



February 10, 2015

Kristi Izzo, Secretary of the Board
New Jersey Board of Public Utilities
44 South Clinton Avenue, 9th Floor
Trenton, New Jersey 08625-0350

Transmitted via email to rule.comments@bpu.state.nj.us

RE: GEA Comments Dkt. No.EX14111343

Dear Secretary Izzo,

The League is grateful for the time and effort BPU staff is putting into revising the current Government Energy Aggregation (GEA) regulations.

This submission represents the League's comments following a discussion of proposed amendments on January 29th 2015.¹

Please see the League's comments below.

I. Modify the rule to require the LDC to use a different standard letter for GEA programs (I,1)

The League is supportive of this concept. It is important that any communication regarding a municipality's GEA program be unambiguous.

We look forward to reviewing a draft of such a letter and providing more substantive comments.

¹ <http://www.nj.gov/bpu/pdf/energy/thirdpartysupplier/TPS%20-%20GEA%20%20stakeholder%20meeting%20notice%20FINAL.pdf>

II. Requirement that each cover letter include the contact information for every governing body member (III,2,a,5)

The League suggests that any and all communications to a municipality be addressed to the municipality's "governing body" collectively, rather than to each and every individual governing body member.

The GEA statute provides that after a municipality has issued bid documents pursuant to the Local Public Contracts Law (LPCL), "...The board and the Division of the Ratepayer Advocate shall have 15 days to review the bid notice and bidding documents and provide comments to the governing body, which may accept or reject the comments." N.J.S.A. 40A:11-2(6)(b)(1). There is a similar comment period after a contract is awarded. N.J.S.A. 40A:11-2(6)(c)(2).

The GEA statute doesn't define "governing body" and the LPCL rather unhelpfully defines the "governing body" of a municipality as, "(b) The governing body of the municipality, when the purchase is to be made or the contract or agreement is to be entered into by, or on behalf of, a municipality." N.J.S.A. 40A:11-2(6)(b)(1).

However, as a practical matter the term "governing body" means the entity that can pass ordinances and resolutions and set policy in a municipality, that is, the local council and mayor acting collectively at a public meeting. The term does not reflect each individual member of the governing body in their capacity as council person or mayor because they have no individual authority to take formal action independently.

The League respectfully suggests that the GEA statute refers to this "collective" notion of the term by stating that the governing body "may accept or reject comments" it has received from the BPU and Rate Counsel. Individual council people and mayors have no authority to accept or reject amendments to a bid.

It would also be helpful to place an "Attn Municipal Clerk" in addition to addressing these comments to the local governing body. As a practical matter, each municipality's municipal clerk is responsible for correspondence to each municipality's local governing body.

Consequently, the League urges that the regulations be amended to clarify that the BPU and the Rate Counsel should send their comments to a municipality in the following form:

Attn: Municipal Clerk
Governing Body of the Township of Municipality Name
123 1st Street, Anytown NJ 08876

III. Requiring that a letter be filed with the BPU and Rate Counsel providing basic, non-confidential statistics regarding the program. (III,3,e)

The League's position is that this information ought to be transmitted to the BPU and Rate Counsel. Understanding when and how this program works, and does not work, will provide policy makers at the state and local level with a better understanding of GEA.

At the January 29th stakeholder meeting there seemed to be a concern by consultants that this information would be considered a "trade secret" and, in any event, would provide a competitive advantage to others in the market and that the consultants should not be required to provide such information.

Under the GEA statute municipalities act as aggregators. Consultants are agents of the municipalities. Any legal requirement to provide this information would fall upon municipalities, and as a consequence, upon the consultants.

In light of the relationship between municipality and consultant as aggregator and agent, and the issue of trade secret and competitive advantage, it may be useful to discuss the requirements of Open Public Records Act (OPRA). OPRA requires that municipalities make available "government records" to the public upon request. N.J.S.A. 47:1A-1. When a municipality wrongly denies access under the law, they are subject to pay the prevailing party's attorney fees. Because

As agents of a municipality, consultants are subject to OPRA. Some of the records a consultant has made or maintained in relation to a GEA project are subject to disclosure. Some records may be exempt as "trade secrets" or "information which, if disclosed, would give an advantage to competitors..." Id. But, the delineation is very fact sensitive. See Communications Workers of America, AFL-CIO v. David Rousseau, 417 N.J. Super. 341 (N.J. App. Div. 2010).

