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September 29, 2014

Eileen McHugh
ESPC Program Coordinator
Department of Energy Resources
100 Cambridge Street, Suite 1020
Boston, MA 02114

Re: Proposed Regulations Relating to Energy Management Services Contracts and
On-Site Energy Generation Contracts

Dear Ms. McHugh:

I am writing in regard to the Department of Energy Resources' ("Department") proposed new regulations, 225 CMR 19.00, entitled "Energy Management Services Contracts Requests for Qualifications Process." The regulations are for the purposes of providing clarity and incorporating best practices when using M.G.L. c. 25A, § 11I, to procure energy management services ("EMS") contracts. As you know, the Office of the Inspector General ("Office") has recommended the development of such regulations. The Office has reviewed procurements of EMS contracts and found that these long-term, complicated arrangements are vulnerable to fraud, waste and abuse. The Department's regulations are an important step in providing local governmental units with proper guidance in procuring EMS contracts.

I do have several suggestions, however, for clarifying procedural aspects of the regulations and avoiding inconsistencies.

- 1) The definition of "Established Baseline" calls for three years of fuel, energy and water consumption data. However, section 19.03(1)(a)(6) and M.G.L. c. 25A, 11I, require two years of data. For consistency, I recommend that the Department require the same number of years of data in both the definition of "Established Baseline" and section 19.03(1)(a)(6).
- 2) Under the definition of "Request for Qualification," I recommend using the term "their capacity," instead of the term "the desire," which is vague. "Capacity" is

usually an indicator of financial worthiness and is similarly used in qualifying contractors for construction projects (see M.G.L. c. 149, § 44D1/2(e)(3)).

- 3) Throughout the document, I recommend that the Department replace any references to “proposal” with “response” or “statement of qualification”.
- 4) Under section 19.03(6)(b), I recommend that the suggested process for soliciting and evaluating responses be clarified to better reflect the steps to be used in selecting an EMS contractor: (a) an initial review to reject those who do not meet the minimum requirements of the RFQ; (b) the evaluation process to identify the most qualified persons; and (c) the IGA and the evaluation of the IGA.

In addition, numbers 3, 7 and 8 relate to contract performance and cost, which could only be evaluated after the IGA is completed. I therefore recommend adding a provision to section 19.04 to evaluate the IGA, which would include evaluating numbers 3, 7 and 8.

- 5) Under section 19.04, it is unclear who will conduct the IGA. For clarity, I recommend that the regulations specify that the most qualified person identified through the qualification review process conduct the IGA.

Also, to ensure that the IGA is “fair, competitive and reasonable” (see 19.05), since under this procurement method the IGA will be conducted by the potential EMS contractor who will go on to perform the contract, I recommend that the regulations require local governmental bodies to independently verify the proposed services and costs using state, federal and other guidance. If such verification is not required in the regulations, I recommend that the Department’s model documents and contracts address this issue.

Also, the regulations (or the Department’s model documents and contracts) related to conducting the IGA should include provisions specifying that (a) the preparation costs of the IGA may be deemed part of the costs of the EMS contract; (b) the local governmental body shall pay the costs incurred in preparing the IGA if the local governmental body does not execute an EMS contract; and (c) if the local governmental body determines that the IGA is not “fair, competitive and reasonable” (see 19.05), it will not pay for the IGA.

- 6) Under section 19.05, I recommend that the regulations (or the Department’s model documents and contracts) specify that in the event a local governmental body is unable to negotiate a satisfactory contract with the most qualified EMS contractor the second most qualified EMS contractor would be authorized to conduct another IGA, which would become the basis for undertaking negotiations and entering into a contract with that EMS contractor.
- 7) Under section 19.06(7), I recommend that the regulations (or the Department’s model documents and contracts) include provisions relative to what happens if any excess amount of energy savings is achieved. I further recommend that any such excess energy savings cannot be carried forward to be used towards the amount of energy savings guaranteed in future years.

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Overall, the Department has included language in the regulations that will guide local governmental bodies and help them to carefully assess the financial and other terms of these multi-faceted and complex contracts. The Department has also incorporated important safeguards, including provisions that that an EMS contract cannot exceed 20 years and that the contract may reflect the useful life of any cost savings measures. Also, for the construction and installation of energy conservation measures and energy conservation projects, the Department requires the EMS contractor to obtain performance and payment bonds.

I have enclosed a version of the draft regulations with my comments identified in the text. Please feel free to contact me or Mary Kolesar if you have any additional questions or concerns.

Sincerely,



Glenn A. Cunha
Inspector General

cc: Meg Lusardi, Acting Commissioner, Department of Energy Resources
Lisa Capone, Acting Director, Green Communities Division

Enclosure