



Agenda Date: 10/22/04  
Agenda Item: 2A

**STATE OF NEW JERSEY**  
**Board of Public Utilities**  
**Two Gateway Center**  
**Newark, NJ 07102**  
**www.bpu.state.nj.us**

IN THE MATTER OF THE PROVISION OF )  
BASIC GENERATION SERVICE FOR )  
YEAR THREE OF THE POST-TRANSITION )  
PERIOD – CONFIDENTIALITY ISSUES )

ENERGY

DECISION AND ORDER

DOCKET No. EO04040288

(SERVICE LIST ATTACHED)

BY THE BOARD:

This matter concerns the confidentiality of certain information to be utilized during the upcoming Basic Generation Service ("BGS") Auction.

At its October 22, 2004, public agenda meeting the Board approved an auction process for the procurement of BGS supplies for the period beginning June 1, 2005 ("Year Three of the post-Transition Period" or "Year Three"), which process is substantially similar to the process which was utilized for the past three years. In each of those auctions, the Board directed that certain sensitive information and processes would be afforded confidential treatment. At this time, in response to a request by the electric distribution companies ("EDCs") (EDC's Initial Proposal at 10-11), the Board is reaffirming the proprietary and confidential nature of the same procurement information and processes for Year Three bidding as it did in its previous Orders. The following areas are covered by this Order:

- (1) **The Logic Processes and Algorithms:** The auction manager, National Economic Research Associates ("NERA"), uses logic processes and algorithms to foster a competitive auction.
- (2) **Starting Prices:** EDC - specific minimum and maximum starting prices and final starting prices in effect during the bidding phase of the first round of the auction. Each EDC, in consultation with Staff, NERA and the Board's consultant, Charles River Associates ("CRA") sets its own starting prices. The EDC-specific final starting prices are announced to approved bidders only, shortly before the start of the auction.
- (3) **Indicative Offers:** The number of tranches that a qualified bidder is willing to supply at the maximum starting price and the number of tranches a qualified bidder is willing to supply at the minimum starting price. Indicative offers are used to determine

eligibility for participation in the auction and are considered in determining final starting prices.

(4) **Round Prices and Individual Bids:** The price set by NERA for each round of the auction, the number of tranches bid by each qualified bidder during each round of the auction, and any other information submitted by the bidder in each round to fully specify its bid, such as exit prices and switching priorities.

(5) **Bidder Information:** The bidder identities and information supplied to NERA on the application forms to become a bidder in the New Jersey BGS Auction.

## **DISCUSSION**

The Open Public Records Act ("OPRA"), N.J.S.A. 47:1A-1 et seq., which amended the former Right to Know Law concerning the public's access to government records, became effective on July 8, 2002. One of the modifications includes an expansion of the definition of a government record from only those documents required to be made, maintained or kept on file by law, to information received, made, maintained or kept on file by a public agency in the course of its official business, except for advisory, consultative or deliberative material. N.J.S.A. 47:1A-1.1. The statute goes on to list information which shall not be included in the definition of a government record and shall be deemed confidential, including trade secrets, proprietary commercial or financial information, and information which, if disclosed, would give an advantage to competitors or bidders. Id.

OPRA also changed procedures regarding government records by setting forth new format and timing requirements for making and responding to requests for access. As a result, many public agencies proposed new rules and regulations to redesign their record request operations in compliance with OPRA. The proposed new rules of the Board of Public Utilities appeared in the July 1, 2002, New Jersey Register, and were adopted in the July 21, 2003 publication of the New Jersey Register.

As part of the new procedures established concerning the public's access to its records and for claimants asserting confidentiality claims, the Board authorized its custodian of records to determine whether information requested by the public is a government record within the meaning of OPRA or is confidential. N.J.A.C. 14:1-12.6. Additionally, the Board reserved its authority to make a confidentiality determination when appropriate:

Nothing herein shall limit the Board's authority to make a confidentiality determination within the context of a hearing or other proceeding or with regard to any other matter, as the Board may deem appropriate.

[N.J.A.C. 14:1-12.6(d).]

Accordingly, the Board may make confidentiality determinations regarding information gathered in proceedings such as the within matter. In ruling on the Year Three procurement processes, the Board has determined that an auction process similar to the ones approved for the past three years are the most appropriate means for obtaining energy prices consistent with those achieved by a competitive market, as required by N.J.S.A. 48:3-57(d).

