**South Carolina General Assembly**

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**H. 3625**

**STATUS INFORMATION**

General Bill

Sponsors: Rep. Herbkersman

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Introduced in the House on February 26, 2009

Currently residing in the House Committee on **Ways and Means**

Summary: Procurement Code

**HISTORY OF LEGISLATIVE ACTIONS**

Date Body Action Description with journal page number

2/26/2009 House Introduced and read first time [HJ](file:///h:\HJ%20Archive\2009\02-26-09.docx)‑107

2/26/2009 House Referred to Committee on **Ways and Means** [HJ](file:///h:\HJ%20Archive\2009\02-26-09.docx)‑107

**VERSIONS OF THIS BILL**

[2/26/2009](file:///p:\pprever\2009-10\3625_20090226.docx)

**A** **BILL**

TO AMEND SECTION 11‑35‑1528, AS AMENDED, CODE OF LAWS OF SOUTH CAROLINA, 1976, RELATING TO COMPETITIVE BEST VALUE BIDDING IN CONNECTION WITH THE CONSOLIDATED PROCUREMENT CODE, SO AS TO PROVIDE FOR BENEFITS BASED FUNDING PROJECTS IN WHICH PAYMENTS TO VENDORS DEPEND UPON THE REALIZATION OF SPECIFIED SAVINGS OR REVENUE GAINS, TO PROVIDE FOR THEIR REQUIRED AND PERMISSIBLE TERMS AND THEIR FUNDING, TO REQUIRE MEASUREMENT TOOLS, AND TO PROVIDE FOR OVERSIGHT BY THE STATE BUDGET AND CONTROL BOARD.

Be it enacted by the General Assembly of the State of South Carolina:

SECTION 1. Section 11‑35‑1528 of the 1976 Code, as last amended by Act 376 of 2006, is amended by adding an appropriately numbered subsection at the end to read:

“( ) Benefits based funding.

(a) As used in this subsection, the term ‘benefits based funding project’ means a governmental improvement project in which payments to vendors depend upon the realization of specified savings or revenue gains attributable solely to the improvements, if each benefits based funding project is structured as follows:

(i) The vendor guarantees that the improvements will generate actual and quantifiable savings or enhanced revenues;

(ii) The governmental body develops a measurement tool for calculating the savings or enhanced revenues realized from the project; and

(iii) The funding for the project is attributable solely to its successful implementation for the period specified in the contract, or, where applicable, from sums remitted by the vendor or surety to remedy a deficit in guaranteed savings or revenue gains.

(b) Other applicable terms are:

(i) ‘Measurement tool’ means the formula used to measure the actual savings or enhanced revenues and includes a means for distinguishing enhanced revenue or savings from normal activities including the possibility of no savings or revenue growth or an increased expenditure or decline in revenue. Baseline parameters must be defined based on historical costs or revenues for a minimum of one year. The measurement tool must use the baseline parameters to forecast savings or enhanced revenues and to determine the overall benefits and fiscal feasibility of the proposed project.

(ii) ‘Special dedicated fund’ means a fund established pursuant to this subsection from which the vendor or vendors are compensated as part of a benefits based funding project. The monies in the special dedicated fund are contractually obligated and must not lapse at the end of each fiscal year.

(c) A governmental body may enter into multiyear lease, purchase, or lease‑purchase contracts of all kinds for the acquisition of goods, materials, real or personal property, improvements to real property, services, construction services, renovation services, and supplies as benefits based funding projects; except that a condition precedent to the award of the contract is a competitive solicitation in compliance with this section and other applicable provisions of this chapter and that the contract must contain provisions for:

(i) absolute termination without further obligation on the part of the governmental body at the close of the fiscal year in which the contract was executed and at the close of each succeeding fiscal year for which it may be renewed;

(ii) renewal only by a positive action taken by the governmental body;

(iii) in addition to other remedies available to the governmental body, provision that at the time the governmental body determines that actual savings or incremental revenue gains are not being generated to satisfy the obligations under the contract, the vendor shall remedy the deficit in actual savings or incremental revenue gains by remitting to the State an amount equal to the deficit. The vendor also shall provide at contract execution, and upon execution of contract renewals, an energy savings guarantee bond, a bank letter of credit, escrowed funds, a corporate guarantee from a corporation with an investment grade credit rating, or other surety instrument acceptable to the governmental body equal to the value of the project’s annual savings or revenue gains;

(iv) statement of the total obligation of the governmental body for repayment for the fiscal year of execution and of the total obligation for repayment to be incurred in each fiscal year renewal term, if renewed; and

(v) limitation that the term of the contract, including renewal periods, may not extend past the date that is ten years from the date of the completion of the project that is the subject of the contract.

