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BEFORE THE DEPARTMENT OF ENVIRONMENTAL QUALITY
OF THE STATE OF MONTANA

In the matter of the adoption of New Rules I through XVI of ARM, pertaining to definitions, adoption by reference, solicitation and evaluation of qualifications and maintenance of list, ESP delisting and discipline, EPC process, multiple projects or contracts, measuring and verifying guaranteed cost savings, cost of measurement and verification, cost-effectiveness, ESP reporting requirements, operation and maintenance, contract term , guaranteed cost savings as percentage of total project cost, guaranteed cost savings, escalation rates, open book pricing	)	NOTICE OF PUBLIC HEARING ON PROPOSED ADOPTION (ENERGY)

TO: All Concerned Persons

1. On _______________, 201__, at __:00 a.m., the Department of Environmental Quality will hold a public hearing in Room 111 of the Metcalf Building, 1520 East Sixth Avenue, Helena, Montana, to consider the proposed adoption of the above-stated rules. Immediately preceding the hearing at [one hour before the hearing time] at the same location, the department will hold an informal question and answer session regarding this rulemaking.

2. The department will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact Denise Hartman, Administrative Rules Coordinator, no later than 5:00 p.m., ___________, 201__, to advise us of the nature of the accommodation that you need. Please contact Denise Hartman at Department of Environmental Quality, P.O. Box 200901, Helena, Montana 59620-0901; phone (406) 444-2630; fax (406) 444-4386; or e-mail dhartman2@mt.gov.

3. The proposed new rules for a subchapter for energy performance contracting provide as follows:

NEW RULE I DEFINITIONS As used in this subchapter, the following definitions apply:

1. “Base Agreement” means an agreement under § 90-4-1110, MCA, between the Department and the ESP. The Base Agreement is contained in Circular DEQ 14.

2. "Baseline" means the pre-project conditions used to determine any use or cost against which the guaranteed cost savings will be measured and where possible established by data for a term not less than 12 months. Baseline use and costs document pre-project energy or water use, or Operation and Maintenance (“O&M”) costs and conditions.

3. "Baseline utility rate" means the mutually agreed on utility rate at the time of an Investment Grade Audit or "IGA."

4. "Buy-down" means a payment by an Entity under § 90-4-1114(2), MCA, that is applied to an Energy Performance Contract or "EPC" to reduce the amount of financing needed to pay for the EPC.

5. "Certificate of Acceptance" or "COA" is a document issued and signed by a governmental entity to document the completion and acceptance of contract work.

(a) The COA for the IGA (termed the "IGA COA") documents the governmental entity's review and acceptance of:

(i) the IGA report; or

(ii) any addendum or amendment to the IGA report.

(b) The COA for the installed equipment (termed the "Implementation COA") documents the governmental entity's inspection and acceptance of the installation and operation of all project components.

(6) "Commissioning" means the process of verifying and documenting that the facility and all of its systems and assemblies are planned, designed, installed, tested, operated, and maintained to meet the governmental entity's project requirements.

(7) "Contingency" is a predetermined amount or percentage of the contract held for unpredictable changes in the project. It serves three core purposes to:

(a) account for errors and omissions in the construction documents;

(b) modify or change the scope of the project; and

(c) pay for addressing unknown conditions.

(8) "Cost-effective or Cost-effectiveness" has the same meaning as in § 90-4-1102, MCA.

(9) "Cost-saving measure" or "CSM" has the same meaning as in § 90-4-1102, MCA.

(10) "Cost-weighted average useful life" of the cost-saving measures or "CSM" shall be defined as the sum of the cost of each cost-saving measure times the useful life of each measure divided by the total cost of the cost-saving measures. $CWA = ((CSM_1\$ \times UL_1) + (CSM_2\$ \times UL_2) + \ldots + (CSM_n\$ \times UL_n))/CSM_T$ Where:

(a) CWA is the cost-weighted average useful life;

(b) $CSM_1\$$ thru $CSM_n\$$ is the cost of each cost-saving measure;

(c) UL_1 thru UL_n is the useful life of the cost-saving measure; and

(d) CSM_T is the total cost of all cost-saving measures included in the project.

(11) "Department" means the Department of Environmental Quality provided

for in § 2-15-3501, MCA.

(12) "Effective date" means the date the Implementation COA is signed.

(13) "Energy Code" means the International Energy Conservation Code, with amendments, in NR II.

(14) "Energy performance contract" or "EPC" has the same meaning as in § 90-4-1102, MCA.

(15) "Energy Performance Contracting Program" or "EPCP" means the program administered by the Department to implement Title 90, chapter 4, part 11, MCA.

(16) "Escalation rate" means the annual percentage change in the cost or price of goods or services. An escalation rate may be guaranteed or unguaranteed.

(17) "Governmental Entity" or "Entity" has the same meaning as in § 90-4-1102, MCA.

(18) "Guarantee period" has the same meaning as in § 90-4-1102, MCA.

(19) "Guaranteed Cost Savings" has the same meaning as in § 90-4-1102, MCA.

(20) "Initial monitoring period" means a term starting on the effective date of an EPC and ending not less than three consecutive years after the effective date.

(21) "Measurement and Verification" or "M&V" has the same meaning as in § 90-4-1102, MCA.

(22) “Open Book Pricing” means a contract for goods or services in which (a) the parties define the costs to be paid and (b) the markups that the ESP may add to these costs. The project is then invoiced to the Entity based on the actual costs incurred plus the agreed markups.

(23) "Operation and Maintenance" or "O&M" means the decisions and actions regarding the control and upkeep of property and equipment. These include, but are not limited to, the following: (a) actions focused on scheduling, procedures, and work/systems control and optimization; and (b) performance of routine, preventive, predictive, scheduled, and unscheduled actions aimed at preventing equipment failure or decline with the goal of increasing efficiency, reliability, and safety.

(24) "Operation and Maintenance Cost Savings" has the same meaning as in § 90-4-1102, MCA.

(25) "Qualified Energy Service Provider" or "QESP" has the same meaning as in § 90-4-1102, MCA. QESP also means "Energy Service Provider" or "ESP."

(26) "Shortfall" means the dollar amount by which the measured cost savings fall short of the guaranteed cost savings and any unguaranteed cost savings resulting from the use of escalation rates in the EPC.

(27) “State-owned building” means a building owned by a state agency as defined in § 90-4-605, MCA.

(28) "Stipulated" means a set value for a parameter that is agreed upon by the Entity and the ESP. A stipulated value remains constant throughout the term of the contract, regardless of the actual behavior of that parameter. This term has the same meaning as "estimated" for M&V purposes.

(29) "Total Project Cost" means total cost of the project, including costs for IGA, EPC, M&V, contingency, and all other ESP fees and services provided under the EPC to completely fulfill the project.

(30) "Unguaranteed" means a cost savings from a utility price escalation rate

that is not specifically guaranteed. If included in an EPC, it is combined with guaranteed cost savings to determine the cost-effectiveness of cost-saving measures and the amount of any shortfall payment.

(31) "Utility Cost Savings" has the same meaning as in § 90-4-1102, MCA.

AUTH: 90-4-1110, MCA
IMP: 90-4-1110, MCA; 90-4-1114, MCA

REASON:

The definitions of these terms are from sources as noted, including the statute at § 90-4-1102, MCA, the Energy Services Coalition (a national association for the energy performance contracting industry), and online dictionaries. ASHRAE definitions are used here to clarify terms and processes included in the statute.

“Base Agreement” is required in § 90-4-1110(1)(c), MCA. That section also requires the Department to “require qualified ESPs to contract and provide services in accordance with this part.” The reason for the Base Agreement is to put into one place the major elements of the EPC Program and inform the ESPs of the requirements of the program.

"Baseline" is referred to in the definitions of Guaranteed Cost Savings in § 90-4-1102(8), MCA, and operation and maintenance cost savings in § 90-4-1102 (11), MCA. Baseline is a record of pre-project use, cost, and conditions. It is necessary to compare a pre-implementation vs. post implementation condition.

"Baseline utility rate" is drawn from the definition of "guaranteed cost savings" in § 90-4-1102(8), MCA.

"Buy-down" is a term commonly used in EPC to describe an upfront cash payment to reduce the amount financed.

"Certificate of Acceptance" or "COA" is a document commonly used in other states’ EPC programs to document a governmental entity's acceptance of the completion by the ESP of all contract requirements for either an EPC or IGA contract. It is similar to the notice of substantial completion for construction projects, but is issued when all terms of the contract are completed.

"Commissioning" is based on the ASHRAE definition as found in the ASHRAE commissioning guidelines and standards.

"Contingency" is based on the definition provided by the American Institute of Architects as found in *The Architect's Handbook of Professional Practice*.

"Cost-weighted average useful life" is a term used in § 90-4-1114(3)(b), MCA, and requires a mathematical formula to standardize the calculation. The formula provided is a standard mathematical formula used for weighted averages. The formula is adapted to use the cost and the useful life of each cost-saving measure.

"Effective date" would be defined here to provide consistency with the same term used in statute and in contract documents. Section § 90-4-1102(7), MCA, defines Guarantee Period as beginning on the "effective date of the contract". “Initial Monitoring Period”, which is used for M&V, would also be defined to start on the “effective date”. The guarantee period in statute (§§ 90-4-1114(4) and 90-4-1114(6)(c), MCA) means the period after the project is complete that is used to determine if the project’s guaranteed savings have been met and if not, how much shortfall in costs versus savings exists. Therefore, the “Effective date” must be the

date the Implementation COA is issued. The definition of “effective date” would distinguish that term from the date the EPC was signed.

“Energy Code” would be defined because it is being used in these rules as a shorthand term for the IECC as amended and adopted by reference by the Department of Labor and Industry. It is the minimum standard for renovations and new construction.

"Escalation" is based on definitions from several sources. The definition used most closely follows the definition used in thelawdictionary.org. The term is used to determine cost savings caused by cost increases over time for each commodity and O&M.

