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**VIA ELECTRONIC MAIL**

Illinois Power Agency  
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**Re: Stakeholder Feedback  
2024 IPA LTP Chapter 7: Illinois Shines  
2024 IPA LTP Chapter 10: Diversity, Equity, and Inclusion  
Request Issued June 8, 2023; Comment Deadline June 29, 2023  
Confidential EEC Response**

To Whom It May Concern:

We represent an Equity Eligible Contractor (“EEC”) Approved Vendor (“AV”) in the Illinois Adjustable Block Program (“ABP”) that would like to remain confidential for purposes of submitting these comments. Accordingly, we respectfully request that the Illinois Power Agency (“IPA”) accept this confidential EEC’s comments through the care of the undersigned, with the understanding that such comments do not in any way reflect the positions of Barnes & Thornburg LLP, its employees, partners, agents, or affiliates, nor any of its other clients.

Subject to that qualification and understanding, the confidential EEC at the outset notes that its responses are an attempt to prioritize providing direct opportunities to EECs and equity eligible persons (“EEPs”) while avoiding undue burdens on applicants and program administrators. Such direct opportunities and their economic benefits should be primarily conferred upon those who have historically faced, and continue to face, discrimination and the direct long-term socio-economic impacts of discrimination in the various ways defined in the Illinois Power Agency Act.

We reproduce the IPA’s requests, and the confidential EEC’s responses, in line below.

**2024 IPA LTP Chapter 7: Diversity, Equity, and Inclusion**

■ **TOPIC 12: BARRIERS TO PARTICIPATION IN THE EEC CATEGORY & PROGRAM-WIDE FOR EECs**

1. *What are current barriers that Program participants face in their participation in either the EEC category or the Program in general that should be understood by the Agency? Please provide a detailed explanation of the barrier and suggestions on how the Agency might work to overcome the barrier.*

**EEC RESPONSE:** In our experience, EECs face challenges associated with little to no liquidity, little to no retained earnings, minimal net worth, a lack of generational wealth, and a lack of private investment opportunities. To overcome these barriers, as we describe below, in other contexts where public agencies certify “minority-owned businesses” to confer specific grants or contracts to underserved communities, there are three main criteria that an applicant must demonstrate: (1) social disadvantage; (2) economic disadvantage; and (3) ownership **and control** of the business. These are warranted here.

2. *Are there future barriers that entities expect to face in this category as it ages that are not currently present of which the Agency should be aware?*

**EEC RESPONSE:** We are unaware of what future barriers may exist for EECs, but it is anticipated that given the long-standing barriers to entry that are currently known, future barriers are likely to be similar to those identified above. In addition to the aforementioned barriers, we anticipate there may be additional future barriers to entry should “pass through” and “sleeving” practices go unchecked thus diverting opportunities from EECs to enter and grow in this market.

\* \* \*

**2024 IPA LTP Chapter 10: Diversity, Equity, and Inclusion**

■ **TOPIC 1: DEFINITION OF “PROJECT WORKFORCE”**

1. *If the Agency were to refine or change the definition of project workforce, what factors should it consider? Are there types of work that should be excluded?*

**EEC RESPONSE:** No response.

2. *What would be the benefits or risks of moving to an hours-worked basis instead of a total number of individuals basis for the MES?*

**EEC RESPONSE:** No response.

■ **TOPIC 2: CERTIFYING EQUITY ELIGIBLE PERSONS**

1. *Should the Agency also require documentation to support certification for the other two criteria: formerly incarcerated and former participant in the foster care system? If so, what documentation should the Agency accept?*

**EEC RESPONSE:** Yes. Documentation accepted by the Agency should be provided from the Illinois State Police and/or the Illinois Department of Children & Family Services for formerly incarcerated and former foster participants in the foster care system, respectively. If the Agency has not already done so, the classification of “incarcerated” should apply only to those who have been convicted and sentenced to time served and not persons who may have spent time in jail. **The utmost care should be taken in the privacy and security of said documentation.**

2. *Individuals that qualify as EEPs based on a “primary residence in an Equity Investment Eligible Community” (EIEC) may move residences over time.*

- i. *How should the Agency track any changes in residence?*

**EEC RESPONSE:** Corporate and/or individual tax transcripts (I.R.S. Form 4506-T) should be used to confirm and track residency by the Agency. In addition, the Agency should require several additional validating documents, like drivers’ licenses or state identification cards, utility bills, credit card statements, and lease or title documents so as to ensure true residency. We also recommend that this information be reviewed on an annual basis to confirm continued eligibility.

