

**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: Determination of the evaluation process of Genera PR LLC Procurement Plan in accordance to Section C-8 of the Energy Certificate in connection to the GOMA.

RESOLUTION AND ORDER

I. Introduction and 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 ("January 15 Resolution") 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 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.⁴ On July 1, 2023, Genera assumed the operation of PREPA's Thermal Legacy Assets and began to provide the O&M Services⁵ 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 COR3⁶ dated June 30, 2023, approving the Procurement Manual, and (iii) a letter issued by PREPA on June 30, 2023, acknowledging the Procurement Manual.

On November 29, 2023 the Energy Bureau issued a Resolution and Order ("November 29 Resolution") that began the administrative procedure to evaluate the Procurement Manual and the Organizational Conflict of Interest Policy required by the GOMA and exercising its authority to evaluate the documents, as stated in the January 15 Resolution.⁷ After

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 *Id.*, pp. 11-19.

⁴ *Puerto Rico Thermal Generation Facilities Operation and Maintenance Agreement*, dated January 24, 2023, executed by and among PREPA, the P3 Authority, and Genera ("GOMA").

⁵ As defined in the GOMA.

⁶ Central Office for Recovery, Reconstruction and Resiliency ("COR3").

⁷ See Section 21.17 of the GOMA which states that:



identifying 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 also included in the November 29 Resolution several requirements of information ("ROIs") related to the Procurement Manual and the Organizational Conflict of Interest Policy.⁸

On December 4, 2023, Genera filed a motion with the Energy Bureau in compliance with the November 29 Resolution ("December 4 Motion") that submitted for the record both the June 30 Letter with the approved Procurement Manual⁹.

On December 8, 2023, Genera filed a motion with the Energy Bureau Submitting Response to Requirement of Information ("December 8 Motion") in compliance with the November 29 Resolution¹⁰.

II. Analysis

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 allowed 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-

Section 21.17 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.

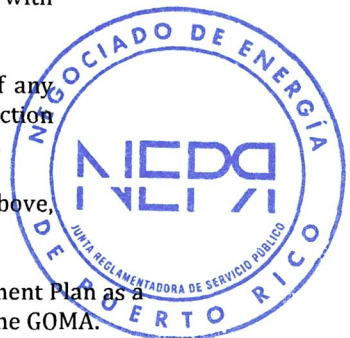
Considering the foregoing, the Energy Bureau further clarifies that the issuance of the Energy Compliance Certificate regarding the Preliminary Contract:

- (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.

⁸ 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.

⁹ In re: Genera PR LC Procurement, Case No.: NEPR-MI-2023-0008, Motion to Submit Genera's Procurement Plan in Compliance with Resolution and Order dated November 29, 2023, filed by Genera on December 4, 2023.


¹⁰ Id., Motion Submitting Response to Requirement of Information in Compliance with Resolution and Order dated November 29, 2023, filed by Genera on December 8, 2023.



Party Procurement Office ("3PPO") to mitigate conflicts of interest and ensure impartiality. This 3PPO will manage affected procurements and administer the associated contracts.

In the January 15 Resolution the Energy Bureau noted that a draft Organizational Conflict of Interest Policy ("OCI Policy") was included as part of the Preliminary Contract (identified as "Annex VI-OCIP").¹¹ The OCI Policy 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.¹² The Energy Bureau also noted that that OCI Policy shall be incorporated by reference into the Genera's Procurement Manual required under Section 4.2(p) of the Preliminary Contract.¹³


This OCI Policy sets forth the policies and procedures by which Genera will identify and mitigate potential, apparent, and actual OCIs that arise in connection with Genera's performance of the GOMA related to Facility Contracts. In the OCI Policy, Genera describes how it will endeavor to: (a) identify and evaluate potential OCIs as early in the procurement process as possible; (b) prevent the existence or appearance of conflicting roles that might bias Genera's judgment; (c) avoid, neutralize, or mitigate significant potential conflicts before contract award; (d) provide unbiased, impartial and objective advice and assistance; (e) prevent the existence of conflicting roles that could result in impaired objectivity; and (f) prevent unfair competition and advantage.¹⁴

 To reduce the risk of impaired objectivity in Genera procurement activities, the Procurement Manual identifies three (3) types of OCI and provides mitigation measures to be implemented:


A. Impaired Objectivity

1. excluding any "impaired" Contractor or Subcontractor from the procurement;
2. changing the scope of the contract and re-bidding;
3. installing a firewall;
4. transitioning the procurement to the 3PPO;
5. using anonymized identifiers, the 3PPO, in its discretion, presents Genera with technical questions during the course of a procurement; and
6. increasing involvement of the 3PPO in oversight.

B. Unequal access to information

 To reduce the risk of unequal access to information in Genera procurement activities, the following mitigation measures will be implemented by Genera: (i) establishing a firewall, security measures, or procedures that effectively limit the flow of "Competitively Sensitive" labeled information between the personnel with access to such nonpublic information, and the personnel that would benefit from the "Competitively Sensitive" labeled information; and (ii) sharing the information with all competing offerors to avoid or mitigate any potential competitive advantage.

