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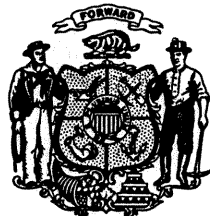
LCRC  
FORM 2

WISCONSIN LEGISLATIVE COUNCIL STAFF

**RULES CLEARINGHOUSE**

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**CLEARINGHOUSE REPORT TO AGENCY**

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[THIS REPORT HAS BEEN PREPARED PURSUANT TO S. 227.15, STATS. THIS IS A REPORT ON A RULE AS ORIGINALLY PROPOSED BY THE AGENCY; THE REPORT MAY NOT REFLECT THE FINAL CONTENT OF THE RULE IN FINAL DRAFT FORM AS IT WILL BE SUBMITTED TO THE LEGISLATURE. THIS REPORT CONSTITUTES A REVIEW OF, BUT NOT APPROVAL OR DISAPPROVAL OF, THE SUBSTANTIVE CONTENT AND TECHNICAL ACCURACY OF THE RULE.]

**CLEARINGHOUSE RULE 00-081**

AN ORDER to create chapter Adm 44, relating to energy conservation and efficiency and renewable resource programs.

Submitted by **DEPARTMENT OF ADMINISTRATION**

04-25-00 RECEIVED BY LEGISLATIVE COUNCIL.

05-19-00 REPORT SENT TO AGENCY.

RS:DLL:jal;rv

**LEGISLATIVE COUNCIL RULES CLEARINGHOUSE REPORT**

This rule has been reviewed by the Rules Clearinghouse. Based on that review, comments are reported as noted below:

1. STATUTORY AUTHORITY [s. 227.15 (2) (a)]

Comment Attached      YES       NO

2. FORM, STYLE AND PLACEMENT IN ADMINISTRATIVE CODE [s. 227.15 (2) (c)]

Comment Attached      YES       NO

3. CONFLICT WITH OR DUPLICATION OF EXISTING RULES [s. 227.15 (2) (d)]

Comment Attached      YES       NO

4. ADEQUACY OF REFERENCES TO RELATED STATUTES, RULES AND FORMS  
[s. 227.15 (2) (e)]

Comment Attached      YES       NO

5. CLARITY, GRAMMAR, PUNCTUATION AND USE OF PLAIN LANGUAGE [s. 227.15 (2) (f)]

Comment Attached      YES       NO

6. POTENTIAL CONFLICTS WITH, AND COMPARABILITY TO, RELATED FEDERAL  
REGULATIONS [s. 227.15 (2) (g)]

Comment Attached      YES       NO

7. COMPLIANCE WITH PERMIT ACTION DEADLINE REQUIREMENTS [s. 227.15 (2) (h)]

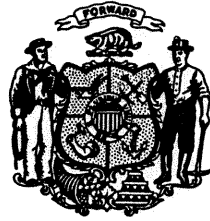
Comment Attached      YES       NO

# WISCONSIN LEGISLATIVE COUNCIL STAFF

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## CLEARINGHOUSE RULE 00-081

### Comments

**[NOTE: All citations to "Manual" in the comments below are to the Administrative Rules Procedures Manual, prepared by the Revisor of Statutes Bureau and the Legislative Council Staff, dated September 1998.]**

#### 1. Statutory Authority

a. This rule appears to use the fewest words possible to comply with the requirement that rules be promulgated. The result is a rule, but not a program. Clearly, by requiring the department to promulgate rules, the Legislature intended the department to flesh out the programs it was creating and to specify minimum program requirements in a process that is open to the public and subject to legislative review. In strong contrast to this, the rule reveals almost none of the mysteries of how this program will be implemented.

In particular, s. 16.957 (2) (c) 2., Stats., requires the department to promulgate rules establishing requirements and procedures for applications for grants awarded under public benefit programs. Section Adm 44.04 contains the few provisions that relate to this topic, requiring only: (1) that the application process be fair and competitive; (2) that a public notice of it be issued including a statement of the purpose of the grant, the selection criteria and application procedures and deadlines; and (3) that applicants apply to the department or program administrator on department forms. The information that the rule requires to be included in the public notice is the information that s. 16.957 (2) (c) 2., Stats., requires to be in the rule; at a minimum, these requirements and procedures must be spelled out in the rule, not left to the program administrator to specify.

Similarly, s. 16.957 (2) (c) 2m., Stats., requires the department to promulgate rules establishing criteria for the selection of proposals to fund; s. 16.957 (3) (b), Stats., requires that the program administrator use the criteria in those rules to select proposals for funding. In

contrast, s. Adm 44.05 (1) (intro.) directs the program administrator to submit to the department for review the selection criteria that will be used to evaluate grant applications and to select contractors. The criteria must be spelled out in the rule, not left to the program administrators to specify.

b. Section Adm 44.06 (intro.) directs the department to provide program administrators with standard terms and conditions to be used in all grant agreements between a program administrator and a contractor. The statutes define the term "rule" to mean "a regulation, standard, statement of policy or general order of general application which has the effect of law and which is issued by an agency to implement, interpret or make specific legislation enforced or administered by the agency or to govern the organization or procedure of the agency . . . ." [s 227.01 (13) (intro.), Stats.] "Standard terms and conditions to be used in all grant agreements" clearly falls within this definition of "rule" and so should be promulgated as part of this rule, rather than being left for articulation by the department at a later date.

## **2. Form, Style and Placement in Administrative Code**

a. The analysis of the rule neither analyzes nor explains the provisions of the rule, but instead merely states the subject of the rules in a paraphrased restatement of the statutes that require the rules.

b. Given the brevity of the new chapter created by this rule and the close relationship between it and the new chapters created in Clearinghouse Rules 00-80 and 00-82, the department may want to consider creating them as three subchapters of a single chapter of the Wisconsin Administrative Code.

c. In s. Adm 44.04 (3), the word "must" should be replaced by the word "shall."

d. Since s. Adm 44.09 relates to decisions made under s. Adm 44.05, it would make more sense to number those sections in sequence, one after the other. Sections Adm 44.07 and 44.08 are on an entirely different subject, and should be placed at the end of the chapter. Also, in s. Adm 44.09 (2), the phrase "shall have the authority to" should be replaced by the word "may."

## **4. Adequacy of References to Related Statutes, Rules and Forms**

a. In s. Adm 44.03 (9), the reference "chapter 181" should be replaced by the phrase "ch. 181, Stats."

b. Section Adm 44.04 (3) refers to department forms. The department should ensure that the requirements of s. 227.14 (3), Stats., are met.

