

**GOVERNMENT OF PUERTO RICO
PUBLIC SERVICE REGULATORY BOARD
PUERTO RICO ENERGY BUREAU**

NEPR

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**IN RE: REQUEST FOR PROPOSAL
FOR TEMPORARY EMERGENCY
GENERATION**

CASE Number: NEPR-AP-2020-0001

**Matter: Engineering Services Internat'l
Inc. motion to Intervene**

PETITION TO INTERVENE

To the Honorable Energy Bureau ("Bureau"):

NOW COMES, ENGINEERING SERVICES INTERNAT'L INC. ("ESI") through its undersigned legal representation and respectfully STATES, RECITES AND REQUESTS:

I. RELEVANT FACTS

1. On February 12, 2020, the Puerto Rico Electric Power Authority ("PREPA") requested the approval of a Request for Proposals ("RFP") for temporary emergency generation in order to replace the generating capacity lost as a result of the January 6 and 7, 2020, seismic events that caused the Costa Sur power plant to cease operations. Such request by PREPA was made pursuant to Regulation 8815. See Notification and Urgent Request for Approval of Request for Proposals for Temporary Emergency Generation *Asunto: Request for Approval of Requests for Proposals under Regulation 8815.*

2. On March 3, 2020, the Energy Bureau approved the commencement by PREPA of the RFP process. The Bureau indicated that pursuant to Regulation 885 Section 7.1 (a) upon the completion of the negotiation of the contract, the Project Committee shall present a report to PREPA'S Board who in turn, shall seek approval by the Bureau.

3. On March 7, 2020, PREPA invited a number of accredited suppliers, including ESI, to present proposals for such temporary emergency generation and published the RFP 102750 document. ("RFP") See Exhibit "A" enclosed herein.

4. Section 30 of the RFP, page 32, states as follows:

"Process Rules & PREPA's General Instruction RFP Guide

This process will be regulated and executed according to Exhibit B "GUIAS PARA PROCESOS DE ADQUISICIONES DE BIENES Y SERVICIOS A TRAVES DE RFP EN LA AEE V006032016 (Request for Proposals)". Please see the Download Documents tab for this Guide. Proponents shall certify compliance with Section 4.17 of the "*GUIAS PARA PROCESOS DE ADQUISICIONES DE BIENES Y SERVICIOS A TRAVES DE RFP EN LA AEE V006032016*". See Exhibit A, page 32.

5. The RFP included in its Power Advocate electronic file system, a copy of such "*GUIAS PARA PROCESOS DE ADQUISICIONES DE BIENES Y SERVICIOS A TRAVES DE RFP EN LA AEE V006032016*" (hereinafter "Guides"). Exhibit "B" herein.

6. Such Guides appear to have been adopted in 2016, it's exact date: unknown. The Guides are in fact an *anonymous* document, *without signature or approval* by PREPA'S

Board of Directors, Executive Director, or any other person for that matter. Exhibit “B” herein.

7. The Guides do not appear to have been registered as a legally valid Regulation with the State Department of the Commonwealth of Puerto Rico. See <http://app.estado.gobierno.pr/ReglamentosOnLine/ReglOnLine.aspx>

8. Section 1.2, page 3 of the Guides, indicate *explicitly* that said Guide has the *specific* purpose of establishing a regulatory framework for the submittal, evaluation, negotiation and the selection of offers submitted as RFP’s to PREPA. As a matter of fact, the **Guide creates its own Committee for the evaluation of the proposals and negotiation with selected entities**, as well as a comprehensive administrative framework for the RFP process.

9. **It should be noted that the Guides deviate substantially from Regulation 8815.** For instance, Regulation 8815 specifically requires in Section 3.1 for the preparation of the RFP, evaluation of proposals, the qualification of proponents and negotiation with the selected entity or entities, a 5 (five) member Project Committee; whose members shall be recommended by PREPA’S Executive Director and appointed by the Board of Directors.

10. In sharp contrast, the Guide’s Evaluation Committee, responsible for the same functions but composed only of 3 members, all of which are solely *appointed* by the Chief of the Procurement Division of PREPA, who is herself/himself a Political Appointee (that is, nominated, directly appointed and reporting to PREPA’s Executive Director, to work at his behest and confidence). See Exhibit B Guides, Section 2 (Definitions) page 5 and Section 3.1 page 11. Under Regulation 8815 the Project

Committee issues a *Final Recommendation* to PREPA'S Governing Board as to the selection of the entity to be contracted. On the other hand, under the Guides in Section 2 (Definitions) page 4 and Section 7.2, page 44 it is the Chief of the Procurement Division of PREPA, after receiving the Committee's recommendations, which determines the party or parties with whom the final contract will be executed. Accordingly, per Regulation 8815 PREPA'S *Governing Board* selects the members of a committee responsible for issuing the RFP, qualifying and evaluating the proposals, negotiating with proponents and receives a final recommendation. That is, PREPA'S *Governing Board* holds the final word as for the selection of one or more entities. In contrast, under the Guides, that process occurs exclusively within the reach of the Chief of the Procurement Division of PREPA, with no recourse or intervention by PREPA'S Governing Board.

11. Finally, while Regulation 8815 allows for a dissatisfied proponent to seek a reconsideration of PREPA'S selection of one or more proponents before an Administrative Law Judge (see Regulation 8815, Section 8.1, page 42) incredibly, **the Guides disallow and prohibits the exercise of such right**. See Guides, Section 8.1, at page 45. The same section number in both documents does not appear to be a happy coincidence. As a note, the Guides seem to follow the same chapter scheme and structure of Regulation 8815.