“Initial Monitoring Period” used in § 90-4-1114(5)(a), MCA, concerning M&V costs. It is the initial period in which guaranteed cost savings are compared to actual savings. As noted under “effective date”, it begins on the issuance of the implementation CoA, and under § 90-4-1114(5)(a), MCA, runs at least three years.

“Open Book Pricing” is generally “cost plus” pricing in which the ESP works with the Entity to determine the cost of each CSM and the total project, then adds its markups to determine the price. The project is then invoiced to the Entity based on the actual costs incurred plus the agreed markups. The Entity is then able to review the ESP’s records for the project to ensure that only appropriate charges have been made in accordance with the contract. [Dept. to add reference later]

"Operation and Maintenance" is as defined in the US DOE’s FEMP Operations & Maintenance Best Practices, A Guide to Achieve Operational Savings. It is used in § 90-4-1102, MCA, to address cost savings and in § 90-4-1113, MCA, to address required components of an IGA. It is proposed to be defined here because it is not defined in statute. The proposed definition limits the term to the control and upkeep of property and equipment. Although maintenance is generally consistent in its definition (generally repair or servicing of buildings and equipment), definitions of operation often include utilities, office supplies, and materials for manufacturing that go beyond the scope of O&M. The FEMP definition is consistent with that used by other national organizations, including National Institute of Building Sciences and the American Council for an Energy-Efficient Economy.

"Shortfall" is used in § 90-4-1114(6)(a), MCA, as part of the term "verified annual guaranteed cost savings shortfall" and as a shorthand term for that term. It means the dollar amount by which the measured cost savings are less than the guaranteed cost savings. An ESP must pay the shortfall to the governmental entity.

"Stipulated," along with variations of the term, is frequently used in EPC as an alternative to the use of "measured." A stipulated parameter is treated as equivalent to a guaranteed parameter. The FEMP M&V Guidelines define stipulated as any factor not measured that is estimated based on assumptions or analysis of historical or manufacturers' data. Some parameters may be measured initially and then stipulated under M&V. Documentable sources must be used for any estimates or stipulations.

"Total Project Cost" includes all costs associated with the project. Section 90-4-1110(3)(a), MCA, authorizes the department to adopt rules to establish criteria for the amount of project costs covered by guaranteed cost savings. A definition of total project cost is necessary for the department to use in establishing those criteria, which are proposed to be adopted in NR XIII. It is also used for other purposes in these proposed rules and program documents. Therefore, a definition is necessary.

Because under § 90-4-1114(5)(a),MCA, M&V must be part of the EPC, it is included in the total project cost. The IGA is also a cost of the project and must be included in the total project cost. The proposed definition would include these items in the total project cost.

"Unguaranteed" is something that is not guaranteed. § 90-4-1110(3)(d), MCA, authorizes the department to adopt rules to determine how unguaranteed utility price escalation rates may be applied to EPC. Sections 90-4-1102(1) and 1114(6)(a), MCA, refer to unguaranteed utility price escalation rates concerning cost- effectiveness and shortfall payments. The definition that would be used here, concerning cost-savings from a utility price escalation rate that is not guaranteed, reflects how the term is used in EPC. An ESP generally does not guarantee an escalation rate, thereby making any escalation rate unguaranteed. However, under § 90-4-1114(6)(a) of these proposed rules, an unguaranteed utility price escalation rate, if used in an EPC, may provide part of the cost savings that are used to determine cost-effectiveness and to determine if guaranteed plus unguaranteed cost savings will pay for the financing repayment obligation.

Other terms are defined to have the same meaning as in the statute and would be defined because they are used in these rules.

NEW RULE II ADOPTION BY REFERENCE

(1) The department adopts and incorporates by reference:

(a) Efficiency Valuation Organization (EVO), International Performance Measurement and Verification Protocol (IPMVP), Volume I, EVO 10000 – 1:2012. It is available at http://evo-world.org/en/.

(b) U.S. Department of Energy Federal Energy Management Program (FEMP), M&V Guidelines: Measurement and Verification for Performance-Based Contracts, Version 4.0, November 2015. It is available at: http://energy.gov/sites/prod/files/2016/01/f28/mv_guide_4_0.pdf;

(c) Energy codes and standards:

(i) International Code Council, International Energy Conservation Code (IECC), as adopted and amended in ARM 24.301.161. The 2012 version of the IECC is available at http://codes.iccsafe.org/app/book/toc/2012/I-Codes/2012%20IECC%20HTML/index.html;

(ii) American Society of Heating, Refrigerating and Air-Conditioning Engineers (ASHRAE), Energy Standard for Buildings Except Low-Rise Residential Buildings. All references to that document in this subchapter are to Standard 90.1-2010, which is available at http://www.techstreet.com/ashrae/standards/ashrae-90-1-2010-i-p?ashrae_auth_token=&gateway_code=ashrae&product_id=1739526;

(iii) Montana Department of Administration, Architecture & Engineering Division, State of Montana High Performance Building Standards. All references to that document in this subchapter are to Adopted Version 1, December 1, 2013, which is available at http://www.architecture.mt.gov/Portals/14/docs/HPBS/HPBS_Documents_Portfolio_v1_Adopted_12_1_13.pdf.

(d) U.S. Department of Energy (DOE) Federal Energy Management Program (FEMP), Energy Escalation Rate Calculator (EERC) All references to the EERC in this subchapter are to version 2.0-16. The current version is posted at

http://energy.gov/eere/femp/energy-escalation-rate-calculator-download.

(e) ARM 24.301.161. All references to that rule in this subchapter are to the rule in effect on December, 31, 2016; and

(f) Circular DEQ 14 Energy Performance Contracting. All references to that document in this subchapter are to the 2017 edition and are viewable at [Department's website to be included in final adoption notice].

(2) A printed version of each of the documents in (1) is available for viewing at the Department's office located at 1520 E. 6th Avenue, Helena, MT 59601.

AUTH: § 90-4-1110, MCA
IMP: § 90-4-1110, MCA; § 90-4-1114, MCA

REASON:

The resources and documents listed are major references that are proposed to be used to standardize the EPC process and documents required in § 90-4-1110(1)(e), MCA, as well as to help implement Title 90, chapter 4, subchapter 11, MCA. Each document proposed to be incorporated by reference is available at the location indicated in the rule. As indicated, the Department has printed versions of each document available for review. However, § 2-4-307(5), MCA, does not require the Department to publish copyrighted materials.

The IPMVP is a standard document of about 140 pages that is used internationally for measurement and verification of savings for performance-based contracts. The IPMVP is available for free viewing on the EVO website. However, every downloader must register as a user to the website (this is free of charge and is different from an EVO website subscription, for which there is a fee). To view or download the IPMVP protocols, first select "document access" and complete the registration here: http://evo-world.org/en/subscribe-join-en. The IPMVP offers general guidelines and processes for conducting M&V activities. The FEMP M&V Guidelines, consisting of about 108 pages, are based on the IPMVP and give greater detail on how the IPMVP should be applied to the M&V process.

The International Code Council revises the IECC, which is about 150 pages, every three years. The Montana Department of Labor and Industry has adopted the 2012 International Energy Conservation Code (IECC), with amendments, at ARM 24.301.161.

The ASHRAE Standard 90.1 - 2010 Energy Standard for Buildings Except Low-Rise Residential Buildings, is about 225 pages. The standard is available for viewing at the Department's website http://deq.mt.gov/Portals/112/Energy/EnergizeMT/Conservation/Public%20Buildings/Energy%20Performance%20Contracting/Documents/ASHRAE_90_1_2010_IP.pdf?ver=2017-04-04-114235-757. The Montana Department of Administration's Architecture and Engineering Division has adopted the State of Montana High Performance Building Standards, consisting of about 125 pages, which establish a goal for new state facilities to be 20 percent better than the IECC.

The EERC would be adopted as a reference tool to standardize the escalation rate to be used in EPCs. This tool is used to establish the maximum escalation rate that the ESP may use for utility and O&M costs. The tool has been created by the US Department of Energy's Energy Information Administration (EIA).

It is a calculator with up to 11 inputs and a built-in database that is hidden from the user.

Proposed Circular DEQ 14 contains procedures and key documents related to the EPC program, such as RFP and RFQ, IGA and EPC contracts and related schedules and exhibits, M & V report, and the base agreement. These documents comprise over 150 pages and are viewable at http://deq.mt.gov/Energy/EnergizeMT/Conservation/EPC/EPC-Program-Documents/EPC-Proposed-Program-Documents

The documents proposed to be adopted by reference total about 900 pages. At a cost of $60/page to publish rules in the Montana Administrative Register (MAR), it would cost over $50,000 to publish those documents as rules. It would therefore be unduly burdensome and expensive to publish the documents in the circular in the MAR and Administrative Rules of Montana (ARM). It would also be very expensive to update the documents if they were in rule. It would likely cost thousands of dollars each time an update is needed because portions of the rules being updated would need to be published in the MAR. Publication in the MAR and ARM would also make the rules very voluminous and unwieldy.

It is reasonable to adopt those documents by reference instead of by publishing them in the MAR and ARM. ESPs and governmental entities have access to the internet and can view the documents on it and, if necessary, download the documents from it. Also, the department has these documents available for review on request.

NEW RULE III SOLICITATION AND EVALUATION OF QUALIFICATIONS AND MAINTENANCE OF LIST

(1) After the Department has issued a Request For Qualifications (RFQ) under § 90-4-1111, MCA, and received submissions of qualifications, it may request an ESP to submit additional information if necessary to complete or clarify information submitted by the ESP or to satisfy other factors the Department determines appropriate. If requested, an ESP shall submit the additional information to the Department.

(2) An ESP seeking to be included on the department's qualified list may submit its qualifications to the Department only once per calendar year.

