

## Full text of the Staff ESIP Regulations Straw proposal follows:

### Chapter 4A. Energy Savings Improvement Program, or “ESIP”

#### Subchapter 1. Purpose, Scope and Definitions

##### 14:4A-1.1 Purpose and Scope

- (a) This chapter implements P.L. 2009, c. 4 and P.L. 2012, c. 55, commonly referred to as the Energy Savings Improvement Program (ESIP) laws. ESIP is a form of energy performance contracting. It serves as a funding mechanism to install Energy Conservation Measures (ECMs) as defined in this section and reduce energy consumption and costs without capital expenditure. Energy cost savings pay for the installation of the ECMs.
- (b) These rules govern ESIP applications from public entities such as New Jersey State agencies, authorities, public institutions of higher education, county colleges, local boards of education, transit authorities, and county and municipal governments.

##### 14:4A-1.2 Definitions

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

“As-built” means a set of drawings that are marked-up by the contractor building a facility or fabricating a piece of equipment that show how the item or facility was actually built versus the way it was originally designed. At the completion of a project, the as-built drawings describe what was actually built.

“ASHRAE Audit” means the standard set by the American Society of Heating, Refrigerating and Air-Conditioning Engineers (ASHRAE) for Commercial Building Energy Audits. There are three levels of ASHRAE Audit:

Level 1 – Walk-Through Survey;

Level 2 – Energy Survey and Analysis; and

Level 3 – Detailed Analysis of Capital-Intensive Modifications.

The Board relies on the latest standards and procedures for defining the levels of audit.

“Board” or “BPU” means the New Jersey Board of Public Utilities.

“BPU Technical Reference Manual” or “BPU TRM” means standardized algorithms to calculate resources savings for energy efficiency measures eligible for incentives updated periodically and posted on the New Jersey Clean Energy Program website as the Technical Reference Manual, that have been developed to measure resource savings or generation from measures and technology eligible for incentives from the New Jersey Clean Energy Program and Board-approved energy efficiency programs.

“Cash Flow Analysis” means demonstration of the method to examine how an ESIP generates and spends money over the project’s financing term with a net positive cash flow in accordance with the ESIP laws, pursuant to P.L. 2009, c. 4, as amended by P.L. 2012, c. 55.

“Contingency fund” means a sum of money allocated for use in an emergency or to cover unforeseen expenses.

“Cooperative Pricing” is a purchasing system in which a Lead Agency advertises for bids; awards a master contract to the vendor providing for its own needs and for the prices to be extended to registered members; and notifies the members of the contract awarded. The registered members then contract directly with the vendor for their own needs, subject to the specifications in the master contract.

“Current Market Rate” means the price currently asked for a commodity or service in a particular market or the current annual percentage rate of interest on loans or accruing to investments as determined by market forces.

“Direct digital controls” are an open protocol format and meet the interoperability guidelines established by the American Society of Heating, Refrigerating, and Air-Conditioning Engineers.

“Direct Digital Control Systems” means the devices and computerized control equipment that contain software and computer interfaces, such as a Building Automation System, that perform the logic that control a building's heating, ventilating, and air conditioning system.

“Do-It-Yourself ESIP Model” or “DIY” means the choice by an authorized public entity with in-house expertise to complete the ESIP work or to retain an engineer or an architectural firm with engineering capabilities to assist with the ESIP and the procurement of ESIP-related services.

“Energy Conservation Measure” or “ECM” means an improvement that results in reduced energy use and costs without capital expenditure, including, but not limited to, installation of energy efficient equipment; demand response equipment; combined heat and power systems; facilities for the production of renewable energy; water conservation measures, fixtures, or facilities; building envelope improvements that are part of an ESIP; and related control systems for each of the foregoing.

“Energy savings” means a measured reduction in fuel, energy, operating, or maintenance costs resulting from the implementation of one or more ECMs when compared with an established baseline of previous fuel, energy, operating, or maintenance costs, including, but not limited to, future capital replacement expenditures avoided as a result of equipment installed or services performed as part of an Energy Savings Plan (ESP).

“Energy Savings Improvement Program” or “ESIP” means an initiative of a public entity, as defined in this section, to implement ECMs in existing facilities, provided that the value of the energy savings resulting from the program will be sufficient to cover the cost of the project's ECMs.

