

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

IN RE: GENERA PR LLC PROCUREMENT
PLAN

CASE NO.: NEPR-MI-2023-0008

SUBJECT: Resolution and Order
commencing the evaluation process of
Genera PR LLC Procurement Plan.

RESOLUTION AND ORDER

I. Relevant Background

On January 14, 2023, the Puerto Rico Public-Private Partnerships Authority ("P3 Authority") requested the Energy Bureau of the Puerto Rico Public Service Regulatory Board ("Energy Bureau") to issue a Certificate of Energy Compliance in connection with a Preliminary Contract for the delegation of the operation and maintenance functions of the base-load generation plants and gas turbine peaking plants throughout the island of Puerto Rico.¹ On January 15, 2023, the Energy Bureau issued a Resolution and Order through which it determined that the Preliminary Contract complies with the Puerto Rico Energy Public Policy and regulatory framework and issued a Certificate of Energy Compliance in connection with the Preliminary Contract.² The January 15 Resolution includes several conditions, constraints, and clarifications regarding the approval of the Preliminary Contract.³

On January 20, 2023, the P3 Authority filed a document through which informed the Energy Bureau of certain minor non-substantive and non-material revisions to the Preliminary Contract.⁴ A modified Preliminary Contract was attached to the January 20 Motion. On January 21, 2023 the Energy Bureau issued a Resolution and Order through which it determined that none of the Preliminary Contract's terms and conditions were materially modified and that the modifications do not affect or alter the Energy Bureau's analysis and evaluation in connection with issuing a Certificate of Energy Compliance through the January 15 Resolution.⁵ Therefore, the Energy Bureau upheld the Energy Compliance Certificate.⁶

On January 24, 2023, the Puerto Rico Electric Power Authority ("PREPA"), the P3 Authority and Genera PR, LLC ("Genera") entered into an agreement for operation and maintenance of PREPA's thermal generation facilities.⁷ On July 1, 2023, Genera assumed the operation of

¹ See *Puerto Rico Public-Private Partnerships Authority's Motion Submitting Documents, As Further Amended, and Requesting Confidential Treatment In Re: Certificate of Energy Compliance*, Case No. NEPR-AP-2022-0001, January 14, 2023.,

² See *Resolution and Order, In Re: Certificate of Energy Compliance*, Case No. NEPR-AP-2022-0001, issued on January 15, 2023 ("January 15 Resolution"), pp. 18-19.

³ See *Id.*, pp. 11-19.

⁴ See *Puerto Rico Public-Private Partnerships Authority's Informative Motion in Connection with 'Resolution and Order' and Confidential Treatment* Case No. NEPR-AP-2022-0001, *In Re: Certificate of Energy Compliance*, Case No. NEPR-AP-2022-0001 filed on January 20, 2023, ("January 20 Motion"), p. 3, ¶ 4.

⁵ See *Resolution and Order, In Re: Certificate of Energy Compliance*, Case No. NEPR-AP-2022-0001, issued on January 21, 2023 ("January 21 Resolution"), p. 2.

⁶ See *Id.*, p. 3.

⁷ *Puerto Rico Thermal Generation Facilities Operation and Maintenance Agreement*, dated January 24, 2023, executed by and among PREPA, the P3 Authority, and Genera ("GOMA").



PREPA's Thermal Legacy Assets and commenced to provide the O&M Services⁸ under the GOMA.

On June 30, 2023, Genera sent a letter ("June 30 Letter") to the Energy Bureau including, (i) a document titled Genera Procurement Manual ("Procurement Manual"), (ii) letters issued by the P3 Authority and COR3⁹ dated June 30, 2023, approving the Procurement Manual, and (iii) a letter issued by PREPA on June 30, 2023, acknowledging the Procurement Manual.

The Procurement Manual outlines the policies and procedures Genera will use when procuring goods and services as agent for PREPA under the GOMA. It outlines formal and informal procurement methods based on purchase thresholds, with competitive sealed bidding or competitive proposals required above determined thresholds. Non-competitive procurement is also permitted under certain circumstances. The Procurement Manual also prescribes documentation requirements for procurements including justifications, cost estimates, evaluations, and notices. It also covers topics like contracting with small/minority businesses, conflicts of interest, dispute resolution, and oversight. For procurements involving Genera affiliates, the Procurement Manual requires use of an independent Third-Party Procurement Office to mitigate conflicts of interest and ensure impartiality. This Third Party will manage affected procurements and contract administration.

