

SUMMARY OF AMENDMENTS

COMMISSION FOR ARKANSAS PUBLIC SCHOOL ACADEMIC FACILITIES AND TRANSPORTATION RULES GOVERNING THE ACQUISITION OF ENERGY CONSERVATION MEASURES FOR PUBLIC SCHOOLS

These proposed rules incorporate provisions of Act 507 of 2019, which addressed energy cost saving measures in governmental facilities (including school districts) designed to reduce the consumption of energy, natural resources, or operating costs. Act 507 authorizes a school district to comply with rules promulgated pursuant to the Guaranteed Energy Cost Savings Act (promulgated by the Arkansas Pollution Control and Ecology Commission) if the district's board of directors chooses to do so. If a district chooses to opt in, the Arkansas Energy Office of the Arkansas Department of Environmental Quality will provide the district with assistance, support, and oversight throughout the process of planning, contracting for, and completing energy conservation projects. The proposed rules also change the definition of "qualified provider" (i.e., contractor) to make the definition in Title 6 (Education) consistent with the Guaranteed Energy Cost Savings Act, which requires pre-approval of providers by the Arkansas Energy Office. The amendments also incorporate Act 507 provisions concerning equipment warranty periods, and allows an energy savings contract to exceed twenty years with the approval of the Arkansas Energy Office. The proposed rules also contain edits and update the rules to mirror current law.

QUESTIONNAIRE FOR FILING PROPOSED RULES WITH THE
ARKANSAS LEGISLATIVE COUNCIL

DEPARTMENT/AGENCY: Commission for Arkansas Public School Academic Facilities and Transportation

DIVISION: Division of Public School Academic Facilities and Transportation

DIVISION DIRECTOR: Tim Cain

CONTACT PERSON: Lori Freno, General Counsel, Division of Elementary and Secondary Education

ADDRESS: Four Capitol Mall, Suite 302A, Little Rock, AR 72201

PHONE NO: (501) 682-4234 **FAX NO:** None **E-MAIL:** lori.freno@arkansas.gov

NAME OF PRESENTER AT COMMITTEE MEETING: Lori Freno

PRESENTER E-MAIL: lori.freno@arkansas.gov

INSTRUCTIONS

- A. Please make copies of this form for future use.**
- B. Please answer each question completely using layman terms. You may use additional sheets, if necessary.**
- C. If you have a method of indexing your rules, please give the proposed citation after “Short Title of this Rule” below.**
- D. Submit two (2) copies of this questionnaire and financial impact statement attached to the front of two (2) copies of the proposed rule and required documents. Mail or deliver to:**

Jessica C. Sutton
Administrative Rules Review Section
Arkansas Legislative Council
Bureau of Legislative Research
One Capitol Mall, 5th Floor
Little Rock, AR 72201

- 1. What is the short title of this rule? CAPSAFT Rules Governing Acquisition of Energy Conservation Measures
- 2. What is the subject of the proposed rule? Acquisition of Energy Conservation Measures at Public Schools.
- 3. Is this rule required to comply with a federal statute, rule, or regulation? Yes____ No **X**
If yes, please provide the federal rule, regulation, and/or statute citation. N/A
- 4. Was this rule filed under the emergency provisions of the Administrative Procedure Act? Yes____ No **X**

If yes, what is the effective date of the emergency rule? __N/A_____

When does the emergency rule expire? ____N/A_____

Will this emergency rule be promulgated under the permanent provisions of the Administrative Procedure Act? Yes **X** No_____