Simulating market conditions, however, requires that the auction participants know that their competitive positions will not be compromised. Based on the experience and expertise gained

in the previous auctions, as well as the advice of its consultant, the Board recognizes the need to alleviate any doubts about its treatment of competitively sensitive information.

The Board has approved the use of a descending clock auction process for Year Three. The auction process, at its most basic level, includes three groups of contributors. The first group is made up of the four electric distribution companies the purchasers of the BGS supply, who rely on maximum participation by qualified bidders in order to ensure a competitive procurement for its BGS customers. The second group consists of the qualified bidders or BGS suppliers, which proffer the competitive bids to supply tranches<sup>1</sup> of power to the EDCs. In order to become a qualified bidder, BGS suppliers must meet certain general, financial and credit requirements. Qualified bidders are made up of two groups: (a) those that provide direct supply and (b) those that provide supply through market purchases. The third contributor is the Auction Manager, National Economic Research Associates, who administers the auction in consultation with the EDCs, the Board Staff and the Board's consultant, Charles River Associates.

During the course of the auction, the auction manager solicits bids through a series of auction rounds. The first round begins as the BGS suppliers bid the number of tranches they are willing to supply at each EDCs-specific starting prices. Assuming the number of tranches bid are greater than those needed by an EDC, the next auction round proceeds at a lower price. With each new price in the rounds, BGS suppliers may change their bids by modifying the number of tranches they are willing to supply. Rounds in the auction continue until the total number of tranches bid equals the total demand from the EDCs.

The auction process is expected to simulate a competitive market. The object is to allow prices to tick down round by round until the final price is one that approximates a price that could be achieved on an open market. To ensure that the EDCs get a competitive price, the BGS suppliers must bid based on their individual assessments of a fair market value or at least their assessment of individual ability to provide BGS supply at a particular rate. If the bidders knew each other's "market" positions or bid positions, the process would fail to create competition. Similarly, if bidders knew all of the details of the auction process they might also be able to determine their exact position in relation to other bidders and also circumvent the competitive intent of the process.

The Board is charged with overseeing the EDCs acquisition of BGS supply at market value. In order to achieve this goal, the Board FINDS and CONCLUDES that it must provide a certain amount of protection to the information supplied by the participants and to the formulas, algorithms and logic used to develop critical auction particulars. The Board's analysis of the need to treat certain information as competitively sensitive and confidential is set forth below.

## **I. THE LOGIC PROCESSES AND ALGORITHMS THE AUCTION MANAGER USES TO FOSTER A COMPETITIVE AUCTION**

The auction manager will set the parameters for the auction, including the minimum and maximum starting prices. The EDCs must use this price range, as well as their own calculations to set their EDC-specific starting prices. Likewise, the qualified bidders must submit indicative offers using the minimum and maximum starting prices. Though the minimum and maximum starting prices are released publicly prior to the auction, the method used to determine these

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<sup>1</sup> A tranche of one product (i.e. a tranche of the BGS load for one EDC) is a full requirements tranche. A tranche for an EDC is a fixed percentage share of the BGS load of that EDC for Year Three of the post-Transition Period beginning June 1, 2004.

prices is confidential information. Revealing this thought process could prejudice the independent evaluation of market prices that qualified bidders would perform. Furthermore, it would impede the competitive nature of the auction. So long as the bidders do not know the rationale behind the auction prices, they must bid based on independent methodologies. As a result, the bidders are more likely to make bids of varying degrees because their valuations will be based on diverse variables.

Just as minimum and maximum starting prices are used to promote competition, volume adjustments during the auction rounds must be used to ensure that the EDCs receive the most competitive bids. The auction manager is given the authority to make two volume adjustments to ensure that the prices not only continue to decrease, but that bidding remains competitive. The auction manager may reduce the auction volume (reduce the number of tranches that the EDCs will purchase) after review of the first round bids. Again, simple market theories apply - if demand is larger than supply, the price remains high. Therefore, the auction rules allow for a volume adjustment after the first round, and once more in a later round. If the guidelines/ algorithms used to make these adjustments were disclosed, the bidders might be able to manipulate the system.

