



State of Wisconsin  
2009 - 2010 LEGISLATURE

LRB-2740/P4 P5

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PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

JA ✓

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1 AN ACT *to renumber* 16.26; *to amend* 103.49 (3) (ar), 103.49 (3) (ar), 109.09 (1),  
2 109.09 (1), 111.322 (2m) (c), 111.322 (2m) (c), 196.374 (4) (b), 196.378 (1) (i),  
3 196.378 (3) (a) 1., 196.378 (3) (c), 227.01 (13) (t), 227.01 (13) (t), 946.15 (1),  
4 946.15 (1), 946.15 (2), 946.15 (2), 946.15 (3), 946.15 (3), 946.15 (4) and 946.15  
5 (4); and *to create* 16.26 (2), 196.374 (2) (d), 196.3745, 196.378 (3) (a) 1m. and  
6 709.03 (form) C. 25m. of the statutes; **relating to:** allowing political  
7 subdivisions and certain utilities to administer investment programs for  
8 energy efficiency improvements and renewable energy applications, providing  
9 an exemption from emergency rule procedures, and granting rule-making  
10 authority.

***Analysis by the Legislative Reference Bureau***

This bill allows the Public Service Commission (PSC) to authorize a city, village, town, or county (political subdivision) or an electric, natural gas, or water public utility (utility) to administer, fund, or provide administrative services for a program for investing in energy efficiency improvements and renewable resource applications at any type of premises within the political subdivision or served by the utility. The bill defines "energy efficiency improvement" as an improvement that reduces the

usage of energy or increases the efficiency of energy usage at premises, and the bill defines "renewable resource application" as the application of specified renewable energy resources, such as, for example, solar or wind power, at premises. The bill allows the PSC to authorize a program only upon application by a political subdivision or utility and prohibits the PSC from requiring that political subdivisions and utilities participate in such a program. The bill requires a utility for which the PSC authorizes a program to file a tariff with the PSC that specifies the terms and conditions of utility and nonutility service provided to customers at premises where energy efficiency improvements or renewable resource applications are made under the program. A tariff has no effect until approved by the PSC.

In addition, the bill specifies that premises are not eligible for an investment unless an audit is performed that demonstrates that an energy efficiency improvement or renewable resource application is cost-effective, as specified in rules promulgated by the PSC. The rules may specify criteria that include comparing the cost of an improvement or application to the value of the premises. In addition, for an energy efficiency improvement, the rules may specify criteria that include the energy savings resulting from the improvement and the period of time required for the energy savings to equal the cost of the improvement. In addition, the PSC must promulgate rules requiring the performance of audit after an energy efficiency improvement or renewable resource application is made or installed. The purpose of such an audit is to determine whether the improvement or application: 1) was made or installed in a competent manner; and 2) operates in a cost-effective manner. The bill requires the PSC to promulgate rules specifying the certification requirements that a person must satisfy to perform either type of audit.

The bill also requires that all work involved in making or installing an energy efficiency improvement or renewable resource application under an authorized program must be performed by a contractor or subcontractor that the PSC has included on a prequalification list of approved contractors and subcontractors. The PSC may include a contractor or subcontractor on the list only if the PSC determines that the contractor or subcontractor satisfies certain requirements, including the following: 1) possesses the technical qualifications and resources to perform the work or obtains those qualifications and resources from subcontractors whom the PSC has included on the list; 2) possesses all valid and effective licenses, registrations, and certificates required under federal, state, and local law; 3) meets bonding and insurance requirements; 4) agrees to comply with prevailing wage and substance abuse prevention requirements that apply to certain public works projects; 5) fully complies with equal employment opportunity, affirmative action, and other workforce participation requirements; 6) certifies that employees are not improperly classified as independent contractors in violation of federal or state law; 7) satisfies cultural competency requirements in rules promulgated by the PSC; and 8) discloses certain past disciplinary actions and violations of federal or state law. If the past disciplinary actions and violations constitute "good cause," as defined by the PSC by rule, the PSC may exclude a contractor or subcontractor from the list. In addition, the PSC must determine that a contractor or subcontractor has agreed to sponsor an apprenticeship program administered by the Department of Workforce

IN SEAT 2A

Development. However, the bill allows work to be performed by a contractor or subcontractor who does not sponsor such a program, but only if contractors and subcontractors who sponsor such a program are not available to perform the work.

In addition, the bill requires the PSC to make grants to political subdivisions and utilities for which the PSC authorizes programs under the bill. A political subdivision or utility must use the grants only for costs associated with an authorized program. The bill directs the PSC to make the grants from certain federal block grants that the state receives under a program administered by the federal Department of Energy under the American Recovery and Reinvestment Act of 2009. The bill also requires the PSC to allocate the federal grants in the manner required under the federal program.

The bill also includes requirements for a utility to prioritize spending on a program authorized under the bill. For spending whose source is a grant by the PSC, the utility must give the greatest priority to energy efficiency improvements and renewable resource applications at residential premises and the least priority to energy efficiency improvements and renewable resource applications at nonresidential premises of customers with the greatest demand for utility service. For spending from other sources, the priorities are reversed. In addition, the bill prohibits a utility from counting any spending whose source is a PSC grant under the bill for purposes of requirements under current law for spending a specified percentage of the public utility's annual operating revenues on energy efficiency and renewable resource programs.

The bill also does all of the following:

1. Allows a political subdivision for which a program is authorized under the bill to make loans to residents for energy efficiency improvements and renewable resource applications, and to collect loan repayments as special charges, divide the special charges into installments, and include the special charges in tax rolls even if they are not delinquent. A political subdivision has similar collection authority under current law for loans for energy efficiency improvements and renewable resource applications.

2. Requires political subdivisions and utilities that receive payments from residents and customers for energy efficiency improvements and renewable resource applications under authorized programs to use the payments to invest in other improvements and applications under the programs.

~~3. Specifies that an energy efficiency improvement or renewable resource application is not eligible for an investment unless at least 25 percent of the employees of all contractors and subcontractors who perform work on the improvement or application reside in the city, village, or town in which the work is performed.~~

3.4. Requires a tariff filed by a utility for which a program is authorized to include contracts between the utility and an owner of property benefited by an energy efficiency improvement or renewable resource application. The contracts must require the owner to do the following: a) inform lessees that are liable for utility service that the cost of the improvement or application will appear on the lessees' utility bills; and b) inform a purchaser of the property that the purchaser, or any

other person who is liable for utility service at the property, is liable for the unpaid costs of the improvement or application, and that such costs will appear on utility bills for the property.

~~4~~ ~~5~~. Allows a utility that participates in the program to include a separate line item on customer bills that compares certain costs of the program with energy savings resulting from an energy efficiency improvement or renewable resource application made under the program.

~~5~~ ~~6~~. Prohibits a utility with an authorized program from recovering from ratepayers any bad debt related to nonutility services provided under the program.

~~6~~ ~~7~~. Requires an owner of residential property to make a disclosure about an energy efficiency improvement or renewable resource application made under an authorized program on the real estate conditions report that is required for residential property transfers.

~~7~~ ~~8~~. Requires contractors and subcontractors to apply to renew their inclusion on the prequalification list every two years, allows the PSC to conditionally approve a contractor or subcontractor for inclusion on the list, allows the PSC to revoke inclusion for "good cause," as defined in rules promulgated by the PSC, and requires the PSC to update the list on a monthly basis and make the list available to the public.

~~8~~ ~~9~~. Requires the PSC to promulgate a rule or issue an order that prohibits any work under contracts under energy efficiency and renewable resource programs administered by the PSC under current law from being performed by contractors and subcontractors who are not included on the list described above. However, the rule or order must allow performance of work by contractors and subcontractors who do not satisfy the apprenticeship requirements only if contractors and subcontractors who do satisfy the requirements are not available to perform the work.

