BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

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| Order Instituting Rulemaking Concerning Energy Efficiency Rolling Portfolios, Policies, Programs, Evaluation, and Related Issues. | Rulemaking 13-11-005 (Filed November 14, 2013) |

# OPENING COMMENTS OF THE CALIFORNIA EFFICIENCY + DEMAND MANAGEMENT COUNCIL ON ADMINISTRATIVE LAW JUDGE'S RULING SEEKING COMMENTS ON THIRD PARTY AND OTHER ISSUES

Dated: August 9, 2022

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The California Efficiency + Demand Management Council[1] ("The Council") appreciates the opportunity to submit these Opening Comments on the Administrative Law Judge's Ruling Seeking Comments on Third Party and Other Issues, issued in this proceeding on July 15, 2022 ("ALJ Ruling"). These Opening Comments have been timely filed and served pursuant to the Commission's Rules of Practice and Procedure and the instructions contained in the ALJ Ruling. The Council's responses to the Questions in the ALJ Ruling are grouped by the topic areas identified in the ALJ Ruling.

## I. BACKGROUND

The Council is a statewide trade association of non-utility businesses that provide energy efficiency, demand response, and data analytics services and products in California. Our member companies employ many thousands of Californians throughout the state. They include energy efficiency ("EE"), demand response ("DR"), and distributed energy resources ("DER") service providers, implementation and evaluation experts, energy service companies, engineering and architecture firms, contractors, financing experts, workforce training entities, and energy efficient product manufacturers. The Council's mission is to support appropriate EE and DR policies, programs, and technologies to create sustainable jobs, long-term economic growth, stable and reasonably priced energy infrastructures, and environmental improvement.

## II. SUMARY OF THE COUNCIL'S POSITION

In general, the Council believes that contracting requirements should balance the risks embedded in a performance-based contract with the freedom to perform. Furthermore,

[1] The views expressed by the California Efficiency + Demand Management Council are not necessarily those of its individual members.

innovation in project delivery requires flexibility. Lastly, contract negotiations should take into consideration the burdens.

## III. STANDARD TERMS AND CONDITIONS

### 1. What is the burden or impact of requiring upfront payment or collateral to the bidder and implementer?

The Council finds requiring upfront payment or collateral to be an unreasonable burden to the bidder and implementer – especially for programs delivering energy efficiency savings. Though upfront payment or collateral requirements are unreasonable and significant for business of all sizes, the Council finds this burden to be inequitably true for small businesses and disadvantaged business entities ("DBEs"). Performance Security requirements add more risk to the implementer and unnecessarily tie up scarce capital. This is especially true when combined with a 100% "Pay-for-Performance" method used to compensate for ongoing installed and approved energy efficiency projects. Implementers face significant challenges with these requirements, including major delays in compensation while needing to operate normal business functions, holding cash reserves, and reserving a line of credit.

The burden is unreasonable and likely to drive a regular risk project to the high-risk category. In turn, this may also discourage implementers from proposing on utility administered contracts, limit contract options and, by extension, prevent ratepayers the benefits of a program. For bidders that do propose on utility administered contracts, the breadth, quality and innovation will be diminished, as bidders will need to embed the additional upfront payment or collateral costs into their pricing, The result is unnecessarily higher costs to ratepayers (if any bids are submitted at all

### 2. What is the benefit of requiring upfront payment or collateral to the utility or ratepayers?

The Council notes that not all utilities seem to use the same up-front financial performance guarantees for similar implementation contracts. We also note that this practice is used for other types of utility contracts (e.g., power purchase agreements), but question the applicability of up-front financial performance guarantees to every utility administered contract, especially those that are 100% "Pay-for-Performance".

3. **Do parties support striking the final sentence to the "performance assurance; bonding" term?**

The Council strongly supports striking the final sentence to the "performance assurance; bonding" Term, as overly broad and potentially burdensome. A 100% "Pay-for-Performance" compensation structure is the primary type of Performance Assurance which burdens the implementer. As noted in the Council's response to Question 1, an implementer will not be paid for approximately another 45 days after energy savings are verified.

4. **If not, why, and are there amendment to the term and condition that you would support?**

The Council does not provide a response at this time but reserves the right to respond to this question in Reply Comments.

5. **Do parties support a 3% upper limit to performance assurances required, when justification that a performance assurance is necessary is provided? If not, explain. Please also propose an alternative that would allow greater consistency across utilities and ease ability for small companies with limited cashflow to bid and contract with utilities.**

The Council favors the elimination of up-front financial performance assurance requirements for the reasons stated in our response to Question 3. We have yet to see a satisfactory justification for imposing an upfront financial performance guarantee on energy efficiency implementation contracts.

6. **Are there legal issues relevant to changing the current rules? Explain.**

The Council is not aware of any California legal or statutory issues that preclude changing the current Standard Contract Terms to those it is recommending.

7. **What upfront disclosures of the types of insurance and coverage amounts required for each insurance type should the investor-owned utilities (IOUs) make during the solicitation process?**

The Council believes there are insurance and coverage amounts that may be applicable to energy efficiency implementation contracts; however the requirements for those business practices must be reasonable, obtainable and affordable. Insurance and coverage requirements should reflect relevant risk. Of particular sensitivity is cybersecurity insurance which is a rapidly evolving and dynamic product. In many cases, actual costs for such insurance cannot be provided without an extensive survey (by the insurer) of the work to be performed. Utility

insurance and coverage requirements have tended to apply a blanket approach to different risk profiles which unnecessarily burden implementers and ultimately ratepayers.

In the case of Cybersecurity Insurance requirements, the Council recommends pursuing the establishment of a uniform procurement requirement to adopt industry standards for cyber- and data- security such as SOC2 or ISO 27001 together with third party audits of compliance annually. Such approaches are more meaningful, verify actual process and procedural compliance within the vendor organization, and lead to better security whereas Cybersecurity Insurance increases procurement costs without any assurances of greater security. Moreover, as standard Cybersecurity terms require the vendor to work with the Insurer to exhaust every and all legal options in fighting a claim, it promotes a litigious and adversarial relationship between vendors and IOU with regard to security matters. The Council recommends eliminating Cybersecurity insurance requirements and instead establishing consistent, statewide, industry-standard security certifications requirements for participating vendors.

