

STATE COMPETITIVE PROCUREMENT: A PARTIAL SURVEY OF BEST PRACTICES

It is a near truism among economists and policymakers that competition in virtually every sector of the U.S. economy provides consumers with significant benefits. Market economies give producers the incentives to invest and innovate, while competition among producers disciplines prices. Consumers benefit from the resulting increased efficiency, increased output, and ultimately lower prices.¹

I. Scope

A joint task force convened by the National Association of Regulatory Commissioners (NARUC) and the Federal Energy Regulatory Commission (FERC) is examining the subject of competitive procurement for electric power resources in the states and at the federal level. The Dickstein Shapiro firm, at the request of the Electric Power Supply Association (EPSA), has prepared this document to assist the task force's deliberations on this important topic. In particular, EPSA has asked us to prepare a preliminary survey – for those states that have not traditionally used a competitive method to meet customers' supply needs – of "best practices" for competitive procurement in the states. In addition, we have attached as an appendix to this document a model rule for state competitive procurement practices, based upon the results of our survey.

Competitive bidding for infrastructure improvements has been a feature of many state procurement regimes for only the past twenty years, i.e. since the early years of the competitive power sector after enactment of the Public Utility Regulatory Policies Act of 1978 (PURPA). In the late 1980s and early 1990s, several utilities, most notably Virginia Electric and Power Company, ceased building their own generation and elected to fill their capacity needs through long-term competitive bidding solicitations. Since that time, many states have developed competitive bidding regimes, under auspices of either statutory authority, regulatory rulemaking, or administrative adjudication.

New power generation resources, and in some cases other infrastructure needs, are now developed under a variety of mechanisms.

¹ An Empirical Assessment of the Benefits of Competition in Wholesale and Retail Markets Electric Markets, prepared for Constellation Energy Group by Bates White, LLC (May 2006) at. p.1.

Our survey has focused on five elements that characterize competitive bidding regimes:

- (A) Integrated Resource Planning / Least Cost Planning: a comprehensive, coordinated planning process, typically run under the auspices of a state regulatory body that identifies the medium- and long-term resource needs of load serving entities, and determines the optimal way to meet those needs.
- (B) Requests For Proposal: in competitive markets, the process by which the Load Serving Entities' (LSE) needs, as identified in the planning process, are met.
- (C) Independent Oversight: in service territories or jurisdictions where the LSE remains in the generation business, either as a utility operation or through a competitive power affiliate, independent oversight ensures that the LSE does not favor affiliated generation options over competitively superior alternatives. In some jurisdictions, this function is filled by, or in conjunction with, public service commission (PSC) staff.
- (D) The Role of the Utility: the rules that govern: (1) the relationships and permissible interactions between the LSE and its affiliates who compete to serve load, and (2) the circumstances under which utility rate basing of new resources is favored or allowed.
- (E) Procuring Specialized Products Such as Renewables: While most RFPs are for commodities without a stated preference for fuel source, the growing focus on renewable power resources has spawned numerous solicitations for resources with particular environmental capabilities.

II. Elements of a Model Competitive Procurement.

A. The Integrated Resource Plan.

Example A1: Colorado Department of Regulatory Agencies -- Part 3 – Rules Regulating Electric Utilities 3604. Contents of the Least – Cost Resource Plan

The utility shall file a plan with the Commission that contains the information specified below. When required by the Commission, the utility shall provide work-papers to support the information contained in the plan. The plan shall include the following:

- a. A statement of the utility-specified resource acquisition period, and planning period. The utility shall consistently use the specified resource acquisition and planning periods throughout the entire least-cost plan and resource acquisition process. The utility shall include a detailed explanation as to why the specific period lengths were chosen in light of the assessment of base-load, intermediate and peaking needs of the utility system.
- b. An annual electric demand and energy forecast developed pursuant to rule 3606.
- c. An evaluation of existing resources developed pursuant to rule 3607.
- d. An assessment of planning reserve margins and contingency plans for the acquisition of additional resources developed pursuant to rule 3608.
- e. An assessment of need for additional resources developed pursuant to rule 3609.
- f. A description of the utility's plan for acquiring these resources pursuant to rule 3610.
- g. The proposed RFP(s) the utility intends to use to solicit bids for the resources to be acquired through a competitive acquisition process, pursuant to rule 3612.