~~9~~ ~~10~~. Requires DOA to promulgate a rule similar to the rule described above that applies to work under contracts under a federal weatherization program administered by DOA under current law.

Finally, current law requires certain electric utilities and cooperatives to ensure that, in a given year, a specified percentage of the electricity it sells at retail is derived from renewable resources. These requirements are commonly referred to as renewable portfolio standards (RPSs). Current law also allows electric utilities and cooperatives to create credits based on the amount of electricity derived from renewable resources that is sold at retail in a year and that exceeds the RPS for the year. Subject to certain restrictions, an electric utility or cooperative may use the credit in a subsequent year to help comply with an RPS, or sell the credit to another electric utility or cooperative to help the buyer comply with an RPS. This bill requires the PSC to promulgate rules that allow an electric utility to create an additional credit that can be used or sold like the credits under current law. The PSC's rules must allow for the creation of credits that are based on the reductions in energy usage, increases in efficiency of electricity usage, and generation of renewable energy that results from an energy efficiency improvement or renewable resource application under a program authorized by the PSC under the bill, but only if the spending source for the improvement or application is not a PSC grant under the bill.

The PSC's rules must include requirements for measuring the amount of such reductions, increases, and generation, and calculating the amount of a credit. In addition, the bill eliminates the requirement under current law that a credit must be used in a year subsequent to the the year in which it is created or purchased.

For further information see the *state and local* fiscal estimate, which will be printed as an appendix to this bill.

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*The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:*

1           **SECTION 1.** 16.26 of the statutes is renumbered 16.26 (1).

      \*\*\*\*NOTE: The above SECTION is new material.

2           **SECTION 2.** 16.26 (2) of the statutes is created to read:

3           16.26 (2) The department shall prohibit by rule the performance of any work  
4           under a contract entered into under sub. (1) by a contractor or subcontractor who is  
5           not included in the list specified in s. 196.3745 (5) (a), except that the department's  
6           rule shall allow the performance of work by a contractor or subcontractor who does  
7           not satisfy the requirement under s. 196.3745 (5) (a) 7. if no contractor or  
8           subcontractor who satisfies the requirement is available to perform the work. This  
9           subsection applies to contracts that are entered into, extended, modified, or renewed  
10          on the effective date of the department's rule.

      \*\*\*\*NOTE: The above SECTION is new material.

11          **SECTION 3.** 103.49 (3) (ar) of the statutes is amended to read:

12          103.49 (3) (ar) In determining prevailing wage rates under par. (a) or (am), the  
13          department may not use data from projects that are subject to this section, s. 66.0903,  
14          103.50, 196.3745 (5) (a) 5., or 229.8275 or 40 USC 276a unless the department  
15          determines that there is insufficient wage data in the area to determine those  
16          prevailing wage rates, in which case the department may use data from projects that

1 are subject to this section, s. 66.0903, 103.50, 196.3745 (5) (a) 5., or 229.8275 or 40  
2 USC 276a.

3 **SECTION 4.** 103.49 (3) (ar) of the statutes, as affected by 2009 Wisconsin Act 28,  
4 is amended to read:

5 103.49 (3) (ar) In determining prevailing wage rates under par. (a) or (am), the  
6 department may not use data from projects that are subject to this section, s. 66.0903,  
7 66.0904, 103.50, 196.3745 (5) (a) 5., or 229.8275 or 40 USC 3142 unless the  
8 department determines that there is insufficient wage data in the area to determine  
9 those prevailing wage rates, in which case the department may use data from  
10 projects that are subject to this section, s. 66.0903, 66.0904, 103.50, 196.3745 (5) (a)  
11 5., or 229.8275 or 40 USC 3142.

12 **SECTION 5.** 109.09 (1) of the statutes is amended to read:

13 109.09 (1) The department shall investigate and attempt equitably to adjust  
14 controversies between employers and employees as to alleged wage claims. The  
15 department may receive and investigate any wage claim which is filed with the  
16 department, or received by the department under s. 109.10 (4), no later than 2 years  
17 after the date the wages are due. The department may, after receiving a wage claim,  
18 investigate any wages due from the employer against whom the claim is filed to any  
19 employee during the period commencing 2 years before the date the claim is filed.  
20 The department shall enforce this chapter and ss. 66.0903, 103.02, 103.49, 103.82,  
21 104.12, 196.3745 (5) (a) 5., and 229.8275. In pursuance of this duty, the department  
22 may sue the employer on behalf of the employee to collect any wage claim or wage  
23 deficiency and ss. 109.03 (6) and 109.11 (2), and (3) shall apply to such actions.  
24 Except for actions under s. 109.10, the department may refer such an action to the  
25 district attorney of the county in which the violation occurs for prosecution and

1 collection and the district attorney shall commence an action in the circuit court  
2 having appropriate jurisdiction. Any number of wage claims or wage deficiencies  
3 against the same employer may be joined in a single proceeding, but the court may  
4 order separate trials or hearings. In actions that are referred to a district attorney  
5 under this subsection, any taxable costs recovered by the district attorney shall be  
6 paid into the general fund of the county in which the violation occurs and used by that  
7 county to meet its financial responsibility under s. 978.13 (2) (b) for the operation of  
8 the office of the district attorney who prosecuted the action.

9 **SECTION 6.** 109.09 (1) of the statutes, as affected by 2009 Wisconsin Act 28, is  
10 amended to read:

11 109.09 (1) The department shall investigate and attempt equitably to adjust  
12 controversies between employers and employees as to alleged wage claims. The  
13 department may receive and investigate any wage claim which is filed with the  
14 department, or received by the department under s. 109.10 (4), no later than 2 years  
15 after the date the wages are due. The department may, after receiving a wage claim,  
16 investigate any wages due from the employer against whom the claim is filed to any  
17 employee during the period commencing 2 years before the date the claim is filed.  
18 The department shall enforce this chapter and ss. 66.0903, 66.0904, 103.02, 103.49,  
19 103.82, 104.12, 196.3745 (5) (a) 5., and 229.8275. In pursuance of this duty, the  
20 department may sue the employer on behalf of the employee to collect any wage claim  
21 or wage deficiency and ss. 109.03 (6) and 109.11 (2) and (3) shall apply to such actions.  
22 Except for actions under s. 109.10, the department may refer such an action to the  
23 district attorney of the county in which the violation occurs for prosecution and  
24 collection and the district attorney shall commence an action in the circuit court  
25 having appropriate jurisdiction. Any number of wage claims or wage deficiencies

1 against the same employer may be joined in a single proceeding, but the court may  
2 order separate trials or hearings. In actions that are referred to a district attorney  
3 under this subsection, any taxable costs recovered by the district attorney shall be  
4 paid into the general fund of the county in which the violation occurs and used by that  
5 county to meet its financial responsibility under s. 978.13 (2) (b) for the operation of  
6 the office of the district attorney who prosecuted the action.

7 **SECTION 7.** 111.322 (2m) (c) of the statutes is amended to read:

8 111.322 (2m) (c) The individual files a complaint or attempts to enforce a right  
9 under s. 66.0903, 103.49, 196.3745 (5) (a) 5., or 229.8275 or testifies or assists in any  
10 action or proceeding under s. 66.0903, 103.49, 196.3745 (5) (a) 5., or 229.8275.

11 **SECTION 8.** 111.322 (2m) (c) of the statutes, as affected by 2009 Wisconsin Act  
12 28, is amended to read:

13 111.322 (2m) (c) The individual files a complaint or attempts to enforce a right  
14 under s. 66.0903, 66.0904, 103.49, 196.3745 (5) (a) 5., or 229.8275 or testifies or  
15 assists in any action or proceeding under s. 66.0903, 66.0904, 103.49, 196.3745 (5)  
16 (a) 5., or 229.8275.

