



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

NEPR
Received:
Jan 31, 2022
4:30 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: Request For
Clarification, Partial Reconsideration
Of The December 28 Order,
Confidential Meeting, And For
Extension of Time

**REQUEST FOR CLARIFICATION, PARTIAL RECONSIDERATION
OF THE DECEMBER 28 ORDER, CONFIDENTIAL MEETING, AND FOR
EXTENSION OF TIME**

TO THE HONORABLE PUERTO RICO ENERGY BUREAU:

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

I. PROCEDURAL BACKGROUND¹

On December 16, 2021, PREPA submitted the *Motion Submitting Draft Power Purchase and Operating Agreements Offered in Tranche 1 of PREPA’s Renewable Generation and Energy Storage Resources RFP for Energy Bureau Evaluation* (the “December 16 Motion”). With the December 16 Motion, PREPA tendered the Tranche 1 Report and Bespoke Contracts and asked the Energy Bureau to evaluate and approve them. In the December 16 Motion, PREPA informed the Energy Bureau that it had finalized Phase III of the Tranche 1 RFP with an offer to fifteen (15) proposals for Solar PV projects that comprise a capacity of 732.7 MW and that it had effectively

¹ PREPA adopts by reference the recitals and definitions to capitalized terms included in the *Motion Submitting 733 MW of PV Renewable Energy Draft Power Purchase and Operating Agreements Offered in Tranche 1 of PREPA’s Renewable Generation and Energy Storage Resources RFP for Energy Bureau Evaluation and Approval* and the *Supplemental Motion Submitting PV Renewable Energy Draft Power Purchase And Operating Agreements (PPOA’s) As Well As Energy Storage Service Agreements (ESSA’s) As Part Of PREPA’s Tranche 1 Renewable Generation And Energy Storage Resources RFP For Energy Bureau Evaluation And Approval* filed by PREPA on December 16 and December 23, 2021, respectively. Capitalized terms not defined in these two motions shall be ascribed the meaning provided to them in this motion.

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sought contracts for energy storage resources that encompass a capacity of 220 MW.

On December 23, 2021, PREPA submitted the *Supplemental Motion Submitting PV Renewable Energy Draft Power Purchase And Operating Agreements (PPOA's) As Well As Energy Storage Service Agreements (ESSA's) As Part Of PREPA's Tranche 1 Renewable Generation And Energy Storage Resources RFP For Energy Bureau Evaluation And Approval* (the "December 23 Motion"). PREPA explained to the Energy Bureau that since the December 16 Motion had been submitted, PREPA had received additional offers from Proponents that met the LCOE and LCOS thresholds previously determined by the Tranche 1 Committee. These Proponents had indicated their willingness to meet the price threshold but needed additional time to assess their proposals and confirm acceptance to PREPA. Given the importance to PREPA of acquiring as much renewable energy during this Tranche 1, the Tranche 1 Committee recommended these projects, which represent an additional 112.1 MW of capacity, to continue in the Phase III evaluation process. With this determination, the total Solar PV capacity of Tranche 1 amounts to 844 MW.

On December 28, 2021, the Energy Bureau entered a *Resolution and Order* (the "December 28 Order"), which referred to the December 16 Motion and directed PREPA to, among other:

- a. include and file with the Energy Bureau at least the next four (4) solar PV proposed offerings representing 130 MW additional nameplate capacity to PREPA's identified fifteen (15) projects as at this time being in alignment with the intentions of the IRP Modified Action Plan for deployment of renewable energy based on competitive procurement processes ("Four Additional PV");
- b. directly include and file with the Energy Bureau at least the next additional

[REDACTED]

six (6) battery energy storage proposed offerings representing 445 MW additional to PREPAs identified three (3) project offerings, in its continuing Phase III evaluation process for battery energy storage resources ("Six Additional Storage"); and

c. provide the FOMB approval of the projects filed in the December 16 Motion.

The Energy Bureau further stated that "PREPA should continue Phase III evaluation and directly consider [the Fourth Additional PV and Six Additional Storage] currently not selected by PREPA in the December 16 Motion." December 28 Order at p. 1.

PREPA respectfully requests the Energy Bureau to clarify whether PREPA already complied with the Order to submit the Four Additional PV that would add 130 MW additional nameplate capacity to the identified Projects when PREPA submitted an additional 112.1 MW of additional nameplate capacity to the identified Projects, thus exceeding the additional capacity requested by the Energy Bureau in the December 28 Order. [REDACTED]

[REDACTED]

[REDACTED] Lastly, PREPA respectfully requests the Honorable Energy Bureau to schedule a confidential meeting with the Tranche 1 Committee [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

