase of essential equipment, and the performance of capital improvements that shall be beneficial for the social well-being and socioeconomic development of Puerto Rico. The role of the Office of Management

and Budget gains greater relevance in that it shall reassert its traditional duty of allocating funds according to the needs of each government unit to ensure compliance with the ESPC's entered into with executed Energy Savings Companies, so as to promote net savings and the reduction of energy consumption. Furthermore, Puerto Rico shall benefit from the specialized knowledge that our young local talent, which faces serious difficulties in getting well-paid jobs, shall acquire. The Energy Affairs Administration shall place itself in a privileged position to promote the spirit and the objectives set forth in this Act.

It should be noted that Energy Savings Performance Contracts are a vehicle that shall enable the efficient financing and execution of long-term energy efficiency and conservation measures. The first step within the framework of Energy Savings Performance Contracts is a technical inspection and audit of government unit facilities. The purpose of such audit is to gather all the necessary information, including technical information, before devising a final plan to reduce electric power consumption. After having conducted an in-depth examination of all core issues, an energy efficiency and conservation plan is devised to respond to the specific needs of a government unit.

On the other hand, Energy Savings Companies are contractually responsible for installing all the equipment necessary for and incidental to the energy efficiency and conservation plan and providing all the technical expert personnel as required for the achievement of the goals set forth. The Government has no contractual responsibility as to costs for technical equipment purchase, installation or financing. The sole obligation of the government unit is to pay Energy Savings Companies a specified amount or a percentage of the savings generated from the efficient implementation of the energy conservation plan, for the term of effectiveness of the contract.

It is necessary to bear in mind that the model for Energy Savings Performance Contracts is not new, since it has been already successfully implemented in many states of the United States of America. The statistics of the United States Department of Energy show that over 485 Energy Savings Performance Contracts have been executed by Federal agencies. Furthermore, such model was established in the Energy Independence and Security Act of 2007 and has ever since become a fixture in the Federal energy efficiency program, thus promoting economic growth. Energy Savings Performance Contracts have generated average energy savings totaling 22.7 trillion (22,700,000,000,000) BTUs a year.

The adoption of Energy Savings Performance Contracts represents a solid and reliable fiscal policy for the Federal Government. These contracts have yielded savings of \$8.2 billion out of which \$6.8 billion have been appropriated for project financing. This measure has generated net savings of \$1.4 billion for the Federal Government. In addition, ideal conditions have been created for the development of a new industry that generates jobs and a knowledge-based industrial and economic sector.

Energy Savings Performance Contracts are certainly highly specialized professional contracts. The services rendered under these contracts require a different approach within traditional government contracting procedures. It is crucial to bear in mind that this is an emerging market in Puerto Rico that requires an objective and readily understandable legal framework, in order to promote Energy Savings Performance Contracts as a useful energy efficiency and conservation vehicle.

Pursuant to the foregoing, the purposes of this legislative measure are, to wit: i) to obtain a long-term sustainable energy plan for government operations, so as to foster the socioeconomic development of Puerto Rico, and ii) to generate recurring fiscal savings. In order to achieve these purposes, the Energy Affairs Administration shall provide viable oversight so that agencies may incorporate and improve their energy efficiency, conservation, and reduction within their daily operations. This change in the energy policy shall be accomplished with the direct collaboration of Energy Savings Companies and other resources, such as nonprofit organizations, academia, and scientific and technological research institutions.

In order to ensure the speedy, diligent, and efficient implementation of this Act, and thus, effectively address the energy needs of Puerto Rico, this measure grants specific powers to the Energy Affairs Administration of Puerto Rico on matters pertaining to the promotion, supervision, and oversight of Energy Savings Performance Contracts made available by Energy Savings Companies.

In accordance with the foregoing, this Legislative Assembly promulgates this Act with the conviction that the same constitutes a step forward in the development of effective strategies for achieving efficient energy use and conservation in Puerto Rico.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF PUERTO RICO:

CHAPTER I – PRELIMINARY PROVISIONS

Section 1.1.—Short Title.—

This Act shall be known as the “Energy Savings Performance Contract Act.”

