

# SENATE BILL REPORT

## SB 5308

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As of February 12, 2019

**Title:** An act relating to performance-based contracting services by energy service contractors.

**Brief Description:** Concerning performance-based contracting services by energy service contractors.

**Sponsors:** Senators Short and Liias.

**Brief History:**

**Committee Activity:** Environment, Energy & Technology: 2/05/19.

**Brief Summary of Bill**

- Amends the performance-based contracting services program to include a complaint process, technical submission requirements, contract review by the Department of Enterprise Services (DES), and independent evaluation for performance-based contracting services that have been procured by a public agency with the involvement of DES.
- Adds updated registry requirements for DES and requires a Joint Legislative Audit and Review Committee review of the program.

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### SENATE COMMITTEE ON ENVIRONMENT, ENERGY & TECHNOLOGY

**Staff:** Greg Vogel (786-7413)

**Background:** Cities, counties, towns, port districts, and other public agencies are authorized to, after a competitive selection process, negotiate a performance-based energy contract with a firm that offers the best proposal. A "performance-based contract" is a contract for water conservation services, solid waste reduction services, or energy equipment and services between a public agency and any other persons or entities that provides that the payment obligation for each year under the contract, including the year of installation, is either:

- set as a percentage of the annual energy cost savings, water cost savings, or solid waste cost savings attributable under the contract; or
- 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.

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*This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.*

Each public agency must publish in advance its requirements to procure water conservation services, solid waste reduction services, or energy equipment and services under a performance-based contract. The announcement must state concisely the scope and nature of the equipment and services for which a performance-based contract is required, and must encourage firms to submit proposals to meet these requirements. The public agency may negotiate a fair and reasonable performance-based contract with the firm that is identified, based on the criteria that is established by the public agency, to be the firm that submits the best proposal. If the public agency is unable to negotiate a satisfactory contract with the firm that submits the best proposal, negotiations must be formally terminated and the public agency may select another firm and continue negotiation until a performance-based contract is reached or the selection process is terminated.

DES must maintain a registry of energy service contractors and provide assistance to public agencies to identify available performance-based contracting services.

**Summary of Bill:** The bill as referred to committee not considered.

**Summary of Bill (Proposed Substitute):** Contractor Registry. DES must, 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 DES. DES must remove a contractor from the registry if the contractor is the subject of a complaint submitted by a public agency. An energy service contractor that has been removed from the registry as a result of a complaint may be returned to the registry if DES determines that the contractor has taken appropriate action to remedy the problems described in the complaint.

Joint Legislative Audit and Review Committee Review. The Joint Legislative Audit and Review Committee must review the performance-based contracting services program, and by December 31, 2021, report to the Legislature on the following issues and other pertinent information:

- the structure of the program, including the roles of DES, energy service contractors, and public agencies;
- cost-effectiveness of the program;
- whether performance-based contracts adequately protect public agencies from performance defects;
- whether performance-based contracting leads to outcomes for public agencies that are superior to general procurement practices; and
- whether the program limits the range of options for energy equipment and services available to public agencies.

Provisions are applied to performance-based contracting services procured by a public agency with the assistance or involvement of DES.

Complaint Process. Public agencies may submit a complaint to DES against an energy service contractor, listed in the contractor registry, regarding a performance defect under a performance-based contract. Complaints must be submitted within two years of the date of discovery of the defect. DES must notify the energy service contractor a complaint has been received and must provide a copy of the complaint to the contractor upon request. The

contractor must respond to DES no later than 30 days after receiving a copy of the complaint from DES.

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

Technical Submissions. All technical submissions required for construction and provided by DES or an energy service contractor under a performance-based contract must be prepared by a registered architect, or if the scope of the work primarily involves engineering, a registered professional engineer.

Performance-Based Contracts. Before a performance-based contract is executed, DES must meet and confer with the parties to the contract to review the energy equipment and services proposed to be provided under the contract. DES 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 public agency, whether other energy equipment and services may be better suited to the public agency's purposes, and the complaint process for contractual defects. Any proposed revisions to the performance-based contract resulting from the meeting among DES, energy service contractor, and public agency must be recorded and agreed upon by all parties before the energy equipment and services may be provided.

Independent Review. DES must provide for independent evaluation or review of the operability of the energy equipment and services under a performance-based contract. The independent evaluation or review must include confirmation the energy equipment and services are properly installed and capable of performing correctly and the public agency's personnel have been appropriately trained in use and maintenance.

Where ongoing monitoring is required under a performance-based contract, the contractor must provide an annual report to the public agency and DES summarizing the results of monitoring.

**Appropriation:** None.

**Fiscal Note:** Available.

**Creates Committee/Commission/Task Force that includes Legislative members:** No.

**Effective Date:** Ninety days after adjournment of session in which bill is passed.

**Staff Summary of Public Testimony on Proposed Substitute:** PRO: This bill was born out of a local situation, Ferry County hospital district. There is support for energy performance and this process but not having sideboards and review at certain times of the process has created angst for them. Significant things that have come up have been put in the proposed substitute to address these issues. There is work being done with DES, and this is still a work in progress. However, what the hospital district has had to deal with over multiple years is still not good. The contractors need to understand whether the equipment meets the weather conditions for facilities that these go into.

CON: Washington State is a leader in energy efficiency and includes this process. It is a program to be proud of and others agree. It serves as a foundation for those developed in other states and has long been referenced as a highly successful model. DOE stated that Washington was one of the first states to develop such a program. It is a well-managed and well-funded program established through documented process and technical oversight. DES is available as a public agency and the ESCO as well for problems that arise. The process includes vetting of firms for placement on the registry. DES has highly trained staff to resolve issues as a team. Problems may arise but there is a successful model to resolve issues. It has embedded consumer protections for contractors and consumers alike.

Wastewater treatment plans and small municipalities have utilized the program to gain significant energy costs and consumption savings, and a reduced carbon footprint through projects. It allows them to tailor projects to specific needs and not have to succumb to larger state regulations. Plants have worked collaboratively with DES and ESCOs to solve problems that arise during and after construction. The necessity of this bill is questionable. It enables provisions that DES already has sufficient coverage to provide. The changes in the bill will hamper the process.

OTHER: The project in Ferry County was completed three CEOs ago. There has been a couple mild winters and problems with keeping the place heated in the second winter. Two normal winters have occurred for the past two years, but there are still problems. The district was told that the system would be designed to go to -7 and keep rooms at 72. It is the only hospital in the county. There are six passes in order to get somebody from the hospital to another hospital. The hospital has 15 long term care people and also some assisted living.

What the hospital has had to do is develop unique plans and arrangements with neighbors. When rooms got too cold, the hospital had to ship people out over those passes, if there was room. The nearest hospital is 45 minutes away. The hospital had to get exemptions from DOH and the fire marshal to put space heaters in the room. This morning the hospital was in the upper sixties and that's after a fix last fall. When things stopped working, nobody stepped up. It is too late for the hospital district, but for others, there should be responsibility to approve and make sure plans are blessed.

**Persons Testifying:** PRO: Senator Shelly Short, Prime Sponsor.

CON: Kerry Meade, Northwest Energy Efficiency Council; Pamela Randolph, City of Edmonds; Rick Zimburean, Project Manager, City of Bremerton and R&M Supervisor, WWTP.

OTHER: David Iverson, Ferry County Public Hospital District #1.

**Persons Signed In To Testify But Not Testifying:** No one.