- h. An explanation stating whether current rate designs for each major customer class are consistent with the contents of its plan. The utility shall also explain whether possible future changes in rate design will facilitate its proposed resource planning and resource acquisition goals.

Example A2 Oklahoma Corporation Commission

SUBCHAPTER 37. INTEGRATED RESOURCE PLANNING

- a. The purpose of this Subchapter is to establish fair, just and reasonable rules and procedures for Commission review of the resource plans of utilities. The utility resource plans establish additional bases for substantial investment and expenses incurred by utilities to provide electric supply to retail consumers. The practices and policies embodied in a utility's resource plan have direct, substantial effects on the costs and reliability of the electric supply to be provided to retail consumers in Oklahoma. Resource planning is a complex process affecting decisions that account for a substantial portion of the total cost of electricity over the long term, including investments in generation and transmission facilities, purchases of power and fuel supply, and investments in energy efficiency. Recognizing the significance of the costs incurred based on resource plans, the Commission believes it is in the best interest of retail ratepayers and the utilities providing regulated retail electric supply to establish regular review of the utilities resource plans to ensure that the utilities' resource overall cost of power supply to retail ratepayers is fair, just, and reasonable.

- b. This Subchapter establishes fair, just and reasonable procedures for:
- (1) Setting standards for prudent resource planning;
 - (2) Conducting periodic review of utility resource plans;
 - (3) Participation of stakeholders, particularly those representing ratepayer interests, to review and have input into the utility's resource plans and the Commission's resource planning policies;
 - (4) Establishing the need for additional resources serving as the basis for long-term competitive procurement of resources, including, but not limited to, utility construction of new electric generation facilities, the utility purchase of existing electric generation facilities; and the purchase of long-term power supplies;
 - (5) Establishing objectives and action plans consistent with Commission resource planning policies;
 - (6) Establishing appropriate plans for capital expenditures for equipment or facilities at utility generation facilities necessary to comply with the Federal Clean Air Act, as amended, and other federal, state, local, or tribal environmental requirements;
 - (7) Establishing a clear, before-the-fact foundation for the recovery of prudently incurred investment and expenses in subsequent rate and fuel and purchased-power cost recovery proceedings; and

- (8) Establishing the appropriate portfolio of products to be obtained through competitive procurement.

Example A3 – Georgia Code § 46-3A-1

As used in this chapter:

'Plan' means an integrated resource plan which contains the utility's electric demand and energy forecast for at least a 20 year period, contains the utility's program for meeting the requirements shown in its forecast in an economical and reliable manner, contains the utility's analysis of all capacity resource options, including both demand-side and supply-side options, and sets forth the utility's assumptions and conclusions with respect to the effect of each capacity resource option on the future cost and reliability of electric service. The plan shall also:

(A) Contain the size and type of facilities which are expected to be owned or operated in whole or in part by such utility and the construction of which is expected to commence during the ensuing ten years or such longer period as the commission deems necessary and shall identify all existing facilities intended to be removed from service during such period or upon completion of such construction;

(B) Contain practical alternative to the fuel type and method of generation of the proposed electric generating facilities and set forth in detail the reasons for selecting the fuel type and method of generation;

(C) Contain a statement of the estimated impact of proposed and alternative generating plants on the environment and the means by which potential adverse impact will be avoided or minimized;

(D) Indicate in detail the projected demand for electric energy for a 20 year period and the basis for determining the projected demand;

(E) Describe the utility's relationship to other utilities in regional associations, power pools, and networks;

(F) Identify and describe all major research projects and programs which will continue or commence in the succeeding three years and set forth the reasons for selecting specific areas of research;

(G) Identify and describe existing and planned programs and policies to discourage inefficient and excessive power use; and

(H) Provide any other information as may be required by the commission.

