

STATE OF VERMONT
PUBLIC UTILITY COMMISSION

Case No. 17-3952-PET

Petition of PLH LLC for a standard-offer contract under the 2016 standard-offer RFP	
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Docket 8817

Investigation into programmatic adjustments to the standard-offer program	
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Order entered: 12/14/2017

ORDER RE REQUEST FOR STANDARD-OFFER CONTRACT

I. INTRODUCTION

This case arises from a series of events that followed the 2016 request for proposals (“2016 RFP”) for the standard-offer program.¹ After reviewing proposals from developers in the 2016 RFP, the Vermont Public Utility Commission (“Commission”) awarded a contract to Sybac Solar (“Sybac”) for a 2.2 MW solar facility in Milton, Vermont (the “Checkerberry Solar Project”). Subsequently, Sybac discovered that it could not construct the Checkerberry Solar Project as it was initially proposed because of environmental site constraints. Sybac sought an extension of the development milestones contained in its standard-offer contract so that it could apply for a certificate of public good (“CPG”) for a smaller project. This request was dismissed on November 15, 2017.² As a result, the standard-offer contract became void due to Sybac’s failure to meet its contractual obligations.

Upon learning about Sybac’s difficulties in delivering the Checkerberry Solar Project, PLH, LLC (“PLH”) filed a petition requesting that the Commission award it a contract from the 2016 RFP. PLH is a disappointed bidder from the 2016 RFP that asserts that it would have been awarded a contract for the Otter Creek 1 Solar Project³ but for Sybac’s “illegitimate project.”

¹ Pursuant to state law, the Commission must annually issue contracts to a certain number of small- and medium-sized renewable energy plants as part of what is known as the “standard-offer program.” 30 V.S.A. § 8005a.

² *Petition of Sybac Solar, LLC for relief from standard-offer contract milestone*, Case No. 17-3665-PET, order of November 15, 2017.

³ In the 2016 RFP, PLH proposed a 2.2 MW solar facility named the “Otter Creek 1 Solar Project.” Subsequently, PLH filed a petition for a CPG to construct a 4.9 MW solar array at the same location, also called the “Otter Creek 1 Solar Project,” along with a separate, adjacent 2.2 MW facility called the “Otter Creek 2 Solar

Notice of PLH's petition was provided to the Vermont Department of Public Service (the "Department"), the Vermont electric distribution utilities, and a list of persons who have requested to receive notice of matters related to the standard-offer program. The Commission required that responses to PLH's petition be filed by no later than September 18, 2017. Only the Department filed a response.

In today's order, the Commission denies PLH's petition for a contract for the Otter Creek 1 Solar Project. Instead, the Commission determines that the capacity from Sybac's contract should be reallocated to the reserve group from the 2017 RFP. Coincidentally, the first project in the 2017 reserve group is another project proposed by PLH, the Otter Creek 2 Solar Project.

II. DISCUSSION

PLH asserts that the Checkerberry Solar Project "was never a legitimate . . . project." PLH states that Sybac's submission in the 2016 RFP clearly showed that the Checkerberry site contained significant constraints, including a flood zone, a utility easement, a stream, and a steep ravine. Therefore, PLH argues that "there was never any legitimate, or even theoretical, possibility to build" in these areas. Accordingly, PLH maintains that the illegitimate portion of Sybac's bid "should be deemed either invalid from inception or withdrawn no later than December 31, 2016."

In response to the Department's opposition to its petition, PLH asserts that "the Commission's precedent clearly judges the legitimacy of a project based upon the size of the project initially bid by the applicant." Specifically, PLH states that the Commission requires that plant owners make a reasonable estimate as to the eventual capacity of a standard-offer project and that this requirement is in accord with hornbook procurement law which requires bidders to detect defects that could have been "discovered by reasonable and customary care."⁴ PLH asserts that Sybac violated the specific requirements of the 2016 RFP to specify the capacity of its proposal and to have site control. PLH contends that the constraints at Sybac's site were so

Project." PLH represented in testimony filed in Docket 8797 that if it is awarded a contract for the Otter Creek 1 Solar Project, it would amend its CPG application to reflect a 2.2 MW project. The CPG petitions for the Otter Creek 1 Solar Project and the Otter Creek 2 Solar Project are under review in Dockets 8797 and 8798, respectively.

