

EFFECT:

- Requires DES to periodically review the contractor registry, rather than annually review the registry.
- Removes revisions to the intent section that changed "performance-based energy contracts" to "performance-based contracts."
- Specifies that technical submissions for construction be prepared by a professional engineer, rather than a registered architect or an engineer if the work is primarily engineering in nature.
- Requires that the independent evaluation or review be conducted by a third-party contractor who is qualified and familiar with energy savings performance contracts but is not currently an eligible vendor in Washington State.
- Adds additional topics to be reported on by JLARC, including the process by which DES adds and removes contractors from the registry; the adequacy of criteria used to assess vendor qualifications; and stakeholder input on the design of the program including municipalities, energy service contractors, and federal researchers located in the Lawrence Berkeley National Laboratory.

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

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

5 **Sec. 1.** RCW 39.35A.020 and 2007 c 39 s 2 are each amended to
6 read as follows:

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

10 (1) "Department" means the department of enterprise services.

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

20 (~~(+2)~~) (3) "Energy management system" has the definition
21 provided in RCW 39.35.030.

1 (~~(3)~~) (4) "Municipality" has the definition provided in RCW
2 39.04.010.

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

17 (~~(5)~~) (6) "Water conservation" means reductions in the use of
18 water or wastewater.

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

21 The (~~state~~) department (~~of enterprise services~~) shall
22 maintain a registry of energy service contractors and provide
23 assistance to municipalities in identifying available performance-
24 based contracting services. The department shall periodically review
25 the registry of energy service contractors and, if necessary, revise
26 the registry by adding or removing contractors based on
27 qualifications identified by the department, such as contractors'
28 performance history, comments from municipalities about services
29 provided by contractors, and other similar factors.

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

32 (1) All technical submissions required for construction and
33 provided by the department or an energy service contractor under a
34 performance-based contract must be prepared by the services of a
35 professional engineer registered under chapter 18.43 RCW.

36 (2) This section only applies to performance-based contracting
37 services that have been procured by a municipality with the
38 assistance or involvement of the department.

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

3 (1) (a) Before a performance-based contract is executed, the
4 department shall meet and confer with the parties to the contract to
5 review the energy equipment and services proposed to be provided
6 under the contract.

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

10 (2) The department and the energy service contractor must be
11 prepared to offer information and answer questions about the
12 capabilities of the energy equipment and services, expected outcomes
13 for the municipality, and whether other energy equipment and services
14 may be better suited to the municipality's purposes.

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

19 (4) This section only applies to performance-based contracting
20 services that have been procured by a municipality with the
21 assistance or involvement of the department.

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

24 (1) The department shall ensure that the performance-based
25 contract provides for independent evaluation or review of the
26 operability of the energy equipment and services. The independent
27 evaluation or review required under this section must be conducted by
28 a third-party contractor who is qualified and familiar with energy
29 savings performance contracts but is not currently an eligible vendor
30 in Washington state. The independent evaluation or review must
31 include confirmation that the energy equipment and services are
32 properly installed and capable of performing correctly and that the
33 municipality's personnel have been appropriately trained in use and
34 maintenance.

35 (2) Where ongoing monitoring is required under a performance-
36 based contract, the energy service contractor shall provide an annual
37 report to the municipality and the department summarizing the results
38 of monitoring.

1 (3) This section only applies to performance-based contracting
2 services that have been procured by a municipality with the
3 assistance or involvement of the department.

4 NEW SECTION. **Sec. 6.** The joint legislative audit and review
5 committee shall review the performance-based contracting services
6 program authorized in chapter 39.35A RCW. By December 31, 2021, the
7 joint legislative audit and review committee shall report to the
8 legislature on the following topics and other pertinent information
9 as determined by the committee: (1) The structure of the performance-
10 based contracting services program, including the roles of the
11 department of enterprise services, energy service contractors, and
12 municipalities as defined under the program; (2) cost-effectiveness
13 of the program; (3) whether performance-based contracts adequately
14 protect municipalities from defects; (4) whether performance-based
15 contracting under chapter 39.35A RCW leads to outcomes for
16 municipalities that are superior to general procurement practices
17 that may not apply as a result of RCW 39.35A.040; (5) whether the
18 program limits the range of options for energy equipment and services
19 available to municipalities; (6) the process by which the department
20 of enterprise services adds and removes contractors from the
21 registry; (7) the adequacy of the criteria used to assess vendor
22 qualifications; and (8) stakeholder input on the design of the
23 program, including municipalities, energy service contractors, and
24 federal researchers located in the Lawrence Berkeley national
25 laboratory.

26 NEW SECTION. **Sec. 7.** This act does not create a private right
27 of action.

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