**5. Clarity, Grammar, Punctuation and Use of Plain Language**

a. Section Adm 44.04 (3) states that applicants may apply to the department or to the program administrator. Under what circumstances is an applicant to apply to the department and under what circumstances is an applicant to apply to the program administrator or is this choice at the discretion of the applicant? This should be clarified. If the rule gave a complete set of requirements and procedures for the program, these points would be clearer.

b. Section Adm 44.05 (1) (d) refers to compliance with the policies and goals of the public benefits program. What policies and goals are referred to? Where are they articulated? This should be clarified.

c. A period should be inserted at the end of s. Adm 44.08 (2).

d. In s. Adm 44.09 (2) and (3), why is the word "promptly" used? The department should be able to specify a specific number of days within which it will act. Also, in sub. (4), it would be appropriate to state that a contract entered into while a protest or appeal is pending is void or voidable.

## PROPOSED ORDER OF THE DEPARTMENT OF ADMINISTRATION

The Wisconsin Department of Administration proposes an order to create chapter Adm 44 of the Wisconsin Administrative Code, relating to Energy Conservation and Efficiency and Renewable Resource Programs.

Analysis Prepared by the Department of Administration:

**Statutory Authority:** ss. 16.004(1) and 16.957(2)(c), Stats.

**Statutes Interpreted:** s. 16.957(2)(b), Stats.

Under s. 16.957(2)(b), Stats., the Department of Administration is required to promulgate rules for energy conservation and efficiency and renewable resource public benefits programs. The proposed rule establishes requirements, procedures and criteria to be followed by program administrators in soliciting and selecting applications for grant funding to be awarded by the department for energy programs established under s. 16.957(2)(b), Stats.

### Initial Regulatory Flexibility Analysis:

Pursuant to s. 227.114, Stats., the rule herein is not expected to negatively impact on small businesses.

### TEXT OF RULE:

**SECTION 1:** Adm 44 is created to read.

## Chapter Adm 44

### Energy Conservation and Efficiency and Renewable Resource Programs

**Adm 44.01 Authority.** Sections 16.004(1) and 16.957(2)(c), Stats., authorize the department to promulgate rules for energy conservation and efficiency and renewable resource public benefits programs.

**Adm 44.02 Purpose.** The purposes<sup>is</sup> of this chapter ~~are~~ to establish requirements, procedures and criteria to be followed by program administrators in soliciting and selecting applications for grant funding to be awarded by the department for energy programs established under s. 16.957(2)(b)1., Stats., and to determine public benefits program continuation or reduction.

**Adm 44.03 Definitions.** In this chapter:

- (1) "Commission" means the public service commission.
- (2) "Contractor" means a person who enters into a grant agreement with a program administrator.

(3) "Department" means the department of administration.

(4) "Division administrator" means the administrator of the division of energy and public benefits in the department of administration, or a designee.

(5) "Grant" means a financial award by the department to a contractor selected by a program administrator for the purpose of implementing a public benefits program.

(6) "Grant agreement" means a contract between a program administrator and a contractor containing the terms and conditions of a grant awarded under s. 16.957 (2)(b), Stats.

(7) "Person" has the meaning set forth in s. 990.01(26), Stats.

*sub*  
(8) "Public benefits program" means a program established in accordance with s. 16.957(2)(b)1., Stats., and designated as such in a contract between the department and a program administrator under s. 16.957(3)(b), Stats.

*(2) substance*  
(9) "Program administrator" <sup>Stats.</sup> means a non-stock, non-profit corporation organized under ~~chapter~~ 181 that contracts with the department to select contractors for, and administer, a public benefits program under s. 16.957(3)(b), Stats. or a designee approved by the department.

**Adm 44.04 Grant solicitation and public notice.** (1) **COMPETITIVE SOLICITATION.** A program administrator soliciting proposals for grants under s. 16.957(3)(b), Stats., shall ensure that all solicitations are conducted in a manner that provides for fairness and competition whenever practicable.

(2) **PUBLIC NOTICE.** (a) A program administrator shall provide reasonable public notice of all solicitations of grant proposals under s. 16.957(3)(b), Stats. Notice may be made through the print, broadcast, or telecommunications media, including the internet, at the discretion of the program administrator. The notice period shall be as specified in the contract entered into between the department and the program administrator under s. 16.957(3)(b) Stats., which shall be commensurate with the scope of the grant.

(b) The notice shall include the purpose of the grant, the selection criteria, application procedures, and all applicable solicitation deadlines that an applicant is required to meet, or shall contain instructions for obtaining this information.

(3) **APPLICATION REQUIREMENTS.** All applications for a grant under s. 16.957(2)(b)1., Stats., shall be submitted to the department or the program administrator as directed in the notice provided under this section, on forms prescribed by the department. All applications must be fully completed, executed by an individual having authority to act for the applicant, and submitted by the required filing deadline.

*FORMS*

10) 16.957(2)(i)2m. requires the criteria in the rule.

**Adm 44.05 Contractor selection criteria.** (1) Prior to the solicitation of a grant under s. 16.957(2)(b)1., Stats., the program administrator shall submit to the department the selection criteria to be used to evaluate grant applications and select a contractor. Selection criteria for all proposals shall be designed to evaluate the following:

(a) Compliance with s. 16.957(2)(b)1., Stats.

(b) Qualifications and financial soundness of the applicant.

(c) Technical feasibility and quality of the proposed work plan, including the feasibility of the proposed goals and performance measures and feasibility of the environmental and economic benefits identified as objectives of the application.

(d) Compliance with the policies and goals of the public benefits program.

(e) Other factors the department or program administrator considers relevant.

(2) The department may modify or reject the proposed criteria in writing to the program administrator. The division administrator and the program administrator may negotiate new criteria to replace any modified or rejected criteria.

(3) The program administrator shall notify the division administrator in writing of its intent to make a grant award to a contractor, but shall not enter into a grant agreement with the selected contractor for at least five (5) business days after notice is received by the division administrator. The program administrator may choose to negotiate a combination of proposals from various contractors, if the program administrator determines that such a combination would better meet the objectives of its contract with the department.

(4) The department may reject a proposed contractor for cause in writing within five (5) business days of the receipt of a program administrator's notice of intent to award. A program administrator may appeal a rejection of a proposed contractor under s. Adm 44.09.

**Adm 44.06 Grant agreements.** The department shall provide the program administrator with standard terms and conditions to be used in all grant agreements between a program administrator and a contractor. Failure of a selected contractor to execute a grant agreement shall result in withdrawal of the offer to award. Upon approval of the division administrator, the program administrator may negotiate modifications to the terms and conditions of the standard grant agreement prior to its execution. The grant agreement shall include the following minimum terms and conditions:

(1) Quantifiable goals and performance measures that contribute to meeting the priorities of s. 16.957(2)(b)1.a., Stats. and the specific objectives of the grant agreement.

what policies + goals? where articulated?

sounds like a rule, so should be in this rule



(2) A requirement to cooperate fully with independent evaluators and financial auditors, identified by the department, in evaluations and audits of the work performed under the terms of the grant agreement.

independent  
total  
to address  
criteria  
market  
analysis

**Adm 44.07 Program continuation, discontinuation or reduction.** (1) Beginning December 31, 2003 and each succeeding December 31 thereafter, the department shall submit to the council on utility public benefits a report containing recommendations for the continuation, discontinuation or reduction in the energy conservation and efficiency and renewable resource programs operated under s. 16.957(2)(b)1., Stats. The report shall include a determination as to whether each program need has been satisfied by the private sector market.