12. **As approved by the Bureau**, the RFP currently based on the Guides provides for a proponent's selection and negotiation process which is dramatically different than that indicated in Regulation 8815. The Guides not only: a) procedurally subrogate the RFP to PREPA'S Executive while incoherently excluding its Governing Board, but b) also

deprive Proponents of recourse, both of which Regulation 8815 explicitly afford both to PREPA and Proponents.

13. While PREPA represented to the Bureau that the RFP would be executed in accordance with Regulation 8815; instead it *surreptitiously* issued an RFP that regulates, executes and is based on the aforementioned Guides. PREPA'S RFP *does not even mention* Regulation 8815; *but it does clearly states* that the RFP has been adopted and regulated by the Guides.

II. APPLICABLE LAW

1. According to the Puerto Rico Supreme Court, since the purchasing and bid process of individual agencies is not specifically regulated by a special law; the administrative agencies approve their own specific regulations regarding such process. *CD Builders v Municipio* 2016 TSPR 190.

2. Under the Puerto Rico Administrative Procedures Act ("APA") Law 37-2017, the terms "*Rule*" or "*Regulation*" is defined as any rule or group of rules intended to be of general application or that interprets or executes any public policy as required by law. 3 L.P.R.A. § 9603.

3. Section 2.1 of the APA (3 L.P.R.A. 9611) requires that if an agency desires to adopt a new rule or regulation, **it MUST be approved pursuant to Chapter II of the APA**. Such chapter requires a previous public notice of the agency's intent to adopt a rule or regulation, a period for receiving public comments and the final approval by the Secretary of State in order for such *rule* or *regulation* to become a valid legal document, enforceable against any party besides the agency itself. See 3 L.P.R.A. 9611 et seq.

4. The Guides indicate, in Section 1.1(4) page 2, that they have been adopted pursuant to, among others, the APA.

5. The Guides are currently *formatted* as Rule or Regulation as defined by the APA since they, as the Guides themselves indicate, establish a regulatory framework for the submittal, evaluation, negotiation and the selection of offers submitted as RFP's to PREPA. APA Section 2.1 explicitly states that, in order for the Guides to be officially approved, adopted and registered as a Regulation, it must *also* comply with all the formal processes stated in APA Chapter II. As such, according to Section 2.7 (a) of the APA, any Rule or Regulation adopted without complying with provisions and stipulations of APA's Chapter II shall be deemed *null and void*.

6. Furthermore, the Guides Section 8.1, eliminating the right to file a motion for Reconsideration, is plainly illegal. See APA section 3.19 (3 L.P.R.A. § 9659) which guarantees such right.

III. LEGAL BASIS AND ANALYSIS FOR INTERVENTION

1. Sections 5.05 of Regulation 8543 refers to the APA for the purpose of determining if a petition for intervention may be granted by the Bureau. Section 3.5, 2155 of Title 3 (app.) of the Laws of Puerto Rico includes several factors to be considered, including whether the petitioner's interests may be adversely affected by the adjudicatory procedure; whether the petitioner's participation may help, within reason, to prepare a more complete record of the procedure and whether the petitioner can contribute information, expertise, specialized knowledge or technical advice which is otherwise not available in the procedure. The agency shall apply the above criteria liberally and may require that additional evidence be submitted to it in order to issue the corresponding determination with regard to the application to intervene. 3 LPRA § 2155.

2. First, we consider whether the petitioner's interests may be adversely affected by the adjudicatory procedure. As a good standing supplier to PREPA invited to participate in the RFP for temporary emergency generation, ESI has a genuine interest in the legality of any RFP process.

3. Second, the petitioner's participation may help, within reason, to prepare a more complete record of the procedure and if the petitioner can contribute information which is otherwise not available in the procedure.

4. Petitioner ESI alleges that the RFP has been published by PREPA using an invalid and null legal basis, the Guides. Thus, Petitioner ESI will contribute vital information for the Bureau's consideration and approval of the RFP published by PREPA. Otherwise the RFP process would be allowed to continue without a legal base.

5. A liberal interpretation of such criteria should move the Bureau to accept ESI's petition to intervene. An illegal RFP would lead to an illegal and null contract between PREPA and the selected entity. This would obviously adversely affect the public interest.

THEREFORE, ESI respectfully requests this Bureau to approve its intervention in this proceeding and after all required procedural actions, determine that the RFP as presented by PREPA to its suppliers is null and invalid.

Respectfully submitted,

In San Juan Puerto Rico, this 7 day of May, 2020.

Electronically Filed <https://radicacion.energia.pr.gov>

I CERTIFY: that I have sent a copy of this motion via e mail to: Lic Nelida Ayala n-ayala@aepr.com, Lic. Carlos Aquino, c-aquino@prepa.com, Lic. Astrid Rodríguez Astrid.rodriguez@prepa.com; Lic. Nidsa Vázquez n-vazquez@aepr.com; Lic Jorge Ruiz Pabón; jorge.ruiz@prepa.com; , legal@energia.pr.gov; wcordero@energia.pr.gov, kbolanos@diazvaz.law, rstgo2@gmail.com, pedrosaade5@gmail.com, larroyo@earthjustice.org, rolando@bufete-emmanuelli.com, jessica@bufete-emmanuelli.com, notificaciones@bufete-emmanuelli.com, rmurthy@earthjustice.org

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