

HB 1777 - S AMD 409
By Senator Nguyen

ADOPTED 04/11/2023

1 Strike everything after the enacting clause and insert the
2 following:

3 "NEW SECTION. **Sec. 1.** A new section is added to chapter 39.35C
4 RCW to read as follows:

5 (1) The objective of this act is to promote private-public
6 partnerships to reduce the amount of deferred maintenance required by
7 the clean building performance standard and decarbonize buildings and
8 central energy systems in public facilities in a cost-effective
9 manner.

10 (2) By June 30, 2031, the department must submit a report to the
11 governor and the appropriate committees of the legislature on the
12 adoption rate and cost-effectiveness of the performance-based
13 contract authorized under this act. The report must include:

- 14 (a) The number of performance-based contracts issued;
15 (b) The cost-effectiveness of performance-based contracts issued,
16 compared to alternative available financing mechanisms, including
17 certificates of participation;
18 (c) Recommendations to improve the use of performance-based
19 contracts; and

20 (d) Any other significant information associated with the
21 implementation of this act.

22 (3) It is the intent of the legislature to consider the findings
23 of the report and extend the expiration date of this act if
24 performance-based contracts are achieving the legislative objective.

25 (4) This section expires June 30, 2033.

26 **Sec. 2.** RCW 39.35A.020 and 2022 c 128 s 2 are each amended to
27 read as follows:

28 The definitions in this section apply throughout this chapter
29 unless the context clearly requires otherwise.

- 30 (1)(a) "Conservation" includes reduced:
31 (i) Energy consumption;
32 (ii) Energy demand;

1 (iii) Energy cost; or

2 (iv) Greenhouse gas emissions.

3 (b) (i) "Conservation" includes reductions in the use or cost of
4 water, wastewater, or solid waste.

5 (ii) "Conservation" does not include thermal or electric energy
6 production from cogeneration.

7 (2) "Energy equipment and services" means:

8 (a) Energy management systems and any equipment, materials,
9 supplies, or conservation projects that are expected, upon
10 installation, to reduce the energy use, reduce the energy demand,
11 reduce the energy cost, or reduce the greenhouse gas emissions, of a
12 facility; and

13 (b) The services associated with the equipment, materials,
14 supplies, or conservation projects including, but not limited to,
15 design, engineering, financing, installation, project management,
16 guarantees, operations, and maintenance. Reduction in energy use or
17 energy cost may also include reductions in the use or cost of water,
18 wastewater, or solid waste.

19 (3) "Energy management system" has the definition provided in RCW
20 39.35.030.

21 (4) "Facility" includes a building, structure, group of buildings
22 or structures at a single site, site improvement, or other facility
23 owned by a municipality.

24 (5) "Municipality" has the definition provided in RCW 39.04.010.

25 (6) "Performance-based contract" means one or more contracts for
26 water conservation services, solid waste reduction services, or
27 energy equipment and services between a municipality and any other
28 persons or entities, if the payment obligation for each year under
29 the contract, including the year of installation, is either: (a) Set
30 as a percentage of the annual energy cost savings, water cost
31 savings, solid waste cost savings, or benefits achieved through
32 conservation projects attributable under the contract; or (b)
33 guaranteed by the other persons or entities to be less than the
34 annual energy cost savings, water cost savings, solid waste cost
35 savings, or other benefits attributable under the contract. Such
36 guarantee shall be, at the option of the municipality, a bond or
37 insurance policy, or some other guarantee determined sufficient by
38 the municipality to provide a level of assurance similar to the level
39 provided by a bond or insurance policy. Payment obligations may
40 include regular service payments made by a municipality to any

1 persons or entities that own energy equipment and services under a
2 performance-based contract.

3 **Sec. 3.** RCW 39.35C.010 and 2022 c 128 s 1 are each amended to
4 read as follows:

5 The definitions in this section apply throughout this chapter
6 unless the context clearly requires otherwise.

7 (1) "Cogeneration" means the sequential generation of two or more
8 forms of energy from a common fuel or energy source. If these forms
9 are electricity and thermal energy, then the operating and efficiency
10 standards established by 18 C.F.R. Sec. 292.205 and the definitions
11 established by 18 C.F.R. Sec. 292.202 (c) through (m) apply.

12 (2)(a) "Conservation" includes reduced:

- 13 (i) Energy consumption;
- 14 (ii) Energy demand;
- 15 (iii) Energy cost; or
- 16 (iv) Greenhouse gas emissions.

17 (b) "Conservation" does not include thermal or electric energy
18 production from cogeneration.

19 (c) "Conservation" also includes reductions in the use or cost of
20 water, wastewater, or solid waste.

21 (3)(a) "Cost-effective" means that the present value to a state
22 agency or school district of the benefits reasonably expected to be
23 achieved or produced by a facility, conservation activity, measure,
24 or piece of equipment over its useful life, including any
25 compensation received from a utility or the Bonneville power
26 administration, is greater than the net present value of the costs of
27 implementing, maintaining, and operating such facility, activity,
28 measure, or piece of equipment over its useful life, when discounted
29 at the cost of public borrowing.