(2) After receiving advice from the council on utility public benefits, the department shall annually determine and make public, no later than March 1, 2004 and every March 1 thereafter, its decision to continue, discontinue or reduce the energy efficiency and renewable energy program operated under s. 16.957(2)(b)1., Stats. The department shall also determine the total funding need for the programs to be continued or continued at reduced funding levels.

(3) The total funding amount determined under this section shall be used in the calculation of the aggregate public benefits fee under s. Adm 43.04. The department shall notify the commission of this amount as required under s. 16.957 (2)(b)2., Stats.

2) paid  
14.57 + 44.08  
= 58.65

**Adm 44.08 Establishing continuation, discontinuation or reduction criteria.** The department shall include the following in the report submitted to the council on utility public benefits under s. Adm. 44.07(1):

(1) An analysis demonstrating whether the need for a program established under s. 16.957(2)(b)1., Stats., is satisfied by the private sector market and, if so, a determination whether the program should be discontinued or reduced.

(2) An assessment of the progress of efforts to transform relevant markets into markets that capture a significant portion of the available cost-effective energy efficiency potential .

x (5)

(3) An analysis of the benefits that state residents receive as a result of the programs under s. 16.957(2)(b)1., Stats.

(4) An analysis of the accomplishments of the program in meeting the priorities of s. 16.957(2)(b)1.a., Stats.

(5) An analysis of the geographic distribution of funds and benefits under programs operated under s. 16.957(2)(b)1., Stats.

(6) Other information and analysis that will assist the council on utility public benefits to provide advice under s. Adm 44.07(2).

**Adm 44.09 Appeals.** [1] RIGHT TO PROTEST. A program administrator that disputes the department's rejection of a selected contractor under s. Adm. 44.05 may protest to the department. The protest shall be served in writing on the division administrator within 15 days of the receipt of the department's rejection of a selected contractor.

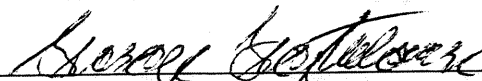
[2] AUTHORITY TO RESOLVE PROTESTS. The division administrator <sup>may</sup> (shall have the authority to) settle and resolve any protest brought under this subsection. If the protest is not resolved by mutual agreement, the division administrator shall promptly issue a written decision to the program administrator. ?

[3] APPEAL. A program administrator may appeal the decision of the division administrator by alleging a violation of statute or a provision of this chapter to the secretary of the department within 30 calendar days of issuance of the division administrator's decision. The secretary or designee shall take necessary action to settle and resolve the appeal and shall promptly issue a decision in writing which shall be mailed or otherwise served on the program administrator.

[4] GRANT AGREEMENT STATUS DURING APPEAL PROCESS. A program administrator shall not enter into a grant agreement with a proposed contractor while a decision from the division administrator under a protest, or the department secretary under an appeal, is pending. } state that such a contr. is void

This rule shall take effect on the first day of the month commencing after the date of publication in the Wisconsin Administrative Register as provided in s. 227.22(2)(intro.), Stats.

Dated: 4-7-00

  
George Lightbourn, Secretary  
Department of Administration

STATE OF WISCONSIN  
DEPARTMENT OF ADMINISTRATION  
101 East Wilson Street, Madison, Wisconsin

TOMMY G. THOMPSON  
GOVERNOR

GEORGE LIGHTBOURN  
SECRETARY



AUG 14 2000

Office of the Secretary  
Post Office Box 7864  
Madison, WI 53707-7864  
Voice (608) 266-1741  
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August 1, 2000

Honorable Fred Risser, President  
Wisconsin Senate  
220 South, State Capitol  
Madison, WI 53702

Honorable Scott Jensen, Speaker  
Wisconsin Assembly  
211 West, State Capitol  
Madison, WI 53702

Dear Senator Risser and Representative Jensen:

RE: Clearinghouse Rule No. 00-081

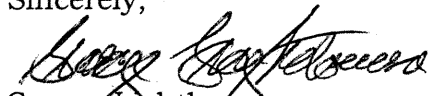
Enclosed in final draft form is Chapter Adm 44, Wis. Adm. Code, relating to the Wisconsin Utility Public Benefits Program. The fiscal estimate is also attached.

A copy of the Legislative Council Rules Clearinghouse Report is enclosed. All of the comments of the Clearinghouse have been addressed or incorporated into the rule. A public hearing was held on the rule on June 16, 2000, in Madison. The names of the persons who appeared at the hearing are provided on the enclosed hearing registration forms.

Also enclosed is a transcript of the hearing and copies of the written comments received by the Department in response to the proposed rule. The final enclosure is a summary of all the comments received by the Department and the Department's response to those comments. This document explains the modifications made to the proposed rule as a result of the comments received by the Department.

We request submittal of the rule to the appropriate standing committees for review.

Sincerely,

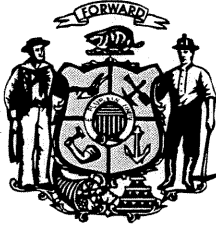
  
George Lightbourn  
Secretary

cc: Revisor of Statutes  
Joint Committee on Review of Administrative Rules

STATE OF WISCONSIN  
DEPARTMENT OF ADMINISTRATION  
101 East Wilson Street, Madison, Wisconsin

TOMMY G. THOMPSON  
GOVERNOR

GEORGE LIGHTBOURN  
SECRETARY



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August 1, 2000

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Honorable Scott Jensen, Speaker  
Wisconsin Assembly  
211 West, State Capitol  
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We request submittal of the rule to the appropriate standing committees for review.

Sincerely,

  
George Lightbourn  
Secretary

cc: Revisor of Statutes  
Joint Committee on Review of Administrative Rules

## PROPOSED ORDER OF THE DEPARTMENT OF ADMINISTRATION

The Wisconsin Department of Administration proposes an order to create chapter Adm 44 of the Wisconsin Administrative Code, relating to Energy Conservation and Efficiency and Renewable Resource Programs.

Analysis Prepared by the Department of Administration:

**Statutory Authority:** ss. 16.004(1) and 16.957(2)(c), 2., 2m. and 2n., Stats.

**Statutes Interpreted:** s. 16.957(2)(b) and (3)(b), Stats.

Under s. 16.957(2)(c)2, 2m., and 2n., Stats., the Department of Administration is required to promulgate rules for energy conservation and efficiency and renewable resource public benefits programs. The proposed rule establishes requirements, procedures and criteria to be followed by program administrators in soliciting and selecting applications for grant funding to be awarded by the Department for energy programs established under s. 16.957(2)(b), Stats.

