

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

Re: Comments on 225 CMR 19.00 Draft

Dear Eileen:

On behalf of the NAESCO members that work in Massachusetts, I want to thank you for the opportunity to comment on these draft regulations.

Introduction to NAESCO

NAESCO is the leading national trade association of the energy services industry. NAESCO numbers among its members some of the world's leading energy services companies, including: ABM Energy, AECOM Energy, , Ameresco, , CM3 Building Solutions, Clark Energy Group, ClearEnergy Contracting, Climatec, ConEdisonSolutions, Constellation New Energy, Control Technologies and Solutions, CTI Energy Services, , Energy Control Inc, Energy Solutions Professionals, Energy Systems Group, Entegreity, Excel Energy, The Fulcrum Group, Indoor Environmental Services, NextEra Energy Solutions, Honeywell, Johnson Controls, Lockheed Martin, McClure Energy, Navitas, NORESO, Onsite Energy, Opterra Energy Services, Pepco Energy Services, Performance Services, Schneider Electric, Siemens Industry, Southland Industries, Synergy Companies, Trane, UCONS, and Wendel Energy Services. Utility members include the New York Power Authority, Pacific Gas & Electric, and Southern California Edison.

During the last twenty years, NAESCO member companies have delivered hundreds of energy efficiency, renewable energy, demand response, distributed generation and combined heat and power projects to institutional, commercial, residential and industrial customers in Massachusetts. Nationally, NAESCO member company projects have produced:

- \$45 billion in projects paid from savings
- \$50 billion in savings – guaranteed and verified
- 400,000 person-years of direct employment
- \$30 billion of infrastructure improvements in public facilities
- 450 million tons of CO2 savings at no additional cost

Most of these projects are Energy Savings Performance Contracts (ESPC), which don't require new taxes, because they re-purpose the money that a customer is currently spending on wasted energy into a payment stream for the energy-saving capital improvements.

In addition to this extensive project implementation history, NAESCO has been part of the project teams that have drafted and revised the US DOE sponsored model ESPC document set for use by state and local governments over the past decade. We also work under contract to both the Oak Ridge and Lawrence Berkeley National Laboratories to assist the Federal Energy Management Program (FEMP) to analyze the project development processes of various federal and state ESPC program administrators to develop a set of best practices that FEMP can implement.

Summary of Comments

NAESCO strongly supports the efforts of DOER to promote the widespread use of Energy Savings Performance Contracts (ESPC) in local government facilities and K-12 schools, and we appreciate the work that you personally have done over the past decade to ensure that each ESPC project delivers the savings that taxpayers expect. We respectfully suggest, however, that these draft regulations go too far. We think they will make the ESPC project development process under Section 25A, 11I more cumbersome, rather than more streamlined, because the draft is trying to make the RFQ process more closely resemble the RFP process. We think this is contrary to the intent of the legislature, which established the RFQ process as an alternative to the RFP process, not a minor variation on the RFP process. Moreover, we believe the regulations also run counter to the intent of the legislature when they enacted Section 25A, 11I.

Discussion

Our comments are detailed below, and follow the order of the sections of the proposed regulations.

19.02 – Definitions – Guaranteed Maximum Cost

We think that the use of this term may cause some confusion among customers. The term is used in 19.06(4) in the form “fixed Guaranteed Maximum Cost” which appears to mix descriptions typically used for two different types of construction contracts: Fixed Price and Guaranteed Maximum Price (GMP).

- In a typical ESPC contract, the customer agrees to pay the ESCO a Fixed Price for a scope of work defined in the project contract.
- Another form of ESPC contract uses a GMP, usually in a project in which the ESCO functions as a construction manager at risk. The project contract does not contain a fixed price, but rather contains a scope of work along with the ESCO's guarantee that the price of the project will not exceed a maximum amount. The ESCO then bids out the various pieces of the scope of work to subcontractors, and the project contract usually contains a formula by which the ESCO and the customer agree to split any savings, if the final cost of the project is less than the GMP. The ESCO is solely responsible for any costs above the GMP.

To eliminate confusion, we suggest that DOER use the standard terminology or “Fixed Price” and “Guaranteed Maximum Price.”

19.03(1)(a)6 – RFQ Terms

The requirement that every RFQ include a full set of energy bills for every facility covered by the RFQ for two years is unnecessary and does not appear to recognize the difficulty that many customers have assembling this information. ESCOs are used to

providing responses to RFQs based on incomplete energy use information, because they have enough experience to estimate missing information for typical facilities. This provision would seem to force customers to hire consultants to assemble the information, which is an unnecessary extra cost for the customer, as it is part of the IGA process, and ESCOs are expert in collecting old bills from utilities and other energy suppliers and organizing them into the databases that feed their building models.