5. Is this a new rule? Yes _____ No If yes, please provide a brief summary explaining the rule.
- Does this repeal an existing rule? Yes _____ No If yes, a copy of the repealed rule is to be included with your completed questionnaire. If it is being replaced with a new rule, please provide a summary of the rule giving an explanation of what the rule does.
- Is this an amendment to an existing rule? Yes No _____ If yes, please attach a mark-up showing the changes in the existing rule and a summary of the substantive changes. **Note: The summary should explain what the amendment does, and the mark-up copy should be clearly labeled "mark-up."** Please see attached summary.
6. Cite the state law that grants the authority for this proposed rule? If codified, please give the Arkansas Code citation. Ark. Code Ann. §§ 6-20-401, 6-20-402, 6-20-405, 6-21-114, 25-15-201 et seq., and Act 507 of 2019.
7. What is the purpose of this proposed rule? Why is it necessary? To implement provisions of Act 507 of 2019 and other provisions of law, and to make technical changes/edits.
8. Please provide the address where this rule is publicly accessible in electronic form via the Internet as required by Arkansas Code § 25-19-108(b). <http://www.arkansased.gov/divisions/legal/rules> and <http://arkansasfacilities.arkansas.gov/facilities/rules-and-regulation-facilities>
9. Will a public hearing be held on this proposed rule? Yes No _____
If yes, please complete the following:
- Date: December 9, 2019
- Time: 1:30 p.m.
- Place: Arkansas Department of Education Auditorium, Four Capitol Mall, Little Rock, AR 72201
10. When does the public comment period expire for permanent promulgation? (Must provide a date.)
December 17, 2019
11. What is the proposed effective date of this proposed rule? (Must provide a date.)
February 2019
12. Please provide a copy of the notice required under Ark. Code Ann. § 25-15-204(a), and proof of the publication of said notice. See attached.
13. Please provide proof of filing the rule with the Secretary of State as required pursuant to Ark. Code Ann. § 25-15-204(e). See attached.
14. Please give the names of persons, groups, or organizations that you expect to comment on these rules? Please provide their position (for or against) if known.

FINANCIAL IMPACT STATEMENT

PLEASE ANSWER ALL QUESTIONS COMPLETELY

DEPARTMENT: Commission for Arkansas Public School Academic Facilities and Transportation

DIVISION: Division of Public School Academic Facilities and Transportation

PERSON COMPLETING THIS STATEMENT: Lori Freno, General Counsel, Division of Elementary and Secondary Education

TELEPHONE NO. (501) 682-4234 FAX NO. None EMAIL: lori.freno@arkansas.gov

To comply with Ark. Code Ann. § 25-15-204(e), please complete the following Financial Impact Statement and file two copies with the questionnaire and proposed rules.

SHORT TITLE OF THIS RULE: CAPSAFT Rules Governing Acquisition of Energy Conservation Measures

1. Does this proposed, amended, or repealed rule have a financial impact?
Yes _____ No X

2. Is the rule based on the best reasonably obtainable scientific, technical, economic, or other evidence and information available concerning the need for, consequences of, and alternatives to the rule?
Yes X No _____

3. In consideration of the alternatives to this rule, was this rule determined by the agency to be the least costly rule considered? Yes X No _____

If an agency is proposing a more costly rule, please state the following:

- (a) How the additional benefits of the more costly rule justify its additional cost;

- (b) The reason for adoption of the more costly rule;

- (c) Whether the more costly rule is based on the interests of public health, safety, or welfare, and if so, please explain; and

- (d) Whether the reason is within the scope of the agency's statutory authority, and if so, please explain.

4. If the purpose of this rule is to implement a federal rule or regulation, please state the following:

- (a) What is the cost to implement the federal rule or regulation?

Current Fiscal Year

Next Fiscal Year

General Revenue Zero

Federal Funds _____

Cash Funds _____

Special Revenue _____

General Revenue Zero

Federal Funds _____

Cash Funds _____

Special Revenue _____

Other (Identify)_____

Other (Identify)_____

Total_____

Total_____

(b) What is the additional cost of the state rule?

Current Fiscal Year

Next Fiscal Year

General Revenue ___ Zero _____

General Revenue ___ Zero _____

Federal Funds_____

Federal Funds_____

Cash Funds_____

Cash Funds_____

Special Revenue_____

Special Revenue_____

Other (Identify)_____

Other (Identify)_____

Total_____

Total_____

- 5. What is the total estimated cost by fiscal year to any private individual, entity and business subject to the proposed, amended, or repealed rule? Identify the entity(ies) subject to the proposed rule and explain how they are affected.

Current Fiscal Year

Next Fiscal Year

\$ ___ Zero _____

\$ ___ Zero _____

- 6. What is the total estimated cost by fiscal year to state, county, and municipal government to implement this rule? Is this the cost of the program or grant? Please explain how the government is affected.