Comments

Integrated resource planning (IRP), also known as least-cost planning, is the time-honored method whereby utilities forecast their needs over a defined time horizon and develop the optimal means to meet those needs. Traditionally, IRP processes have been conducted at the state level, under the auspices of a state regulatory authority, and address all aspects of the utility's medium and long-term needs: generation, transmission, distribution, conservation and demand-side programs, renewable power, etc.). A completed IRP process is usually the precursor or predicate for approval by the regulatory authority of the utility's proposed means for meeting its identified needs. The utility, through the IRP process, is tasked with demonstrating that its proposal is the optimal (which is usually, but not always, the least cost) means for meeting those needs.

As the above examples demonstrate, the traditional IRP process has been reexamined in recent years, for a variety of reasons. First, passage of the three major energy acts of the past few decades (PURPA, the Energy Policy Act of 1992, and the Energy Policy Act of 2005) has established definitively that electric power generation is a competitive industry, not a "natural" monopoly. The result is that many IRP processes, such as the ones cited above, have explicitly directed load serving entities (LSEs) to consider non-utility generation in their generation planning processes. The objective is not necessarily to displace the utility-build option, but rather to render it one option among many, with the LSE proceeding down that path only upon a demonstration that there are no superior options in the wholesale competitive market.

Second, the FERC has in recent years put strong emphasis on the necessity for a planning process at the federal level. In particular, regional planning is a centerpiece of the FERC's recently concluded Order No. 890, and is an important part of the development of ISOs and RTOs in the organized markets. While the FERC's focus with regard to planning has been more on transmission planning than on generation development, both the states and the FERC appear to realize that there is no neat dividing line between the two planning regimes; an optimal planning process should in fact treat generation, transmission and other options (such as demand side planning) as

a menu of resources available to meet the LSE's long-term needs, not as freestanding topics to be addressed separately and independently of one another.

Finally, the FERC and state regulatory authorities have indirectly cooperated in IRP processes where LSEs have proposed meeting their generation needs through power purchase agreements with their non-utility affiliates. In those instances, the state regulator essentially has authority over the prudence of purchase by its jurisdictional LSE, and the FERC has authority over the wholesale sale by the non-utility affiliate. In the so-called *Edgar*² line of cases, the FERC, focusing on the potential for affiliate abuse, has laid out a test whereby the seller must demonstrate the absence of such abuse in the contract award. The centerpiece of that burden of proof is demonstrating some form of competitive solicitation (or a strong proxy for it) that shows that the affiliate deal was reasonable, based on a combination of price and non-price factors, and that the process for deciding to contract with the affiliate was fair.

B. The RFP

Example B1 - Utah § 54-17-201

Solicitation process required – Exception.

(1) (a) An affected electrical utility shall comply with this chapter to acquire or construct a significant energy resource after February 25, 2005.

(b) Notwithstanding Subsection (1)(a), this chapter does not apply to a significant energy resource for which the affected electrical utility has issued a solicitation before February 25, 2005.

(2)(a) Except as provided in Subsection (3), to acquire or construct a significant energy resource, an affected electrical utility shall conduct a solicitation process that is approved by the commission.

(b) To obtain the approval of the commission of a solicitation process, the affected electrical utility shall file with the commission a request for approval that includes:

(i) a description of the solicitation process the affected electrical utility will use;

(ii) a complete proposed solicitation; and

(iii) any other information the commission requires by rule made in accordance with Title 63, Chapter 46a, Utah Administrative Rulemaking Act.

(c) In ruling on the request for approval of a solicitation process, the commission shall determine whether the solicitation process:

² Boston Edison Company Re: Edgar Electric Company, 55 FERC P 61,382 (1991)