(d) A contract developed pursuant to this subsection containing the provisions enumerated in item (c) of this subsection obligates the governmental body only for those sums payable during the fiscal year of execution or, in the event of a renewal by the governmental body, for those sums payable in the individual fiscal year renewal term and only to the extent that savings or enhanced revenues are attributable to the benefits based funding project calculated using the measurement tool and, where applicable, sums remitted by the vendor or surety to remedy a deficit in guaranteed savings or revenue gains.

(e) A contract developed and executed pursuant to this subsection does not create a debt of the State for the payment of a sum beyond the fiscal year of execution or, in the event of a renewal, beyond the fiscal year of the renewal.

(f) The contract may provide for the payment by the governmental body of interest or the allocation of a portion of the contract payment to interest if the contract is in compliance with this subsection.

(g) During the term of the contract, including renewal periods, the governmental body, using the measurement tool, shall periodically calculate the total amount of the savings or enhanced revenues attributable to the implementation of the benefits based funding project. To the extent that savings or enhanced revenues are realized, the governmental body shall transfer from its budget into the special dedicated fund an amount up to but not to exceed the amount owed on the contract for the then current fiscal year term’s obligation to provide for payments or, where applicable, sums remitted by the vendor or surety to remedy a deficit in guaranteed savings or revenue gains must be transferred to the special dedicated fund by the governmental body.

(h) During the term of the contract, including renewal periods, the governmental body, using the measurement tool, shall calculate the total amount of the savings or enhanced revenues attributable to the implementation of the benefits based funding project during the then current fiscal year at least thirty days before the end of the then current fiscal year. If the governmental body renews the contract, and to the extent that savings or enhanced revenues are realized in excess of the amount due on the contract in the then current fiscal year term, the governmental body shall transfer before the end of the then current fiscal year from its budget into the special dedicated fund an amount up to but not to exceed the next fiscal year’s obligation to provide for future payments.

(i) Promptly upon nonrenewal, termination, or expiration of the contract, monies remaining in the special dedicated fund must be deposited in the general fund of the State.

(j) Each governmental body may accept title to property subject to the benefits based funding contract and may transfer title back to the vendor in the event the contract is not fully consummated.

(k) Payments to which a vendor is entitled under the contract must not be assigned without the approval of the governmental body. In its discretion, the governmental body may agree that the vendor may assign the payments to which it is entitled under the benefits based funding contract to a third party, if:

(i) the governmental body is made party to the assignment agreement and if the assignment agreement will not alter the obligations of the governmental body under the contract specifically including, but not limited to, the provisions required by items of this subsection; and

(ii) the vendor, at the time of the request that the governmental body agrees to an assignment of benefits, must provide to the governmental body an energy savings guarantee bond, a bank letter of credit, escrowed funds, a corporate guarantee from a corporation with an investment grade credit rating, or other surety instrument acceptable to the governmental body equal to the guaranteed savings for the total project duration including anticipated renewal periods and the energy savings guarantee bond, bank letter of credit, escrowed funds, corporate guarantee from a corporation with an investment grade credit rating, or other surety instrument acceptable to the governmental body must remain in force for the entire project duration including renewal periods. As savings are realized and verified by the measurement tool during the term of the contract including renewal periods, the value of the energy savings guarantee bond, bank letter of credit, escrowed funds, corporate guarantee from a corporation with an investment grade credit rating, or other surety instrument acceptable to the governmental body may decrease proportionately.

(l) The State Budget and Control Board shall review and approve all proposed benefits based funding projects determining the:

(i) overall feasibility of the benefits based funding project;

(ii) measurement tool;

(iii) projected savings or enhanced revenues; and

(iv) dollars to be set aside for vendor payments.

(m) A benefits based funding project and the proposed contract must be approved by the State Budget and Control Board before execution of the contract and is subject to further review by the board at any time.

(n) Each governmental body shall prepare an annual report to be sent to the State Budget and Control Board, the Governor, and the General Assembly on all contracts entered into pursuant to this subsection, describing the benefits based funding project, its progress, its savings or enhanced revenues, and other relevant information.”

SECTION 2. This act takes effect upon approval by the Governor.

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