

CERTIFICATION OF ENROLLMENT

HOUSE BILL 1777

Chapter 309, Laws of 2023

68th Legislature
2023 Regular Session

PUBLIC CONTRACTS—ENERGY SERVICES AND EQUIPMENT—PERFORMANCE-BASED
CONTRACTING

EFFECTIVE DATE: July 23, 2023

Passed by the House April 17, 2023
Yeas 96 Nays 0

LAURIE JINKINS

**Speaker of the House of
Representatives**

Passed by the Senate April 11, 2023
Yeas 47 Nays 2

DENNY HECK

President of the Senate

Approved May 4, 2023 3:41 PM

JAY INSLEE

Governor of the State of Washington

CERTIFICATE

I, Bernard Dean, Chief Clerk of the House of Representatives of the State of Washington, do hereby certify that the attached is **HOUSE BILL 1777** as passed by the House of Representatives and the Senate on the dates hereon set forth.

BERNARD DEAN

Chief Clerk

FILED

May 5, 2023

**Secretary of State
State of Washington**

HOUSE BILL 1777

AS AMENDED BY THE SENATE

Passed Legislature - 2023 Regular Session

State of Washington **68th Legislature** **2023 Regular Session**

By Representatives Doglio, Fitzgibbon, Duerr, Lekanoff, Stearns, McEntire, Ramel, and Pollet

Read first time 02/07/23. Referred to Committee on Capital Budget.

1 AN ACT Relating to authorizing the use of performance-based
2 contracting for energy services and equipment; amending RCW
3 39.35A.020, 39.35C.010, 39.35C.050, and 39.35C.060; adding a new
4 section to chapter 39.35C RCW; and providing expiration dates.

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

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

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

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

17 (a) The number of performance-based contracts issued;

18 (b) The cost-effectiveness of performance-based contracts issued,
19 compared to alternative available financing mechanisms, including
20 certificates of participation;

1 (c) Recommendations to improve the use of performance-based
2 contracts; and

3 (d) Any other significant information associated with the
4 implementation of this act.

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

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

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

11 The definitions in this section apply throughout this chapter
12 unless the context clearly requires otherwise.

13 (1)(a) "Conservation" includes reduced:

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

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

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

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

23 (a) Energy management systems and any equipment, materials,
24 supplies, or conservation projects that are expected, upon
25 installation, to reduce the energy use, reduce the energy demand,
26 reduce the energy cost, or reduce the greenhouse gas emissions, of a
27 facility; and

28 (b) The services associated with the equipment, materials,
29 supplies, or conservation projects including, but not limited to,
30 design, engineering, financing, installation, project management,
31 guarantees, operations, and maintenance. Reduction in energy use or
32 energy cost may also include reductions in the use or cost of water,
33 wastewater, or solid waste.

34 (3) "Energy management system" has the definition provided in RCW
35 39.35.030.

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

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

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

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

21 The definitions in this section apply throughout this chapter
22 unless the context clearly requires otherwise.

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

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

- 29 (i) Energy consumption;
30 (ii) Energy demand;
31 (iii) Energy cost; or
32 (iv) Greenhouse gas emissions.

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

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

37 (3)(a) "Cost-effective" means that the present value to a state
38 agency or school district of the benefits reasonably expected to be
39 achieved or produced by a facility, conservation activity, measure,

1 or piece of equipment over its useful life, including any
2 compensation received from a utility or the Bonneville power
3 administration, is greater than the net present value of the costs of
4 implementing, maintaining, and operating such facility, activity,
5 measure, or piece of equipment over its useful life, when discounted
6 at the cost of public borrowing.

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

10 (4) "Department" means the state department of enterprise
11 services.

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

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

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

21 ~~((7))~~ (8) "Energy efficiency project" means a conservation or
22 cogeneration project.

23 ~~((8))~~ (9) "Energy efficiency services" means assistance
24 furnished by the department to state agencies and school districts in
25 identifying, evaluating, and implementing energy efficiency projects.

26 ~~((9))~~ (10) "Local utility" means the utility or utilities in
27 whose service territory a public facility is located.