30 (b) The expected value of energy equipment and services at the
31 time of contract execution that are provided through a performance-
32 based contract may exceed the fair market value.

33 (4) "Department" means the state department of enterprise
34 services.

35 (5) "Energy" means energy as defined in RCW 43.21F.025(5).

36 (6) "Energy as a service" means a performance-based contract in
37 which a state agency, public school district, public university, or
38 municipality makes service payments to a third party or entity for

1 energy services, which may include the provision of energy equipment
2 that is owned and operated by a third party or entity.

3 (7) "Energy audit" has the definition provided in RCW 43.19.670,
4 and may include a determination of the water or solid waste
5 consumption characteristics of a facility.

6 ~~((7))~~ (8) "Energy efficiency project" means a conservation or
7 cogeneration project.

8 ~~((8))~~ (9) "Energy efficiency services" means assistance
9 furnished by the department to state agencies and school districts in
10 identifying, evaluating, and implementing energy efficiency projects.

11 ~~((9))~~ (10) "Local utility" means the utility or utilities in
12 whose service territory a public facility is located.

13 ~~((10))~~ (11) "Performance-based contracting" means contracts for
14 which payment ~~((is))~~ or payment obligations are conditional on
15 achieving contractually specified energy savings, which may include
16 regular service payments made by a state agency, public school
17 district, public university, or municipality to any persons or
18 entities that own energy equipment and services under a performance-
19 based contract.

20 ~~((11))~~ (12) "Public agency" means every state office, officer,
21 board, commission, committee, bureau, department, and all political
22 subdivisions of the state.

23 ~~((12))~~ (13) "Public facility" means a building, structure,
24 group of buildings or structures at a single site, site improvement,
25 or other facility owned by a state agency or school district.

26 ~~((13))~~ (14) "State agency" means every state office or
27 department, whether elective or appointive, state institutions of
28 higher education, and all boards, commissions, or divisions of state
29 government, however designated.

30 ~~((14))~~ (15) "State facility" means a building or structure, or
31 a group of buildings or structures at a single site, owned by a state
32 agency.

33 ~~((15))~~ (16) "Utility" means privately or publicly owned
34 electric and gas utilities, electric cooperatives and mutuals,
35 whether located within or without Washington state.

36 **Sec. 4.** RCW 39.35C.050 and 2015 c 79 s 10 are each amended to
37 read as follows:

38 In addition to any other authorities conferred by law:

1 (1) The department, with the consent of the state agency or
2 school district responsible for a facility, a state or regional
3 university acting independently, and any other state agency or school
4 district acting through the department or (~~as otherwise authorized~~
5 ~~by law~~) acting independently, may:

6 (a) Develop and finance conservation at public facilities in
7 accordance with express provisions of this chapter;

8 (b) Contract for energy services, including through a
9 performance-based (~~contracts~~) contract; and

10 (c) Contract to sell energy savings from a conservation project
11 at public facilities to local utilities or the Bonneville power
12 administration.

13 (2) (a) This subsection authorizes state agencies, public school
14 districts, public universities, and municipalities to enter into
15 energy as a service contracts. Pursuant to this subsection, a state
16 agency, public school district, public university, or municipality
17 may, whether acting independently or through the department:

18 (i) Develop conservation projects and services that require the
19 ownership of energy equipment to be held by other persons or
20 entities;

21 (ii) Contract for energy services, including through a
22 performance-based contract;

23 (iii) Contract to sell energy savings from a conservation project
24 at public facilities to local utilities or the Bonneville power
25 administration; and

26 (iv) Contract with a person or entity for energy equipment or
27 services.

28 (b) Any contract for energy as a service entered into pursuant to
29 the authority of this subsection is subject to the following
30 conditions:

31 (i) The contract may include terms that transfer ownership of
32 energy equipment from the state agency, public school district,
33 public university, or municipality to the person or entity;

34 (ii) The person or entity is responsible for cost-savings and
35 performance guarantees through the terms of the contract;

36 (iii) The value of energy equipment or services at the time of
37 contract execution may exceed the fair market value;

38 (iv) At the end of the term of the contract, equipment ownership
39 may be transferred back to the state agency, public school district,
40 public university, or municipality;

1 (v) The state agency, public school district, public university,
2 or municipality will ensure that a contract does not directly result
3 in loss of any position of employment by state employees in the
4 classified service under RCW 41.06.020, employees included in the
5 Washington management service under RCW 41.06.022, or school district
6 employees under RCW 28A.150.203;

7 (vi) Training must be offered in the preventative maintenance and
8 other related activities of energy equipment and services as detailed
9 in the contract for energy services to existing classified employees
10 who currently provide maintenance of energy equipment for the state
11 agency, public school district, public university, or municipality;
12 and

13 (vii) Prior to entering into a contract, the state agency, public
14 school district, public university, or municipality must coordinate
15 with the department to analyze the cost-effectiveness of the proposed
16 performance-based contract compared to alternative available
17 financing and service mechanisms, including certificates of
18 participation. The state agency, public school district, public
19 university, or municipality may enter into a contract only if the
20 cost-effectiveness is greater than other available alternatives.

