

## 225 CMR 19.00

### 225 CMR 19.00: ENERGY MANAGEMENT SERVICES (EMS) CONTRACTS REQUESTS FOR QUALIFICATIONS PROCESS

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#### 19.01: Application and Authority.

(1) Application. 225 CMR 19.00 shall apply to the procurement of Energy Management Services using a Request for Qualifications, which may include On-site Energy Generation by a Local Governmental Body. Any dispute as to inclusion or exclusion within the provisions of 225 CMR 19.00 shall be determined by DOER.

(2) Authority. 225 CMR 19.00 is promulgated pursuant to M.G.L. c. 25A, §11I.

#### 19.02: Definitions.

Business Day. A business day shall mean Monday through Friday, exclusive of state and federal legal holidays.

Central Register. The publication maintained by the Secretary of the Commonwealth that publishes Notices of RFQs.

Certificate of Eligibility. A certificate provided by DCAMM under M.G.L. c. 149 §44D, indicating a Contractor's qualifications to perform the EMS.

Commissioner. The Commissioner of DOER established by M.G.L. c. 25A §1.

Contractor. The vendor selected by the Local Governmental Body to perform the EMS solicited pursuant to 225 CMR 19.00.

DCAMM. Division of Capital Asset Management & Maintenance, established by M.G.L. c. 7, §4A.

DOER. The Department of Energy Resources, established by M.G.L. c. 25A, §1.

EMS Annual Report. A report form required by DOER that must be completed by the Local Governmental Body summarizing the energy or water unit and dollar cost savings. The initial report providing estimated savings must be filed along with the EMS contract and thereafter within 90 days after the anniversary of the Guaranteed Energy Performance Period.

Energy Audit. A systematic inspection, verification and determination of the energy consumption characteristics of a building or facility which:

- (1) identifies the type, size and rate of energy consumption of such building or facility and the major energy using systems of such building or facility;
- (2) determines appropriate Energy Conservation maintenance and operating procedures; and
- (3) indicates the need, if any, for the acquisition and installation of Energy Conservation Measures or On-site Energy Generation.

Energy Conservation. A modification of, or change in, the operation of real or personal property in a manner likely to improve the efficiency of energy use, and shall include Energy Conservation Measures and any Energy Audits to identify and specify energy and cost savings.

Energy Conservation Measures. Measures involving modifications of maintenance and operating procedures of a building or facility and installations therein, which are designed to reduce energy and water consumption in such building or facility, or the installation or modification of an installation in a building or facility which is primarily intended to reduce energy and water consumption.

Energy Conservation Projects. Projects to promote Energy Conservation, including but not limited to energy conserving modification to windows and doors; caulking and weather stripping; insulation, automatic energy control systems; hot water systems; equipment required to operate variable steam, hydraulic and ventilating systems; plant and distribution system modifications, including replacement of burners, furnaces or boilers; devices for modifying fuel openings; electrical or mechanical furnace ignition systems; utility plant system conversions; installation of water saving devices; replacement or modification of lighting fixtures; energy recovery systems; on-site electrical generation equipment using new Renewable Energy generating sources as defined in M.G.L. c. 25A, § 11F; and cogeneration systems.

Energy Management Services (EMS). A program of services, including Energy Audits, Energy Conservation Measures, Energy Conservation Projects or a combination thereof, and building maintenance and financing services, primarily intended to reduce the cost of energy and water in operating buildings, which may be paid for, in whole or in part, by cost savings attributable to a reduction in energy and water consumption that result from such services. The EMS contract may extend for a term not to exceed 20 years. The allowable length of the contract may also reflect the useful life of the cost savings measures.

Energy Savings. A measured reduction in fuel and its costs, energy and its costs, water and its costs, or operating or maintenance costs resulting from the implementation of Energy Conservation Measures or Energy Conservation Projects; provided, however, that any payback analysis to evaluate the Energy Savings of a geothermal energy system to provide heating, cooling or water heating over its expected lifespan shall include gas and electric consumption savings, maintenance savings and shall use an average escalation rate based on the most recent information for gas and electric rates compiled by the Energy Information Administration of the United States Department of Energy.

