

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

NEPR Received: Sep 15, 2023 5:00 PM
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IN RE:

10 YEAR PLAN FEDERALLY FUNDED
COMPETITIVE PROCESS

CASE NO.: NEPR-MI-2022-0005

SUBJECT: Memorandum of Law in Support
of Confidential Treatment of RFP Draft Scope
Submitted in Compliance with Resolution and
Order Dated August 23, 2023

**MEMORANDUM OF LAW IN SUPPORT OF CONFIDENTIAL TREATMENT OF RFP
DRAFT SCOPE SUBMITTED IN COMPLIANCE WITH RESOLUTION AND ORDER
DATED AUGUST 23, 2023**

TO THE HONORABLE PUERTO RICO ENERGY BUREAU:

COMES NOW GENERA PR LLC (“Genera”), as agent of the Puerto Rico Electric Power Authority (“PREPA”),¹ through its counsels of record, and respectfully state and request the following:

I. Introduction

1. Effective as of July 1, 2023, (the Service Commencement Date) the responsibility for O&M Services for the Legacy Generation Assets transitioned from PREPA to Genera, in accordance with the provision of the LGA OMA. , Genera's exclusive responsibility for managing,

¹ Pursuant to the *Puerto Rico Thermal Generation Facilities Operation and Maintenance Agreement* (“LGA OMA”), dated January 24, 2023, executed by and among PREPA, Genera, and the Puerto Rico Public-Private Partnerships Authority, Genera is the sole operator and administrator of the Legacy Generation Assets (as defined in the LGA OMA) and the sole entity authorized to represent PREPA before PREB with respect to any matter related to the performance of any of the O&M Services provided by Genera under the LGA OMA.

leading, and deciding on RFP 3784² and RFP 3800³ matters was recognized and affirmed by the PREB in their Resolutions and Orders dated July 13, 2023,⁴ and July 17, 2023.⁵

2. On August 16, 2023, Genera, acting as agent of PREPA, submitted a detailed report to the Energy Bureau covering the period from August 1 to August 15, 2023, regarding the procurement status of the emergency generation and black-start generation units. The report also included recommendations for changes to the RFP processes, which Genera affirmed could lead to significant cost savings and a reduction in time.

3. On August 23, 2023, the Energy Bureau issued a Resolution and Order titled *Bi-Monthly Reports on the Status of Emergency Generation and Black-Start Generation Procurement for the Periods from July 15 to July 31, 2023, and August 1 to August 15, 2023, filed by Genera PR, LLC* (“August 23rd Order”). Pursuant to this motion, in the August 23rd Order, the Energy Bureau, among other things, **ordered** Genera to submit a draft RFP for their review and approval within ten days of the notification of the August 23rd order, which was September 4, 2023.

4. On September 1, 2023, Genera submitted a document titled *Motion to Submit Bi-Monthly Report on the Status of Emergency Generation and Black-Start Generation Procurement for the Period of August 16 to August 31, 2023, and to Request of Time* (“September 1st Motion”). In this motion, Genera requested an extension of time until September 8, 2023, for the submission

² See, Resolution and Order, *In re: Request for Approval of RFP Process for the New Black-Start Systems at Costa Sur and Yabucoa*, Case No.: NEPR-MI-2022-0005, December 5, 2022, wherein the Energy Bureau approved PREPA's request of November 10, 2022, for an Request For Proposal (“RFP”) process to procure black-start systems at Costa Sur and Yabucoa (“RFP 3784”).

³ See, Resolution and Order, *In re: PREPA's 10 Year Plan Competitive Infrastructure Procurement Processes*, Case No.: NEPR-MI-2022-005, January 23, 2023, through which the Energy Bureau conditionally approved PREPA's RFP process for the procurement of emergency generation at Jobos, Dagua, and Palo Seco (“RFP 3800”).

⁴ See, Resolution and Order, *In re: 10-Year Plan Federally Funded Competitive Process*, Case No.: NEPR-MI-2022-0005, July 13, 2023 (July 13th Resolution).

⁵ See, Resolution and Order, *In re: 10-Year Plan Federally Funded Competitive Process*, Case No.: NEPR-MI-2022-0005, July 17, 2023 (July 17th Resolution).

of the draft RFP. This request was made on the grounds of the scale and complexity associated with the equipment acquisition process, which constitutes the primary focus of the RFP.

