

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

NEPR

Received:

Sep 20, 2021

5:47 PM

IN RE: THE IMPLEMENTATION OF THE
PUERTO RICO ELECTRIC POWER
AUTHORITY INTEGRATED RESOURCE
PLAN AND MODIFIED ACTION PLAN

CASE NO.: NEPR-MI-2020-0012

SUBJECT: Motion to Submit
Proposals Under Seal and Request for
Confidential Designation

**MOTION TO SUBMIT PROPOSALS UNDER SEAL AND
REQUEST FOR CONFIDENTIAL DESIGNATION**

TO THE HONORABLE PUERTO RICO ENERGY BUREAU:

COMES NOW the Puerto Rico Electric Power Authority, through its counsel of record, and respectfully submits and prays as follows:

1. On August 26, 2021, the Puerto Rico Energy Bureau of the Public Service Regulatory Board (the “Energy Bureau”) entered a *Resolution and Order* (the “August 26 Order”) requiring the Puerto Rico Electric Power Authority (PREPA) to provide, *inter alia*, “copy of the proposals that were selected for Phase III Evaluation.” August 26 Order at p. 2.

2. On September 8, 2021, PREPA submitted to the Energy Bureau a *Motion for Extension of Time to Submit Information Requested [by] Resolution and Order Dated August 26, 2021, Including Information Related to Pricing* (the “September 8 Motion”). In that Motion, PREPA (i) sought leave to submit the proposals selected for Phase III evaluation with the contracts to be submitted as part of the Energy Bureau contract approval process contemplated in Section 7.1 of Regulation 8815.¹

¹ PREB and PREPA, *Joint Regulation for the Procurement, Evaluation, Selection, Negotiation and Award of Contracts for the Purchase of Energy and for the Procurement, Evaluation, Selection, Negotiation and Award Process for the Modernization of the Generation Fleet*, No. 8815 (Nov. 9, 2016) (“Regulation 8815”).

3. On September 17, 2021, PREPA submitted *Motion for Extension of Dates for Notification of Proponents Being Selected for Phase III Negotiations, for Submission of Pricing Information per Technology Group and for Additional Time to Issue the Tranche 2 RFP* (the “September 17 Motion”). In the September 17 Motion, PREPA noted that, as of that day, the September 8 Motion remained pending. September 17 Motion at p. 4. ¶ 9. PREPA informed that it would be submitting the proposals under seal to the Energy Bureau today. *Id.*

4. Therefore, in compliance with the representation made by PREPA in the September 17 Motion and cited above, today, PREPA has granted access to the Honorable Commissioners of PREB to the proposals submitted in response to the Tranche 1 RFP (the “Proposals”). Safeguarding the confidentiality of request for proposals processes is of the utmost importance to PREPA and thus, the Proposals have been submitted under seal and for the Honorable Commissioners-eyes only.

5. PREPA respectfully submits that the Proposals are part of the ongoing deliberative Tranche 1 RFP process and, as such, they are confidential and must remain under seal.

6. The documents in possession of PREPA are presumed public. However, access to public information is not absolute and there are various exemptions for access to public information.²

These exceptions are:

(1) **a law so declares**; (2) the communication is protected by one of the evidentiary privileges that the citizens may invoke; (3) revealing the information may injure the fundamental rights of third parties; (4) it deals with the identity of a confidante and (5) it is ‘official information’ pursuant to Rule 514 of Evidence, 2009, 32 LPRA Ap. VI (formerly Rule 31 of Evidence 32 LPRA for. Ap. IV). *Colon Cabrera v. Caribbean Petroleum*, supra.³

² *Bhatia Gautier v. Gobernador*, 199 D.P.R. 59, 82 (2017) (emphasis added).

³ *Id.* at 83.