“Energy Services Company” or “ESCO” means a commercial entity that is qualified by the Division of Property Management and Construction (DPMC) in the Department of Treasury to develop and implement an ESP, as defined in this chapter.

“ESIP Coordinator” means a staff member from the Board of Public Utilities (Staff) designated to review and approve the ESIP components, including RFP, plan, and implementation by a public entity.

“ESIP RFP” or “RFP” means a standard request for proposal provided by the BPU to be used for all ESIP projects to be undertaken by any public entity authorized to implement an ESIP. This RFP shall be approved by the ESIP Coordinator prior to advertising.

"Energy related capital improvement" means a capital improvement that uses energy but does not result in a reduction of energy use.

“Energy savings obligation” means a bond, note, or other agreement evidencing the obligation to repay borrowed funds incurred in order to finance energy savings improvements.

“Energy Savings Plan” or “ESP” means the document that describes the actions to be taken and monetary savings to be realized to implement the ESIP.

“Energy Savings Services Contract” or “Energy Services Agreement” means an energy performance contract to develop an ESP and implement the ECMs contained in it. It can be authorized as two separate parts where the first portion covers the audit and ESP while the second part implements the ECMs and commissions the equipment. There may or may not be a performance guarantee provision built into the second part of the contract.

“Goods and Services” or "goods or services" means any work, labor, commodities, equipment, materials, or supplies of any tangible or intangible nature, except real property or any interest therein, provided or performed through a contract awarded by a contracting agent, including goods and property subject to N.J.S.A. 12A:2-101 et seq.

“Hybrid ESIP Model” or “Hybrid” means a combination of ESCO and DIY models where the public entity retains a licensed professional (architect/engineer) to design and manage the ESIP and the ESCO serves as a sub-contractor.

“Investment Grade Energy Audit” or “IGA” means a study by the qualified energy service provider selected for a particular energy performance contract project, the estimated costs of the improvements, and the operations and maintenance cost savings and utility cost savings projected to result from the recommended improvements.

“Measurement and Verification” or “M&V” means a method to measure and verify, in a defined, disciplined, and transparent way, the energy savings resulting from planned and defined changes to all or parts of the energy infrastructure of a specific facility or a group of specific facilities. The savings are measured and verified without regard to the energy performance of any facility other than the facility at which an ECM is implemented.

“Milestone Reporting Schedule” means the schedule of required periodic reporting concerning the implementation of the ESP.

“Procurement” means all stages of the ESIP, from development of RFPs for equipment, materials, and services through the issuance of contracts.

“Project Manager” means the designated main point of contact on the ESCO or contractor side who is responsible for overseeing the planning, design, construction, and M&V of the project. If a performance guarantee is purchased, the designated person shall be identified.

“Public entity” means any New Jersey government entity that is authorized to expend public funds and enter into contracts. This includes New Jersey State agencies, authorities, public institutions of higher education, county colleges, local boards of education, transit authorities, and county and municipal governments.

“Public Entity Project Manager” means a designated employee from the public entity with decision making authority to coordinate with the ESCO and the Board to address issues associated with the implementation of the ESIP as they arise, provided that any decision requiring a change order shall be made only upon approval of the public entity.

“Public Works Activities” means any work subject to the provisions of N.J.S.A. 34:11-56.25 et seq.

“Water conservation measure” means an alteration to a facility or equipment that reduces water consumption, maximizes the efficiency of water use, or reduces water loss.

## Subchapter 2. ESIP Program Guidelines

### 14:4A-2.1 ESIP Coordinator

(a) The ESIP Coordinator shall be a staff member of the BPU who is authorized to:

- i. Approve, reject, or modify all RFPs for solicitation of an ESCO by a public entity;
- ii. Review, analyze, modify, and make recommendations concerning an ESP and an M&V analysis before approving said plan;
- iii. Review complaints related to ESIP projects; and
- iv. Receive routine reports from the public entity on the progress of the work and the resulting energy savings.

(b) All ESIP projects shall obtain approval from the ESIP Coordinator. The ESIP Coordinator shall process ESIP submissions, including RFP and ESP drafts, within 14 business days. If no action by the ESIP Coordinator is taken after 14 business days, a plan is considered approved.