In short, the methodologies used to determine the starting prices, as well as volume adjustments, are integral to the competitive bidding process. Both categories of information fall under an OPRA exception to the definition of a government record because they would provide an advantage to competitors or bidders. As stated above, the Legislature has required the Board to procure energy prices consistent with market conditions. N.J.S.A. 48:3-57(d). The Board is therefore simulating a market scenario through the use of supply and demand theory. Releasing these auction parameters would result in an advantage to all of the bidders, at the expense of higher energy prices for the EDC's customers. Thus, as long as the Board continues to rely on a similar auction process to procure BGS supply, this information continues to require confidential treatment.

The Board HEREBY FINDS and CONCLUDES that this information, if disclosed would provide an advantage to competitors or bidders to the detriment of BGS customers, and shall be deemed confidential and not included as a government record pursuant to OPRA.

Therefore, should a request for this information be made to the Board's custodian, the Board DIRECTS that such information be treated as confidential and that any requests for access be denied.

## **II. EDC-SPECIFIC STARTING PRICES**

There are two types of starting prices used in the auction. First, there are the minimum and maximum starting prices, which are released to potential bidders shortly before the application process to provide a basis for the EDC-specific starting prices and the BGS suppliers' indicative offers. The second type consists of the EDC-specific starting prices that will be in effect for the first round of the auction. These prices must fall somewhere between the minimum and maximum starting prices, and are released to the qualified bidders shortly before the auction. The EDC-specific starting prices are derived from the indicative offers and the value judgments of the EDCs, Board Staff, CRA and Auction Manager regarding the future price of energy.

Both types of starting prices are intended to attract qualified bidders to the auction. The financial community and/or the general public could misinterpret the EDC-specific starting prices if they were to be made public prior to the release of the final auction results.

Rather than having qualified bidders making independent business judgments on the value assigned to a product, their bids could be influenced by outside perception. For example, should the starting prices create lofty expectations regarding energy prices on the part of shareholders or financial analysts, BGS suppliers might not bid as aggressively as necessary to create market conditions. In short, releasing this information prior to the public announcement of the final auction results could put the entire auction process at a competitive disadvantage. While some individual bidders in the auction might not suffer, distorted financial perceptions could lead to a less competitive auction, ultimately disadvantaging the ratepayers through inflated prices.

The Board HEREBY FINDS and CONCLUDES that this information would provide an advantage to competitors or bidders, and shall be deemed confidential and not included as a government record pursuant to OPRA.

Therefore, should a request for this information be made to the Board's custodian, the Board DIRECTS that such information be treated as confidential and that any requests for access be denied until the Board has released the auction results.

### III. INDICATIVE OFFERS

Indicative offers are the number of tranches that a qualified bidder is willing to supply at the maximum starting price and at the minimum starting price. The number of tranches the bidder offers to supply at the maximum starting price determines the bidder's initial eligibility for the auction. The indicative offer creates two limitations for the bidder. First, the total number of tranches the BGS supplier can bid in any round of the auction is now capped at its initial eligibility. As such, bidders are encouraged to make an indicative offer for the maximum number of tranches they would be willing to serve. Second, the bidder is now required to post a financial guarantee proportional to its initial eligibility.

Clearly, the indicative offer contains proprietary commercial and financial information. N.J.S.A. 47:1A-1.1. The BGS supplier is making a business judgment regarding the amount of load it is willing to supply. These judgments could be based on many factors. For instance, a direct supplier might indicate a willingness to supply a high number of tranches because it has a limited number of supply contracts compared to its available plant capacity. On the other hand a supplier who buys its energy from the market may only be willing to supply a low number of tranches because it has already entered into a number of contracts at the time of the auction. As stated, the indicative offers also reveal information concerning the amount of credit a BGS supplier may or may not have at hand.

Not only do the indicative offers constitute proprietary commercial and financial information, but their release would provide an advantage to competitors, including those not participating as bidders in the auction. N.J.S.A. 47:1A-1.1. BGS suppliers compete in a market place outside of the auction. If such information were to become public, the BGS suppliers' competitors would be given otherwise confidential information, providing an opportunity to speculate on the individual supplier's market position. If the Board does not keep sensitive market data confidential, it will not be able to simulate an arms-length negotiation. Moreover, release of this proprietary commercial and financial information would have a chilling effect on the BGS suppliers' willingness to participate in this or any future auctions.

