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**SENATE BILL 5308**

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**State of Washington 66th Legislature 2019 Regular Session**

**By** Senators Short and Liias

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

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

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

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

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

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

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

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

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

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

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

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

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

The ((~~state~~)) department ((~~of enterprise services~~)) shall maintain a registry of energy service contractors and provide assistance to municipalities in identifying available performance-based contracting services. The department shall, at least annually, review the registry of energy service contractors and, if necessary, revise the registry by adding or removing contractors based on qualifications established by the department. Notwithstanding any other determination by the department with respect to an energy service contractor under this section, the department shall remove a contractor from the registry if the contractor is the subject of a complaint under section 3 of this act. An energy service contractor that has been removed from the registry as a result of a complaint under section 3 of this act may be returned to the registry if the department determines that the contractor has taken appropriate action to remedy the problems described in the complaint.

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

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

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

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

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

(1)(a) Before a performance-based contract is executed under this chapter, 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.

(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, whether other energy equipment and services may be better suited to the municipality's purposes, and the complaint process established in section 3 of this act.

(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.

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

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

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

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

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

NEW SECTION. **Sec.**  The joint legislative audit and review committee shall review the performance-based contracting services program authorized in chapter 39.35A RCW. By December 31, 2020, the joint legislative audit and review committee shall report to the legislature on the following issues and other pertinent information as determined by the committee: (1) The structure of the performance-based contracting services program, including the roles of the department of enterprise services, energy service contractors, and municipalities as defined under the program; (2) cost-effectiveness of the program; (3) whether performance-based contracts adequately protect municipalities from defects as defined under RCW 39.35A.020; (4) whether performance-based contracting under chapter 39.35A RCW leads to outcomes for municipalities that are superior to general procurement practices that may not apply as a result of RCW 39.35A.040; and (5) whether the program limits the range of options for energy equipment and services available to municipalities.

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

The legislature finds that:

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

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

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

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

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

**--- END ---**