SEC. 2805. CLARIFICATION OF AUTHORITY TO ENTER INTO ENERGY SAVING PERFORMANCE CONTRACTS.

(a) DEFINITION OF "ENERGY SAVINGS".—Paragraph (2)(A) of section 804 of the National Energy Conservation Policy Act (42 U.S.C. 8287c) is amended—

(1) by redesignating clauses (ii) and (iii) as clauses (iii) and (iv), respectively; and

(2) by inserting after clause (i) the following new clause (ii):

"(ii) with respect to operating equipment covered by a lease or purchase referred to in clause (i)—

"(I) repair or modification of existing buildings and infrastructure to accommodate the operating equipment; or

"(II) construction of buildings, structures, and infrastructure to accommodate the operating equipment in order to provide necessary support to the primary function of the operating equipment;".

(b) OVERSIGHT.—Section 801 of such Act (42 U.S.C.8287) is amended by adding at the end the following new subsection:

"(d) ADDITIONAL RULES FOR DEPARTMENT OF DEFENSE.—With respect to the Department of Defense—

"(1) when a decision to carry out an energy savings performance contract that includes construction of a new facility with an estimated value of $10,000,000 or more or a new facility that will cover more than 5,000 square feet of land, the project shall be subject to the same requirements and limitations as apply under section 2805(b)(2) of title 10, United States Code, to a project subject to that section; and

24 "(2) when a decision is made to carry out an energy savings performance contract

25 that includes a repair project with an estimated cost of $7,500,000 or more, the project

26 shall be subject to the same requirements and limitations as apply under section 2811 of

27 title 10, United States Code, to a project subject to that section.".

[Please note: The "Changes to Existing Law" section below sets out in red-line format how the legislative text above would amend existing law.]

Section-by-Section Analysis

This proposal would amend section 804 of the National Energy Conservation Policy Act (42 U.S.C. 8287c) to provide specifically that repairs or modifications of existing buildings, infrastructure, and facilities are permitted to accommodate operating equipment and that ancillary buildings, structures, infrastructure, and facilities may be constructed, as part of an energy savings performance contract (ESPC), to accommodate the operating equipment. Currently, paragraph (2)(A)(i) of that section provides that "improvements" and "increased efficient use of an existing energy source by cogeneration" are permitted under an ESPC, but not new construction.

In the joint statement of the managers to accompany the conference report for the National Defense Authorization Act (NDAA) for Fiscal Year 2013 (House Rpt. No. 112-705), the conferees noted that "[w]hile ESPCs are not available for the purpose of the construction of new buildings or facilities . . . modification or repair of existing facilities, or the construction of ancillary facilities or infrastructure, to accommodate the equipment" would be needed in some ESPCs. The conferees further stated that "[i]n such cases, ESPCs may be used for the construction, repair, maintenance, or modification of facilities or infrastructure ancillary to the qualifying equipment." Accordingly, this proposal is designed to implement Congress' intent.

The new language authorizes agencies to undertake repair or modification of existing buildings and infrastructure to accommodate the operating equipment and new construction of buildings, structures, and infrastructure to accommodate the operating equipment in order to provide necessary support to the primary function of the operating equipment. This clarification of ESPC repair, modification and construction authority is limited to the express purposes stated in the statute and shall not be utilized to fulfill other agency requirements.

Budget Implications: This proposal does not require any additional funding. The military departments will fund any such contracts from their authorized accounts. It is noted that existing law requires that there be no net impact on the agency's operating budget through the use of energy savings performance contracts: "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". (42 USC § 8287(a)(2)(B)). Accordingly, all energy savings performance contracts are required by law to be funded with energy savings and require no additional appropriations from Congress.

RESOURCE REQUIREMENTS ($MILLIONS)									
	FY 2015	**FY 2016**	**FY 2017**	**FY 2018**	**FY 2019**	**Appropriation From**	**Budget Activity**	**Dash-1 Line Item**	**Program Element**
	0	0	0	0	0	N/A	N/A	N/A	N/A

Change to Existing Law: This proposal would make the changes to title VIII of the National Energy Conservation Policy Act (42 U.S.C. 8287c) as follows:

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 title 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 title 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 title 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) of this section, using procedures and methods established under this title;

(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 25 of the Office of Federal Procurement Policy Act [*now*, 41 U.S.C. 1303] or the applicable rules promulgated under this title.

(E) FUNDING OPTIONS.—In carrying out a contract under this title, 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.

(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 543(f) [42 U.S.C. 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 after the date of enactment of this subparagraph [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.

(b) IMPLEMENTATION.—

(1)(A) The Secretary, with the concurrence of the Federal Acquisition Regulatory Council established under section 25(a) of the Office of Federal Procurement Policy Act [*now*, 41 U.S.C. 1302(a)], 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 formulate substitute regulations consistent with laws governing Federal procurement.

(B) The procedures and methods established pursuant to subparagraph (A) shall be the procedures and contracting methods for selection, by an agency, of a contractor to provide energy savings performance services. Such procedures and methods shall provide for the calculation of energy savings based on sound engineering and financial practices.