Established Baseline. A written description of previous fuel, energy, and water consumption data and operating and maintenance costs for the past three years, including, but not limited to, future capital replacement expenditures avoided as a result of equipment installed or services performed. The description shall be included in the RFQ.

Guarantee of Generation. The written guarantee of a Contractor warranting the particular electrical energy generation derived from an On-site Energy Generation unit. Such written guarantee shall include:

- (1) a detailed description of the equipment to be installed; and
- (2) the annual amount of electrical energy to be generated in kilowatt hours per year.

Guarantee of Savings. The written guarantee of a Contractor warranting the Energy Savings derived from a particular Energy Conservation Measure, Energy Conservation Project, EMS, or Energy Savings. Such written guarantee shall include a detailed description of the cost of the energy or water conservation or usage measures, all causally connected work, and ancillary improvements provided for in the contract. The guarantee shall state the annual savings expressed in applicable energy units or (if water savings) in gallons per year and be based on dollars saved by reference to established unit rates.

Guaranteed Maximum Cost. The fixed maximum cost of the EMS, including:

- (1) the cost of each Energy Conservation Measure and Energy Conservation Project, after installation, startup, and testing; and
- (2) the total payments made by a Local Governmental Body to a Contractor, including but not limited to, the total capital investment and the Contractor's costs.

Utility sponsored rebates, tax credits or other incentives, any direct governmental subsidies, interest payments, and energy and water cost savings shall not be deducted from the Guaranteed Maximum Cost.

Guidelines. A set of clarifications, interpretations, and procedures, including forms and model documents, developed and issued by DOER to assist it in determining compliance with 225 CMR 19.00. Each Guideline shall be effective on its date of issuance or on such date as is specified therein, except as otherwise provided in 225 CMR 19.00.

Investment Grade Audit (IGA). An Energy Audit that includes a detailed evaluation of the Energy Conservation Project cost, including but not limited to the investment opportunities for Energy Conservation Measures, operations and maintenance. The IGA shall provide a return on investment that represents an optimized bundle of short-term payback Energy Conservation Measures combined with long-term payback Energy Conservation Measures to meet Local Governmental Body Energy Savings and financial goals.

Local Governmental Body. A city, town, district, regional school district or county, or an agency or authority thereof, including a housing authority, board, commission, department or instrumentality of a city, town district, regional school district or county, and any other agency that is not a state agency or building authority; or a combination of two or more such cities, towns, districts, regional school districts or counties, or agencies or authorities thereof.

On-site Energy Generation. The generation of Renewable Energy or the cogeneration of electricity and heating or cooling of a generation unit located on or adjacent to a building or structure owned by a Local Governmental Body that utilizes some or all of the energy so generated either directly or indirectly through net metering, as defined in M.G.L. c 164, §138.

Renewable Energy. The electrical energy output of an RPS Class I Renewable Generation Unit, Solar Carve-Out Renewable Generation Unit, or Solar Carve-Out II Renewable Generation Unit as defined under 225 CMR 14.00: *Renewable Energy Portfolio Standards – Class I*.

Request for Qualifications (RFQ). A written document issued by a Local Governmental Body that invites qualified providers to submit responses outlining their qualifications, the desire to perform the EMS for the Local Governmental Body, and other information required by 225 CMR 19.00 and the Local Governmental Body.

Responsive Offeror. A person who has submitted a proposal, which conforms in all respects to the RFQ and who possesses the skill, ability, and integrity necessary to faithfully perform the work, based upon a determination of competent workmanship and financial soundness in accordance with M.G. L. c. 149, §44D.

RFQ Compliance Certification. A form prepared by DOER from time to time that is completed and signed by a duly authorized officer of the Local Governmental Body, certifying that the Local Governmental Body's RFQ for EMS is in full compliance with 225 CMR 19.00 and M.G.L. c. 25A, § 11I.

Update Statement. A form developed by DCAMM, as defined in 810 CMR 4.01: *Definitions*, to be completed by a general contractor and submitted with all proposals.

19.03: Request For Qualifications.