17 **SECTION 9.** 196.374 (2) (d) of the statutes is created to read:

18 196.374 (2) (d) *Contractors.* The commission shall prohibit, by order or rule,  
19 the performance of any work under a contract under a program under par. (a) 1., (b)  
20 1. or 2., or (c) by a contractor or subcontractor who is not included in the list specified  
21 in s. 196.3745 (5) (a), except that the commission's order or rule shall allow the  
22 performance of work by a contractor or subcontractor who does not satisfy the  
23 requirement under s. 196.3745 (5) (a) 7. if no contractor or subcontractor who  
24 satisfies the requirement is available to perform the work. This paragraph applies



1 to contracts that are entered into, extended, modified, or renewed on the effective  
2 date of the commission's order or rule.

\*\*\*\*NOTE: The above SECTION is new material.

3 **SECTION 10.** 196.374 (4) (b) of the statutes is amended to read:

4 196.374 (4) (b) An energy utility that provides financing under an energy  
5 efficiency program under sub. (2) (b) 1. or 2. for installation, by a customer, of energy  
6 efficiency or renewable resource processes, equipment, or appliances, or an affiliate  
7 of such a utility, may not sell to or install for the customer those processes,  
8 equipment, appliances, or related materials. The Subject to any order or rule of the  
9 commission under sub. (2) (d), the customer shall acquire the installation of the  
10 processes, equipment, appliances, or related materials from an independent  
11 contractor of the customer's choice.

\*\*\*\*NOTE: The above SECTION is new material.

12 **SECTION 11.** 196.3745 of the statutes is created to read:

13 **196.3745 Energy efficiency and renewable energy investment**  
14 **program. (1) DEFINITIONS.** In this section:

15 (a) "Cultural competency" means the ability to understand and act respectfully  
16 toward, in a cultural context, the beliefs, interpersonal styles, attitudes, and  
17 behaviors of persons of various cultures.

\*\*\*\*NOTE: Paragraph (a) is new material and is based on the definition under  
current law in s. 48.983 (1) (cm).

18 (b) "Energy efficiency improvement" means an improvement to any type of  
19 premises that reduces the usage of energy, or increases the efficiency of energy usage,  
20 at the premises.

\*\*\*\*NOTE: The above is revised to refer to "any type of premises" rather than  
"residential premises."

1 (c) "Improvement or application" means an energy efficiency improvement or  
2 renewable resource application.

3 (d) "Political subdivision" means a city, village, town, or county.

\*\*\*\*NOTE: Paragraph (d) is new material.

4 (e) "Renewable resource application" means the application of a renewable  
5 resource, as defined in s. 196.374 (1) (j), at any type of premises.

\*\*\*\*NOTE: The above is revised to refer to "any type of premises" rather than  
"residential premises."

6 (f) "Utility" means a public utility that furnishes electricity, natural gas, or  
7 water service to retail customers.

\*\*\*\*NOTE: The above is revised to refer to "retail customers" rather than "residential  
customers."

8 **(2) AUTHORIZATION.** The commission may, upon application by a political  
9 subdivision or utility, authorize the political subdivision or utility to administer,  
10 fund, or provide administrative services for a program for investing in improvements  
11 or applications for any type of premises within the political subdivision or served by  
12 the utility. Participation in such a program shall be at the discretion of political  
13 subdivisions, utilities, and premises owners, and the commission may not require  
14 that a political subdivision, utility, or premises owner participate in such a program.

\*\*\*\*NOTE: The above is revised to refer to "any type of premises" rather than  
"residential premises," and to refer to political subdivisions, in addition to utilities.

15 **(3) TARIFFS.** A utility for which a program is authorized under sub. (2) shall file  
16 a tariff specifying the terms and conditions of utility and nonutility service provided  
17 to customers at premises where improvements or applications are made under the  
18 program. A tariff filed under this subsection shall have no effect until approved by  
19 the commission. A tariff filed by a utility under this subsection shall include all of  
20 the following:

\*\*\*\*NOTE: The above is revised to refer to "premises" rather than "residential premises."

1 (a) Terms and conditions for billing customers at premises for utility and  
2 nonutility service related to improvements or applications for which investments are  
3 made.

\*\*\*\*NOTE: The above is revised to refer to "premises" rather than "residential premises."

4 (b) A contract between the utility and an owner of property benefited by an  
5 improvement or application that requires the owner to inform any property lessees  
6 who are liable for utility service that the cost of the improvement or application will  
7 appear on the lessees' utility bills.

8 (c) A contract between the utility and an owner of property benefited by an  
9 improvement or application that requires the owner to inform any purchaser of the  
10 property that the purchaser, or any other person who is liable for utility service at  
11 the property, is liable for the unpaid cost of the improvement or application and that  
12 such unpaid cost will appear on utility bills for the property.

13 (d) Any other term or condition required by the commission.

14 (4) AUDITS. (a) *Pre-audits*. A premises is not eligible for an investment for an  
15 improvement or application under a program authorized under sub. (2) unless an  
16 audit is performed that demonstrates that the improvement or application is  
17 cost-effective. The commission shall promulgate rules for determining whether an  
18 improvement or application is cost-effective. For an improvement or application, the  
19 rules may specify criteria that include comparing the cost of the improvement or  
20 application to the value of the premises benefited by the improvement or application.  
21 For an improvement, the rules may specify criteria that include the energy savings

1 resulting from the improvement and the period of time required for the energy  
2 savings to equal the cost of the improvement.

\*\*\*\*NOTE: The above is substantially revised. Note that the last sentence is limited to improvements. The reason is that, based on discussions at a meeting on this draft, I assume that a renewable resource application should not be evaluated on the basis of its energy savings or "payback period." Is the above okay?

3 (b) *Post-audits.* The commission shall promulgate rules requiring the  
4 performance of an audit after an improvement or application is made or installed  
5 under a program authorized under sub. (2). The purpose of the audit shall be to  
6 determine whether an improvement or application was made or installed in a  
7 competent manner and whether the improvement or application operates in a  
8 cost-effective manner.

\*\*\*\*NOTE: Paragraph (b) is new material. Note that par. (d) applies only to utilities and not political subdivisions. Is that okay?

9 (c) *Certifications.* The commission shall promulgate rules specifying the  
10 certification requirements that a person must satisfy in order to perform an audit  
11 required under this subsection.

\*\*\*\*NOTE: The above is revised to refer to "premises" rather than "residential premises."

12 (5) CONTRACTORS AND SUBCONTRACTORS. (a) All work involved in making or  
13 installing an improvement or application under a program authorized under sub. (2)  
14 shall be performed by a contractor or subcontractor that the commission has included  
15 on a list of prequalified contractors and subcontractors. The commission shall  
16 approve a contractor or subcontractor for inclusion on the prequalification list only  
17 if the commission determines that the contractor or subcontractor satisfies all of the  
18 following:

19 1. Possesses the technical qualifications and resources, including equipment,  
20 personnel, and financial resources, necessary to perform the required work or

1 obtains those qualifications and resources through the use of responsible  
2 subcontractors who are approved by the commission for inclusion on the  
3 prequalification list.

4 2. Possesses all valid and effective licenses, registrations, and certificates that  
5 are required under federal, state, and local law for the type of work that the  
6 contractor or subcontractor performs.

7 3. Meets all bonding requirements required by law or contract specifications.

8 4. Meets all insurance requirements as required by law or contract  
9 specifications, including general liability insurance, workers compensation  
10 insurance, and unemployment insurance requirements. The commission shall  
11 promulgate rules specifying the requirements that must be met under this  
12 subdivision.

