

STATE OF NEW JERSEY
Board of Public Utilities
Two Gateway Center
Newark, NJ 07102
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ENERGY

I/M/O THE PROVISION OF BASIC)	
GENERATION SERVICE PURSUANT)	DECISION AND ORDER
TO THE ELECTRIC DISCOUNT AND)	
ENERGY COMPETITION ACT,)	DOCKET Nos. EX01110754
<u>N.J.S.A. 48:3-49 ET SEQ.</u>)	and EO02070384

(SERVICE LIST ATTACHED)

BY THE BOARD:

The Electric Discount and Energy Competition Act of 1999 ("EDECA" or "Act"), N.J.S.A. 48:3-49 et seq., provides that for at least three years from the starting date of electric retail choice and until the Board finds it to be no longer necessary and in the public interest, electric public utilities shall provide basic generation service ("BGS"). N.J.S.A. 48:3-57(a). After an extensive proceeding, the Board, by Order dated December 11, 2001, determined that for Year 4 of the Transition Period (August 1, 2002-July 31, 2003), the electric utilities should continue to provide BGS, with the procurement of supply to meet the full electricity requirements of BGS customers to be achieved via an auction process. The Board also determined that a further review as to whether to make BGS available on a competitive basis for the period beginning August 1, 2003, ("post-Transition Period") would be undertaken pursuant to a separate scheduling order.

Thereafter, at its November 6, 2002, public agenda meeting, the Board authorized a term-averaged procurement process in which two-thirds of the Electric Distribution Companies' (EDC's) BGS-FP load is auctioned for a 10-month period and one-third for a 34-month period. Additionally, the Board directed the Secretary to issue a letter soliciting comments from the Parties as to whether certain information to be utilized during the auction process should be treated as confidential. The Secretary's letter was transmitted electronically on November 7, 2002, to every member of the service list allowing an opportunity for their comments on whether protections should be afforded to the following information:

(1) **The logic processes and algorithms:** The auction manager, National Economic Research Associates ("NERA"), uses logic processes and algorithms to foster a competitive auction (i.e. the equations NERA uses to come up with volume adjustments and determinations, minimum and maximum starting prices, as well as final starting prices, etc.).

(2) **Starting Price:** Electric distribution company - specific starting prices are the going prices in effect during the bidding phase of the first round of the auction. Each EDC sets its own starting price. The EDC-specific starting prices are announced to approved bidders only, shortly before the start of the auction.

(3) **Indicative Offer:** 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:** The price set by NERA for each round of the auction.

(5) **Individual Bids:** The number of tranches bid by each qualified bidder during each round of the auction.

(6) **Bidder Information:** The non-public information supplied to NERA on the application forms to become a qualified bidder in the New Jersey BGS Auction.

COMMENTS AND REPLY COMMENTS

On November 13, 2002, several parties filed comments regarding the Board's issuance of an order conferring confidential treatment for the documents and information listed above. Of the five sets of comments filed, no parties objected to such an order. Of the three wholesale energy providers who filed comments, both ConEdison Energy ("ConEd"), and J. Aron & Company ("J. Aron") endorsed the confidential treatment of all six categories of documents. Indeed, J. Aron made the following observation "the auction is being offered as a surrogate for an arm's-length negotiations for contracts to supply electric energy to customers in the State of New Jersey. If such arm's-length negotiations had actually taken place, the various elements of the negotiation would not become public information." The third wholesale supplier, Sempra Energy Trading Corp. offered its support for an order protecting the confidentiality of Indicative Offers, Individual Bids and Bidder information.

The Division of the Ratepayer Advocate ("RPA"), while supportive of the issuance of an order protecting the information from the general public, noted concerns that it and its consultants be provided with the above-listed information on a timely basis, in order to carry out its statutory obligations. Nonetheless, the RPA acknowledges that disclosure of the sensitive information listed above, even to fulfill their statutory purpose, would be subject to "strict safeguards."

The four electric distribution companies also submitted a joint letter advocating their view that the information listed in the Secretary's letter is not only confidential, but also exempt from the definition of a government record under the Open Public Records Act ("OPRA"), N.J.S.A. 47:1A-1 et seq. The comments go on to explain why each category of information falls under one or two of the various exceptions to the definition of a government record because it is either: (a) proprietary commercial or financial information; or (b) information which, if disclosed, would give an advantage to competitors or bidders. N.J.S.A. 47:1A-1.1.

The only reply comments were submitted by the EDCs, who simply echoed their earlier support for confidential treatment.

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 requests operations in compliance with OPRA. These proposed new rules appeared in the July 1, 2002, New Jersey Register, and were made effective by Executive Orders 21 (effective on July 8, 2002)¹ and 26 (effective on August 13, 2002)².

The Board of Public Utilities was one of the agencies that proposed new rules under OPRA. N.J.A.C. 14:1-12 et seq. As part of the new procedures established concerning

¹ Executive Order 21 declares the following with regard to agency regulations published in the Register: "In light of the fact that State departments and agencies have proposed rules exempting certain government records from public disclosure, and these regulations have been published for public comment, but cannot be adopted prior to the effective date of the Open Public Records Act, State agencies are hereby directed to handle all government records requests in a manner consistent with the rules as they have been proposed and published, and the records exempted from disclosure by those proposed rules are exempt from disclosure by this Order. Once those regulations have been adopted, they shall govern all government records requests filed thereafter."

² Executive Order 26 amended and supplemented portions of Executive Order 21. However, Executive Order 21's direction to agencies to handle government records requests consistent with the rules as proposed and published remains in effect, to the extent that those rules do not conflict with the clarifying provisions of Executive Order 26.

