

Add a New Rule 4 CSR 240-XX

~~SUBCHAPTER 34.~~ COMPETITIVE PROCUREMENT

Section

~~165:35-34-1.~~ Purpose of this Subchapter

~~165:35-34-2.~~ Confidential Information

~~165:35-34-3.~~ RFP Competitive Bidding Procurement Process

[Source: Added at 23 Ok Reg 1666, eff 7-1-06; Amended at 24 Ok Reg 1827, eff 7-1-07, Amended at 25 Ok Reg 1566, eff 7-1-08]

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OAC 165:35 _____ CORPORATION COMMISSION

(1) ~~165:35-34-1.~~ Purpose of this Rule Subchapter

(a) This Rule Subchapter establishes a fair, just, and reasonable process that best serves the public interest of all electricity consumers and that will complement and improve the state's economic growth by, among other things, making the most efficient use of Missouri's Oklahoma's coal, natural resources gas, and power generation and transmission assets and furthers the policy of the Commission that a competitive procurement process is among the most effective means to achieve these objectives. All utilities shall employ a competitive bidding process when purchasing long-term electric generation or long-term fuel supply for self-generation of electricity. The competitive bidding process shall be open to Commission scrutiny, as are other regulated utility practices. The provisions of this Rule Subchapter must be followed unless the utility obtains a waiver from the Commission for good cause shown, pursuant to 165:35-34-3(e).

(b) It is the intent of the Commission to create an open, transparent, fair and nondiscriminatory competitive bidding process for the utility to meet its needs. It should not be construed that this Rule Subchapter absolves or relieves any utility or competitive bidder from any duty prescribed by the laws of the State of Missouri Oklahoma, or the United States including, but not limited to, the federal Public Utility Regulatory Policies Act (Public Law 95-617, as amended) and any other state or federal law regarding contractual rights and obligations, antitrust enforcement or liability, or laws against improper restraint of trade or "takings" of property.

(c) This Rule Subchapter also establishes reasonable standards of conduct for transactions between utilities and their affiliates and standards for transactions between utilities and competitive bidders conducting business within the State of Missouri, Oklahoma.

In addition to this Rule, utilities and their affiliates must comply with 4 CSR 240-20.015.

~~(d) This Subchapter shall not be applicable to a utility with no generation plant within the boundaries of Oklahoma and less than ten percent of its customers within the state.~~

~~(ed)~~ Wherever Independent Evaluator is referred to in this Rule, subchapter, it is understood that particular reference is only applicable if an Independent Evaluator has been retained by the Commission.

~~[Source: Added at 23 Ok Reg 1668, eff 7-1-06, Amended at 25 Ok Reg 1568, eff 7-1-08]~~

165:35-34-2. Confidential Information

~~(a) A person or entity may file a motion with the Commission for an order to protect confidential information pursuant to 51 O.S., Section 24A.22.~~

~~(b) Bids submitted in a competitive bidding process and the resulting contracts shall be considered confidential information. Such bidding documents and contracts shall be available for review subject to a protective order issued by the Commission except that such protective order may limit access to appropriate non-competitive representatives such as lawyers and consultants, of bidders participating in the RFP, so that such persons may review the details of all the bids, the bid process and the bid evaluation related materials. The Commission may determine, on a case-by-case basis, that~~

~~certain information about the winning bid and resulting contract shall be publicly disclosed so long as such disclosure does not reveal confidential information.~~

~~(c) Pending a determination by the Commission regarding any protective order, the person or entity seeking the protective order, the Commission, the Attorney General and the Independent Evaluator may, at their option, review the information claimed to be confidential at a mutually agreed upon location.~~

[Source: ~~Added at 23 Ok Reg 1668, eff 7-1-06, Amended at 25 Ok Reg 1569, eff 7-1-08~~]

(2) 165:35-34-3: RFP Competitive Bidding Procurement Process

(a) Competitive Bidding Structure and Process Guidelines

(1) The soliciting utility shall notify the Commission of its intent to engage in a competitive bidding process at least 45 days before or as soon as reasonably practicable but not less than 30 days before drafting a request for proposal ("RFP"), as required by subsection (4) below.

(2) The soliciting utility shall prepare the initial draft of the RFP documents, including but not limited to RFP procedures, and a pro forma power purchase agreement that, to the maximum extent practicable, utilizes industry standard contractual terms and contains all expected material terms and conditions and a solicitation schedule (collectively, the "RFP Document").

(3) In addition to the information required by (1) of this Section, the RFP and RFP Document, at a minimum, shall identify clearly:

(A) Term;

(B) Amount of megawatts, if applicable, and types of products being solicited;

(C) All price and non-price evaluation factors to be considered;

(D) Respective weight for each price and non-price evaluation factor; and

(E) Utility's preliminary analysis of transmission availability and the utility's plan for evaluation of transmission availability for each proposal received, including, but not limited to:

(i) Description of the role of transmission analysis to be conducted by the utility in the bid evaluation process. This analysis should use publicly available tools provided by the controlling entity, such as the Southwest Power Pool Scenario Analyzer, and

(ii) Role of the transmission analysis to be conducted by ~~the controlling entity, currently the Southwest Power Pool,~~ any involved RTO in the bid evaluation process.