⁴ PLH Reply Comments at 1-2 citing, *Investigation Re: Establishment of a Standard Offer Program*, Docket 7533, Order of December 31, 2009 at 5; and *Analytical & Research Tech., Inc. v. United States*, 39 Fed. Cl. 34, 46 (1997).

patently obvious that the Commission should conclude that Sybac misrepresented both the size of its project and the fact that it had site control of sufficient land to build such a project. PLH further argues that Sybac breached its duty to notify the Commission immediately when a need for a change in plant capacity arose.

PLH argues that the integrity of the selection process was improperly compromised and that the standard remedy is to place the disappointed bidder in the circumstance it would have been in but for Sybac's negligent, reckless, or intentional actions. In support of this argument, PLH cites several federal procurement cases. Finally, PLH requests a hearing to support the factual assertions contained in its petition.

The Department states that PLH's motion should be denied because the Checkerberry Solar Project was a legitimate project that was entitled to the standard-offer contract it obtained. The Department argues that there is no support for PLH's contention that Sybac was required to identify any circumstances that might result in the reduction or withdrawal of the Checkerberry Solar Project. For example, the Department asserts that that the 2016 RFP did not require a "full natural resource analysis" as part of a complete bid.

We have reviewed PLH's petition and the comments of PLH and the Department, and are not persuaded that it is appropriate to award PLH a contract for the Otter Creek 1 Solar Project under the circumstances of this case. The federal procurement cases cited by PLH are not relevant to the facts before us because they deal with instances where it was alleged that a government agency failed to follow the required procurement procedures.⁵ PLH maintains that "[a] disappointed bidder has the right to a legally valid procurement process."⁶ First, PLH has not identified any legal error committed by the Commission in awarding a contract to Sybac during the 2016 RFP. Second, we do not find any error in our substantive determination that Sybac had submitted a bid in conformity with the 2016 RFP and our resulting decision to award Sybac a contract. In this regard, PLH alleges that Sybac failed to exercise reasonable and customary care in preparing its bid and that Sybac misrepresented both the size of the

⁵ See e.g., *Delta Data Sys., Corp. v. Webster*, 744 F.2d 197, 206-07 (D.C. Cir. 1984). (holding that an agency's failure to give the disappointed bidder an opportunity to refute the negative inferences it drew from the bidder's financial data was a violation of the federal procurement regulations); *Analytical & Research Tech., Inc. v. United States*, 39 Fed. Cl. 34, 46 (1997) (rejecting plaintiff's contention that agency award of contract was "arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law.").

⁶ PLH Reply Comments, dated September 22, 2017, at 5.

Checkerberry Solar Project and the fact that Sybac had site control over sufficient land to build the project as proposed. The focus of PLH's allegations is the purported failures of Sybac, not of the Commission. These arguments overlook the requirements stated in the 2016 RFP and the applicable Commission precedents. As discussed in more detail below, Sybac's bid met those requirements.

The Commission's orders implementing the standard-offer program RFP and the language of the 2016 RFP itself govern the standards for awarding contracts through the RFP process.⁷ For example, the Commission requires bidders to submit a proposal security deposit and documentation to demonstrate site control to "encourage legitimate and realistic bidding during the RFP process and . . . the timely development of projects."⁸ In contrast, the Commission explicitly declined to adopt more qualitative standards for evaluating bids, such as a requirement that bidders demonstrate sufficient experience developing renewable energy projects, because such standards would be subjective and less transparent.⁹

For these same reasons, the requirements stated in the 2016 RFP do not include a qualitative review of environmental or other site constraints. In fact, the 2016 RFP did not require Sybac to supply any specific information about its project, other than its planned capacity and location in Vermont.¹⁰ Sybac submitted the required proposal security and the required proof of site control and, thus, demonstrated that its bid was "legitimate" according to the written requirements of the 2016 RFP. The Commission properly accepted Sybac's bid and awarded Sybac a contract because Sybac had met the requirements of the 2016 RFP. In addition, Sybac forfeited \$38,500 in deposits because of its failure to deliver the Checkerberry Solar Project. Accordingly, the Commission concludes that PLH was not wrongfully deprived of a contract during the 2016 RFP process.

⁷ The requirements of the RFP process were first announced in *In re Programmatic Changes to the Standard Offer Program*, Dockets 8774 and 7874, Order of March 1, 2013. The Commission has adopted additional requirements or clarified the RFP process in subsequent orders in Dockets 7873, 7874, and 8817.

