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**HOUSE BILL 1777**

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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.

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