



STATE OF NEW JERSEY
Board of Public Utilities
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CLEAN ENERGY

IN THE MATTER OF THE IMPLEMENTATION OF)
P.L.2012, CHAPTER 55, ("ESIP AMENDMENTS") - AN) ORDER
ACT CONCERNING ENERGY SAVINGS)
IMPROVEMENT PROGRAMS) DOCKET NO. EX13050418V

Party of Record:

Stefanie A. Brand, Esq., Director, Division of Rate Counsel

BY THE BOARD:

By this Order, and pursuant to its authority under N.J.S.A. 48:3-109 and the Energy Savings Improvement Program ("ESIP") statutes¹ the Board of Public Utilities ("Board") hereby adopts the guidelines set forth in Appendix A, in furtherance of ESIP administration and in light of the 2012 ESIP amendments. The Board also directs Board Staff to initiate a rulemaking proceeding in accordance with the Administrative Procedures Act ("APA"), N.J.S.A. 52:14B-1 et seq., to consider the full breadth of issues associated with the ESIP process and to further develop the program's requirements in light of the 2012 amendments.

BACKGROUND

P.L. 2009, c. 4 ("ESIP Law") authorizes certain public entities to implement an energy savings improvement program when it is determined that the savings realized from energy use from the program's conservation measures will be sufficient to cover the cost of those energy conservation measures as set forth in an approved energy savings plan.² ESIP provide authorized public entities with an alternate method to finance the implementation of energy conservation measures. P.L. 2009, c. 4. An ESIP is a type of performance contract, whereby a public entity can leverage the future value of energy savings to pay for the upfront project costs by using the ESIP financing alternative. "How to Implement an Energy Savings Improvement Plan-Sustainable Jersey How-To Guide," www.sustainablejersey.com. (February 2013).

¹ N.J.S.A. 52:34-25 (ESIP by state contracting agencies); N.J.S.A. 40A:11-4.6 (ESIP's by contracting units); N.J.S.A. 52:35A-1 (ESIP by public agencies); N.J.S.A. 18A:18A-4.6 (ESIP's by boards of education); and N.J.S.A. 18A:65A-1 (ESIP by boards of trustees of public institutions).

² N.J.S.A. 52:34-25(a)(1); N.J.S.A. 40A:11-4.6(a)(1); N.J.S.A. 52:35A-1(a)(1); N.J.S.A. 18A:18A-4.6(a)(1); N.J.S.A. 18A:65A-1(a)(1).

Authorized public entities can choose to implement the ESIP in one of three ways: 1) by contracting with an Energy Services Company (“ESCO”) which would be responsible for virtually all of the required work associated with the completion of the particular ESIP; (2) the “Do-It-Yourself Method,” where an authorized public entity with in-house expertise can either complete the ESIP work in-house or retain an engineer or an architectural firm with engineering capabilities to assist with the ESIP and the procurement of ESIP related services; or (3) the “Hybrid Method,” which uses parts of both previous options are used. Ibid.

On September 21, 2012, Governor Christie signed P.L. 2012, Chapter 55 (“ESIP amendments”) into Law, further defining the ESIP process. Notably, the ESIP amendments designate the Board as the agency of the State Government responsible for implementing and enforcing the provisions of the ESIP Law. N.J.S.A. 48:3-109(a). The amendments further authorize the Board to take such action as it deems necessary and appropriate to implement and enforce the ESIP Law, including but not limited to modifying a non-conforming request for proposal, modifying or cancelling a procurement by a public entity for an energy savings project, and withholding State and federal renewable energy and energy efficiency incentives from an energy savings project. N.J.S.A. 48:3-109(c)(3). The Board is also charged, in consultation with the State Treasurer and the Commissioner of the Department of Community Affairs, with establishing a standard request for proposal (“RFP”) to be used for all ESIP projects to be undertaken by any State contracting agency or public agency authorized by Law to implement an ESIP. N.J.S.A. 48:3-108.

In addition to designating the Board as the implementing agency, the amendments call for certain programmatic changes. Some of these changes include:

1. limiting the types of savings which an ESCO can include in its proposal in response to an RFP;³
2. limiting the term of the contract between the public entity and the ESCO;⁴
3. authorizing the public entity to appoint an employee to facilitate implementation of the ESIP through coordination with the ESCO;⁵
4. defining “commencement” for purposes of determining the date on which a lease-purchase agreement begins;⁶ and
5. regarding State contracting entities, creating pre-qualification requirements for subcontractors seeking to join the pool of subcontractors eligible to bid for and perform ESIP work.⁷

In response to the ESIP amendments, Board Staff took steps to inform the public and interested stakeholders of the changes to the ESIP Law and their impact on the ESIP process. On October 2, 2012, Board Staff conducted a workshop to notify interested stakeholders about the amendments and the availability of new procurement documents, as specified in N.J.S.A. 48:3-