In addition to clarifying regarding required insurance amounts, the Council believes it would also be helpful for bidders to know in advance the terms an IOU requires for insurance, for example: adding the IOU as an additional insured entity under the implementer's policy. The IOUs should also provide clarity on circumstances in which insurance requirements may or may not flow down to subcontractors with respect to IOU DBE requirements.

It may also be appropriate to allow sub-contractors to hold security agreements to protect raw data which may include "from" the prime if necessary - derivative data to operate the program would still be accessible.

8. **When in the solicitation process should the IOUs disclose their insurance requirements and why?**

The Council believes IOUs should disclose their insurance requirements upfront and early in the Request for Application ("RFA") process, or for single-stage processes, early in the Request for Proposal process. At a minimum, such disclosures should be required to occur upon a bidder's invitation to participate in the RFP stage. These disclosures are critical for companies assessing whether to expend the significant resources required to respond to a solicitation. The Council believes IOUs are capable of disclosing these requirements and at the same time providing the rationale as to why they have put these requirements in place.

9. **Should the IOUs be required to justify how the insurance type is relevant to the anticipated scope of work for programs resulting from the solicitation? Why or why not?**

The Council believes the Commission should require IOUs to justify how the insurance type is relevant to the anticipated scope of work for programs resulting from the solicitation. The Council is aware of instances where unreasonable insurance requirements were established at a high cost for unnecessary and unrelated insurance. The Council suggests IOUs be required to provide insurance type justification and risk analysis for individual implementation contracts. Otherwise, the Council is concerned justifications would be deemed ineffective at curbing unreasonable insurance requirements if IOUs are only required to submit justification to program review groups.

10. **Do parties support the staff proposal for contracts with insurance requirements tailored to their specific scope of work? Why or why not?**

The Council supports the staff proposal regarding contracts with insurance requirements tailored to their specific scope of work. Requiring unnecessary insurance places an unnecessary burden on implementers while providing no benefits to ratepayers.

11. **Are there insurance types that are especially costly or present other challenges for Implementers to attain? Provide specifics on the challenge that attaining the coverage presents, and any recommendations you propose CPUC consider to mitigate this challenge.**

As noted in Council's response to Question 7, cybersecurity insurance is a particular challenging coverage to obtain and value. Insurers seek specific information with respect to the Implementer's cybersecurity systems, integration with IOU information technology ("IT") and operations technology ("OT") systems, and the array of risks posed to Implementer and IOU stakeholders. These are often difficult to characterize during the solicitation process, resulting in a default to the most expensive coverage for an implementer.

For insurance requirements that flow down to subcontractors, it can be difficult for smaller subcontractors to carry or obtain some of the larger cyber and professional liability policies. To mitigate this challenge, it would be beneficial to allow the implementer more flexibility over the applicable insurance requirements of subcontractors to reflect the nature of the work a subcontractor provides and associated risk to the program.

**12. <u>In what circumstances is it appropriate for an Implementer to hold professional liability insurance, cybersecurity insurance, employee dishonesty insurance, and/or pollution insurance?</u>**

The Council believes it is generally appropriate for an Implementer to hold professional reliability insurance so long as there are reasonable and appropriate limits to that liability. Those limits should result in professional liability that is appropriately sized and related to the work at hand. For example, pollution liability is irrelevant and unnecessary for offsite or virtual programs and therefore should not be a component of required professional liability.

Current requirements lead to professional liability amounts that are untethered and in excess of what is appropriate and necessary for program implementation - often leading to higher costs to implementers who must pay higher rates for higher yet unnecessary coverage. This often shifts solicitation focus away from industry or program expertise towards contracting with bidders who are most willing to accept high risk and liability costs.

The Council urges the Commission to consider: What are the largest document exposure losses in California relative to implementing energy efficiency programs over the last 20 years? The Council is also unaware of any other jurisdiction addressing professional liability requirements regarding energy efficiency program implementation with comparable terms and conditions

**13. <u>Are there specific program scopes of work for which certain types of insurance should not be required?</u>**

The Council believes there are likely many program types for which certain types of insurance should not be required. However, when the Commission directed IOUs to propose standard terms and conditions in Decision ("D.") 18-01-004, the IOUs put forth a proposal based on a legacy energy efficiency contract that was outdated even at the time of filing. The end result was a set of terms and conditions designed for on-premise implementation work (for example: by contractors), despite the fact that even in 2018, a significant percentage of energy efficiency savings were being generated by newer delivery methods for which many of the proposed terms simply did not apply. Therefore, the Council urges the Commission to direct the IOUs to only require types of insurance that are directly relevant to the scope of work being contracted.

An additional consideration is whether resource programs and non-resource programs should be subject to the same insurance requirements. Resource programs generally have 50-

70% of their contract amount comprised by direct incentive payments to end-users. Non-resource programs have no incentive payments, and thus have a different risk profiles. These differences—-among others—should be taken into account when developing updated insurance and coverage requirements for energy efficiency programs.

## IV. MODIFIABLE TERMS AND CONDITIONS

**14. Are there changes to the modifiable request for proposal (RFP) instructions for Payment Terms and Table 2 that would improve the number and diversity of businesses bidding for contracts? If so, provide specific changes you propose.**

The Existing "Payment Terms" passage includes the following language: "Company prefers Program Proposals that include a "Pay for Performance" fee structure component that conditions payments from Company to Implementer based on specific savings or other metrics…."

This has generally been interpreted by IOU's that implementers of resource programs should be paid solely by a pay-for-performance model. The Council believes this interpretation is misguided. Hybrid compensation models are more consistent with industry practice and will attract a greater number and a more diverse group of bidders to the energy efficiency solicitation process.