II. Analysis

Section 4.2(p) of the GOMA provides that promptly (and within ninety (90) days) following the Effective Date of the GOMA, Genera shall prepare and submit to P3 Authority and COR3 for review and approval (with copy to the Federal Emergency Management Agency, the Department of Homeland Security Office of the Inspector General and PREB) a proposed Procurement Manual, that includes among others, an agreed Organizational Conflict of Interest Policy.¹⁰ Upon receipt of the proposed Procurement Manual, P3 Authority, acting in consultation with COR3 and PREB (each of which shall provide comments no later than thirty (30) days following receipt of a copy of the proposed Procurement Manual), shall provide Genera comments on the proposed Procurement Manual including any changes or modifications they believe are necessary or appropriate.¹¹ Thereafter, within thirty (30) days following receipt of P3 Authority's consolidated comments Genera shall submit to P3 Authority and COR3 (with copy to PREB) the revised Procurement Manual, incorporating the feedback from P3 Authority, COR3 and PREB.¹² The GOMA also establishes a procedure to solve any disagreement between the relevant parties regarding the Procurement Manual.¹³

In the January 15 Resolution the Energy Bureau noted that a draft Organizational Conflict of Interest Policy was included as part of the Preliminary Contract (identified as "Annex VI-OCIP").¹⁴ The draft OCIP was aimed at setting forth the policies and procedures by which Genera will identify and mitigate potential, apparent and actual organizational conflict of interest that arise from the Genera's performance under the GOMA.¹⁵ The Energy Bureau also noted, that that Organizational Conflict of Interest Policy shall be incorporated by

⁸ As defined in the GOMA.

⁹ Central Office for Recovery, Reconstruction and Resiliency ("COR3").

¹⁰ The detailed scope of the Organizational Conflict of Interest Policy is included in the GOMA. See GOMA, Section 4.2(p)(i)(A).

¹¹ See GOMA, Section 4.2(p)(ii).

¹² See GOMA, Section 4.2(p)(iii).

¹³ See *Id.*

¹⁴ See January 15 Resolution, p. 16.

¹⁵ See *Id.*, p. 16.



reference into the Genera's Procurement Manual required pursuant to Section 4.2(p) of the Preliminary Contract.¹⁶

The Energy Bureau determined in the January 15 Resolution that given the potential conflicts of interest in fuel supply and the high proportion of these costs in electricity rates it will carefully review and approve the Organizational Conflict of Interest Policy applicable to the Preliminary Contract and any updates to it, to make sure future fuel supply procurement is conducted fairly with no bias to affiliates, and results in just and reasonable electricity rates.¹⁷ It also determined that it will evaluate the OCIP in the proceedings pertaining to the evaluation of [Genera's] Fuel Optimization Plan.¹⁸ The Energy Bureau also determined that the draft Organizational Conflict of Interest Policy and the requirements of Section 4.2(p) of the Preliminary Contract will be used as guidance in the process of approval of a final [Organizational Conflict of Interest Policy], and the final version of the Organizational Conflict of Interest Policy applicable to the Preliminary Contract shall be reviewed and approved by the Energy Bureau in accordance with the applicable laws and regulations.¹⁹

On July 18, 2023, the Energy Bureau began proceedings to evaluate Genera's proposed Fuel Optimization Plan in *In Re: Genera PR, LLC Fuel Optimization Plan*, Case No.: NEPR-MI-2023-0004. Genera did not submit the Procurement Manual (which incorporates the Organizational Conflict of Interest Policy in its Section X and Attachment 13) for evaluation and approval by the Energy Bureau in accordance with Section 4.2(p) of the GOMA and the January 15 Resolution. Instead, the Procurement Manual was submitted after being evaluated and approved by P3 Authority, PREPA, and COR3.