³ N.J.S.A. 52:34-25(e)(1)(b); N.J.S.A. 52:35A-1(e)(1)(b); N.J.S.A. 40A:11-4.6(e)(1)(b); N.J.S.A. 18A:65A-1(e)(1)(b); N.J.S.A. 18A:18A-4.6(e)(1)(b);

⁴ N.J.S.A. 52:34-25(f)(3); N.J.S.A. 52:35A-1(f)(4); N.J.S.A. 40A:11-4.6(f)(3); N.J.S.A. 18A:65A-1(f)(3); N.J.S.A. 18A:18A-4.6(f)(3);

⁵ N.J.S.A. 52:34-(b)(3)(c); N.J.S.A. 52:35A-1(b)(3)(c); N.J.S.A. 40A:11-4.6(b)(3)(c); N.J.S.A. 18A:65A-1(b)(3)(c); N.J.S.A. 18A:18A-4.6(b)(3)(c).

⁶ N.J.S.A. 52:34-25(c)(1); N.J.S.A. 52:35A-1(c)(1); N.J.S.A. 40A:11-4.6(c)(1); N.J.S.A. 18A:65A-1(c)(1); N.J.S.A. 18A:18A-4.6(c)(1).

⁷ N.J.S.A. 52:34-25(b)(3)(b).

108(a). In addition, the Board sponsored the creation of an ESIP guidebook written by Sustainable Jersey that outlines changes resulting from the amendments and explains how to implement an ESIP.⁸ That document is available on the New Jersey Clean Energy website.

Board Staff proposes the adoption of the additional guidelines in Appendix A to further inform interested stakeholders and the public about the ESIP process and 2012 amendments, and the initiation of a rulemaking proceeding to further develop the program's requirements in light of the new legislation.

DISCUSSIONS AND FINDINGS

The ESIP amendments delineate the Board's authority to implement and enforce the provisions of the ESIP Law and to take such actions as it deems necessary and appropriate to do so. N.J.S.A. 48:3-109. The ESIP amendments also give non-exclusive examples of the Board's authority in that regard. Ibid. Likewise, the ESIP Law authorizes the Board to adopt implementation guidelines or directives and to adopt such rules, pursuant to the APA, as are necessary for the implementation of its responsibilities under the ESIP Law. N.J.S.A. 52:34-25(h)(2); N.J.S.A. 52:35A-1(h)(2); N.J.S.A. 40A:11-4.6(h)(2); N.J.S.A. 18A:65A-1(h)(2); N.J.S.A. 18A:18A-4.6(h)(2).

The Board's review of the Appendix A guidelines indicates that each guideline directly relates to the Board's implementation of the ESIP and its enforcement duties under the ESIP amendments. The guidelines cover, for example, RFP requirements which involve the Board's authority under N.J.S.A. 48:3-108, the exclusion of capital cost avoidance and solar renewable energy credit ("SREC") values from the energy cost savings calculation, as required by the ESIP legislation, as well as the types of costs that can be included in the energy cost savings calculation. The guidelines also reinforce the ESIP Law's prohibitions against blended utility rates and negative cash flows, to state a few. We find the guidelines to be consistent with the Board's authority under N.J.S.A. 48:3-109 and the ESIP framework set forth by the Legislature in the ESIP Law and amendments.

Accordingly, the Board **HEREBY ADOPTS** Appendix A for the reasons set forth in the Order. The Board likewise authorizes Staff to follow and apply the guidelines set forth in Appendix A as the "ESIP Guidelines." The Board further **DIRECTS** Board Staff to initiate a rulemaking in accordance with the Administrative Procedures Act, N.J.S.A. 52:14B-1 et seq., to consider the full breadth of issues associated with the ESIP amendments and to further develop ESIP requirements. The Board **ORDERS** that the rulemaking also include the following subjects of the adopted ESIP guidelines:

- a. grounds for denial of Clean Energy program incentives;
- b. grounds for rejection and modification of an RFP;

⁸ Sustainable Jersey is a 501(c)(3) non-profit corporation that represents municipal governments and leading organizations working to assist communities in working toward a sustainable future. The Sustainable Jersey program was launched in 2009, and the Board approved its initial budget of \$400,000. On January 18, 2012, the Board approved the Office of Clean Energy's 2012 program and budget filings on behalf of Sustainable Jersey, which tasked Sustainable Jersey with conducting ESIP workshops, ESIP information sessions and updating written ESIP guidance materials. I/M/O Comprehensive Energy Efficiency and Renewable Energy Resource Analysis for the 2009-2012 Clean Energy Program: 2012 Sustainable Jersey Compliance Filing, Board Docket Numbers EO07030203 & EO11100631V (January 18, 2012).

- c. DPMC certification requirement for entities not set forth in the ESIP amendments;
- d. the nature and sufficiency of Operational & Maintenance costs for purposes of the energy cost savings calculation; and
- e. changes to the ESCO fee once established and the protocol for determining the fee percentage rate.