(1) RFQ Terms. A Local Governmental Body shall solicit competitive sealed proposals through an RFQ. Except for those soliciting only On-site Energy Generation, requirements set forth in 225 CMR 19.03(2), every RFQ shall, at a minimum, include the following:

- (a) A general description of those buildings to be addressed by the RFQ, including where applicable:
  - 1. the general purpose for which the building is used, the physical location, and approximate hours of daily occupancy;
  - 2. the approximate size, age, and condition of the building envelope;
  - 3. a general description of the heating and cooling systems including the approximate age, condition, and fuel type(s);
  - 4. a general description of the heating and cooling distribution and control systems;
  - 5. a general description of the lighting and lighting control systems; and
  - 6. fuel, electricity, and water consumption data for the past two years;
- (b) A general statement of the minimum scope of building improvements proposed by the Local Governmental Body;
- (c) A request that the Responsive Offeror provide recommendations to address building improvements referenced in 225 CMR 19.03(1)(b), and where applicable, additional improvements for:
  - 1. the building envelope;
  - 2. the heating and cooling systems;
  - 3. the lighting and control systems; and
  - 4. any other recommendations for Energy Savings sought by the Local Governmental Body;
- (d) A statement of objectives, identifying the Local Governmental Body's priorities, on which the proposals will be evaluated. The statement of objectives may include Energy Savings, reducing energy and/or water consumption, funding major capital improvements, and improving building operating conditions;
- (e ) A requirement to submit a Certificate of Eligibility and the most current Update Statement; and
- (f) A requirement to submit the cost of an IGA.

(2) RFQ Terms For On-site Energy Generation. A Local Governmental Body that is soliciting proposals for solely the construction of On-site Energy Generation shall be required to solicit competitive sealed proposals through an RFQ process. An RFQ shall at a minimum include the information listed below:

- (a) A general description of those buildings or facilities to be addressed by the RFQ, including:
  - 1. the general purpose for which the building or facility is used, and approximate hours of daily occupancy;
  - 2. any permitting requirements;
  - 3. the conditions (surface, subsurface, and underground facilities) at the site; and
  - 4. For rooftop installations, the approximate size, age and condition of the building, including the roof where the system will be mounted;
- (b) A statement of objectives, identifying the Local Governmental Body's priorities on which proposals will be evaluated; and
- (c) A requirement to submit a Certificate of Eligibility and the most current Update Statement.

(3) Notice of EMS Procurement. All Local Governmental Bodies shall file a notice of EMS procurement with DOER at least 15 Business Days prior to filing the RFQ with the Secretary of the Commonwealth for publication in the *Central Register*. The notice of EMS procurement shall include a copy of the RFQ, the contact information, the name of the Local Governmental Body, the physical address, the name and contact information for the Chief Procurement Officer, if applicable, or an alternative local governmental official with equivalent responsibilities, and the current phone number and email address for the person responsible for the RFQ. The Local Governmental Body shall use the most current forms and associated instructions, including all required information, documentation, and assurances provided by DOER.

(4) Acknowledgment of Receipt. Upon receipt of a notice of EMS procurement, EMS contract, or EMS contract amendment from a Local Governmental Body, DOER shall determine whether it is complete and satisfies all requirements.

- (a) If such notice is deemed incomplete, DOER shall identify all information necessary to complete the filing and notify the Local Governmental Body in writing within ten Business Days of receipt.
- (b) Once DOER has deemed that the notice of EMS procurement, EMS contract, or EMS contract amendment is complete, DOER shall, within ten Business Days of receipt, email an acknowledgement of receipt to the contact person named in the Notice and the Chief Procurement Officer which does not constitute a review or approval of the RFQ, EMS contract, or EMS contract amendment by DOER.

- (c) A Local Governmental Body shall not issue and publish an RFQ, or execute an EMS contract or contract amendment until the Local Governmental Body receives an acknowledgment of receipt from DOER.
- (d) Publication by the Local Governmental Body of an RFQ or execution of an EMS contract or contract amendment prior to receipt of an acknowledgment of receipt shall be deemed to be a violation of the procurement process under 225 CMR 19.00, unless the Local Governmental Body has not received a response from DOER within ten Business Days of receipt.