Current Fiscal Year

Next Fiscal Year

\$ ___ Zero _____

\$ ___ Zero _____

- 7. With respect to the agency's answers to Questions #5 and #6 above, is there a new or increased cost or obligation of at least one hundred thousand dollars (\$100,000) per year to a private individual, private entity, private business, state government, county government, municipal government, or to two (2) or more of those entities combined?

Yes _____ No X _____

If YES, the agency is required by Ark. Code Ann. § 25-15-204(e)(4) to file written findings at the time of filing the financial impact statement. The written findings shall be filed simultaneously with the financial impact statement and shall include, without limitation, the following:

- (1) a statement of the rule's basis and purpose;
- (2) the problem the agency seeks to address with the proposed rule, including a statement of whether a rule is required by statute;
- (3) a description of the factual evidence that:
 - (a) justifies the agency's need for the proposed rule; and
 - (b) describes how the benefits of the rule meet the relevant statutory objectives and justify the rule's costs;
- (4) a list of less costly alternatives to the proposed rule and the reasons why the alternatives do not adequately address the problem to be solved by the proposed rule;
- (5) a list of alternatives to the proposed rule that were suggested as a result of public comment and the reasons why the alternatives do not adequately address the problem to be solved by the proposed rule;
- (6) a statement of whether existing rules have created or contributed to the problem the agency seeks to address with the proposed rule and, if existing rules have created or contributed to the problem, an explanation of why amendment or repeal of the rule creating or contributing to the problem is not a sufficient response; and
- (7) an agency plan for review of the rule no less than every ten (10) years to determine whether, based upon the evidence, there remains a need for the rule including, without limitation, whether:
 - (a) the rule is achieving the statutory objectives;
 - (b) the benefits of the rule continue to justify its costs; and
 - (c) the rule can be amended or repealed to reduce costs while continuing to achieve the statutory objectives.

**THE ARKANSAS COMMISSION ON PUBLIC SCHOOL ACADEMIC
FACILITIES AND TRANSPORTATION
RULE GOVERNING THE ACQUISITION OF ENERGY
CONSERVATION MEASURES FOR PUBLIC SCHOOLS**
November 2005

1.0 Authority

~~1.1~~—The Arkansas Commission on Public School Academic Facilities and Transportation’s authority for promulgating this rule is promulgates these Rules pursuant to Ark. Code Ann. §§ ~~6-21-113, Ark. Code Ann. §§ 6-20-401, 6-20-402, and 6-20-405, 6-21-114, and 25-15-201 et seq., and Act 2156 of the 85th General Assembly of 2005.~~ Act 507 of 2019.

~~1.2~~—This rule shall be known as the Arkansas Commission on Public School Academic Facilities and Transportation Rule Governing the Acquisition of Energy Conservation Measures for Public Schools.

2.0 Purpose

~~2.1~~—The purpose of ~~this rule~~ these Rules is to establish procedures for school districts to acquire energy conservation measures using energy savings contracts and short-term debt instruments.

3.0 Definitions —~~For purposes of this rule, the following terms mean:~~

3.1 “Energy conservation measure” means any improvement, repair, alteration, or betterment of any new building design or any existing building or facility owned or operated by a school district or any equipment, fixture, or furnishing to be added to or used in any building or facility that is designed to reduce energy consumption or operating costs and may include, without limitation, one (1) or more of the following:

3.1.1 Insulation of the building structure or systems within the building;

3.1.2 Storm windows or doors, caulking or weather-stripping, multi-glazed windows or doors, heat absorbing or heat reflective glazed and coated window or door systems, additional glazing, reductions in glass area, or other window and door system modifications that reduce energy consumption;