The point that the League is endeavoring to make is that while the BPU may require the disclosure of some information regarding the program, this information may be nevertheless subject to disclosure under OPRA.

The League is sensitive to any legitimate concerns regarding "trade secrets" or competitive advantage and hopes that an amicable solution can be reached between the consultants and BPU staff on this issue.

IV. Requiring the governing body of each participating municipality to review the LDC's list of customers and remove those customers whose properties are not physically located within the municipality's borders before the list can be used for the distribution of opt-out letters. (IV,4,b)

The League is supportive of this concept with the understanding that this task can be delegated to the consultant, and that that cost will be added to the overall cost of the GEA program.

V. Requiring that the contract between the aggregator and the TPS be signed by one or more members of the governing body of each participating municipality and that this task cannot be delegated. (VI,1,d)

The League respectfully opposes the proposal to amend current GEA regulations to clarify that “one or more members of the governing body” must sign the contract between the municipality (acting as an aggregator) and the TPS. Under the Local Public Contracts Law (LPCL), contracts are awarded by the local governing body. N.J.S.A. 40A:11-24. As a part of this award, the mayor is directed to sign the contract.² This proposed regulation would be contrary to the LPCL, and as such, the League respectfully requests that this proposal not be adopted.

Beyond this proposal, the League would like to take this opportunity to clear up some irregularities and non-congruities between the GEA statute and the Local Public Contract Law and suggest some regulatory amendments to promote clarity.

A. Background

While the GEA statute requires that the “governing body” comply with the “public bidding” provisions of the LPCL (N.J.S.A. 48:3-94(b)(1)), the GEA statute lays out a form of procurement more akin to an alternative form of procurement under the LPCL called “competitive contracting” (N.J.S.A. 40A:11-4.1) and not public bidding (N.J.S.A. 40A:11-24). The League respectfully requests that amendments be made to the GEA regulations to clarify this issue.

By way of background, the procurement process laid out in the GEA statute at N.J.S.A. 48:3-94 (b) &(c) is analogous to competitive contracting under the LPCL. Whereas public bidding under the LPCL awards contracts to the “lowest responsible bidder” (N.J.S.A. 40A:11-24), competitive contracting under the LPCL awards contracts based on a blending of criteria (N.J.S.A. 40A:11-4.4). That blending of criteria is visible in the GEA statute which requires that the, “governing body shall select a licensed electric power supplier or licenses gas supplier, or both, based on the most advantageous proposal, price and other factors considered.” [emphasis added] N.J.S.A. 48:3-94(b)(2). In sum, while the GEA statute uses the term “public bidding,” from a LPCL perspective, it really provides for competitive contracting.

² See also passages of the Faulkner Act which give mayors the authority to sign contracts after they have been approved by the council. N.J.S.A. 40:69A-40(g).

B. Recommendations

1. A revision of N.J.A.C. 14:4-6.8(a) stating that contracts awarded to TPSs under the GEA program are subject to competitive bidding requirements of N.J.S.A. 40A:11-4.1 to 4.5 and N.J.A.C. 5:34-4.1 to 4.4;
2. Because the LPCL only allows for the mayor to sign contracts on behalf of a municipality after they have been awarded by the governing body, the League suggests that any need to explicitly state that the signing of a contract cannot be delegated is confusing, duplicitous and unnecessary.

Conclusion

As stated above the League is very appreciative of the hard work that BPU staff is putting into updating the GEA regulations. We also appreciate the time and effort that the consultants have put in to make sure that these regulations are a practical means of promoting GEA programs across the state.

If there are any questions regarding this submission, please feel free to contact my office.

Very Truly Yours,



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