(3) If the Department determines to list an ESP as qualified, it shall list the ESP only if the ESP enters into the Base Agreement with the Department as required in § 90-4-1110(1)(c), MCA.

(4) An ESP listed by the Department shall maintain the qualifications established in its qualifications submittal.

(5) An ESP shall report, via email to the address in Circular DEQ 14, any significant changes to its qualifications to the Department within 60 days after the change occurs. Significant changes include:

(a) going out of business;

(b) no longer providing the services that originally qualified the ESP;

(c) a relevant change of personnel submitted in response to RFQ or in report under this section; and

(d) any other matter determined by the Department necessary to fulfill the requirements of this subchapter.

(6) The Department shall review a listed ESP's qualifications annually and determine by 60 days prior to the anniversary date of the ESP's listing if an ESP is qualified to remain on the qualified list.

(7) The Department shall maintain the list of qualified ESPs and publish the list on its web site.

AUTH: 90-4-1110, MCA
IMP: 90-4-1110, MCA; 90-4-1111, MCA

REASON:

The Department is required to request qualifications and review submitted qualifications of ESPs at least every five years for potential inclusion on its list of qualified ESPs. If an ESP submits its qualifications at another time, the Department is similarly required to review them. § 90-4-1111(1), MCA. Subsection (2) of that statute requires the Department to evaluate the submitted qualifications based on knowledge and experience with energy performance contracts, ability to guarantee cost-effectiveness, financial stability, and other factors determined by the department.

Proposed (1) would authorize the department to request additional information relating to the submission or other information the department determines appropriate. The Department would review and evaluate the additional information to determine whether the ESP qualifies for listing. An entity requesting to be listed as an ESP would be required to submit the requested additional information. § 90-4-1111(2), MCA, requires the department to evaluate qualifications based on other factors determined by the department. The department needs to have sufficient information on which to base its decision to qualify an ESP. Occasionally, a submittal may lack some required information or the information needs to be clarified. In addition, the department may determine that additional information is appropriate for it to evaluate. For this reason, proposed (1) would allow the department to request additional information from the ESP, and would require the ESP to provide it.

The Department is proposing in (2) to limit an ESP's submission of qualifications to one time per year. The Legislature has not funded the Department's work to administer the EPCP, so to limit its cost and workload, the department needs to limit the number of reviews and evaluations of qualifications submissions to one per year for each.

Section (3) would provide that, after the Department determines that an ESP is qualified, it shall list the ESP if it enters into the Base Agreement in Circular DEQ 14. Section 90-4-1110(1)(c), MCA, provides that, as part of the EPC program, the Department shall enter into agreements with qualified ESPs and require them to contract and provide services in accordance with the EPC law. The Base Agreement is an agreement between the department and the ESP that describes requirements of the law and rules and contains the commitment of the ESP to follow those requirements in providing EPC services to a governmental entity. Circular DEQ 14 is being adopted by reference and contains the documents that govern the EPC program, including the base agreement.

Section 90-4-1110(1)(b), MCA, requires the department, pursuant to administrative rules it has adopted, to disqualify and remove from the qualified list

ESPs who do not comply with the qualifications for which they were placed on the list, and (1)(h) of that section requires the department to establish reporting requirements for qualified ESPs. Section (4) of the proposed rule would require each ESP to maintain the qualifications in its submission. Section (5) would require each ESP to report significant changes in it qualifications to the department within 60 days after the change occurs. Significant changes are defined as including going out of business, no longer providing the services for which the ESP was qualified, or changes in personnel affecting the qualifications.

Section (6) would require the department to annually review each listed ESP's qualifications and determine if it should remain on the list or be removed. The proposed sections are necessary for the Department to receive adequate information to determine whether ESPs remain qualified and should stay on the list or be disqualified and removed from the list if they are no longer qualified. The proposed sections are necessary for the Department and governmental entities to be made aware of changes that could affect an ESP's capability to enter into and guarantee EPCs, and of ESPs that have been removed from the list and may no longer be solicited for EPCs.

Section 90-4-1110(1)(a) and (f), MCA, require the Department to maintain a list of qualified ESPs and to assist governmental entities by providing technical assistance and maintaining a website. To enable governmental entities to easily use the list to solicit proposals from ESPs for EPCs, the department has been providing the list electronically on its website and also sending printed copies on request; it would continue to do so under ~~the~~ proposed (7).

NEW RULE IV ESP DELISTING AND DISCIPLINARY ACTION

(1) The Department shall delist an ESP if it determines that the ESP has failed to meet the qualifications established under § 90-4-1111(2), MCA.

(2) Based on the severity and culpability determined under (1), the Department may decline to evaluate or act on a submission of qualifications by an ESP for a period of up to five years.

(3) The Department may relist an ESP delisted under (1) if the ESP has remedied, to the satisfaction of the Department, the failure to meet the qualifications established.

(4) If it determines that an ESP has violated Title 90, chapter 4, part 11, MCA, of this subchapter or an agreement or contract entered into pursuant to Title 90, chapter 4, part 11, MCA, or this subchapter, the Department may revoke or suspend the listing of an ESP on the qualified list, place the ESP on probation, reprimand or censure an ESP, or take other appropriate disciplinary action concerning an ESP.

(5) Based on the severity and culpability determined under (4), the Department shall determine the type and duration of, or whether to modify, any action in (4).

(6) Upon selecting a disciplinary action under (1) or (4), the Department shall serve the ESP by U.S. mail with a written notification of the determination, action, and the reasons for them.

(7) An action in (1) or (4) becomes final if the ESP does not file a written appeal with the Department within 30 days after the notification was served. A

written appeal must state with specificity each fact and basis for appealing the determination.

(8) When it receives a written appeal, the Department shall appoint a hearing examiner to conduct a hearing and decide the appeal. The Montana Rules of Civil Procedure, except 37(a)(5) and (b)(2)(C), and Evidence, and the Uniform Rules of District Court, Rules, except Rules 7 and 9, apply to the appeal. Every reference in those rules to "court" or "judge" is deemed to be a reference to the hearing examiner.

(9) The hearing examiner shall serve the decision on the appeal by mail on the parties. Except as provided in (10), the decision is final when served.

(10) A decision in (9) to delist an ESP becomes final if the ESP does not file a written request for review with the Department's director within 30 days after the decision was served on it.

(11) When the director receives a written request for review under (10), the director shall review it and issue a final decision. The director shall serve the final decision on the parties by U.S. mail.

(12) After a department action or decision in this rule becomes final, the Department shall:

(a) serve a copy by mail on the ESP;

(b) provide a copy to each Entity currently contracting with the ESP; and

(c) post a copy to the Department's website.

(13) An ESP that has been delisted by the Department shall fulfill all obligations for any current contract and meet the standard of conduct set forth in the Base Agreement.

(14) Each service required by this rule is effective on mailing.

AUTH: § 90-4-1110, MCA
IMP: § 90-4-1110, MCA; § 90-4-1111, MCA

REASON:

This rule addresses two paths that the department may take to discipline an ESP if it fails to comply with EPC requirements. The first path is based on the requirement in § 90-4-1110(1)(b), MCA, that the department "shall … pursuant to rules adopted by the department, disqualify and remove from the list energy service providers who do not comply with qualifications established." If the department finds that an ESP is not complying with qualifications established under the request for and approval of qualifications in § 90-4-1111(2), MCA, it must remove the ESP from the list. There is no provision in statute regarding the reinstatement of a removed ESP. However, § 90-4-1110(2)(b), MCA, states the department may adopt rules to implement this part; this authorizes the department to adopt rules allowing it to reinstate on the qualified list, after an appropriate period has passed, an ESP if the department determines that it is appropriate. To give effect to these statutory provisions, the department is proposing to adopt sections (1)-(3). Section (1) would require the Department to delist an ESP if it determines that the ESP has failed to meet the qualifications established under the statute. This is necessary to comply with the statute.

Section (2) would authorize the Department to decline, if the severity and culpability of the ESP's failure to comply with qualifications justify it, to evaluate a

submission of qualifications by an ESP for a period of up to five years. This is necessary to give the Department the authority to allow an ESP that has been delisted the opportunity, after a period that is appropriate to the severity and culpability of its failures, to seek relisting as a qualified ESP.

Section (3) would authorize the department to relist a delisted ESP if it is satisfied that the ESP has remedied the failures that led to the delisting. This is necessary to allow a delisted ESP to again qualify for listing so it can conduct EPC work, while making sure that the failures have been corrected.

The second path, starting at (4), is for the department to adopt rules under § 90-4-1110(2)(b), MCA, authorizing it to take disciplinary action against an ESP for violations of the statute, rules, or agreement. That statutory section authorizes the department to adopt rules "for … implementation of the part." "Implementation" includes a process for addressing discipline for those violations. The department is proposing to adopt in (4) provisions authorizing it to determine violations and take the following types of disciplinary action as appropriate: revocation, suspension, probation, reprimand or censure, or other appropriate action. These types of disciplinary action are taken from section 37-1-136(1), MCA, which authorizes boards in charge of regulating occupations to adopt the authority to impose those types of action.

In (5), the Department would be required to determine the type and duration of, or whether to modify, any disciplinary action in (4) based on the severity of the violation and the culpability of the ESP in committing it. This is necessary to ensure that the type and duration of any discipline are proportionate to the violation and culpability of the ESP.

Because the statute is silent on the method of notification that the department must use to inform an ESP of a disciplinary action taken under (1) or (4), section (6) would require notification by U.S. mail. U.S. mail is an appropriate and low-cost method for sending notices, and the law presumes that a mailed notice is received.

Sections (7) through (12) would provide for the procedure for disciplinary actions, either for failure to comply with qualifications under (1) or violation of a requirement of law, rule, or agreement under (4). The proposed rules would establish 30-day deadlines for an ESP to challenge a disciplinary action or have the action become final, a two-tier appeal process for delisting, and a one-tier appeal process for lesser disciplinary actions. Those procedures generally follow the approach of the Montana Administrative Procedure Act (MAPA) for contested cases, although a contested case for a disciplinary action in these rules is not provided for by law, and so an appeal under this subchapter is not subject to MAPA. These proposed procedures are reasonable and provide due process to ESPs.