(c) If an ESIP project begins without approval, the ESIP Coordinator shall have the authority to take actions as set forth at P.L. 2009, c. 4 and P.L. 2012, c. 55, including denial of incentives provided under all energy efficiency programs approved by the BPU.

#### 14:4A-2.2 ESIP Specifications for All Implementation Models

All projects that participate in the ESIP Program shall adhere to applicable public contracting and public finance laws in addition to the following processes:

##### (a) Preliminary Audit and Project Interest

The project intake form and the preliminary energy audit are both required as part of the first step of the ESIP process.

- i. An ESIP project shall only be pursued based on a valid LGEA or ASHRAE Audit, as those terms are defined in this section. An LGEA or ASHRAE Audit is valid for 3 years for the purposes of ESIP consideration. If an LGEA was performed more than 3 years but less than 5 years, an entity may request a waiver from the ESIP coordinator to provide a detailed list of all changes made to buildings.

- ii. An ESIP project interest form shall be submitted to the ESIP Coordinator.
  - a. The results of the LGEA or ASHRAE Audit shall be submitted with the project interest form if completed before an ESIP was considered. If an audit has not been done, an entity should submit the form and coordinate with the ESIP Coordinator post audit.
  - b. The public entity shall indicate on the form which ESIP implementation model it intends to pursue: ESCO, DIY, or Hybrid. The public entity may change the ESIP implementation model selected prior to submitting the RFP for the ESIP Coordinator's approval.

(b) Investment Grade Energy Audit

- i. All entities shall perform an investment grade energy audit (IGA) and designate a Public Entity Project Manager. The completed IGA shall be submitted to the ESIP Coordinator with the associated ESP.

(c) Energy Savings Plan (ESP)

An energy savings plan that consists of one or more energy conservation measures. The plan shall: (a) contain the results of an energy audit; (b) describe the energy conservation measures that will comprise the program; (c) estimate greenhouse gas reductions resulting from those energy savings; (d) identify all design and compliance issues that require the professional services of an architect or engineer and identify who will provide these services; (e) include an assessment of risks involved in the successful implementation of the plan; (f) identify the eligibility for, and costs and revenues associated with the PJM Independent System Operator for demand response and curtailable service activities; (g) include schedules showing calculations of all costs of implementing the proposed energy conservation measures and the projected energy savings; (h) identify maintenance requirements necessary to ensure continued energy savings, and describe how they will be fulfilled; and (i) if developed by an energy services company, a description of and cost estimates of an energy savings guarantee.

- i. When developing the ESP, the professional firm and public entity shall review the current BPU-approved energy efficiency programs (utility-administered and NJ Clean Energy Program) and incentives at the time of application to ensure eligibility. The ESIP Coordinator shall be notified of the results.

- a. ESIP projects must remain cash flow positive throughout the life of the repayment term.
  - b. If any Board-approved program incentives are denied, all ESP-related forms shall be re-submitted to the ESIP Coordinator to retain approval and ensure that the project remains cash flow positive.
  - c. Previously utilized Board-approved program incentives, if completed within 12 months of the ESP approval, may count towards the project savings. If incentives are on installments, the ESP should reflect any expected future payments and savings.
  - d. Incentives must be clearly delineated on the ESP forms if they are utility or BPU Clean Energy. If incentive amounts change from approved ESP, a revised cash flow must be submitted to ESIP coordinator to show that cash flow remains positive.
  - e. The only ECMs eligible for Demand Response are those that do not receive utility incentives.
- ii. Calculation methodologies utilized in the ESP shall be transparent and available for BPU review. If a professional firm deems any aspect of the submissions to be proprietary, a redacted version may be submitted for posting pursuant to the Board's Procedures for Determining the Confidentiality of Submitted Information, N.J.A.C. 14:1-12.1 through -12.18.
    - a. The BPU TRM shall be used for determining energy savings calculations.
    - b. The costs paid for through energy savings may include ESIP, ESCO fees, monitoring services, and other services that are directly related to implementing the ESIP.
    - c. The energy savings resulting from an ESIP project shall cover the cost of the project's ECMs. The annual savings shall exceed annual payment each and every year throughout the term of the project. Excess savings in one year or interim savings during the construction period may not be allocated to meet shortfalls in any other year.
    - d. Operational and maintenance cost savings may be permitted in the energy cost savings calculations for up to ten (10) years, provided that supporting documentation is submitted to and approved by the ESIP Coordinator.
    - e. Contracted third party utility rates may only be used to calculate energy savings for the term of the contract up to a maximum of five (5) years. For

any portion of the contractual period that exceeds five (5) years, projected utility tariff rates shall be used. The calculation of energy savings shall utilize, and specifically reference as a benchmark, the actual demand and energy components of the applicable public tariff rate then in effect. 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 ESP.

