

108TH CONGRESS  
2D SESSION

# S. 2318

To expand upon the Department of Defense Energy Efficiency Program required by section 317 of the National Defense Authorization Act of 2002 by authorizing the Secretary of Defense to enter into energy savings performance contracts, and for other purposes.

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## IN THE SENATE OF THE UNITED STATES

APRIL 8, 2004

Ms. COLLINS (for herself, Mr. BAYH, Mr. ROBERTS, and Mr. REED) introduced the following bill; which was read twice and referred to the Committee on Armed Services

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## A BILL

To expand upon the Department of Defense Energy Efficiency Program required by section 317 of the National Defense Authorization Act of 2002 by authorizing the Secretary of Defense to enter into energy savings performance contracts, and for other purposes.

1       *Be it enacted by the Senate and House of Representa-*  
2       *tives of the United States of America in Congress assembled,*

3       **SECTION 1. SHORT TITLE.**

4       This Act may be cited as the “National Defense En-  
5       ergy Savings Act of 2004”.

1 **SEC. 2. ENERGY SAVINGS PERFORMANCE CONTRACTS.**

2 (a) CONTRACTS AUTHORIZED.—The Secretary of De-  
3 fense may enter into an energy savings performance con-  
4 tract under this section for the sole purpose of achieving  
5 energy savings and benefits ancillary to that purpose. The  
6 Secretary may incur obligations under the contract to fi-  
7 nance energy conservation measures so long as guaranteed  
8 savings exceed the debt service requirements.

9 (b) TERMS AND CONDITIONS.—

10 (1) CONTRACT PERIOD.—Notwithstanding any  
11 other provision of law, an energy savings perform-  
12 ance contract may be for a period of up to 25 years  
13 beginning on the date on which the first payment is  
14 made by the Secretary pursuant to the contract. The  
15 contract need not include funding of cancellation  
16 charges (if any) before cancellation, if—

17 (A) the contract was awarded in a com-  
18 petitive manner, using procedures and methods  
19 established under this section;

20 (B) the Secretary determines that funds  
21 are available and adequate for payment of the  
22 costs of the contract for the first fiscal year;

23 (C) the contract is governed by part 17.1  
24 of the Federal Acquisition Regulation; and

25 (D) if the contract contains a clause set-  
26 ting forth a cancellation ceiling in excess

1           \$10,000,000, the Secretary provides notice to  
2           Congress of the proposed contract and the pro-  
3           posed cancellation ceiling at least 30 days be-  
4           fore the award of the contract.

5           (2) COSTS AND SAVINGS.—An energy savings  
6           performance contract shall require the contractor to  
7           incur the costs of implementing energy savings  
8           measures, including at least the cost (if any) in-  
9           curred in making energy audits, acquiring and in-  
10          stalling equipment, and training personnel, in ex-  
11          change for a share of any energy savings directly re-  
12          sulting from implementation of such measures dur-  
13          ing the term of the contract.

14          (3) OTHER TERMS AND CONDITIONS.—An en-  
15          ergy savings performance contract shall require an  
16          annual energy audit and specify the terms and con-  
17          ditions of any Government payments and perform-  
18          ance guarantees. Any such performance guarantee  
19          shall provide that either the Government or the con-  
20          tractor is responsible for maintenance and repair  
21          services for any energy related equipment, including  
22          computer software systems.

23          (c) LIMITATION ON ANNUAL CONTRACT PAY-  
24          MENTS.—Aggregate annual payments by the Secretary to  
25          a contractor for energy, operations, and maintenance

1 under an energy savings performance contract may not  
2 exceed the amount that the Department of Defense would  
3 have paid for energy, operations, and maintenance in the  
4 absence of the contract (as estimated through the proce-  
5 dures developed pursuant to this section) during term of  
6 the contract. The contract shall provide for a guarantee  
7 of savings to the Department, and shall establish payment  
8 schedules reflecting such guarantee, taking into account  
9 any capital costs under the contract.