7. Article 6.15 of the *Puerto Rico Energy Transformation and RELIEF Act*, provides that “any person who is required to submit information to the Energy [Bureau] believes that the information to be submitted has any confidentiality privilege, such person may request the [Bureau] to treat such information as such[.]”⁴ “If the Energy [Bureau], after the appropriate evaluation, believes such information should be protected, it shall grant such protection in a manner that least affects the public interest, transparency, and the rights of the parties involved in the administrative procedure in which the allegedly confidential document is submitted.”⁵ If the Energy Bureau determines that the information is confidential, “the information shall be duly safeguarded and delivered exclusively to the personnel of the Energy [Bureau] who needs to know such information under nondisclosure agreements.”⁶ “The Energy [Bureau] shall swiftly act on any privilege and confidentiality claim made by a person subject to its jurisdiction by means of a resolution to such purposes before any allegedly confidential information is disclosed.”⁷

8. In the exercise of its powers the Energy Bureau and PREPA approved Regulation 8815 which has force of law.⁸ Pursuant to Section 4.2 of Regulation 8815, communications between the Energy Bureau and PREPA shall be maintained confidential while the administrative competitive procurement process is ongoing. Further, a participant in a request for proposals process may request the confidential treatment of all or a portion of the information submitted as part of an RFP.

⁴ *Puerto Rico Energy Transformation and RELIEF Act*, Act no. 57 of May 27, 2014, 22 L.P.R.A. §§ 1051-1056 (“Act 57”) at Art. 6.15.

⁵ *Id.* at Art. 6.15 (a).

⁶ *Id.* at Art. 6.15 (c).

⁷ *Id.* at Art. 6.15 (d).

⁸ *Id.* at Art. 6.3 (b); *see also Puerto Rico Electric Power Authority Act*, Act No. 83 of May 12, 1941, as amended, 22 L.P.R.A §§ 191-240 (“Act83”) at Sec. 5 (“The regulations so adopted shall have the force of law once the provisions of Act No. 38-2017, the *Government of Puerto Rico Uniform Administrative Procedure Act*, are complied with.”)

9. Further, PREPA adopted the *Regulation for the Program to Administer Documents of the Puerto Rico Electric Power Authority*.⁹ Pursuant to Regulation 6285, documents including information related to the evaluation of offers or requests for bids are confidential while the evaluation, adjudication and award processes are still ongoing.¹⁰

10. The Proposals have been produced by the proponents during the Tranche 1 RFP process. The evaluation of the Proposals is still in progress and the Tranche 1 RFP has not been yet awarded. The evaluation, award and completion of contracts process is still underway.

11. Therefore, as established in the above cited laws and regulations, both the Energy Bureau and PREPA have the obligation to preserve the confidentiality of the Proposals.¹¹

WHEREFORE, the Puerto Rico Electric Power Authority respectfully requests that the Energy Bureau (i) note that PREPA complied with the August 26 Order; (ii) grant confidentiality designation to the Proposals and (iii) direct Energy Bureau's Secretary to maintain the Proposals under seal.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this 20th day of September 2021.

⁹ PREPA, *Regulation for the Program to Administer Documents of the Puerto Rico Electric Power Authority*, No. 6285 (Jan. 10, 2001) ("Regulation 6285").

¹⁰ *Id.* at Sec. V, ¶ 13.

¹¹ In accordance with Regulation 8815, after the conclusion of the RFP process, PREPA will determine whether the information and materials provided by proponents is confidential. Regulation 8815 at Sec. 10.2. It is not under the sole discretion of the Energy Bureau to withdraw the protection granted to a privileged or confidential information when previously has been demonstrated that the information deserves such protection. *Resolution and Order* entered in case no. NEPR-AP-2020-0001, *In Re: Request for Proposals for Temporary Emergency Generation* (March 3, 2020).

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CERTIFICATE OF SERVICE

It is hereby certified that, on this same date, I have filed the above motion with the Office of the Clerk of the Energy Bureau using its Electronic Filing System at <https://radicacion.energia.pr.gov/login>, and a courtesy copy of the filing was sent to LUMA through its legal representatives at margarita.mercado@us.dlapiper.com and laura.rozas@us.dlapiper.com.

In San Juan, Puerto Rico, this 20th day of September 2021.

s/ Katuska Bolaños-Lugo

Katuska Bolaños-Lugo