(5) Publication of RFQ. A Local Governmental Body may only publish an RFQ for EMS if the RFQ process is in compliance with 225 CMR 19.00. Such publication of an RFQ shall also comply with the requirements of M.G.L. c. 149, § 44J(1). Local Governmental Bodies are encouraged to provide longer than required posting and publication periods, when appropriate, to increase fair competition among Responsive Offerors.

(6) Response Opening and Evaluation.

- (a) Response Opening. A Local Governmental Body shall open proposals publicly, in the presence of two or more witnesses, at the time specified in the RFQ, and shall be available for public inspection.
- (b) Response Evaluation. A Local Governmental Body shall evaluate each proposal and award each contract based solely on the criteria set forth in the RFQ. Unless no other manner of description suffices, and the Local Governmental Body so determines in writing, the requirements for a basis of determination may not result in exclusively requiring a proprietary supply or service, or procurement from a sole source. Response evaluation criteria shall include, but not be limited to, the following:
  - 1. references of other Energy Savings contracts performed;
  - 2. the Certificate of Eligibility and Update Statement;
  - 3. quality of the products proposed;
  - 4. methodology of determining Energy Savings;
  - 5. general reputation and performance capabilities including responsiveness and responsibility;
  - 6. substantial conformity with the specifications and other conditions set forth in the RFQ;
  - 7. time specified in the RFQ for the performance of the contract;
  - 8. technical merit and cost to the Local Governmental Body; and
  - 9. any other factors the Local Governmental Body considers reasonable and appropriate, which factors shall be made a matter of record.

The Local Governmental Body shall conduct discussions with, and may require public presentations by, each person who submitted qualifications in response to the RFQ regarding his qualifications, approach to the project and ability to furnish the required services. The Local Governmental Body shall select in order of preference three such persons, unless fewer persons respond, it considers to be the most highly qualified to perform the required services.

The Local Governmental Body may request, accept and consider proposals for the compensation to be paid under the contract only during competitive negotiations conducted under 225 CMR 19.05(1).

19.04: Investment Grade Audit Agreement.

Prior to negotiating a contract for EMS with the most qualified person under 225 CMR 19.05(1), the Local Governmental Body shall enter into an Investment Grade Audit contract for design and engineering services. A Local Governmental Body shall only negotiate a contract for EMS after completing an IGA. The IGA agreement shall include the following requirements:

- (a) Price data on each proposed Energy Conservation Measure and Energy Conservation Project that includes a breakdown of each Energy Conservation Measure and Energy Conservation Project cost structure, mark-ups, overhead, and profit;
- (b) Estimated Guarantee of Savings or Energy Savings based on the specified savings calculation methodology prescribed by the most recent standards established by the Federal Energy Management Program (FEMP) Guide for Measurement and Verification; and
- (c) The minimum payment terms including, but not limited to, all payments to the Contractor; any related Energy Savings; revenues such as utility sponsored rebates; tax incentives or other incentives; and payments to the Local Governmental Body.

19.05: Contract Negotiation and Award.

- (1) Contract Negotiation. The Local Governmental Body shall negotiate a contract with the most qualified person at compensation which it determines is 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. The Local Governmental Body shall then undertake negotiations with the second most qualified person. Failing accord with the second most qualified person, the Local Governmental Body shall terminate those negotiations and then undertake negotiations with the third most qualified person. Should the Local Governmental Body be unable to negotiate a satisfactory contract with any of the selected persons, it may select additional qualified providers who responded to the RFQ, in the order of their competence and qualification, and continue negotiations in accordance with this subsection until either an agreement is reached or the Local Governmental Body cancels the RFQ.



(2) Contract Award.

- (a) A Local Governmental Body shall only award a contract for EMS if all the requirements of 225 CMR 19.00 have been met. At least 15 Business Days prior to execution of an EMS contract, the Local Governmental Body shall file with DOER a final copy of the contract along with DOER's EMS Annual Report with projected energy and water cost savings estimates. Within 15 Business Days after the contract is executed, the Local Governmental Body shall file an electronic copy of the executed contract with the Commissioner of DOER under the terms of the DOER *EMS Contract Submission Guideline*, available on the DOER website.
- (b) The Local Governmental Body shall provide public notice of the meeting at which it proposes to award the EMS contract, of the name of the parties to the proposed contract and of the purpose of the contract. The public notice shall be made at least ten days before the meeting. The Local Governmental Body shall promptly publish in the *Central Register* notice of the award and shall provide the Commissioner with notice of the award and a copy of the EMS contract.
- (c) Before entering into a contract for EMS, the Local Governmental Body shall require the Responsive Offeror to file with the Local Governmental Body payment and performance bonds for construction and installation of Energy Conservation Measures and Energy Conservation Projects in an amount equal to 100% of the estimated contract value from a surety company licensed to do business in the commonwealth and whose name appears on United States Treasury Department Circular 570.

