



LINDABURY

McCORMICK, ESTABROOK & COOPER, P.C.

Attorneys at Law

Construction Alert

February 5, 2009

ATTORNEY ADVERTISING

The Construction Law Practice at Lindabury provides the full scope of legal services to businesses and other organizations in the construction industry—everything from the inception of the project, including negotiation with the design team to final wrap-up of the project, resulting in acceptance and final payment to architects, engineers and contractors. We also provide representation in all venues for disputes arising out of projects, including representation in arbitration and mediation.

Westfield Office

P. O. Box 2369
53 Cardinal Drive
Westfield, NJ 07091
(TEL) 908-233-6800
(FAX) 908-518-2967

www.lindabury.com

Energy Legislation Provides New Opportunities For HVAC And Other Trade Contractors

By Edward J. Frisch, Esq.

On January 21, 2009, Governor Corzine signed legislation amending New Jersey's public contracting statutes to implement Energy Savings Improvement Projects (ESIP). These contracts are for the installation or addition of energy conservation measures in public buildings and facilities – such as more energy efficient HVAC systems, water conserving plumbing fixtures, cogeneration, and others. It is anticipated that this legislation will be producing greater public sector work opportunities for HVAC, plumbing, and other contractors.

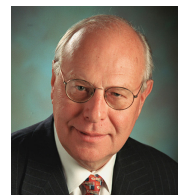
Edward J. Frisch, Esq., assisted by Bruce P. Ogden, Esq. of the Lindabury law firm, was intimately and actively involved with this legislation which had been pending in many forms over the last fifteen years. Mr. Frisch, a member of the Lindabury Construction Law Group, assisted the Mechanical Contractors Association of New Jersey, in consulting with the administration and sponsoring legislators in the drafting and passing of the legislation. These efforts helped to insure that the existing New Jersey public bid laws would be preserved, thus insuring that HVAC contractors would be afforded the same opportunities to bid and contract for this new work.

Mr. Frisch, along with members of the Mechanical Contractor's Association, including its Executive Director, Alan O'Shea, and President William Albanese, were specifically invited by Governor Corzine's special counsel and staff to attend the public bill signing.

This new legislation applies to virtually all New Jersey public entities, including public school districts, the N.J. Schools Development Authority, municipal, county, and State government, public colleges and universities, and the various public authorities and agencies. It allows a public entity to contract with an "energy savings company" (or ESCO) for energy conservation improvements, with the expectation that the improvements will pay for themselves from the future energy cost savings. The legislation now provides a financing alternative to the public bodies who in the past had to obtain voter approval of bond issues for major capital expenditures.

Generally, the improvement work itself still must be publicly bid and then contracted or subcontracted for like other public construction work. Those in the major specialty trades – such as HVAC and plumbing – must be DPMC classified and rated, and most other public contracting requirements will still apply. (*cont'd* →)

Edward J. Frisch has more than thirty years experience in all phases of law relating to the construction trades, representing owners, general contractors, mechanical and electrical contractors, masonry contractors, and other specialty subcontractors. He can be reached at efrisch@lindabury.com.



One twist is with the ESCO's role, which can be either as a consultant to the public entity owner, a project CM, or the general contractor. The format for bidding and contracting for the trade work then will depend on the ESCO's role in the particular project.

With an exception, the ESCO cannot do the major specialty trade work itself or through its own subsidiary or affiliated companies. The statute provides that even when the ESCO is the general contractor, "the hiring of [the major trades] subcontractors . . . shall be performed pursuant to the public bidding requirements of [the public entity]." If you should see this or other public contracting requirements being disregarded on one of these projects, please call us about it.

The one exception where a "manufacturing" ESCO can do major trades work is in supplying direct digital controls (DDC's) which it manufactures and which it supplies as part of a guaranteed contract with the public entity. In that situation, the ESCO's own DDC's can be sole-source specified. If so, however, the bid specifications must set forth an allowance price for the DDC's for all of the HVAC bidders to use.

As noted, this sole-sourcing of the ESCO's own DDC's is only allowed as part of a guaranteed contract (where the ESCO guarantees the future energy cost savings). In a non-guaranteed contract, even the DDC's must be competitively sourced. Also, the statute requires all DDC's to be open protocol format and to meet ASHRAE's interoperability guidelines.

Post-installation, the public bidding and contracting requirements also will apply to contracts for system maintenance. The long term maintenance will be important to achieving the energy cost savings, and the public entity must have an "energy savings plan" which in part describes the maintenance requirements and how they will be met.

Also, the public entity must post its energy savings plan on its website (if it has one), as well as submit it to the N.J. Board of Public Utilities, for posting on the Board of Public Utilities' website. These web posts will provide information about upcoming contracting opportunities.

Another item of note is that an energy savings contract can also include "[e]nergy-related capital improvements that do not reduce energy usage" – for instance, adding air conditioning. They cannot be financed in the same new ways as the energy savings measures, so it remains to be seen how popular their addition will be.

One word of caution is that the statute requires third party verification at the time when equipment is placed in service or commissioned, to ensure that the projected energy savings will occur. That could add to the contractor's testing/commissioning, punch list, and/or owner training costs. More generally, the contractor should be careful not to inadvertently take on the ESCO's obligation for the future energy cost savings, such as by any "flow down" of the ESCO's own contract responsibilities for them.

Finally, the statute authorizes certain state agencies or officials to adopt guidelines, directives, and administrative rules and regulations to implement the statute. When they are issued, they should provide some further guidance.

Various other agencies have begun implementing qualifications which are additionally needed for this program. There are various pre-qualified disciplines now being added by the New Jersey Division of Property Management and Construction (DPMC) for energy auditing, building commissioning, and renewable energy consulting. Also, the New Jersey Board of Public Utilities is now working on protocols to identify energy savings.

We are excited by the opportunities for added public sector contracting work to come under this new statute. If you require further additional information, or have concerns, you may contact Mr. Frisch.



The information provided here is necessarily general and is not intended as legal advice or a substitute for legal advice. If you have any questions regarding this Alert, please contact Edward J. Frisch of the Construction Law Group at efrisch@lindabury.com.

Before making your choice of attorney, you should give this matter careful thought. The selection of an attorney is an important decision.

You may, if this letter is inaccurate or misleading, report same to the Committee on Attorney Advertising, Hughes Justice Complex, P.O. Box 037, Trenton, NJ 08625.