ORDER NO. 21-460

ENTERED Dec 10 2021

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 2166

In the Matter of PORTLAND GENERAL ELECTRIC COMPANY, 2021 All-Source Request for Proposals.	ORDER

DISPOSITION: 2021 ALL-SOURCE REQUEST FOR PROPOSALS APPROVED WITH MODIFICATIONS

I. SUMMARY

This order memorializes our decision, made and effective at our December 2, 2021 Special Public Meeting, to approve Portland General Electric Company's final draft 2021 All-Source Request for Proposals (RFP) with modifications. As explained below, our approval involves all of Commission Staff's changes, as well as changes to three RFP terms requested by the parties: a reduction in the points allocated to commercial performance risk and to the non-price score overall, an increase in a liability cap, and removal of the broadly applicable project labor agreement requirement while requiring that bidders adhere to labor requirements in state law.

II. INTRODUCTION

Our review of PGE's RFP involved four steps. First, we acknowledged with conditions PGE's 2019 IRP with action items[1] describing a RFP seeking up to approximately 150 MWa of new RPS-eligible resources that contribute to meeting PGE's capacity needs by the end of 2024 and non-emitting resources to meet remaining capacity needs.[2] Second,

[1] *In the Matter of Portland General Electric Company*, Docket No. LC 73, Order No. 21-129 (May 3, 2021). PGE's 2019 IRP described two RFPs and our order directed PGE to optimize and coordinate its procurement of renewable resources with nondispatchable capacity. PGE's IRP Update indicated that PGE intended to conduct a single solicitation, rather than the two-vehicle approach described in the 2019 IRP.
[2] *In the Matter of Portland General Electric Company*, Docket No. LC 73, Order No. 20-152 at 22 (May 6, 2020).

we selected Bates White as the Independent Evaluator (IE) and directed Staff to engage stakeholders on the development of a schedule that includes an adequate opportunity for stakeholder comments on the draft RFP details and scoring and modeling methodology.[3] Third, we approved PGE's proposed scoring and modeling methodology with 15 modifications or additions recommended in Staff's memo, and our expanded directive to allow repowers of existing resources to participate in the RFP.[4]

The December 2, 2021 Special Public Meeting marked the fourth and final step in RFP scoping. PGE filed its final draft RFP on October 15, 2021. The Independent Evaluator filed comments on the draft RFP on October 20, 2021. Swan Lake, Staff, the Alliance of Western Energy Consumers (AWEC), the Northwest & Intermountain Power Producers Coalition (NIPPC), and Renewable Northwest filed comments on the draft RFP on November 1, 2021. PGE filed reply comments and a slide deck on scoring and modeling methodology on November 10 and 11, 2021, respectively. Staff filed a comprehensive memo on November 19, 2021, describing the issues raised up to that point, with summaries of resolved issues and an additional 11 recommended changes or additions to the RFP for our consideration. After Staff's memo, AWEC, the Oregon Solar + Storage Industries Association (OSSIA), NIPPC, NewSun Energy, and the Community Renewable Energy Association (CREA) filed comments.

III. DISCUSSION

A. Staff's Recommendations

1. Eleven Recommendations in Staff's Memo

a. Staff and Stakeholders' Positions

Staff recommended that the Commission find good cause for expedited review of PGE's draft RFP and to approve PGE's draft RFP with Staff's eleven recommendations from its memo plus one amendment and one additional recommendation offered at the public meeting.

Recommendation one through three involve the effective load carrying capacity (ELCC) and its calculation as part of the non-price scoring. Staff and stakeholders had concerns that bidders could not self-score their resources' ELCC. PGE agreed to provide a calculator for bidders to use. Because the calculator would not accurately represent non-IRP resources or larger solar and storage projects, Staff recommended an additional

[3] Order No. 21-235 (Jul 15, 2021).
[4] Order No. 21-320, Appendix A at 9 (Oct 6, 2021).

ELCC for the larger solar and longer duration storage resources. Staff also included two other refinements to determine if ELCC improvements could be made so that bidders could more accurately estimate it in future RFPs.

NewSun Energy requested additional transparency into the ELCC calculation. NewSun asked that the calculated ELCC of all resources be provided alongside the bids' rankings in the final shortlist for a clear comparison. Staff stated that its recommendation number two provides that the ELCC values be published with the initial shortlist. Staff stated that it did not specifically consider the final shortlist, but that by publishing the ELCC values with the initial shortlist, there will be transparency.

Recommendation four involves the potential availability of Colstrip transmission rights, which PGE indicated could be made available at a later time in the RFP. Staff's memo recommends that PGE be required to notify the Commission "as soon as possible" if the Colstrip rights become available for this RFP. Staff amended its recommendation to add specificity, so PGE is required to notify the Commission by December 17, 2021, if the Colstrip transmission rights are available in this RFP. The December date is one month before bids are due and would give bidders an opportunity to assemble bids.