Section 1.2.—Statement of Public Policy.—

By virtue of this Act, the Government of Puerto Rico sets forth its public policy on the efficient use and conservation of electric power in the public sector. It is hereby established specifically that all the components of the Government of Puerto Rico shall promote, implement, and execute effective strategies to achieve

energy efficiency and conservation in their operations. This Act requires all government units to:

1. Promote and foster the efficient electric power use and conservation in public buildings;
2. Promote and foster energy conservation in the Government of Puerto Rico;
3. Diversify electric power generation sources by decreasing oil dependency;
4. Foster the use of renewable energy in public buildings;
5. Recognize energy efficiency and conservation as a cost-effective vehicle to reduce energy, operating, and maintenance costs;
6. Stabilize, reduce, and control electric power costs in order to promote Puerto Rico's socioeconomic development and the competitiveness;
7. Conserve and improve our environment, our natural resources, and our quality of life;
8. Promote the use of Energy Savings Performance Contracts as a contractual vehicle to achieve the efficiency, conservation, and integration of renewable energy;
9. Promote capital contribution and financing vehicles, whether public or private, through Energy Savings Performance Contracts;
10. Educate on and promote the efficient use of energy and renewable energy technologies to gain the acceptance by the citizenry.

To such ends and by virtue of this Act, the Government of Puerto Rico adopts Energy Savings Performance Contracts as an indispensable tool for the promotion of efficient energy use, subject to the ability to achieve a reduction in energy consumption without inflicting an impact on the government unit's budget, so that said unit may improve its public fund flow and availability. This Act

expressly authorizes government units to execute Energy Savings Performance Contracts.

Section 1.3.—Interpretation.—

The provisions of this Act shall be interpreted liberally, so as to enable the implementation of the objectives and principles set forth in this Act, and in Acts Nos. 82-2010 and 83-2010. Should there be any conflict in the interpretation of concepts, principles, and technical terms used in this Act, the definitions of Federal and state laws and regulations shall prevail, as well as the interpretation by the appropriate administrative forums and by state and Federal court rulings.

Section 1.4.—Definitions.—

For purposes of this Act, the following terms or phrases shall have the meaning set forth below, except when clearly stated otherwise.

1. “Administration”.—The Energy Affairs Administration of Puerto Rico.

2. “Savings in Public Utility Expenses”.—Any reduction in public utility expenses for a prolonged period because of any efficiency and conservation measures implemented or the services rendered by a Qualified Energy Savings Company.

3. “Savings in Operating and Maintenance Expenses”.—Measurable reductions in operating, maintenance, and replacement expenses resulting directly from the implementation of energy efficiency and electric power and water conservation measures. These savings shall be calculated against the operating and maintenance expenses established as the basis for the computation.

4. “Investment Grade Energy Audit”.—A comprehensive analysis by a Qualified Energy Savings Company selected and contracted by a government unit. This analysis includes, but is not limited to:

- a. An accurate description of the improvements to be made in the government unit;
- b. The cost estimate for the improvements to be made by the government unit;
- c. The savings projection on public utility consumption and operating and maintenance expenses of the government unit as a result of the recommended improvements;
- d. An inventory of existing equipment, including an energy efficiency measurement.

5. “Energy Savings Performance Contract”.—A contract between a government unit and a Qualified Energy Savings Company for the evaluation, recommendation, and implementation of one or more energy conservation and savings measures. An Energy Savings Performance Contract shall include any of the following criteria, obligations, and energy efficiency methods:

- a. A guaranteed Energy Savings Contract includes, at the very least: the design of equipment by a specialist in energy efficiency and conservation methods; the installation of equipment; and, if applicable, the operation and maintenance of some of the measures implemented by the specialist in energy efficiency and conservation methods. This contract modality guarantees certain annual savings for the government unit, which shall equal or exceed the sum total of annual payments to be made by the government unit to the Qualified Energy Savings Company, including financing charges incurred during the effective term of the contract, or

- b. A Shared-Savings Contract that shall consist of contractual terms mutually agreed to by the contracting government unit and the Qualified Energy Savings Company in connection with the payments to be made by the government unit. The sum total of these payments shall be fixed

on the basis of the savings in operating and electric power expenses, in a defined agreement as to the maximum level of energy consumption during the effective term of the contract.

6. “Cost-effective”.—Means any savings that a government unit shall achieve or generate as a result of the implementation of energy efficiency, energy conservation, and renewable energy alternatives, new facilities, activities, measures, or equipment, whose present worth—upon computation—is greater than the present net worth of the costs for implementing, maintaining, and operating such energy efficiency, energy conservation, and renewable energy alternatives, new facilities, activities, measures, or equipment throughout its useful life.