Under a hybrid compensation model, a bidder could receive a portion of their compensation under some sort of recurring fixed fee payment and the remainder based upon actual program results. There are already ample performance and delivery targets which incentivize the implementer to achieve program goals. The 100% "Pay for Performance") model backloads compensation to implementers—--even when they reach all programmatic goals. Furthermore, existing contracts provide a cap for compensation, limiting implementers to a cap on energy efficiency savings beyond which they are not compensated.

**15. Would it be appropriate for an Implementer pay cash or a letter of credit (i.e., a "performance security" to a utility) such that Utility and ratepayers have confidence the Implementer will complete the contracted scope of work and meet performance requirements within? Explain what circumstances might or might not merit such an arrangement**

The Council believes it would be highly inappropriate under any circumstance for an Implementer to pay cash or provide a letter of credit to heighten confidence the Implementer will complete the contracted scope of work and meet performance requirements. Even without any

form of up-front payment, there are ample IOU-Implementer contract provisions that enforce strict measures to incentivize for attainment of contract goals. Furthermore, requiring an up-front financial performance guarantee is completely inconsistent with past practice. When utilities administered energy efficiency programs they collected energy efficiency funding in advance of actual program implementation. The IOUs did not provide up-front financial performance guarantees to the Commission (and/or ratepayers) when implementing programs.

**16. Should all language on performance security be removed? Why or why not?**

Yes, the Council suggests all language on performance security be removed from Section 2 and Table 2 of the Staff Proposal for the reasons indicated in the Council's Response to Question 15.

**17. If an IOU does collect against a performance security, should collected funds offset recovery of funds from ratepayers or be added to the program administrator's budget for their energy efficiency portfolio? Why?**

The Council finds collection of a performance security as unnecessary for "Pay for Performance" only, therefore Program Administrators should be prohibited from imposing this requirement in their contracts.

**18. Would certain payment terms or structures allow for businesses that require early payment to have working capital on hand to implement their programs (e.g., milestone or deliverable based payment arrangements; higher performance payments for early performance milestones)? What are such terms or structures and why would they help bidders?**

The Council strongly supports payment terms or structures that provide compensation to implementers along a "hybrid" model where a portion of payment is recurring (e.g. progress or milestone payments) with the remaining portion tied to final contract performance, allowing those businesses to have working capital on hand to implement their programs.

**19. Now that the energy efficiency portfolio is segmented and utilizing the total system benefit (TSB) metric, should the stated preference for pay-for-performance based on verified savings be amended to be based on verified TSB for the Resource Acquisition segment?**

The Council appreciates the Commission's thoughtfulness in posing this question as the shift towards a Total System Benefit ("TSB") metric has many implications for program portfolios. However, at this time, the Council does not recommend the Commission provide a specific pay-for-performance preference for either TSB or energy savings metrics. It is not clear

that the measurement and verification infrastructure required for assessing the load shapes of non-Database of Energy Efficiency Resources ("DEER") measures (such as Behavior, Retrocommissioning and Operational ("BROs")) exist or will exist by 2024 to ensure implementers will be paid on a quarterly, or monthly, basis. Since the timing of savings will be a significant factor in determining the TSB achieved by a given program, a requirement for pay-for-performance to be based on TSB could create a significant problem for program implementers involving non-deemed measures, whose load shape can only be assessed at the end of a full year.

**20. Should performance payments be tied to a CPUC preferred metric for programs in the Equity and Market Support segments, or should the appropriate performance metric pertinent to the scope of work be left to contracting parties to negotiate?**

The Council opposes prescriptive metrics for performance-based payment structures in the Equity and Market Support segments. While the Council understands the desire and need to hold implementers accountable for program results, the Council is concerned that the purpose these programs serve—which is largely to support the performance of the rest of the portfolio—-may be lost.

The Council does not find it any more appropriate to view each individual support activity as its own stand-alone "program" with its own individual metrics, any more than it would be appropriate to judge the prudence of each software application a utility uses in its operations on whether it drives a specific, measurable metric. This perspective has created a situation in which important and worthy support systems and activities are not implemented as they may not fit within a solicitation process designed for energy savings programs. Therefore, the Commission should not require performance payments for non-resource programs be tied to standardized or CPUC prescribed metrics.

**21. Are there sectors, segments, or program types for which it is inappropriate to use a pay-for-performance structure? Why?**

The Council believes pay-for-performance may be appropriate on a case-by-case basis; however, please note our response to Question 13 where we set forth a preferred hybrid compensation structure which includes both a fixed fee and pay-for-performance element. Additionally, the pay-for-performance element will different significantly based upon whether a program is a resource or non-resource program.

**22. What other, if any, changes to General Order 156 require update/amendments to these Energy Efficiency Terms and Conditions or third-party solicitation process?**

The Council does not provide a response at this time but reserves the right to respond to this question in Reply Comments.

## V. OTHER TERMS AND CONDITIONS

**23. Assuming a contractor may not avoid obligations under its contract by use of subcontracts, is any explicit direction needed on which term flows down to subcontractors? Are there terms of a contract that do not or should not flow to subcontractors? What is the legal basis for your response?**

As noted in earlier responses, the Council would like to see IOUs allow for negotiating flexibility between the prime contractor and subcontractors when waiving certain flow down provisions may place unnecessary and overly burdensome requirements on subcontractors. The Council also suggests allowing prime contractors to engage with subcontractors during the negotiation process to minimize the likelihood of flow down provisions that cannot or will not be accepted by the subcontractor.

