

EMERGENCY RULE – Effective for 90-day period beginning July 7, 2010

95-648 EFFICIENCY MAINE TRUST

Chapter 1: CONTRACTING PROCESS FOR SERVICE PROVIDERS AND GRANT RECIPIENTS

SUMMARY: This Chapter establishes the procedures governing the selection of service providers for conservation programs and the selection of projects to receive awards under grants administered by the Efficiency Maine Trust. Most service providers and grant recipients will be selected by means of a competitive bid process conducted by issuing Requests for Proposals or similar documents. Some service providers may be selected without a competitive bid process, when sole-source contracting is the most efficient means to deliver conservation programs. The chapter also establishes the procedure to seek reconsideration of a selection decision.

§ 1 GENERAL PROVISIONS AND DEFINITIONS

- A. **Scope of Rule.** This rule establishes the procedures governing the selection of service providers of conservation programs.
- B. **Definitions**
1. **Aggrieved person.** "Aggrieved person" means any person who bids in response to an RFP, RFQ or PON and who is adversely affected by the contract award decision made pursuant to the RFP, RFQ or PON.
 2. **Bid.** "Bid" means a response to an RFP, RFQ or PON.
 3. **Bidder.** "Bidder" means a person or entity that submits a bid.
 4. **Commission.** "Commission" means the Maine Public Utilities Commission.
 5. **Conservation Program.** "Conservation programs" means programs developed pursuant to 35-A M.R.S.A. Chapter 97, designed to reduce inefficient energy use and, for the purposes of this rule only, to promote cost-effective alternative energy resources.
 6. **Contract Administrator.** "Contract Administrator" means the employee of the Efficiency Maine Trust designated to administer contracts between the Efficiency Maine Trust and service providers and other vendors and consultants.
 7. **Program Fund.** "Program fund" means the conservation program fund established by the Efficiency Maine Trust pursuant to 35-A M.R.S.A. §10110.7
 8. **Program Opportunity Notice.** "Program Opportunity Notice" means a document identifying the area or market sector of interest and the energy efficiency goals sought to be achieved. The document will solicit proposals on how the efficiency goals can be achieved. As a result of the Program Opportunity Notice, the Efficiency Maine Trust may choose one or more service providers to work on one or more projects. This document is also known by the initials "PON."

9. **Proposal.** "Proposal" has the same meaning herein as the term "bid."
10. **Request for Proposal.** "Request for Proposal" means a document listing the scope of work for the service needed or the project proposed to be funded, other requirements of the Efficiency Maine Trust, and the technical and cost evaluation criteria for selection. The document is also known by the initials "RFP."
11. **Request for Qualifications.** "Request for Qualifications" means a document listing the scope of work for the service needed, other requirements of the Efficiency Maine Trust, and the technical evaluation criteria for selection. The document normally requires only a technical response. The Trust may select one or more providers or projects in response to a Request for Qualifications and then request cost proposals, or negotiate the cost terms of agreement with the qualified bidder(s). The document is also known by the initials "RFQ."
12. **Service Provider.** "Service provider" means a public or private provider of energy conservation services or an entity selected by the Efficiency Maine Trust to contract with such providers or otherwise arrange the delivery of conservation programs. "Service provider" also includes entities that indirectly deliver energy conservation services to customers, such as entities that process and pay coupons, and entities that provide assistance in performing program evaluations.
13. **Trust.** "Trust" means the Efficiency Maine Trust.

§ 2 COMPETITIVE PROCUREMENT

- A. **Competitive Bidding Process.** Except as provided in Section 3, the Efficiency Maine Trust shall select service providers and grant recipients through a competitive bidding process. Competitive bidding processes shall be conducted by issuance of one of the following documents:
 1. Request for Proposals (RFP)
 2. Request for Qualifications (RFQ)
 3. Program Opportunity Notices (PON)The processes shall be designed to maximize participation from qualified bidders.
- B. **Development of RFPs/RFQs/PONs.** When the Efficiency Maine Trust is to select a service provider or grant recipient by competitive bid, it shall develop and issue an RFP, RFQ, or PON.
 1. Each RFP and RFQ will contain sufficient information to permit bidders to develop responsive proposals. This information will include, at a minimum:
 1. A description of the scope of work required;
 2. The required content and format of the bids;

3. A list of the bid evaluation criteria and scoring weights to be applied;
4. The date, time and place that the proposal is due. Open solicitations may alternately specify a notice period for closing the solicitation;
5. The name, address, and contact information for the Efficiency Maine Trust contact person; and
6. A copy of the standard form agreement.