19.06: Contract Terms.

The EMS contract shall conform to the terms included in the RFQ, utilize the terms and conditions set forth in Guidelines established by DOER, and conform to other terms required by law and by the Local Governmental Body. The Contract shall include, but not be limited to, the following provisions:

- (1) A description of:
  - (a) each required Energy Conservation Measure;
  - (b) each water conservation measure; and
  - (c) each unit producing On-site Energy Generation, to be installed by the Contractor. Such description shall include the cost of each measure or unit, the Energy Savings, or in the case of On-site Energy Generation, the energy to be generated, and the method to be used to measure and verify said Energy Savings or energy generated that conform to the most recent standards established by the FEMP of the United States Department of Energy;

- (2) All services and to be provided by the Contractor and the associated costs, including but not limited to, operation and maintenance services, measurement and verification services, and costs thereof, if applicable;
- (3) The payment terms;
- (4) The fixed Guaranteed Maximum Cost;
- (5) The fixed minimum Guarantee of Savings or in the case of On-site Energy Generation the Guarantee of Generation, measured in the appropriate unit of energy when compared with an Established Baseline of previous fuel, energy, water and operating or maintenance costs, including, but not limited to, future capital replacement expenditures avoided as a result of equipment installed or services performed;
- (6) The method to make the Local Governmental Body whole in the case of Guaranteed Savings or Generation shortfall, to be determined annually; and
- (7) A written guarantee of the Contractor that either the amount of Energy Savings guaranteed shall be achieved or the Contractor shall reimburse the Local Governmental Body for the shortfall amount. Methods for measurement and verification of Energy Savings shall conform to the most recent standards established by the FEMP of the United States Department of Energy.

Payments under a contract for EMS may be based in whole or in part on any cost savings attributable to a reduction in energy and water consumption due to the Contractor's performance or revenues gained due to the Contractor's services which are aimed at energy and water cost savings.

#### 19.07: Contract Amendments.

An EMS contract may be amended if it does not exceed the scope of the RFQ, and does not violate the requirements established in M.G.L. c. 25A, §11I, 225 CMR 19.00, and all other applicable laws of the Commonwealth. The Local Governmental Body shall file a copy of a contract amendment with DOER on or before ten Business Days before the effective date of the applicable contract amendment.

#### 19.08: Monitoring and Reporting Requirements.

For the duration of the EMS contract term, the Local Governmental Body shall annually file with DOER an Annual Report utilizing the Guidelines established by DOER. Said Annual Report shall be filed not later than 90 days from the first anniversary of the effective date of the contract, and every year thereafter on the same date, ending with a final report on the contract termination date, or any time before six months after the contract termination date.

19.09: Enforcement; Complaint Processing Procedures; and Disputes.