**24. If your response suggests that certain contract provisions do not or should not flow to subcontractors, what direction should be given? Specify in response:**

**a. Which terms and conditions must flow down to subcontractors and why, including a discussion of applicable law or precedent,**

**b. If you contend there should be terms and conditions in a contract that should not flow to subcontractors, explain what those terms and conditions are and why flexibility should exist, with discussion of applicable law or precedent, and**

**c. For the terms and conditions you contend should not automatically be imposed on subcontractors, in what circumstances is it inappropriate or overly burdensome for terms and conditions to flow down to a subcontractor? For example, do all subcontractors have to also hold all insurance IOUs required of the prime Implementer, or do all subcontracts need hold license for the type of work the prime Implementer is responsible to perform? For any such term or condition, explain how your position ensures the contractor is not avoiding its obligations under the contract by using a subcontractor.**

The Council does not provide a response at this time but reserves the right to respond to this question in Reply Comments.

25. **Should CPUC require IOUs include language in their contracts on which term and condition prevails in the case there is a conflict within the contract terms and conditions between an IOUs added modifiable term and condition and the CPUC decision ordered standard or modifiable term and condition? Why or why not?**

The Council believes that in such instances, the Commission decision provisions at the time of contract execution should always be prevailing.

26. **If so, what language do you propose be added to IOUs contracts with Implementers?**

The Council refers to its Response to Question 25.

27. **Should IOUs ask bidders to provide redlines to terms and conditions in their proposals. If so, why and at what stage (request for abstract, request for proposal, bidder interview, contract negotiation)?**

The Council finds it important that bidders submit redlines to terms and conditions that are realistically considered and these may be negotiated throughout the solicitation process. This may assist in establishing negotiating positions of the two parties and allow for alignment of bidder proposals and bidder estimated costs. Therefore, the Council suggests the Commission allow for, but not require, bidders submit redlines early in the process but reserve the right to provide redlines later in the process if redlines were not provided earlier in the solicitations process.

28. **Should IOUs be allowed to score bids based on bidders redlines to terms and conditions? Why or why not?**

The Council does not provide a response at this time but reserves the right to respond to this question in Reply Comments.

29. **What benefits do you see in bidders providing redlines to terms and conditions in their proposals (e.g., does this practice reduce the back-and-forth that will be required during contract negotiation and how is this beneficial to the bidder and/or IOU?**

The Council does not provide a response at this time but reserves the right to respond to this question in Reply Comments.

30. **What additional guidance or requirements regarding the timing and process of redlining of terms and conditions by bidders do you propose?**

The Council does not provide a response at this time but reserves the right to respond to this question in Reply Comments.

31. **Please comment on any exceptions or circumstances when terms and conditions should only apply to a subset of solicitation/contract types. Consider for example, should terms and conditions only apply to:**

    a. **Contracts with companies of a certain size;**

    b. **Contracts for Resource Acquisition programs;**

    c. **Contracts of a certain size budget?**

The Council believes that there is a strong basis for creating two model contracts: (1) A Contract for Resource Programs and (2) A Contract for Non-Resource Programs. These two program types are so different in operation, goals, and objectives that they merit very different types of contractual approach.

32. **To which contracts or solicitations should any changes to terms and conditions or solicitation processes apply? Consider whether changes should apply to:**

    a. **New contracts only (contracts resulting from solicitations where the RFP hasn't yet released as of date of decision);**

    b. **Existing contracts (should IOUs be required to reenter into negotiation with their Implementer on terms related to the changes made in this decision if the Implementer is able to show significant impact – such as, that the term update would have a >= 5% impact on the cash flow available for the business/contract);**

    c. **Large IOU's Energy Savings Assistance contracts?**

The Council believes that changes to terms and conditions or solicitation process should definitely apply to any and all new programs (i.e. programs for which the solicitation process has not started; programs for which contract negotiation has not commenced in earnest). The Council also believes that changes to terms and conditions or the solicitation process should apply to any existing program where the Implementer and IOU mutually agree to these changes.

**33. Are any of your responses to question in Section 3 also relevant the contract terms and conditions for Local Government Partners adopted in D.19-08-006? If so, which ones?**

The Council does not provide a response at this time but reserves the right to respond to this question in Reply Comments.

## VI. SOLICITATION PROCESS

**34. Do you support the staff proposal to increase the flexibility of solicitation stages? Why or why not?**

The Council supports the Staff Proposal to increase the flexibility of solicitation stages while compressing the timeframe from start to finish for the solicitation process.

**35. What should otherwise or additionally be done to amend the current two-stage requirement in D.18-01-004?**

The Council recommends updates to the Advice Letter approval process to shorten the review and approval timelines, giving third parties greater visibility into when they can expect approval and triggering the contractual Notice to Proceed. The Council's recommendation could be achieved in several ways, but first and foremost, the Council requests tracking and reporting on timelines between key stages such as: (1) contract execution to IOU Advice Letter filing and (2) Advice Letter submission to approval.

The current process typically results in a lag of at least six months from the IOUs' bidder selection to Advice Letter and contract approval. This lag significantly impact delivery timelines, increases Implementer uncertainty, and reduces the IOUs' ability to meet their goals – limiting options for customers to save energy. This results in processes counter to the State's ambitious policy goals.

**36. Is the staff proposal framework and the Tier 1 Advice Letter requirement appropriate for disclosing contract amendments? Does it meet legal requirements for contract approval set forth in applicable CPUC decisions?**

The Council generally supports the staff's proposed framework for oversight of amendments to third-party contracts. With respect to the Staff's proposal for a Tier 1 advice letter if the amendment "adds or removes a performance metric," some clarification is necessary. If a contract includes a performance metric that is not tied to performance-based compensation (for example, a metric that is used for informational purposes only), then an advice letter should

not be required for such a contract modification. The Council also notes the concern that current contract approval processes are time intensive to the point that they add greater risk and uncertainty to bidders.

37. **Do you support, or how would you amend the triggers in staff proposal? Consider for example, if an Implementer substituting a diverse business enterprise (DBE) subcontractor for a non-DBE subcontractor should be added as a trigger.**

The Council does not believe the scenario outlined in the question should act as a trigger. Third-Party implementers often have contractual DBE spend requirements. If, for some reason, a subcontractor is not performing or unable to complete their scope of work, the Third-Party implementer needs a reasonable avenue to make adjustments.