- f. Energy savings achieved during the installation year shall be included in the first year of the repayment term. Energy savings may not be reported in the installation year of the Cash Flow Analysis Form.
- g. The timeframe associated with the Cash Flow may not extend beyond 15 years or, for Combined Heat and Power projects, beyond 20 years.
- h. Energy savings calculations shall not assume, include, or reference capital cost avoidance savings, the current or projected value of a “solar renewable energy certificate,” as defined pursuant to N.J.S.A. 48:3-51 or its successor programs, or other environmental or similar attributes or benefits of whatever nature that derive from the generation of renewable energy. Energy savings calculations shall not include any costs or discounts associated with maintenance services, an energy savings guarantee, or third-party verification of energy conservation measures and energy savings.
- i. Energy-related capital improvements done as facility alterations that do not reduce energy usage but are required to properly implement other energy efficiency or energy conservation measures may be undertaken or supervised by the energy services company performing the Energy Savings Services Contract if:
  - 1. the total cost of the improvement does not exceed 15 percent of the total cost of the work to be performed under the Energy Savings Services Contract; and
  - 2. (a) the improvement is necessary to conform to a law, rule or regulation, or order, or (b) an analysis within an approved proposal, or the public entity, at the time of the award of the proposal, demonstrates that there is an economic advantage to the public entity implementing the improvement as part of the Energy Savings Services Contract, and the savings rationale for the improvement.

These improvements required to properly implement the ECM may be funded through the ESIP as long as the total cost of the improvement does not exceed 15 percent of the total cost of the

work. Building envelope or health/safety measures that exceed 15 percent of total project cost can be appealed to BPU for consideration of a project waiver on a case by case basis.

Examples of energy-related measures include: roof replacement/repair; windows and building envelope; remediation of environmental hazards to allow for installation of ECM; and related air quality improvements such as ionization, air conditioning, and ventilation upgrades.

- iii. The draft ESP shall be reviewed and approved by an independent, third-party auditor. All correspondence between the auditor and ESCO shall be submitted to the ESIP Coordinator along with the final report.
- iv. The ESP and the third-party audit of the ESP shall be submitted to the ESIP Coordinator for approval. A summary of the ESIP project shall also be included for public posting along with the ESP.
- v. Any subsequent modifications or changes to the ESP shall be submitted again to the ESIP Coordinator. Such submittal will reset the 14-day BPU review period.

#### (d) Financing

- i. ESIP financing may be used for project design, construction, ESCO fees, and all applicable soft costs associated with the issuance of securities, such as the costs of a financial advisor, bond counsel, local attorney, auditor, underwriting fee, and bond rating.
- ii. Funding Options  
ESIP projects may be financed through the following mechanisms:
  - a. Lease-Purchase Agreement
    - 1. The public entity may enter into this agreement directly with the ESCO, other private financing party, or through a county improvement authority or the New Jersey Economic Development Authority.
    - 2. When a public entity enters into a lease with a private party that is not a governmental entity, or with the ESCO it has selected through competitive contracting, it shall be done in accordance with a competitive process as required under the local government unit's procurement law.
    - 3. A bond rating is not required.

b. Refunding Bond

1. Energy savings obligations may be funded through appropriations for utility services in the annual budget and may be issued as refunding bonds.
  2. Bond financing requires an ordinance, hearing, and approval by the Local Finance Board. Bonds for school districts require DOE “Other Capital” Project approval.
  3. A bond rating is required for this option.
- iii. In both financing options, the maturity schedules for energy savings obligations shall not exceed the estimated average useful life of the individual ECMs.
  - iv. Lease purchase agreements, refunding bonds, and energy savings obligations shall not be utilized to finance maintenance, guarantees, or verification of guarantees of ECMs.
  - v. The cost of energy savings obligations may be treated as an element of the local government unit’s utility budget.
  - vi. Once finances are secured, the public entity’s Project Manager shall submit the final Cash Flow Analysis to the ESIP Coordinator.
  - vii. Contingency funds that are not utilized in a project’s implementation will remain with the public entity.