3.1.3 Automated or computerized energy control systems;

3.1.4 Heating, ventilation, or air conditioning system modifications or replacements;

3.1.5 Replacements or modifications of lighting fixtures to increase the energy efficiency of the lighting system;

- 3.1.6 Indoor air quality improvements to increase air quality that conform to the applicable state or local building code requirements even in lieu of an increase in energy usage;
 - 3.1.7 Any additional building infrastructure improvements, cost savings, and life safety or other safety or conservation measures that provide long-term operating cost reductions and are in compliance with state and local codes; and
 - 3.1.8 Building operation programs that reduce operating costs.
- 3.2 “Energy savings contract” means a contract for the implementation of one ~~(1)~~ or more energy conservation measures as defined in Ark. Code Ann. § 6-20-401 and shall include ~~a~~ an investment grade pre-installation energy audit ~~or~~ and analysis.
- 3.2.1 The contract may provide that all payments except obligations on termination of the contract before its expiration date are to be made over time and that the energy cost savings are guaranteed by the qualified provider to the extent necessary to pay all of the costs of the energy conservation measures, including all costs of financing and annual services that may include the measurement and verification of the guaranteed savings.
 - 3.2.2 The energy conservation measures to be performed under the contract may be paid for with either any combination of revenue or non-revenue receipts of a school district or, alternatively, financed by the issuance of postdated warrants or entering into installment contracts or a lease-purchase agreement.
- 3.3 “Equipment warranty period” means the time following the execution of a guaranteed energy cost savings contract in which a material defect in an installed energy conservation measure is required to be replaced or corrected by the manufacturer or an energy service company.
- ~~3.3-3.4~~ “Qualified provider” has the same definition as in Ark. Code Ann. § 19-11-1202. —business that possesses a valid Arkansas contractor’s license and that has a minimum of five (5) years experience in the analysis, design, implementation, and installation of energy efficiency and facility improvement measures, and the technical capabilities to ensure the measures generate energy cost savings, and the ability to provide maintenance and ongoing measurement of these measures to ensure and verify energy savings; and is pre-approved by the Division of Public School Academic Facilities and Transportation. ~~3.3.1~~ A qualified provider to whom the contract is awarded:
- ~~3.303.1(a)~~ 3.4.1 Shall be required to provide a payment and performance bond to the school district for its

faithful performance of the equipment installation;
and

~~3.03.01(b)~~ 3.4.2 May be required to provide a letter of credit, surety bond, escrowed funds, or a corporate guarantee from a company with an investment grade credit rating in an amount necessary to ensure the effective performance of the contract; and

~~3.4~~ 3.5 “Request for Qualifications” means ~~means~~ a negotiated procurement.

~~3.4.1~~ 3.5.1 Notice of the request for qualifications shall be published one ~~(1)~~ time each week for no ~~fewer~~ less than two ~~(2)~~ consecutive weeks in a newspaper of statewide circulation.

~~3.4.2~~ 3.5.2 Responses shall be sealed and opened in a public forum within at a date ~~twenty (20)~~ thirty (30) days from the last publication, at which point the school district shall evaluate the qualifications.

3.6 “Useful Life” means the rated service life of an individual energy conservation measure as defined by the:

3.6.1 American Society of Heating, Refrigerating and Air-Conditioning Engineers;

3.6.2 Illuminating Engineering Society; or

3.6.3 Solar Energy Industries Association.

4.0 Process And Procedures for Acquiring Energy Conservation Measures

4.1 A school district may enter into a guaranteed energy savings contract with a qualified provider if it finds that the amount it would spend on the energy conservation measures ~~recommended in the proposal~~ detailed in the contract would not exceed the amount to be saved in any combination of energy or operational costs, or future capital expenditures avoided within a twenty-year period from the date of the installation, if the recommendations in the proposal are followed.

4.2 A school district may provide by resolution that the school district shall comply with the rules promulgated by the Arkansas Pollution Control and Ecology Commission under the Guaranteed Energy Cost Savings Act, Ark. Code Ann. § 19-11-1201 et seq.

4.3 A school district’s purchase or installation or both of energy conservation measures under Ark. Code Ann. § 6-20-405 may be financed by the school district over a twenty-year period after the execution by the school district of the postdated warrants, lease-purchase agreement, or installment contract.

