

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 energy efficiency and alternative energy programs administered by the Efficiency Maine Trust and the selection of grant recipients to receive funds administered by the Efficiency Maine Trust for energy efficiency and alternative energy projects. Grant recipients and most service providers 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 another solicitation process is the most efficient and effective means to deliver programs administered by the Trust. 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 for energy efficiency and alternative energy programs administered by the Efficiency Maine Trust and the selection of grant recipients to receive funds administered by the Trust for energy efficiency and alternative energy projects.
- 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. **Contract Administrator.** "Contract Administrator" means the employee of the Efficiency Maine Trust designated to administer contracts between the Efficiency Maine Trust and service providers, grant recipients and other vendors and consultants.
 5. **Program.** "Program" means an energy efficiency or alternative energy program developed or administered by the Efficiency Maine Trust pursuant to 35-A M.R.S.A. Chapter 97 or Chapter 99 or other applicable law.
 6. **Program Opportunity Notice.** "Program Opportunity Notice" means a document identifying the area or market sector of interest and the energy efficiency or alternative energy goals sought to be achieved. The document will solicit proposals on how the identified goals can be achieved. As a result of the Program Opportunity Notice, the Efficiency Maine Trust may choose one or

more bidders to work on one or more programs or projects. This document is also known by the initials "PON."

7. **Project.** "Project" means an energy efficiency or alternative energy project that is funded in part or in whole by a grant from the Efficiency Maine Trust.
 8. **Proposal.** "Proposal" has the same meaning herein as the term "bid."
 9. **Request for Proposal.** "Request for Proposal" means a document inviting proposals for and listing the scope of work being requested, other requirements of the Efficiency Maine Trust, and the technical evaluation criteria and cost evaluation criteria for selection of the winning bidder. The document is also known by the initials "RFP."
 10. **Request for Qualifications.** "Request for Qualifications" means a document listing the scope of work for the being requested, other requirements of the Efficiency Maine Trust, and the technical evaluation criteria for selection of the winning bidder. The document normally requires only a technical response. The Trust may select one or more bidders in response to a Request for Qualifications and then request cost proposals from or negotiate the cost terms of agreement with the qualified bidder(s). The document is also known by the initials "RFQ."
 11. **Service Provider.** "Service provider" means a public or private provider of energy efficiency or alternative energy services or an entity selected by the Trust to contract with such providers or otherwise arrange the delivery of programs. "Service provider" also includes entities that indirectly deliver energy efficiency or alternative energy services to customers, such as entities that process and pay coupons, and entities that provide assistance in performing program evaluations and other services required by the Trust to fulfill its duties under 35-A M.R.S.A. Chapter 97 and Chapter 99 and other applicable law.
 12. **Trust.** "Trust" means the Efficiency Maine Trust established in 35-A M.R.S.A. section 10103.
- C. **Computation of time periods.** All time periods prescribed in this rule are computed using calendar days, including Saturdays, Sundays and Federal holidays. The day from which the designated time period begins to run shall not be included in the computation. The last day of the period shall be included unless it is a Saturday, Sunday or Federal holiday, in which case the period runs until the next day which is not a Saturday, Sunday or Federal holiday.

§ 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:
 - a. A description of the scope of work required;
 - b. The required content and format of the bids;
 - c. A list of the bid evaluation criteria and scoring weights to be applied;
 - d. The date, time and place that the proposal is due. Open solicitations may alternately specify a notice period for closing the solicitation;
 - e. The name, address, and contact information for the Efficiency Maine Trust contact person; and
 - f. A copy of the standard agreement or applicable alternative agreement as described in Section 4.

In each RFP or RFQ, the 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 programs or projects within an area or market sector that require bidders to detail their own approach to the PON's topic. A PON will describe the objectives of the program opportunity but the bidder is then responsible for providing a detailed statement of work that represents a solution to the opportunity 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 list of interested persons who will be notified whenever the Trust issues a RFP, RFQ or PON related to a program or project. The Trust will reasonably advertise each RFP, RFQ and PON. Each RFP, RFQ or PON will be posted on the website maintained by the Trust.
- D. Written Questions and Pre-Bid Conferences.** The RFP, RFQ, or PON will specify the manner in which written questions may be asked. The Efficiency Maine Trust at its option may hold a pre-bid conference. Answers to written questions and to all questions raised at a pre-bid conference will be posted on the website maintained by the Trust.