\*\*\*NOTE: The sentence regarding rules is new material.

13 5. Agrees to pay all employees working on an improvement or application for  
14 which an investment is made under the program who would be entitled to receive the  
15 prevailing wage rate under s. 66.0903 and who would not be required or permitted  
16 to work more than the prevailing hours of labor, as defined in s. 103.49 (1) (c), if the  
17 improvement or application were a project of public works under s. 66.0903, not less  
18 than the prevailing wage rate determined under s. 66.0903 (3) or (6) and not to  
19 require or permit those employees to work more than the prevailing hours of labor,  
20 except as permitted under s. 66.0903 (4) (a); to keep and permit inspection of records  
21 in the same manner as a contractor performing work on a project of public works that  
22 is subject to s. 66.0903 is required to keep and permit inspection of records under s.  
23 66.0903 (10); and otherwise to comply with s. 66.0903 in the same manner as a

1 contractor performing work on a project of public works that is subject to s. 66.0903  
2 is required to comply with s. 66.0903.

3 6. Agrees not to permit an employee working on an improvement or application  
4 for which an investment is made under the program to use, possess, attempt to  
5 possess, distribute, deliver, or be under the influence of a drug, as defined in s.  
6 103.503 (1) (d), or use or be under the influence of alcohol, while performing that  
7 work, to have in place a written program for the prevention of substance abuse  
8 among those employees in the same manner as a contractor performing work on a  
9 project of public works that is subject to s. 66.0903 is required to have in place such  
10 a written program under s. 103.503 (3), and otherwise to comply with s. 103.503 in  
11 the same manner as a contractor performing work on a project of public works that  
12 is subject to s. 66.0903 is required to comply with s. 103.503.

13 7. Except as provided in par. (b), agrees, if the contractor or subcontractor  
14 employs employees in trades that are apprenticeable under subch. I of ch. 106, to  
15 sponsor an apprenticeship training program that is approved by the department of  
16 workforce development for each of those trades and to employ in each of those trades  
17 the maximum ratio of apprentices to journeymen that are permitted under  
18 standards adopted, recognized, or approved by that department.

19 8. Fully complies with all equal employment opportunity, affirmative action,  
20 and other workforce participation requirements.

21 9. Provides the commission a detailed statement regarding related business  
22 entities if, at any time in the 3 years prior to inclusion on the prequalification list,  
23 the contractor or subcontractor has controlled or has been controlled by another  
24 corporation, partnership, or other business entity operating in the construction  
25 industry.

1           10. Certifies to the commission that the contractor or subcontractor  
2 understands that, in performing work under the program, the contractor or  
3 subcontractor will be required to use as subcontractors only those entities that are  
4 also included on the prequalification list.

5           11. Certifies to the commission that employees are not improperly classified as  
6 independent contractors in violation of federal or state law.

7           12. Discloses to the commission whether in the 3 years prior to inclusion on the  
8 prequalification list the contractor or subcontractor has had any type of business,  
9 contracting, or trade license, certification, or registration revoked or suspended;  
10 been debarred by any federal state, or local government agency; defaulted on any  
11 project; committed a willful violation of federal or state safety law as determined by  
12 a final decision of a court or government agency authority; or been found by a final  
13 decision of a court or government agency to be in violation of any other law relating  
14 to its contracting business, including wage and hour laws, prevailing wage laws,  
15 environmental laws, antitrust laws, or tax laws, where the penalty for such violation  
16 resulted in the imposition of a fine, back pay damages, or any other type of penalty,  
17 in an amount of more than \$10,000.

18           13. Satisfies cultural competency requirements established in rules  
19 promulgated by the commission.

\*\*\*\*NOTE: Subdivision 13. is new material.

20 ~~(15.)~~ Certifies to the commission that an application for inclusion on the  
21 prequalification list has been executed by a principal or person employed by the  
22 applicant who has sufficient knowledge to address all matters in the application,  
23 including an attestation stating, under the penalty of perjury, that all information  
24 submitted is true, complete, and accurate.

INSERT 15-19

1           (b) The commission may include on the prequalification list under par. (a) a  
2 contractor or subcontractor who does not satisfy the requirement under par. (a) 7.  
3 The commission shall promulgate rules allowing a contractor or subcontractor who  
4 does not satisfy the requirement to perform work on an improvement or application  
5 for which an investment is made under a program authorized under sub. (2), only if  
6 no contractor or subcontractor who satisfies the requirement is available to perform  
7 the work.

8           (c) Based on good cause shown by the disclosures required under par. (a) 12.,  
9 the commission may disapprove a contractor or subcontractor for inclusion in the  
10 prequalification list under par. (a). The commission shall promulgate rules defining  
11 “good cause” for purposes of this paragraph.

\*\*\*\*NOTE: Paragraph (c) is new material.

12           (d) A contractor or subcontractor shall report to the commission any material  
13 change to its business or operations that are relevant to the commission’s approval  
14 to include the contractor or subcontractor in the prequalification list under par. (a).  
15 A contractor or subcontractor shall make a report required under this paragraph no  
16 later than 15 days after obtaining knowledge of the material change. If a contractor  
17 or subcontractor violates this paragraph, the commission may revoke the  
18 contractor’s or subcontractor’s inclusion in the prequalification list for a period of no  
19 more than 3 years.

20           (e) Except for conditional approvals under par. (f), a contractor’s or  
21 subcontractor’s inclusion in the prequalification list under par. (a) is valid for 2 years,  
22 unless the commission revokes the inclusion under par. (d). The commission shall  
23 promulgate rules for a contractor or subcontractor to apply every 2 years for the  
24 commission to renew an approval for inclusion in the prequalification list.



1 (f) The commission may conditionally approve a contractor or subcontractor for  
2 inclusion in the prequalification list under par. (a) for a period not exceeding 2 years.  
3 The commission shall set forth in writing any conditions of an approval made under  
4 this paragraph.

5 (g) Prior to disapproving a contractor or subcontractor for inclusion in the  
6 prequalification list under par. (a), the commission shall provide the contractor or  
7 subcontractor with notice and opportunity to be heard.

8 (h) The commission shall make the prequalification list under par. (a) available  
9 to the public. The prequalification list shall show the name, address, identification  
10 number assigned by the commission, and approval renewal date for each contractor  
11 or subcontractor. The commission shall update the prequalification list on a monthly  
12 basis and make the updated lists available to the public.

13 (i) The commission shall periodically review the qualifications and  
14 performance of contractors and subcontractors included in the prequalification list  
15 under par. (a). For good cause shown, the commission may, after notice and  
16 opportunity to be heard, revoke a contractor's or subcontractor's inclusion on the  
17 prequalification list. The commission shall promulgate rules defining "good cause"  
18 for purposes of this paragraph. The rules shall define "good cause" to include the  
19 work experience of a contractor or subcontractor on improvements or applications  
20 which audits under sub. (4) (b) determine were not made or installed in a competent  
21 manner or do not operate in a cost-effective manner.

\*\*\*\*NOTE: The language regarding rules is new material.

*[Handwritten signature and date: 1/7/03]*

22 (j) An improvement or application is not eligible for an investment under a  
23 program authorized under sub. (2) unless ~~at least 25 percent of the employees of all~~

1 contractors and subcontractors who perform work on the improvement or  
2 application reside in the city, village, or town in which the work is performed.

\*\*\*\*NOTE: The above is revised to refer to employees of all contractors and subcontractors who reside in a city, village, or town.

3 (6) UTILITIES. (a) A utility for which the commission authorizes a program  
4 under sub. (2) and approves a tariff under sub. (3) may include a separate line item  
5 on bills of a customer at premises benefited by an improvement or application made  
6 or installed under the program that compares the costs of the program borne by the  
7 customer with the energy savings resulting from the improvement or application.  
8 Notwithstanding s. 218.04, a utility need not obtain a license as a collection agency  
9 for this billing practice.