Board Staff shall provide a quarterly updates to the Board on the status of the rulemaking proceeding until the rules are adopted.

CONCLUSION

In accordance with the above, the Board **HEREBY DIRECTS** the Division of Economic Development and Energy Policy to implement the ESIP guidelines incorporated as Appendix A to this Order, and to conduct an ESIP rulemaking in accordance with the APA and the determinations set forth in this Order.

DATED: 6/21/13

BOARD OF PUBLIC UTILITIES
BY:


ROBERT M. HANNA
PRESIDENT


JEANNE M. FOX
COMMISSIONER


JOSEPH L. FIORDALISO
COMMISSIONER


MARY-ANNA HOLDEN
COMMISSIONER

ATTEST:


KRISTI IZZO
SECRETARY

I HEREBY CERTIFY that the within document is a true copy of the original in the files of the Board of Public Utilities



APPENDIX A

1. A public entity applying for an Energy Savings Investment Plan ("ESIP") must designate in the Request of Proposal ("RFP") whether it intends to use an Energy Services Company ("ESCO"), the "Do-it-Yourself Method" ("DIY"), or a combination of the two ("Hybrid Method"). A change in project control after the RFP closing date will be cause for withholding Clean Energy program incentives under the ESIP.
2. Only RFP's which conform to the provisions of N.J.S.A. 48:3-108 may be used. Failure to abide by this requirement will result in modification or rejection of the RFP by Board Staff.
3. If an ESCO will be used, the RFP must include a copy of an audit (ASHRAE Level II w/ Level III for lighting) prepared by a firm classified by the Department of Treasury, Division of Property Management and Construction ("DPMC") in the 036 (ESCO) discipline.
4. All professional service firms and other firms and/or companies used to carry out an ESIP must be DPMC classified.
5. An ESCO may contract directly with an architectural firm, which would serve as a subcontractor to the ESCO, and the project related architectural service costs may be included within the project's economic model. However, if the public entity chooses the DIY Method, architect fees are payable directly to the architectural firm by the public entity. Architect fees may be included in the energy cost savings analysis and payback.
6. Public entities shall arrange for ESCO's to make site visits and attend pre-bid meetings in advance of placing bids, in order to provide potential bidders with information about the nature of the proposed project. Attendance by ESCO's at pre-bid site visits and meetings is mandatory.
7. The energy savings resulting from the program must be sufficient to cover the cost of the program's energy conservation measures. There shall be no negative cash flow in any year of the program.
8. SREC values are not permitted to be used in the energy cost savings calculations.
9. Capital cost avoidance values are not to be used in the energy savings calculations.
10. Operational and maintenance cost savings may be permitted in the energy cost savings calculations, provided that supporting documentation is submitted to the Board.
11. Utility rates shall be defined by the public entity in the RFP proposal. The calculation of energy savings shall utilize and specifically reference as a benchmark the actual demand and energy components of the applicable public utility tariff rate. Blended utility rates that aggregate, combine or restate, in any manner, the distinct demand and energy components of the public utility tariff rate into a single combined or restated tariff rate are prohibited and will be grounds for rejection of the proposal.

12. Contracted third party utility rates may only be used for the term of the contract up to a maximum of five years. For any portion of the contractual period that exceeds five years, projected utility tariff rates, in addition to the annual BPU escalation rates, must be used.
13. Public entities shall arrange for a measurement and verification ("M&V") analysis at the one (1) year operational date of the project. The M&V analysis shall be conducted by a qualified third party to ensure the savings projected in the energy savings plan have been achieved. The public entity shall provide a copy of the M&V report to the Board.
14. The ESCO shall include the cost for the one (1) year M&V analysis in the RFP. For comparative purposes, the one year M&V cost shall be indicated on the proposal Form VI, under "Annual Service Costs." Additional M&V analyses may be conducted at the discretion of the local unit but the cost may not be included in the RFP.
15. For the RFP only, projected Demand Response ("DR") revenues claimed by ESCO's cannot exceed three (3) years. DR revenues must be included and presented under the "Energy Rebates/Incentives" column of FORM VI.
16. ESCO "fees" proposed during the RFP phase of the project cannot increase post-award without prior notice to the Board. Any post-award increase which results in a negative cash flow outcome will result in the applicant's disqualification for an ESIP.
17. Public bid openings shall be held on the due date of the proposal submissions. The public entity shall announce the name of the bidder and the total dollar amount. All proposals received will be made available by the owner for public inspection after the contract is awarded.
18. Rejection of bids by the public entity must be conducted in accordance with Local Public Contracts Law, N.J.S.A. 40A:11-1, et seq. Additionally all proposals must be returned to the respective ESCOs upon rejection.
19. An entity whose proposal is rejected or who receives an adverse finding by Staff, may apply to the Board for review.

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