In each RFP or RFQ, the Efficiency Maine Trust will establish reasonable timeframes for the submission of bids, the evaluation of bids, and the selection of the winning bidders.

2. Each PON will be a formal request for projects that require responders to detail their own approach to the PON's topic. A PON will describe the objectives of the program but the responder is then responsible for providing a detailed statement of work that represents a solution to the problem outlined in the PON. Cost-sharing by the contractor may be required.
- C. **Notice of RFPs, RFQs and PONs.** The Efficiency Maine Trust will maintain a service list of persons who will be notified whenever it issues a RFP, RFQ or PON related to a conservation program. The Efficiency Maine Trust will reasonably advertise each RFP, RFQ and PON. Each RFP, RFQ or PON posted on the Efficiency Maine Trust or Efficiency Maine website.
- D. **Written Questions and Pre-Bid Conferences.** The RFP, RFQ, or PON will specify the manner in which written questions may be asked. Answers to questions will be posted on the Efficiency Maine website. The Efficiency Maine Trust at its option may hold a pre-bid conference. Answers to all questions raised at a pre-bid conference will be posted on the Efficiency Maine website.
- E. **Submission of Bids.** To the extent practicable, the Efficiency Maine Trust will accept bids electronically in response to RFPs, RFQs, or PONs. All timely submitted bids will be turned over to the Contract Administrator. The Contract Administrator shall keep a written record of the bidder's names, the date and time the bid was received, the cost/price of the bid and the bidder's contact person. The written record kept by the Contract Administrator shall be a public document as defined in 1 M.R.S.A. §401. The bids received in response to an RFP, RFQ or PON shall be treated as confidential and not subject to public disclosure from the date of submission until notification of the contract award by the Contract Administrator. After the notification of the contract award, the bids become public documents.
- F. **Rejection of Noncompliant or Untimely Bids; Rejection of All Bids.** The Efficiency Maine Trust shall reject all bids that do not comply with the requirements of this Chapter or the RFP, RFQ or PON, or that are not submitted before the deadline for submitting bids established pursuant to subsection B of this section. The Efficiency Maine Trust may reject all bids if it finds that the bids are unreasonably high in cost or that acceptance of any bid will not be in the public interest.

G. Evaluation and Selection.

1. **Proposal Review Team.** Responses to each RFP, RFQ and PON will be reviewed and evaluated by an assigned Proposal Review Team. Each Proposal Review Team shall be comprised of a minimum of three persons. The chairperson of each Proposal Review Team shall be the Executive Director of the Efficiency Maine Trust, or the Director's designee. The chairperson of each Proposal Review Team will select the other members of the Proposal Review Team. The other members may be members of the Efficiency Maine Trust staff or other persons who have training or experience relevant to the program for which the competitive bidding process is held.
2. **Criteria.** Evaluation and selection criteria will be listed in each RFP, RFQ or PON. Criteria shall include:
 - a. Cost.
 - b. If practicable, the extent to which the proposal promotes the development of resources, infrastructure and skills within the State.
 - c. Experience and qualifications.
 - d. Responsiveness to the solicitation.
 - e. Other qualifications as the Executive Director of Efficiency Maine Trust may determine.
3. **Bid Review.** Each member of the Proposal Review Team will individually review all bids based on the criteria established in the RFP, RFQ or PON. The Proposal Review Team will document the scoring and the substantive information that supports the scoring, and select the winning bidder(s).
4. **Review Process.** The Proposal Review Team may take any of the following steps, either with respect to all of the bids received, or to a subset of bids selected as superior to the others:
 - a. Consult with prior clients on the performance of firms or particular persons proposed for the program or project.
 - b. Schedule presentations or interviews with representatives of the firms or persons proposed for the conservation program.
 - c. Conduct a review of past performance, including a review of reports, analyses, or other materials that would reflect on the bidder's performance.
 - d. Request additional data or material to support bids from any or all bidders.
5. **Bidder Discussions.** The Proposal Review Team may review bids and award a contract based on the bids received without discussion with any bidders, or may conduct limited discussions or negotiations with all bidders or a selected subset of bidders determined to have presented superior bids. The Proposal Review