- (i) complies with this chapter and rules made in accordance with Title 63, Chapter 46a, Utah Administrative Rulemaking Act; and
- (ii) is in the public interest taking into consideration:
 - (A) whether it will most likely result in the acquisition, production, and delivery of electricity at the lowest reasonable cost to the retail customers of an affected electrical utility located in the state;
 - (B) long-term and short-term impacts;
 - (C) risk;
 - (D) reliability;
 - (E) financial impacts on the affected electrical utility; and
 - (F) other factors determined by the commission to be relevant.
- (d) Before approving a solicitation process under this section the commission:
 - (i) may hold a public hearing; and
 - (ii) shall provide an opportunity for public comment.
- (e) As part of its review of a solicitation process, the commission may provide the affected electrical utility guidance on any additions or changes to its proposed solicitation process.
- (f) Unless the commission determines that additional time to analyze a solicitation process is warranted and is in the public interest, within 90 days of the day on which the affected electrical utility files a request for approval of the solicitation process, the commission shall:
 - (i) approve a proposed solicitation process;
 - (ii) suggest modifications to a proposed solicitation process; or
 - (iii) reject a proposed solicitation process.
- (3) Notwithstanding Subsection (2), an affected electrical utility may require or construct a significant energy resource without conducting a solicitation process if it obtains a waiver of the solicitation requirement in accordance with Section 54-17-501.
- (4) In accordance with the commission's authority under Subsection 54-12-2(2), the commission shall determine:
 - (a) whether this chapter or another competitive bidding procedure shall apply to a purchase of a significant energy resource by an affected electrical utility from a small power producer or cogenerator; and
 - (b) if this chapter applies as provided in Subsection (4)(a), the manner in which this chapter applies to a purchase of a significant energy resource by an affected electrical utility from a small producer or cogenerator.

Comments

The centerpiece of the competitive procurement process is the request for proposals (RFP), which defines the product the LSE is seeking and offers the opportunity to qualified competitors. Conceptually, RFPs in the electric power sector are no different from competitive solicitations in other sectors; the overlay of the regulatory structure, however, renders RFPs in the U.S. power sector materially different. For example, the LSE buyer in many U.S. markets is a regulated monopsonist, and its procurement decisions are thus regulated by its state PSC. In addition, the LSE buyer may itself be a competitor in the RFP, leading to the necessity for independent oversight of the procurement. (See Section C, below.) The Utah statutory provision cited above addresses many of these special issues and concerns surrounding the competitive procurement of electric generation resources, and in addition provides an opportunity for the LSE to seek waiver of these requirements for good cause shown.

Finally, it is essential that the RFP “rules of the road” be developed through a comprehensive stakeholder process that permits the involvement of the LSE, potential competitors who might serve the load, the independent monitor who will oversee the RFP process, consumer groups and regulatory authorities. Much as is the case with regard to the transmission planning process that the FERC addressed in detail in Order No. 890, a stakeholder process to structure RFP protocols ensures the optimal, cost-effective development of these large infrastructure projects, and can also inoculate the RFP process against charges of manipulation, exclusion or incompleteness.

C. The Independent Monitor

Example C1 – Arizona Docket No. E-00000A-02-0051 et al. (2002)

To assist the Staff and to assure all parties to the solicitation for power supplies that the process employed is conducted in a transparent, effective, efficient and equitable manner, an Independent monitor will be appointed by the Staff to the Commission to oversee the conduct of the Solicitation. The Independent Monitor will be selected by the Staff and will work at the Staff's direction. Any person expecting to participate in the solicitation process may suggest to the Staff any individual to serve as the Independent monitor. The utility will retain the Independent Monitor selected by the Staff and will be responsible for all related costs. The independent Monitor shall submit all invoices to the Staff for review. The Staff shall forward the invoices to the utility with a recommendation as to payment.

The Independent Monitor will be responsible for:

- monitoring all communications regarding the solicitation by and among the utility and any bidders or potential bidders;
- evaluating the adequacy, accuracy and completeness of all solicitation materials, and the quality of the evaluations conducted;
- monitoring any negotiations conducted by the utility and any bidder;
- assisting the Staff in developing the "prices to beat" and such other tasks as required;
- advising the Staff and the utility of any issue affecting the integrity of the solicitation process and providing the utility an opportunity to remedy the defect identified;
- periodically submitting status reports to the Commission and the Staff on the solicitation being

conducted, noting any deficiencies identified in the preparation of solicitation materials, maintenance of records, communications with bidders, or in evaluating or selecting bids;

- advising the Commission and the Staff of significant unresolved issues as they arise;
- after bids have been selected, preparing and submitting a report to the Commission detailing the Independent Monitor's observations and findings relating to the conduct of the solicitation and any recommendations for improvements of the solicitation process employed in the initial solicitation; and
- making all written status reports and the final reports to the Commission available to any person having an interest in the solicitation.

The Independent Monitor shall have full access to all materials used in or relating to the Solicitation. The utility shall make its personnel available for consultation with the Independent Monitor as requested. The Independent Monitor shall attend, in person or telephonically, any negotiations conducted with bidders.