The Department believes it is neither wise nor practical to include specific detail in this rule to cover programs that are not yet in existence. These programs will be developed over a longer period of time, with a wide range of input from the Council on Utility Public Benefits, potential program providers, and recipient citizens. They will develop as the needs of the energy efficiency and conservation market becomes clearer and our collective knowledge is increased.

Examples of the variety of programs to be created under s. 16.957(2)(b) 1., Stats., run the gamut from a simple rebate of a few cents for the purchase of energy efficient products or services to programs requiring complete engineering audits of industrial plants, arrangement of financing, performance contracting and multi-year performance monitoring. The requirements, procedures and related selection criteria necessary to implement these varying programs cannot be specified with detail in this rule. Rather, the rule is designed to allow flexibility for development of policies and procedures through detailed policy and procedure manuals for each program, consistent with Department practice for low-income assistance programs now in effect under sections 16.385 and 16.39, Stats.

Section Adm 44.03 defines terms necessary for implementation of subsequent programs under these rules. "Contractor" refers to the individual or entity that enters into a grant agreement with the program administrator, who in turn is charged with implementing grant solicitation and awards for the Department. In essence, a contractor is the functional equivalent to a subcontractor of the Department. "Program administrator" is specifically defined as a non-stock, nonprofit corporation organized under chapter 181, Stats., as required by s. 16.957(3)(b), Stats. As noted, the program administrator actually functions under the auspices of the Department to solicit, award and oversee grants awarded under programs to be developed from public benefits fee revenues.

Section Adm 44.04 provides general guidance to future program administrators acting for the Department. Section 16.957(3)(b), Stats., requires the program administrator to use a competitive process in soliciting proposals or bids. The Department will utilize the competitive procurement requirements under s. 16.70, *et seq.*, Stats., when selecting the program administrator. However, in consultation with potential program administrators and likely contractors, the Department believes there may be situations in which the specific procedures and requirements to be used to procure a program administrator may not be necessary or advisable when a program administrator solicits proposals from potential contractors. The requirements necessary for each grant proposal solicitation will be dependent upon the specific program to be developed.

Section Adm 44.04 also provides notice requirements in order to cast as wide a net as possible in soliciting grant proposals. Since the exact programs are yet to be developed, it is uncertain what will be included on an application. The rule, therefore, contains a note that forms (as they are developed) may be obtained by contacting the Department.

Section Adm 44.05 provides overarching criteria for program administrators to use in evaluating and awarding grant applications. These include the requirements of s. 16.957(2)(b) 1., Stats., and information involving the qualifications and financial soundness of the applicant, the technical feasibility and quality of the proposed work plan, compliance with the policies and goals of the various public benefits program or programs to be developed, and any other relevant factors that may arise dependent upon the specific program. Subsections Adm 44.05(3) and (4) allow for the Department's review of a contractor *tentatively* selected by a program administrator, which the Department may reject for cause within 5 days of receipt of a notice of intent to award. If the Department rejects a proposed contractor, the program administrator may appeal under s. Adm 44.06. The appeals process is internal within the Department. While an appeal is pending, the program administrator may not enter into a grant agreement with a proposed contractor. Any grant agreement entered into during this period is voidable.

Section Adm 44.07 provides brief guidelines for grant agreements. Essentially, the Department intends to utilize the terms and conditions and it now uses in its various grant agreements and contracts. However, because those may change or be negotiated on a case by case basis, the Department intends to utilize the process that it now follows in its normal procurements. That is, the specific contract terms and conditions will be developed from the Department's "standard" language depending on the program under consideration.

Section Adm 44.08 addresses the requirements of s. 16.957(2)(b) 2., Stats., that the Department determine whether the need for energy conservation, efficiency and renewable resource program established is satisfied by the private sector market and if so, whether it should be continued, discontinued or reduced. Beginning no later than March 1, 2004, this determination will be made annually. The criteria used to make this determination was developed in conjunction with potential program administrators and contractors who

presently deliver energy conservation and efficiency and renewable resource programs. They are listed in section Adm 44.09.

**Final Regulatory Flexibility Analysis:**

Pursuant to s. 227.114, Stats., the rule herein is not expected to negatively impact on small businesses.

**TEXT OF RULE:**

**SECTION 1:** Adm 44 is created to read.

**Chapter Adm 44**

**Energy Conservation and Efficiency and Renewable Resource Programs**

**Adm 44.01 Authority.** Sections 16.004(1) and 16.957(2)(c), Stats., authorize the department to promulgate rules for energy conservation and efficiency and renewable resource public benefits programs.

**Adm 44.02 Purpose.** The purposes of this chapter are to establish requirements, procedures and criteria to be followed by program administrators in soliciting and selecting applications for grant funding to be awarded by the department for energy programs established under s. 16.957(2)(b)1., Stats., and to determine public benefits program continuation or reduction.

**Adm 44.03 Definitions.** In this chapter:

- (1) "Commission" means the public service commission.
- (2) "Contractor" means a person who enters into a grant agreement with a program administrator.
- (3) "Department" means the department of administration.
- (4) "Division administrator" means the administrator of the division of energy and public benefits in the department of administration, or a designee.
- (5) "Grant" means a financial award by the department to a contractor selected by a program administrator for the purpose of implementing a public benefits program.
- (6) "Grant agreement" means a contract between a program administrator and a contractor containing the terms and conditions of a grant awarded under s.16.957 (2)(b), Stats.
- (7) "Person" has the meaning set forth in s. 990.01(26), Stats.

(8) "Program administrator" means a non-stock, non-profit corporation organized under chapter 181, Stats., that contracts with the department to administer and select contractors for a public benefits program under s. 16.957(3)(b), Stats., or a designee approved by the department.

(9) "Public benefits program" means a program established in accordance with s. 16.957(2)(b)1., Stats., and designated as such in a contract between the department and a program administrator under s. 16.957(3)(b), Stats.

**Adm 44.04 Grant solicitation and public notice.** (1) **COMPETITIVE SOLICITATION.** A program administrator soliciting proposals for grants under s. 16.957(3)(b), Stats., shall ensure that all solicitations are conducted in a manner that provides for fairness and competition whenever practicable.

(2) **PUBLIC NOTICE.** (a) A program administrator shall provide reasonable public notice of all solicitations of grant proposals under s. 16.957(3)(b), Stats. Notice may be made through the print, broadcast, or telecommunications media, including the Internet, at the discretion of the program administrator. The notice period shall be as specified in the contract entered into between the department and the program administrator under s. 16.957(3)(b) Stats., which shall be commensurate with the scope of the grant.

(b) The notice shall include the purpose of the grant, the selection criteria, application procedures, and all applicable solicitation deadlines that an applicant is required to meet, or shall contain instructions for obtaining this information.

(3) **APPLICATION REQUIREMENTS.** All applications for a grant under s. 16.957(2)(b)1., Stats., shall be submitted to the department or the program administrator as directed in the notice provided under this section, on forms prescribed by the department. All applications shall be fully completed, executed by an individual having authority to act for the applicant, and submitted by the required filing deadline.

