

Memorandum

To: The Members of the SEU Oversight Board

From: Francis J. Murphy, Esquire

Date: May 2, 2008

Re: Authority of the Sustainable Energy Utility ("SEU") Oversight Board

Questions Presented

I have been asked by the SEU Oversight Board to clarify for the record its authority and that of the Delaware Energy Office, its Fiscal Agent and the Contract Administrator with respect to the following: a) who directs the day-to-day activities of the Contract Administrator or the Fiscal Agent selected by the Delaware Energy Office to administer the SEU's programs, b) who directs the Contract Administrator to award contracts to specific implementation contractors to carry out the SEU's programs, and c) who directs the Contract Administrator or Fiscal Agent to pay funds of the SEU to contractors or others.

Answers

The SEU Oversight Board does not have the authority to direct the day-to-day activities of the Contract Administrator or the Fiscal Agent. The Board does not have the authority to direct the Contract Administrator to award contracts to specific implementation contractors, as the Board has not been given responsibility for or power over the selection or approval process. The Board has no authority to direct the Contract Administrator or the Fiscal Agent to pay SEU funds to contractors or others. These powers are vested by law in the Delaware Energy Office under the direction of the State Energy Coordinator.

Discussion

The SEU and its Oversight Board ("Board") were created by Delaware law. The legislation is found at Title 29, Section 8059. Because the SEU and its Board were created by statute, they have no authority other than what has been conferred upon them by Delaware law.

The Board's powers are limited, and its legal power is set forth principally in Section 8059(e) of Title 29. Board members must serve without compensation, and are prohibited from receiving financial gain from service on the Board. The Board's responsibilities include the review and approval of Requests for Proposals ("RFP") developed by the Delaware Energy Office ("DEO") under Section 8059(e)(7)a to solicit applicants for the position of SEU Contract Administrator. However, this power is limited to approving the format and content of RFPs to be issued by the DEO. It does not authorize the Board to become involved in the selection of contractors retained by the DEO or the SEU Contract Administrator as a result of the public RFP process. Please note that under Section 8059(d)(1), the RFPs must also be open for public comment, and amended, if necessary, to account for public input.

The Board has the power to review and approve performance targets recommended by the Contract Administrator, approve modifications to the targets, and contract with an independent professional agency to monitor and verify the results reported by the Contract Administrator. See Section 8059(e)(7)b, c, and d. However, these provisions do not grant the Board any power over the actual selection process. Nor do they empower the Board to direct the Contract Administrator as to who will be awarded contracts or to whom it will pay funds of the SEU. The Board's independent review is informational and does not supercede the independent review required by law to be conducted annually by the Fiscal Agent on behalf of the DEO (see below for additional details).

Under Section 8059(a)(3), (c)(2) and (g), the SEU "Contract Administrator" is charged with managing the day-to-day functions and responsibilities of the SEU. Under Section 8059(a)(2), (c)(2) and (f), the funds to support the SEU's activities must be managed by a "Fiscal Agent". Under Section 8059(d)(1), the Fiscal Agent cannot be affiliated with the Contract Administrator so that the two will be completely independent of one another. This separates the Contract Administration function from the fiscal management function, presumably to provide a measure of fiscal control. Under Section 8059(f)(1), the Fiscal Agent has the authority to disburse funds to the Contract Administrator under the Direction of DEO. The Board does not play any role in the disbursement of SEU funds under the control of the Fiscal Agent.

Under Section 8059(d)(1)d, DEO has the sole power to select and hire the Contract Administrator and the Fiscal Agent. The legislation does not give the Board any power to select either the Contract Administrator or the Fiscal Agent. Under Section 8059(d)(1), (d)(1)d, and (d)(2)b, the DEO will be the party that enters into contracts with the Contract Administrator and the Fiscal Agent. The Board will not be a party.

Under Section 8059(e)(8), the Board does have an annual budget of between \$50,000 and \$75,000 (real 2007 dollars). However, use of the funds is expressly limited to the purposes set forth in Section 8059(e)(8). The Board's discretion in the use of those funds is limited and subject to public scrutiny.

Under Section 8059((d)(2)c, the Contract Administrator has the power to select the Implementation Contractors who carry out the SEU's programs. Because the Contract Administrator contracts with and answers to DEO, the Board has no authority to select Implementation Contractors. Indeed, the Board's role in the program implementation process is quite limited and, under Section 8059(d)(2)f, it would only be involved in the approval process if the Contract Administrator failed to select an Implementation Contractor for a given program or project and sought to implement the program on its own. In those limited circumstances, the program delivery process would be subject to the joint approval of DEO and the Board.

Respectfully submitted,



Francis J. Murphy