38. **Would CPUC staff's proposed triggers present an inappropriate burden or delay to program Implementers or program administrators?**

Disclosure of contract amendments is important for transparency; however, such disclosure should target minimal, if any delay in program implementation and the accompanying transition planning required to do so.

39. **Would methods to improve transparency of contracts that are amended, such as a report on amendments in the annual report, be sufficient? Why or why not, and for what types of amendments would an alternative method be sufficient?**

No. The Commission Staff Proposal, as set forth in the "trigger" protocol, provides an appropriate level of visibility to and timing for contract changes based upon materiality. Lumping all amendments into annual reports (whether material or not) risks an inordinate time delay in public disclosures for material items.

## VII. BIDDER PARTICIPATION

40. **What are the risks and benefits resulting from the concentration of energy efficiency contracts with a few, large companies?**

The Council believes the relative size of any given company awarded an energy efficiency contract should not be the primary metric by which the outcomes of solicitations are judged. While it is a laudable goal to attract greater diversity among bidding entities, this is not an end unto itself. Rather, the Council believes that concentration of energy efficiency budgets may be an indicator that there are structural maladies present within the solicitation and contracting process itself which need to be identified and addressed. Mandating a certain number

of contracts be awarded to companies of a particular size will not solve the core issue at hand and could result in unintended consequences.

The Council therefore suggests the challenges we identify and solutions we propose throughout our response effectively address this question. The Council supports a more level playing field for the solicitations process to grow Implementer diversity, refocus the process on expertise rather than risk acceptance, and accelerate industry innovation.

**41. Should the CPUC establish a cap on the percentage of budget or number contracts of the overall or IOU-specific (i.e., not including statewide programs) outsourced portfolio that a single contract or single entity can have? If so, how should the cap be established? Are there legal issues that come into play if concentration requirements are adopted?**

The Council refers to its Response to Question 40.

**42. Should the CPUC consider goals for the number of entities the IOU holds contracts with for energy efficiency third-party programs? If so, how should the goals be established?**

The Council suggests that there be significantly greater transparency and visibility to the level of subcontracting being done by the current Prime Contractors. Prime Contractors subcontracting work to Subcontractors – especially those that are diverse and/or small – is another pathway for helping assure enhanced innovation, diversity, and participation, while establishing a reasonable balance between risk and reward. The current concentration of work among large contractors brings significant risk to the State's Energy Efficiency Portfolio – especially if one or more of the programs held by these large contractors fails. Diversification in and of itself can be a mitigating factor in the overall risk profile of the portfolio.

**43. If yes to either a cap or goals, should having a diversity of sub-contractors factor into the calculation of hitting the cap or goals? If so, how?**

The Council refers to its Response to Question 42. Yes, understanding and providing visibility to the level of subcontracting should factor into the development of the energy efficiency portfolio.

**44. What other options are there for mitigating risks associated with energy efficiency contract concentration?**

The Council refers to its Response to Question 42. The ongoing performance of individual programs and transparency with respect to program failures, contract defaults, and

changes to Prime and Subcontractors will be key indicators for guiding mid-course corrections and planning for future energy efficiency solicitations.

**45. Should the CPUC or the IOUs further promote the opportunities for DBEs in third party solicitations? How?**

The Council supports enabling broader participation by DBEs in third-party solicitations which can partially be accomplished if the Commission imposes reasonable DBE carve-out requirements from the outset of the solicitation process. Such carve-outs should directly impact proposal evaluation and scoring. The Commission should also implement monitoring functions so that Prime Contractors actually follow through and retain the DBE work that they originally committed to.

**46. Are there solicitation opportunities that can be more appropriately structure to attract DBE vendors to submit bid? If so, which type of solicitations would present this opportunity?**

The Council refers to most of our responses throughout this document as providing the benefit of attracting further DBE engagement and bid submittals. The Council's suggestions throughout this document would, generally, refocus solicitations on the bidder's abilities and expertise rather than an emphasis on risk acceptance. The Council understands imposed risk requirements are burdensome if not prohibitive particularly for smaller business and DBE participation in the bidding process.

**47. Are there ways to promote and encourage DBE participation as subcontractors?**

The Council would like to see the IOUs facilitate bidder meet and greet forums during the time when a bid is open. The Commission should mandate that the IOUs be required to offer such forums. All bidders (including prospective DBEs) would be invited to such forums. Additionally, such forums should be followed up by a sharing of contact information with all participants.

## VIII. INNOVATION

**48. Would it be appropriate for these procurement models to be incorporated into or partially replace the current two-stage solicitations process for programs that count towards the outsourced budget threshold?**

Yes. The current ongoing market access solicitations provide la less administratively burdensome process for small business enterprises and DBEs, although it is unclear at this time

whether these models will be successful. The IOUs have used different approaches for the market access solicitations with some essentially (1) outsourcing the entire administrative process (e.g., Pacific Gas and Electric ("PG&E") and (2) others directly overseeing project implementers (e.g., Southern California Edison ("SCE"). The lifecycle of project origination, review, and approval under this model in comparison with the existing procurement model should inform future procurement models, in addition to other factors.

**49. How would the duties and authority of the procurement review groups (PRGs) and the independent evaluators (IEs) change as a result of utilizing these or other proposed procurement models?**

The Council does not provide a response at this time but reserves the right to respond to this question in Reply Comments.

**50. For what purpose/uses do stakeholders (specify which stakeholders) find benefit from Implementers and utilities openly sharing data?**

The Council does not provide a response at this time but reserves the right to respond to this question in Reply Comments.