5. In accordance with the August 23rd Order, on September 8, 2023, Genera submitted a document titled *Motion to Submit Draft RFP in compliance with Resolution and Order Dated August 23, 2023 and Request for Extension of Time to Supplement*, (“September 8th Motion”), whereby Genera submitted under seal of confidentiality a copy of the document titled *Grid Support Units; Technical Specification for Power Generation Equipment* (“Draft Scope”), detailing the requirements and scope of the RFP that Genera will issue to purchase the units. Additionally, Genera requested an extension of time to submit a Memorandum of Law supporting its request for confidential treatment of the Draft Scope.

6. In line with the September 8th Motion, Genera respectfully submits this Memorandum of Law to support its request for maintaining the confidentiality of the Draft Scope, pursuant to the Energy Bureau's Policy on Management of Confidential Information, CEPR-MI-2016-0009, issued on August 31, 2016, and partially amended on September 16, 2016 (“Energy Bureau’s Policy on Management of Confidential Information”), as it contains sensitive commercial information of a RFP process that has not been approved by the Energy Bureau.

II. Identification of Confidential Information

Document Name and File Date	Pages in which Confidential Information is Found, if applicable	Summary of Legal Basis for Confidential Designation, if applicable	Summary of why each claim or designation conforms to the applicable legal basis for confidentiality
Exhibit A – Draft Scope, filed on September 8, 2023.	Entire document.	Sensitive commercial information during ongoing competitive procurement process.	The Draft Scope’s contains sensitive commercial information that the Energy Bureau has not yet approved. As part of an ongoing procurement process, which includes Genera's evaluation

			of offers, the Draft Scope must remain confidential to safeguard the procurement process's transparency and integrity and prevent potential prejudice to Genera.
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III. Memorandum of Law in Support of Confidential Treatment

A. Applicable Law

The governing statute for the management of classified information submitted to the Energy Bureau is Section 6.15 of Act No. 57-2014, also known as the "Puerto Rico Energy Transformation and RELIEF Act." This section stipulates that "[i]f any person who is required to submit information to the Energy [Bureau] believes that the information to be submitted carries a confidentiality privilege, such person may request the [Bureau] to treat such information as confidential..." 22 L.P.R.A. § 1054n. If, after conducting appropriate evaluation, the Energy Bureau determines that the information warrants protection, it is required to "grant such protection in a manner that minimally 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 Section 6.15(a). Consequently, such information must be withheld from the public domain by the Energy Bureau and "must be duly safeguarded and provided exclusively to the personnel of the Energy [Bureau] who need to know such information under nondisclosure agreements." *Id.* at Section 6.15(c). Therefore, "[t]he Energy [Bureau] must swiftly act on any privilege and confidentiality claim made by a person under its jurisdiction through a resolution for such purposes before any potentially confidential information is disclosed." *Id.* at Section 6.15(d).

Additionally, the Energy Bureau's Policy on Management of Confidential Information detail the procedures a party should follow to request confidential treatment for a document or a

portion of it. The Energy Bureau's Policy on Management of Confidential Information requires identifying confidential information and filing a memorandum of law explaining the legal basis and support for a request to file information confidentially. *See* Section A of the Energy Bureau's Policy on Management of Confidential Information. The memorandum should also include a table that identifies the confidential information, a summary of the legal basis for the confidential designation, and an explanation of why each claim or designation conforms to the applicable legal basis for confidentiality. *Id.* The party seeking confidential treatment of information filed with the Energy Bureau must also file both a "redacted" (or "public") version and an "unredacted" (or "confidential") version of the document that contains the confidential information. *Id.*

In conjunction with the aforementioned, Energy Bureau Regulation 8815, also known as the *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 and other Resources* ("Regulation 8815"), provides clear and explicit safeguards for confidential information during competitive bidding procedures, as delineated in Articles 4.2.

