
SUBSTITUTE SENATE BILL 5308

State of Washington

66th Legislature

2019 Regular Session

By Senate Environment, Energy & Technology (originally sponsored by Senators Short and Liias)

READ FIRST TIME 02/21/19.

1 AN ACT Relating to performance-based contracting services by
2 energy service contractors; amending RCW 39.35A.020, 39.35A.050, and
3 39.35A.010; adding new sections to chapter 39.35A RCW; and creating
4 new sections.

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

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

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

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

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

1 ((+2)) (3) "Energy management system" has the definition
2 provided in RCW 39.35.030.

3 ((+3)) (4) "Municipality" has the definition provided in RCW
4 39.04.010.

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

19 ((+5)) (6) "Water conservation" means reductions in the use of
20 water or wastewater.

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

23 The ((state)) department ((of—enterprise—services)) shall
24 maintain a registry of energy service contractors and provide
25 assistance to municipalities in identifying available performance-
26 based contracting services. At least annually, the department shall
27 review the registry of energy service contractors and, if necessary,
28 revise the registry by adding or removing contractors based on
29 qualifications identified by the department, such as contractors'
30 performance history, comments from municipalities about services
31 provided by contractors, and other similar factors.

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 an architect
37 registered under chapter 18.08 RCW, but the services of a
38 professional engineer registered under chapter 18.43 RCW may be used

1 in lieu of an architect if the scope of work is primarily engineering
2 in nature.

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

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

8 (1)(a) Before a performance-based contract is executed, the
9 department shall meet and confer with the parties to the contract to
10 review the energy equipment and services proposed to be provided
11 under the contract.

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

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

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

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

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

29 (1) The department shall ensure that the performance-based
30 contract provides for independent evaluation or review of the
31 operability of the energy equipment and services. The independent
32 evaluation or review required under this section must include
33 confirmation that the energy equipment and services are properly
34 installed and capable of performing correctly and that the
35 municipality's personnel have been appropriately trained in use and
36 maintenance.

37 (2) Where ongoing monitoring is required under a performance-
38 based contract, the energy service contractor shall provide an annual

1 report to the municipality and the department summarizing the results
2 of monitoring.

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

6 NEW SECTION. **Sec. 6.** The joint legislative audit and review
7 committee shall review the performance-based contracting services
8 program authorized in chapter 39.35A RCW. By December 31, 2021, the
9 joint legislative audit and review committee shall report to the
10 legislature on the following issues and other pertinent information
11 as determined by the committee: (1) The structure of the performance-
12 based contracting services program, including the roles of the
13 department of enterprise services, energy service contractors, and
14 municipalities as defined under the program; (2) cost-effectiveness
15 of the program; (3) whether performance-based contracts adequately
16 protect municipalities from defects; (4) whether performance-based
17 contracting under chapter 39.35A RCW leads to outcomes for
18 municipalities that are superior to general procurement practices
19 that may not apply as a result of RCW 39.35A.040; and (5) whether the
20 program limits the range of options for energy equipment and services
21 available to municipalities.

22 **Sec. 7.** RCW 39.35A.010 and 2007 c 39 s 1 are each amended to
23 read as follows:

24 The legislature finds that:

25 (1) Conserving energy and water in publicly owned buildings will
26 have a beneficial effect on our overall supply of energy and water;

27 (2) Conserving energy and water in publicly owned buildings can
28 result in cost savings for taxpayers; and

29 (3) Performance-based ((energy)) contracts are a means by which
30 municipalities can achieve energy and water conservation without
31 capital outlay.

32 Therefore, the legislature declares that it is the policy that a
33 municipality may, after a competitive selection process, negotiate a
34 performance-based ((energy)) contract with a firm that offers the
35 best proposal.

1 NEW SECTION. **Sec. 8.** This act does not create a private right
2 of action.

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