**II. REQUEST FOR CLARIFICATION AND TO SET ASIDE ORDER TO
SUBMIT ADDITIONAL SOLAR PV PROPOSED OFFERINGS**

On December 16, 2021, PREPA informed the Energy Bureau that it had finalized Phase III of the Tranche 1 RFP with an offer to fifteen (15) proposals for Solar PV projects that comprise a capacity of 732.7 MW. The Energy Bureau recognizes this submittal in the December 28 Order. Nevertheless, it maybe the case that the Energy Bureau did not consider the December 23 Motion when rendering its decision. Such conclusion can be drawn for the fact that the Energy Bureau did not mention the December 23 Motion in the December 28 Order. PREPA has a genuine concern of whether the filing of the 3 additional projects that represent an additional 112.1 MW nameplate capacity was considered in the December 28 Order.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

III. [REDACTED]
[REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]
[REDACTED]

On November 6, 2017, the FOMB established its Contract Review Policy, pursuant to Section 204(b)(2) of PROMESA.² This Policy requires prior FOMB approval of certain contracts to assure that they “promote market competition” and “are not inconsistent with the approved fiscal plan.” *Id.* at p. 1. The Contract Review Policy applies to any contract that is proposed to be entered into by the Commonwealth or any covered instrumentality, like PREPA³.

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

² The November 6, 2017 Contract Review Policy and any subsequent amendment thereto are herein referred to as the “Contract Review Policy”). Available at <https://drive.google.com/file/d/1xJY178FnVFrOTXXSv5Txn2JZYmcmJkB5/view> (Last visited January 5, 2022).

³ On September 30, 2016, FOMB designated PREPA as a covered instrumentality under PROMESA section 101(d).

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

IV. REQUEST OF CONFIDENTIAL MEETING [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

PREPA respectfully asserts that the foregoing request for a meeting and an extension is made in good faith and that it has carefully examined the matter and has concluded that there is a true need for an extension; has not created the need for the extension through any lack of due diligence; and has made a bona fide effort to resolve the matter without the requested extension.

V. THIS MOTION DISCUSSED CONFIDENTIAL INFORMATION AND MUST REMAIN UNDER SEAL

Pursuant to Article 10.2 of Joint Regulation 8815 related to the confidentiality of the documents submitted to the Energy Bureau as part of the renewable energy procurement process, the Tranche 1 Evaluation Committee report shall be public once the Template Contracts have been executed. Article 10.2 states in part as follows:

[o]nce the Contract has been executed, the Authority shall make public the report of the Project Committee which shall contain the information related to the procurement, evaluation, scoring, selection and negotiation process, and the information contained in the Proposal as required by law, except trade secrets, proprietary or privileged information of the Proponent clearly identified as such by the Proponent, or information that must otherwise be protected from publication according to law, unless otherwise ordered by a court order, in each case, if the Authority determines that the protection of such information is appropriate.

Further, the documents in possession of a corporation like PREPA are presumed public. However, access to public information is not absolute and there are various exemptions for access to public information. *Bhatia Gautier v. Gobernador*, 199 D.P.R. 59, 82 (2017) (emphasis added).

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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.

Id. at 83.

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[.]” Act 57 at Art. 6.15. “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.” *Id.* at Art. 6.15(a). 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.” *Id.* at Art. 6.15(c). “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.” *Id.* at Art. 6.15(d).

In the exercise of its powers the Energy Bureau and PREPA approved Regulation 8815 which has force of law. *Id.* at Art. 6.3(b)⁴ Pursuant to Section 4.2 of Regulation 8815, communications

⁴ See also *Puerto Rico Electric Power Authority Act*, Act No. 83 of May 12, 1941, as amended, 22 L.P.R.A §§ 191-240 (“Act 83”) 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.”)

[REDACTED]

between the Energy Bureau and PREPA shall be maintained confidential while the administrative competitive procurement process is ongoing.

Lastly, PREPA adopted the *Regulation for the Program to Administer Documents of the Puerto Rico Electric Power Authority*.⁵ 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. *Id.* at Sec. V, ¶ 13.

[REDACTED]

Pursuant to the above, PREPA respectfully requests confidential treatment to this motion as this are part of a still ongoing deliberative process which is yet to result in executed contracts.

VI. CONCLUSION

WHEREFORE, for the reasons stated above, PREPA respectfully requests that the Energy Bureau:

- a. to reconsider the order to include and file the Four Additional PV and to find that the order to file the Four Additional PV has become moot; or, in the alternative, to reconsider the order taking into consideration that PREPA submitted an additional 112.1 MW that were not considered when the Energy Bureau entered the December 28 Order;
- b. [REDACTED]

⁵ [REDACTED] *Regulation for the Program to Administer Documents of the Puerto Rico Electric Power Authority*, No. 6285 (Jan. 10, 2001) (“Regulation 6285”).

- [REDACTED]
- [REDACTED]
- [REDACTED]
- c. to concede a confidential meeting with the Tranche 1 Committee and grant an extension of time of ten (10) additional business days [REDACTED]

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this 6th day of January 2022.

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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 6th day of January 2022.

s/ Katuska Bolaños-Lugo
Katuska Bolaños-Lugo