
SECOND SUBSTITUTE SENATE BILL 5308

State of Washington

66th Legislature

2019 Regular Session

By Senate Ways & Means (originally sponsored by Senators Short and Llias)

1 AN ACT Relating to performance-based contracting services by
2 energy service contractors; amending RCW 39.35A.020 and 39.35A.050;
3 adding new sections to chapter 39.35A RCW; and creating new sections.

4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

5 **Sec. 1.** RCW 39.35A.020 and 2007 c 39 s 2 are each amended to
6 read as follows:

7 ~~((Unless the context clearly indicates otherwise,))~~ The
8 definitions in this section ~~((shall))~~ apply throughout this chapter
9 unless the context clearly requires otherwise.

10 (1) "Department" means the department of enterprise services.

11 (2) "Energy equipment and services" means energy management
12 systems and any equipment, materials, or supplies that are expected,
13 upon installation, to reduce the energy use or energy cost of an
14 existing building or facility, and the services associated with the
15 equipment, materials, or supplies, including but not limited to
16 design, engineering, financing, installation, project management,
17 guarantees, operations, and maintenance. Reduction in energy use or
18 energy cost may also include reductions in the use or cost of water,
19 wastewater, or solid waste.

20 ~~((+2))~~ (3) "Energy management system" has the definition
21 provided in RCW 39.35.030.

1 (~~((3))~~) (4) "Municipality" has the definition provided in RCW
2 39.04.010.

3 (~~((4))~~) (5) "Performance-based contract" means one or more
4 contracts for water conservation services, solid waste reduction
5 services, or energy equipment and services between a municipality and
6 any other persons or entities, if the payment obligation for each
7 year under the contract, including the year of installation, is
8 either: (a) Set as a percentage of the annual energy cost savings,
9 water cost savings, or solid waste cost savings attributable under
10 the contract; or (b) guaranteed by the other persons or entities to
11 be less than the annual energy cost savings, water cost savings, or
12 solid waste cost savings attributable under the contract. Such
13 guarantee shall be, at the option of the municipality, a bond or
14 insurance policy, or some other guarantee determined sufficient by
15 the municipality to provide a level of assurance similar to the level
16 provided by a bond or insurance policy.

17 (~~((5))~~) (6) "Water conservation" means reductions in the use of
18 water or wastewater.

19 **Sec. 2.** RCW 39.35A.050 and 2015 c 225 s 46 are each amended to
20 read as follows:

21 The (~~((state))~~) department (~~((of enterprise services))~~) shall
22 maintain a registry of energy service contractors and provide
23 assistance to municipalities in identifying available performance-
24 based contracting services. The department shall periodically review
25 the registry of energy service contractors and, if necessary, revise
26 the registry by adding or removing contractors based on
27 qualifications identified by the department, such as contractors'
28 performance history, comments from municipalities about services
29 provided by contractors, and other similar factors. The department
30 must incorporate the cost of this activity in its project management
31 fee.

32 NEW SECTION. **Sec. 3.** A new section is added to chapter 39.35A
33 RCW to read as follows:

34 (1) All technical submissions required for construction and
35 provided by the department or an energy service contractor under a
36 performance-based contract must be prepared by the services of a
37 professional engineer registered under chapter 18.43 RCW.

(2) This section only applies to performance-based contracting services that have been procured by a municipality with the assistance or involvement of the department.

NEW SECTION. **Sec. 4.** A new section is added to chapter 39.35A RCW to read as follows:

(1)(a) Before a performance-based contract is executed, the department shall meet and confer with the parties to the contract to review the energy equipment and services proposed to be provided under the contract. The department must incorporate the cost of this activity in its project management fee.

(b) The purpose of the meeting required under this section is to ensure that the energy equipment and services are appropriate to meet the specific needs of the municipality.

(2) The department and the energy service contractor must be prepared to offer information and answer questions about the capabilities of the energy equipment and services, expected outcomes for the municipality, and whether other energy equipment and services may be better suited to the municipality's purposes.

(3) Any proposed revisions to the performance-based contract that are a result of the meeting among the department, energy service contractor, and municipality must be recorded and agreed upon by all parties before the energy equipment and services may be provided.

(4) This section only applies to performance-based contracting services that have been procured by a municipality with the assistance or involvement of the department.

NEW SECTION. **Sec. 5.** A new section is added to chapter 39.35A RCW to read as follows:

(1) The department shall ensure that the performance-based contract provides for independent evaluation or review of the operability of the energy equipment and services. The independent evaluation or review required under this section must be conducted by a third-party contractor who is qualified and familiar with energy savings performance contracts but is not currently an eligible vendor in Washington state. The independent evaluation or review must include confirmation that the energy equipment and services are properly installed and capable of performing correctly and that the municipality's personnel have been appropriately trained in use and maintenance.

1 (2) Where ongoing monitoring is required under a performance-
2 based contract, the energy service contractor shall provide an annual
3 report to the municipality and the department summarizing the results
4 of monitoring.

5 (3) This section only applies to performance-based contracting
6 services that have been procured by a municipality with the
7 assistance or involvement of the department.

8 NEW SECTION. **Sec. 6.** The joint legislative audit and review
9 committee shall review the performance-based contracting services
10 program authorized in chapter 39.35A RCW. By December 31, 2021, the
11 joint legislative audit and review committee shall report to the
12 legislature on the following topics and other pertinent information
13 as determined by the committee: (1) The structure of the performance-
14 based contracting services program, including the roles of the
15 department of enterprise services, energy service contractors, and
16 municipalities as defined under the program; (2) cost-effectiveness
17 of the program; (3) whether performance-based contracts adequately
18 protect municipalities from defects; (4) whether performance-based
19 contracting under chapter 39.35A RCW leads to outcomes for
20 municipalities that are superior to general procurement practices
21 that may not apply as a result of RCW 39.35A.040; (5) whether the
22 program limits the range of options for energy equipment and services
23 available to municipalities; (6) the process by which the department
24 of enterprise services adds and removes contractors from the
25 registry; (7) the adequacy of the criteria used to assess vendor
26 qualifications; and (8) stakeholder input on the design of the
27 program, including municipalities, energy service contractors, and
28 federal researchers located in the Lawrence Berkeley national
29 laboratory.

30 NEW SECTION. **Sec. 7.** This act does not create a private right
31 of action.

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