Section (13) would provide that a delisted ESP is required to fulfill all obligations for a current contract and meet the standard of conduct in the Base Agreement. This is proposed to make it clear that the delisting of an ESP does not affect its contractual obligations.

Section (14) would provide that each service required by this rule is effective on mailing. This is proposed to make it clear that deadlines in this rule start to run when the department mails a document.

NEW RULE V EPC PROCESS

(1) An ESP may not enter into an EPC contract before:

(a) completing ~~an~~ the final IGA report;

(b) completing an EPC project proposal based on the final IGA report; and

(c) receiving an IGA COA from an Entity.

(2) A governmental entity may not sign and issue an Implementation COA unless it has inspected and accepted the ESP's installation and operation of all project components and preparation of documents, including:

(a) all measures identified in the scope of work of the EPC contract;

(b) the EPC commissioning;

(c) the project O&M manual;

(d) the completion of Entity O&M training; and

(e) the M&V plan.

(3) An ESP may not ~~begin shortfall negotiations~~ negotiate the terms of measurement and verification reports and shortfall payments under § 90-4-1114(6)(b), MCA, before the end of the initial monitoring period, ~~unless approved in writing by the Entity~~.

(4) An ESP may charge an Entity for costs listed in the IGA contract or EPC contract only. Costs that may not be listed in either contract include costs incurred:

(a) in developing RFP responses;

(b) prior to both parties' signing an IGA contract;

(c) between an entity's signing of an IGA COA and the parties' signing of an EPC contract; and

(d) in negotiating a shortfall.

(6) An EPC is contingent, and each EPC contract must state that it is contingent, upon

(a) The Entity's securing funds for the buy-down, except for potential utility incentives; and

(b) obtaining financing for the balance of the total project cost.

(7) If funds are not secured or obtained as required in (6), the Entity is not liable for any costs incurred under the EPC.

(8) Any contingency funds must be specified in the EPC and must be included as part of the guaranteed maximum price of the Contract. The Entity retains control of the contingency fund, which may be spent only if:

(a) the Entity has provided written approval for each contingency expense; and

(b) used for goods or services necessary to implement cost-saving measures in the EPC.

AUTH: § 90-4-1110, MCA

IMP: 90-4-1110, MCA; 90-4-1113, MCA; 90-4-1114, MCA

REASON:

In section (1), the department proposes language to ensure that the EPC process is sequential—that one step is not started until the previous step is completed. This would give effect to the statutory language and make sure that a governmental entity becomes liable for financial obligations only at the appropriate stages, after it has received proper information and has made specific approvals and

authorizations. According to § 90-4-1113(1), MCA, the IGA report must be incorporated into an EPC. This means that an IGA must be completed before an EPC is fully signed. The ESP provides the Entity with a project proposal based on the IGA report. This project proposal may be modified during the negotiations for the EPC. Proposed section (1) would prohibit an ESP from entering into an EPC contract before completing both an IGA report and an EPC project proposal, and before the governmental entity issues a certificate of approval for the IGA report. The IGA COA documents the Entity's acceptance of the completed IGA. The Entity then has the option to proceed with an EPC. By statute, § 90-4-1102, MCA, the guarantee period does not start until the effective date of the EPC contract. The effective date would be defined in New Rule I(12) to be the date the implementation COA was issued by the governmental entity.

Section (2) of this rule would provide that the governmental entity may sign and issue an implementation COA only if the Entity has inspected and accepted the installation and operation of all project components and preparation of documents. This is necessary to ensure that the guarantee period starts only when all work necessary for the governmental entity to operate the project and start receiving the benefits of its investment in the project has been completed. Only then will the monitoring and verification, which will show if the project is saving the energy it guarantees, begin.

Regarding (3), § 90-4-1114(6)(b), MCA, allows an Entity and ESP to negotiate the terms of M&V reports and shortfall payments for the remainder of the EPC finance term. However, the statute is silent as to what degree negotiations can take place during the initial monitoring period. Until the initial monitoring period has elapsed, the dollar amount of actual future shortfalls cannot be established, and negotiations would be premature. Therefore, the department is proposing not to allow negotiations concerning M&V and shortfalls during the remainder of the EPC contract term to occur until the end of the initial monitoring period, which is a minimum of three years under § 90-4-1114(5)(a), MCA. The Department's intent is for the ESP to identify and document any shortfall in the M&V reports before any negotiation of shortfall can be begin. This is to allow the Entity to understand the amount of the shortfall before it enters into a negotiation.

During the guarantee period the ESP is responsible to ensure that the guaranteed cost savings are realized. The ESP should take necessary corrective action during the initial monitoring period to remedy and prevent any shortfalls. Otherwise the ESP will have to pay for M&V and shortfalls until guaranteed cost savings are met for a period of all years in a term of consecutive years equal to the initial monitoring period, § 90-4-1114(5)(a, b), MCA.

Regarding (4), it is common practice in other states that an ESP responding to an RFP may not charge the entity for the cost of preparing its proposal. Furthermore, the time and expense required to negotiate a contract is outside the scope and timeframe of the contract. These items are part of the costs of doing business, and may be part of the overhead charged by the ESP in an IGA and EPC, but should not be allowed in either contract as line items. For this reason, the department is proposing not to allow the ESP's costs incurred prior to the IGA contract or after signing of that IGA COA until the EPC contract is signed to be charged to the Entity. Any work performed during those periods would not have been negotiated by the parties and any costs for that work would have to be

recovered under overhead. The department requires the entity to use COA forms, in part to create a clear delineation of ESP work provided under contractual obligations. Under the EPC performance guarantee, the ESP is obligated to meet the guaranteed cost savings. Therefore, any ESP costs for negotiating a shortfall are not permissible or billable to the Entity.

Section (5)(a) would provide that an Entity and an ESP may not sign an IGA unless the Entity has funds on hand to pay for it. This is necessary because an IGA does not always result in an EPC. If it does not, the cost of the IGA cannot be rolled into the financed cost of the EPC, and the IGA cost must be paid to the ESP out of funds available to the Entity. See § 90-4-1113(3), MCA. If the Entity has not set aside the cash to pay the cost of the IGA, and no EPC is signed, the Entity will not be able to pay the ESP unless it takes the money away from other budgeted purposes. So, it is necessary for the Entity to have the cash on hand to pay for an IGA before it signs the IGA contract. Section (5)(b) would provide that that an Entity and an ESP may not sign an EPC unless the Entity has identified funding sources for any buy-down and the financing method and source for the balance of the cost of the project. This is necessary because § 90-4-1102(1), MCA, requires that the cost savings of an EPC be sufficient to pay for any financing repayment obligation. If the amount of the total project cost to be financed is to be reduced by a buy-down, the Entity must know the sources and amounts it intends to use for the buy-down before it signs an EPC. Otherwise, it will not be able to pay the ESP the costs of the buy-down when due, unless it takes the money away from other obligations.

Part of the role of an ESP in an EPC is to work with the Entity to help obtain financing to ensure that sufficient funds are available to complete the EPC.

Section (6) would establish the contingency that an Entity obtain the financial resources to pay for an EPC before it becomes liable to the ESP for the costs of the EPC. This is necessary because funding sources for the buy-down may be contingent on other factors, and financing agreements may be finalized after the EPC is signed. This contingency provision would protect an Entity from incurring a debt obligation to an ESP if the funding for the project was unavailable. Section (7) would complete this concept by protecting an Entity from liability to an ESP for any costs incurred if the funds are not available.

Regarding (8), an EPC includes a Guaranteed Maximum Price (GMP) to cap the financial obligation of the entity. Contingency funds for unforeseen conditions and changes to the project scope should be identified and included in the GMP. Contingency funds should be controlled by the Entity. Any expenditure of the contingency should be subject to approval by the Entity. Any contingency funds remaining after the Implementation COA is signed should remain with the Entity. The proposed rule language would mandate this, and would follow the process established by the American Institute of Architects (AIA), in The Architect's Handbook of Professional Practice.

NEW RULE VI PROJECT SCOPE AND MULTIPLE CONTRACTS

(1) In a Request for Proposals (RFP) issued by an Entity, the Entity shall list the facilities to be addressed in the project scope, and may include the option to expand the project scope to include additional listed facilities. If the option to expand the project scope was:

(a) not included in the RFP, an Entity may not enter into an IGA for a project that is outside the project scope of the RFP unless the Entity issues another RFP in which additional facilities may be considered for EPC.

(b) included in the RFP, the Entity may either:

(i) issue an RFP for the additional listed facilities at any time or

(ii) if the IGA COA has:

(A) not been signed, the Entity may negotiate with the ESP to include those additional listed facilities in the scope of work for the IGA.

(B) been signed, the Entity may negotiate a new IGA contract with the ESP.

(2) If the Entity chooses to expand the project scope as provided in (1) and the ESP is no longer listed as a qualified ESP, the Entity shall:

(a) attempt to negotiate an IGA contract with the ESP that obtained the next-highest ranking in the RFP process; or

(b) issue a new RFP to qualified ESPs.

(3) The Entity may not expand project scope to be included under an IGA more than five years after the issuance of the RFP for the initial project.

(4) An ESP may combine guaranteed cost savings for multiple EPCs, as in phased or amended EPC project contracts ("the combined EPC"), only if:

(a) the combined EPC is based on the same IGA;

(b) the combined EPC meets the requirements of cost-effectiveness in § 90-4-1102 and proposed NR IX;

(c) the combined EPC all other requirements in statute and rule regarding qualification as an EPC; and

(d) the measurement and verification plan includes all measures in the combined EPC.;

(e) M&V is conducted for all measures at least through the initial monitoring period of the combined EPC and through any additional period required by § 90-4-1114(5)(b), MCA.