Recommendations five through eight involve the commercial performance risk non-price scoring element (scoring and the terms of the contracts) which is discussed in detail below. These items involve items in the form contracts that the IE flagged for changes.

Recommendation nine involves the process around the final shortlist. The IE requested additional detail on how PGE intends to make the final portfolio selection. PGE provided an explanation and Staff recommended the explanation be included in the RFP.

Recommendations 10 through 11 concern the docket schedule going forward. Staff's recommendations aim to ensure that PGE notifies the Commission as soon as possible if a schedule change is needed in the docket. NewSun Energy commented that the schedule may be able to be extended if tax credits are extended in new federal legislation.

b. PGE's Response

PGE stated that it did not oppose any of the recommendations in Staff's memo. Although PGE had disagreed with some of the changes in reply comments, PGE indicated at the public meeting that it could make the changes recommended by Staff. PGE stated that with the new changes and the changes that PGE had previously agreed to, PGE would be making at least 25 discrete changes to the RFP.

2. Additional Staff Recommendation and Clarification

Staff offered one additional recommendation at the public meeting. Staff's memo stated that PGE should note the conditional nature of the affiliate bid in the RFP and that it will depend on the Commission's review of the affiliate in docket UI 461. At the public meeting Staff provided an update that the affiliate docket will be taken up at the Commission's December 14, 2021 Regular Public Meeting. Given this, Staff recommended that PGE mark the affiliate bid as tentative in nature. Staff also recommended that PGE be directed to notify the Commission on December 17, 2021, if PGE is going forward with an affiliate bid. Staff noted the December 17 date is consistent with the Colstrip transmission date that was added to Staff's recommendation four at the public meeting.

Staff made a clarification on PGE's cost containment screen that will be used in bid evaluation. In the 2019 IRP, the cost containment screen was aimed at over-procurement concerns. In this RFP, PGE has changed the cost containment screen name to the "value to cost evaluation." PGE updated the metric to allow additional flexibility in light of the renewable and non-emitting requirements of HB 2021. It is Staff's understanding that the metric will still be used for analysis, but a bid will no longer be required to pass the screen to be eligible for inclusion on the initial shortlist. Staff stated the additional flexibility is warranted given the changes to planning from HB 2021.

3. Resolution

We adopted Staff's recommendations as described in Staff's memo, with the amendment of the December 17, 2021 date to the condition on the Colstrip transmission rights and the addition of a December 17, 2021 notification date for the affiliate bid.

B. Significant Issues from Stakeholders' Comments

1. Commercial Performance Risk Scoring and Terms/Forms

a. Summary of Issues

NIPPC raised issues with several pro forma terms in the PPA and Storage Capacity Agreement (SCA) form contracts, asserting the terms are unreasonable and outside what is normally seen in the market. NIPPC also raised concerns that the non-price points associated with adherence to the contract terms was too high. NewSun stated that the contract terms would have a chilling effect on the pool of initial bids.

We asked the IE if the performance terms were generally reasonable. The IE explained that the credit requirements and the availability guarantee in PGE's contracts were on the high side but not out of the bounds of what is seen in the marketplace. PGE responded that the default terms in its contracts are intended to protect customers and are reasonable based on PGE's existing contracts or other publicly available contracts.

Both the IE and PGE discussed how, at the time of bid submission, bidders may identify exceptions to any term or condition in the term sheet and propose alternative terms. In response to NewSun's comment that the pro forma performance terms would cause bidders to place a price premium on bids, we asked how the scoring of redlines would impact bidding behavior. PGE stated that if revisions to highlighted terms and conditions increase PGE's exposure to risks related to project schedule, performance, or cost, then PGE will adjust the bid's non-price score consistent with Appendix N. The IE responded that its RFP analysis will review whether the non-price decrements from redlines make a difference in the bids' rankings and the IE may independently score non-price elements.

NIPPC found particularly problematic PGE's scoring proposal. PGE proposed that the commercial performance risk category, which includes the disputed contract terms, be allocated 212 non-price points or 21.2 percent of the overall RFP score. NIPPC recommended that we reduce the points scored for adherence to PGE's term sheets to 10 percent of the overall RFP score.

We raised concerns about how an Engineering Procurement and Construction (EPC) or benchmark bid would be scored to fairly compare the performance guarantees expected of PPA bids against utility-owned benchmark bids. We specifically raised curtailment and negative price provisions. The IE responded that it would consider ratepayer impacts that could occur if the performance of a benchmark resource does not meet the contract terms. PGE responded that operational risks such as negative price events for utility-owned assets are generally borne by the utility because they are not included in the forward-looking power cost forecast.