In its pertinent part, Article 4.2 of Regulation 8815 mandates that "prior to launching any public procurement process, and after receiving the approval of the [Board of Directors] from PREPA to proceed with the proposed Project and procurement process, the Executive Director [of PREPA] will notify in writing to the Energy [Bureau] the recommendation of the Project Committee with respect to: (i) the proposed Project, including all associated documents that explain the Project; (ii) the proposed parameters to determine such profit margin and price escalators; (iii) consistence with the Integrated Resource Plan approved by the Energy [Bureau];

and (iv) compliance with Regulation 8815, the Acts, and other applicable regulations.”⁶ Importantly, Article 4.2 provides that the information should remain confidential while the administrative competitive procurement process is ongoing.⁷

In addition to the aforementioned, it is worth noting that under Act. No. 80-2011, also known as *the Industrial and Trade Secret Protection Act of Puerto Rico* (“Act No. 80-2011”), certain information may be granted protection as a trade secret. Specifically, Act No. 80-2011 provides that industrial or trade secrets are deemed to be any information:

- a. That has a present or potential independent financial value or that provides a business advantage, insofar as such information is not common knowledge or readily accessible through proper means by persons who could make a monetary profit from the use or disclosure of such information, and
- b. For which reasonable security measures have been taken, as circumstances dictate, to maintain its confidentiality.

Furthermore, in the context of Act No. 80-2011, information refers to knowledge that amplifies or clarifies existing understanding, including but not limited to formulas, compilations, methods, techniques, processes, recipes, designs, treatments, models, or patterns. *See* Article 3 of Act No. 80-2011. In addition, Puerto Rico’s Supreme Court has delineated a trade secret as any process of manufacturing, treating, or preserving materials, a formula or recipe, a blueprint or pattern for the development of machinery, or even a list of specialized customers that constitute a distinct market, thereby bestowing a competitive advantage upon its owner. *See Ponce Adv. Med. v. Santiago González*, 197 DPR 891, 903-904 (2007).

⁶ See Article 4.2 of Regulation 8815.

⁷ *Id.*

B. Ground for Confidentiality

The Draft Scope RFP submitted by Genera in the September 8th Motion contains information related to the development of an ongoing public procurement process that is still under consideration for approval by the Energy Bureau. This information is liable to change under the recommendations of the Energy Bureau if deemed necessary. Consequently, such information must remain confidential in accordance with the provisions of Article 4.2 of Regulation 8815. Releasing the information contained in the Draft Scope would not only contravene the provision of Regulation 8815 but also compromise the transparency and integrity of the ongoing procurement process, thereby undermining Genera's position as the issuing authority.

Furthermore, Genera's Draft Scope proposal results from an in-depth proprietary analysis built upon a comprehensive market understanding and assimilation of past experiences. This analysis includes methodologies that are not readily available to the public or to competitors in the energy sector. Given that this proprietary information has considerable financial value, it qualifies for trade secret protection under Act No. 80-2011. The proprietary information contained in Genera's Draft Scope proposal merits classification as a trade secret and should thus be accorded the full extent of legal protection available under Act No. 80-2011 and the Energy Bureau's regulations. Thus, the Draft Scope submitted by Genera is entitled to confidential treatment under both Regulation 8815 and Act No. 80-2011.

In light of the foregoing, disclosure of the Draft Scope would provide an unfair advantage to potential proponents. The premature disclosure of this information could disrupt future proceedings and subvert the equitable treatment of all participants. Therefore, in accord with both Regulation 8815 and Act No. 80-2011, as well as all other applicable laws and regulations, Genera

respectfully requests that the Energy Bureau maintains the confidential treatment of the Draft Scope.

WHEREFORE, Genera respectfully requests that the Energy Bureau **take notice** of the above and **grant** this request for confidential treatment of the Draft Scope filed on September 8, 2023.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this 15^h day of September 2023.

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CERTIFICATE OF SERVICE

We hereby certify that a true and accurate copy of this motion was filed with the Office of the Clerk of the Energy Bureau using its Electronic Filing System and that we will send an electronic copy of this motion to the attorney for Puerto Rico's Electric Power Authority, Joannely Marrero-Cruz, at jmarrero@diazvaz.law; and Maralíz Vázquez-Marrero, at mvazquez@diazvaz.law.

In San Juan, Puerto Rico, this 15th day of September 2023

/s/ Alejandro López-Rodríguez
Alejandro López-Rodríguez