Following the bidders conferences and before the distribution of solicitation materials, the Independent Monitor shall submit a status report to the Commission and the Staff noting any unresolved issues that could impair the equity or appropriateness of the solicitation process.

**Example C2 – Oklahoma Regulations Subchapter 34,
165:35-34-3 RFP Competitive Bidding Procurement Process**

(a) Independent Evaluator

The Commission may, at its discretion, retain and compensate an Independent Evaluator to monitor the RFP and competitive bidding process. Notwithstanding the foregoing, the Commission shall retain an Independent Evaluator to monitor the RFP and competitive bidding process in the following instances: (i) when an affiliate of the utility is anticipated to participate in the competitive bidding process; (ii) when the RFP and bid resulting therefrom is expected to have a material impact on the utilities' cost of providing electricity to its customers, or (iii) when it is anticipated that the utility may participate as a bidder in the competitive bidding process. The Commission shall establish the minimum qualifications and requirements for an Independent Evaluator and ensure the Independent Evaluator is financially and substantively independent from any soliciting electric utility or affiliate thereof, complaining entity, and any potential bidder.

The Independent Evaluator will report to the Commission and the Attorney General.

If the Independent Evaluator's conclusion is different from the conclusion of the soliciting utility about the winning bidder(s), the Independent Evaluator and utility may attempt to resolve such differences. In the event the Independent Evaluator and utility cannot resolve their differences, the soliciting utility will determine which bid(s) is successful. The Independent Evaluator shall submit its independent evaluation to the Commission.

As part of its contract with the Independent Evaluator, the Commission shall require the Independent Evaluator, to enter into an agreement to keep all information confidential that pertains to the disclosure and use of any models analytical tools, data, or other materials of a confidential or proprietary nature provided or made

available by the soliciting utility in conjunction with the competitive bidding process.

Example C3 – Arizona Docket No. E-00000A-02-0051 et al. (2002)

III. Independent Oversight

We agree with Staff and AUJA, and will again clarify that the utilities have the right to reject all bids if the bids do not reasonably meet the needs of the utility and its customers. We do expect the utilities to give serious consideration to all bids received, including long- and short-term bids, which consideration should include sound economic and deliverability analysis of the bids. The utilities' goal should be to obtain for their customers the least-cost mix of reliable power over the long term, while being mindful of the air quality and water issues effects of their procurement decisions, as well as whether their procurement decisions will further this Commission's goal of encouraging the development of a competitive wholesale generation market in Arizona. While we are not requiring APS and TEP to accept bids in the solicitation process that are unreasonable, uneconomical, or unreliable, APS and TEP should be on notice that the Commission will closely scrutinize the offered bids and the utilities' procurement decisions based on those bids for conformity with those goals. If the utility accepts no bids, the utility shall notify the Commission by filing a detailed written explanation within 72 hours after its decision. The Commission may take whatever action it deems appropriate at that time.

Comments

Perhaps the most important facet of a well-designed competitive procurement process is a defined and adequately empowered independent monitor. The core reason for an independent monitor is that competitors will not participate in procurement regimes that are or are perceived to be “rigged” or slanted in the direction of the LSE or its affiliates. The importance of the independent monitor is well stated in the following quote from the Arizona Independent Monitor after that state’s load was opened up to all-source competitive bidding several years ago:

[I]n order for the Solicitation to attract wide participation, the process had to be accepted by participants as fair, open, and transparent. To achieve this, prospective bidders and interested persons who agreed to keep certain information confidential had the opportunity to review supporting data and draft documents in advance of the RFP... Many bidders and other interested persons provided comments to the utilities, the Independent Monitor, or the Staff regarding the completeness or quality of the information provided... Bidders’ conferences were held so that all interested parties had the opportunity to ask questions directly of the utilities as well as to identify deficiencies in the Solicitation documents or supporting data.³

EPSA’s recent white paper on well-designed competitive solicitations states the reasons for an independent monitor as follows:

The decision on whether to use an independent monitor is driven primarily by three factors: (1) the desire to assist state regulatory commission staff with logistical and technical assistance; (2) whether a utility affiliate or the utility’s self-build option participates in the solicitation; and (3) an assessment of the need to enhance confidence among stakeholders that the solicitation is credible.