AUTH: § 90-4-1110(2)(b), MCA
IMP: § 90-4-1113, MCA

REASON:

EPC offers a governmental entity seeking to obtain energy or water use savings an exemption from normal state procurement requirements, which may lead to less competition and higher costs. In exchange, the entity gets to solicit proposals from companies prequalified by the Department of environmental quality and a guarantee from the company it selects that cost savings will pay back any loan or bond the entity uses to finance the project.

Regarding (1), § 90-4-1112, MCA, places the responsibility for selecting an ESP on the Entity through the RFP process. That statute does not address expanding the project scope of an EPC after the entity has solicited providers to

submit proposals to address its energy or water conservation needs. This proposed section would allow the Entity to add buildings or facilities to the project scope without issuing another RFP if the additions were listed in the original RFP. The RFP should clearly state the scope of the project, identifying the buildings or facilities to be included.

Having the potential to expand the scope of an EPC project in the Request for Proposals (RFP) stage might increase interest from more ESPs and therefore create more competition and potentially lower total cost to the entity.

Expanding the scope from the initial project subjects the entity to increased risk of reduced competition and higher costs. Therefore if the scope is allowed to be expanded, the potential expansion must be listed in the initial RFP. This allows all the ESPs responding to an RFP to analyze all of the possible projects and facilities for feasibility of conducting an EPC. It is then fair to allow expansion of project to the initially-selected ESP, because all the ESPs responding had a chance to propose and conduct the work.

If the expanded scope was not listed as an option in the initial RFP, a new RFP would be required before an IGA or EPC for that work could be negotiated. Section 90-4-1113(1), MCA, requires that an IGA must be done before an EPC may be entered into, and that the project scope of an EPC must be based on an IGA. If an IGA has not yet been accepted, the IGA may be expanded to address the expanded scope and an EPC could be based on the IGA with the expanded scope. If the IGA has been completed and accepted, a new IGA would be required before an EPC could address the expanded scope. Proposed (1) would mandate the above approach to maintain fairness and competition and to ensure that statutory requirements are met.

When the Entity chooses to proceed in phases – completing the IGA on one group of facilities prior to initiating an IGA on another group – each group of facilities should be addressed in different contracts as presented in (1)(b)(ii)(B). This follows from § 90-4-1113, MCA, as the IGA must be incorporated into an EPC.

Regarding (2), under § 90-4-1102(4), MCA, an ESP that is no longer listed as qualified may not enter into an IGA or EPC. In this situation, section (2) would give effect to the statute by providing that the Entity may either attempt to negotiate an IGA with the next-ranked ESP from the RFP or issue a new RFP. The IGA and EPC contracts in Circular DEQ 14 authorize the Entity to determine whether delisting would be a material breach and to terminate a contract for a material breach.

Regarding (3), the original RFP should have a limited duration. The duration is often included in the RFP, but if it is not, there needs to be a maximum time period during which the project scope stated in the RFP may be expanded. The duration of the RFP term is important to multiple parties for a number of reasons, including: (a) the Entity should review its selection of an ESP as other ESPs may have become qualified or improved their qualifications or pricing; (b) an ESP is limited to the pricing structure it first submitted in the RFP, unless renegotiated in the IGA. Shifts in the marketplace may result in changes to its pricing structure; and (c) other ESPs may be interested in contracting with the Entity to provide services at a lower cost. The Department is proposing five years as the maximum period in which the scope of an RFP can be expanded. This period would reasonably address the concerns listed in the previous paragraph.

The effect of (3) is to limit the expansion of scope related to the IGA process and has no effect on any EPC resulting from an IGA completed within the five year term of the RFP.

Regarding (4), the Department recognizes that an EPC project may be completed in phases or modified through actions such as change orders, whether by facility or CSM, to meet the financial ability or other considerations of the Entity. Under § 90-4-1113(1), MCA, an IGA must be incorporated into an EPC. Conversely, an EPC must be based on an IGA. Subsection (a) would require that the combined EPC must be based on the same IGA. The IGA contract plus any amendments to it, therefore, determines the boundary for the EPC and phasing. Under § 90-4-1102(4), MCA, an EPC must be cost-effective. Subsection (b) would address this requirement plus any requirements or modifications included in rule. Subsection (c) would state that the combined EPC meets requirements in statute and rule regarding its qualification as an EPC, particularly those requirements under NR VII, VIII, and XIII. Subsection (d) would require that the M&V plan must include all measures in the combined EPC. Often the phasing or change orders occur prior to the end of the initial monitoring period. Also, cost-saving measures may have interactions that affect the total cost savings. Subsection (e) would address these concerns by requiring M&V to continue through the initial monitoring period of the combined EPC for all measures to ensure that the guaranteed cost savings are realized.

NEW RULE VII MEASURING AND VERIFYING GUARANTEED COST SAVINGS

(1) An ESP shall, in an IGA report, include in an M&V plan the IPMVP option (A, B, C, or D) it intends to use for each CSM and the M&V procedures it intends to apply in compliance with FEMP M&V Guidelines.

(2) The ESP shall measure key parameters before and after the implementation of the CSM. The ESP shall clearly identify and document the sources of the values of other parameters in IPMVP Option A; those values may be stipulated only with the written consent of the Entity.

(3) An ESP choosing IPMVP option B, C, or D shall conduct short-term or continuous field measurement to document both baseline and post-implementation conditions.

(4) The ESP shall include in an EPC an M&V Plan that complies with the FEMP M&V Guidelines. In that Plan, the ESP may use a different M&V option from that selected in the IGA report. Before the implementation COA is issued, the EPC M&V plan may be modified only with the written consent of the Entity.

(5) In the EPC M&V Plan, the ESP shall identify each relevant static factor and independent variable and how each will be used for baseline adjustments during the guarantee period. Before issuance of the implementation COA, a modification to a static factor, independent variable, or baseline adjustment methodology may be made only with the written approval of the Entity.

(6) During the guarantee period:

(a) the ESP shall follow the M&V Plan, including the matters in (5), in effect when the implementation COA was signed; and

(b) that M&V Plan may be changed only with the written consent of the Entity. Any such change must be based on measurable or documented factors within the M&V plan such as change in use or occupancy.

AUTH: § 90-4-1110(1)(g), MCA
IMP: , MCA

REASON:

The IPMVP is an internationally-recognized approach for measurement and verification of cost-saving measures and has been adopted by several states and the Federal government for performance contracts. The IPMVP provides an outline for the M&V Plan. It also includes M&V requirements and recommendations. As part of the M&V Plan, the ESP must select one of four options it will use for M&V procedures and provide a detailed description of that option. Subsections (1) through (4) are all mandatory requirements of the IPMVP are proposed to be included in the rule to emphasize the requirements of the IPMVP.

Regarding (2), the Department proposes to require that “key parameters” be measured before and after the implementation of the cost-saving measure, and that other parameters be identified and documented. This would comport with FEMP M&V guidelines. Measurement of “key parameters” is reasonable and necessary to verify cost-savings. Identifying and documenting the other parameters without direct measurement is reasonable and necessary because it allows characterization of cost-savings without spending the additional time and money for direct measurement.

Regarding (3), the FEMP M&V Guidelines require measurements for options B through D. The Department proposes to adopt this requirement and to add “baseline and post-implementation conditions”. This would clarify that the measurements must be made pre- and post-implementation.

Regarding (4), this provision would allow the ESP to modify how the performance of the CSM will be verified after the IGA report has been completed; however, it would require the ESP to continue to follow the IPMVP. It would also allow modifications of M&V procedures from those in the EPC M&V Plan if mutually agreed by the ESP and the Entity.

Regarding (5), IPMVP defines the M&V options and processes for adjusting the baseline based on static factors and independent variables within the measurement boundary (the system affected by the cost-saving measure) as described in FEMP M&V guidelines. Because of the ESP’s qualifications and expertise and its role in conducting M&V, the Department proposes to make it the responsibility of the ESP to identify these factors and how they will be used to adjust the baseline. The Entity needs to understand the risk for the factors and methods used to adjust the baseline prior to approving the M&V Plan. Section (5) would limit alterations to how each CSM must be measured after the implementation because it is critical to maintaining the integrity of performance measure(s) in EPC projects, which is necessary to verify that the cost-savings are being realized. It is important to measure the same things in the same way, before and after the project, to see what has changed. Also, documenting in the EPC contract both the baseline and how performance of all CSMs will be measured is required to verify project performance.

Regarding (6), the M&V plan provides the methodology and procedures for determining the actual savings for an EPC. It is critical to maintain consistency in the methodologies and procedures throughout the guarantee period. For this reason, the Department proposes that the M&V plan may be changed only with consent of the entity, and if a change to measurable or documented factors in the M&V plan, such as change in use or occupancy, has occurred. Modifying the M&V option is acceptable after the guaranteed savings for the measure are verified through the guarantee period.

NEW RULE VIII COST OF MEASUREMENT AND VERIFICATION

(1) In the EPC, the ESP shall:

(a) clearly identify the cost of M&V for each year of the initial monitoring period; and

(b) include the total cost of M&V in the total project cost.

AUTH: § 90-4-1110(3)(c), MCA
IMP: , MCA 1114,5a

REASON:

Section 90-4-1114(5)(a), MCA, requires that the cost for M&V must be included in an EPC and paid for by the Entity each year during the initial monitoring period, which may not be less than three years. Subsection (1) would require that, in an EPC, the ESP shall identify the cost for M&V for each year. This would provide the Entity with full information on the cost of M&V.

NEW RULE IX COST-EFFECTIVENESS

(1) Cost-effectiveness for all of the CSMs in an EPC must be determined each year of a finance period by adding the guaranteed cost savings to any unguaranteed cost savings attributed to utility price escalation. This total must be equal to or exceed any financing repayment obligation each year of a finance term.