7. “Public Building”.—Any structure, building, or facility, including its electric equipment and infrastructure, which are the property of or operated by a government unit.

8. “Independent Engineer”.—A person who meets the following requirements:

a. He/she holds a degree or an accreditation certificate evidencing that he/she has satisfactorily completed the requirements of this discipline in a higher education institution whose curriculum is recognized by the Council on Higher Education and the Accreditation Board for Engineering and Technology (the Board).

b. He/she has met the requirement to enroll in the Board Register pursuant to the provisions of Act No. 173 of August 12, 1988, as amended.

c. The Board has issued the appropriate certificate evidencing that he/she has complied with the requirements of Act No. 173 of August 12, 1988, as amended, to practice such profession.

d. He/she has at least two (2) years of experience.

e. He/she holds a license issued by the Board authorizing him/her to practice the profession and evidencing that he/she is enrolled in the Register.

f. He/she shall not be an official, employee, or stockholder, or have a direct or indirect financial or other interest in a Qualified Energy Savings Company regarding the contract under his/her consideration.

g. He/she shall not be a government employee either, and shall meet all the requirements of the Government Ethics Act if he/she held office in the public service.

9. “Energy Conservation Measure”.—Any improvement, repair or alteration, equipment, accessory or training program to be added to or used in a building, facility, or any other system using energy, to generate electric power savings by reducing operating costs or increasing operational efficiency during the useful life cycle. All measures must meet or surpass the compliance requirements set forth in the applicable Commonwealth building codes. These measures include, but are not limited to the following:

a. The replacement or modification of lighting control accessories, devices, and systems, including the use of natural light-harvesting systems.

b. The insulation of structures and systems.

c. The application of caulk and weather-strip on windows or doors; the installation of multilayer glass systems on windows or doors, or thermo-absorbent or thermo-reflective glass window and door systems; the addition of glass layers; the reduction of the exterior glass area; or the modification of window and door systems to reduce energy consumption.

d. Automated or computer-ready control systems.

e. The modification or replacement of ventilation or air conditioning systems, or any other system operating in government units.

f. Energy recovery systems.

g. Steam trap valve improvement programs to reduce operating costs.

h. Cogeneration systems that produce steam or other kinds of energy, such as heat or electric power, mainly for use inside a building or a building complex.

i. Renewable and alternative energy systems.

j. Changes in operating and maintenance practices.

k. Improvement of inside air quality to comply with applicable building code requirements.

l. Operating programs for buildings to reduce operating costs and public utility consumption, such as electric power-related information technology administration programs and consumption tracking programs, training of personnel, and other similar activities.

m. Personal safety measures that yield a long-term reduction of operating expenses and are consistent with the applicable Commonwealth and local codes.

n. Personal safety measures compliant with the "American with Disabilities Act of 1990," as amended (known as the ADA), that provide for

the long-term reduction of operating expenses, while observing the applicable Commonwealth and municipal codes.

o. Programs to reduce electric power costs through rate adjustments, charge transfers to reduce the demand during peak hours, and others, such as:

- i. Rate restructuring;
- ii. Negotiation for lower rates, if viable;
- iii. Audit of electric power bills and meters; and
- iv. Reduction in sewer system rates.

p. Services to reduce expenses relative to public utility consumption through the identification of billing errors and the optimal use of the rates being charged at present.

q. Improvements to building infrastructure through installation, modification or remodeling that result in savings in operating and maintenance expenses and public utility services in connection with functions as identified, pursuant to the applicable Commonwealth and local codes.

r. Alternative fuel and accessory options for the transportation system of the government unit.

s. Any other measure as the Energy Affairs Administration may define in the future by regulation or order as an energy conservation or savings measure.

10. “Water Conservation Measures”.—Any improvement, modification, equipment, or change in maintenance practices or a training program designed to reduce water consumption or operating costs pertaining to water conservation. Such measures shall meet or exceed the compliance requirements set forth in the applicable Commonwealth building codes. Such measures may include, but are not limited to the following:

a. Water conservation accessories and equipment, or replacing these with waterless equipment or accessories.

b. Landscaping measures that reduce water demand and include dew and rainwater harvesting and storage, such as landscape profiling, which includes the creation of mounds, ditches, and terraces; the use of soil additives to increase its water retention ability, including compost; equipment to harvest rainwater and equipment to use harvested water as part of a sewer system installed for water quality control purposes.

c. Equipment for recycling and reusing water that originates from the premises or from other sources, including treated waste water.

d. Equipment to harvest water from unconventional and alternative sources, which include air conditioning condensation or waste waters, for uses that do not require drinking water.

e. Gauging equipment to differentiate water uses and identify water conservation opportunities or ascertain water consumption savings.

f. Any other measure as the Energy Affairs Administration may define in the future by regulation or order as a water conservation measure.

