Energy Performance Savings Contracting Act

Number: INFORMAL

Date: July 18, 2007

The Honorable Kevin C. Ambler
Representative, District 47
3820 Northdale Boulevard, Suite 301-A
Tampa, Florida 33624

Dear Representative Ambler:

You state that several municipalities within your district are interested in replacing existing water meters with a new remote reading system to eliminate billing errors and improve customer service. According to the companies providing this service, the new system would reduce operating costs as well as potentially generate additional revenue for the municipalities since the new meters are more accurate than the existing meters. You state that one company is promoting a guaranteed energy contract pursuant to section 489.145, Florida Statutes. A question, however, has arisen as to whether a water meter replacement is an acceptable energy conservation measure as addressed by section 489.145, Florida Statutes. Related to this issue is whether the replacement water meters will generate energy cost savings and will significantly reduce energy and operating costs as contemplated by the statute.

In creating section 489.145, Florida Statutes, the Guaranteed Energy Performance Savings Contracting Act, the Legislature made certain findings:

"The Legislature finds that investment in energy conservation measures in agency facilities can reduce the amount of energy consumed and produce immediate and long-term savings. It is the policy of this state to encourage agencies to invest in energy conservation measures that reduce energy consumption, produce a cost savings for the agency, and improve the quality of indoor air in public facilities and to operate, maintain, and, when economically feasible, build or renovate existing agency facilities in such a manner as to minimize energy consumption and maximize energy savings. It is further the policy of this state to encourage agencies to reinvest any energy savings resulting from energy conservation measures in additional energy conservation efforts."[1]

In construing the statute, these legislative findings may be used to ascertain the legislative intent.[2]

Section 489.145(4)(a), Florida Statutes, permits an agency[3] to enter into a guaranteed energy performance savings contract with a guaranteed energy performance savings contractor to significantly reduce energy or operating costs of an agency facility through one or more energy conservation measures. The agency must obtain from a guaranteed energy performance savings contractor a report that summarizes the costs associated with the energy conservation measures and provides an estimate of the amount of the energy cost savings.[4] The agency must find that the amount the agency would spend on the energy conservation measures will not

likely exceed the amount of the energy cost savings for up to 20 years from the date of installation.[5]

An "energy conservation measure" is defined within the act as a training program, facility alteration, or equipment purchase to be used in new construction, including an addition to an existing facility, which reduces energy or operating costs and includes, but is not limited to:

"1. Insulation of the facility structure and systems within the facility.
2. Storm windows and doors, caulking or weatherstripping, multiglazed windows and doors, heat-absorbing, or heat-reflective, glazed and coated window and door systems, additional glazing, reductions in glass area, and other window and door system modifications that reduce energy consumption.
3. Automatic energy control systems.
4. Heating, ventilating, or air-conditioning system modifications or replacements.
5. Replacement or modifications of lighting fixtures to increase the energy efficiency of the lighting system, which, at a minimum, must conform to the applicable state or local building code.
6. Energy recovery systems.
7. Cogeneration systems that produce steam or forms of energy such as heat, as well as electricity, for use primarily within a facility or complex of facilities.
8. Energy conservation measures that provide long-term operating cost reductions or significantly reduce Btu consumed.
9. Renewable energy systems, such as solar, biomass, or wind systems.
10. Devices that reduce water consumption or sewer charges.
11. Storage systems, such as fuel cells and thermal storage.
12. Generating technologies, such as microturbines.
13. Any other repair, replacement, or upgrade of existing equipment."[6]

Although the above definition includes devices that reduce water consumption or sewer charges, this office has not been presented with any evidence that the replacement of water meters would reduce water consumption or sewer charges. Moreover, where a general term follows an enumeration of specific classes, the general term will be limited to the same general nature as those specifically enumerated.[7] Thus, while section 489.145(3)(b), Florida Statutes, includes the general reference to "any other repair, replacement of existing equipment," such reference should be construed in light of the types of energy conservation measures specifically enumerated within the statute. The categories specifically enumerated therein would not appear to encompass the type of water meter replacement program described herein.

Section 489.145(3)(c), Florida Statutes, defines "Energy cost savings" to mean

"a measured reduction in the cost of fuel, energy consumption, and stipulated operation and maintenance created from the implementation of one or more energy conservation measures when compared with an established baseline for the previous cost of fuel, energy consumption, and stipulated operation and maintenance."

The above statute refers to a measured reduction in the cost of fuel and energy consumption which would not appear to be applicable to a program replacing water meters. Such a program

does not result in a reduction in either the cost of the water or the consumption of the resource. While it is possible that the replacement program may result in a measured reduction in the cost of stipulated operation and maintenance, such reduction must be created from an energy conservation measure which, as discussed above, would not appear to encompass such a program.

As noted above, the legislative findings may be used in determining the legislative intent. Such findings address energy conservation measures in agency facilities that reduce the amount of energy consumed and produce immediate and long-term savings. While the installation of remotely read meters may result in a reduction of operating costs, such reduction is not the result of a reduction in the amount of the water used.