*Note: Application forms may be obtained by contacting the Division of Energy and Public Benefits, Department of Administration at 101 East Wilson Street, 6<sup>th</sup> Floor, P.O. Box 7868, Madison, Wisconsin 53707-7868, or by telephone at (608) 266-8234.*

**Adm 44.05 Contractor selection criteria.** (1) Prior to the solicitation of a grant under s. 16.957(2)(b)1., Stats., the program administrator shall submit to the department the selection criteria to be used to evaluate grant applications and to select a contractor. Selection criteria for all proposals shall be designed to evaluate the following:

(a) Compliance with s. 16.957(2)(b)1., Stats.

(b) Qualifications and financial soundness of the applicant.



(c) Technical feasibility and quality of the proposed work plan, including the feasibility of the proposed goals and performance measures and feasibility of the environmental and economic benefits identified as objectives of the application.

(d) Compliance with any of the policies and goals of the public benefits program issued by the department.

(e) Other factors the department or program administrator considers relevant.

(2) The department may modify or reject the proposed criteria in writing to the program administrator. The division administrator and the program administrator may negotiate new criteria to replace any modified or rejected criteria.

(3) The program administrator shall notify the division administrator in writing of its intent to make a grant award to a contractor, but shall not enter into a grant agreement with the selected contractor for at least five (5) business days after notice is received by the division administrator. The program administrator may choose to negotiate a combination of proposals from various contractors, if the program administrator determines that such a combination would better meet the objectives of its contract with the department.

(4) The department may reject a proposed contractor for cause in writing within five (5) business days of the receipt of a program administrator's notice of intent to award. A program administrator may appeal a rejection of a proposed contractor under s. Adm 44.06.

**Adm 44.06 Appeals.** [1] RIGHT TO PROTEST. A program administrator that disputes the department's rejection of a selected contractor under s. Adm. 44.05 may protest to the department. The protest shall be served in writing on the division administrator within 15 days of the receipt of the department's rejection of a selected contractor.

[2] AUTHORITY TO RESOLVE PROTESTS. The division administrator may settle and resolve any protest brought under this subsection. If the protest is not resolved by mutual agreement, the division administrator shall issue a written decision to the program administrator.

[3] APPEAL. A program administrator may appeal the decision of the division administrator by alleging a violation of statute or a provision of this chapter to the secretary of the department within 30 calendar days of issuance of the division administrator's decision. The secretary or designee shall take necessary action to settle and resolve the appeal and shall issue a decision in writing which shall be mailed or otherwise served on the program administrator.

[4] GRANT AGREEMENT STATUS DURING APPEAL PROCESS. A program administrator shall not enter into a grant agreement with a proposed contractor while a decision is pending from the division administrator under a protest, or

from the department secretary under an appeal. A grant agreement entered into while a protest or appeal is pending shall be voidable.

**Adm 44.07 Grant agreements.** The department shall provide the program administrator with terms and conditions to be used in all grant agreements between a program administrator and a contractor. Failure of a selected contractor to execute a grant agreement shall result in withdrawal of the offer to award. Upon approval of the division administrator, the program administrator may negotiate modifications to the terms and conditions of the standard grant agreement prior to its execution. The grant agreement shall include the following minimum terms and conditions:

- (1) Quantifiable goals and performance measures that contribute to meeting the priorities of s. 16.957(2)(b)1.a., Stats. and the specific objectives of the grant agreement.
- (2) A requirement to cooperate fully with independent evaluators and financial auditors, identified by the department, in evaluations and audits of the work performed under the terms of the grant agreement.

**Adm 44.08 Program continuation, discontinuation or reduction.** (1) Beginning December 31, 2003 and each succeeding December 31 thereafter, the department shall submit to the council on utility public benefits a report containing recommendations for the continuation, discontinuation or reduction in the energy conservation and efficiency and renewable resource programs operated under s. 16.957(2)(b)1., Stats. The report shall include a determination as to whether each program need has been satisfied by the private sector market.

(2) After receiving advice from the council on utility public benefits, the department shall annually determine and make public, no later than March 1, 2004 and every March 1 thereafter, its decision to continue, discontinue or reduce the energy efficiency and renewable energy program operated under s. 16.957(2)(b)1., Stats. The department shall also determine the total funding need for the programs to be continued or continued at reduced funding levels.

(3) The total funding amount determined under this section shall be used in the calculation of the aggregate public benefits fee under s. Adm 43.04. The department shall notify the commission of this amount as required under s. 16.957 (2)(b)2., Stats.

**Adm 44.09 Establishing continuation, discontinuation or reduction criteria.** The department shall include the following in the report submitted to the council on utility public benefits under s. Adm. 44.08(1):

- (1) An analysis demonstrating whether the need for a program established under s. 16.957(2)(b)1., Stats., is satisfied by the private sector market and, if so, a determination whether the program should be discontinued or reduced.

(2) An assessment of the progress of efforts to transform relevant markets into markets that capture a significant portion of the available cost-effective energy efficiency potential.

(3) An analysis of the benefits that state residents receive as a result of the programs under s. 16.957(2)(b)1., Stats.

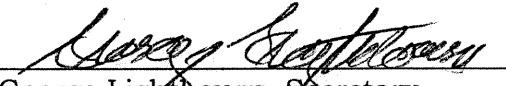
(4) An analysis of the accomplishments of the program in meeting the priorities of s. 16.957(2)(b)1.a., Stats.

(5) An analysis of the geographic distribution of funds and benefits under programs operated under s. 16.957(2)(b)1., Stats.

(6) Other information and analysis that will assist the council on utility public benefits to provide advice under s. Adm 44.07(2).

This rule shall take effect on the first day of the month commencing after the date of publication in the Wisconsin Administrative Register as provided in s. 227.22(2)(intro.), Stats.

Dated: 8-7-00

  
George Lighthourn, Secretary  
Department of Administration

**FISCAL ESTIMATE FORM**

**1999 Session**

ORIGINAL

UPDATED

CORRECTED

SUPPLEMENTAL

**LRB #**

**INTRODUCTION #**

**Admin. Rule # Dept of Admin Chap 44**

**Subject**

Energy Conservation and Efficiency and Renewable Resource Programs

**Fiscal Effect**

State:  No State Fiscal Effect

Check columns below only if bill makes a direct appropriation or affects a sum sufficient appropriation.

Increase Costs - May be possible to Absorb Within Agency's Budget  Yes  No

Increase Existing Appropriation

Increase Existing Revenues

Decrease Existing Appropriation

Decrease Existing Revenues

Decrease Costs

Create New Appropriation

Local:  No local government costs

1.  Increase Costs  
 Permissive  Mandatory

3.  Increase Revenues  
 Permissive  Mandatory

5. Types of Local Governmental Units Affected:  
 Towns  Villages  Cities

2.  Decrease Costs  
 Permissive  Mandatory

4.  Decrease Revenues  
 Permissive  Mandatory

Counties  Others \_\_\_\_\_  
 School Districts  WTCS Districts

**Fund Sources Affected**

GPR  FED  PRO  PRS  SEG  SEG-S

**Affected Ch. 20 Appropriations**

**Assumptions Used in Arriving at Fiscal Estimate:**

The administrative rule proposes requirements, procedures, and criteria for energy grant funding. The rule also establishes procedures for the department to address program continuation, reduction or discontinuation as of December 31, 2003. An appeal process is created. The department is reviewing staffing requirements for the program and what cost may be associated with those requirements.