(2) When multiple facilities are included in an EPC, the cost-effectiveness in (1) must be determined for all of the facilities combined.

AUTH: § 90-4-1110(1)(g), MCA
IMP: 90-4-1102, 90-4-1110, MCA

REASON:

Cost-effectiveness is defined in § 90-4-1102(1), MCA, as "the sum of guaranteed cost savings and, if and to the extent allowed by rules adopted pursuant to § 90-4-1110(3)(d), MCA, unguaranteed energy cost savings attributable to utility unit price escalation are equal to or exceed any financing repayment obligation each year of a finance term." Discussions held by the department with ESPs and governmental entities indicated they had some question on how cost-effectiveness must be applied – whether to individual measures, a single building, or an entire project. Authorization for this rule is based on §§ 90-4-1110(1)(g) and (2)(b), MCA.

Regarding (1), cost-effectiveness would be based on the entire project, thereby allowing measures with higher levels of cost-effectiveness to offset measures that are less cost-effective or not cost-effective. This would comply with the definition of cost-effective.

Regarding (2), when an EPC includes more than one facility or building, cost-effectiveness is based on all CSMs for the project. This allows the Entity to get the necessary work completed under the EPC process. See NR VI, which concerns "Multiple Projects or Contracts" and the associated SRN.

New Rule X ESP Reporting Requirements

(1) An ESP shall notify the Department via email at the address provided in Circular DEQ 14 at least two weeks before entering into an IGA or EPC contract. The notification must include the name of the ESP and the Entity, and the name, email address, and phone number of the representative of each;

(2) Upon request by the Department, the ESP shall provide to the Department electronic copies of the following:

(a) IGA Contract;

(b) final IGA Report and any addendum to the IGA Report;

(c) IGA Certificate of Acceptance;

(d) EPC Contract;

(e) Implementation Certificate of Acceptance;

(f) negotiated terms of M&V reports and amount of shortfall payment under § 90-4-1114(6)(b), MCA; and

(g) any other document determined by the Department to be necessary to fulfill the purposes of this subchapter, within two weeks after receiving a request.

(3) An ESP shall provide to the Department electronic copies of the following:

(a) EPC Proposed Project Summary in Circular DEQ 14, at least two weeks before an EPC Contract is signed;

(b) EPC Project Summary Report in Circular DEQ 14, within two weeks after issuance of an Implementation Certificate of Acceptance; and

(c) M&V Reports, at the same time they are submitted to the Entity.

AUTH: § 90-4-1110(1)(h), MCA
IMP: , MCA

REASON:

The purpose of this rule is to provide the department with information it needs to administer and manage the EPCP in the state. These reporting requirements are similar to requirements from other states. Some states, such as Washington and Colorado, require much more from the ESPs, as the state offices also provide project management and construction management services. Regarding (1), if the department is not notified of projects in advance of contract signing, it would be unable to offer assistance to governmental entities or to track EPC projects in the state.

The purpose of (2) is to require an ESP to submit, upon request of the department, contract documents, certificates of acceptance, and reports. The Department lacks the resources to review all of these documents, but will seek to

review them in response to specific requests from Entities. Department review of these documents would provide additional information and milestone data for the EPC process and enable the Department to provide an Entity with technical assistance. See § 90-4-1110(1)(f), MCA. Regarding (2)(a) and (2)(d), this would allow the department to review the contracts to ensure that they comply with statute, rules (including the forms in the Circular), and the Base Agreement. In section (2)(d), the requirement that the EPC be submitted to the department on request would mean that the M&V Plan, which is part of the EPC, would also be submitted. This would enable the department to review that Plan for compliance with the IPMVP and the FEMP M&V Guidelines. Regarding (2)(b), § 90-4-1110(2)(a), MCA, authorizes the Department to adopt rules for the review of IGAs. This section would implement that subsection by authorizing Department review, again most likely on the request of an Entity.

Section (3)(a) would require the ESP to provide the Department with the EPC Proposed Project Summary at least two weeks before an EPC Contract is signed. This document includes general information about the proposed EPC project that is necessary for the department to provide a preliminary evaluation of the project's qualification as an EPC under program requirements. This would allow the Department to provide technical assistance to an Entity, in fulfillment of § 90-4-1110(1)(f), MCA. Section (3)(b) would require the ESP to provide the department with a summary report of the EPC project. The department would incorporate this summary data into a database, such as eProject Builder, to track EPC projects in the state. Such a database has been adopted by several states and is recommended by the U.S. Department of Energy in promoting EPC. Section (3)(c) would require the ESP to provide the department with M&V reports. This would permit the department to track the performance of the projects and maintain its database on the benefits of EPC.

New Rule XI OPERATION AND MAINTENANCE

(1) If the ESP provides O&M services related to cost-saving measures implemented in an EPC, the costs of these services must be included in the total project cost.

(2) The total cost for O&M cost-saving measures may not exceed 50 percent of the total project cost of the EPC.

AUTH: § 90-4-1110(2)(b), MCA
IMP: , MCA

REASON:

Regarding (1), EPC is not intended to allow normal O&M activities conducted by an Entity to be funded by the EPC program. However an Entity may choose to have the ESP operate and/or maintain its facility during the initial monitoring period. The cost of these services provided by the ESP must be identified in the EPC. If the services are to be provided under a separate contract, then an appropriate non-EPC procurement method must be used, as it is outside an EPC.

Regarding (2), the department is proposing to limit total cost for O&M CSMs to no more than 50 percent of total project cost, for the following reasons:

(a) O&M cost savings are defined in § 90-4-1102(11), MCA, to mean a measurable decrease in operation and maintenance costs as a direct result of cost-saving measures calculated using baseline operation and maintenance costs. O&M cost savings may include more efficient operation and maintenance practices, equipment maintenance contracts that are no longer needed with new equipment, budgeted replacement parts that are no longer needed with the new equipment, etc.
(b) Under §§ 90-4-1101 and 1102, MCA, the purpose of an EPC is to conserve energy and water and thus obtain cost savings. Long-term verifiable energy and water use reductions, and associated cost savings, are achieved through capital equipment upgrades. These include cost-effective facility improvement, repair, or alteration or equipment designed to reduce energy or water consumption or operation and maintenance costs.
(c) Savings attributable to O&M improvements are generally difficult to measure and verify. For that reason, O&M savings are often stipulated (pre-agreed) with no risk to the ESP and no guarantee that savings, such as reduced hours for maintenance staff, will materialize to help meet financial repayment obligations. In contrast, energy and water savings are measured and verified using a nationally-recognized protocol.
(d) O&M improvements may not deliver sustained and consistent savings over the long-term financing period as required by the savings guarantee.
(i) O&M requirements and resulting cost savings often vary from year to year.
(ii) O&M savings may be applicable only to a fraction of the financing period (e.g., lighting equipment replacement savings over a 5-year lamp life). This may mean that the O&M cost must be incurred again during the finance period to replace equipment at the end of its service life.
(e) O&M savings that are related to the installed CSMs are easier to quantify and are therefore more justifiable to include in an EPC than those that standalone. Capital improvements deliver sustained utility cost savings that can be measured and verified using a nationally-recognized protocol. Therefore, repayment obligations for the EPC should be largely funded by utility savings.

NEW RULE XII EPC CONTRACT TERM

(1) The minimum term of an EPC is four years or one year longer than the initial monitoring period, whichever is greater.

AUTH: § 90-4-1110(2)(b), MCA
IMP: §§ 90-4-1114(5) and (6), MCA

REASON:

The statute does not explicitly address the minimum term of an EPC. By implication, the minimum period would be the initial monitoring period, which is a minimum of three years under § 90-4-1114(5)(a), MCA. The maximum term is 20 years, the cost-

weighted average useful life of the CSMs, or the term of financing, whichever is shortest. See § 90-4-1114(3)(b), MCA. A minimum term must be provided to give effect to the intent of statute in the definition of EPC – that the guaranteed cost savings be sufficient to meet the financing repayment obligation. The minimum term must be at least as long as the initial monitoring period to allow verification that savings will meet the repayment obligations. An additional year is necessary to provide a period for final M&V reporting. Therefore the Department is proposing that the minimum term for an EPC be four years, or one year longer than the initial monitoring period.

<Note change numbering in SRNs.>

NEW RULE XIII GUARANTEED COST SAVINGS AS PERCENTAGE OF TOTAL PROJECT COST

(1) For a project to qualify as an EPC:

(a) the sum of the projected guaranteed cost savings over the term of the EPC must be at least ~~greater than or equal to~~ 51% of the total project cost, as presented in an EPC project proposal that was based on a final IGA report covered by an IGA COA;
and

(b) the guaranteed cost savings, plus any cost savings attributable to escalation under proposed NR XV, must be equal to or exceed any financing repayment obligation for each year of the finance term.

(2) The ESP shall make good faith efforts to continue to meet the 51% requirement in NR XIII(1)(a) in the EPC.

(3) A buy-down may be used in an EPC only if the amount and sources of the buy-down are established in the EPC. A buy-down is limited to utility incentives, or funds in the possession of the entity such as grants, capital reserves, or funds received from other sources. A buy-down may not be funded from a source or in an amount that results in a repayment obligation of the Entity. Any unused contingency may not be applied to a buy-down.

(4) Except as provided in (5), if an EPC contains an amount of a utility incentive as a buy-down, the ESP shall project the amount of the incentive to be used as a buy-down. If the utility incentive used as a buy-down received by the Entity is~~as~~:

(a) ~~zero or~~ less than or equal to the projected amount, the Entity shall pay any incentive amount received to the ESP, and the Entity's obligation to pay the total project cost to the ESP is reduced by the amount by which the utility incentive received is less than the projected amount.

(b) greater than the projected amount, the Entity shall pay the projected amount to the ESP and retain~~s~~ the excess.