Team may review and score bids after any amendments to the bids as a result of the discussions or negotiations. The Proposal Review Team may enter into price negotiations for a "best and final offer" with selected bidders, prior to contract award. The Proposal Review Team will not substantially change the nature of the proposals sought by the RFP without notifying bidders and permitting all bidders to modify their bids.

6. **Contract Award.** The Proposal Review Team may make one or more contract awards to fulfill the requirements of the RFP, RFQ or PON. The contract award will be made to the highest rated proposal(s) that conforms to the requirements of the RFP, RFQ or PON.
7. **Bid Rejection.** The Proposal Review Team may summarily reject any bid that it finds contains false or misleading material information. The Contract Administrator may bar any entity that has submitted false or misleading material information from participating in any contract award for a period of up to three years.
8. **Notification.** The Efficiency Maine Trust shall notify all bidders responding to an RFP, RFQ or PON of the contract award decision in writing, postmarked or electronically mailed a minimum of 14 calendar days prior to contract effective date.
9. **Contract Execution.** After 14 calendar days from the contract award notification, the Director of Efficiency Maine Trust, or his/her designee, shall execute a written contract with the winning bidder or bidders.
10. **Final Approval.** Standard agreements, as described in section 4, between the Efficiency Maine Trust and selected service providers or grant recipients shall be given final approval by the Executive Director of the Efficiency Maine Trust, at least seven days prior to the proposed contract effective date.
11. **Effective Date.** The effective date of the standard agreement shall be the date the Executive Director approves the agreement.

H. Delegations

The authority to develop and issue RFPs, RFQs and PONs, and to otherwise administer the RFP, RFQ, and PONs processes as described in this section 2, is delegated to the Executive Director of Efficiency Maine Trust.

§ 3 OTHER TYPES OF SOLICITATIONS

The Efficiency Maine Trust may select a service provider for one or more conservation programs without employing a competitive bidding process if the Trust finds that the selection of the service provider by another solicitation process will promote the efficient and effective delivery of conservation programs and is consistent with the objectives and overall strategy of the conservation programs. Solicitations that do not employ competitive bidding processes may include:

- A. **Open Solicitations.** An open solicitation seeks to acquire multiple service providers for a program through an ongoing solicitation process. The solicitation specifies the

qualifications and requirements the service provider is required to meet. Service providers meeting these qualifications must complete a cooperative agreement with the Efficiency Maine Trust to provide the specified services.

- B. **Sole Source Procurements.** The Efficiency Maine Trust may use a sole source procurement when: 1) the service provider has unique qualifications, resources, or experience; 2) there is not enough time to use a competitive bidding process or 3) the Efficiency Maine Trust finds that the conservation program would clearly benefit from a sole source procurement. The decision whether to use a sole source procurement for \$10,000 or less is delegated to the Executive Director of Efficiency Maine Trust. The decision to use a sole source procurement for more than \$10,000 will be made by the Efficiency Maine Trust, or may be delegated on case-by-case basis by the Efficiency Maine Trust.
- C. **Low-Income Service Providers.** For the delivery of conservation programs to low-income residential customers, the Efficiency Maine Trust may, without employing a competitive bidding process, use the delivery system of the Low Income Weatherization Assistance for Low-Income Persons Program administered through the United States Department of Energy, and the network of for-profit and not-for-profit entities which have held contracts with transmission and distribution utilities to deliver efficiency services to low-income and residential customers.