C. Biased ground rules

 To reduce the risk that any procurement could contain biased ground rules in Genera procurement activities, the following mitigation measures will be implemented:

1. Genera will recuse itself from procurements that involve Parent Company or an Affiliate, and instead use a 3PPO established by P3 Authority.

¹¹ See January 15 Resolution, p. 16.

¹² *Id.*, p. 16.


¹³ *Id.*

¹⁴ Procurement Manual – Attachment 13.




2. Genera will exclude any Affiliate or Parent Company from participating as a prime contractor or subcontractor in any procurement process in which the 3PPO was not engaged.
3. When the 3PPO is controlling a procurement, the 3PPO will set the evaluation criteria, and may pose questions to Genera to inform the 3PPO's decision-making.
4. Any bid protests for PREPA procurements involving allegations of unmitigated biased ground rules will be reviewed by P3 Authority, consistent with its oversight responsibilities under the O&M Agreement.

In addition to the mitigation activities above, Genera will obtain an annual independent audit (by an auditor chosen by Genera and approved by P3 Authority) of the following:


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1. Compliance with the OCI Policy and with the Procurement Manual requirements related to OCI mitigation (as changed from time to time) (e.g., market research, solicitation content, proposals received and evaluations thereof, etc.)
 2. Proper management of OCI process (e.g., errors, observations, limitations on competition)
 3. The auditor will propose corrective action and/or recommend revisions to processes to address any material issues identified that relate to the OCI Mitigation.
 4. A copy of the audit report will be provided to the Executive Director of P3A, or their designee.

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 Law¹⁵ that affect any procurement, and (iii) upon any reasonable request from P3 Authority. Given the changing nature of the Procurement Manual, the Energy Bureau determined to conduct its evaluation in an independent proceeding, that is, not in the evaluation of the Fuel Optimization Plan.¹⁶



In accordance with the above, The November 29 Resolution began the evaluation process of the Procurement Manual and the OCI Policy. The November 29 Resolution included a set of 18 ROIs regarding Genera's OCI Policy to gain more insights and clarifying outstanding questions.

These ROIs solicited clarifications from Genera on the following topics:

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1. Formal procurement methods above the simplified acquisition threshold
 2. Procedures for identifying, avoiding, or mitigating actual or apparent conflicts of interest prior to the initiation of a procurement process
 3. Procedures for reporting of all actual/apparent conflicts of interest
 4. Informal procurement methods
 5. Pre-qualification
 6. Definition of "Best Interest of Good Administration"
 7. Potential for Lack of Transparency and Fairness
 8. Inadequate competition
 9. Emergency and Exigency Circumstances
 10. Affiliate or Parent Company Participation in Tenders
 11. Disclosure of Affiliates or Parent Company
 12. Contract Management
 13. Biased Ground Rules
 14. Managing Conflicts of Interest Outside of Procurement

Genera's responses confirmed that it has taken action to limit conflicts of interest by implementing several organizational policies. According to Genera's responses to ROI's:

¹⁵ As defined in the GOMA.

¹⁶ See GOMA, Section 4.2(p)(v).



- Genera is building a separation between Genera and its affiliates or Parent Company, such as New Fortress Energy (“NFE”). All electronic communications, servers, and clouds are separate from NFE and managed internally by Genera.¹⁷
- Genera has integrated the Procurement Department under the Legal Department umbrella, giving the Chief Compliance Officer more visibility and oversight of all the requests, services, and contracts in the procurement pipeline.¹⁸
- Staff have been trained in potential conflict of interest when engaging personnel from an affiliate for current contracts.¹⁹
- Genera has expanded its Compliance Program to include additional training related to conflict of interest and has created a hotline for employees to anonymously report any potential or actual conflict of interest.²⁰

Genera also clarified its approach to mitigating actual or perceived conflict of interest where the Procurement Manual does not require the involvement of the 3PPO. According to Genera’s responses:

- While the Procurement Manual states that Genera may purchase goods or services under the micro purchase threshold without soliciting a competitive price, Genera has no plan to make micro-purchases from an Affiliate or Parent Company.²¹
- When using the Limited Exceptions to Procurement Methods, Genera would review all current contracts with the vendor it intends to choose and determine if the price is reasonable within market value and if the vendor has enough experience to perform the task or provide goods of the required quality. These contracts are also reviewed by Genera’s Legal and Compliance departments and the P3 Authority depending on the contract amount.²²
- When using the Limited Exceptions to Procurement Methods to act in the best interest of good administration, Genera would use its discretion to determine when it needs to bypass standard competitive bidding processes based on criteria including whether opening a formal competition would cause a disruption to the power grid, increase costs and damages, or incur fines or penalties as a result of delays.²³

Last, Genera confirmed that it would collaborate and cooperate with the 3PPO, as selected by the P3 Authority. According to Genera’s responses:

- The 3PPO would be selected through a procurement process conducted by the P3 Authority, allowing the process to occur transparency and prevent any influence from Genera.²⁴
- The 3PPO will have independence and autonomy to perform the required oversight when a possible OCI is identified.²⁵

¹⁷ Genera response to ROI 2.