We asked about different contract structures. PGE responded that bidders could submit one base proposal in addition to two alternatives for the same bid fee. The alternatives may consist of a different technology, volume, contract term, in-service date, and/or pricing structure for the same resource at the same location. The IE explained that bidders may choose to focus on the lowest price offer without concern for the non-price points, or may try to balance price and redlined contract terms. PGE stated that it has lined up the risk categories across different contract structures to have an apples-to-apples comparison for PPAs and utility-owned resources.

b. Resolution

We adopted NIPPC's recommendation for a reduction in the points allocated to commercial performance risk and to take the remaining points and add them to the price score. Rather than PGE's proposed allocation of 21.2 percent of a bid score to commercial performance risk, we approved a reduced impact with 10 percent of a bid score allocated to commercial performance price risk, and a correlating reduction to the overall non-price score category.

We stated this change is a show of good faith to avoid deterring bidders. We declined to further modify PGE's contract terms. We noted mitigating factors in the RFP process, such as the fact that a bid may include two alternatives which allows bidders to decide whether to add a cost associated with adherence to the PPA's terms, versus an alternative bid with the bidder's redlines. We noted that the scoring decrement would be small for reasonable alternative contract terms.

2. Confidentiality, Non-Disclosure Agreement, and Limitation of Liability

a. Summary of Issue

PGE's draft RFP describes a Confidentiality and Non-Disclosure Agreement (NDA)[5] that bidders are required to complete and sign prior to the bid submission deadline, and that PGE will countersign and return. PGE states that, due to the need to ensure uniform treatment of all confidential information, no changes may be made to the agreement. The confidentiality agreement states the maximum liability to either party related to the agreement is $500,000.

NIPPC asserted that we should require that PGE remove the maximum amount of liability listed in the NDA to more appropriately account for potential harm that could result from a breach of the NDA, tort, or other claim. NIPPC explained a prior example where a utility was held liable for breach of a NDA by misappropriating trade secrets and required to pay over $110 million in damages.[6]

NIPPC also argued the NDA is unreasonably limited to a term of just two years after its execution. NIPPC explained that projects do not have to come online until the end of 2024, which could be more than two years after the NDA is signed. NIPPC states that

[5] Available on PGE's RFP website www.PortlandGeneralRFP2021.com and included as Appendix L to the RFP (Dec 6, 2021).
[6] NIPPC Comments on PGE's Final Draft RFP at 29 (Nov 1, 2021).

trade secrets regarding a project need to be protected at least until commercial operation date.

PGE opposed modifications to its NDA as out of market and asserted that removal of the liability cap was unreasonable. The IE commented that a NDA between bidders and utilities is common, and in PGE's last RFP the cap was lower than $500,000. The IE stated the cap was mutual, and typically bidders like to see their own liability capped. However, the IE deferred to NIPPC's view that the danger of utility disclosure outweighed the risk of bidders' liability.

b. Resolution

We approved two adjustments to the NDA: an extension of the term to five years and an increase in the maximum liability cap to $2 million. The IE stated these numbers were within the range of mutual liability agreements in other RFPs.

3. Additional Affiliate Bid Issues

a. Summary of Issue

As noted above, Staff described how the affiliate that PGE seeks to create is proceeding in another docket and is scheduled to come before the Commission in December. Staff's position is that under the competitive bidding rules affiliate bids are permissible and treated according to the rules, assuming the affiliate is approved in the other proceeding.

We discussed NIPPC and NewSun's concerns with PGE potentially offering an affiliate bid. NIPPC asked us to either reject use of an affiliate in this RFP or require the affiliate bid to be treated as a benchmark bid. Staff advised that the competitive bidding rules provide that benchmark bids are scored earlier and independently scored by the IE to compare and resolve differences in benchmark scoring. The IE explained that it would provide extra scrutiny of any affiliate bid. The IE assumed that PGE staff working on the affiliate bid would be separated from PGE's RFP team, just as the benchmark team would be walled off.

b. Resolution

We declined to adopt any additional changes to the RFP on the affiliate bid, other than Staff's recommended change described above to have the affiliate bid marked as tentative until December 17, 2021 when PGE will indicate if it is moving forward with an affiliate bid. We will review the appropriateness of the affiliate separately. We found that the competitive bidding rules sufficiently address treatment of affiliate bids as the IE is required to independently score affiliate bids similar to benchmark bids.[7]

4. HB 2021-related Issues

a. Summary of Labor Requirements

HB 2021 adopted labor standards with certain applicability for projects sited in Oregon. PGE's final draft RFP requires all bidders, regardless of location or size, to secure a Project Labor Agreement (PLA). NIPPC and Renewable NW asserted that HB 2021 already includes sufficiently strict labor requirements that projects must adhere to, and there is no need to require a PLA—particularly given the current constrained labor market.