- 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 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 as determined by the Trust in accordance with the Triennial Plan and laws governing the Trust.
- 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 Executive 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 Trust staff or other persons who have training or experience relevant to the program or project for which the competitive bidding process is held.
 2. **Criteria.** Evaluation and selection criteria will be listed in each RFP, RFQ or PON. Criteria may include, but are not limited to:
 - a. Cost.
 - b. For service providers, to the extent 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 criteria as the Executive Director of the Efficiency Maine Trust may determine consistent with the Triennial Plan and the laws governing the Trust.
 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 bidder or particular persons proposed for the program or project.
 - b. Schedule presentations or interviews with representatives of the bidder or persons proposed for the program or project.
 - 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 or proposals that conform 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 or person that has submitted false or misleading material information as part of a bid 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 Executive Director of the Efficiency Maine Trust, or the Executive Director's designee, shall execute a written contract with the winning bidder or bidders.

10. **Final Approval.** Standard agreements or other 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 calendar days prior to the proposed contract effective date.
11. **Effective Date.** The effective date of the 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, is delegated to the Executive Director of the Efficiency Maine Trust.

§ 3 OTHER TYPES OF SOLICITATIONS

The Efficiency Maine Trust may select a service provider for one or more 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 programs and is consistent with the objectives and overall strategy of the programs. Solicitations that do not employ competitive bidding processes may include:

- A. **Open Solicitations.** The Efficiency Maine Trust may use an open solicitation to select multiple service providers for a program through an ongoing solicitation process. The open solicitation specifies the qualifications and requirements the service provider is required to meet. Service providers meeting these qualifications must complete a cooperative program agreement, as described in Section 4(C), 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; (3) the Trust finds that the program or required service would clearly benefit from a sole source procurement; or (4) the service provider is an identified partner in a grant proposal that has been submitted by and awarded to the Trust. 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 Board, or may be delegated on case-by-case basis by the Efficiency Maine Trust Board.
- 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 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 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 the Efficiency Maine Trust and service providers or grant recipients must be in writing and use the Efficiency Maine Trust standard agreement form. The completed standard 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 agreement when implementing agreements with other government or quasi-governmental agencies.
- C. **Cooperative Program Agreement.** The Efficiency Maine Trust may use a cooperative program agreement as an alternative to the standard 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, or memorandum of agreement (MOA), when implementing agreements for cooperative efforts with the University of Maine System 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 grant recipient.

§ 5 APPEALS OF CONTRACT AWARD DECISIONS

- A. **Request for Reconsideration.** An aggrieved person may request a hearing for reconsideration of a contract award decision by filing a written petition with the Executive Director of the Efficiency Maine Trust within 14 calendar days of the notification of the contract award pursuant to Section 2(G)(8). The petition must meet the requirements of Section 5(B). When a petition is filed under this section, the Trust may not execute a contract with a winning bidder until the Trust has taken final agency action on the petition.
- B. **Petition.** Each petition for a hearing to reconsider a contract award decision must contain the award decision being appealed, the name of the aggrieved person, the facts that make the petitioner an aggrieved person and the specific nature of the grievance, including the Appeal Criteria specified in Section 5(D). The Chair of the Board or the Chair's designee shall grant a hearing to reconsider a contract award decision unless it is determined that:
 1. The petitioner is not an aggrieved person;
 2. The request was made more than 14 calendar days after notification of award; or
 3. The request is capricious, frivolous or without merit.

The Chair of the Board or the Chair's designee shall notify the petitioner in writing of the decision regarding the request for a hearing within 15 calendar days of receipt of the request. If a request for a hearing is granted, notification must be made at least 10

calendar days before the hearing date. The notification must include the date and location of the hearing and the names of the Appeal Committee members. In the event the request for hearing is denied, the notification shall constitute final agency action.

In the event that multiple petitions for a hearing to reconsider are granted on a single contract award, the Chair of the Board or the Chair's designee may, at its discretion, consolidate all petitions that relate to a single contract award decision.

- C. **Appeal Committee.** The Appeal Committee consists of a quorum of the Executive Committee of the Board or, as necessary due to conflicts of Executive Committee members, a quorum of the Board. A trustee who has served on the Proposal Review Team for a contract award may not serve on the Appeal Committee for an appeal of that award.

The Appeal Committee shall appoint a person to serve as presiding officer over the hearing. This person may be one of the Appeal Committee members or any other person who has no direct or indirect personal, professional or financial conflict of interest in the appeal. The presiding officer, if not from the ranks of the Appeal Committee, shall have no vote in the decision.

- D. **Review Criteria; Burden.** The Appeal Committee will review, hold hearings on and decide all petitions to reconsider contract award decisions. A petition to reconsider a contract award decision will be denied unless the petitioner persuades the Appeal Committee 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 evidence presented must specifically address and be limited to one or more of these criteria. Evidence of any type that cannot be related to these criteria may be ruled inadmissible by the presiding officer.

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

- E. **Hearing Participants.** The petitioner may participate alone or be represented by Counsel or other agent. The Proposal Review Committee shall be represented by the Trust and/or its counsel. Other contract award winning bidders may petition to intervene. Such petition to intervene shall be presented in writing to the Executive Director of the Trust who shall determine and allow or disallow participation in writing within 7 calendar days of receipt of the request to intervene. Copies of this notification of participation shall be sent to the Appeal Committee members, the presiding officer and the petitioner.