21 (3) A state or regional university acting independently, and any
22 other state agency acting through the department or as otherwise
23 authorized by law, may undertake procurements for third-party
24 development of conservation at its facilities.

25 ~~((3))~~ (4) A school district may also:

26 (a) Develop and finance conservation at school district
27 facilities; and

28 (b) ~~((Contract for energy services, including performance-based~~
29 ~~contracts at school district facilities; and~~

30 ~~(e))~~ Contract to sell energy savings from energy conservation
31 projects at school district facilities to local utilities or the
32 Bonneville power administration directly or ~~((to local utilities or~~
33 ~~the Bonneville power administration))~~ through third parties.

34 ~~((4))~~ (5) Direct financial grants and incentives received on
35 behalf of the state agency, public school district, public
36 university, or municipality will be passed on to the state agency,
37 public school district, public university, or municipality.

38 (6) In exercising the authority granted by subsections (1),
39 ~~((2), and))~~ (3), and (4) of this section, a school district or state
40 agency must comply with the provisions of RCW 39.35C.040.

1 **Sec. 5.** RCW 39.35C.060 and 1996 c 186 s 410 are each amended to
2 read as follows:

3 State agencies, public school districts, public universities, and
4 municipalities may use financing contracts under chapter 39.94 RCW,
5 as well as performance-based contracts, to provide all or part of the
6 funding for conservation projects. The department shall determine the
7 eligibility of such projects for financing contracts. The repayments
8 of the financing contracts or performance-based contracts shall be
9 sufficient to pay, when due, the principal and interest on the
10 contracts or the services payments over the agreed upon term.
11 Performance-based contracts entered into by state agencies, public
12 school districts, public universities, and municipalities under this
13 act that include the purchase of real or personal property are
14 subject to the requirements of chapter 39.94 RCW. Pursuant to chapter
15 39.94 RCW, no later than December 31, 2023, the department shall
16 complete development of approved model contracts authorized by this
17 act.

18 NEW SECTION. **Sec. 6.** Sections 2 through 5 of this act expire
19 June 30, 2033. Contracts entered into under the authority granted by
20 this act may remain in effect following expiration of this act."

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21 On page 1, line 2 of the title, after "equipment;" strike the
22 remainder of the title and insert "amending RCW 39.35A.020,
23 39.35C.010, 39.35C.050, and 39.35C.060; adding a new section to
24 chapter 39.35C RCW; and providing expiration dates."

EFFECT: (1) Provides an expiration date of June 30, 2033, and
that contracts entered into under this act may remain in effect
following expiration.

(2) Requires the Department of Enterprise Services (DES) to
submit a report, by June 30, 2031, including specified information on
the implementation of this act, such as the number of performance-
based contracts issued and the cost-effectiveness of such contracts.

(3) Specifies legislative intent to consider findings in the DES
report and extend the expiration date of this act if performance-
based contracts are achieving the legislative objective.

(4) Authorizes state agencies, public school districts, public universities, and municipalities to enter into energy as a service contract.

(5) Specifies state agencies, public school districts, public universities, and municipalities, acting independently or through DES, may develop and finance conservation at public facilities, contract for energy services including performance-based contracts, and contract to sell energy savings from a conservation project at public facilities to local utilities or the Bonneville Power Administration.

(6) Defines "energy as a service" as a performance-based contract in which a state agency, public school district, public university, or municipality makes service payments to a third party or entity for energy services, which may include the provision of energy equipment that is owned and operated by a third party or entity.

(7) Specifies energy as a service contract requirement by requiring the state agency, public school district, public university, and municipality to ensure that the contract does not directly result in loss of any position of employment by certain state employees.

(8) Provides that direct financial grants and incentives received on behalf of a state agency, public school district, public university, or municipality will be passed on to the state agency, public school district, public university, or municipality.

(9) Specifies performance-based contracts entered into under this act are subject to statutory financing contract regulations.

(10) Requires DES, no later than December 31, 2023, to complete development of approved model contracts authorized under this act.

(11) Removes language designating items in excess of fair market value to be cost-effective.

(12) Removes requirement that equipment be transferred back to the state agency or school district at no residual value.

(13) Modifies the energy as a service contract requirement that training must be offered in the preventative maintenance and other related activities rather than preventative maintenance and repair.

(14) Adds requirement that a state agency, public school district, public university, or municipality may enter into an energy as a service contract only if the cost-effectiveness is greater than other available alternatives such as certificates of participation.

(15) Reinstates current law authorizing school districts to contract to sell energy savings from energy conservation projects directly.

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