(e) Requirements for ESIP Vendors

- i. All professional service firms used to carry out any aspect of the ESIP shall be approved by the Department of Treasury, Division of Property Management and Construction (DPMC) for the job task in the ESIP project. This qualification shall be valid during the entirety of work performed on the ESIP project. These certifications include, but are not limited to, an Energy Services Company, Construction Manager, Energy Management Systems, HVAC, Energy Auditing, Mechanical/Engineering, etc.
- ii. All firms and companies employed on an ESIP project shall pay prevailing wage.
- iii. Upon contract execution, the public entity shall provide the Project Contacts form to the ESIP Coordinator on a yearly basis detailing the Project Managers and the Public Entity Project Manager.

- a. The Project Manager shall submit any deviations from the established scope to the ESIP Coordinator.
  - iv. ESCOs shall submit a case study of each project to the BPU.
- (f) Post Construction
- i. Upon completion of construction, a summary of the project as installed shall be provided to the ESIP Coordinator.
  - ii. Public entities shall arrange for an M&V analysis one (1) year after the operational date of the project. The M&V analysis shall be conducted by a qualified third party to ensure that the savings projected in the ESP have been achieved. The public entity shall provide a copy of the report to the ESIP Coordinator for review and recording.
  - iii. The public entity shall provide reports to the ESIP Coordinator according to the agreed upon milestone schedule and through the BPU selected reporting platform. The ESIP Coordinator reserves the right to set forth an additional reporting schedule if the Coordinator determines that additional reporting is needed. For the ESCO model, the public entity should work with the ESCO to set up project reporting requirements through the BPU selected reporting platform.

(g) Post commissioning

- i. Entities and/or ESCOs shall submit an updated ESP ECM list that includes as-built changes made during the useful life of the project. The submission should also include any impacts to energy savings projections or cash flow.

#### 14:4A-2.3A - ESCO or Hybrid Model

The hiring of an ESCO for any portion of the ESIP project will categorize an ESIP as either the ESCO or Hybrid model since an ESCO has been granted special rights under the ESIP law. All public bid thresholds must be followed and RFPs issued accordingly. Public entities utilizing the ESCO or the Hybrid model shall meet the following requirements:

- (a) A public entity may determine to enter into an Energy Savings Services Contract with an ESCO either through public advertising for bids and the receipt of bids therefor or through competitive contracting in lieu of public bidding in the manner provided by sections 45-49 of P.L. 1999, c. 440. Based on the type of public entity, the provisions of N.J.S.A. 18A:18A-1 et

seq., N.J.S.A. 18A:65-1 et seq.; N.J.S.A. 18A:64A-1 et seq.; N.J.S.A. 18A:64-1 et seq.; or any other applicable public financing laws shall apply to any contracts awarded pursuant to P.L. 2009, c. 4 and P.L. 2012, c. 55.

(b) RFP Requirements

- i. Calculation methodologies utilized in the RFP shall be transparent and available for public entity review.
  - a. RFPs shall follow the requirements outlined at N.J.A.C. 14:4A-2.2C(ii)a-g.
  - b. The BPU Protocols shall be used for determining energy savings calculations.
- ii. The public entity shall electronically submit an RFP (using the RFP template provided on the BPU website), consistent with the provisions of applicable public contracting, to the ESIP Coordinator for approval.
  - a. The ESIP Coordinator shall review and either approve, reject, and/or modify the RFP within fourteen (14) business days of receipt. If the ESIP Coordinator requests modification of the RFP, the resulting submission will restart the 14-day review period. After receipt of the RFP, if the ESIP Coordinator fails to act within the 14 days, the RFP format is considered approved. Upon formal approval of the RFP, the public entity may then advertise.
  - b. If the RFP proposes an expenditure greater than \$2.5 million, it shall also be subject to the requirement for review by the New Jersey Office of the State Comptroller in accordance with N.J.S.A. 52:15C-10. Failure to abide by this requirement shall result in modification or rejection of the RFP by the ESIP Coordinator. Any modifications made as a result shall be forwarded to the ESIP Coordinator by the public entity.
  - c. The RFP shall designate whether the public entity intends to utilize an ESCO or a Hybrid model. A change in project control after the RFP closing date may be cause for denial of Board-approved energy efficiency incentives and rejection of the ESP. The ESIP Coordinator will make this determination on a case-by-case basis.
  - d. A copy of the LGEA or ASHRAE Audit shall be made available along with the RFP.
  - e. The utility rates and energy costs shall be provided in or as an attachment to the RFP.

