



STATE OF NEW JERSEY
Board of Public Utilities
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www.nj.gov/bpu/

CLEAN ENERGY

IN THE MATTER OF COMPREHENSIVE ENERGY)
EFFICIENCY AND RENEWABLE ENERGY)
RESOURCE ANALYSIS FOR THE YEARS 2009 –)
2012: REIVSED 2012 PROGRAMS LARGE SCALE)
COMBINED HEAT AWARDEE APPROVAL)

ORDER

DOCKET NOS. EO07030203
and EO11100631V

Parties of Record:

Sandy Zeglarski, New Jersey Economic Development Authority
Vincent Wieczorek, Bristol-Myers Squibb Company

BY THE BOARD¹:

In this Order, the Board considers Bristol Myers Squibb ("Bristol Myers") as a potential awardee under the Large Scale Combined Heat and Power/ Fuel Cell Grant Program ("LSCHP-FC"). The New Jersey Economic Development Authority ("NJEDA" or "EDA") and the Board established the LSCHP-FC, which was approved by the Board on April 11, 2012. The NJEDA began accepting program applications beginning April 25, 2012, and required applicants to submit a completed application by June 25, 2012. In total, six companies, including Bristol Myers completed applications, and the NJEDA determined that all were complete.² The Board addressed awards to the five other projects in Order dated January 7, 2013, Docket No. EO EO07030203 and EO11100631V. The sixth project, Bristol Myers, was determined to be financially feasible and is being submitted for approval by the NJEDA.

¹ This matter was initially heard by the Board on December 19, 2012. During the hearing President Hanna recused himself due to a potential conflict of interest. Commissioner Fiordaliso had already recused himself due to a potential conflict of interest. In part, Staff's recommendation included certain delegated authority to President Hanna. The Board approved Staff's recommendation without amendment. Prior to issuing an order memorializing the action, however, it became apparent that the delegation should change due to President Hanna's recusal. This order amends the delegated authority and memorializes all other aspects of the Board's December 19, 2012 decision.

² The NJEDA provided an additional week to all the applicants to submit omitted items that were found in their original applications. Applicants with omitted items resolved all concerns within the one week extension.

BACKGROUND AND PROCEDURAL HISTORY

By Order dated December 20, 2011, Docket Nos. EO07030203 and EO11100631V, the Board approved programs and budgets for the 2012 New Jersey Clean Energy Program program year, including the LSHP-FC program which was to be administered with the assistance of the EDA. The program description for the LSCHP-FC broadly explained that the “program will offer assistance to support large sized CHP projects including stand-alone qualified fuel cells.” It also stated that this “program will be designed to assist those implementing a CHP or combined cooling heat and power or fuel cell project with an electric generating capacity of greater than one megawatt serving a commercial, institutional, or industrial electricity customer in New Jersey.” In approving the program concept, the Board directed Office of Clean Energy to work with the NJEDA to develop a detailed program description and solicitation for the LSCHP-FC. Consistent with the December 20, 2011, Budget Order, EDA coordinated with Board Staff and stakeholders to develop a detailed LSCHP-FC program description and solicitation. The Board subsequently approved the LSCHP-FC on April 11, 2012 and authorized Staff and EDA to release a competitive Solicitation for \$20 million with the expectation that a second Solicitation would occur at a later time.

The NJEDA released the Solicitation and began accepting program applications on April 25, 2012. Applicants were required to submit a completed application by June 25, 2012. In total, six companies responded to the competitive solicitation – Nestle USA, Inc., AtlantiCare Regional Medical Center, Monmouth Medical Center, New CMC, Inc., Bristol Myers and UMM Energy Partners, LLC.

The respondents’ applications were ranked by an evaluation committee comprised of representatives from NJEDA, NJBPU, and the New Jersey Department of Environmental Protection. Bristol Myers proposed a 4.11 MW project located in Pennington New Jersey. The total cost of the project is \$9,307,350 and the grant request was \$1,980,960. A description of the project is attached to this order, and is incorporated by reference. Using the scoring criteria set forth in the Solicitation, Bristol Myers passed the technical review phase and proceeded to the due diligence and underwriting review phase.

The goal of the NJEDA’s underwriting analysis is to determine that each respondent has the financial wherewithal to complete the project. Equally as important, the analysis determines if the operating activity of each respondent is sound and sufficient to service all existing forms of debt obligations and any new debt obligations that may be incurred as a result of the project. The due diligence and underwriting process included corporate background checks and verification of supplied documentation, among other things.

Disqualification Analysis

During the underwriting and due diligence review, among other things, the company was required to disclose any legal matter that resulted in a criminal conviction. Bristol Myers informed EDA that in 2006 it was charged with two violations of the federal False Statements Act.