28 ~~((10))~~ (11) "Performance-based contracting" means contracts for
29 which payment ~~((is))~~ or payment obligations are conditional on
30 achieving contractually specified energy savings, which may include
31 regular service payments made by a state agency, public school
32 district, public university, or municipality to any persons or
33 entities that own energy equipment and services under a performance-
34 based contract.

35 ~~((11))~~ (12) "Public agency" means every state office, officer,
36 board, commission, committee, bureau, department, and all political
37 subdivisions of the state.

38 ~~((12))~~ (13) "Public facility" means a building, structure,
39 group of buildings or structures at a single site, site improvement,
40 or other facility owned by a state agency or school district.

1 ~~((13))~~ (14) "State agency" means every state office or
2 department, whether elective or appointive, state institutions of
3 higher education, and all boards, commissions, or divisions of state
4 government, however designated.

5 ~~((14))~~ (15) "State facility" means a building or structure, or
6 a group of buildings or structures at a single site, owned by a state
7 agency.

8 ~~((15))~~ (16) "Utility" means privately or publicly owned
9 electric and gas utilities, electric cooperatives and mutuals,
10 whether located within or without Washington state.

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

13 In addition to any other authorities conferred by law:

14 (1) The department, with the consent of the state agency or
15 school district responsible for a facility, a state or regional
16 university acting independently, and any other state agency or school
17 district acting through the department or ~~((as otherwise authorized~~
18 ~~by law)) acting independently, may:~~

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

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

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

26 (2)(a) This subsection authorizes state agencies, public school
27 districts, public universities, and municipalities to enter into
28 energy as a service contracts. Pursuant to this subsection, a state
29 agency, public school district, public university, or municipality
30 may, whether acting independently or through the department:

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

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

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

1 (iv) Contract with a person or entity for energy equipment or
2 services.

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

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

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

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

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

16 (v) The state agency, public school district, public university,
17 or municipality will ensure that a contract does not directly result
18 in loss of any position of employment by state employees in the
19 classified service under RCW 41.06.020, employees included in the
20 Washington management service under RCW 41.06.022, or school district
21 employees under RCW 28A.150.203;

22 (vi) Training must be offered in the preventative maintenance and
23 other related activities of energy equipment and services as detailed
24 in the contract for energy services to existing classified employees
25 who currently provide maintenance of energy equipment for the state
26 agency, public school district, public university, or municipality;
27 and

28 (vii) Prior to entering into a contract, the state agency, public
29 school district, public university, or municipality must coordinate
30 with the department to analyze the cost-effectiveness of the proposed
31 performance-based contract compared to alternative available
32 financing and service mechanisms, including certificates of
33 participation. The state agency, public school district, public
34 university, or municipality may enter into a contract only if the
35 cost-effectiveness is greater than other available alternatives.

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

40 ~~((3))~~ (4) A school district may also:

1 (a) Develop and finance conservation at school district
2 facilities; and

3 ~~((Contract for energy services, including performance-based
4 contracts at school district facilities; and~~

5 ~~(e))~~ Contract to sell energy savings from energy conservation
6 projects at school district facilities to local utilities or the
7 Bonneville power administration directly or ~~((to local utilities or
8 the Bonneville power administration))~~ through third parties.

9 ~~((4))~~ (5) Direct financial grants and incentives received on
10 behalf of the state agency, public school district, public
11 university, or municipality will be passed on to the state agency,
12 public school district, public university, or municipality.

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

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

18 State agencies, public school districts, public universities, and
19 municipalities may use financing contracts under chapter 39.94 RCW,
20 as well as performance-based contracts, to provide all or part of the
21 funding for conservation projects. The department shall determine the
22 eligibility of such projects for financing contracts. The repayments
23 of the financing contracts or performance-based contracts shall be
24 sufficient to pay, when due, the principal and interest on the
25 contracts or the services payments over the agreed upon term.
26 Performance-based contracts entered into by state agencies, public
27 school districts, public universities, and municipalities under this
28 act that include the purchase of real or personal property are
29 subject to the requirements of chapter 39.94 RCW. Pursuant to chapter
30 39.94 RCW, no later than December 31, 2023, the department shall
31 complete development of approved model contracts authorized by this
32 act.

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

Passed by the House April 17, 2023.
Passed by the Senate April 11, 2023.
Approved by the Governor May 4, 2023.

Filed in Office of Secretary of State May 5, 2023.

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