

JUL 20 2023 2:46 pm

Secretaria
Negociado de Energía *Jm*

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

IN RE: 10-YEAR PLAN FEDERALLY
FUNDED COMPETITIVE PROCESS

CASO NÚM. NEPR-MI-2022-0005

SOBRE: ICSE COMMENTS ON RESOLUTIONS OF
JULY 13, 2023, AND JULY 17, 2023

**ICSE COMMENTS ON RESOLUTIONS OF
JULY 13, 2023, AND JULY 17, 2023**

TO THE BUREAU:

Now comes Instituto de Competitividad y Sostenibilidad Económica de Puerto Rico (ICSE) represented by appearing counsel.

I. Introduction

On July 6, 2023, Genera PR submitted a document titled *Motion Requesting Order to Affirm Genera PR's Exclusive Responsibility in Managing and Decision-Making for Ongoing Public Procurement Processes and Facilitation of Related Documentation Transfer*¹. According to the PREB, Genera “requested that the Energy Bureau issue an order clarifying its exclusive responsibility in managing, leading, and deciding on matters pertaining the black-start and emergency units being procured in RFPs 3784 and 3800.”² (underline ours)

On July 13, 2023, the PREB issued a Resolution and Order in which it determined that pursuant to the LGA OMA, Genera is the “sole entity responsible for managing, leading, and deciding on RFPs 3784 and RFP 3800.”³ In reaction to the foregoing, the PREPA issued a document titled *PREPA's Response to Motion Requesting Order to*

¹ The referenced document is not available in the electronic docket of the current case in the PREB's webpage. It is herein also requested that the July 6 Motion be published.

² *Resolution and Order in Case No. NEPR-MI-2022-0005, In RE: 10-Year Plan Federally Funded Competitive Process*, at page 1 (July 13, 2023).

³ *Id.*

*Affirm Genera PR's Exclusive Responsibility in Managing and Decision-Making for Ongoing Public Procurement Processes and Facilitation of Related Documentation Transfer.*⁴ PREPA argues that Genera's—and the PREB's, as per the July 13 Resolution and Order—interpretation of the contract is too expansive and that Genera's decisions regarding new resources are outside the scope of contract's definition of the Legacy Generation Assets.⁵

Subsequently on July 17, the PREB issued an additional Resolution and Order ratifying its previous determinations while expanding on its rationale.⁶

II. Contractual interpretation

The PREB and Genera's contractual interpretation is—as PREPA claimed—very expansive. The first indication of the foregoing is that the PREB equates “optimization” with the procurement of resources needed to achieve said optimization. Meaning that any other responsibility that may not be expressly mentioned in the LGA OMA could be construed as included in its scope since it is a necessary—or even auxiliary—to further the contract's purpose. Concretely, the Resolution and Order of July 17 states:

[C]onsidering that approving the Seven Additional Peakers was part of an optimization plan approved by the Energy Bureau, the Energy Bureau DETERMINES that, pursuant to the LGA OMA, Genera is the sole entity responsible for the operation and maintenance of the Seven Additional Peakers, as part of its responsibilities assumed on July 1, 2023.⁷

However, the contractual provision it highlights is the following:

[Genera] shall (i) provide **management, operation, maintenance, repair, restoration, replacement and other related services** for the Legacy Generation Assets, as well as any **optimization** [...] approved by PREB, in each case that are

⁴ PREPA's Response to Motion Requesting Order to Affirm Genera PR's Exclusive Responsibility in Managing and Decision-Making for Ongoing Public Procurement Processes and Facilitation of Related Documentation Transfer in Case No. NEPR-MI-2022-0005, In RE: 10-Year Plan Federally Funded Competitive Process (July 14, 2023).

⁵ *Id.* at pages 2-3.

⁶ *Resolution and Order* in Case No. NEPR-MI-2022-0005, In RE: 10-Year Plan Federally Funded Competitive Process (July 17, 2023).