19.03(1)(f) – RFQ Terms

The requirement that an RFQ ask the ESCO for a price on the IGA runs the risk of skewing the ESCO selection process in a way that is not in the best interests of the customer. The price of the IGA is a very small fraction of the cost of a project, and is really only relevant if the customer decides to terminate the project at the end of the IGA process, and is liable for paying the ESCO the price of the IGA. If this is the only cost criterion in the RFQ, the customer runs the risk of selecting an ESCO based on a low-ball IPA cost, rather than the full qualifications of the ESCO. Selection based on such minor criteria is not what DOER should be promoting. It would be better for DOER to counsel a customer that is genuinely uncertain about whether it wants to implement an ESPC project to firm up its decision process before engaging an ESCO.

19.03(1)(6)(b)3 and (b)8 – Response Evaluation

These selection criteria indicate that DOER thinks that the RFQ selection process should solicit project equipment specifications and project cost. These criteria may be appropriate for an RFP, but not for an RFQ, in which the selection of the ESCO is determined by the qualifications of the ESCO, not equipment specifications and cost for a project that has not been scoped. Customers that are interested in making project pricing a part of their RFQ today require the respondent to include a mark-up percentage for all their soft costs, such as Overhead, Profit, Engineering, Construction Management, etc., which can provide useful comparative information for customers.

19.03(3) – Notice of EMS Procurement

The last section in this sentence is unclear. Is DOER saying that the customer must use a specified form to notify DOER of the pending RFQ, or is DOER saying that the customer must use a specified DOER form for the RFQ itself? Best practices in ESPC procurement are that the state agency charged with promoting ESPC to local governments publishes a set of recommended forms and offers to help local governments in the use of the forms, but does not mandate the use of the forms, because the state agency has no authority to dictate the details of local government or K-12 procurements. Note that this limitation on the state agency's authority over local government projects is in contrast to the state's authority over projects in state buildings, where the state does have the power to dictate the details of project procurement, but that authority is usually conferred on the state's landlord agency (e.g., DCAM). We urge DOER to make the use of its RFQ forms voluntary, in accordance with national best practices.

19.04 – Investment Grade Audit Agreement

This provision mandates that negotiation of the EMS contract cannot begin until after the Investment Grade Audit (IGA) is completed. Unfortunately, this provision runs counter to

the best practices in ESPC project development and does not recognize the scheduling issues that often force the acceleration of project development. We are certainly not advocating that the EMS contract be signed before the IGA is completed and accepted, but there are good reasons for conducting the IGA, contract negotiations and finance negotiations concurrently, rather than sequentially.

NAESCO's work for FEMP in analyzing various project development processes indicates that this concurrent work is the best practice because the IGA, the project contract and the project financing are interactive. This is especially important in local government and K-12 projects, in which the customer's financial officials and legal counsel are often unfamiliar with ESPC. It is much more efficient for them to be educated about the technologies and economics as the IGA is being conducted, and to provide their feedback into the IGA process about acceptable project economics and contract terms in real time, rather than after the IGA is completed. If the finance officials or legal counsel have insurmountable objections to certain technologies, it is better to eliminate their consideration before the ESCO incurs costs to scope and price them in the IGA.

A second factor is that the project development schedule has to be compressed in many projects in order to fit the customer's timeframe for project construction. For example, it is often desirable for most of the construction work on K-12 projects to be done over the summer, when work in classrooms can be done during the first shift, rather than the more expensive second or third shifts, and in advance of the October 15 heating date. Unfortunately, the decision-making process in many school systems is slow, so that if project contract negotiation has to wait until after the IGA is completed, the summer construction period is missed, which imposes additional costs and operational problems (e.g., supplying temporary heat while the replacement of a defunct boiler is completed) on the customer.

19.05(2)(a) – Contract Award

Three weeks is too long a lead time for the customer to inform DOER of its intent to execute a contract. As per the discussion above, the time frame for project development is often compressed, and a three-week notice requirement can significantly impact a project construction schedule. Likewise, the two-week notice requirement in 19.07 – Contract Amendments can cause significant problems, because it appears to insert DOER into the project management process in the field, and would interfere with the ability of the customer and the ESCO to agree on a timely and cost-effective remedy for an undiscovered field condition. We urge DOER to reduce the lead time for project execution to five business days, and to eliminate the lead time requirement for contract amendments.