**51. Should the CPUC require program administrators to gather and release program data from ratepayer funded third-party solicited energy efficiency programs openly in a manner that would not undermine the Implementer's intellectual property (e.g., share the data after a certain amount of time)? If so, which data and at what level of detail? Are there legal requirements the CPUC has adopted that relate to this question?**

The Council believes the Commission should first query the Program Administrators as to what program operations data they would view to be sensitive. After this review, Implementers could express what additional program data, if any, should be considered proprietary. Of particularly note here is prior participation data. Commission energy efficiency guidelines preclude similar energy efficiency measures being installed at the same location within a set period of time. Visibility to this data is important to many stakeholders and program participants in assessing and implementing market opportunities.

**52. What timelines are appropriate for disclosure of this third-party program data, consistent with law?**

The Council refers to its Response to Question 51. It is not clear to the Council that any time delays in disclosure are required – certainly none beyond the termination of an IOU-Implementer contract.

**53. If non-incumbent bidders do not have access to the same data as incumbents, does this create an uneven playing field? Are there ways to level the playing field by making data accessible to non-incumbents? If so, at what level of detail, via what communication mechanism or platform for sharing information, and when should access to data be provided?**

Yes, there is an inherent uneven playing field between incumbents and non-incumbents for many reasons – including data access. Contractual and programmatic requirements prescribe that Program Operations data be captured, reported, and archived in one or more platform. That data exists. Access by a broader group of stakeholders does not currently exist. However, developing a data mart and/or configurable reporting drawn from a centralized program database that does not violate Commission privacy requirements is certainly a viable undertaking that could be integrated with other Commission databases (e.g. CEDARS).

## IX. TRANSPARENCY AND FUTURE MARKET OPPORTUNITIES

**54. Should there be CPUC direction or criteria for third-party contract renewals and what should be the guiding rules? For example, should there be a limit on contract extensions or a CPUC approval process for extensions?**

The Council supports the Commission directing IOUs to publicly disclose whether they are opting to renew existing third-party contracts. Generally, the IOUs should be required to provide their justification for the renewal in the form of a request for approval by the Commission.

**55. Should there be CPUC requirements around the frequency by which new competitive solicitations are held in specific segments or sectors?**

The Council does not provide a response at this time but reserves the right to respond to this question in Reply Comments.

**56. Is a PRG guideline to IOUs on the timing of feedback to bidders sufficient to ensure bidders receive feedback or should the CPUC require more granular feedback requirements in a decision?**

The Council believes incremental improvements have been made by the IOUs in the feedback process. However, the Council suggests the following recommendations as additional improvements to ensure timely and substantive feedback is provided to unsuccessful bidders:

1. Hold meaningful feedback sessions with unsuccessful bidders within 30 days of the due date of the submission of the original proposal.

2. Develop standardized scoring criteria by working with Independent Evaluators. The scoring results should be shared with each bidder during the feedback session. Included in the results would be the unsuccessful bidder's score for each criteria, a side-by-side comparison to the successful bidder(s), and the range of scores across all bidders.
3. Offer a written description that provides the rationale behind each given score, including an explanation for why the unsuccessful bidder's score was higher or lower than the successful bidder's score.
4. Document these feedback sessions (anonymizing the unsuccessful bidders and noting where unsuccessful bidders declined invitation for feedback) inclusive of date and time. Such documentation could be captured as an attachment in the initial program Advice Letter.
5. All scoring criteria should be provided in the RFP process and should be clear and understandable to bidders.

**57. If the CPUC should add more requirements, what should they be? Specify what the appropriate level of detail a bidder should receive in feedback sessions (whether voluntarily offered or required) is?**

The Council refers to its Response to Question 56.

**58. Do you agree that CPUC adopting an Energy Efficiency procurement specific confidentiality matrix is a prudent action that simultaneously a) assures transparency on information appropriate for public consumption and b) mitigates burden related to the process of determining, declaring, and challenging confidentiality claims? Are there instances from the past that affect your response; if so, describe them.**

The Council does not provide a response at this time but reserves the right to respond to this question in Reply Comments.

**59. What additions, deletions, modifications to the confidentiality matrix, as proposed here for energy efficiency, do parties suggest?**

The Council does not provide a response at this time but reserves the right to respond to this question in Reply Comments.

**60. Should IOUs and Implementers be permitted to make a bilateral agreement to not disclose information? What, if any, legal basis exists that such an agreement could or would take precedent over a CPUC adopted confidentiality matrix to specify when data shall be publicly disclosed?**

The Council does not provide a response at this time but reserves the right to respond to this question in Reply Comments.

## X. OTHER PROCESS IMPROVEMENTS

**61. Are there alternatives to intervenor compensation that would allow individual experts to participate and receive compensation for serving on the PRG? What is the legal basis for such alternatives? Would using such alternatives affect others' access to intervenor compensation?**

The Council does not provide a response at this time but reserves the right to respond to this question in Reply Comments.

**62. Should the definition of financially interested party be amended for purposes of the third-party solicitations process to allow experts that have no real conflict to take part in PRGs or recuse themselves from individual solicitations where a perceived conflict of interest exists? If so, provide specific amendments to the definition? Does such change require any change to statute or the CPUC's rules?**

The Council believes the current Procurement Review Group ("PRG") conflict rules are too rigid and must be eased. The current rigid conflict provisions effectively limit the pool of experts who can serve as valuable members of the PRG. For example, the Council was made aware recently of a PRG member (who was affiliated with a very large nationally-based organization) who was stripped of their eligibility due to the fact that a separate and unrelated part of their organization had prior financial dealings with one or more of the affected parties. The affected individual had no contact with this other section of their organization and even attested they would create and abide by a strict firewall policy. Their rigidity of the conflict provisions did not allow the flexibility to address this scenario and unnecessarily stripped that PRG member of their eligibility.

**63. Does waning PRG participation negatively impact the solicitations process in a way that is not mitigated by other oversight mechanisms (e.g., IEs and their semi-annual reports)? If so, should more active PRG participation by external parties be encouraged by the IOUs or the CPUC? How?**

The Council believes that waning PRG participation is a function of the rigid conflict rules, relative to our Response to Question 62.