According to the criminal complaint, Bristol Myers entered a deferred prosecution agreement (“DPA”) in 2003 that prohibited the company from settling patent infringement cases with any generic drug producer without Federal Trade Commission (“FTC”) review. The complaint alleged that Bristol Myers violated the DPA when it made representations to, and reach an

understanding with Apotex, Inc., a generic drug producer, during the course of a patent infringement litigation. The complaint further alleged that Bristol Myers provided false certifications to the FTC related to its discussions with Apotex. The company pleaded guilty to the charges in 2007 and paid a \$1 million fine. The guilty pleas were entered days before the expiration of the deferred prosecution agreement.

Despite the guilty pleas, Staff recommends issuing the LSCHP-FC grant to Bristol Myers in light of mitigating corrective efforts the company implemented. According to Bristol Myers, it promptly investigated the matter, terminated the employment of certain executive-level personnel, cooperated with federal authorities, and provided company-wide updates. Although the guilty pleas violated the DPA, federal authorities concluded that Bristol Myers had "cured that breach." In addition, Bristol Myers has documented extensive reforms that were implemented as a result of the DPA to improve corporate governance and accountability. These efforts are ongoing and include, for example, an active Office of Compliance and Ethics, comprehensive Standards of Business Conduct and Ethics, employee training and certification on business standards, and corporate governance and securities regulations group within the company's Law Department. Board Staff notes that there is no indication that repeat offenses have occurred since the resolution of those matters.

DISCUSSION AND FINDINGS

Upon consideration of the facts set forth above, and in the attached project descriptions, the Board **FINDS** that the LSCHP-FC Solicitation began on April 25, 2012, and ended on June 25, 2012. The Board **FURTHER FINDS** that Bristol Myers submitted an application and the NJEDA determined that it was complete under the stated evaluation criteria set forth in the Solicitation. The Board **FURTHER FINDS** that NJEDA conducted an underwriting review and recommended the company for a grant in the amount of \$1,980,960.

Concerning Bristol Myers' criminal conviction, the company's guilty pleas could be the basis of disqualification from BPU financial assistance pursuant to Governor Brendan Byrne's Executive Order 34. The Executive Order states in pertinent part:

Debarment, suspension, and disqualification are measures which shall be invoked by the State to exclude or render ineligible certain persons from participation in contracts and subcontracts with the State, or projects or contracts performed with the assistance of and subject to the approval of the State, on the basis of a lack of responsibility.

[Executive Order 34 (March 17, 1976).]

Pursuant to Executive Order 34, criminal convictions, violations of certain laws and guilty pleas can serve as the basis for disqualification or debarment absent sufficient mitigating factors.³ Considering Bristol Myers representations during the underwriting review, the Board **FINDS** sufficient mitigating factors to waive debarment under Executive Order 34. Such mitigating factors include, but are not limited to, that the termination of certain personnel, the federal authorities' conclusion that Bristol Myers cured its breach, and the corporate governance reforms that the company continues to implement. Therefore, the Board **FINDS** that the grant

³ The DPA is not grounds for debarment because it was completed successfully.

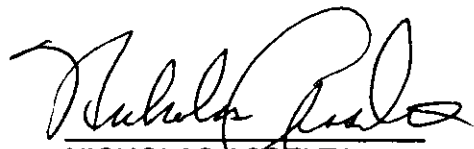
award for Bristol Myers is appropriate and proper. Now, therefore, the Board **HEREBY ACCEPTS** Staff's recommendation and **HEREBY APPROVES** the award to Bristol Myers for \$1,980,960 in accordance with the conditions herein.

The Board **FURTHER FINDS** that the commitment letter and grant agreement for the LSCHP-FC program are in substantially final form and accurately represent the terms of the Solicitation. The Board **ORDERS** that commitment letters and grant agreements, consistent with the terms of this Order, be issued. The Board **AUTHORIZES** the Chief of Staff of the Board to approve non-material amendments to the grant agreement and sign the agreement, consistent with the terms of this Order and the Department of Treasury requirements. The Board also **AUTHORIZES** the Chief of Staff to review and approve matters within the scope of Section VII(B) of the Memorandum of Understanding between BPU and EDA dated March 24, 2011, consistent with the terms of this Order, subject to Board review as necessary.

DATED: 1/23/13


BOARD OF PUBLIC UTILITIES
BY:

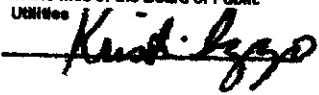

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COMMISSIONER


NICHOLAS ASSELTA
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MARY-ANNA HOLDEN
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ATTEST:


KRISTI IZZO
SECRETARY

I HEREBY CERTIFY that the within document is a true copy of the original in the files of the Board of Public Utilities


IN THE MATTER OF COMPREHENSIVE ENERGY EFFICIENCY AND RENEWABLE
ENERGY RESOURCE ANALYSIS FOR THE YEARS 2009 -2012: REVISED 2012
PROGRAMS -- LARGE SCALE CHP / FUEL CELL GRANT PROGRAM AWARDEES
APPROVAL

DOCKET NOs. EO07030203 and EO11100631V

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