11. “Person”.—Any natural person, partnership, enterprise, association, corporation, public corporation, or entity, whether or not under the jurisdiction of the Administration.

12. “Qualified Energy Savings Company”.—A juridical person or entity with specialized knowledge and experience in the design, implementation, and installation of energy conservation measures, energy efficiency, renewable energy, and water conservation and use, that meets the qualification requirements set forth by the Administration.

13. “Reconciliation”.—A comparison between projected and obtained savings by virtue of the execution of the Energy Savings Performance Contract for a fiscal year, as defined by the Government of Puerto Rico; provided that, the Qualified Energy Savings Company shall render, at the very least, a quarterly report to the Energy Affairs Administration for each year under contract.

14. “Public Utilities”.—Electric power, water, aqueduct and sewer systems, telephone, telecommunications, cable or satellite television, and gas supply services, as well as other like services.

15. “Government Unit”.—Any agency, instrumentality, office, or division of the Executive Branch, authorities or political subdivisions of the Government of Puerto Rico, or any other entity as defined or identified by the Administration.

CHAPTER II – ENERGY SAVINGS PERFORMANCE CONTRACTS

Section 2.1.—**Applicability.**—

This Act, together with any such orders, decisions, and regulations as issued or promulgated by the Administration in order to implement the provisions of this Act shall apply to all government units that intend to execute an Energy Savings Performance Contract in Puerto Rico, as well as to Energy Savings Companies that intend to enter into contracts with a government unit in Puerto Rico for this specialized service.

Section 2.2.—**Powers of the Administration.**—

In addition to the powers delegated to the Administration under other laws, the Administration shall have the following powers to achieve the purposes of this Act:

1. To draft regulations as necessary and convenient to enforce the objectives and principles set forth in this Act.

2. To promulgate, amend, or repeal regulations pursuant to the provisions of this Act and the procedures established in Act No. 170 of August 12, 1988, as amended, known as the “Uniform Administrative Procedures Act.” Furthermore, the Administration is hereby authorized to issue norms and regulations for the interpretation of the terms used in this Act.

3. To promote the use of Energy Savings Performance Contracts in government units.

4. To qualify Energy Savings Companies and Energy Suppliers pursuant to the procedure set forth in Section 2.5 of this Act.

5. To issue Declaratory Rulings and official interpretations of laws and regulations under its jurisdiction.

6. To contract or subcontract the professional services of consultants, economists, engineers, attorneys-at-law, and any other professional as the Administration may deem necessary to properly discharge all the duties conferred under this Act, in compliance with the public policy set forth herein, to carry out specialized tasks, but without relinquishing any government duties or responsibilities, and to receive assistance in the discharge of such duties.

7. To establish agreements with government units to assist these in the contracting of Qualified Energy Savings Companies.

8. To fix and collect a reasonable amount for assistance and administration resources or other services provided to government units.

9. To evaluate government units, especially any such documents that attest to savings generated in energy consumption, in addition to information and documents pertaining to any Energy Savings Performance Contract.

10. To coordinate and oversee all aspects of this Act.

11. To establish partnerships and agreements with private entities or nonprofit organizations that directly or indirectly promote the objectives and principles set forth in this Act.

Section 2.3.—Authorization.—

Government units shall implement energy conservation, energy efficiency, and profitable energy measures in order to seek greater efficiency in the operation of their facilities by reducing energy and water consumption and minimizing their environmental impact, pursuant to Executive Order 2009-004.

A government unit may execute an Energy Savings Performance Contract with a Qualified Energy Savings Company when it is determined that:

1. The investment to be made in the implementation of energy conservation, efficiency, and renewable energy measures shall not exceed the accrued sum total of savings in operating, maintenance, and public utility expenses for a period of fifteen (15) years as of the date on which the Energy Savings Performance Contract shall take effect.