(5) if the utility has reduced the incentive due to a lack of sufficient incentive program funds or a change in the utility incentive program, and the utility incentive received is less than the projected amount, the Entity shall pay the ESP the projected amount.

(6) Except for a general obligation bond, an Entity may not enter into a financing agreement or issue an obligation, including a loan agreement, bond, installment payment contract, or lease purchase agreement, for EPC project

financing unless the agreement or obligation states that the restrictions on collectibility in § 90-4-1109, MCA, apply.

AUTH: 90-4-1110, MCA
IMP: 90-4-1110, MCA; 90-4-1114, MCA

REASON:
In (1), EPC is intended to provide a governmental entity with guaranteed utility and O&M cost savings with which to pay for energy or water conservation projects. In addition, EPC allows governmental entities an exemption from normal procurement requirements for professional and construction services, so that they may undertake a limited solicitation of providers qualified by the department. This could potentially increase the cost of the projects due to decreased competition as compared to a competitive bid process.

Because the statute defines an EPC as a contract for cost-saving measures, the Department believes that, ideally, 100 percent of the total project cost should be paid for by guaranteed cost savings. However, the Department recognizes a need for a portion of some EPC projects to address deferred maintenance issues.

For these reasons, the Department proposes that the greater part of the total project cost must be directly related to these savings. The department proposes in (a) that at least 51% of the total project cost must be paid for by the guaranteed cost savings over the term of the contract. The Department recognizes that the final guaranteed cost savings and total project cost may not be finalized until the EPC is signed. Occasionally these costs and savings are further modified during the implementation period. In order to establish criteria for a project to qualify as an EPC, the Department proposes that the guaranteed cost savings and total project cost as estimated at the time of the project proposal based on the IGA report at the time of the signed COA be used for the 51% requirement. The Department expects that the ESP and Entity will adhere to this requirement throughout the term of the EPC.

Subsection (b) is proposed to make it clear that subsection (a) does not supersede the cost-effectiveness requirements in § 90-4-1102(1). Alternative procurement, implementation, and financing methods may be more appropriate than an EPC when the guaranteed cost savings are insufficient to pay for either 51% of the total project cost or the financing repayment obligation of the project. See § 90-4-1103(2), MCA.

Under proposed NR IX(1), the guaranteed cost savings from all cost-saving measures are cost-effective if they meet or exceed any financing repayment obligation for each year of a finance term. This allows the combination of measures that meet or exceed the financing repayment obligation on their own and with those that do not. An example would be the combination of a lighting retrofit measure that has a short payback period with the replacement of an aging boiler for which the payback period exceeds the EPC contract term. The combined guaranteed cost savings might not be able to meet the financing repayment obligation if the entire project were financed. However, if the amount financed is reduced by a buy-down, those savings may be able to meet the obligation.

Reducing the amount financed has three major purposes to: 1) allow the EPC to meet the criteria for cost-effectiveness, because cost-effectiveness means that guaranteed cost savings are more than the financing repayment costs; 2) reduce the annual repayment obligation; and 3) reduce the length of the finance period.

Regarding (2), § 90-4-1114(2), MCA, states that "[u]tility incentives, grants, operating costs, capital budgets, or other permissible sources may be used to reduce the amount of financing" of an EPC. This refers to a "buy-down". An EPC is contingent the Entity's securing funds for the buy-down, except for potential utility incentives, and obtaining financing for the balance of the total project cost. See NR V(6). Under NR V, and EPC is contingent upon funding of both the buy-down and any financed amount and the Entity is not liable if funds are not obtained. Under NR XIII the buy-down must be in the possession of the Entity, except for utility incentives.

The reason for this is that if the project is undertaken and part of the buy-down is not available, the contract could be terminated and the guarantee could be lost, yet the Entity could still be responsible for paying for any costs of the project that have been incurred including the repayment of any financed amount. For this reason, the department proposes to limit the sources used to reduce financing to utility incentives as provided in (3), grants, capital reserves, and other on-hand cash reserves. "Other permissible sources" must meet this cash on-hand criterion.

Any amount financed must be paid by the cost savings under § 90-4-1102(1), MCA; therefore, no amount of the buy-down, which is defined as a payment used to reduce the amount of financing, may be financed. Unused or unspent contingency may not be applied to a buy-down since that amount is unknown until after the Implementation COA is issued, except when 100 percent of the project is paid for by funds that do not require repayment.

In (3), under § 90-4-1114(2), MCA, any utility incentive or rebate may be allowed as part of the buy-down. The amount of the utility incentive that will be received is not known until awarded by the utility after the EPC implementation is complete. Until that time, the amount of the incentive is only an estimate. If the incentive is included in the buy-down, thereby reducing the amount financed, it is not part of the financed portion of the project. An incentive payment less than the amount identified by the ESP in the analysis, as an element of the buy-down, puts the Entity at risk to find other sources of funding. The Entity likely will need to find additional internal funds as the financing, particularly third party financing, would already be firmly in place and would be more difficult to modify. Setting the incentive amount to be used as a buy-down is the responsibility of the ESP because a role of the ESP is to assist the entity in securing EPC funding, including utility incentives. Therefore, the risk should be borne by the ESP. Therefore, the Department is proposing that if a utility incentive is included as one of the methods used to pay for an EPC and included in the buy-down, the obligation of the Entity to pay the ESP is reduced by the amount of any projected utility incentive not received by the Entity.

The ESP can establish the total project cost based on excluding the incentive, or other funds, and adding alternative CSMs as part of the contract to utilize funds that were not secure at the time of signing the EPC.

The Department recognizes that the utility incentive is between the Entity and the utility and that these incentives may change between the time of the IGA and the completion of the cost-saving measures of the EPC. For these reasons, (4) is provided as an exception. The ESP has no control over the utility incentive program and , therefore, should not be held liable for the exceptions listed in the proposed rule.

The Department originally proposed to require that all funds to pay for an EPC, including M&V, be allocated and identified before the EPC was signed; however, associations representing Entities objected that this would interfere with their rights to manage their own finances. Therefore the Department has eliminated this requirement. However, Entities should be aware that this exposes them to paying for a contract for an EPC and if they are unable to budget the annual M&V cost, the ESP could terminate the contract (see EPC Contract Article 4, Section 4.1), including the guarantee, and the Entity will be left with having paid for the upfront cost of the project, but will not have a guarantee for the cost saving measures.

Regarding (5), §90-4-1114(1), MCA, sets forth alternatives that a governmental entity may use to finance the cost of an energy performance contract. Nothing in §90-4-1114(1), MCA, however, creates by itself original authority for a governmental entity to borrow money or incur indebtedness for or otherwise to finance the costs of an energy performance contract. The authority of a governmental entity to borrow money or incur indebtedness for or otherwise finance the costs of an energy performance contract must be found in other statutes applicable to the type of governmental entity that desires to pursue such an undertaking. That authority is subject to satisfaction of the terms and conditions of the borrowing, indebtedness, or financing statutes applicable to that governmental entity. For illustrative purposes only, a governmental entity that desires to borrow money or incur indebtedness for or otherwise finance the costs of an energy performance contract and that is a (i) municipality, must satisfy the terms and conditions of Title 7, Chapter 7, Part 42, MCA, to issue a general obligation bond, (ii) school district, must satisfy the terms and conditions of §20-9-471, MCA, to issue a general obligation bond without a vote, (iii) county must satisfy the terms and conditions of §7-7-2402, MCA, to, without a vote, issue an obligation or consummate a borrowing to which the general credit of the county is pledged, (iv) county or a city must satisfy the terms and conditions of §7-5-2306, MCA, and §7-5-4306, MCA, respectively, and other applicable provisions of Montana law, if any, to use an installment purchase contract, and (v) county or city must satisfy the applicable terms and conditions of Title 7, Chapter 8, MCA, and other applicable provisions of Montana law, if any, to enter into a lease purchase agreement.

The Department interprets §§ 90-4-1109(1), and 1114(1), MCA, in the context of other existing law, to mean that only general obligation bonds, are collectible against funds other than guaranteed cost savings or other revenue that has been pledged to pay for the financing of an EPC. Other financing mechanisms such as bank loans, installment payment contracts, or lease purchase agreements, are collectible only from guaranteed cost savings provided in the energy performance contract and other revenue, if any, pledged in the energy performance contract. It is necessary to include language containing this restriction in any financing agreement or bond that is not a general obligation, so that any lender or bond holder will have notice.

NEW RULE XIV GUARANTEED COST SAVINGS

(1) For new construction or facilities/buildings undergoing a change of use:

(a) an ESP shall determine guaranteed cost savings by taking the difference of the cost of the energy or water usage of the proposed design and those costs for a baseline that meets the Energy Code according to (1)(b).

(b) Except as provided in (1)(c), an ESP shall determine the costs of the baseline and proposed design in (1)(a) by using Section C407 (Total Building Performance) of the Energy Code or Informative Appendix G (Performance Rating Method) from ASHRAE Standard 90.1.

(c) For a state-owned building, an ESP shall determine the costs of the baseline and proposed design in (1)(a) by using a building baseline that meets or exceeds the criteria in the High Performance Building Standards.

(2) An ESP may include as guaranteed O&M cost savings only the savings from operating or maintaining a facility. Such guaranteed O&M cost savings may include savings from renting or leasing property only if the property is rented or leased when the IGA contract is signed.

(3) Except as provided in (4), an EPC may not include any new construction that increases the total square footage of a facility.

(4) New construction in an EPC must be limited to:

(a) buildings or structures used to house boilers, chillers, generators, and similar equipment required as part of a cost-saving measure;

(b) mechanical penthouses; and

(c) buildings or structures determined by the Department to be necessary to implement the cost-saving measure.