NIPPC stated that HB 2021 includes requirements that renewable energy projects over 10 megawatts comply with prevailing wage rates and benefits, participate in apprenticeship programs, and establish and execute a plan for outreach, recruitment, and retention of workers of women, minorities, veterans, and people with disabilities. NIPPC stated that HB 2021 also makes a PLA a compliance option, but not a requirement, for developers of renewable energy projects. Renewable NW recommends PGE adjust the RFP requirements to conform to or directly reference the statewide "Responsible Contractor Labor Standards" established by HB 2021 (or any successor standards) to avoid confusion.

Staff and PGE state that broadly applicable PLAs protect customers and bring stability to labor. PGE stated the PLA does not need to be submitted with a bid as it is customary to negotiate such labor agreements closer to construction. In response to our questions, PGE stated the PLA has benefits that are separate from HB 2021 compliance, although a PLA does bring certainty to how a developer can comply with HB 2021. In response to questions, PGE stated that it would consider modifications to, or relief from the PLA requirements as necessary, although it also stated that it would require a commitment to such enter into a PLA as a threshold requirement before a bid could be made.

b. Resolution

We adopted the recommendation from Renewable NW and NIPPC that PGE remove the requirement for a PLA and instead require that developers comply with HB 2021's

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[7] OAR 860-089-0450(5).

provisions.[8] We expressed concerns about limiting the out-of-state projects that may bid and wanting to defer to the compromises made in the legislation, at least in the absence of a more robust policy discussion of the customer implications of a broad mandate for PLAs.

c. Size of PGE's Procurement Summary

PGE's RFP states that PGE will explore procuring approximately 65 MWa of additional renewable resources beyond the 150 MWa target. PGE states this will position PGE to potentially procure approximately one third of its forecasted renewable needs to achieve the HB 2021 2030 goal. Staff found PGE's potential expansion reasonable, based on preliminary analysis PGE provided for complying with HB 2021, and subject to further analysis in the docket. In response to questions, Staff stated that HB 2021 has changed the planning environment so that PGE should not be limited to the procurement size from its IRP. AWEC raised concerns with PGE proposing to acquire the additional 65 MWa of renewable resources above what was acknowledged in its IRP. AWEC stated a preliminary analysis is insufficient to warrant approval of an RFP that deviates from an acknowledged IRP.

d. Resolution

We declined to change the size of PGE's procurement at this time. Although we conclude that PGE's preliminary analysis established the wisdom of considering acquiring more resources in response to the RFP, we agree with AWEC that the preliminary analysis does not itself justify actual procurement of additional resources. We stated that, going forward, PGE will need to produce robust analysis to justify the size and nature of any procurement, particularly if PGE is to procure resources going beyond the levels we acknowledged in the IRP.

e. In-state Preference Summary

OSSIA and NewSun Energy encouraged us to consider how this docket can comply with HB 2021's statement to provide direct benefits in this state "to the maximum extent possible".[9] PGE replied that geographic diversity is essential to acquiring reliable and affordable energy.

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[8] Commissioner Tawney abstained from this resolution. She expressed a desire to understand from the independent evaluator, if Oregon based projects do not score well enough to reach the initial and final shortlists, whether this difference in requirements between states played a material role.

[9] OSSIA Comments on PGE's Draft RFP at 1 (Nov 24, 2021).

f. Resolution

We declined to require any language preferring in-state projects. We noted that we will continue to consider this provision as we work through HB 2021 implementation, and there will be discussion beginning in multiple other forums of capturing community benefits from HB 2021 implementation. At this early stage, however, we found there is no clear basis in the operative provisions of the law to require PGE to adjust RFP scoring to explicitly create an in-state preference, nor has there been discussion of the potential policy and legal downsides of doing so.

IV. ORDER

IT IS ORDERED that the Portland General Electric Company's 2021 All-Source Request for Proposal is approved with the changes described in this order.

Made, entered, and effective Dec 10 2021.

Megan W. Decker
Chair

Letha Tawney
Commissioner

Mark R. Thompson
Commissioner

A party may request rehearing or reconsideration of this order under ORS 756.561. A request for rehearing or reconsideration must be filed with the Commission within 60 days of the date of service of this order. The request must comply with the requirements in OAR 860-001-0720. A copy of the request must also be served on each party to the proceedings as provided in OAR 860-001-0180(2). A party may appeal this order by filing a petition for review with the Circuit Court for Marion County in compliance with ORS 183.484.