- 4.3.1 However, no financing shall exceed the reasonably expected useful life of the energy facilities or equipment subject to the energy savings contract in favor of either a qualified provider or a third party financing company designated by a qualified provider.
- 4.4 If a guaranteed energy cost savings contract includes energy cost savings measures that possess either an active equipment warranty period or a combined useful life in excess of twenty (20) years, a guaranteed energy cost savings contract may be extended to the length of the equipment warranty or weighted useful life of the relevant energy cost.
- 4.5 A guaranteed energy cost savings contract shall not exceed twenty (20) years without the approval of the Arkansas Energy Office of the Arkansas Department of Environmental Quality.
- ~~4.3~~ 4.6 The energy conservation measure to be performed under the contract may be paid for with either revenue or non-revenue receipts of a school district, or, alternatively, financed by the issuance of postdated warrants or entering into installment contracts or lease-purchase agreements.
- 4.4 4.7 Postdated warrants, lease-purchase agreements, and installment contracts must be registered on forms provided by the State Board of Education with the treasurer of the district and the board.
- ~~4.5~~ 4.8 A copy of any guaranteed energy savings contract that is executed in connection with the acquisition, installation, or construction of energy conservation measures under this section shall be filed with the ~~Department of Education.~~ Arkansas Division of Elementary and Secondary Education.
- ~~4.6~~ 4.9 Obligations incurred pursuant to a guaranteed energy savings contract are not included in computing a school district's debt ratio.
- ~~4.6.1~~ 4.9.1 In the event that an energy savings contract is to be executed concurrently with one or more conventional construction contracts for a common structure, the energy savings contract shall be separate and distinct from the other contract.
- ~~4.7~~ 4.10 The district may select the qualified provider or providers best qualified and capable of performing the desired work and negotiate an energy savings contract for the project: as stated in the contract.
- ~~4.8~~ 4.11 The qualified provider shall reimburse the school district for any annual shortfall of guaranteed energy use savings projected in the project.
- ~~4.9~~ 4.12 The qualified provider's proposal shall include:
- ~~4.9.1~~ 4.12.1 The estimates of all costs of installation, modifications, or remodeling, including, without limitation, costs of a an investment grade pre-installation energy audit or and analysis, design, engineering, installation, commissioning, maintenance, repairs, debt

service, post-installation project monitoring, savings measurement and verification, and data collection and reporting, as well as whether energy consumed or the operating costs, or both, will be reduced.;

~~4.9.2~~ 4.12.2 The qualifications of the provider; and

~~4.9.3~~ ~~Certification that all energy consuming products utilized in the projects will be certified with the appropriate standards by the Air Conditioning and Refrigeration Institute; and~~

4.12.3 The amount and specific sources of operational savings and capital cost avoidance that the school district acknowledges will occur without future measurement and verification;

~~4.9.4~~ 4.12.4 A statement from an Arkansas licensed professional engineer that he or she was a member of the qualified provider's project team that completed a comprehensive energy audit and analysis of the school district's facilities; and

~~4.9.5~~ 4.12.5 The reasonably expected useful life of each recommended energy conservation measure.

~~4.10~~ 4.13 Except as provided in ~~4.10.02~~ 4.13.2 of ~~this section~~ these Rules, before entering into any energy savings contract, the contract shall be reviewed as follows:

~~4.10.1~~ 4.13.1 The contract shall be reviewed by an engineer who is:

~~4.10.1(a)~~ 4.13.1.1 Licensed in the State of Arkansas; ~~and~~

~~4.10.1(b)~~ 4.13.1.2 Designated by the Division of Public School Academic Facilities and Transportation as qualified to review energy savings contracts; and

~~4.10.1(c)~~ 4.13.1.3 The engineer conducting the contract review shall report to the district any comments or issues that he or she believes merit consideration by the district before the district executes the energy savings contract. The engineer shall bear no liability for any estimation of energy savings generated as part of a contract review under ~~Section 4.10.02~~ 4.13.2 of ~~these rules~~ Rules.

~~4.10.2~~ 4.13.2 Third party review as provided in ~~4.10.04~~ 4.13.1 of this section shall not be required if the qualified provider demonstrates the provider is a current member in good standing of the Energy Service Company or Energy Service Provider category of the National Association of Energy Companies, Energy Service Company category. Companies.

~~4.10.3~~ 4.13.3 The qualified provider shall provide to the school district an annual reconciliation report of the guaranteed energy use savings.

Markup