2. The Qualified Energy Savings Company shall provide a written warranty that the savings in public utility consumption, operating, and maintenance expenses shall surpass the cost of the conservation measures to be implemented.

3. The energy and water conservation measures under the contract shall be implemented in an existing building at the time of executing the contract.

Section 2.4.—Chief Agency.—

The Administration is hereby designated as the chief agency for the development and promotion of Energy Savings Performance Contracts in government units. The Administration shall discharge, according to its resources and budget, the following duties:

1. To provide advice and information as necessary for the government unit to ratify Energy Savings Performance Contracts;
2. To establish the norms that shall define the steps to be followed in the execution process of Energy Savings Performance Contracts;
3. To qualify Energy Savings Companies pursuant to the criteria and the procedures established by the Administration;
4. To keep and update yearly a list of Qualified Energy Savings Companies;
5. To provide government units with a general overview on the negotiation of basic contracts and pricing tables with Qualified Energy Savings Companies whenever the Administration deems it pertinent.

The norms adopted pursuant to this Act shall provide that an independent engineer who holds a license and is certified by the College of Engineers and Surveyors of Puerto Rico shall review savings projections made by a Qualified Energy Savings Company.

Section 2.5.—Selection of Qualified Energy Savings Companies.—

The procedure to select a Qualified Energy Savings Company for each Energy Savings Performance Contract executed by government units shall include the following steps, among others:

First Stage.—

a. Request for Qualification (RFQ).—The Administration shall be responsible for selecting Energy Savings Companies through RFQs. The determining criteria to evaluate an Energy Savings Company in the areas of design, engineering, installation, maintenance, and repairs in connection with an Energy Savings Performance Contract shall include, but not be limited to:

i. Experience in the conversion of different energy or fuel sources, insofar as this is done as part of a comprehensive renovation aimed at improving energy efficiency;

ii. Monitoring capacity after installation;

iii. Ability to collect data and draw up savings reports;

iv. Project administration experience and credentials;

v. Ability to provide administrative, technical, and support services in Puerto Rico;

vi. Access to long-term financing and financial solvency;

vii. Previous experience with projects of similar size and scope;

viii. Any other factors as the Administration may deem pertinent regarding the ability to complete the project; and

ix. Any other ability as the Administration, in its discretion, may deem necessary pursuant to the Energy Savings Performance Contract executed.

b. The Administration shall issue a qualification certificate to Energy Savings Companies that meet the requirements of the Request for Qualification to the satisfaction of the Administration. This qualification certificate shall be effective for a term of three (3) years since its date of issue, subject to the Qualified Energy Savings Companies' submittal of a certification, under oath, evidencing that the conditions and circumstances that gave rise to their favorable certification

have not changed to the detriment of the performance of the Energy Savings Performance Contract executed.

Second Stage.—

a. Selection Procedure.—After the Administration has qualified Energy Savings Companies, and before executing any Energy Savings Performance Contract, government agencies shall follow a selection procedure pursuant to the norms of the Energy Savings Performance Contract Program of the Administration. Such selection procedure shall be followed only with those Energy Savings Companies that have been duly qualified by the Administration to carry out a project under an Energy Savings Performance Contract. All Qualified Energy Savings Companies shall comply with the norms of the Energy Savings Performance Contract Program set forth by the Administration.

Third Stage.—

a. Viability Analysis of the Government Unit.—Consequently, after the selection procedure, the government unit shall conduct a viability analysis contingent upon the energy efficiency and cost-effectiveness of the measures to be implemented by virtue of the contract. This viability analysis shall be the document to provide the grounds for the selection of the Qualified Energy Savings Company with whom the government agency shall enter into final negotiations to execute the contract. The factors to be considered in selecting a qualified company shall include, but not be limited to: the essential terms and conditions of the contract, a detailed account of the scope of the proposal, conservation and savings measures in relation to expenses, experience, quality, technical approach, and general benefits

for the government unit. The viability study shall define the cost of the Investment Grade Energy Audit pursuant to the regulation and the norms of the Energy Savings Performance Contract Program adopted by the Administration.