- f. An approved RFP shall be advertised for not less than ten business days prior to the pre-proposal meeting.
- g. Public entities shall arrange for ESCOs to make site visits and attend pre-proposal meetings in advance of placing proposals, in order to provide potential proposers with information about the nature of the proposed project. It is recommended that ESCOs attend the pre-proposal conference, and it is mandatory that the ESCO attends at least one site visit to each facility listed in the RFP.
- h. Proposals shall be due no earlier than twenty (20) business days after the pre-bid conference date. Additional time may be afforded to ESCOs to develop proposals for entities with a larger number of buildings in scope and/or anticipated project costs exceeding \$12.5 million.
- i. Public proposal openings shall be held on the due date of the proposal submissions. The public entity shall announce the name of the proposer and the total dollar amount. All proposals received shall be made available by the owner for public inspection after the contract is awarded, except where the entity submitting the proposal has followed the procedures for requesting confidentiality in the Board's rules. Proposals are valid for a minimum of ninety (90) days and shall be awarded prior to the end of that term.

(c) Requirements for Responses/Bids

- i. All proposal responders shall submit a base case of the project established in the LGEA. If requested by the public entity, an ASHRAE Audit and an alternative case may also be submitted.
- ii. All proposals shall utilize the current market rate as set by the BPU annually.
- iii. The calculation of energy savings shall utilize, and specifically reference as a benchmark, the actual demand and energy components of the applicable public tariff rate then in effect. 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 RFP.
- iv. In its response to the RFP, the ESCO shall include the cost for the one (1) year of M&V analysis and the performance guarantee.
  - a. The associated costs of the M&V shall be separate within the bid.

- b. A performance guarantee option up to 15 or 20 years shall be offered and a fee schedule established.
  - c. The costs associated with the one (1) year of M&V and the performance guarantee shall be included in the “Annual Service Costs” column in Cash Flow Analysis Form. However, these costs shall not be included in the financed project cost.
- v. Projected Demand Response revenues and all PJM Demand Management Program revenues claimed by the ESCO shall not exceed four (4) years in the RFP. Demand Response revenues shall be presented as a separate item under the “Energy Rebates/Incentives” column of the Cash Flow Analysis Form.
- vi. ESCO fees proposed during the RFP phase shall not increase post-award. These fees include such items as hard costs, ESCO profit, ESCO overhead, and such other costs as may be shown to be necessary to implement the ESIP project.
- vii. An ESCO’s proposal shall not include a savings calculation that assumes, includes, or references:
  - a. capital cost avoidance savings;
  - b. the current or projected value of a “solar renewable energy certificate,” as defined pursuant to N.J.S.A. 48:3-51, any successor renewable solar incentives, or any other environmental or similar attributes or benefits of whatever nature that derive from the generation of renewable energy; or
  - c. any costs or discounts associated with maintenance services, an energy savings guarantee, or third-party verification of energy conservation measures and energy savings.

(d) Denials; Rejections

- i. If an RFP is deemed denied by the ESIP Coordinator, the public entity and/or the ESCO may apply to the Board for review. An RFP is considered denied if the ESIP Coordinator identifies an adverse finding that is not corrected; incomplete or false information is provided; and/or the public entity has not submitted required information. If an RFP is not approved, the public entity will not be eligible to proceed or receive Board-approved energy efficiency incentives.
- ii. Rejection of proposals by the public entity shall be conducted in accordance with Local Public Contracts Law, N.J.S.A. 40A:11-1 et seq., and all proposals shall be returned to the respective ESCOs upon rejection.