¹⁶ See *Id.*

¹⁷ See *Id.*

¹⁸ See *Id.*

¹⁹ See *Id.*

Notwithstanding the foregoing, the Energy Bureau will exercise its authority to evaluate the Procurement Plan and, particularly the Organizational Conflict of Interest Policy, as stated in the January 15 Resolution.²⁰

According to the GOMA, the Procurement Manual shall be updated by Genera, (i) on an annual basis, (ii) as necessary to reflect any changes in Applicable Law²¹ that affect any procurement and, (iii) upon any reasonable request from P3 Authority . Given the changing nature of the Procurement Manual, the Energy Bureau determines that its more convenient to conduct its evaluation in an independent proceeding, that is, not in the evaluation of the Fuel Optimization Plan.²²

III. Conclusion

For the forgoing reasons, the Energy Bureau begins this administrative procedure to evaluate the Procurement Manual and the Organizational Conflict of Interest Policy required by the GOMA. After conducting a preliminary evaluation of Genera's Procurement Manual, the Energy Bureau identified aspects that required further clarification to make sure Genera's practices align with regulatory standards and promote transparency, fairness, and the best interests of all stakeholders. The Energy Bureau **DETERMINES** additional information is required for its review of the Procurement Manual and the Organizational Conflict of Interest Policy.²³

The Energy Bureau **ORDERS** Genera, (i) to file within five (5) days of the issuance of this Resolution and Order the June 30 Letter and Procurement Manual in this Docket, and (ii) to

²⁰ See Section 21.17 of the GOMA which states that:

PREB Authority. Notwithstanding anything to the contrary herein, but without affecting Operator's remedies in the event of a Change in Regulatory Law, no provision of this Agreement shall be interpreted, construed or deemed to limit, restrict, supersede, supplant or otherwise affect, in each case in any way, the rights, responsibilities or authority granted to PREB under Applicable Law with respect to the Legacy Generation Assets, Owner or Operator.

See also the January 15 Resolution which states that:

The Energy Bureau is not a party to the Preliminary Contract. Thus, no obligation and/or duty may be imposed to the Energy Bureau under the Preliminary Contract. No provision of the Preliminary Contract shall be interpreted, construed, or considered to limit, restrict, supersede, supplant, or otherwise affect, in each case the rights, responsibilities or authority granted to the Energy Bureau under applicable laws and regulations.

Considering the foregoing, the Energy Bureau further clarifies that the issuance of the Energy Compliance Certificate regarding the Preliminary Contract:

(1) Shall not be construed, in any way whatsoever, as to impair, restrict, relinquish, or abridge the scope of the Energy Bureau's: (1) administrative powers; (2) statutory and regulatory jurisdiction and/or authority; (3) statutory and regulatory oversight and enforcement powers; (4) rights; (5) duties; and (6) obligations, all in accordance with the applicable laws and regulations.

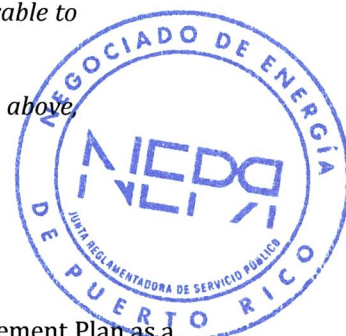
(2) Shall not be construed, in any way whatsoever, as a waiver and/or release of any applicable statutory or regulatory requirement nor any related regulatory action applicable to the LGA, their Operator, PREPA (or the successor owner of the LGA).

(3) Anything in the Preliminary Contract contrary to Section IV(B)(1) and IV(B)(2) above, or otherwise contrary to the law, shall be deemed unenforceable.

²¹ As defined in the GOMA.

²² See GOMA, Section 4.2(p)(v).

²³ For the avoidance of doubt, until otherwise stated, the Energy Bureau recognizes the Procurement Plan as a valid and enforceable document pursuant to which Genera shall discharge its obligations under the GOMA.



respond, on or before December 8, 2023, to the Requirements of Information ("ROI") set forth in **Attachment A** to this Resolution and Order.

Be it hereby notified and published.




Edison Avilés Deliz
Chairman



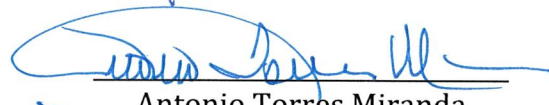
Lillian Mateo Santos
Associate Commissioner



Ferdinand A. Ramos Soegaard
Associate Commissioner



Sylvia B. Ugarte Araujo
Associate Commissioner



Antonio Torres Miranda
Associate Commissioner

CERTIFICATION

I certify that the majority of the members of the Puerto Rico Energy Bureau agreed on November 29, 2023. Also certify that on November 29, 2023, I have proceeded with the filing of this Resolution and Order and was notified by email to brannen@genera-services.com; kbolanos@genera-pr.com; legal@genera-pr.com; regulatory@genera-pr.com.