**64. Should the IOUs use a consistent method for accounting third-party administration costs among cost categories? Justify your response.**

Yes. Although utilities are now outsourcing a significantly greater portion of their energy efficiency programs, IOU administration costs and third-party administration costs still form a material portion of overall portfolio costs. Most programs also have caps relating to administration costs. Thus, it is important that there be absolute clarity around what does, and what does not, constitute an administrative cost in order to normalize internal versus ratepayer facing expenditures.

**65. May or should the CPUC delegate establishing consistent accounting methodology for third-party administration costs to staff? Is such delegation lawful?**

Yes, although the methodology should be subject to stakeholder review and comment.

**66. If so, what principles or boundaries should a CPUC decision set for staff to adhere to?**

The Commission decision should be guided by principles of standardization across programs and Program Administrators, relative simplicity, ease of administration, and integration of existing program cap guidelines.

**67. If not, what direction at what level of detail should a CPUC decision provide to assure consistent accounting methodology is used by all IOUs for third party administration costs?**

The Council refers to its Responses to Questions 64, 65, and 66.

**68. After 2022 should workshops with stakeholders continue, and if so, at what frequency?**

The Council believes that the current semi-annual cadence for these workshops is appropriate and beneficial and should continue after 2022. The Council sees an ongoing need to continuously review and discuss challenges and opportunities for improvement to the solicitations process.

Although the current wave of energy efficiency solicitations is in its final stage, it is likely that solicitation related issues will fall out of existing program operations (e.g. program performance, contract defaults, force majeure events, major regulatory or statutory impacts, etc). These forums will be valuable in addressing these issue and planning for the future wave of energy efficiency solicitations.

**69. What purpose and scope of workshops would continue to serve value?**

The Council believes that, similar to the workshop held on July 11, 2022, the Council recommends the Commission convene separate panels for Independent Evaluators and third-party implementers. During these sessions, speakers can offer their independent perspectives, largely free of influence by their contracting entities.

**70. What are other issues relevant to the third-party solicitations process are critical to address at this time through a CPUC decision?**

The Council does not provide a response at this time but reserves the right to respond to this question in Reply Comments.

## XI. DATABASE TOOLS

**71. What are the benefits of creating a governance committee comprised of program administrator and Commission staff to jointly determine the annual development and update priorities for energy efficiency reporting and data system, including CEDARS and CET? How can such a committee make the process transparent to stakeholders?**

The Council supports the creation of an independent governance committee for CEDARS and CET and encourages that such a committee include members from the third-party implementation community. These entities should nevertheless have an equal vote in the governance process. These committees should be open and transparent with stakeholders welcome to attend meetings, offer oral comment, and be able to comment on specific outputs developed by the committee

**72. Should all of the program administrators, or only the investor-owned utilities (IOUs), be expected to co-fund the reporting systems (and why)? If the reporting systems are funded by the four IOUs, how can the non-IOU program administrators be appropriately represented in the governance process?**

The Council believes that all program administrators should proportionally fund the costs associated with administering the CEDARS and CET reporting systems. As such, all funders must have representation and an equal vote in the governance process. Furthermore, all non-funding members of the governance committee should have an equal vote relative to the funding members.

**73. The CEDARS database accepts, processes, and stores official energy savings and cost claims upon which the program administrators are assessed for regulatory compliance. How should the Commission maintain data integrity and oversight, while enabling the program administrators to co-fund and co-manage the CEDARS and CET tools?**

The Council recommends that the Commission adopt the same governance forma that has been established by the California Technical Forum ("CalTF") for the Electronic Technical Reserve Manual ("TRM") database.

**74. How should the Commission ensure transparency to stakeholders about CEDARS/CET and other resource development and maintenance? What role should stakeholders play in the software development and update process?**

The Council refers to its Response to Question 73.

**75. What types of reports or notifications, such as an annual CEDARS/CET development plan, would enable stakeholders to clearly understand how resources, such as data specifications and other tools, are changing?**

The Council does not provide a response at this time but reserves the right to respond to this question in Reply Comments.

**76. What other technical resources would stakeholders like to see from the CEDARS/CET governance committee, if one is created?**

The Council does not provide a response at this time but reserves the right to respond to this question in Reply Comments.

## XII. STRATEGIC ENERGY MANAGEMENT ("SEM") PROGRAM

**77. Could the industrial SEM program design and related guidebooks be applicable to non-industrial sectors? If yes, why? If not, why not and how could they be revised to be more applicable to non-industrial sectors?**

The Council believes that it is appropriate for SEM eligibility to be extended to non-industrial sectors. This is already a common practice in other states and provinces where SEM is practiced. The Council believes SEM should be considered a pathway to achieve savings, similar to Custom, Deemed or Normalized Metered Energy Consumption ("NMEC"). The distinguishing factors associated with SEM, and described in detail in the California SEM Design Guide and M&V Guide are associated with the delivery approach and are agnostic about the customer segment designation. In fact, it is the Council's understanding that the recent Design Guide was updated to remove references to industrial only, which was broadly accepted

and supported by the stakeholder community. The Council is aware that there is an ongoing Evaluation, Measurement, and Verification ("EM&V") study managed by Southern California Gas Company that is investigating this question and will provide further insights into future SEM iterations.[2]

**78. Currently the industrial SEM program is designed as a long-term customer participation program following a prescriptive program design comprised of two 2-year cycles and eventually up to three 2-year cycles. Customers may elect to participate in some or all cycles. If a less rigorous approach is more appropriate for certain non-industrial sectors (e.g., shorter cycles, fewer activities, etc.), when compared to the more rigorous industrial SEM program design, is there a rationale that the NTGR of 1.0 and/or longer EUL are still applicable? Why or why not?**

The Council does not believe that limited modifications to the cycle term is necessarily a less rigorous approach. Any adjustments or incidental deviations from the SEM Design Guide can and should be documented in a program's Implementation Plan. By doing so, this allows Program Administrators and stakeholders the opportunity to ensure fundamental SEM Design Guide practices and M&V methods are followed, along with transparency for Commission Staff of the appropriate designation as an SEM program. If a SEM delivery can produce reliable and persistent savings, the SEM delivery should not be arbitrarily limited. Though SEM has different characteristics across the country, the term SEM is used to describe the delivery approach and M&V methodology which we believe is appropriate. The Council believes creating another programmatic category that leverages these same fundamentals will only prove to cause more market confusion.