¹⁸ Genera response to ROI 3.

¹⁹ Genera response to ROI 11.

²⁰ *Id.*

²¹ Genera response to ROI 4.

²² Genera response to ROI 8.

²³ Genera response to ROI 7.

²⁴ Genera response to ROI 12.

²⁵ *Id.*



- The 3PPO will provide oversight during the post-award contract management, direction, and monitoring of contractor activity and collaborate with Genera to provide a quarterly report as part of Genera's reporting requirements under the OMA and Procurement Manual on all contracts awarded to an Affiliate or Parent Company.²⁶
- As early as Genera identifies a possible conflict or participation of an affiliate in a procurement process, Genera will step down and engage the 3PPO to handle the procurement process.²⁷
- Genera cannot directly solicit any Affiliate or Parent Company in any formal procurement. To engage an Affiliate or Parent Company in a formal procurement, the 3PPO would need to be engaged and it would be up to their discretion to determine to directly solicit from an Affiliate or Parent Company.²⁸

On August 23, 2023, the P3 Authority as an agent of PREPA signed a Professional Services Agreement²⁹ with Regulatory Compliance Services Corp. to provide procurement and contract management services to serve as the 3PPO.³⁰ The 3PPO's role as contracted is to independently manage procurement activities, as needed, to help ensure that: (i) procurements undertaken by Genera are planned, awarded, and managed in a way that identifies, avoids, mitigates, and/or neutralizes actual or apparent conflicts of interest as early in the procurement process as possible, and (ii) administration of any contract which, consistent with the requirements in the Applicable Procurement Manual, as amended from time to time, may require either full or partial independent third-party oversight.³¹

The 3PPO provides personnel with expertise in procurement, federal funding compliance, contracting, and contract Administration. The 3PPO must, and has, evaluated technically and operationally complex proposals; must, and has, negotiated with stakeholders, and must, and has, overseen all aspects of contract execution to support the scope of work expected from the 3PPO office.

After review of Genera's OCI Mitigation Plan and other 3PPO and the P3 Authority created procedures³² to conduct procurement activities and contract administration activities and to facilitate the efficient and seamless exchange of information and task responsibility between the 3PPO and Genera for the support of PREPA, the Energy Bureau has determined that the procedures outline how the 3PPO engages with Genera and the P3 Authority consistent with the Procurement Manual and the incorporated Organizational Conflict of Interest Avoidance and Mitigation Plans ("OCIAMP"). The 3PPO will conduct procurement activities as described in the Procurement Manual and will make certain that they are planned, awarded, and managed in a way that identifies, avoids, mitigates, and/or neutralizes actual or apparent conflicts of interest as early in the procurement process as possible.

Contract administration and management begins after a contract is signed. Once PREPA, directly or via Genera, enters a contract with a vendor with a conflict of interest, PREPA must perform contract administration and management functions. Consistent with PREPA's operation and maintenance agreements, and Genera's corresponding Procurement Manuals

²⁶ Genera response to ROI 15.

²⁷ Genera response to ROI 16.

²⁸ Genera response to ROI 1.

²⁹ Oficina del Contralor de Puerto Rico ("OCPR") - Contract Number: 024-PPP039.

³⁰ Section 4.2 of the LGA OMA required the Operator to create a procurement manual which would address, among other things, employee, and organizational conflicts of interest ("OCI"). The OCI policy outlined the use of an independent 3PPO to avoid or mitigate potential organizational conflicts of interest in compliance with the Puerto Rico Code of Ethics, and Genera's Procurement Manuals.

³¹ OCPR - Contract Number: 024-PPP039; Appendix A.

³² Such as Attachment 13 of the Procurement Manual and Appendix D of the OCIAMP.



and OCIAMP, when a PREPA contract is awarded to a covered party, the 3PPO will perform contract administration and management duties to protect the best interests of PREPA. Unless delegated in writing to Genera in its OCIAMP or through separate stand-alone written approval by the 3PPO, contract administration and management functions for the PREPA contracts with the covered parties are to be performed by the 3PPO. In its performance of contract administration duties, the 3PPO will maintain detailed records ensuring alignment with the Procurement Manuals, as well as Commonwealth and federal laws.

III. Conclusion

Considering all the information provided and reviewed as described in Sections I and II of this Resolution and Order, the Energy Bureau **ACCEPTS** the conflict-of-interest provisions and processes in Genera's Procurement Manual and the Organizational Conflict of Interest Policy as filed through the June 30 Letter.

Be it notified and published.


Lillian Mateo Santos
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 May 17, 2024. Chairman Edison Avilés Deliz and Associate Commissioner Ferdinand A. Ramos Soegaard did not intervene. Also certify that on May 17, 2024, I have proceeded with the filing of this Resolution and Order and was notified by email to legal@genera-pr.com; regulatory@genera-pr.com; jfr@sbgblaw.com; alopez@sbgblaw.com.

I sign in San Juan, Puerto Rico, today, May 17, 2024.


Sonia Seda Gaztambide
Clerk