For the record, I sign in San Juan, Puerto Rico, today, November 29, 2023.



Sonia Seda Gaztambide
Clerk



ATTACHMENT A

Requests of information (ROIs) to Genera PR, LLC (“GENERA”) regarding its Proposed Procurement Manual (“Manual”) and Conflict of Interest Policy²⁴

Formal Procurement Methods above the Simplified Acquisition Threshold

1. In sections III.C.1.a and b of the Manual (pages 11 and 12), it states that bids, offers, and proposals may be solicited directly from potential vendors. However, it is not clear how Genera would solicit directly and to which potential vendors.
 - a. How would Genera directly solicit a bid, offer, or proposal of a competitive formal procurement to a potential vendor?
 - b. What is the process that Genera would use to identify which potential vendors to solicit directly?
 - c. Will Genera directly solicit any Affiliates or Parent Company in a future formal procurement?

Procedures for identifying, avoiding, or mitigating actual or apparent conflicts of interest prior to the initiation of a procurement process

2. On pages 88 and 89 of the Manual, it states that organizational, physical, and/or geographic separation between Genera and an Affiliate or Parent Company will be established to reduce the risk of inadvertent disclosures and provides a list of considerations.
 - a. Please describe the current degree of organizational, physical, or geographic overlap, if any, that already exists between Genera and Affiliates or Parent Company.
 - b. Please describe the specific actions that Genera has taken and plans to take with respect to organization, physical, and/or geographic separation.

Procedures for reporting of all actual/apparent conflicts of interest

3. How will Genera ensure that Genera employees, Contractors, and Subcontractors report actual or apparent conflicts of interest to Genera’s Chief Compliance Officer?

Informal Procurement Methods

4. On page 10 of the Manual, it states that purchases of goods and services not exceeding the Micro Purchase Threshold may be made without Competitive Sealed Bidding or Competitive Proposals if the Project Officer considers the price to be fair and reasonable based on research, experience, purchase history, or other information and documents the decision.
 - a. How does Genera define “fair and reasonable”?
 - b. What is Genera’s plan for conducting micro-purchases with Affiliates or Parent Companies? For example, will Genera handle contracting and payment, or will this be handled by the Third-Party Procurement Office (“3PPO”)?
 - c. How will Genera prevent potential misuse or favoritism in micro-purchase contracts?

Pre-qualification

5. On page 13 of the Manual, it states that pre-qualification shall be based on criteria related to that which is to be procured and are designed to solicit vendors fully

²⁴ Terms used in this ROI not otherwise defined, shall have the definition ascribed to them in the Manual.



capable of performing the anticipated contract. However, it's not clear what specific criteria are used for pre-qualification.

- a. What specific criteria are used for pre-qualification?
 - b. Are these criteria standardized across all procurements or do they vary depending on the nature of the procurement?
6. On page 13 of the Manual, it states that pre-qualified lists are not contracts, they simply aid in the procurement of future contracts by documenting the qualification of prospective contractors in advance of procurements. However, it's not clear how often these lists are updated and what measures are in place to ensure they remain current.
- a. How often are pre-qualified lists updated?
 - b. What measures are in place to ensure these lists remain current?

Definition of 'Best Interest of Good Administration'

7. In section III.E of the Manual (*Limited Exceptions to Procurement Methods*, page 15) the Manual establishes dispositions to bypass the standard competitive bidding process. The term 'best interest of good administration' is a broad and subjective term. It would be preferable to establish clearer and more objective criteria that can justify a non-competitive procurement.
- a. What specific criteria or conditions qualify as the 'best interest of good administration'?
 - b. Who determines what is in the 'best interest of good administration' and how is this decision-making process recorded and validated?

Potential for Lack of Transparency and Fairness

8. The exceptions described in the Manual (such as in section III.E on page 15) allow for a significant amount of non-competitive procurement, which might lead to potential misuse. Non-competitive procurement can also inhibit market competition, potentially leading to higher prices and lower quality.
- a. What are the controls and accountability mechanisms to prevent potential misuse or favoritism in non-competitive procurement?
 - b. How does the entity ensure that the non-competitive procurement process is fair and equitable?