Moreover, this office is aware that during the past several legislative sessions, bills have been introduced to amend section 489.145, Florida Statutes, to add water and wastewater efficiency and conservation measures to the types of guaranteed performance savings contracts that may be entered into by agencies.[8] Many of the issues raised in your letter were addressed in the proposed legislation. For example, the Senate and House bills considered during the 2007 regular session would have expanded the measures considered "conservation measures" to include equipment upgrades that improve the accuracy of billable revenue-generating systems, and systems that reduce direct personnel costs.[9] In addition, in defining conservation measures, the bills would have clarified that the term included not only the facility, but the infrastructure.[10] None of the bills passed.

There is a general presumption that when the Legislature seeks to amend a statute, it intends to accord the statute a meaning different from that accorded before the amendment.[11] Accordingly, the presumption exists that the Legislature, by seeking to amend the statute to add water and wastewater efficiency and conservation measures to the types of guaranteed performance savings contracts that may be entered into by agencies pursuant to section 489.145, Florida Statutes, does not consider such measures to be currently encompassed within the terms of section 489.145.

In light of the above, it does not appear that a remote readable water meter replacement program would qualify as an energy conservation measure resulting in energy saving costs under section 489.145, Florida Statutes.

Sincerely,

Joslyn Wilson
Assistant Attorney General

JW/t

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[1] Section 489.145(2), Fla. Stat.

[2] *See, e.g.,* Ervin v. Peninsular Telephone Company, 53 So. 2d 647 (Fla. 1951) (Supreme

Court has duty in construction of statutes to ascertain Legislature's intention and effectuate it); *State v. Webb*, 398 So. 2d 820 (Fla. 1981) (legislative intent is the polestar by which the courts must be guided). *And see State Board of Accountancy v. Webb*, 51 So. 2d 296 (Fla. 1951) (in construing a statute, courts look at the purpose of the legislation, examining such things as the history of the act, evil to be corrected, intention of the law-making body, the subject regulated, and the object to be obtained); *DeBolt v. Department of Health and Rehabilitative Services,* 427 So. 2d 221 (Fla. 1st DCA 1983); Ops. Att'y Gen. Fla. 99-61 (1999) and 98-82 (1998).

[3] Section 489.145(3)(a), Fla. Stat. ("'Agency' means the state, a municipality, or a political subdivision").

[4] Section 489.145(4)(b), Fla. Stat.

[5] Section 489.145(4)(c), Fla. Stat.

[6] Section 489.145(3)(b), Fla. Stat.

[7] *See, e.g., City of West Palm Beach v. Board of Trustees of the Internal Improvement Trust Fund,* 746 So. 2d 1085 (Fla. 1999) (where statute first uses terms confined and limited to a particular class of a known species of things, and later uses a broader term, the more general word is construed as applying to the same kind of species with those comprehended by the preceding limited and confined terms); *Green v. State,* 604 So. 2d 471 (Fla. 1992); Ops. Att'y Gen. Fla. 99-32 (1999) and 97-36 (1997) (general term "other structures" may be interpreted to include facilities comparable to or in the same class as those enumerated). *Cf. Turnberry Isle Resort and Club v. Fernandez,* 666 So. 2d 254 (Fla. 3d DCA 1996) (under the doctrine of noscitur a sociis the meaning of statutory terms, and the legislative intent behind them, may be discovered by referring to words associated with them in the statute); *Cepcot Corporation v. Department of Business and Professional Regulation, Construction Industry Licensing Board,* 658 So. 2d 1092 (Fla. 2d DCA 1995) (court looked to the terms "construct," "repair," "remodel," and "demolish," in the statute to determine what types of duties were encompassed by the use of the terms "alter" and "improve"); Op. Att'y Gen. Fla. 00-07 (2000) (while staff analysis refers to "invoices," that term should be construed in light of the other types of information referenced).

[8] *See, e.g.*, Committee Substitutes for Senate Bill 1164 and House Bill 271 (2007); Senate Bill 278 and 597 (2006) and Senate Bill 1554 (2005).

[9] *See* s. 2, CS/SB 1164 and s. 2, CS/CS/HB 271 (2007).

[10] *Id.* For example, s. 2, CS/CS/HB 271 (2007) would have amended the definition in s. 489.145(3)(b) to read: "'Energy, water, or wastewater efficiency or conservation measure' means a training program, facility alteration, or equipment purchase to be used in new facilities or in retrofitting or adding to existing facilities or infrastructure that new construction, including an addition to an existing facility, which reduces energy, water, wastewater, or operating costs and includes, but is not limited to . . . ."

[11] *See, e.g., Sam's Club v. Bair*, 678 So. 2d 902 (Fla. 1st DCA 1996) (by enacting a material amendment to a statute, Legislature is presumed to have intended to alter a law unless the

contrary is made clear); *Capital Bank v. Schuler*, 421 So. 2d 633 (Fla. 3d DCA 1982); *Capella v. City of Gainesville*, 377 So. 2d 658 (Fla. 1979); Op. Att'y Gen. 85-44 (1985) (it is presumed that when the Legislature amends a statute, it intends to accord the statute a different meaning from that accorded to it before the amendment). *Cf. Smith v. Piezo Technology and Professional Administrators,* 427 So. 2d 182 (Fla. 1983) (provisions enacted by the Legislature must be assumed to have some useful purpose as the Legislature is not be presumed to have enacted useless or meaningless legislation); *Arnold v. Shumpert*, 217 So. 2d 116 (Fla. 1968); *Neu v. Miami Herald Publishing Company,* 462 So. 2d 821 (Fla. 1985) (in construing legislation, courts should not assume Legislature acted pointlessly).