- ii. *What would be the advantages or disadvantages to allowing a “grace period” so that an individual that qualified as an EEP based on primary residence in an EIEC but subsequently moved remains EEP-certified for a certain period of time?*

**EEC RESPONSE:** As it pertains to EEPs whom are EECs, they should not remain EEP-certified, but there should be a grace period of 6 months to re-establish residency in a qualifying community to continue compliance and continue being part of the workforce. However, EECs should be allowed to complete the contracts they entered into and/or were awarded while qualified as an EEC.

3. *Relatedly, stakeholders have expressed concern that the “primary residence” criterion is too broad, given the rapid change in the demographics in many EIECs. To prevent gaming or benefits flowing to those that do not actually face barriers to entering the solar market, one stakeholder proposed learning from the Social Equity Applicant model in the cannabis sector. To qualify as an SEA, an entity had to demonstrate that a majority of its owners had lived in a qualifying community for at least 5 of the last 10 years (though it did not need to be the same address or community for all 5 years).*

- i. *What could be the benefits or risks of such an approach?*

**EEC RESPONSE:** This additional criterion would assist in preventing or reducing the ability of persons to unreasonably obtain the benefits that were designed to be conferred to those who have historically faced, and continue to face, discrimination and the direct long-term socio-economic impacts of discrimination in the various ways defined in the Illinois Power Agency Act.

*ii. What would be a reasonable threshold or minimum number of years?*

**EEC RESPONSE:** The minimum threshold should be 5 years of the last 10 years, with those 5 years qualifying only if they predate the establishment of the EEC program and designation.

**4. *The map of EIECs is a combination of the Illinois Solar for All (SFA) Environmental Justice Communities and the R3 communities. The IPA has recently updated the SFA Environmental Justice Communities map based on 2020 census data and other updated sources of data. The Agency will accept EEP certification requests based on the previous map for the 2023 – 2024 Program Year.***

*i. Is one year of accepting both maps sufficient?*

**EEC RESPONSE:** Yes.

*ii. How should this transition work for utility-scale projects with longer timelines?*

**EEC RESPONSE:** Should updates to maps cause an EEP to no longer qualify, they should be allowed to complete the contracts they entered into and/or were awarded while qualified as an EEP, which necessarily will allow the completion of utility-scale projects with longer timelines.

**5. *Individuals may use the Energy Workforce Equity Portal to receive certification as an Equity Eligible Person without disclosing sensitive information to their employer or to potential employers. To verify the EEP status of the minimum number of individuals in the project workforce to satisfy the MES, entities will submit a Year-End Report that includes either the certification from the Portal or an EEP application for each individual EEP.***

*i. What would be the advantages or disadvantages of moving all EEP certification to the Energy Workforce Equity Portal?*

**EEC RESPONSE:** The advantages are providing one single point for certifying all applicants as well as project-workforce reporting. There should be separate login pages for individual EEPs (*i.e.*, employees), and EEC applicants and/or MES reporting entities (*i.e.*, employers). The rationale between separate login pages (or a similar concept) is to segregate and sequester potentially sensitive information from unauthorized users or categories of individuals who do not have a recognized need for such information.

■ **TOPIC 3: CERTIFYING EQUITY ELIGIBLE CONTRACTORS (EECS)**

1. *Some commenters raised the potential for “sleeving” and “pass throughs” in EECs – where a non-EEC company partners with an EEP as the majority owner, but the EEP has little involvement in the management of the company, or where an EEC subcontracts out most of the development and construction, such that only a small portion of the state incentives flow to the EEP.*
  - i. *Do such structures further the objectives of the Equity Accountability System, which is to advance “priority access to the clean energy economy for businesses and workers from communities that have been excluded from economic opportunities in the energy sector, have been subject to disproportionate levels of pollution, and have disproportionately experienced negative public health outcomes”? If so, how?*

**EEC RESPONSE:** Such structures do not further the objectives of the Equity Accountability System; in other words, “sleeving” and “pass-throughs” are a disservice to disadvantaged businesses that have incurred substantial costs of business, and which have put in years of “sweat” (and real) equity to be a legitimate self-sustaining business. It also circumvents the whole purpose of the MES. In other words, if an entity is not employing disadvantaged persons to complete their work, the spirit of the Climate **and Equitable** Jobs Act (“CEJA”) is not being fulfilled. Furthermore, it strips these benefits from persons who have been disproportionately exposed to levels of pollution, which may have caused them to experience negative health outcomes, and awards them to anyone, including sophisticated commercial entities.