**Long-Range Fiscal Implications:**

Ongoing costs for the duration of the program.

Prepared By: / Phone # / Agency Name  
Richard Wagner/ 608-266-0653 /DOA

Authorized Signature / Telephone No.  
Chuck McDowell/ 608-267-3836

Date  
4/14/00

**WISCONSIN DEPARTMENT OF ADMINISTRATION  
PUBLIC HEARING**

**CHAPTER ADM 44  
Energy Conservation and Efficiency  
and Renewable Resources Programs  
June 16, 2000  
11:00 a.m.**

**REGISTRATION**

NAME: George Edgar

ADDRESS: 211 S. Paterson, Third Floor  
Madison, WI. 53703

PHONE: 608-249-9322 x 170

REPRESENTING: Wisconsin Energy Conservation Corporation

Please check applicable statement(s):

- Appearing in favor.
- Appearing in opposition.
- Appearing for informational purposes.
- I wish to testify.

**WISCONSIN DEPARTMENT OF ADMINISTRATION  
PUBLIC HEARING**

**CHAPTER ADM 44  
Energy Conservation and Efficiency  
and Renewable Resources Programs  
June 16, 2000  
11:00 a.m.**

**REGISTRATION**

NAME: GREGORY BULLOM

ADDRESS: P O Box 1231  
Madison, WI 53701-1231

PHONE: 608 /252- 4748

REPRESENTING: Madison Gas & Electric Company

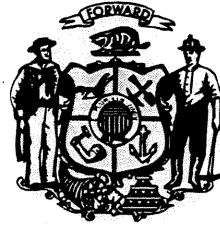
Please check applicable statement(s):

- Appearing in favor.
- Appearing in opposition.
- Appearing for informational purposes.
- I wish to testify.

STATE OF WISCONSIN  
DEPARTMENT OF ADMINISTRATION  
101 East Wilson Street, Madison, Wisconsin

TOMMY G. THOMPSON  
GOVERNOR

GEORGE LIGHTBOURN  
SECRETARY



Office of the Secretary  
Post Office Box 7  
Madison, WI 53707-7  
Voice (608) 266-1  
Fax (608) 267-3  
TTY (608) 267-9

Department of Administration  
Division of Energy

PUBLIC HEARING ON UTILITY PUBLIC BENEFITS

Department of Administration Building  
101 East Wilson Street  
St. Croix Room, First Floor  
June 16, 2000

**Public Hearing on Adm 44  
Energy Conservation and Efficiency and Renewable Resources Programs**

Administration Rule 44

Mr. Mark Saunders called the meeting to order at 11:00 A.M. He welcomed everyone for attending and gave the introductory remarks:

The Department of Administration has set this time and place for a public hearing under ss. 16.004(1), 16.957(4)(b) and 227.11(2)(a), of the Wisconsin Statutes, in order to consider the creation of rules relating to Utility Public Benefits Fees. My name is Mark Saunders and I'm the Deputy Legal Counsel for the Department of Administration. With me is Pat Meier, Director of the Bureau of Energy in the Department of Administration, Luann Wickeham, Assistant to Mr. Marx, and Donna Sorenson, paralegal, Office of Legal Counsel.

Notice of this public hearing and proposed rule adoption was published in the May 31, 2000, issue of the Wisconsin Administrative Register. In addition, copies of the rule and notice were made available to interested parties. Also, on June 2, 2000, copies were hand-delivered to the Press Boxes located in Room 235, Southwest in the State Capitol Building

The proposed rule creates Chapter Adm 44 of the Wisconsin Administrative Code. Pursuant to s. 16.957(2)(c), of the Statutes, the Department of Administration is required to promulgate rules for energy conservation and efficiency and renewable resource public benefits programs. The proposed rule establishes requirements, procedures and criteria to be followed by program administrators in soliciting and selecting applications for grant funding to be awarded by the department for energy programs established under s. 16.957(2)(b), Stats.

June 19, 2000

Page 2 of 3

The purpose of today's hearing is to give all interested persons or their representatives an opportunity to present facts, views or arguments regarding proposed Adm 44. In addition to today's testimony, the department will accept written comments or questions received by Friday, June 30, 2000. Please direct written comments to Donna Sorenson, Department of Administration, 101 East Wilson Street, P.O. Box 7864, Madison, Wisconsin 53707.

Section 227.18(3) of the Statutes requires that all persons present at this hearing have an opportunity to present their arguments and comments to the agency officer responsible for promulgating these rules; that is, the Secretary of the Department of Administration. The Secretary has determined that argument to him should be made in writing rather than orally. Consequently, a transcript of this hearing, along with your written comments will be provided to him prior to final promulgation of this rule.

The proposed rule was submitted to the Wisconsin Legislative Council Rules Clearinghouse on April 25, 2000 for its review, analysis and recommendations. The Legislative Council issued its report on the proposed rule on May 19, 2000. Based on the suggestions from the Rules Clearinghouse, and your oral and written comments and suggestions, the Department of Administration will consider amending the rule before forwarding it to the presiding officers of each house of the legislature for final promulgation.

The statutes also require that the UPB Rule be promulgated as an emergency rule. Upon the advice and request of the Council on Utility Public Benefits, the Department of Administration has delayed that process in order to consider incorporating your comments and suggestions and those from the Rules Clearinghouse as well.

So for those of you who have inquired, there are no emergency rules in effect.

There are appearance slips in the back for you to fill out. You are not required to do so, unless you want to testify. But we would like to maintain a record of attendees, and you can simply register your position--for, against or neutral--without having to testify. I'll go through the appearance slips to see who wants to give testimony on the rule. When I call you, please state your name, who you are representing and if you are testifying in favor or in opposition to the



June 19, 2000

Page 3 of 3

proposed rule. In the interest of time, I ask that you try to limit your comments to a reasonable amount.

One final note, the UPB rules are being proposed in 3 parts for practical reasons. The hearing for the Chapter 45 which deals with low-income assistance is at Noon today. However, if you are here to testify on Chapter 44 and 45, then by all means feel free to combine your testimony during this hearing session.

Thank you.

**Mark Saunders:**

11:00 A.M.

No appearance slips were submitted to testify. Call for anyone to testify. No one requested to be heard. A break was called for.

11:20 A.M.

Break was taken, no parties were interested to testify. Public Hearing for Adm 44 was adjourned.