⁷ *Id.* at page 3.

customary and appropriate, or as required by Applicable Law, including the services in this Article 5 (O&M Services) and Annex IX (Scope of Services).⁸

The foregoing can't be logically understood as a delegation to Genera to conduct in its entirety the RFPs in question. Of course, Genera as operator has a certain degree of independence in executing its responsibilities as per the contract—as any other contractor—; however, this does not mean that Genera is the ultimate entity making decisions regarding PREPA's own generation resources. There is a very clear line between “acquisition of resources” and the “management, operation, maintenance, repair, restoration, and optimization of resources”. The PREB's interpretation clearly crosses that line. Furthermore, if that were the case, it would mean that Genera could undermine PREPA's decision-making at every turn. It would produce the absurdity that PREPA has no proprietary faculties derived from its capacity as owner of the generation fleet. PREPA's legal responsibilities under Law 83-1942 have not disappeared. It has not been eliminated through legislated amendment. The PPP contracts can not amend PREPA's law.

III. Structure of public-private partnerships

The most worrying aspect of the current proceeding is that it is not understood which of these entities—PREPA or Genera—is the principal and which is the agent. This chapter is a déjà vu of the perpetual novel of PREPA-LUMA. It reproduces precisely the same dilemma as ever: Who is in charge? Therefore, it is seriously beyond appalling the PREB's claim that Genera is “the sole entity responsible for managing, leading, and deciding on matters pertaining” PREPA's generation assets. That phrase can be easily construed as a release of PREPA's statutory obligations. It must be kept in mind that the public policy behind the public-private partnerships is not an abolition of PREPA's role in the scheme envisioned for the energy sector. The Legislature has not repealed PREPA's organic law, as we have stated.

Genera—just like LUMA—is merely an agent of PREPA, as per expressly established in the LGA OMA. The consequence of such a role is that the former can't exercise faculties in the principal's exclusive purview of powers. Furthermore, it can't be claimed that

⁸ *Id.*

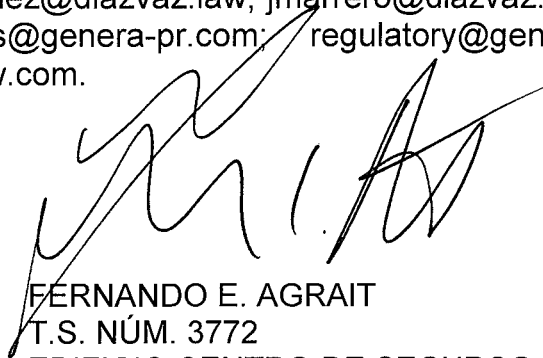
the principal is unable to exercise the same powers as its agent. There is no doubt that PREPA, by granting the private-public partnership with Genera, delegated certain powers to the latter. In addition, it can also be argued—just as PREPA did in its July 14 Motion—that Genera has the power to complete the bidding process in question. What is an impermissible conclusion is that this delegation is a complete waiver of PREPA's statutory faculties. This is precisely the logically ineludible interpretation elicited by this Bureau's expressions in the Resolution and Orders.

These expressions can not be made absent a detailed analysis of PREPA's legislated powers than fact PREPA owns the assets, the fact that both Govern and LUMA are agents. The interaction between PREPA's law, included Law 57-2014 and 19-2017, the PPP contracts and the actual delegation of powers by PREPA requires a more thorough examination.

WHEREFORE, it is respectfully requested to Bureau reconsider its Resolution and Orders and to clarify the contractual relationship between PREPA and Genera.

RESPECTFULLY SUBMITTED this 20, day of July, 2023, in San Juan, Puerto Rico.

I certify was notified by email to mvazquez@diazvaz.law; jmarrero@diazvaz.law; brannen@genera-services.com; kbolanos@genera-pr.com; regulatory@genera-pr.com; jfr@sbgblaw.com; alopez@sbgblaw.com.



FERNANDO E. AGRAIT
T.S. NÚM. 3772
EDIFICIO CENTRO DE SEGUROS
701 AVENIDA PONCE DE LEÓN
OFICINA 414
SAN JUAN, PUERTO RICO 00907
TELS 787-725-3390/3391
FAX 787-724-0353
EMAIL: agraitfe@agraitlawpr.com