**79. If a less rigorous approach is applied to non-industrial sectors for SEM, should these programs be called something else, to avoid stakeholder confusion? Explain your rationale and suggest alternative names, if applicable.**

The Council does not provide a response at this time but reserves the right to respond to this question in Reply Comments.

[2] *See,* Slides 10-11 from the Attachment shared by the Commission at the July 21, 2022 EM&V Stakeholder Meeting.

**80. Currently the official SEM guidebooks are maintained by the statewide SEM program administrators as living documents able to be revised in real time, as needed. Should this process continue, or should a different process be used to revise/update the SEM guidebooks? Or if the current process should be continued, are there any additional steps that should be incorporated? Explain your rationale.**

The Council believes the process outlined in the question has been successful and should continue to allow updates as market and policy conditions change, warranting adjustments.

**81. The primary objective of the Potential and Goals Study2, updated every two years, is to adopt energy efficiency goals for the program administrators, not to formally adopt energy savings calculation parameters such as EUL metrics. In addition, the studies only reference SEM EULs for commercial, industrial, and agricultural sectors. Are these EULs appropriate for commercial, industrial, and agricultural SEM programs that meet the Commission's threshold for SEM program design? Are they also appropriate for other sectors? Why or why not? Alternatively, should the Commission direct its staff to conduct California-specific SEM EUL studies? Are there different studies that are more appropriate for determining EUL metrics for SEM? Explain your rationale .**

The Council believes it is appropriate to consider SEM potential in other sectors as part of the Potential and Goals Study to appropriately capture the available opportunity as it does with custom and deemed delivery channels.

## XIII. CATALENA PROJECT

**82. How should the IOUs be required to implement the disaggregated demand data as defined in California Code of Regulation. Title 20, § 1353 – Disaggregated Demand Data, in the statewide tool ordered in Ordering Paragraph 32 of D.18-05-041?**

The Council does not provide a response at this time but reserves the right to respond to this question in Reply Comments.

**83. Describe how the winning bidder of the statewide tool should make disaggregated demand data accessible to qualifying users and use cases as defined in D.14-05-016?**

The Council does not provide a response at this time but reserves the right to respond to this question in Reply Comments.

**84. Explain if and how the statewide tool should adapt to data needs from other proceedings such as those addressing building decarbonization, demand response, and integrated distributed energy resources, to avoid duplication of efforts?**

The Council does not provide a response at this time but reserves the right to respond to this question in Reply Comments.

**85. What additional clarifications are needed to ensure that the statewide Energy Atlas-like tool will be most useful to California energy policy development for the long term?**

The Council does not provide a response at this time but reserves the right to respond to this question in Reply Comments.

**86. Is a long-term funding commitment needed, and if so, provide detailed suggestions for how much and how it should continue to be funded.**

The Council does not provide a response at this time but reserves the right to respond to this question in Reply Comments.

## XIV. DATA SHARING FOR COMMISSION-AUTHORIZED ENERGY EFFICIENCY PROGRAMS

**87. Should IOUs be ordered to provide disaggregated consumption data to 3C-REN and other RENs, upon their request, for the purposes of REN energy efficiency program operations and measurement and verification activities? If so, please specify:**

**a. The specific data that IOUs should be required to share**

**b. Frequency of data sharing**

**c. Which entity should incur associated operational costs**

**d. Compliance requirements, conditions, and other considerations**

The Council believes, consistent with our comments filed in connection with this motion (June 20, 2022), that the IOUs should be ordered to provide disaggregated consumption data to Tri-County Regional Energy Network ("3C-REN") and other regional energy networks ("RENs"), upon their request, for the purposes of REN EE program operations and M&V activities. This data should include interval metered data for participants and non-participants for time periods that adhere to reasonable statistical standards. As Program Administrators, the IOUs should be responsible for absorbing those costs. The IOUs should be responsible for taking the appropriate steps to anonymize the supplied data for non-participants prior to supplying the data to the RENs.

88. **Should IOUs be ordered to provide disaggregated consumption data to implementers (including third-party implementers) who are contracted to deliver Commission-authorized energy efficiency programs in their territory, for the purposes of energy efficiency program operations and measurement and verification activities? If so, please specify:**

    a. **The specific data that IOUs should be required to share**

    b. **Frequency of data sharing**

    c. **Compliance requirements, conditions and other considerations.**

The Council finds that Third Party Implementers are required to comply with policy standards, which in many cases require access to data for eligibility screening, project or customer validation, energy savings calculations or other delivery activities. Without access to this information, Third Parties are unable to complete their contractual obligations and/or realize the full potential of their savings opportunities. This has significant commercial implications for companies that have already taken on most or all of the performance risk. If a Third Party is selected by a Program Administrator to provide a local or statewide program, they should have access to necessary data to facilitate that implementation if they can demonstrate compliance with data security and privacy requirements. The Council recommends that IOUs should be required to share data to enable program delivery and M&V in alignment with the approved Program Design via a Commission Advice Letter (where applicable) or Implementation Plan for the relevant customer segment. In addition, the Commission recommends that frequency should depend on need, with all parties striving for efficiencies such as application programming interface ("APIs") to minimize administrative burden.

89. **Provide any additional information related to the 3C-REN motion and data access in energy efficiency programs which you believe may be beneficial to the Commission.**

The Council does not provide a response at this time but reserves the right to respond to this question in Reply Comments.

## XV. CONCLUSION

The Council appreciates the opportunity to provide these Opening Comments.

Respectfully submitted,

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/s/ JOSEPH DESMOND

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