Inadequate Competition

9. The Manual (page 14) mentions that Genera may proceed to award as a Non-competitive Procurement if competition is determined to be inadequate. However, it's not clear what criteria are used to determine whether competition is inadequate. What criteria are used to determine whether competition is inadequate, allowing for Non-competitive Procurement?



Emergency and Exigency Circumstances

10. In Section III.D. (*Non-competitive Procurements*, page 13), the Manual provides guidelines for emergency and exigency circumstances (Page 9). However, it's not clear how these guidelines are enforced.
 - a. How are emergency and exigency circumstances defined and who has the authority to declare them?
 - b. What measures are in place to ensure these guidelines are followed?
11. The Manual (page 14) mentions that the Organizational Conflicts of Interest process does not apply during the time that Emergency or Exigency conditions prohibit competitive procurement. However, it's not clear what measures are in place to ensure that conflicts of interest are still managed effectively during these periods. What measures are in place to manage conflicts of interest during periods when the OCI process does not apply?

Affiliate or Parent Company Participation in Tenders

12. In Section III of Attachment 13 (OCIAMP), on page 85 of the Manual, entitled *OCI Identification and Avoidance/Mitigation*, the Manual contains various dispositions relating to Organizational Conflicts of Interest. It outlines that if an Affiliate or Parent Company responds to a Request for Information/Quotation (RFI/RFQ), the procurement process will be managed by the 3PPO (Third Party Procurement Officer). However, it's not clear what parameters are used to select the 3PPO and how their independence is ensured. What measures are in place to adequately select the 3PPO and ensure impartiality in the procurement process?
13. The Puerto Rico Public-Private Partnerships Authority ("P3A") will select the 3PPO with reasonable input from Genera.
 - a. If the 3PPO has been selected, what is the entity?
 - b. If the 3PPO has been selected, please provide the contract between the 3PPO and the P3A.
 - c. If the 3PPO has not been selected, when does Genera expect the 3PPO to be selected?

Disclosure of Affiliates or Parent Company

14. The Manual (page 98) requires that an Affiliate or Parent Company identify themselves as such in their submittal and that any Proponents/Bidders disclose if an Affiliate or Parent Company is part of its bid team. However, it is not clear what measures are in place to verify these disclosures. How does Genera verify the accuracy of these disclosures?

Contract Management

15. The Manual outlines that if a contract is awarded to an Affiliate or Parent Company, certain activities will be performed by Genera, some by the 3PPO, and some by Genera only after pre-approval by the 3PPO. This could potentially lead to conflicts of interest if not properly managed. What measures are in place to ensure that Genera's involvement in contract management does not lead to conflicts of interest?



Biased Ground Rules

16. Regarding the discussion of the potential for biased ground rules on pages 86 through 89 of the Manual:
 - a. How will Genera know that a Parent Company or Affiliate, or subsidiary, will participate in a competitive bid? Will Genera utilize a 3PPO in the event that such participation is possible, but not known for sure?
 - b. How will Genera ensure that the 3PPO has sufficient expertise and knowledge to “ensure there are no biased technical specifications” (page 87)?
17. Clarify under what circumstances the protections detailed in Section B on page 88 of the Manual will be applied. The introductory text to this section says these actions “may be considered.” However, text in Section B on page 86 states that the “mitigation measures will be implemented.”
 - a. Will mitigation strategies be applied in all cases? If not, what is the process to determine when they are applied?
 - b. Would Genera consider amending this section to state that these mitigation strategies will be used in all cases? If not, why not?

Managing Conflicts of Interest Outside of Procurement

18. The Manual addresses process-related conflicts of interest related to procurement but does not address conflicts of interest related to other Genera activities. For example, there is a risk that Genera could choose to inappropriately favor investment in, or maintenance of, facilities for which an Affiliate or Parent Company provides fuel or other services, over other facilities within its fleet. Does Genera have a written policy or other document that would address this type of organizational conflict of interest?
 - a. If so, please provide the policy or other related document.
 - b. If not, why not? Does Genera plan to develop such a policy or manual?