19.06 – Contract Terms

As per the discussion of the RFQ above, we do not think that DOER has the authority to dictate the terms of a contract between a Local Government Body and an ESCO, and trying to dictate these terms runs contrary to national best practices. DOER should make available its recommended contract form, and help those customers who want to use the form to adapt it to their particular project, but DOER should not try to dictate the terms of a local government procurement.

19.06(7) – Contract Terms

This provision is probably unworkable, because the Federal Energy Management Program (FEMP) is moving federal projects to complex and expensive project M&V that is not suitable for many local government and K-12 ESPC projects. The average federal ESPC project today costs about \$20 million and employs a set of retrofits designed to meet the federal government's aggressive energy efficiency and renewable energy goals (no fossil fuels by 2030). FEMP is therefore trying to get federal projects to use IPMVP Option C for the first few years of project operation, followed by Option B for the remainder of the project term, because this protocol is justified by the technical complexity, cost and risk of the projects. FEMP is getting significant pushback from the federal agencies who are ESPC customers and do not want to incur of the cost and complexity of this M&V protocol. The typical federal contract officer and facility management personnel are more sophisticated than the typical local government or K-12 personnel, because they are managing much larger facilities and contracts. If the federal personnel are unable to make the FEMP protocols work, then it seems unwise for DOER to try to impose the protocols on much smaller projects and much less sophisticated personnel. So we suggest that DOER remove this provision from the regulations and substitute a requirement that the EMS contract utilize the IPMVP protocols that are suitable to the technical complexity, cost structure and risk profile of the local government and K-12 projects.

19.08 -- Monitoring and Reporting Requirements

NAESCO suggests that this requirement should be synced to the definition of the EMS Annual Report, so that there is no confusion about the due date for the report.

19.09 -- Enforcement; Complaint Processing Procedures; and Disputes

This section of the draft regulations is particularly troubling because it appears that DOER is resurrecting a demon that all of the ESPC program stakeholders – DOER, ESCOs and customers -- have worked for two decades to eliminate, and which the legislature specifically addressed when it enacted 25A, 11I. The demon is the confusion and project delays that result from a process in which anyone can complain to DOER about a violation of the regulations and trigger a DOER review process and tribunal with no defined schedule, which indefinitely suspends project implementation and assigns to DOER the right to abrogate contracts without legal due process. As DOER knows, the legislature eliminated this demon, which had subjected projects to years of delays in the 1990s, when losing bidders protested to DOER, and DOER routinely threw out the project award and ordered a new RFP. Section 7 of 25A, 11I says, very simply, that

(f) The decision of the state agency, local governmental body or building authority regarding the selection of a qualified provider shall be final and not subject to appeal except on the grounds of fraud or collusion.

Since this section follows the section that describes the process by which the state agency, local government body or building authority negotiates a contract with the selected ESCO, we think that the legislature clearly intends that DOER has no role in fielding complaints or passing judgment on contracts except when the complaint alleges fraud or collusion. We would further expect that DOER, in fielding complaints that allege fraud or collusion set a very high bar for even considering such complaints, because it

knows that school committee meetings, city council meetings, selectman's meetings and town meetings are frequented by the local gadflies who always allege that the fix is in on whatever contract is on the agenda – pothole repairs, school lunch vendors, and ESPC contracts. Furthermore, if this complaint procedure results in project delays that are later found by the Suffolk County superior court that is not justified, DOER will be subject to claims by the local government bodies for the cost of the project delays.

We also strongly suggest that the DOER reconsider and drop section 19.09(9), in which DOER asserts the right to abrogate a contract between a local government body and an ESCO. We see no legal basis for this assertion and suggest that it improperly inserts DOER into contract negotiations in which it does not belong. Section (3) of 25A, 11I assigns no role to DOER in the negotiation of a project contract, and we think that any attempt to by DOER to insert itself into project contract negotiations is contrary to the legislative intent.

Conclusion

NAESCO appreciates the opportunity to comment on the draft of 225 CMR 19.00. We urge DOER to accept our suggestions and modify the draft regulations to accomplish their goal of helping Massachusetts local governments and K-12 schools implement cost-effective ESPC projects that produce lasting value for taxpayers.

Sincerely,

A handwritten signature in black ink, appearing to read "Donald Gilligan", with a stylized flourish extending from the end.

Donald Gilligan
President