14:4A-2.3B - Award of RFP

- (a) Once an ESCO is selected, the public entity has fourteen (14) business days to notify the ESIP Coordinator with the following documents:
- i. Notice of the award;
  - ii. Final evaluation summary;
  - iii. A copy of the fully executed ESCO Energy Services Agreement; and
  - iv. Base Case Project Cost Form and the Cash Flow Analysis Form from each proposer.
- (b) If the Board determines that the award of the bid may violate the provisions of P.L. 2009, c. 4 (N.J.S.A. 18A:18A-4.6 et al.), the Board may modify or cancel a procurement by a public entity within fourteen (14) days of the Board's receipt of the award.
- i. If the Board modifies the procurement, the Board shall provide written comments to the public entity, outlining any issues and providing the opportunity for the issues to be remedied.
  - ii. If the Board does not notify the public entity within fourteen (14) days of receipt of the award that the Board may modify or cancel the procurement, the procurement shall be deemed approved.
- (c) An ESCO may contract directly with an architectural and/or engineering 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.
- (d) After an ESCO is selected, any change in project control shall comply with the following provisions:
- i. An Energy Savings Services Contract can be sold only to a DPMC-certified ESCO.
  - ii. The BPU shall be notified prior to any change in project control.
  - iii. The public entity's approval shall be provided to the BPU along with a copy of the agreement.

- iv. Any changes to the terms and conditions of the existing RFP/ESP shall comply with the provisions of N.J.A.C. 14:4A-2.3A(c)(vi).

#### 14:4A-2.4 DIY Model

An ESCO cannot be used for any part of a DIY model project except for housing authority projects.

- (a) The Board may grant limited exceptions from the contracting requirements of this section to a local housing authority in conformance with the provisions of P.L. 2012, c. 55 or to other entities as it deems appropriate.
- (b) All projects following the DIY model are subject to the requirements set forth in N.J.A.C. 14:4A-1.1 through 1.2; 14:4A-2.1, 2.2, and 2.5; and 14:4A-3.
- (c) If a public entity or local housing authority chooses the DIY Model, professional fees such as design, construction, engineering, and/or commissioning shall be either: i) payable directly to the professional firm by the public entity; or ii) included in the energy cost savings analysis and payback in the ESP.
- (d) Contracts related to an Energy Savings Improvement Program under the DIY Model for housing authorities shall use an energy performance contracting process developed by the United States Department of Housing and Urban Development for selecting an ESCO. This process is subject to the review and approval of the United States Department of Housing and Urban Development and the BPU. All other approved entities shall follow the process as laid out in N.J.A.C. 14:4A-2.4(a)-(c).

#### 14:4A-2.5 Additional Phases of ESIP Projects

- (a) A public entity may pursue a second phase ESIP project with the public entity's previously awarded ESCO if the following conditions are met:
  - i. The public entity has an approved ESP;
  - ii. The equipment, facility, or ECM(s) in question were included and considered in the ESP but were not implemented;
  - iii. The first phase of the ESIP has completed all construction; and
  - iv. Less than five years have elapsed since the completion of the first phase.

- (b) The public entity shall notify the ESIP Coordinator that it wishes to pursue a second phase project and provide a new ESP with a positive cash flow for approval.
- (c) Any equipment, facility, ECM(s), or buildings outside of the scope of the original ESP shall be part of a new ESIP project and shall be rebid.

### Subchapter 3. Enforcement

#### 14:4A-3 Enforcement

The Board of Public Utilities is designated as the agency of the State Government responsible for implementing and enforcing the provisions of P.L. 2009, c. 4 (C.18A:18A-4.6 et al.) and for responding to requests for assistance from public entities eligible to implement energy performance contracting.

- (a) Failure to comply with any provision of this chapter shall subject the violator to the following penalties in accordance with the Board's regulatory and statutory authority:
  - i. Modifying or canceling a procurement by a public entity for an ESIP project;
  - ii. Financial penalties, including withholding State renewable energy and energy efficiency incentives from an energy savings project. This includes all energy efficiency incentives received through Board-approved programs; and
  - iii. Disclosure to DPMC for consideration in certification and revocation proceedings.
- (b) In determining the appropriate sanction, the Board shall consider the following criteria:
  - i. The good faith efforts, if any, of the entity charged in attempting to achieve compliance;
  - ii. The gravity of the violation or non-compliance with the requirements in this chapter;
  - iii. The number of past violations by the entity charged regarding these standards and other standards adopted by the Board;
  - iv. The severity of the sanction or fine relative to the size of the company and/or government entity charged; and

- v. Any other factors deemed appropriate and material to the violator's failure to comply.

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