³ Independent Monitor’s Final Report on Track B Solicitation to the Arizona Corporation

D. The Role of the Utilities

Example D1 – Oklahoma Corporation Commission

IV. Standards of Conduct / Codes of Conduct

(a) Affiliate Bidders' Requirements

Each soliciting utility affiliate that intends to bid shall disclose publicly, in writing, the names and titles of the members of the affiliate's "Bid Team." Each soliciting utility shall disclose publicly, in writing, the names and titles of the members of its "Evaluation Team." A Bid Team develops the affiliate's bid and, to assure fairness, is not involved, directly or indirectly, in the evaluation or selection of bids. An Evaluation Team evaluates bids, selects the successful bidder and, to assure fairness, is not involved, directly or indirectly, in the development of the affiliate's bid.

Each soliciting utility and bidding affiliate shall assure that the Bid Team and the Evaluation Team and any member of either do not engage in any communications, either directly or indirectly, regarding the RFP or the competitive bidding process. For bidder and Commission assurance, the soliciting utility and bidding affiliate shall execute an acknowledgement that the utility and affiliate have not and will not in the future so communicate, other than to submit and receive the bid at the appropriate time. The Bid Team and Evaluation Team may communicate as part of a bidding technical conference of which potential bidders or all actual bidders, if bids have already been submitted, are given adequate notice and opportunity to attend.

The Evaluation Team shall report to the Independent Evaluator, any contact or communications by any bidder, including the Bid Team, and advise the bidder any future contact must be directed to the Independent Evaluator. Bidders and the Evaluation Team may communicate as part of a bidding technical conference of which potential bidders or all actual bidders, if bids have already been submitted, are given adequate notice and opportunity to attend.

In addition, the record in this proceeding supports a requirement that APS' parent and affiliates, including but not limited to M&T, PWEC and Pinnacle West, who may be involved in the preparation of a bid in the solicitation process shall not have contact with employees that will conduct the solicitation. We do not wish to harm APS customers by depriving APS of access to needed expertise provided by Pinnacle West "shared services," such as consulting legal counsel or in-house environmental experts, the examples provided by APS in its Reply Brief. However, we see no reason to allow APS' parent and affiliates, including but not limited to M&T, PWEC and Pinnacle West, access to such expertise if such access could provide even an appearance of impropriety in the solicitation process. We will therefore require that for the purposes of the solicitation and procurement, APS shall prohibit personnel who provide advice to APS in the solicitation process from communicating with personnel working for APS' parent or affiliate who may be involved in the preparation of a bid in the solicitation process, concerning any business matter related to APS' parent and affiliates pertaining to the Track B solicitation. Notwithstanding any other provision of this Opinion and Order to the contrary, nothing herein shall be construed as prohibiting APS, Pinnacle West, or PWEC officers and directors from providing corporate oversight, support and governance to their employees so long as such activities do not favor PWEC in Track B or provide PWEC with confidential bidding information during the Track B procurement that is not available to all other Track B bidders; nor prohibiting APS or Pinnacle West employees from communicating with PWEC employees about non-Track B matters. If APS affiliates, including but not limited to M&T, PWEC and Pinnacle West, require access to expertise that is dedicated to APS in the procurement process, they can obtain such expertise elsewhere, at their own expense.

Comments

As previously discussed, the advent of wholesale competition does not mean that LSEs or their affiliates are precluded from construction. Should an LSE or its affiliate choose to compete to serve load, however, a credible system must be in place to ensure that that option, if selected, is the best possible deal for consumers.

The issue of utility building arises in at least two contexts. In the first instance, the LSE or its affiliate seeks to compete for load. In this instance, the paramount concern is that the LSE be compelled to compete under the same rules, terms and conditions as other, non-affiliated competitors, including being held prospectively to the conditions under which the opportunity is awarded. This situation is best addressed by the terms of the bid design, in particular the design of the RFP so as to be neutral to the identity or affiliation of the bidders, and by the presence of the independent monitor to ensure that the bid protocols are followed.