\*\*\*\*NOTE: The above is revised to refer to "premises" rather than "a residential premises."

10 (b) Any costs that a utility incurs to administer, fund, or provide administrative  
11 services for an investment made in accordance with a tariff approved under sub. (3),  
12 and for which the utility receives a grant under sub. (8) (b), shall be in addition to  
13 the amounts the commission requires the energy utility to spend under s. 196.374  
14 (3) (b) 2.

\*\*\*\*NOTE: The phrase "and for which the utility receives a grant under sub. (8) (b)" is new material.

15 (c) A utility shall use any payments received for improvements and  
16 applications from customers pursuant to a program authorized under sub. (2) to  
17 invest in other improvements and applications under the program.

\*\*\*\*NOTE: Paragraph (c) is new material.

18 (d) 1. A utility for which a program is authorized under sub. (2) shall prioritize  
19 the utility's spending on the program in the following manner:

1 a. If the source of the spending is a grant under sub. (8) (b), the utility shall give  
2 the greatest priority to improvements and applications at residential premises and  
3 the least priority to improvements and applications at nonresidential premises of  
4 customers with the greatest demand for service provided by the utility.

5 b. If the source of the spending is not a grant under sub. (8) (b), the utility shall  
6 give the greatest priority to improvements and applications at nonresidential  
7 premises of customers with the greatest demand for service provided by the utility  
8 and the least priority to improvements and applications at residential premises.

9 2. The commission shall promulgate rules implementing the requirements of  
10 subd. 1.

\*\*\*\*NOTE: Paragraph (d) is new material. Note that par. (d) applies only to utilities,  
and not political subdivisions. Is that okay?

11 (e) A utility may not recover from ratepayers any bad debt related to nonutility  
12 services provided under a tariff approved under sub. (3).

13 **(7) POLITICAL SUBDIVISIONS.** A political subdivision for which a program is  
14 authorized under sub. (2) shall make loans to residents of the political subdivision  
15 for improvements or applications. A political subdivision that makes such a loan  
16 may collect the loan repayment in the same manner as loans under s. 66.0627 (8).  
17 A political subdivision shall use any loan repayments to make additional loans for  
18 other improvements or applications.

\*\*\*\*NOTE: Subsection (7) is new material.

19 **(8) GRANTS.** (a) In this subsection, "block grant program" means the the energy  
20 efficiency and conservation block grant program under P.L. 111-5.

21 (b) Notwithstanding s. 16.54 (2) (a), the commission shall administer all  
22 moneys received by the state under the block grant program for the purpose of  
23 making grants to political subdivisions and utilities for which programs are

1 authorized under sub. (2). The commission shall allocate the moneys received under  
2 the block grant program in the manner required under the block grant program. A  
3 political subdivision or utility may use a grant only for costs associated with a  
4 program authorized under sub. (2).

\*\*\*\*NOTE: Subsection (8) is new material.

5 **SECTION 12.** 196.378 (1) (i) of the statutes is amended to read:

6 196.378 (1) (i) "Renewable resource credit" means a credit calculated in  
7 accordance with rules promulgated under sub. (3) (a) 1. ~~and, 1m., or 2.~~

8 **SECTION 13.** 196.378 (3) (a) 1. of the statutes is amended to read:

9 196.378 (3) (a) 1. Subject to subd. 2., an electric provider that provides total  
10 renewable energy to its retail electric customers or members in excess of the  
11 percentages specified in sub. (2) (a) 2., or that satisfies the requirements specified in  
12 rules promulgated under subd. 1m., may, in the applicable year, create a renewable  
13 resource credit and sell to any other electric provider the renewable resource credit  
14 or a portion of the renewable resource credit at any negotiated price. An electric  
15 provider that creates or purchases a renewable resource credit or portion may use  
16 the credit or portion ~~in a subsequent year~~, as provided under par. (c), to establish  
17 compliance with sub. (2) (a) 2. The commission shall promulgate rules that establish  
18 requirements for the creation and use of a renewable resource credit created on or  
19 after January 1, 2004, including calculating the amount of a renewable resource  
20 credit, and for the tracking of renewable resource credits by a regional renewable  
21 resource credit tracking system. The rules shall specify the manner for aggregating  
22 or allocating credits under this subdivision or sub. (2) (b) 4. or 5.

23 **SECTION 14.** 196.378 (3) (a) 1m. of the statutes is created to read:

1           196.378 (3) (a) 1m. The commission shall promulgate rules that allow an  
2 electric utility to create renewable resource credits based on the reduction in  
3 electricity usage, increase in the efficiency of electricity usage, and generation of  
4 renewable energy that results in a year from an improvement or application, as  
5 defined in s. 196.3745 (1) (c), under a program of the electric utility that is authorized  
6 under s. 196.3745 (2), but only if the utility's spending source for the improvement  
7 or application is not a grant under s. 196.3745 (8) (b). The rules shall include  
8 requirements for measuring the amount of such a reduction, increase, and  
9 generation and calculating the amount of a renewable resource credit.

      \*\*\*NOTE: The phrase "but only if the utility's spending source for the improvement  
or application is not a grant under s. 196.3745 (8) (b)" is new material.

10           **SECTION 15.** 196.378 (3) (c) of the statutes is amended to read:

11           196.378 (3) (c) A renewable resource credit created under s. 196.378 (3) (a),  
12 2003 stats., may not be used after December 31, 2011. A renewable resource credit  
13 created under par. (a) 1., 1m., or 2., ~~as affected by 2005 Wisconsin Act 141~~, may not  
14 be used after the 4th year after the year in which the credit is created, except the  
15 commission may promulgate rules specifying a different period of time if the  
16 commission determines that such period is necessary for consistency with any  
17 regional renewable resource credit trading program that applies in this state.

18           **SECTION 16.** 227.01 (13) (t) of the statutes is amended to read:

19           227.01 (13) (t) Ascertains and determines prevailing wage rates under ss.  
20 66.0903, 103.49, 103.50, 196.3745 (5) (a) 5., and 229.8275, except that any action or  
21 inaction which ascertains and determines prevailing wage rates under ss. 66.0903,  
22 103.49, 103.50, 196.3745 (5) (a) 5., and 229.8275 is subject to judicial review under  
23 s. 227.40.

1           **SECTION 17.** 227.01 (13) (t) of the statutes, as affected by 2009 Wisconsin Act  
2 28, is amended to read:

3           227.01 (13) (t) Ascertains and determines prevailing wage rates under ss.  
4 66.0903, 66.0904, 103.49, 103.50, 196.3745 (5) (a) 5., and 229.8275, except that any  
5 action or inaction which ascertains and determines prevailing wage rates under ss.  
6 66.0903, 66.0904, 103.49, 103.50, 196.3745 (5) (a) 5., and 229.8275 is subject to  
7 judicial review under s. 227.40.

8           **SECTION 18.** 709.03 (form) C. 25m. of the statutes is created to read:

9           709.03 (form)

10          C.25m. I am aware that an energy efficiency improve-     ...     ...     ...  
11                   ment or renewable resource application has  
12                   been made or installed to the property under  
13                   a program authorized under s. 196.3745 and  
14                   that utility bills for the property will include  
15                   unpaid costs of the improvement or applica-  
16                   tion.