Section 2.6.—Investment Grade Energy Audit.—

The Qualified Energy Savings Company selected pursuant to the procedure provided in Section 2.5 of this Act and regulations approved thereunder shall conduct an Investment Grade Energy Audit, which, if accepted by the government unit, shall become a part of the Energy Savings Performance Contract finally executed. Said Investment Grade Energy Audit shall include estimate projections on savings in operating, maintenance, and public utility expenses, as well as estimates of all savings in expenses relative to energy conservation measures, including, among other issues, supplies, a breakdown of costs for design, engineering, equipment, supplies, installation, maintenance, repairs, and financing.

The Administration shall establish by regulation any exceptional conditions under which the execution of an Energy Savings Performance Contract shall not be authorized. Such regulation shall specify the maximum cost for an audit, taking into account the total area being audited and the structural complexity of the facilities.

Section 2.7.—Engineering Services.—

Qualified engineers whose services are required to effectively carry out Energy Savings Performance Contracts shall review the savings projections of Qualified Energy Savings Companies. Qualified engineers shall focus primarily on proposal evaluation, project methodology, savings computations, increased income and, if possible, the efficiency and precision of gauging equipment.

Qualified engineers who review contracts shall keep the confidentiality of any and all information that they may acquire during such review.

Section 2.8.—Skilled and Specialized Personnel.—

All government units are hereby authorized to contract or subcontract, as their budgets allow, any necessary personnel, including skilled or specialized labor, to fully meet the objectives and principles of the public policy set forth in this Act and carry out Energy Savings Performance Contracts.

Section 2.9.—Court Review.—

a. Energy Savings Companies who have been denied qualification by the Administration shall have a jurisdictional term of ten (10) days to file a Motion for Reconsideration of Order Denying Qualification with the Administration. Such term shall begin to count from the date of notice of the Order Denying Qualification. The Motion for Reconsideration shall state particulars and specifics of the facts and the applicable law and be grounded on substantial issues, in order for the Administration to have at hand all the necessary evaluation elements to adjudicate the reconsideration on its merits without any further efforts.

b. The Administration shall have up to fifteen (15) days, counted from the filing date of the Motion for Reconsideration, to issue a final notice on the merits of such Motion.

c. If the Administration should ratify its Order Denying Qualification or fails to take action within fifteen (15) days after the filing date of the Motion for Reconsideration, the term to request court review before the Court of Appeals shall begin to count from the date of such determination to ratify the denial of qualification, or upon expiration of the fifteen (15)-day term after the Administration has failed to take action.

d. Energy Savings Companies that receive a final denial notice may request court review before the Court of Appeals within the jurisdictional term of

ten (10) days, to be counted from the date of the Administration's final notice. The sole filing of a request for court review with the Court of Appeals shall not result in the automatic stay of the Administration's determination.

e. Any affected party that wishes to stay the effects of the Administration's determination shall file a petition for a Writ in Aid of Appellate Jurisdiction with the Court of Appeals. The Writ in Aid of Appellate Jurisdiction thus issued by the Court of Appeals shall render ineffective the Administration's determination to deny a qualification certificate, among other issues to be addressed in such writ. This Writ in Aid of Appellate Jurisdiction shall have a maximum term of sixty (60) days, within which the Court of Appeals shall adjudicate the court review on its merits.

f. Should the Writ in Aid of Appellate Jurisdiction rendering ineffective the denial of a qualification certificate not be granted, the Administration shall bar the petitioner from the Qualified Energy Savings Company List until the reviewing judicial entities rule otherwise.

g. No request for court review other than that provided for in this Act or which is not within the terms or is not compliant with the procedures provided for herein, may be instituted or filed.

Section 2.10.—Payment and Performance Bond.—

As a condition to execute an Energy Savings Performance Contract, the Qualified Energy Savings Company shall provide evidence of having posted a performance bond in favor of the government unit. The bond shall be issued by an underwriter authorized by the Insurance Commissioner to do business in this jurisdiction that has, at the very least, a B+ rating as published by A.M. Best. The bond shall have the purpose of guaranteeing energy savings measures and contractual representations made by the Qualified Energy Savings Company as agreed under the Energy Savings Performance Contract.

