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SCHOOL ENERGY CONSERVATION: QUALIFIED PROVIDERS

Senate Bills 482 and 761 as passed by the
Senate
First Analysis (11-12-03)

Sponsor: Sen. Wayne Kuipers
House Committee: Education
Senate Committee: Education

THE APPARENT PROBLEM:

The Revised School Code provides that a school district may contract for energy conservation improvements to school buildings, and that the cost of the improvements may be paid for with the savings that result. Many districts take advantage of this by hiring companies that specialize in energy improvements to school districts. These improvements often involve changes to the school infrastructure, including lighting, electrical, and plumbing upgrades.

Under Public Act 306 of 1937, any type of school construction must be supervised by a licensed architect or engineer. Although Public Act 306 does not specifically prohibit the supervising architect or engineer from working for the main contractor, many have interpreted that act to require their independence. Some believe that more savings could be realized if the architect or engineer could be affiliated with, or work for, the company doing the improvements.

In 1957, then-Attorney General Thomas Kavanagh issued Opinion No. 3028, addressing this issue. The opinion found that Michigan statute requires architects or engineers supervising the construction of school buildings to be employed by, and represent the interests of, the board of education of the school under construction. "The architect is the one to guard the board against defects and deficiencies in the work of the contractor."

While some see the independence of an architect or engineer as necessary to ensure proper oversight of the project, others view it as an added cost to a project in cases in which a company specializes in energy improvements to schools.

THE CONTENT OF THE BILL:

Senate Bill 482 would amend the Revised School Code (MCL 380.1274a) to permit the board of a school district, intermediate school district, or local act school district to contract with a qualified provider for energy conservation improvements to school facilities. Senate Bill 761 would amend Public Act 306 of 1937 (MCL 388.851) which regulates school construction, to permit a licensed architect or professional engineer to be directly affiliated with the qualified provider. Senate Bill 761 is tie-barred to Senate Bill 482.

Senate Bill 482. The Code permits a school board to provide for energy conservation improvements to school facilities, and provides that these improvements may be paid for from the district's operating funds, from the proceeds of bonds or notes, or from the savings that result from the improvements. The bill would retain these provisions, but specifies that a district could contract with a qualified provider for energy conservation improvements. The bill would define "qualified provider" as an individual or a business entity that was experienced in performing design, analysis, and installation of energy conservation improvements and facility energy management measures, and that would provide these services under the contract with a guarantee or on a performance basis. Under the bill, a board could require the qualified provider to furnish a bond that guaranteed energy cost savings for a specified period of time.

Further, the bill states that energy conservation improvements could include, but would not be limited to, the following: building envelope improvements; heating and cooling upgrades; lighting retrofits; installing or upgrading an energy management system; motor, pump, or fan replacements; domestic water use reductions; and upgrading other energy consuming equipment or appliances. Currently, energy conservation

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improvements may include, but are not limited to, heating system improvements, fenestration improvements, roof improvements, the installation of any insulation, the installation or repair of heating or air condition controls, and entrance or exit way closures.

The Code requires that a school board submit a report to the Michigan Public Service Commission (PSC) on a form provided by the PSC within 60 days of completing the energy improvements and each year for five years after the improvements are completed. The bill would require that a school board report to the state treasurer, instead of the PSC.

Senate Bill 761. Public Act 306 of 1937 requires all plans and specifications for school buildings to be prepared by an architect or professional engineer licensed in Michigan. A licensed architect or another person qualified to supervise construction must supervise the construction of a school building. Under the bill, for energy conservation projects and services, the licensed architect or professional engineer could be directly affiliated with the qualified provider that was providing the applicable improvements and services; however, the specifications for the project would have to be generic in character and, to the extent possible, could not include proprietary equipment or technology developed by the qualified provider or in which the provider had an interest.

HOUSE COMMITTEE ACTION:

The members of the House Education Committee reported out the Senate-passed version of the bills without amendments. This analysis relies on information provided by the Senate Fiscal Agency in its analysis dated 10-29-03.

FISCAL IMPLICATIONS:

The Senate Fiscal agency notes that the bills would have no fiscal impact on state or local government. (10-29-03) The House Fiscal Agency concurs with the earlier fiscal analysis. (11-5-03)

ARGUMENTS:

For:

The ability to have a qualified provider design its own energy improvement projects would allow for better use of “performance-based contracting”. In the energy services industry, performance-based contracting means that the installation price of the project is fixed when the contract is signed, and that

the company is contractually obligated to reimburse the school district if the guaranteed energy savings are not realized. It would be more efficient under this system if the design team (architect or engineer) worked for the provider, because one company would be responsible for the entire project and could better guarantee results. This would spare districts the frustration of working with multiple companies, and the finger-pointing between companies that can result if there are problems. Time saved is money saved, money that could be used for educational services and programs.

Against:

It is necessary for architects and engineers to oversee construction projects so that an objective third party can look out for the interests of the school district. An architect or engineer who worked for a main contractor would be loyal to the contractor, and not to the school board, which would be paying for the project. Attorney General Kavanagh had it right when he wrote in Opinion No. 3028, “It is a common law doctrine or principle of public policy ‘that no person can, at one and the same time, faithfully serve two masters representing diverse or inconsistent interests with respect to the services to be performed.’”

Response:

The bill would leave contracting decisions to the individual school boards, which could continue to retain an independent architect or engineer. A school board also could protect itself by requiring a guarantee or a performance bond.

POSITIONS:

The Department of Consumer and Industry Services supports the bills. (11-10-03)

Johnson Controls has indicated support for the bills. (11-6-03)

Honeywell has indicated support for the bills. (11-6-03)

Analyst: J. Hunault

■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.