The second instance arises where the LSE offers itself as the sole source to serve load, either as a utility-build / ratebased option or through a PPA with its affiliate, and asks the regulator to forego or waive the competitive procurement process so that it may do so. As suggested by the recent litigation on this topic in Georgia, the LSE should be tasked with a material burden of proof before a regulator should grant any request of this order.

E. Renewables and Other “Specialized” Products

Example E1 – Code of Colorado Regulations § 3651

(6) Renewables and Other Specialized Products

Overview and Purpose

The purpose of these rules is to establish a process to implement the renewable energy standard for qualifying retail utilities in Colorado, pursuant to the power to regulate public utilities delegated to the Commission by §24-4-101 C.R.S., *et seq.*, §40-2-108 C.R.S., §40-3-102 C.R.S., §40-3-103 C.R.S., §40-4-101 C.R.S., and §40-2-124 C.R.S.

Section 40-2-124 was enacted by the voters of the State of Colorado as 2004 Ballot Amendment 37 and was amended by the 2005 Colorado General Assembly by Senate Bill 05-143.

Energy is critically important to Colorado’s welfare and development, and its use has a profound impact on the economy and environment. Growth of the state’s population and economic base will continue to create a need for new energy resources, and Colorado’s renewable energy resources are currently underutilized.

Therefore, in order to save consumers and businesses money, attract new businesses and jobs, promote development of rural economies, minimize water use for electricity generation, diversify Colorado’s energy resources, reduce the impact of volatile fuel prices, and improve the natural environment of the state, it is in the best interests of the citizens of Colorado to develop and utilize renewable energy resources to the maximum practicable extent.

It is the policy of this State to encourage local ownership of renewable energy generation facilities to improve the financial stability of rural communities.

Comments

As previously noted, competitive procurement is thought of primarily as a competition among generators to serve load. Competitive procurement, however, may be thought of more broadly as a tool for meeting all the needs of the electric power sector, including reliability needs, solutions for transmission constraints, and demand-side resources. One area that has lent itself well to competitive solicitation is the growing area of renewable resources. Approximately half the states currently have renewable portfolio standards (RPS), provisions that require the LSE to have a specified percentage of load served by renewable power resources. “Renewables-specific” RFPs have proven to be an effective way of developing such resources in many states. The cited Colorado statutory provision is a good example of such a program.

APPENDIX

STATE COMPETITIVE PROCUREMENT PROCEDURES: MODEL RULES AND BEST PRACTICES

A. The Integrated Resource Plan.

Each load-serving entity (“LSE”) shall file a plan with its state public service commission (“PSC”) that contains the information specified below.

1. A statement of the LSE-specified resource acquisition period, and planning period. The LSE shall include a detailed explanation as to why the specific period lengths were chosen in light of the assessment of base-load, intermediate and peaking needs of the utility system.
2. An annual electric demand and energy forecast.
3. An evaluation of existing resources.
4. An assessment of planning reserve margins and contingency plans for the acquisition of additional resources.
5. An assessment of need for additional resources.
6. A description of the LSE’s plan for acquiring these resources.
7. The proposed Request For Proposals (“RFP”) the LSE intends to use to solicit bids for the resources to be acquired through a competitive acquisition process.
8. An explanation stating whether current rate designs for each major customer class are consistent with the contents of its plan. The LSE shall also explain whether possible future changes in rate design will facilitate its proposed resource planning and resource acquisition goals.
9. To the extent feasible, the PSC shall try to ensure that the Integrated Resource Plan (IRP) takes into consideration state and regional transmission plans and alternatives to generation options, coordinating generation and transmission planning on a regional basis to increase the efficiency of existing infrastructure and regional planning.

B. The Request for Proposals (“RFP”)

(1) All acquisitions or construction of energy resources greater than __ MW shall be done pursuant to an RFP process that is approved by the PSC unless the LSE can establish by convincing evidence that such RFP process is not feasible or without purpose.

(2) The RFP shall be developed pursuant to a stakeholder process that includes, to the maximum extent feasible, participation by the LSE, potential wholesale competitors who might serve the load, the independent monitor who will oversee the RFP process, consumer groups and regulatory authorities.