17          **SECTION 19.** 946.15 (1) of the statutes is amended to read:

18          946.15 (1) Any employer, or any agent or employee of an employer, who induces  
19 any person who seeks to be or is employed pursuant to a public contract, as defined  
20 in s. 66.0901 (1) (c), or who seeks to be or is employed on a project on which a  
21 prevailing wage rate determination has been issued by the department of workforce  
22 development under s. 66.0903 (3), 103.49 (3), 103.50 (3), 196.3745 (5) (a) 5., or  
23 229.8275 (3) or by a local governmental unit, as defined in s. 66.0903 (1) (d), under  
24 s. 66.0903 (6) to give up, waive, or return any part of the compensation to which that  
25 person is entitled under his or her contract of employment or under the prevailing

1 wage rate determination issued by the department or local governmental unit, or  
2 who reduces the hourly basic rate of pay normally paid to an employee for work on  
3 a project on which a prevailing wage rate determination has not been issued under  
4 s. 66.0903 (3) or (6), 103.49 (3), 103.50 (3), 196.3745 (5) (a) 5., or 229.8275 (3) during  
5 a week in which the employee works both on a project on which a prevailing wage  
6 rate determination has been issued and on a project on which a prevailing wage rate  
7 determination has not been issued, is guilty of a Class I felony.

8 **SECTION 20.** 946.15 (1) of the statutes, as affected by 2009 Wisconsin Act 28,  
9 is amended to read:

10 946.15 (1) Any employer, or any agent or employee of an employer, who induces  
11 any person who seeks to be or is employed pursuant to a public contract as defined  
12 in s. 66.0901 (1) (c) or who seeks to be or is employed on a project on which a prevailing  
13 wage rate determination has been issued by the department of workforce  
14 development under s. 66.0903 (3), 66.0904 (4), 103.49 (3), 103.50 (3), 196.3745 (5) (a)  
15 5., or 229.8275 (3) or by a local governmental unit, as defined in s. 66.0903 (1) (d),  
16 under s. 66.0903 (6) or 66.0904 (6) to give up, waive, or return any part of the  
17 compensation to which that person is entitled under his or her contract of  
18 employment or under the prevailing wage rate determination issued by the  
19 department or local governmental unit, or who reduces the hourly basic rate of pay  
20 normally paid to an employee for work on a project on which a prevailing wage rate  
21 determination has not been issued under s. 66.0903 (3) or (6), 66.0904 (4) or (6),  
22 103.49 (3), 103.50 (3), 196.3745 (5) (a) 5., or 229.8275 (3) during a week in which the  
23 employee works both on a project on which a prevailing wage rate determination has  
24 been issued and on a project on which a prevailing wage rate determination has not  
25 been issued, is guilty of a Class I felony.

1           **SECTION 21.** 946.15 (2) of the statutes is amended to read:

2           946.15 (2) Any person employed pursuant to a public contract, as defined in s.  
3 66.0901 (1) (c), or employed on a project on which a prevailing wage rate  
4 determination has been issued by the department of workforce development under  
5 s. 66.0903 (3), 103.49 (3), 103.50 (3), 196.3745 (5) (a) 5., or 229.8275 (3) or by a local  
6 governmental unit, as defined in s. 66.0903 (1) (d), under s. 66.0903 (6) who gives up,  
7 waives, or returns to the employer or agent of the employer any part of the  
8 compensation to which the employee is entitled under his or her contract of  
9 employment or under the prevailing wage determination issued by the department  
10 or local governmental unit, or who gives up any part of the compensation to which  
11 he or she is normally entitled for work on a project on which a prevailing wage rate  
12 determination has not been issued under s. 66.0903 (3) or (6), 103.49 (3), 103.50 (3),  
13 196.3745 (5) (a) 5., or 229.8275 (3) during a week in which the person works  
14 part-time on a project on which a prevailing wage rate determination has been  
15 issued and part-time on a project on which a prevailing wage rate determination has  
16 not been issued, is guilty of a Class C misdemeanor.

17           **SECTION 22.** 946.15 (2) of the statutes, as affected by 2009 Wisconsin Act 28,  
18 is amended to read:

19           946.15 (2) Any person employed pursuant to a public contract as defined in s.  
20 66.0901 (1) (c) or employed on a project on which a prevailing wage rate  
21 determination has been issued by the department of workforce development under  
22 s. 66.0903 (3), 66.0904 (4), 103.49 (3), 103.50 (3), 196.3745 (5) (a) 5., or 229.8275 (3)  
23 or by a local governmental unit, as defined in s. 66.0903 (1) (d), under s. 66.0903 (6)  
24 or 66.0904 (6) who gives up, waives, or returns to the employer or agent of the  
25 employer any part of the compensation to which the employee is entitled under his



1 or her contract of employment or under the prevailing wage determination issued by  
2 the department or local governmental unit, or who gives up any part of the  
3 compensation to which he or she is normally entitled for work on a project on which  
4 a prevailing wage rate determination has not been issued under s. 66.0903 (3) or (6),  
5 66.0904 (4) or (6), 103.49 (3), 103.50 (3), 196.3745 (5) (a) 5., or 229.8275 (3) during  
6 a week in which the person works part-time on a project on which a prevailing wage  
7 rate determination has been issued and part-time on a project on which a prevailing  
8 wage rate determination has not been issued, is guilty of a Class C misdemeanor.

9 **SECTION 23.** 946.15 (3) of the statutes is amended to read:

10 946.15 (3) Any employer or labor organization, or any agent or employee of an  
11 employer or labor organization, who induces any person who seeks to be or is  
12 employed on a project on which a prevailing wage rate determination has been issued  
13 by the department of workforce development under s. 66.0903 (3), 103.49 (3), 103.50  
14 (3), 196.3745 (5) (a) 5., or 229.8275 (3) or by a local governmental unit, as defined in  
15 s. 66.0903 (1) (d), under s. 66.0903 (6) to permit any part of the wages to which that  
16 person is entitled under the prevailing wage rate determination issued by the  
17 department or local governmental unit to be deducted from the person's pay is guilty  
18 of a Class I felony, unless the deduction would be permitted under 29 CFR 3.5 or 3.6  
19 from a person who is working on a project that is subject to 40 USC 276c.

20 **SECTION 24.** 946.15 (3) of the statutes, as affected by 2009 Wisconsin Act 28,  
21 is amended to read:

22 946.15 (3) Any employer or labor organization, or any agent or employee of an  
23 employer or labor organization, who induces any person who seeks to be or is  
24 employed on a project on which a prevailing wage rate determination has been issued  
25 by the department of workforce development under s. 66.0903 (3), 66.0904 (4), 103.49

1 (3), 103.50 (3), 196.3745 (5) (a) 5., or 229.8275 (3) or by a local governmental unit, as  
2 defined in s. 66.0903 (1) (d), under s. 66.0903 (6) or 66.0904 (6) to permit any part of  
3 the wages to which that person is entitled under the prevailing wage rate  
4 determination issued by the department or local governmental unit to be deducted  
5 from the person's pay is guilty of a Class I felony, unless the deduction would be  
6 permitted under 29 CFR 3.5 or 3.6 from a person who is working on a project that is  
7 subject to 40 USC 3142.

8 **SECTION 25.** 946.15 (4) of the statutes is amended to read:

9 946.15 (4) Any person employed on a project on which a prevailing wage rate  
10 determination has been issued by the department of workforce development under  
11 s. 66.0903 (3), 103.49 (3), 103.50 (3), 196.3745 (5) (a) 5., or 229.8275 (3) or by a local  
12 governmental unit, as defined in s. 66.0903 (1) (d), under s. 66.0903 (6) who permits  
13 any part of the wages to which that person is entitled under the prevailing wage rate  
14 determination issued by the department or local governmental unit to be deducted  
15 from his or her pay is guilty of a Class C misdemeanor, unless the deduction would  
16 be permitted under 29 CFR 3.5 or 3.6 from a person who is working on a project that  
17 is subject to 40 USC 276c.