Section 2.11.—Savings Measurement and Independent Ascertainment.—

During the term of effectiveness of the Energy Savings Performance Contract, the Qualified Energy Savings Company shall assess any savings in energy consumption generated by reason of the energy conservation and efficiency measures implemented under the contract, as well as any costs attributable to the implementation of such measures. At least once every three (3) months per year under contract, the Energy Savings Company shall submit a report to the government unit and the Administration whereby the results of energy conservation and efficiency measures, as well as renewable energy measures, shall be ascertained pursuant to the criteria set forth in this Act and the regulations approved thereunder. A licensed independent engineer certified by the College of Engineers and Surveyors of Puerto Rico shall certify the accuracy of the savings stated on the report. The Qualified Energy Savings Company may make recommendations and suggest that the government unit modify any savings computations, as established in the Contract, solely and exclusively under the following circumstances:

- a. Any substantial changes in the basic energy consumption identified at the beginning of the Energy Savings Performance Contract;
- b. Any unforeseeable substantial changes in public utility rates;
- c. Any changes in the period covered by the public utility bill;
- d. Any changes in the total surface area of the building;
- e. Any changes in the operating plan of the government unit's facilities;

- f. Any changes in the temperature of the government unit's facilities;
- g. Any significant changes in the amount of equipment or lighting in the facilities; and
- h. Any other change that could be construed to reasonably modify electric power use or costs.

Government units and Qualified Energy Savings Companies shall state on a report to the Administration, the name of the project under the Energy Savings Performance Contract, the investment, and the savings in electric power consumption as agreed in the contract in question. Such information shall be furnished to the Office within a term of sixty (60) days after the date of award of the Energy Savings Performance Contract. The Administration shall be empowered to impose fines on Qualified Energy Savings Companies if these should fail to submit such reports within the term provided for in this Section. This fine shall not exceed \$2,500.00 for each report not filed on time.

Section 2.12.—Installment Contract and Lease Contract with Call Option.—

Government units may use appropriated funds, bonds, or any kind of investment or loan instrument created and authorized by the Government Development Bank, and the constructs of lease or financial lease contracts, lease contracts with call option, and installment contracts to acquire lighting control equipment, accessories, devices, and systems, including natural light-harvesting systems.

Guaranteed Energy Savings Performance Contracts may provide for financing, including financing through a third party. For financing, either sought by the Energy Savings Company or provided by a third party (bank or financial institution), a clause shall be included to establish that the Energy Savings Company or the financial entity shall have no more rights or privileges than those

due under the Energy Savings Performance Contract. However, both the Energy Savings Companies and the government unit shall seek financial advice from the Government Development Bank for the project in question in order for the government unit to be able to compare and/or choose the most convenient public or private financing alternative from among those presented by the Energy Savings Company or the Government Development Bank. In discharging this duty, the Government Development Bank is under the obligation to include and consult the Energy Affairs Administration by reason of its being the agency with the specialized knowledge in the energy efficiency and renewable energy field, which specialized knowledge shall enable the Government Development Bank to recommend the most appropriate public or private financing option in benefit of the government unit.

Section 2.13.—Schedule for Payments and Savings.—

Energy Savings Performance Contracts shall provide that all payments between the parties, except for obligations upon termination of the contract before its expiration date, shall be made pursuant to the agreements in the Energy Savings Performance Contract between the government unit and the Qualified Energy Savings Company. Seeing as the objective of such Energy Savings Performance Contracts the implementation of measures to conserve energy and generate savings in energy and operating costs, such payments shall be subject to the completion and success of savings measures stated in the contract, and the Energy Savings Company shall be under the obligation to assume any monetary difference between the energy consumption savings set forth in the contract and those generated each year under contract.

Section 2.14.—Effective Term of Contracts.—

Energy Savings Performance Contracts and the payments provided therein may be extended beyond the fiscal year in which the Energy Savings Performance Contract has been executed, subject to the appropriation of funds for expenses incurred in subsequent fiscal years. Energy Savings Performance Contracts may be executed for a term that shall not exceed fifteen (15) years. The appropriation of funds shall be assured for the effective term of such contracts. The term allowed for the contract shall also state the useful life of the conservation measure. Energy Savings Performance Contracts may provide for payments to be made in installments, which shall not exceed the date set forth for the final implementation of energy conservation measures.

If the useful life of the implemented conservation measures is less than fifteen (15) years, the term of the contract shall be factored in as the useful life of such measures, as determined by the maximum asset depreciation range (or ADR) of the Class Life Asset Depreciation Range System established by the United States Internal Revenue Service under the United States Internal Revenue Code or any comparable norms in connection with any equipment not included within asset depreciation ranges.

The Office of Management and Budget (OMB) shall allocate sufficient funds for each government unit to pay for public utilities, in order to comply with the purposes and spirit of this Act.