- (1) Document Inspection: DOER may audit the accuracy of all information submitted under 225 CMR 19.00. The Department may request and obtain from any Local Governmental Body or Contractor information that the Department determines necessary to monitor compliance with and enforcement of 225 CMR 19.00.
- (2) Audit and Site Inspection: Upon reasonable notice to a Local Governmental Body or Contractor, DOER may conduct audits, which may include inspection and copying of records and/or site visits, including but not limited to, all files and documents that DOER determines are related to compliance with 225 CMR 19.00.
- (3) DOER shall investigate any complaints of non-compliance with M.G.L. c. 25A, §11I and 225 CMR 19.00 subject to the following procedures and requirements:
  - (a) Any person may file with DOER a complaint of non-compliance with the requirements of M.G.L. c. 25A, §11I and 225 CMR 19.00.
  - (b) The complaint shall be in writing, mailed to the Commissioner and the relevant Local Governmental Body, certified mail return receipt requested, and shall include the following information:
    1. the name, address, email address, and phone number of the person filing the complaint;
    2. the name of the entity about whom the complaint is filed;
    3. a detailed description of the nature of the alleged non-compliance, including but not limited to, all applicable dates, the applicable statutory and regulatory requirement(s) allegedly violated, and names of any other persons involved in and aggrieved by the non-compliance;
    4. a statement demonstrating that the complaint has been brought to the attention of the Local Governmental Body and describing all previous efforts to resolve or correct the non-compliance with the Local Governmental Body; and
    5. any supporting documentation.
- (4) Upon receiving a written complaint which complies with the requirements established in 225 CMR 19.09(3) or upon its own initiative, DOER shall conduct an investigation if it has reasonable cause to believe a violation has occurred.
- (5) DOER shall notify the Local Governmental Body or individual that is the subject of the complaint of the alleged violation and the existence of the investigation within a reasonable period of time.
- (6) After giving such notice, DOER may:
  - (a) Contact the person filing the complaint to request additional information;
  - (b) Request information, including existing documentation and verbal or written explanations, from the Local Governmental Body regarding the complaint; and

- (c) Contact other persons, including Responsive Offerors and the selected Contractor, to seek additional information regarding the complaint. All persons including but not limited to Responsive Offerors, Local Governmental Bodies, and Contractors, involved in the RFQ procurement which is the subject of the complaint, shall comply fully with any such investigation and provide such information as DOER may require.
- (7) If DOER determines after its initial investigation that there has been no violation of M.G.L. c. 25A §11I or 225 CMR 19.00, then DOER shall terminate the investigation and notify the subject of the complaint of its finding, in writing.
- (8) If DOER determines after its initial investigation concludes that there is evidence to support its investigative conclusion that a violation occurred, DOER shall conduct a hearing under 801 CMR 1.00 et seq. The hearing shall determine whether there was a violation of M.G.L. c. 25A §11I or 225 CMR 19.00.
- (9) If, after a hearing, there is a finding that a violation did occur, the Commissioner may order:
  - (a) Immediate and future compliance with M.G.L. c. 25A, §11I or 225 CMR 19.00;
  - (b) Any specific action to correct the violation;
  - (c) Nullification of any actions taken, including issued RFQs, or executed contracts; or
  - (d) Other appropriate action.
- (10) DOER may forward its findings and any order to the Attorney General or Inspector General for further investigation.
- (11) The Commissioner may seek enforcement of any Order issued under 225 CMR 19.00 in the Superior Court of Suffolk County.
- (12) The decision of the Local Government Body regarding the selection of a Contractor shall be final and not subject to appeal except on the grounds of fraud or collusion.

19.10: Waivers.

- (1) The Commissioner of DOER may grant a waiver from one or more provisions or requirements of 225 CMR 19.00 upon written request of a Local Governmental Body and a showing of special or exceptional circumstances or need, provided that such written request shall at a minimum meet the following conditions:
  - (a) The waiver request must be in writing, signed by the Chief Executive Officer, or a designee, of the Local Governmental Body, specifying the provisions of 225 CMR 19.00 to be waived;

- (b) The written waiver request must be mailed to the Commissioner by certified mail, return receipt requested;
- (c) The waiver request must provide a detailed explanation of why the waiver should be granted, including all documentation supporting the special circumstances or need for such waiver including all information and documentation required by DOER; and
- (d) The waiver request must include a statement that the Local Governmental Body has made a good faith effort to comply with the applicable requirements of 225 CMR 19.00.

(2) Any waiver granted by the Commissioner of DOER shall not relieve the Local Governmental Body from any responsibility or obligation to comply with the other provisions of 225 CMR 19.00 or any other requirement of law.

19.11: Severability.

If any provision of 225 CMR 19.00 is declared or found to be illegal, unenforceable or void, Local Governmental Bodies shall be relieved of all obligations under that provision only, and all other provisions shall remain in full force and effect.

REGULATORY AUTHORITY

225 CMR 19.00: M.G.L. c. 25A, §11I.