§ 4 TYPES OF AGREEMENTS

- A. **Standard Agreement.** Except as allowed in subsections B through E, contracts between service providers and the Efficiency Maine Trust must be in writing and use the Efficiency Maine Trust Agreement. The completed standard form agreement must describe the service to be performed, the terms and conditions agreed to by the parties, the cost of the service and how payment will be made.
- B. **Memorandum of Understanding (MOU).** The Efficiency Maine Trust may use an MOU as an alternative to the standard form agreement when implementing agreements with other government agencies.
- C. **Cooperative Program Agreement.** The Efficiency Maine Trust may use a program agreement as an alternative to the standard form agreement when implementing agreements with multiple service providers under an open solicitation for a program.
- D. **Cooperative Agreements.** The Efficiency Maine Trust may use a cooperative agreement, when implementing agreements with the University of Maine or the Maine Community College System.
- E. **Grant Agreement.** The Efficiency Maine Trust may use a grant agreement when awarding a grant to a group, organization or other recipient. The grant agreement must describe the terms and conditions and scope of performance or action which is expected of the recipient.

§ 5 APPEALS OF CONTRACT AWARD DECISIONS

- A. **Request for Reconsideration.** An aggrieved person may request reconsideration of a contract or grant award decision by filing a written petition to reconsider to the Efficiency Maine Trust Executive Director within 14 days of the notification of the contract award pursuant to Section 2 (G)(8).
- B. **Petition.** Each petition to reconsider must contain the award decision being appealed, the name of the aggrieved person, the facts that make the petitioner an aggrieved person and reason that the contract award decision should be reversed.
- C. **Review of Petition; Burden.** The Efficiency Maine Trust Board will review and decide all petitions to reconsider contract award decisions. A petition to reconsider will be denied unless the petitioner persuades the Efficiency Maine Trust Board that in making the contract award decision, the Proposal Review Team:
1. committed a material violation of statute or law;
 2. committed irregularities resulting in fundamental unfairness; or
 3. acted in an arbitrary or capricious manner.

The petitioner has the burden of demonstrating that reconsideration should be granted.

- D. **Nonadjudicatory.** Each petition to reconsider a contract award decision shall be determined on the record of the decision, together with any additional documents the petitioner submits or that may be provided by the Proposal Review Team in response. The Trust may appoint a presiding officer to assist with the orderly processing of the petition. The Trust, at its discretion, may consolidate all petitions to reconsider that relate to a single contract or grant award decision.
- E. The Efficiency Maine Trust Board or presiding officer on its own motion or at the request of the petitioner may require additional written argument, hold an oral argument, or hold a hearing on the petition. The presiding officer shall invite a representative of the contract award winning bidder to participate in any review of a contract award.
- F. **Final Action.** A denial by the Efficiency Maine Trust Board of a petition to reconsider a contract award decision constitutes final agency action.
- G. **Reversal.** If the Efficiency Maine Trust Board finds that the petitioner has made the demonstration required by subsection B, then the contract or grant award decision shall be reversed. The Efficiency Maine Trust Board may then alternatively: 1) remand the matter to the original or a newly-constituted Proposal Review Team to review the bids and award a contract consistent with the written decision of the Efficiency Maine Trust Board or 2) decide to issue a new RFP, RFQ or PON and begin a new selection process or 3) decide not to proceed with the program.

§ 6 WAIVER OR EXEMPTION

Upon the request of any person subject to the provisions of this Chapter or upon its own motion, the Efficiency Maine Trust may waive any of the requirements of this Chapter that are not required by statute. Where good cause exists, the Efficiency Maine Trust or its designee may grant the requested waiver, provided that the granting of the waiver would not be inconsistent with the purposes of this Chapter and of Title 35-A.

STATUTORY AUTHORITY: 35-A M.R.S.A. §§ 10105.4, 10105.5, 10110.13, 10111.3, 10119.3

EFFECTIVE DATE: This Emergency Chapter was approved as to form and legality by the Attorney General on July 1, 2010. It was filed with the Secretary of State on July 7, 2010 and became effective on July 7, 2010.