⁸ *Id.* at 24.

⁹ *Id.* at 25.

¹⁰ See 2016 RFP at Section 3.2 (stating mandatory bid requirements). In certain circumstances, a project proponent is required to supply additional project design information to ensure that the project is not part of a larger facility. However, Sybac was not required to supply this information because its project was not located adjacent to an existing or proposed energy facility. 2016 RFP at Section 3.2.3.

The decision to award a contract to Sybac was not inconsistent with the Commission's orders from Docket 7533 cited by PLH, which pre-date the adoption of the annual RFP contracting process. While those orders govern aspects of the standard-offer program that continue today, they do not contain the specific standards that the Commission must follow when awarding contracts through the RFP contracting process. For example, PLH asserts that the "legitimacy of a project" is determined by the capacity initially proposed.¹¹ However, the language cited by PLH describes the standard that the Commission applies when evaluating a request to amend a standard-offer contract. That standard is not the same as the criteria established by the Commission for determining whether a bid should be awarded a contract under the 2016 RFP.

In summary, while Sybac failed to deliver the project that it proposed in the RFP process, the Commission's award of a contract to Sybac did not constitute a violation of PLH's right to a fair RFP process. Therefore, PLH's request for a contract as part of the 2016 RFP is denied, as well as PLH's request for a hearing in this matter.

Having determined that PLH is not entitled to be awarded a standard-offer contract for the Otter Creek 1 Solar Project, the Commission must decide how to reallocate the capacity from Sybac's contract. The Commission has consistently favored reallocating capacity to projects that are ready to be developed. In its first order announcing the RFP process, the Commission established a reserve group of projects and stated that the Commission may award a contract to the reserve group when a project withdraws from the program between April 1 and January 1 of each year.¹² In a subsequent decision, the Commission reallocated available capacity to the reserve group when projects within the original 50 MW of standard-offer program capacity failed to achieve commissioning.¹³ This reallocation process was adopted to support the timely development of standard-offer resources at the lowest feasible cost.¹⁴ The Commission believes that the same process is appropriate in this situation because it will result in a contract being awarded to a project that is ready to be developed and that is likely to have a lower price than

¹¹ PLH Reply Comments at 2 *citing* Docket 7533, Order of December 31, 2009.

¹² *Programmatic Changes to the Standard-Offer Program*, Dockets 7873 and 7847, order of 3/1/2013 at 28 ("We are persuaded that a Reserve will facilitate the goal of timely development of standard-offer projects by ensuring that if a project is withdrawn following its selection, another project may be contracted immediately.").

¹³ *Programmatic Changes to the Standard-Offer Program*, Dockets 7873 and 7847, order of 7/18/2013.

¹⁴ 30 V.S.A. § 8005a(f).

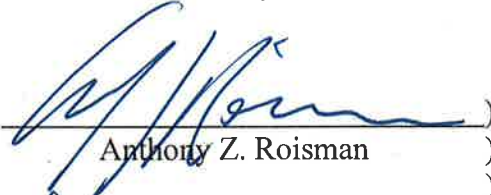


projects from a prior year's RFP. Because the Checkerberry Project was withdrawn from the program in 2017, we will allocate this capacity to the 2017 RFP reserve group.

By coincidence, a different project proposed by PLH, the Otter Creek 2 Solar Project, is the least-cost proposal in this year's reserve group.¹⁵ Therefore, we hereby award it a contract and direct the Standard-Offer Facilitator to execute such a contract once this order becomes final.

SO ORDERED.

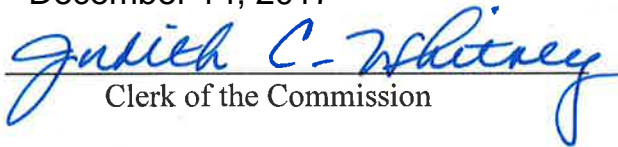
¹⁵ *Investigation into programmatic adjustments to the standard-offer program*, Docket 8817, Order of 10/20/2017 at 18.

Dated at Montpelier, Vermont, this 14th day of December, 2017

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Anthony Z. Roisman)	PUBLIC UTILITY
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Margaret Cheney)	COMMISSION
)	
)	
Sarah Hofmann)	OF VERMONT

OFFICE OF THE CLERK

Filed: December 14, 2017

Attest: 
Clerk of the Commission

Notice to Readers: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Commission (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: puc.clerk@vermont.gov)

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