18 **SECTION 26.** 946.15 (4) of the statutes, as affected by 2009 Wisconsin Act 28,  
19 is amended to read:

20 946.15 (4) Any person employed on a project on which a prevailing wage rate  
21 determination has been issued by the department of workforce development under  
22 s. 66.0903 (3), 66.0904 (4), 103.49 (3), 103.50 (3), 196.3745 (5) (a) 5., or 229.8275 (3)  
23 or by a local governmental unit, as defined in s. 66.0903 (1) (d), under s. 66.0903 (6)  
24 or 66.0904 (6) who permits any part of the wages to which that person is entitled  
25 under the prevailing wage rate determination issued by the department or local

1 governmental unit to be deducted from his or her pay is guilty of a Class C  
2 misdemeanor, unless the deduction would be permitted under 29 CFR 3.5 or 3.6 from  
3 a person who is working on a project that is subject to 40 3142.

4 **SECTION 27. Nonstatutory provisions.**

5 (1) By the first day of the 4th month beginning after the effective date of this  
6 subsection, the public service commission shall, using the procedure under section  
7 227.24 of the statutes, promulgate the rules required under section 196.3745 (5) (a)  
8 4. and 13., (c), and (i) of the statutes, as created by this act, for the period before the  
9 effective date of the permanent rules promulgated under section 196.3745 (5) (a) 4.  
10 and 13., (c), and (i) of the statutes, as created by this act, but not to exceed the period  
11 authorized under section 227.24 (1) (c) and (2) of the statutes. Notwithstanding  
12 section 227.24 (1) (a), (2) (b), and (3) of the statutes, the public service commission  
13 is not required to provide evidence that promulgating a rule under this subsection  
14 as an emergency rule is necessary for the preservation of the public peace, health,  
15 safety, or welfare and is not required to provide a finding of emergency for a rule  
16 promulgated under this subsection.

\*\*\*\*NOTE: The above nonstatutory provision is new material. Do you also want to  
require emergency rules for the audit requirements under proposed s. 196.3745 (4) (a),  
(b), or (c)? Or for the prioritization rules under proposed s. 196.3745 (6) (d)?

17 **SECTION 28. Initial applicability.**

18 (1) The treatment of section 709.03 (form) C. 25m. of the statutes first applies  
19 to original real estate condition reports that are furnished on the effective date of this  
20 subsection.

21 **SECTION 29. Effective dates.** This act takes effect on the day after publication,  
22 except as follows:

hiring rules under proposed s.  
hiring rules under proposed s.  
196.3745 (5) (a) 14. or the



**2009-2010 DRAFTING INSERT  
FROM THE  
LEGISLATIVE REFERENCE BUREAU**

LRB-2740/P5ins  
MDK:.....

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**INSERT 2A:**

8) certifies that not less than 30 percent of the total hours worked on an individual energy efficiency improvement or renewable resource application will be performed by individuals who reside in the city, village, or town where the work is performed and who belong to historically disadvantaged or underrepresented groups;

**INSERT 15-19:**

14. Certifies to the commission that not less than 30 percent of the total hours of work performed by the contractor or subcontractor on an individual improvement or application will be performed by individuals who reside in the city, village, or town in which the work is performed and who are members of groups that are historically disadvantaged or underrepresented in the trades employed by the contractor or subcontractor, including women, individuals of color, and low-income individuals. The commission shall promulgate rules for making certifications under this subdivision.

✓  
✓  
\*\*\*\*NOTE: Subdivision 14. is new material. It replaces the material set forth in proposed s. 196.3745 (5) (j) in LRB-2740/P4. The reason that I moved the material from s. 196.3745 (5) (j) is that, by including it in subd. 14., it will also apply to work performed under ss. 16.26 and 196.374, which I assume is your intent. Is that okay?  
✓  
✓

**DRAFTER'S NOTE**  
**FROM THE**  
**LEGISLATIVE REFERENCE BUREAU**

LRB-2740/P5dn

MDK:f:....

*gjs*

*date*

Rep. Mason:

*that*

This version is identical to the previous version (LRB-2740/P4), except that the material ~~was~~ previously in proposed s. 196.3745 (5) (j) is moved to proposed s. 196.3745 (5) (a) 14. See the NOTE following proposed s. 196.3745 (5) (a) 14. ✓

Also note that I retained the NOTES in the previous version that point out the new material that is different from the material in LRB-2740/P3. When the draft is finalized, I will remove the NOTES to create a version of the draft that can be introduced, which can be produced fairly quickly.

Mark D. Kunkel  
Senior Legislative Attorney  
Phone: (608) 266-0131  
E-mail: mark.kunkel@legis.wisconsin.gov

**DRAFTER'S NOTE  
FROM THE  
LEGISLATIVE REFERENCE BUREAU**

LRB-2740/P5dn  
MDK:cjs:ph

January 11, 2010

Rep. Mason:

This version is identical to the previous version (LRB-2740/P4), except that the material that was previously in proposed s. 196.3745 (5) (j) is moved to proposed s. 196.3745 (5) (a) 14. See the NOTE following proposed s. 196.3745 (5) (a) 14.

Also note that I retained the NOTES in the previous version that point out the new material that is different from the material in LRB-2740/P3. When the draft is finalized, I will remove the NOTES to create a version of the draft that can be introduced, which can be produced fairly quickly.

Mark D. Kunkel  
Senior Legislative Attorney  
Phone: (608) 266-0131  
E-mail: [mark.kunkel@legis.wisconsin.gov](mailto:mark.kunkel@legis.wisconsin.gov)

## Kunkel, Mark

---

**From:** Kunkel, Mark  
**Sent:** Thursday, January 14, 2010 4:44 PM  
**To:** Selkove, Vicky  
**Subject:** RE: Local hiring question

Vicky,

Sorry for the delay in getting back to you but I've been busy on another big project.

Yes, the approach below takes care of the racial quota issue.

There is, however, a possibility that a local hire requirement would violate the privileges and immunities clause of the federal constitution. In short, the privileges and immunities clause prohibits a state from discriminating against citizens of other states in favor of its own citizens. In your bill, the local hire requirement discriminates against out-of-state contractors. When a court analyzes a state statute in light of the privileges and immunities clause, the court undertakes the following analysis:

1. Does the statute infringe a fundamental right of the out-of-state citizen that is protected by the constitution?
2. Is the out-of-state citizen against whom the statute is directed a "peculiar source of evil"?
3. Does the discrimination in the statute bear a substantial relationship to the evil that the out-of-state citizen represents?

As with any test, it is difficult to predict what a court would do. Moreover, you could probably make good arguments that your local hire requirements would survive the test. Therefore, I wouldn't eliminate the requirements from your bill based on a potential challenge. Nevertheless, I thought you should be aware of it.

I can get you a new draft that does what you want tomorrow by mid-morning.

Let me know how you want to proceed.

-- Mark

---

**From:** Selkove, Vicky  
**Sent:** Wednesday, January 13, 2010 7:03 PM  
**To:** Kunkel, Mark  
**Subject:** RE: Local hiring question

Thanks, Mark. What if we just utilized the language you had in the draft you sent Friday (P4, I believe): "Specifies that an energy efficiency improvement or renewable resource application is not eligible for an investment unless at least 25 percent of the employees of all contractors and subcontractors who perform work on the improvement or application reside in the city, village, or town in which the work is performed" which we liked and which seemed like a more elegant way of doing what we were trying to do in the first place. The only difference would be that we still want it to be 30% and not 25%.

Since we also have the cultural competency requirement for contractors, we'll just eliminate the women/disadvantaged group language and go with the above, as modified, instead. Does that make sense and help avoid this unconstitutionality issue?