AUTH: 90-4-1110, MCA
IMP: 90-4-1110, MCA

REASON:

Section (1)(a) would require that an ESP select as the baseline for new construction or change of use one meeting the requirements of the Energy Code. This would create a consistent baseline for determining energy cost savings. Section (1)(b) would require the use of relevant energy cost-determining standards from the Energy Code that has been adopted by the Department of Labor and Industry as the standard in Montana for energy conservation, or from ASHRAE, an organization that also develops such standards. Section (1)(c) would require calculation of energy usage and costs using the High Performance Building Standards adopted by the Department of Administration. Compliance with the High Performance Building Standards is required for new construction of state buildings in § 17-7-213, MCA, so it is reasonable to use them to establish the baseline for energy and water use.

Section (2) would limit O&M savings for rented or leased property that is currently leased and only for the current rental or lease period. Projected rental or lease payments are not measureable or verifiable under M&V. O&M cost savings are as defined in § 90-4-1102(11), MCA, with O&M as defined in New Rule I.

Under (3) and (4), new construction would not be allowed as part of an EPC, unless the construction was essential to a cost-saving measure. This section was proposed by the ESPs as the majority considers new construction as inappropriate for EPC.

NEW RULE XV ESCALATION RATES

If an EPC uses an escalation rate in an EPC:

(1) An ESP shall use the Energy Escalation Rate Calculator (EERC) to determine the maximum escalation rate for each listed fuel type.

(2) An escalation rate may not exceed the maximum inflation rate in (4) for:

(a) fuel types not listed in the EERC;

(b) water; or

(c) operation and maintenance.

(3) For each fuel type, water, and O&M, the ESP and the Entity shall negotiate the escalation rate to be used in an EPC. Each rate may not exceed the maximum rate determined in (1) or (2).

(4) The inflation rate used by the ESP in the EERC to determine an escalation rate may not exceed the default inflation rate provided in the EERC.

(5) Throughout the IGA and EPC process, the ESP shall use separate escalation rates for each fuel type, water, and O&M in the EERC in (1) and (2).

(6) In an EPC, the escalation rate for each fuel type, water, and O&M must remain constant for the financing term.

(7) The ESP shall include in the EPC M&V plan a determination of cost savings for each fuel type and water that first calculates the units saved (e.g. kWh, DKT, etc.) or savings due to reduction in peak load (e.g. kw) and then multiplies each unit saved by its associated rate. The associated rate is:

$AR = BR * (1.0+Esc)^{(n-1)}$, where:

AR is the associated rate for the fuel type in dollars
BR is the baseline rate for the fuel type in dollars as established in the EPC
Esc is the fuel type escalation rate, and
n is the year of the contract finance term beginning after the effective date.

AUTH: 90-4-1110, MCA
IMP: 90-4-1110, MCA; 90-4-1114, MCA

REASON:

The use of escalation rates in determining cost-effectiveness is permitted by § 90-4-1102(1), MCA, if the department establishes rules regarding escalation rates under § 90-4-1110(3)(d), MCA. ESPs often use escalation rates in their cash flow analyses to demonstrate that the project is cost-effective because utility or other costs are projected to rise, thus increasing the savings earned by conservation measures. If adopted in department rule, and used in an EPC to determine cost-effectiveness, escalation rates would also be used in § 90-4-1114(6)(a), MCA, to calculate shortfall payments.

There is a need to have a standard resource and process for determining escalation rates. DOE has created the EERC to provide a simple tool for calculating escalation rates. Adopting this tool would standardize the escalation rates used in EPC. Establishing the rates calculated by this tool as maximum escalation rates would contribute to the IPMVP requirement that M&V be conservative. The inputs to the EERC include fuel type, starting year, number of years, carbon offset, and

inflation rate. The output of the EERC is the average escalation rate over the defined period with and without inflation.

Regarding (4), the ESP often uses one escalation rate for all commodities. The actual escalation rates for each fuel type are often far different. The calculator allows for individual or weighted escalation rates. Since the cost savings are based on units saved and the applicable rates, it is important that the escalation rate for each fuel type is used.

Regarding (7), savings must be calculated for each year of the initial monitoring period and subsequent years of M&V per to § 90-4-1114(6)(a), MCA. Cost savings calculations are to be completed for each fuel type using the baseline rate plus any unguaranteed cost savings attributable to utility unit price escalation rates. The calculation procedure included in (7) in its standard form would be $AR = BR * (1.0+Esc)^n$ as found in numerous resources for economic calculations. However, since the baseline utility rate is typically used for the first year of savings, the escalation factor (1.0+Esc) is set equal to 1 (no escalation). This is equivalent to setting the exponent to n-1. Each subsequent year, then, would continue to use n-1 as the exponent. This also establishes the utility rate for cost savings as "equal" to the rate for the given year of utility savings.

Example of calculation in (7) follows:

Given:

- Escalation rate is 5%
- Guarantee was for 100 units
- @ $1/unit = $100
- Actual energy saved = 90 units
- Actual value @$1 = $90
- BL Shortfall = 100 – 90 = 10 units
- BL Shortfall 10units@$1/unit = $10
- Money shortfall for any n-year: shortfall for year n = 10 units * AR
- E.g. in year 3: Shortfall = 10 units * $1/unit * $(1.05)^2$ = $11.025

NEW RULE XVI: OPEN BOOK PRICING

(1) An ESP shall provide to the Entity, in an IGA and an EPC, Open Book Pricing that fully discloses all costs.

(2) An ESP shall maintain cost accounting records for all actual costs, including costs for labor, materials, and other services for all authorized work performed under an IGA or an EPC.

(3) An ESP shall provide the records in (1) and (2) to the Entity or the Department on request, and shall preserve them for one year after the initial monitoring period.

(5) In an IGA contract, the ESP shall provide to the Entity the pricing methodology and project cost percentages in a form provided by the Department. The methodology and percentages must be based on the estimated project scope and size. Compared to the IGA, if there has been:

(a) no substantial change in project scope or size, the ESP shall provide, in the EPC, the pricing methodology and cost percentages from the IGA contract;

(b) a substantial change in project scope or size, the ESP shall provide, in the EPC, the revised pricing methodology and cost percentages.

(c) The ESP may not increase the markup percentage for any category after the submittal for the RFP.

(6) To request payment for work done or services rendered under an EPC, the ESP shall submit to the Entity an invoice with a detailed report describing all costs being billed.

AUTH: 90-4-1110, MCA
IMP: 90-4-1110, MCA

REASON:

Although ESPs may request bids to perform subcontract work, solicitation of their services does not come from a bid process. Therefore the Entity must be allowed to access and to track project expenditures. Since most EPC is based on a guaranteed maximum price, it is in the Entity's best interest to be able to review all costs for the project.

Open book pricing is common in contracting, particularly where guaranteed maximum cost (price) is used. It is a type of “cost plus” pricing in which the cost for each component is determined and then a markup is used to determine the total price. The Entity may participate in the process, for example, by specifying a particular manufacturer for a piece or equipment or by selecting which CSMs are to be included in the EPC or as alternates in the EPC. The ESP determines the cost and applies its markups to the various components of the project. The department has developed a cost and pricing tool that is required throughout the EPC process.

The open-book component allows the Entity to review the accounting records, including invoices, labor costs, and other cost components related to the EPC. This, together with section (6) of this rule, ensures that the Entity pays only for the actual cost plus agreed-upon markup for the project. Sections (2) and (3) provide for the information that must be available to the Entity and the time period during which the Entity may review this information. The requirement of “one year after the initial monitoring period” would permit the Entity to review M&V costs.

Section (5) would allow the ESP to modify its input to some portions of the cost and pricing tool, but would prohibit increasing the markup percentage. The markup percentage may not be increased as this is a consideration that the Entity used to select the ESP for the project.

This rule is based on provisions included in the documents from Colorado and from the DOE template.

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5. Concerned persons may submit their data, views, or arguments, either orally or in writing, at the hearing. Written data, views, or arguments may also be submitted to Denise Hartman, Administrative Rules Coordinator, Department of Environmental Quality, 1520 E. Sixth Avenue, P.O. Box 200901, Helena, Montana 59620-0901; faxed to (406) 444-4386; or e-mailed to dhartman2@mt.gov, no later than 5:00 p.m. August 19, 2016. To be guaranteed consideration, mailed comments must be postmarked on or before that date. Each document proposed to be adopted and incorporated by reference in the proposed new rules may be viewed at the Department's office listed above. The Department requests a person wishing to view such a document to contact Meranda Sikes of the Department at 406-444-6460 or send an email request to EPCrulecomments@mt.gov to schedule the viewing.

6. The department maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request that includes the name, e-mail, and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding: air quality; hazardous waste/waste oil; asbestos control; water/wastewater treatment plant operator certification; solid waste; junk vehicles; infectious waste; public water supplies; public sewage systems regulation; hard rock (metal) mine reclamation; major facility siting; opencut mine reclamation; strip mine reclamation; subdivisions; renewable energy grants/loans; wastewater treatment or safe drinking water revolving grants and loans; water quality; CECRA; underground/above ground storage tanks; MEPA; or general procedural rules other than MEPA. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to Denise Hartman, Administrative Rules Coordinator, Department of Environmental Quality, 1520 E. Sixth Ave., P.O. Box 200901, Helena, Montana 59620-0901, faxed to the office at (406) 444-4386, e-mailed to Denise Hartman at dhartman2@mt.gov; or may be made by completing a request form at any rules hearing held by the department.

7. Norm Mullen, attorney for the department, has been designated to preside over and conduct the hearing.

8. The bill sponsor contact requirements of 2-4-302, MCA, apply and were fulfilled through a letter addressed to the Honorable Jill Cohenour, dated January 8, 2016.

9. With regard to the requirements of 2-4-111, MCA, the department has determined that the amendment and repeal of the above-referenced rules will not significantly and directly impact small businesses.

Reviewed by:	DEPARTMENT OF ENVIRONMENTAL QUALITY
______________________________	BY: ______________________________
Norman Mullen	TOM LIVERS
Rule Reviewer	Director

Certified to the Secretary of State, _______________