- ii. *If they do not, how might the Agency prevent such structures?*
- iii. *Are there other states or local government programs that have model requirements to verify disadvantaged business that the IPA could look to?*

**EEC RESPONSE:** The IPA can draw from several well-established programs to mitigate against this risk. In other contexts where public agencies certify “minority-owned business,” there are three main criteria that an applicant must demonstrate: (1) social disadvantage; (2) economic disadvantage; and (3) ownership **and control** of the business. For example, under the City of Chicago’s “Regulations Governing Certification of Minority- and Women-Owned Business Enterprises, Veteran-Owned Business Enterprises and Business Enterprises Owned or Operated by People with Disabilities For Construction Contracts,” to qualify as a “minority owned business,” it must be “**a small local business enterprise** which is at least 51% owned by one or more **economically disadvantaged minority** persons, or, in the case of a publicly held corporation, at least 51% of all classes of the stock of which is owned by one or more economically disadvantaged minority persons, who **independently manage(s) and control(s) the management, policies, major decisions and daily business operations.**”

Each of these highlighted terms, in turn, impose additional requirements:

- A “local business” is “a business entity that has its principal office (where the business entity directs, controls, and coordinates its activities) located within the counties of Cook, DuPage, Kane, Lake, McHenry or Will in the State of Illinois.” (§ V(20).)
- A “small business enterprise” is “a business that has gross receipts averaged over its previous seven (7) fiscal years that do not exceed one and half times the size standards of the U.S. Small Business Administration (“SBA”) set forth in 13 CFR Part 121, relevant to the scope(s) of work the firm seeks to perform on the City contracts.” (§ V(28).)
- “Economically disadvantaged” means “an individual whose personal net worth is less than \$2,000,000, indexed annually for inflation, such annual adjustment to begin January 2008, based on the Consumer Price Index- Urban Wage Earners and Clerical Workers (Chicago All Items) published by the United States Bureau of Labor Statistics. As of January 1, 2022, the personal net worth limit for Economically Disadvantaged individual is \$2,491,543.64.” (§ V(16).)
- “Minority” means (1) “[a]ny individual in the following racial or ethnic groups, members of which are rebuttably presumed to be **socially disadvantaged**: African Americans or Blacks[, . . .] Hispanics[, . . .] Asian Americans[, . . .] and American Indians”; and (2) “individual members of other groups, including, but not limited to, Arab- Americans, found by the city to be **socially disadvantaged** by having suffered racial or ethnic prejudice or cultural bias within American society, without regard to individual qualities, resulting in decreased opportunities to compete in Chicago area markets or to do business with the city.” (Ex. A § V(22) (emphasis added).)

In other words, an applicant must demonstrate “social disadvantage” and economic disadvantage.” (§§ VII-VIII.)

Continuing, “[o]wnership and control by such qualifying individuals shall be real, continuing and shall go beyond the *pro forma* ownership of the Applicant as reflected in ownership documents.” (§ X(A).) Put another way, the qualified individuals (i.e., the disadvantaged and minority persons” must not only own the corporation but must also manage and control the corporation. As illustrated by one of the requirements:

**Qualifying owners must, either collectively or individually, possess the power to direct or cause the direction of management, policies, and objectives of the Applicant and to make all substantive day-to-day decisions on the Applicant’s major and essential operations.** Those persons who have the ultimate power to hire and fire the managers can be considered as controlling the business. No formal or informal restrictions of any kind may exist which limit the customary discretion necessary to actual business control by the qualifying individual. Unless mandated by law, **no restrictions in by-law provisions, partnership of limited liability company agreements, or charter requirements may exist which limit qualifying individuals from effective and continuous control of the Applicant**

**or which prevent qualifying individuals, without the cooperation of any owner who is not a qualifying individual, from making any operational business decision for the Applicant.** In all cases, any business relationship between Applicant and its qualifying owners and non-qualifying individuals shall be given scrutiny.

(§ X(A) (emphasis added).)