G\energy\public benefits\public hearing.6.16.adm44

IDENTIFY AND DESIGN

June 29, 2000

Donna Sorenson  
Department of Administration  
101 E. Wilson St. 10<sup>th</sup> Floor  
P.O. Box 7864  
Madison, WI 53707-7864

Re: Comments on Creation of Chapter Adm 44

Dear Donna Sorenson:

Thank you for the opportunity to comment on the creation of Chapter Adm 44 of the Wisconsin Administrative Code, relating to Energy Conservation and Efficiency and Renewable Resources Programs. I have over twenty years of experience with public benefit types of programs including 13 years as staff of the Public Service Commission, as a Director at Wisconsin Energy Conservation Corporation, and now as an independent consultant. The comments below are not intended to represent the positions of any of my clients.

CHANGES NEEDED IN ADM 44.05

The following first summarizes recommended changes to ADM 44.05, provides revised wording, and then discusses the changes.

- **The reference of Contractor Selection Criteria Adm 44.05 (1) to selection of a contractor should be revised to include acceptance and integration of grant applications by more than one contractor when a combination of contractors is a better strategy than selection of only one contractor.**
- **Contractor selection criteria Adm 44.05(1)(a) to (e) should be revised to include evaluation of likelihood of success in the context of costs and benefits. (b) and (c) should be deleted as they pre-judge what will contribute to success with no consideration of context.**
- **Contractor selection criteria Adm 44.05(1)(a) to (e) should include criteria that relate to potential improvement of the public benefits as a whole.**
- **The way public benefit programs are administered can negatively impact small business. Contractor selection criteria Adm 44.05 should**

**consider the ways to reduce negative impacts.**

**Proposed revised wording Adm 44.05**

*- ... the program administrator shall submit to the department the selection criteria and integration process to be used to evaluate grant applications and select one or more contractors. The selection criteria and integration process shall be designed to permit multiple strategies to improve success of public benefits as a whole and evaluate the following:*

- (a) Compliance with s.16.957(2)(b)1., Stats*
- (b) Whether the likelihood for success is reasonable given the magnitude of costs and expected benefits. (Success includes both energy savings and benefits gained from evolution of public benefits efforts.)*
- (c) The magnitude of expected public benefits net of costs.*
- (d) Whether the program contributes to evolution and future success of public benefit efforts*
- (e) Whether the program contributes to diversity of approach and thereby increases the likelihood of more net public benefits.*
- (f) Whether the proposed program complements other efforts. Programs mutually exclusive to other alternatives must justify the exclusivity.*
- (g) The extent to which negative impacts on small businesses or unfair competitive advantages are minimized.*

**DISCUSSION**

Adm 44.05 (1) says: "selection criteria to be used to evaluate grant applications and select a contractor." The code should contain provisions to determine how many applications and contractors are selected (accepted) rather imply only one contractor. Selecting more than one contractor may make the public benefits more successful by being less dependent on the performance of a single contractor and by allowing diversified approaches. Since market transformation is a priority in many public benefit programs, selecting multiple contractors might allow a competitive market to contribute to market transformation. Furthermore, selection of multiple contractors might reduce the negative impacts on small businesses of public benefit grants (see discussion below).

The draft criteria of 44.05(1) (b) and (c) prejudge what contributes to success; criteria (a), (d) and (e) are so general as to provide little guidance. Of course, it could be argued that qualifications, financial soundness, technical feasibility, and the rest of (b) and (c) contribute to success. This is simply pre-judging before applications are submitted without considering context of the applications.

It is better to consider the likelihood of success in the context of the costs, potential benefits and relative risks rather than pre-judge the importance of financial soundness. Just

because a large utility in California is more financially sound than a small business in Wisconsin does not mean they would be more successful or innovative for a Wisconsin public benefit program.

The criteria should relate to the potential for improvement of public benefits and not pre-judge or restrict innovation. There are no single best answers on how to achieve public benefits. In fact, one of the basic assumptions of public benefit programs is that improvements can be made to what is being achieved now. Spending public benefits funds on improving the technical feasibility of saving energy has and continues to be a reasonable public policy.

Learning ways to improve public benefits success is important. Flexibility is needed to allow diversity in approaches to be tested rather than risk failure on one or a few approaches. How well approaches complement each other and criteria to consider approaches that are mutually exclusive to other approaches are important. For instance, criteria are needed to allow decisions on when to choose many contractors in a competitive market and when to choose a state-wide contractor that dominates the market.

#### NEGATIVE IMPACTS ON SMALL BUSINESS

The "Initial Regulatory Flexibility Analysis" states that the rule is not expected to negatively impact small businesses. However, the way public benefit programs are administered can negatively impact small businesses. The access to public benefit funds by one or a few businesses can be an unfair advantage harming those not receiving funding. It is obviously difficult to sell an efficient product or service in competition with a business who is not charging for the service or is being subsidized by public benefits programs. The Wisconsin Coalition for Fair competition has provided evidence of such problems to the Public Service Commission and a law was drafted to address specific abuses. The potential to reduce negative impacts on businesses should be considered in the code to preempt problems before they occur.

The administration of public benefit programs may even have negative impacts on small companies in the public benefits business. Reducing the number of opportunities to compete for public benefit funds by selecting a statewide or regional program or multi-year program has a negative impact on firms not receiving funding. Ironically, a winner take all mentality of public benefit administration can eliminate the very infrastructure needed for public benefit success in competitive markets. Simply, businesses can go out of business because they lose a grant by a few points on a scoring scale even though there may not have been a clear difference between the winning and losing business.

#### ADM 44.02 PURPOSE

- The purpose needs to be more specific. When will program administrators be used under this code? Is it for all public benefit funding or programs? How does this code relate to the role of the "Department" in public benefits? How are program administrators selected? Who selects program administrators? What criteria are used to select administrators? Are administrators allowed to also be recipients of grants or implementers of programs?

ADM 44.03 (9) Definitions "Program Administrator"

- The definition should be revised to: ...a business or an organization selected by the department to select contractors for, and administer, a public benefit programs under ...
- The references to a non-stock, non-profit or a designee approved by the department should be remove from the definition
- The code should specify the process and selection criteria of program administrator(s) separate from the definition.
- A non-stock, non-profit, or a designee approved by the department are not sufficient criteria to select a program administrator. Non-profits may or may not be more capable than others to perform administrator duties. Capable non-profits may or may not be available, especially if there are challenges to their non-profit status.

ADM 44.07 Program continuation and 44.08 (3) Establishing continuation

- These sections refer only to analysis and consideration of the benefits. Benefits need to be considered in the context of the costs incurred to achieve the benefits. Both 44.07 and 44.08 should be amended to reflect analysis and consideration of benefits relative to costs.

ADM 44.09 Appeals

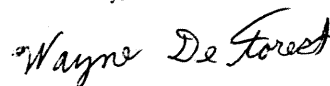
- The right for anyone, not just administrators, to appeal either program administrators or department actions or decisions should be added to the code.