10 (d) RULEMAKING.—Not later than 90 days after the  
11 date of the enactment of this Act, the Secretary, with the  
12 concurrence of the Federal Acquisition Regulatory Coun-  
13 cil, shall issue final rules to establish the procedures and  
14 methods for use by the Department of Defense to select,  
15 monitor, and terminate energy savings performance con-  
16 tracts in accordance with laws governing Federal procure-  
17 ment that will achieve the intent of this section in a cost-  
18 effective manner. In developing such procedures and meth-  
19 ods, the Secretary, with the concurrence of the Federal  
20 Acquisition Regulatory Council, shall determine which ex-  
21 isting regulations are inconsistent with the intent of this  
22 section and shall formulate substitute regulations con-  
23 sistent with laws governing Federal procurement.

1 (e) IMPLEMENTATION PROCEDURES AND METH-  
2 ODS.—The procedures and methods established by rule  
3 under subsection (d) shall—

4 (1) provide for the calculation of energy savings  
5 based on sound engineering and financial practices;

6 (2) allow the Secretary to request statements of  
7 qualifications, which shall, at a minimum, include  
8 prior experience and capabilities of contractors to  
9 perform the proposed types of energy savings serv-  
10 ices and financial and performance information from  
11 firms engaged in providing energy savings services;

12 (3) allow the Secretary to presume that a con-  
13 tractor meets the requirements of paragraph (2) if  
14 the contractor either—

15 (A) has carried out contracts with a value  
16 of at least \$1,000,000,000 with the Federal  
17 Government over the previous 10 years; or

18 (B) is listed by a Federal agency pursuant  
19 to section 801(b)(2) of the National Energy  
20 Policy Act (42 U.S.C. 8287(b)(2));

21 (4) allow the Secretary to, from the statements  
22 received, designate and prepare a list, with an up-  
23 date at least annually, of those firms that are quali-  
24 fied to provide energy savings services;

1           (5) allow the Secretary to select firms from  
2           such list to conduct discussions concerning a par-  
3           ticular proposed energy savings project, including re-  
4           questing a technical and price proposal from such se-  
5           lected firms for such project;

6           (6) allow the Secretary to select from such  
7           firms the most qualified firm to provide energy sav-  
8           ings services based on technical and price proposals  
9           and any other relevant information;

10          (7) allow the Secretary to permit receipt of un-  
11          solicited proposals for energy savings performance  
12          contracting services from a firm that the Depart-  
13          ment of Defense has determined is qualified to pro-  
14          vide such services under the procedures established  
15          pursuant to subsection (d) and require facility man-  
16          agers to place a notice in the Commerce Business  
17          Daily announcing they have received such a proposal  
18          and invite other similarly qualified firms to submit  
19          competing proposals;

20          (8) allow the Secretary to enter into an energy  
21          savings performance contract with a firm qualified  
22          under paragraph (7), consistent with the procedures  
23          and methods established pursuant to subsection (d);  
24          and

1           (9) allow a firm not designated as qualified to  
2       provide energy savings services under paragraph (4)  
3       to request a review of such decision to be conducted  
4       in accordance with procedures, substantially equiva-  
5       lent to procedures established under section 759(f)  
6       of title 40, United States Code, to be developed by  
7       the board of contract appeals of the General Services  
8       Administration.

9       (f) TRANSITION RULE FOR CERTAIN ENERGY SAV-  
10      INGS PERFORMANCE CONTRACTS.—In the case of any en-  
11      ergy savings performance contract entered into by the Sec-  
12      retary, or the Secretary of Energy, before October 1,  
13      2003, for services to be provided at Department of De-  
14      fense facilities, the Secretary may issue additional task or-  
15      ders pursuant to such contract and may make whatever  
16      contract modifications the parties to such contract agree  
17      are necessary to conform to the provisions of this section.