Chicago’s program is comparable to the requirements imposed upon governments that accept federal financial assistance from the U.S. Department of Transportation (“DOT”). For example, Chicago is a recipient of U.S. DOT funds, which in turn obligates Chicago to administer Disadvantaged Business Enterprise (“DBE”) and Airport Concessions Disadvantaged Business Enterprise (“ACDBE”) certifications, with requirements found under 49 C.F.R. Parts 26 and 23.

The Illinois Department of Transportation, City of Chicago, Chicago Transit Authority (“CTA”), Northeast Illinois Regional Commuter Railroad Corporation (“Metra”), and Pace Suburban Bus (“Pace”), a division of the Regional Transportation Authority, have a federally funded statewide program for DBEs. These agencies have established the Illinois Unified Certification Program (“IL UCP”), which is based on the concept of reciprocity among the agencies. “One stop shopping” is provided to DBE program applicants, such that an applicant need only apply once for statewide DBE certification that will be honored by all participating agencies in the IL UCP. Although the Cook County Highway Department does not have its own DBE program, it utilizes IL UCP-certified DBEs on its highway projects.

Similarly, once qualified utilizing these criteria, an EEP here should not need to “recertify” and should not be limited in engaging in normal business growth strategies including establishing subsidiaries, partnerships, or joint ventures. Any annual eligibility reporting implemented by the Agency should eliminate revenue or personal net worth caps.

***2. What benefits or risks might be posed by requiring that registered EECs be listed publicly, even if only by company name? (Currently, EECs can decline to be listed on the Illinois Shines website.)***

**EEC RESPONSE:** Requiring registered EECs to be listed publicly benefits transparency in the Program. As long as the qualifying criterion for certification is not listed, which can be private and highly sensitive, there is no perceived risk.

■ **TOPIC 4: MINIMUM EQUITY STANDARD FOR NON-ILLINOIS SHINES PROCUREMENTS AND PROGRAMS**

**EEC RESPONSE:** No response.

■ **TOPIC 5: OTHER MINIMUM EQUITY STANDARD ISSUES**

1. *The 2022 Long-Term Plan proposed to increase the MES for the 2024-2025 Program Year from 10% to 12%. Is this increase still reasonable?*
  - i. *If so, should the Agency increase the MES to 15% for the 2025-2026 Program Year? Or would another level be more appropriate?*

**EEC RESPONSE:** No response.

2. *Should the Agency create different Minimum Equity Standards for projects in different areas of the state? If so, which areas?*
  - i. *If the Agency were to adopt differing MES for distinct geographic areas, what criteria or factors should the IPA consider in setting those Standards?*

**EEC RESPONSE:** No response.

3. *The current MES of 10% may result in fractional targets, especially for small businesses (<10 employees). How should the Agency calculate a company's MES in that case? Should the Agency round to the nearest whole number?*

**EEC RESPONSE:** No response.

4. *Current Illinois Shines guidance requires that entities interacting directly with customers should register as Designees. Designees must submit their own Compliance Plan and Year-End Report and must meet the MES for their workforce. Given the variety of entities that might employ the majority of workers on a given project, should the Agency allow a wider range of firms to register as Designees in order to allow subcontractors that do not interact with customers the ability to report on MES compliance?*

**EEC RESPONSE:** If the intention in expanding a wider range of firms to register and thus report on MES compliance, or if the effect of such an expansion is to cause the expansion of disadvantaged persons joining these workforces, we support such an expansion.

- ii. *If so, how should the Agency define which entities must register as a Designee?*

**EEC RESPONSE:** We support an expansion that is permissive or voluntary.

- iii. *Should that registration be mandatory?*

**EEC RESPONSE:** We support an expansion that is permissive or voluntary.

- iv. *Would subcontractors without direct interaction with end-use customers be required to meet the same requirements applicable to current Designees?*



**EEC RESPONSE:** If an entity elects to register as a Designee, we support the same requirements being imposed upon them as if they were obligated to register as a Designee (because of their direct interaction with end-use customers).

5. *Currently, the Agency considers EECs to be in compliance with the MES by virtue of their ownership. Should the Agency narrow or adjust that interpretation, and if so, how? Should the Agency require that EECs also submit Compliance Plans?*

**EEC RESPONSE:** The Agency should continue using the same compliance interpretation for EECs by virtue of their ownership and not require Compliance Plans.