(2) The procedures and methods established pursuant to paragraph (1)(A) shall—

(A) allow the Secretary to—

(i) request statements of qualifications, which shall, at a minimum, include prior experience and capabilities of contractors to perform the proposed types of energy savings services and financial and performance information, from firms engaged in providing energy savings services; and

(ii) from the statements received, designate and prepare a list, with an update at least annually, of those firms that are qualified to provide energy savings services;

(B) require each agency to use the list prepared by the Secretary pursuant to subparagraph (A)(ii) unless the agency elects to develop an agency list of firms qualified to provide energy savings performance services using the same selection procedures and methods as are required of the Secretary in preparing such lists; and

(C) allow the head of each agency to—

(i) select firms from the list prepared pursuant to subparagraph (A)(ii) or the list prepared by the agency pursuant to subparagraph (B) to conduct discussions concerning a particular proposed energy savings project, including requesting a technical and price proposal from such selected firms for such project;

(ii) select from such firms the most qualified firm to provide energy savings services based on technical and price proposals and any other relevant information;

(iii) permit receipt of unsolicited proposals for energy savings performance contracting services from a firm that such agency has determined is qualified to provide such services under the procedures established pursuant to paragraph (1)(A), and require agency facility managers to place a notice in the Commerce Business Daily announcing they have received such a proposal and invite other similarly qualified firms to submit competing proposals; and

(iv) enter into an energy savings performance contract with a firm qualified under clause (iii), consistent with the procedures and methods established pursuant to paragraph (1)(A).

(3) A firm not designated as qualified to provide energy savings services under

paragraph (2)(A)(i) or paragraph (2)(B) may request a review of such decision to be conducted in accordance with procedures to be developed by the board of contract appeals of the General Services Administration.

(c) TASK OR DELIVERY ORDERS.—

(1) The head of a Federal agency may issue a task or delivery order under an energy savings performance contract by—

(A) notifying all contractors that have received an award under such contract that the agency proposes to discuss energy savings performance services for some or all of its facilities and, following a reasonable period of time to provide a proposal in response to the notice, soliciting from such contractors the submission of expressions of interest in, and contractor qualifications for, performing site surveys or investigations and feasibility designs and studies, and including in the notice summary information concerning energy use for any facilities that the agency has specific interest in including in such task or delivery order;

(B) reviewing all expressions of interest and qualifications submitted pursuant to the notice under subparagraph (A);

(C) selecting two or more contractors (from among those reviewed under subparagraph (B)) to conduct discussions concerning the contractors' respective qualifications to implement potential energy conservation measures, including—

(i) requesting references and specific detailed examples with respect to similar efforts and the resulting energy savings of such similar efforts; and

(ii) requesting an explanation of how such similar efforts relate to the scope and content of the task or delivery order concerned;

(D) selecting and authorizing—

(i) more than one contractor (from among those selected under subparagraph (C)) to conduct site surveys, investigations, feasibility designs and studies, or similar assessments for the energy savings performance contract services (or for discrete portions of such services), for the purpose of allowing each such contractor to submit a firm, fixed-price proposal to implement specific energy conservation measures; or

(ii) one contractor (from among those selected under subparagraph (C)) to conduct a site survey, investigation, feasibility design and study, or similar assessment for the purpose of allowing the contractor to submit a firm, fixed-price proposal to implement specific energy conservation measures;

(E) providing a debriefing to any contractor not selected under subparagraph (D);

(F) negotiating a task or delivery order for energy savings performance contracting services with the contractor or contractors selected under subparagraph (D) based on the energy conservation measures identified; and

(G) issuing a task or delivery order for energy savings performance contracting services to such contractor or contractors.

(2) The issuance of a task or delivery order for energy savings performance contracting services pursuant to paragraph (1) is deemed to satisfy the task and delivery order competition requirements in section 2304c(d) of title 10, United States Code, and section 303J(d) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253j(d)) [*now***,** 41 U.S.C. 4106(d)].

(3) The Secretary may issue guidance as necessary to agencies issuing task or delivery orders pursuant to paragraph (1).

(d) ADDITIONAL RULES FOR DEPARTMENT OF DEFENSE.—With respect to the Department of Defense—

(1) when a decision to carry out an energy savings performance contract that includes construction of a new facility with an estimated value of $10,000,000 or more **or** a new facility that will cover more than 5,000 square feet of land, the project shall be subject to the same requirements and limitations as apply under section 2805(b)(2) of title 10, United States Code, to a project subject to that section; and

(2) when a decision is made to carry out an energy savings performance contract that includes a repair project with an estimated cost of $7,500,000 or more, the project shall be subject to the same requirements and limitations as apply under section 2811 of title 10, United States Code, to a project subject to that section.

SEC. 802. PAYMENT OF COSTS.

Any amount paid by a Federal agency pursuant to any contract entered into under this title 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).

SEC. 803. REPORTS.

Each Federal agency shall periodically furnish the Secretary of Energy with full and complete information on its activities under this title, and the Secretary shall include in the report submitted to Congress under section 550 a description of the progress made by each Federal agency in—

(1) including the authority provided by this title in its contracting practices; and

(2) achieving energy savings under contracts entered into under this title.

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 as a result of—

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

(ii) with respect to operating equipment covered by a lease or purchase referred to in clause (i)—

(I) repair or modification of existing buildings and infrastructure to accommodate the operating equipment; or

(II) construction of buildings, structures, and infrastructure to accommodate the operating equipment in order to provide necessary support to the primary function of the operating equipment;

(~~ii~~iii) 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; or

(~~iii~~iv) 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.

(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, United States Code), be in compliance with the prospectus requirements and procedures of section 3307 of title 40, United States Code.

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

(A) an energy conservation measure, as defined in section 551 [42 U.S.C. 8259]; 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.