Accordingly, the Board HEREBY FINDS and CONCLUDES that this information is proprietary commercial and financial information that would provide an advantage to competitors or bidders, and shall be deemed confidential and not included as a government record pursuant to OPRA.

Therefore, should a request for this information be made to the Board's custodian, the Board DIRECTS that such information be treated as confidential and that any such requests for access be denied for a period of three years from the close of the auction. Three years after the conclusion of the auction, the Board will consider the indicative bids public information, unless prior to the expiration of the three years a party formally requests that this information remain confidential. If a request for continuing confidentiality is made, the information shall remain confidential pending a further decision by the Board.

#### **IV. ROUND PRICES AND INDIVIDUAL BIDS**

Each round of the auction produces two sets of information: (a) the price for each round as determined by the auction manager and (b) the individual bids.

For similar reasons to those set forth above in Indicative Offers, the individual bids contain proprietary commercial and financial information. N.J.S.A. 47:1A-1.1. Furthermore, release of either the round-by-round price or the number of tranches individually bid in a round would allow the bidders to mathematically work backwards and determine the incremental algorithm used by the auction manager to make volume adjustments during the course of the auction. As explained in Section I, *supra*, revealing this methodology could impede the current and any future competitive process to the detriment of customers.

Accordingly, the Board FINDS and CONCLUDES that this information could provide an anti-competitive advantage to competitors or bidders, and shall be deemed confidential and not considered a government record pursuant to OPRA.

Therefore, should a request for the round-by-round prices be made to the Board's custodian, the Board DIRECTS that such information be treated as confidential and that any requests for access be denied.

Should a request for the individual bids be made to the Board's custodian, the Board DIRECTS that such information be treated as confidential and that any such requests be denied for a period of three years from the close of the auction. Three years after the conclusion of the auction, the Board will consider the individual bids public information, unless prior to the expiration of the three years a party has formally requested that this information remain confidential. If a request for continuing confidentiality is made, the information shall remain confidential pending a further decision by the Board.

#### **V. BIDDER INFORMATION**

While the upcoming auction will be held in February 2005, the period of power supply being procured will not begin to flow until June 1, 2005. For all past auctions, the list of bidders obtaining contracts was announced with the Board Order approving the auction results. Approximately one month before the load was to be served, when suppliers had presumably locked up their contracts, the list of bidders with BGS contracts along with the volumes and prices for each contract were released. The reason for the delayed release of this information was to ensure that the bidders were not placed at a competitive disadvantage. As stated above,

there are two types of BGS suppliers - those who supply directly from their own plants and those that purchase power from the market for resale. Power marketers must go to the market and fulfill the BGS requirements they have won by negotiating contracts. If their competitors knew the volumes that the bidder had already contracted to supply as a result of the auction, the successful bidder might be at a competitive disadvantage. The same can be said for direct suppliers who must market their product. If buyers knew the amount of their plant supply already locked up due to the BGS auction, it could put them at a competitive disadvantage for negotiation of other contracts.

The Board also believes that if it were to release the names of all of the auction participants, those suppliers that participated in the auction but failed to obtain a contract could be prejudiced in the private sector energy market. Specifically, the financial community might interpret loss of the contracts as a sign of weakened financial position. Furthermore, releasing the names of everyone who participated but failed to leave the auction with a contract, could lead to speculation by the financial community that might have a chilling effect on the BGS suppliers' willingness to participate in this or any future auctions. As such, the Board could be damaging the competitive nature of its own auction by making the financial risk of participation unpalatable to participants. The ultimate result would be higher energy prices passed on to consumers.

Based on its experience with the past three BGS auctions and the expert recommendations of the Board's consultant, CRA, the Board believes that releasing the winning bidders' volume and price information before contracts for the supply period are locked up, could put those suppliers participating in the auction at a disadvantage in the greater energy market, making such information an exemption to the definition of a government record. N.J.S.A. 47:1A-1.1. Additionally, releasing the list of unsuccessful participants could impair the competitive nature of the auction by making the financial risk of participation unpalatable to participants and resulting in higher energy prices for consumers therefore making such information an exemption to the definition of a government record. N.J.S.A. 47:1A-1.1.

