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SENATE BILL 5308

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State of Washington

66th Legislature

2019 Regular Session

By Senators Short and Lias

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) "Complaint" means a written communication to the department  
12 from a municipality primarily expressing a grievance.

13 (2) "Defect" means a flaw, imperfection, or shortcoming, in  
14 design, functionality, or operation, not caused by normal wear and  
15 tear, that is essential to performance or safety.

16 (3) "Department" means the department of enterprise services.

17 (4) "Energy equipment and services" means energy management  
18 systems and any equipment, materials, or supplies that are expected,  
19 upon installation, to reduce the energy use or energy cost of an  
20 existing building or facility, and the services associated with the  
21 equipment, materials, or supplies, including but not limited to

1 design, engineering, financing, installation, project management,  
2 guarantees, operations, and maintenance. Reduction in energy use or  
3 energy cost may also include reductions in the use or cost of water,  
4 wastewater, or solid waste.

5 ~~((2))~~ (5) "Energy management system" has the definition  
6 provided in RCW 39.35.030.

7 ~~((3))~~ (6) "Municipality" has the definition provided in RCW  
8 39.04.010.

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

23 ~~((5))~~ (8) "Water conservation" means reductions in the use of  
24 water or wastewater.

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

27 The ~~((state))~~ department ~~((of enterprise services))~~ shall  
28 maintain a registry of energy service contractors and provide  
29 assistance to municipalities in identifying available performance-  
30 based contracting services. The department shall, at least annually,  
31 review the registry of energy service contractors and, if necessary,  
32 revise the registry by adding or removing contractors based on  
33 qualifications established by the department. Notwithstanding any  
34 other determination by the department with respect to an energy  
35 service contractor under this section, the department shall remove a  
36 contractor from the registry if the contractor is the subject of a  
37 complaint under section 3 of this act. An energy service contractor  
38 that has been removed from the registry as a result of a complaint  
39 under section 3 of this act may be returned to the registry if the

1 department determines that the contractor has taken appropriate  
2 action to remedy the problems described in the complaint.

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

5 A municipality may submit a complaint to the department against  
6 an energy service contractor listed on the registry maintained by the  
7 department under RCW 39.35A.050, regarding a defect under a  
8 performance-based contract. A complaint under this section must be  
9 submitted within two years of the date of discovery of the defect by  
10 the municipality. The department shall notify the energy service  
11 contractor that a complaint has been received and shall provide a  
12 copy of the complaint to the contractor upon request.

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

15 All technical submissions required for construction and provided  
16 by the department or an energy service contractor under a  
17 performance-based contract must be prepared by an architect  
18 registered under chapter 18.08 RCW, but the services of a  
19 professional engineer registered under chapter 18.43 RCW may be used  
20 in lieu of an architect if the scope of work is primarily engineering  
21 in nature.

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

24 (1) (a) Before a performance-based contract is executed under this  
25 chapter, the department shall meet and confer with the parties to the  
26 contract to review the energy equipment and services proposed to be  
27 provided under the contract.

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

31 (2) The department and the energy service contractor must be  
32 prepared to offer information and answer questions about the  
33 capabilities of the energy equipment and services, expected outcomes  
34 for the municipality, whether other energy equipment and services may  
35 be better suited to the municipality's purposes, and the complaint  
36 process established in section 3 of this act.

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

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

7 The department shall provide for a third-party verification of  
8 the effectiveness of the energy equipment and services no later than  
9 ninety days after the work under the performance-based contract is  
10 completed. The third-party verification required under this section  
11 must include verification that the energy equipment and services are  
12 installed and performing correctly and that the municipality's  
13 personnel have been appropriately trained in use and maintenance.

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

16 (1) Any funding provided by the department for the purpose of  
17 assisting municipalities in obtaining performance-based contracting  
18 services under this chapter must be conditioned such that ten percent  
19 of the funding must be withheld from the energy service contractor  
20 until monitoring required under the contract is complete.

21 (2) Every contract for energy equipment and services executed  
22 under this chapter must provide that ten percent of any funding  
23 provided by the department for the purpose of assisting  
24 municipalities in obtaining performance-based contracting services  
25 must be withheld or recouped from the energy service contractor if a  
26 complaint is filed under section 3 of this act, and that the funding  
27 withheld or recouped may be provided to the energy service contractor  
28 after the complaint is resolved.

29 NEW SECTION. **Sec. 8.** The joint legislative audit and review  
30 committee shall review the performance-based contracting services  
31 program authorized in chapter 39.35A RCW. By December 31, 2020, the  
32 joint legislative audit and review committee shall report to the  
33 legislature on the following issues and other pertinent information  
34 as determined by the committee: (1) The structure of the performance-  
35 based contracting services program, including the roles of the  
36 department of enterprise services, energy service contractors, and  
37 municipalities as defined under the program; (2) cost-effectiveness

1 of the program; (3) whether performance-based contracts adequately  
2 protect municipalities from defects as defined under RCW 39.35A.020;  
3 (4) whether performance-based contracting under chapter 39.35A RCW  
4 leads to outcomes for municipalities that are superior to general  
5 procurement practices that may not apply as a result of RCW  
6 39.35A.040; and (5) whether the program limits the range of options  
7 for energy equipment and services available to municipalities.

8 **Sec. 9.** RCW 39.35A.010 and 2007 c 39 s 1 are each amended to  
9 read as follows:

10 The legislature finds that:

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

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

15 (3) Performance-based (~~energy~~) contracts are a means by which  
16 municipalities can achieve energy and water conservation without  
17 capital outlay.

18 Therefore, the legislature declares that it is the policy that a  
19 municipality may, after a competitive selection process, negotiate a  
20 performance-based (~~energy~~) contract with a firm that offers the  
21 best proposal.

22 NEW SECTION. **Sec. 10.** This act does not create a private right  
23 of action.

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