■ **TOPIC 6: EQUITY ELIGIBLE CONTRACTOR CATEGORY IN ILLINOIS SHINES**

1. *Considering that the Category received more applications than available capacity in the 2022-2023 Program Year, the IPA seeks feedback on a potential developer cap of 20% across all project types applicable for the entire Program Year, to mirror the developer cap in the Traditional Community Solar category.*

- i. *Is 20% the right level?*

**EEC RESPONSE:** We believe that this cap should increase to 25%.

- ii. *One stakeholder responded to the IPA's request for feedback on May 5, 2023, that the IPA should apply a cumulative cap on the amount of capacity awarded to a single developer (and its affiliates) across the life of the EEC category. What would be the advantages and disadvantages of that approach?*

**EEC RESPONSE:** There are no perceived advantages. The disadvantage is that this approach could incentivize a single developer and its affiliates to front load their cumulative program lifetime RECs in a short duration of time, which would overwhelm blocks that are already oversubscribed. Another potential disadvantage is that it at a certain point it forecloses EECs from participating, when it can be expected that such a participant has accumulated knowledge about and familiarity with the program, that they can no longer “use.”

2. *Also due to the oversubscription in PY 2022-2023, the Agency seeks to develop a method for selecting projects should applications exceed capacity on the first day. The Traditional Community Solar category uses a point system to prioritize projects with qualitative aspects that reflect policy objectives in the IPA Act. Would it be appropriate to use a similar scoring system for project selection in the EEC Category?*

**EEC RESPONSE:** Yes.

*i. If so, what would be the advantages or disadvantages of awarding points based on elements such as:*

- 1. Status as a small and emerging business or MWBE*
- 2. Number of EEPs employed*
- 3. Amount of capacity awarded to the EEC AV in previous program years (providing points to those that have not previously received a REC contract)*
- 4. Whether the majority-owner EEP qualifies under multiple criteria*
- 5. Amount of REC contract value flowing to EECs*

**EEC RESPONSE:** We believe that by awarding points based on 1, 2, 4, and 5 above, there is a the Agency can confer additional projects and benefits to the businesses and persons that were intended to benefit from the program.

*ii. Another option would be to create carveouts or “lanes” for certain project types or EECs, similar to the point categories listed above.*

**EEC RESPONSE:** We believe that a carve-out based on the combined criteria of 1 and 3 would give priority to small and diverse businesses just entering the program.

*iii. Are there other characteristics that the Agency should or could prioritize in such a project selection method for the EEC category?*

**EEC RESPONSE:** We believe that priority should be given in awarding points to EECs that are self-performing project construction.

■ **TOPIC 7: EEC REQUESTS FOR ADVANCE OF CAPITAL**

*1. What types of barriers might EECs face in accessing capital?*

**EEC RESPONSE:** In our experience, EECs face challenges associated with little to no liquidity, little to no retained earnings, minimal net worth, a lack of generational wealth, and a lack of private investment opportunities.

*2. How could an EEC demonstrate “need” for an advance of capital? Should that need be tied to the AV’s status as an EEC?*

**EEC RESPONSE:** We believe that EECs can demonstrate “need” through cash flow statements, cash flow projections, and tax returns. We also believe that that as identified above through other jurisdictions’ programs, socio economic criterion should be added as a qualifier.

3. *The 2022 Long Term Plan allows for up to 50% of the contract value to be paid before energization. Is this a reasonable amount?*

**EEC RESPONSE:** Yes.

4. *The 2022 Long-Term Plan requires that applications for an advance of capital include a list of expected costs that would be met by the advance. Should the Agency limit the types of costs that may be included in the request for advance of capital? If so, what types of costs should or should not be eligible? Note that Section 1-75(c)(1)(K)(vi) of the IPA Act expressly allows the advance to cover “increase[s] in development costs resulting from prevailing wage requirements or project-labor agreements.”*

**EEC RESPONSE:** There should not be a limit on the types of costs included in requests for capital.

■ **TOPIC 8: DEMOGRAPHIC AND GEOGRAPHIC DATA COLLECTION**

1. *Are there other workforce characteristics or data that the IPA should collect and monitor? For example, veteran-status, disability, other?*

**EEC RESPONSE:** We submit that other categories should include: black, indigenous, and people of color (“BIPOC”); veterans; and persons with disabilities.

2. *Are there ways the Agency could streamline the data collection on these topics?*

**EEC RESPONSE:** Data collection could be streamlined through the Energy Workforce Equity Portal.

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Please feel free to contact me if you have any questions to the confidential EEC or clarifications from the confidential EEC that we can forward to the confidential EEC. Thank you much.

Best regards,



Alexander J. Bandza