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 this matter at its last agenda meeting, the Board has determined that an auction process is 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). The Board further approved a term-averaged procurement process in which two-thirds of the EDCs' BGS-FP load is auctioned for a 10-month period and one-third for a 34-month period. The tranche-weighted average of the winning bids from both the 10 and 34-month periods will be used to determine the price for BGS-FP rate design for Year One (August 1, 2003 through May 31, 2004). The Board will review this decision and the process prior to the procurement for Year Two (June 1, 2004 through May 31, 2005) of the post-Transition Period to determine how best to proceed at that time.

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 auction, as well as the advice of its consultant, the Board recognizes the need to alleviate any doubts about its treatment of the sensitive information listed in Exhibit A of the Secretary's letter on November 7, 2002.

The Board approved the use of a descending clock auction process. The auction process, at its most basic level, includes three groups. 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. The second group consists of the qualified bidders or BGS suppliers, which proffer the competitive bids to supply tranches³ 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

³ 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 the post-Transition Period beginning August 1, 2003.

administers the auction in consultation with the EDCs, the Board Staff and the Board's consultant, Charles River Associates ("CRA").

During the course of the auction, the 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 price. Assuming the number of tranches bid are greater than those needed by the EDCs, 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. The auction rounds continue until the total number of tranches bid equals the total demand for the EDCs.

The auction process is expected to simulate a 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 if supply equaled demand. 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.

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 the information listed in Attachment A of the November 7, 2002, Secretary's letter is set forth below.

I. 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 the EDCs and qualified bidders shortly before the auction to provide a basis for the EDC-specific starting prices and the BGS suppliers indicative offers. These minimum and maximum prices represent a price in ¢/kWh. These estimates are derived solely from the value judgments of the EDCs, Board Staff, CRA and auction manager regarding the future price of energy.

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.

A successful auction requires at least two components: (a) the ability to attract a pool of bidders and (2) keep the bidding competitive. Both types of starting prices attract qualified bidders to the auction because they generally begin at a conservatively elevated rate. If the prices start too low, there will be no room for competition to whittle the prices down. If this information were to be made public prior to the release of the final auction results, the financial community and general public could misinterpret it.

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 aggressive as necessary to create market conditions. In short, releasing this information prior to the public announcement of the final auction results would put the entire auction process at a competitive disadvantage. While individual bidders in the auction might not suffer as to the other bidders, 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 deny requests for access until the Board has released the auction results.

II. 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 all of the starting prices are released to the participants prior to the auction and publicly upon release of the auction results, the method used to determine these prices is confidential information. Revealing this thought process would provide an advantage to the qualified bidders since they would no longer need to do an independent evaluation to estimate a market price. 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 could 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 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 deny all requests for access.

III. INDICATIVE OFFER

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 he has a limited number of supply contracts compared to his available plant capacity. On the other hand a supplier who buys his energy from the market may only be willing to supply a low number of tranches because he 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 or bidders. N.J.S.A. 47:1A-1.1. BGS suppliers compete in a market place outside of the auction. If

this 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 the arms-length negotiations referred to in J. Aron's comments. 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. Thus, this information is not a government document and should remain confidential.

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 deny all requests for access.

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. The individual bids could also be used to determine the aggregate number of tranches bid per round. In any event, release of either of these pieces of information would allow the bidders to work backward mathematically and determine the incremental algorithm used by the auction manager to make volume adjustments during the course of the auction. As explained in II above, revealing this methodology would impede the current and any future competitive process.

The Board FINDS and CONCLUDES that this information would provide an advantage to competitors or bidders, and shall be deemed confidential and not considered 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 deny all requests for access.

V. BIDDER INFORMATION

The procurement of BGS supply takes place over either a 10-month period or 34-month period of time. While the auction will be held in February of 2003, the period of power supply up for bid does not begin until August, 2003 and runs until June, 2004 or June, 2006. Last year's auction was conducted along a twelve month timeline. In that case, 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 this timing for release of 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 plant 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 amount of volume and prices they had already contracted to supply, they would 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 separate contracts.

Similarly, the Board believes that if it were to release the names of all of the auction participants prior to release of the volume and price information, those suppliers that participated in the auction but failed to obtain a contract would 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. Until the financial community can analyze the bidders' positions in light of the full auction results (i.e. deciding whether the price was above or below market value), releasing the names of all of the bidders could be troublesome.

Based on the expert recommendations of the Board's consultant, CRA, the Board believes that releasing the full list of participants or releasing the winning bidders' volume and price information before contracts for the supply period are locked up, would 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.

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 would have a chilling effect on the BGS suppliers' willingness to participate in this or any future auctions. As such, the Board would 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.

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 deny all requests for access, until such time as the Board has decided to release the volume and price components of the final bids.

Of course, once the Board has determined that the winning auction suppliers have locked in their BGS supply for the designated period of time, information such as volume, price and the identities of the participants may be released. 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, the following sections on the applications contain 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:

§ 1.5 Bidding Agreements

§ 1.7 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.

§ 1.8 Guarantor's Information

§ 1.9 Justification for Omissions

Part 2 Application Form:

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

§ 1.2 Qualified Bidder's Preliminary Maximum Interest in Each EDC

§ 1.3 Additional Financial and Credit Requirements

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 this information be made to the Board's custodian, the Board DIRECTS that such information be treated as confidential and deny all requests for access, until such time as the Board has decided to release the volume and price components of the final bids.

DATED: December 3, 2002

BOARD OF PUBLIC UTILITIES
BY:

Signed
JEANNE M. FOX
PRESIDENT

Signed
FREDERICK F. BUTLER
COMMISSIONER

Signed
CAROL J. MURPHY
COMMISSIONER

Signed
CONNIE O. HUGHES
COMMISSIONER

Signed
JACK ALTER
COMMISSIONER

ATTEST:

Signed
KRISTI IZZO
SECRETARY