The Board HEREBY FINDS and CONCLUDES that this information is proprietary commercial and financial information that could provide an advantage to competitors or bidders, and that such information shall be deemed confidential and not included as a government record pursuant to OPRA.

Therefore, should a request for the names of winning bidders be made to the Board's custodian, the Board DIRECTS that such information be treated as confidential and all requests for access be denied, until May 1, 2005.

Should a request for the names of unsuccessful participants be made to the Board's custodian, the Board DIRECTS that such information be treated as confidential and that all requests for access be denied.

Once the Board has determined that the winning auction suppliers have had sufficient time to lock in their BGS supply for the designated period of time, information such as volume and the identities of the successful participants may be released. In the past, this information has been released approximately a month before the beginning of the supply period. Identification information would also include all of the public information supplied to NERA on the application forms to become a qualified bidder in the New Jersey Basic Generation Service Auction. For example, information such as name, authorized representative, authorized legal representative, name of the entities' directors are of a public nature and must be disclosed as a government record. On the other hand, both the Part 1 and Part 2 Application Forms contain confidential business information of bidders that is not available publicly. The following information from the

applications is non-public proprietary commercial or financial information, which is not considered a government record pursuant to OPRA. N.J.S.A. 47:1A-1.1.

Part 1 Application Form:

Bidding Agreements

Financial and Credit Requirements, except for the supplemental data which includes the following public information:

- (i) Two most recent annual Reports
- (ii) Most recent SEC Form 10-K;
- (iii) Applicant's senior unsecured debt rating from Moody's, Standard & Poor's, and Fitch, if unavailable, the issuer rating may be provided instead.

Guarantor's Information

Justification for Omissions

Part 2 Application Form:

Qualified Bidder's Indicative Offer and Calculation of Required Bid Bond

Qualified Bidder's Preliminary Maximum Interest in Each EDC

Additional Financial and Credit Requirements

Bidder Certifications Concerning Associations and Confidential Information

Justification for Omissions

If the information above were to become public as a result of participation in the BGS Auction, some bidders might elect not to participate in order to maintain the confidentiality of their proprietary commercial and financial information. This could impair the ability of the Auction to obtain a market price and could be detrimental to the interests of the EDCs' customers.

The Board HEREBY FINDS and CONCLUDES that the information listed above is proprietary commercial and financial information, and shall be deemed confidential and not included as a government record pursuant to OPRA.

Therefore, should a request for the public bidder information provided to NERA concerning successful bidders be made to the Board's custodian, the Board DIRECTS that such information be treated as confidential and that all requests for access be denied, until such time as the Board releases the final names and volumes for successful bidders.

Should a request for the public bidder information provided to NERA concerning non-successful bidders be made to the Board's custodian, the Board DIRECTS that such information be treated as confidential and that all requests for access be denied, since such information would identify the non-successful bidders.

Should a request for the non-public bidder information provided to NERA be made to the Board's custodian, the Board DIRECTS that such information be treated as confidential and that all requests for access be denied.



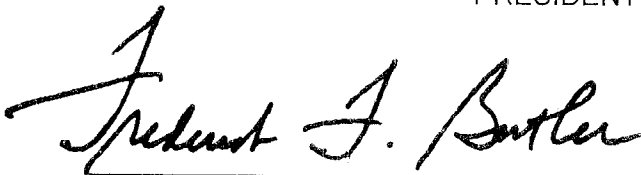
At its October 22, 2004, public agenda meeting the Board approved a descending clock Auction to procure needed BGS supplies for Year Three as well as for Year Four (supply period beginning June 1, 2006). It is anticipated that, should a request for confidentiality be made, similar reasoning to that described above would apply.

DATED: 12/1/04

BOARD OF PUBLIC UTILITIES  
BY:



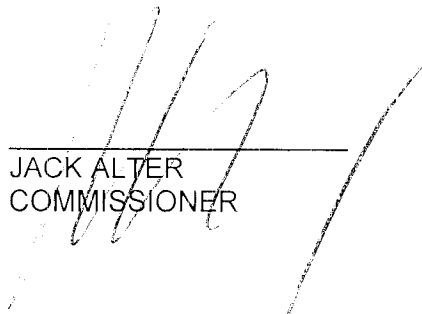
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