Vicky

**Vicky Selkove**  
**Office of State Representative Cory Mason**  
**62nd Assembly District**  
Room 321 East, State Capitol  
PO Box 8953, Madison, WI 53708



Phone: (608) 266-0634  
Toll-free: (888) 534-0062

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**From:** Kunkel, Mark  
**Sent:** Wednesday, January 13, 2010 5:29 PM  
**To:** Selkove, Vicky  
**Subject:** Local hiring question

I spoke to some attorneys here and it looks like there is an issue that the local hire requirement imposes an unconstitutional racially-based quota. A way around that issue would be to establish a hiring goal, rather than a requirement, and to give the goal some teeth, require contractors and subcontractors to report on whether they've met the goal. Perhaps you could also allow the PSC to kick a contractor or subcontractor off the list if, based on the reports, they have rarely met the goal.

Let me know what you think.

-- Mark

## Kunkel, Mark

**From:** Selkowe, Vicky  
**Sent:** Friday, January 15, 2010 3:33 PM  
**To:** Kunkel, Mark  
**Cc:** Rep. Mason  
**Subject:** Comments/Answers to your questions on LRB 2740/P4

Hi Mark –

Several questions/comments and answers to your notes in the P4 draft. With only #1 below as the exception, I'm working from the P4 for page references, etc. because that's the version we marked up last weekend. I hope that's ok.

- ✓ 1. Re. local hire provisions: leave it as is in the P5.
2. Re. our discussion earlier this week of the minority hiring, Rep. Mason would like goal oriented language inserted along the lines of what you suggested in your email: "A way around that issue would be to establish a hiring goal, rather than a requirement, and to give the goal some teeth, require contractors and subcontractors to report on whether they've met the goal. Perhaps you could also allow the PSC to kick a contractor or subcontractor off the list if, based on the reports, they have rarely met the goal." And we then can remove the current #8 in the contractor requirement section, page 14, re. affirmative action/EO compliance. → *delete*
3. The descriptions of good cause state that if a contractor's past disciplinary actions and violations constitute good cause they can be **\*excluded\*** from the PSC list. I thought "good cause" was generally used to show that someone's violations are ok/excusable because of some deemed-legitimate reason, so if a contractor could demonstrate "good cause" for its violations, it would be allowed to be **\*included\*** on the list? Am I missing something or is this language as currently drafted backwards? *OK as is*
4. Answer to your note on page 11 in (4) Audits is: yes, the above is ok.
5. Answer to your note on page 12 in (4) Audits is: no, it is not ok to limit the post-audits to just the utilities. It should apply to both political subdivisions and utilities. However, we would like to simplify the post-audit language to simply require these post-audits to confirm that the work was done ("made or installed"). Please remove the rest of that clause re. "competent manner and whether the improvement or application operates in a cost-effective manner." *-A-NOTE mistake in \*\*\*+NOTE*
6. Answer to your note on page 15-16 re. #14 is: yes, it should apply to both the political subdivision and utility sections. However, we do also need it clarified that ALL of the contractor requirements, not just the local hire piece, in the bill apply to both the utilities and the political subdivisions.
7. Answer to your note on page 19 re. the new paragraph (d) is: no, it should not just apply to utilities. The bill needs to very clearly say that if the source of the spending is a grant under (8)(b) the political subdivision or the utility has to give the highest priority to residential, and if the source of spending is not a grant under (8)(b) then the political subdivision or the utility has to give highest priority to nonresidential. *These changes*
8. Answer to your note on page 27 in 27 Nonstatutory provisions is: yes, we do also want to require emergency rules for the audit, hiring, and prioritization rules.
9. Related to #6, above, based on the in-person conversation you, Cory & I had, we had thought you were going to ask the PSC (or others) for the definitions they use for residential, small commercial, and industrial. Are there definitions that could be inserted that would clarify the different priority areas based on energy used, or some other more specific definition of what type of premise it is? *OK as is*

As always, please let me know if you have questions about any of this.  
Vicky

**Vicky Selkowe**  
**Office of State Representative Cory Mason**  
**62nd Assembly District**  
Room 321 East, State Capitol

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## Kunkel, Mark

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**From:** Selkowe, Vicky  
**Sent:** Wednesday, January 20, 2010 10:53 AM  
**To:** Kunkel, Mark  
**Subject:** RE: Comments/Answers to your questions on LRB 2740/P4

Hi Mark –

Thanks for those responses. We've talked about it and will leave the below-referenced sections as you had them.

Do you need anything else from us to finalize the draft?

Vicky

**Vicky Selkowe**  
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**From:** Kunkel, Mark  
**Sent:** Friday, January 15, 2010 5:11 PM  
**To:** Selkowe, Vicky  
**Subject:** RE: Comments/Answers to your questions on LRB 2740/P4

Vicky, here are my comments the following:

1. You wrote: "The descriptions of good cause state that if a contractor's past disciplinary actions and violations constitute good cause they can be **\*excluded\*** from the PSC list. I thought "good cause" was generally used to show that someone's violations are ok/excusable because of some deemed-legitimate reason, so if a contractor could demonstrate "good cause" for its violations, it would be allowed to be **\*included\*** on the list? Am I missing something or is this language as currently drafted backwards?"

Response: I thought the intent was to require contractors or subcontractors to disclose the specified violations and, if the PSC determined that a particular violation was a good enough reason for exclusion from the list (i.e., that there was good cause for exclusion), the PSC would then exclude from the list. And because we weren't sure exactly what would constitute a good enough reason, we required the PSC to promulgate rules resolving the issue. I think this approach is consistent with the fact that the drafts up to this point have required contractors and subcontractors to disclose the violations as a condition for getting on the list. However it appears that you may want to approach the issue differently: Do you want to exclude a contractor or subcontractor from the list if it has committed any of the violations, unless the PSC determines that there is good cause for inclusion? If you want me to do that, let me know.

2. You wrote "based on the in-person conversation you, Cory & I had, we had thought you were going to ask the PSC (or others) for the definitions they use for residential, small commercial, and industrial. Are there definitions that could be inserted that would clarify the different priority areas based on energy used, or some other more specific definition of what type of premise it is?"

Response: I thought I could simplify the priority scheme by distinguishing between 1) residential customers and 2) nonresidential with the greatest demand for utility services (i.e. large utility customers). Under such a priority scheme, it wouldn't be necessary to distinguish between different types of nonresidential customers. Instead, for any type of nonresidential customer (industrial or commercial), the only thing that matters is how big its demand is (i.e., how large it is). As a result, for example, for improvements funded by a utility's own funds, a commercial customer that has greater demand than an industrial customer would have priority over the industrial customer. You could take a different approach and categorize the nonresidential customers into different classes, such as commercial and industrial. But the prioritization would be much more complicated because it would be based on more than two factors. Let me know if you

want to proceed in this manner.

3. You wrote: "Answer to your note on page 19 re. the new paragraph (d) is: no, it should not just apply to utilities. The bill needs to very clearly say that if the source of the spending is a grant under (8)(b) the political subdivision or the utility has to give the highest priority to residential, and if the source of spending is not a grant under (8)(b) then the political subdivision or the utility has to give highest priority to nonresidential."

Response: If the political subdivisions are only distinguishing between residential and nonresidential, this is an easy change to make. But if you want to also consider size of the customer (demand for utility service), it will be a bit complicated. How will a political subdivision know what the level of demand is? Do you want to require utilities to share info with political subdivisions so the political subdivisions can make prioritization?

-- Mark

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**Sent:** Friday, January 15, 2010 3:33 PM  
**To:** Kunkel, Mark  
**Cc:** Rep.Mason  
**Subject:** Comments/Answers to your questions on LRB 2740/P4

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Vicky

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