

September 26, 2014

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

RE: EMS Regulations Comments

Dear Ms. McHugh:

Tanko Lighting appreciates the opportunity to submit comments on the Department of Energy Resources' (DOER) Regulatory Proceedings for Energy Management Services (EMS) and commends DOER for its efforts to streamline the regulations.

Tanko Lighting is a national firm that provides turn-key professional services to assist municipalities with energy efficient street light conversions. Tanko Lighting has participated in recent EMS procurement processes in Massachusetts regulated by Section 11I of Chapter 25A of the General Laws.

Tanko Lighting has reviewed the proposed new regulations for 225 CMR 19 – Energy Management Services (EMS) Contracts and the 225 CMR 19.00 Draft Regulations and provides the following comments.

#### Concerns

In Section 19.05: Contract Negotiation and Award, subsection (1) Contract Negotiation of 225 CMR 19.00 Draft Regulations, it states:

“The Local Governmental Body shall negotiate a contract with the most qualified person at compensation which it determines to be fair, competitive, and reasonable. If the Local Governmental Body is unable to negotiate a satisfactory contract with the person considered to be the most qualified at a price the Local Governmental Body determines to be fair, competitive and reasonable, negotiations with that person shall be formally terminated.”

Tanko Lighting is concerned that because the regulations do not provide a process by which a Local Governmental Body can determine “fair, competitive, and reasonable” compensation, it results in a lack of context of market rates and places the Local Governmental Body at risk for higher costs.

As they are currently drafted, the regulations only require that Investment Grade Audit (IGA) costs be included in the Request for Qualifications (RFQ). As such, it is conceivable

that a bidder could minimize (or even eliminate entirely) IGA costs in its response to the RFQ for the sake of being selected and then later price gouge the Local Governmental Body during the EMS contract negotiations phase – without the Local Governmental Body being aware of the inflated pricing. In the absence of exposure to any other pricing but the selected bidder’s pricing, the Local Governmental Body would not have a mechanism to determine what is “fair, competitive, and reasonable”. This scenario creates an unfair competitive advantage for the winning bidder and places the Local Governmental Body in the position of unknowingly wasting taxpayer funds.

#### Recommendations

Tanko Lighting respectfully recommends that the DOER consider adding language to the draft regulations that requires preliminary pricing for potential EMS phase measures to be included in the RFQ response. While it is understandable that many projects will not have all measures identified until the IGA is concluded, the Local Governmental Body could request preliminary pricing for a primary set of measures on a per unit basis that it believes will most likely be involved in the project. While this pricing would not be binding, it would at least provide a comparable data set that would allow the Local Governmental Body to better evaluate the RFQ responses. Indeed, part of being qualified to lead EMS projects is the bidder’s true market knowledge of relevant pricing for the project. Requiring at least a preliminary demonstration of this knowledge would protect the Local Governmental Body from being taken advantage of during the EMS contract negotiations process.

Tanko Lighting appreciates the DOER’s consideration of these comments and recommendations.

Sincerely,



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