18      (g) PILOT PROGRAM FOR NONBUILDING APPLICA-  
19      TIONS.—

20           (1) IN GENERAL.—The Secretary may carry out  
21      a pilot program to enter into up to 10 energy sav-  
22      ings performance contracts for the purpose of  
23      achieving energy savings, secondary savings, and  
24      benefits incidental to those purposes, in nonbuilding  
25      applications.

1           (2) SELECTION.—The Secretary shall select the  
2       contract projects to demonstrate the applicability  
3       and benefits of energy savings performance con-  
4       tracting to a range of non-building applications.

5           (3) REPORT.—Not later than three years after  
6       the date of the enactment of this Act, the Secretary  
7       shall submit to Congress a report on the progress  
8       and results of the pilot program. The report shall in-  
9       clude a description of projects undertaken; the en-  
10      ergy and cost savings, secondary savings and other  
11      benefits that resulted from such projects; and rec-  
12      ommendations on whether the pilot program should  
13      be extended, expanded, or authorized.

14       (h) DEFINITIONS.—In this section:

15           (1) ENERGY SAVINGS.—The term “energy sav-  
16      ings” means a reduction in the cost of energy, from  
17      a base cost established through a methodology set  
18      forth in the energy savings performance contract,  
19      utilized in an existing federally owned building or  
20      buildings or other federally owned facilities as a re-  
21      sult of—

22           (A) the lease or purchase of operating  
23      equipment, improvements, altered operation and  
24      maintenance, increased capacity or payload, or  
25      technical services; or



1 (B) the increased efficient use of existing  
 2 energy sources by cogeneration or heat recovery,  
 3 excluding any cogeneration process for  
 4 other than a federally owned building or build-  
 5 ings or other federally owned facilities.

6 (2) ENERGY SAVINGS PERFORMANCE CON-  
 7 TRACT.—The term “energy savings performance  
 8 contract” means a contract that provides for the  
 9 performance of services for the design, acquisition,  
 10 installation, testing, operation, and, where appro-  
 11 priate, maintenance and repair of an identified en-  
 12 ergy conservation measure or series of measures at  
 13 one or more locations. Such contracts—

14 (A) may provide for appropriate software  
 15 licensing agreements; and

16 (B) shall, with respect to an agency facility  
 17 that is a public building, as defined in section  
 18 13(l) of the Public Buildings Act of 1959 (40  
 19 U.S.C. 612(l)), be in compliance with the pro-  
 20 spectus requirements and procedures of section  
 21 7 of the Public Buildings Accountability Act of  
 22 1959 (40 U.S.C. 606).

23 (3) NONBUILDING APPLICATION.—The term  
 24 “nonbuilding application” means—

1 (A) any class of vehicles, devices, or equip-  
2 ment that is transportable under its own power  
3 by land, sea, or air that consumes energy from  
4 any fuel source for the purpose of such trans-  
5 portability, or to maintain a controlled environ-  
6 ment within such vehicle, device, or equipment;  
7 or

8 (B) any Federally owned equipment used  
9 to generate electricity or transport water.

10 (4) SECONDARY SAVINGS.—The term “sec-  
11 ondary savings” means additional energy or cost  
12 savings that are a direct consequence of the energy  
13 savings that result from the energy efficiency im-  
14 provements that were financed and implemented  
15 pursuant to the energy savings performance con-  
16 tract. Such secondary savings may include energy  
17 and cost savings that result from a reduction in the  
18 need for fuel delivery and logistical support, per-  
19 sonnel cost savings and environmental benefits. In  
20 the case of electric generation equipment, secondary  
21 savings may include the benefits of increased effi-  
22 ciency in the production of electricity, including rev-  
23 enue received by the Federal Government from the  
24 sale of electricity so produced.

- 1           (5) SECRETARY.—The term “Secretary” means  
2   the Secretary of Defense.