Public Input

- The code should have provisions for input from people or businesses with diverse perspectives. The code should require the department to continuously seek input from businesses or individuals with diverse perspectives. The department should undertake whatever processes are appropriate to seek diverse perspectives.

Thank-you for considering my comments on the proposed administrative code.

Sincerely,



Wayne DeForest

**Summary of rule revisions based on comments from the Rules Clearinghouse, hearing testimony and written comments received by the Department:**

CLEARINGHOUSE RULE 00-081

CHAPTER Adm 44

DEPARTMENT RESPONSE TO RULES CLEARINGHOUSE  
RECOMMENDATIONS

1. STATUTORY AUTHORITY

- a. The Department made a conscious effort to promulgate a succinct rule; it intends to produce a workable rule rather than specific programs. The programs that will result from this rule will be developed over a greater period of time, with a broader range of input from the Council on Utility Public Benefits and potential program providers. They will be dynamic programs that will evolve as the needs of the energy efficiency market become more clear and our collective knowledge more advanced. The Department does not believe that it is prudent to represent that it, or any other entity, has full and adequate knowledge at this time to delineate programs sufficient to meet the goals of the legislation.

The Rules Clearinghouse may have misunderstood the multitude and variety of programs to be created under s. 16.957 (2) (b) 1., Stats. Some programs may entail a simple rebate of a few cents to consumers for the purchase of energy efficient products or services. Other programs may require complete engineering audits of industrial plants, arrangement of financing, performance contracting and multi-year performance monitoring. The requirements and procedures and related selection criteria necessary to these programs will vary dramatically. It is therefore not feasible to develop one set of program requirements in this rule.

- b. The term "standard terms and conditions" referenced in proposed s. Adm 44.06 (intro.) does not refer to a "standard" as that term is used in s. 227.01 (13) (intro.), Stats. Rather, the Department, by policy, consistently uses a set of standard terms and conditions in its contracts and grant agreements. These terms and conditions are updated and or modified as may be required on a case by case basis. However, the term "standard" has been removed from (renumbered) s. Adm 44.07 (intro.) to avoid any further confusion.

## 2. FORM, STYLE AND PLACEMENT IN ADMINISTRATIVE CODE

- a. The Rules Clearinghouse recommendation was adopted. An expanded analysis has been provided.
- b. The majority of utilities and energy efficiency/conservation groups consulted, including the Council on Utility Public Benefits, agreed that it made more sense to create three rules which deal with distinct elements of the utility public benefits program; fee setting, collecting and reporting (ch. Adm 43); energy conservation and renewable resource programs (ch. Adm 44); and, low-income assistance benefits (ch. Adm 45).
- c. The Rules Clearinghouse recommendation was adopted.
- d. The Rules Clearinghouse recommendations were adopted. Section Adm 44.09 dealing with appeals was renumbered s. Adm 44.06 and all subsequent sections were renumbered accordingly.

## 4. ADEQUACY OF REFERENCES TO RELATED STATUTES, RULES AND FORMS

- a. The Rules Clearinghouse recommendation was adopted.
- b. The Rules Clearinghouse recommendation was adopted.

## 5. CLARITY, GRAMMAR, PUNCTUATION AND USE OF PLAIN LANGUAGE

- a. As discussed above, the program or programs developed under this rule have yet to be determined. Whether or not an applicant for a specific program will need to apply to the Department or to a program administrator is also not possible to determine yet. The needs of each specific program will be determined at the time the program is developed and will be specified in the procedures issued by the Department for participation in the program.
- b. It is not possible at this time to specify with certainty the various policies and goals of a particular program developed under s. 16.957 (2) (b) Stats. The type of detail sought by the Rules Clearinghouse can not be easily included in this rule prior to the determination of the nature, scope and focus of a specific program.
- c. The Rules Clearinghouse recommendation was adopted.
- d. The Rules Clearinghouse recommendation was adopted. The word "promptly" was deleted and the recommended change to s. 44.09 (4) [renumbered s. 44.06(4)] was adopted.

## DEPARTMENT RESPONSE TO WRITTEN COMMENTS

### WAYNE DEFOREST, IDENTIFY AND DESIGN, JUNE 29, 2000.

Identify and Design argues that s. Adm 44.05 (1) should be clarified so that more than one contractor could be selected under a grant program; that s. Adm 44.05(1) (a) to (e) should be revised to include evaluation of the likelihood of success in the context of costs and benefits; and that (b) and (c) should be deleted because they pre-judge what would contribute to success with no consideration of context. Concern was also expressed that criteria should be included in s. Adm 44.05 relating to the potential improvement of the public benefits program as a whole. Finally, they suggested that the selection criteria in s. Adm 44.05 should consider ways to reduce any negative impacts on small business that the public benefits program may have.

#### Response:

As noted in the analysis, situations may arise where more than one contractor might be utilized. It was never the intent of the rule to limit either the program administrator or contractors to only one single person or entity.

The contractor selection criteria are intended to help the Department identify and select the contract with the highest likelihood of success. It is not inappropriate to consider the qualifications and financial soundness of an applicant because the Department can not ignore its fiduciary responsibilities in handling public funds. Similarly, to suggest that considering technical feasibility and quality of proposed work-plan be ignored would blind the Department's evaluators to very significant information related to the quality of a proposal.

The public benefits legislation places the responsibility for continually improving energy conservation programs upon the Department, the Council on Utility Public Benefits, and program administrators. That task can not be delegated to sub-contractors. Although their opinions will be solicited, it is impossible to grant every sub-contractor program improvement responsibilities since there will likely be hundreds of them and it would be extremely unmanageable.

While it is true that any public program can theoretically be administered as to negatively impact small business, no specific concerns were addressed by Identify and Design. It is certainly not the intent of the Department to administer the program in such a way as to have a negative impact on any discrete group. The Department has regularly and publicly stated its intent to work in close partnership with small businesses under the program, particularly heating, ventilation, air conditioning and electrical contractors.



DEBBIE EATON, REPRESENTING HERSELF, JUNE 27, 2000.

Ms. Eaton does not believe that the program administrator should be restricted to a non-stock, non-profit organization. In general, she was concerned that the general language of s. 44.04 through s. 44.09 was inadequate and vague with no apparent accountability.

Response:

Section 16.967 (3) (b), Stats., requires the program administrator to be a non-stock, non-profit corporation organized under ch. 181, Stats. Regarding the overall comment concerning the inadequacy and vagueness of the language, the Department's response to the Rules Clearinghouse comments in the section entitled "Statutory Authority" address that issue.

BOB JONES, WISCONSIN COMMUNITY ACTION PROGRAM ASSOCIATION (WISCAP), JUNE 27, 2000.

WISCAP supports the general nature of chapter Adm 44 as proposed and particularly the flexibility inherent in that language. WISCAP believes that because the public benefits program will forge new ground and methods in the delivery of services, it is critical that the rules not be too prescriptive as to inhibit the full level of creativity, which will be necessary in order to make the program a success.