(3) To obtain the approval of the PSC of a proposed RFP process, the LSE shall file with the PSC a request for approval that includes:

- (a) a description of the solicitation process the affected LSE will use;
- (b) a proposed draft RFP; and
- (c) any other information the PSC requires by rule.

(4) In ruling on the request for approval of a RFP process, the PSC shall determine whether the solicitation process:

- (a) complies with applicable law and
- (b) is in the public interest taking into consideration:
 - (i) whether it will likely result in the acquisition, production, and delivery of electricity at the lowest reasonable cost to the retail customers of the LSE;
 - (ii) long-term and short-term impacts;
 - (iii) risk;
 - (iv) reliability;
 - (v) financial impacts on the affected LSE; and
 - (vi) other factors determined by the PSC to be relevant.

(5) As part of its review of a solicitation process, the PSC may provide the affected LSE guidance on any additions or changes to its proposed RFP process. If the LSE or an affiliate of the LSE is permitted to participate in the RFP process, such entity shall (a) participate in that process under the same terms and conditions as any other competitor, with no opportunity to amend its bid or solicitation response that is different from the opportunity provided to all other competitors, and (b) be subject to the procedural protections set forth in Section D (The Role of the LSE).

(6) Unless the PSC determines that additional time to analyze a solicitation process is warranted and is in the public interest, within 90 days of the day on which the affected electrical utility files a request for approval of the solicitation process, the PSC shall:

- (i) approve a proposed RFP process;
- (ii) suggest modifications to the proposed RFP process; or
- (iii) reject the proposed RFP process.

C. The Independent Monitor

(1) The PSC may, at its discretion, retain and compensate an Independent Monitor (“IM”) to monitor the RFP and competitive bidding process. Notwithstanding the foregoing, the PSC shall retain an IM to monitor the RFP and competitive bidding process in the following instances: (i) when an affiliate of the LSE is anticipated to participate in the RFP; (ii) when the RFP and bid resulting therefrom is expected to have a material impact on the LSE’s cost of providing electricity to its customers, or (iii) when it is anticipated that the LSE may participate as a bidder in the competitive bidding process. The PSC shall establish the minimum qualifications and requirements for an IM and ensure the IM is financially and substantively independent from any soliciting electric utility or affiliate thereof, complaining entity, and any potential bidder.

(2) The IM will report its findings with regard to the RFP process to the PSC.

(3) If the IM’s conclusion is different from the conclusion of the LSE about the winning bidder(s), the IM and LSE may attempt to resolve such differences. The IM shall submit its independent evaluation to the PSC.

(4) As part of its contract with the IM, the PSC shall require the IM to enter into an agreement to keep all information confidential that pertains to the disclosure and use of any models analytical tools, data, or other materials of a confidential or proprietary nature provided or made available by the LSE in conjunction with the RFP.

D. The Role of the LSE

(1) Each LSE affiliate that intends to bid shall disclose publicly, in writing, the names and titles of the members of the affiliate's "Bid Team." Each LSE shall disclose publicly, in writing, the names and titles of the members of its "Evaluation Team." The Bid Team develops the affiliate's bid and, to assure fairness, is not involved, directly or indirectly, in the evaluation or selection of bids. The Evaluation Team evaluates bids, selects the successful bidder and, to assure fairness, is not involved, directly or indirectly, in the development of the affiliate's bid.

(2) Each LSE and bidding affiliate shall ensure that the Bid Team and the Evaluation Team have completely distinct personnel, and that any member of either do not engage in any communications, either directly or indirectly, regarding the RFP or the competitive bidding process. For bidder and PSC assurance, the LSE and bidding affiliate shall execute an acknowledgement that the LSE and affiliate have not and will not in the future so communicate, other than to submit and receive the bid at the appropriate time. The Bid Team and Evaluation Team may communicate as part of a bidding technical conference of which potential bidders or all actual bidders, if bids have already been submitted, are given adequate notice and opportunity to attend.

(3) The Evaluation Team shall report to the IM, any contact or communications by any bidder, including the Bid Team, and advise the bidder that any future contact must be directed to the IM. Bidders and the Evaluation Team may communicate as part of a bidding technical conference of which potential bidders or all actual bidders, if bids have already been submitted, are given adequate notice and opportunity to attend.