- F. **Hearing Procedures.**

1. The presiding officer shall control all aspects of the hearing, rule on points of order, and rule on all objections and may set time limits and question witnesses.

2. The petitioner must present evidence to substantiate the specific grievances stated in the appeal. Brief opening statements directed to the Appeal Committee may be made by the petitioner, the Proposal Review Team and any intervenors, in that order.
 - a. The petitioner shall present evidence first, using witnesses and exhibits who may be cross examined by the Proposal Review Team and the intervenors. Re-direct questioning related to issues raised during cross examination only may be done by the petitioner, followed by re-cross examination by the Proposal Reviews Team and intervenors.
 - b. Witnesses may be called who can present factual information related directly to the appeal. All witnesses shall be sworn. To expedite the proceeding, testimony of any witness may be pre-filed in written form. If used, pre-filed testimony must be made available to the Proposal Review Team, the Appeal Committee, presiding officer and all intervenors on the preceding work day, a minimum of twenty-four (24) hours prior to the hearing. Every such witness shall be subject to cross examination.
 - c. Exhibits relating to any issue of fact in the proceeding may be presented. Documentary evidence may be incorporated into the record by reference when the materials so incorporated are made available for examination by the parties before being received in evidence. The petitioner must furnish copies of all documentary evidence to the presiding officer, Appeal Committee, the Proposal Review Team and all intervenors. Any costs associated with this subparagraph are the responsibility of the petitioner and shall not be recovered by any judgement of the Appeal Committee.
3. The Proposal Review Team and all intervenors shall have the opportunity to submit evidence relevant to the appeal through witnesses and exhibits. The procedures for presenting this evidence are the same as those for the petitioner, substituting the words "Proposal Review Team" or "intervenor" for petitioner. The order of examination and cross examination when the Proposal Review Team presents evidence is Proposal Review Team, all intervenors, and the petitioner. The order of the examination and cross examination when an intervenor presents evidence shall be remaining intervenors (if any), the Proposal Review Team and the petitioner.
4. The Appeal Committee may ask questions for clarification at any point throughout the direct and cross examinations. In addition, the Appeal Committee may ask questions after the direct and cross examination, may request additional witnesses, and may recall any witness for additional questioning.
5. All evidence received or considered shall be part of the record. Evidence shall be admitted if it is the kind of evidence upon which reasonable persons are accustomed to rely in the conduct of serious affairs. The presiding officer may exclude irrelevant or unduly repetitious evidence. No sworn written evidence shall be admitted unless the author is available for cross examination, except for good cause shown.

- G. **Additional argument.** The Appeal Committee 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 an additional hearing on the petition. The presiding officer shall invite a representative of the contract award winning bidder to participate in any additional review of a contract award.
- H. **Decision.** The Appeal Committee shall consider all evidence entered into the record and shall determine whether the petitioner has established by a preponderance of the evidence that one or more of the standards set forth in Section 5(D) of these rules has been proven. On the basis of the record, the Appeal Committee may:
1. Deny the petition to reconsider and uphold the contract award decision; or
 2. Reverse the contract award decision if it finds that the petitioner has made the demonstration required under Section 5(D) of these rules. If the Appeal Committee decides to reverse the contract award decision, the Efficiency Maine Trust Board may then:
 - a. 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 Appeal Committee;
 - b. Decide to issue a new RFP, RFQ or PON and begin a new selection process; or
 - c. Decide not to proceed with the program or project.
- I. **Notice of Decision; Final Agency Action.** The Appeal Committee or the presiding officer if so designated by the Committee shall notify the petitioner, the Proposal Review Team and all intervenors of its decision in writing within 15 calendar days following the final day of the hearing. Notification of the decision of the Appeal Committee regarding the petition to reconsider a contract award decision constitutes final agency action.

§ 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 to the extent permitted by law, where good cause exists, waive any of the requirements of this Chapter that are not required by statute, except for the requirements of Section 5 which may not be waived. Any request for a waiver from any requirement of this Chapter shall be made in writing to the Executive Director of the Efficiency Maine Trust. Upon a finding of good cause or that compliance with the requirement in question would be unduly burdensome, the Executive Director of 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 or impair the policies of this Chapter and of Title 35-A Chapter 97 or Chapter 99 and other applicable law.

STATUTORY AUTHORITY: 35-A M.R.S.A. §§10105(4), 10105(5), 10110(3), 10111(3), 10119(3), 10154, 10155, 10159.

EFFECTIVE DATE:

This Chapter was approved as to form and legality by the Attorney General on September 29, 2010. It was filed with the Secretary of State on September 29, 2010, and will be effective on October 4, 2010.