Section 2.15.—Use of Funds and Reconciliation.—

Government units that have executed Energy Savings Performance Contracts shall retain the net savings generated as a consequence of such contracts. Net savings shall be the amount remaining after deducting any amount corresponding to the payment of the Qualified Energy Savings Company under the Energy Savings Performance Contract and the amount that shall be payable to the

Puerto Rico Electric Power Authority and the Energy Affairs Administration, to be determined by regulation.

Energy Savings Performance Contracts shall provide that a Qualified Energy Savings Company shall be under the obligation to provide a government unit with an annual reconciliation of savings in energy consumption expenses. If the reconciliation should reveal that the annual savings in energy costs do not reach the amount agreed under the Energy Savings Performance Contract, the Qualified Energy Savings Company shall respond for the difference in such amount, as provided in the Contract.

The Puerto Rico Electric Power Authority is hereby directed to forward a copy of electric power consumption bills, as requested by the director, secretary, president, commissioner, advocate or head of agency of any government unit that executes an Energy Savings Performance Contract under this Act. The government unit shall also be entitled to install an electric meter in the main line parallel to the meter installed by the Electric Power Authority.

Section 2.16.—Contingency Provisions.—

Energy Savings Performance Contracts shall include provisions on contingencies in the event that actual savings fall below savings projections. Contingency measures shall include: adjustment in the distribution of savings between the parties; a payment priority order; the extension of the Energy Savings Performance Contract; the extension and improvement of financing terms and conditions; the implementation of measurement and ascertainment criteria to match actual savings with savings projections; and, as a last resort, terminate the Energy Savings Performance Contract, after having paid for any expenses incurred.

Section 2.17.—Use of Savings Generated by Energy Savings Performance Agreements.—

Except as otherwise provided by law or Executive Order, government units are hereby required to reinvest any corresponding net savings in cost reduction measures, capital improvements, and the acquisition of goods and services that shall result in the improvement of services rendered to citizens, subject to the government unit's ability to meet all its obligations under the Energy Savings Performance Contract.

Section 2.18.—Transfer of Knowledge and Transition Plan.—

All Energy Savings Performance Contracts shall contain a knowledge transfer clause, in order to ensure that the government unit's personnel shall receive training to follow up on the operations and the conservation measures implemented upon conclusion of the contractual relationship. The Energy Savings Performance Contract shall clearly establish a Transfer of Knowledge Plan under which gradual training shall be provided during the effective term of the contract, and by the expiration date of such contract, a Transition Plan shall be adopted whereby all details pertaining to the project's operation shall be set forth.

CHAPTER III – GENERAL PROVISIONS

Section 3.1.—Applicability of Existing Laws and Conflicting Provisions.—

Any provisions of existing laws which are in conflict with the provisions of this Act are hereby repealed. If any controversy should arise between laws, this Act shall prevail. The Secretary of Justice shall consult the Energy Affairs Administration as to the interpretation of this Act. It is hereby expressly stated that the provisions of Act No. 29-2009, known as the "Public-Private Partnership Act," shall not apply to any contract executed under the provisions of this Act.

Section 3.2.—Severability.—

If any provision, part, paragraph or section of this Act were ruled invalid, null or unconstitutional by a court with jurisdiction, such ruling shall only affect the part, paragraph or section thus ruled invalid, null, or unconstitutional.

Section 3.3.—**Terms.**—

It shall be understood that any term in the singular form includes the plural form. Likewise, when usage so warrants, it shall be understood that any term in the masculine gender includes the feminine gender or vice versa.

Section 3.4.—**Effectiveness.**—

This Act shall take effect immediately after its approval.

CERTIFICATION

I hereby certify to the Secretary of State that the following **Act No. 19-2012 (S. B. 2372)** of the **6th Session of the 16th Legislature** of Puerto Rico:

AN ACT to promulgate the “Energy Savings Performance Contracts Act”; grant specific powers to the Energy Affairs Administration to coordinate and supervise the implementation and ascertainment of and compliance with this Act; to ensure that Energy Savings Performance Contracts are effectively carried out and thus implement the public policy of the Government of Puerto Rico in connection with energy efficiency; and for other related purposes.

has been translated from Spanish to English and that the English version is correct.

In San Juan, Puerto Rico, on the 14th day of March, 2012.

María del Mar Ortiz Rivera