(4) The draft of the RFP Document, supporting documentation, and bid evaluation procedures shall be provided to the Commission, Attorney General~~Public Counsel~~, and Independent Evaluator for review prior to the planned issue date of the RFP. After receiving input from all interested parties, which may include the Commission, ~~Attorney General~~Public Counsel, and Independent Evaluator, and holding a technical conference regarding the bidding process, the soliciting utility shall post the draft RFP Document and comments of the Commission, ~~Attorney General~~Public Counsel, and Independent Evaluator, on the soliciting utility's website or electronic bulletin

board, or by some other

publicly accessible method and solicit comments from interested parties concerning the draft RFP Document. The soliciting utility will post the final RFP Document on its website or electronic bulletin board, or by other publicly accessible method. RFPs shall include any involved RTO's ~~the Southwest Power Pool's~~ time requirements to conduct transmission analyses, i.e. the aggregate study.

(b) Independent Evaluator

(1) The Commission may, at its discretion, retain and arrange compensation for 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 utility's 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.

(2) The Independent Evaluator will report to the Commission and the ~~Attorney General~~ Public Counsel.

(3) 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.

(4) 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.

(c) Affiliate Bidders' Requirements

(1) 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.

(2) 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.

(3) 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.

(d) Evaluation of Responses to the RFP

(1) The evaluation of the responses to the RFP will proceed as follows:

(A) The soliciting utility will evaluate all timely submitted bids to determine the lowest reasonable cost for long-term reliable power or reliable long-term fuel sought that minimizes ratepayer cost, including but not limited to charges for or costs relating to long-term fuel supply, long-term fuel transport, long-term fuel storage, long-term fuel processing, or increased cost of capital, consistent with the principles and procedures contained in this Rule Subchapter and in the utility's resource plan and associated procurement plans.

(B) The Commission, ~~Attorney General~~ Public Counsel, and Independent Evaluator will be included in the evaluation of all bids submitted to the soliciting utility. The soliciting utility shall include within the RFP the time and place for the opening of the bids so that the Commission, ~~Attorney~~

~~General~~Public Counsel and the Independent Evaluator may attend and monitor the opening of bids. Bids shall be opened by the soliciting utility at the time and place so indicated in the RFP whether or not any or all of those parties are in attendance.

(2) All bids shall be evaluated on the basis of the bidder's final best offer. No bidder shall be permitted to unilaterally submit a refreshed bid unless all bidders are given a meaningful opportunity to submit a refreshed bid as a result of some material, documented change. The Independent Evaluator shall be charged with evaluating any such changes and ensuring that the changes are substantive and not an attempt to influence the final selection process in favor of a particular bidder.

(3) Should any bid be unclear to such extent that the lack of clarity could impact the outcome of the bidding, the soliciting utility, Commission, ~~Attorney General~~Public Counsel, or Independent Evaluator may request further information from any bidder regarding its bid, provided, any such communication between or among the soliciting utility, Commission, ~~Attorney General~~Public Counsel, or Independent Evaluator and bidder should be conducted through an open process in which the utility, Independent Evaluator, Commission and ~~Attorney General~~Public Counsel are given adequate notice and an opportunity to attend.

(4) The Commission, ~~Attorney General~~Public Counsel and Independent Evaluator, as well as the soliciting utility, may rely on an involved RTO the Southwest Power Pool to conduct all necessary transmission analyses concerning bids received. ~~Southwest Power Pool~~ RTO analyses provided to the Commission, ~~Attorney General~~Public Counsel, or Independent Evaluator shall be equivalent in quality and content to that provided to the soliciting utility. No bidder, including any bidder that is an affiliate (including the Bid Team) of the soliciting

utility, shall communicate with the RTO ~~Southwest Power Pool~~ transmission group during the course of the competitive bidding process regarding any aspect of the RFP or process.

(5) In conducting the evaluation of the responses, the soliciting utility shall not:

(A) Waive or otherwise modify any evaluation factor or evaluation weight for any bidder;

(B) Add any adjustments on the basis of expected effects on the utility's cost of capital if not already contained in the RFP;

(C) Impose any penalty on the price of purchased power; or

(D) Include any discount for utility self-generation on the basis of reliability as part of the utility's resource mix.

(e) Prior to a utility taking long-term procurement action other than by means of the competitive procurement process set forth in this Rule, Subchapter, such utility must obtain shall seek a waiver for good cause shown of all or any part pad of these competitive bidding rules by filing a cause with from the Commission.

(f) The utility shall promptly submit its decision concerning the successful bid with the Commission and mail copies of such submission to all bidders, the Independent Evaluator, and the ~~Attorney General~~ Public Counsel. Included within that mailing, the utility shall provide the non-winning bidders the rationale and analysis used for the selection of the winning bid.

(1) Any unsuccessful bidder, the Independent Evaluator, or the ~~Attorney General~~ Public Counsel shall have fifteen (15) days following submission of the successful bid decision with the Commission to file with the Commission a complaint challenging the decision as not meeting the criteria for decision specified in this subchapter or waiver previously obtained pursuant to 165:35-34-3(e) and the RFP document and bid evaluation procedures developed pursuant to 165:35-34-3(a).

(2) In the event of the filing of such a complaint, after notice to all bidders and hearing, the Commission shall determine whether the utility's decision reveals either a clear departure from the criteria stated in these rules or previously obtained waiver, the RFP Document and bid evaluation procedures for decision or is erroneous, in which event the utility shall be required immediately to rebid, in accordance with this Rule, Subchapter, the items which were the subject of such determination.

(g) Upon determination of the successful bidder, the utility and successful bidder shall promptly proceed to finalize contracts necessary to implement the bid.

(1) The contract shall contain appropriate guarantees, as set by the Commission, regarding the reliability of services.

(2) At the request of either party and upon notice and hearing, the Commission shall have authority to determine any disputes between the parties as to terms incidental to the bid. All matters to be determined by the Commission under this provision shall be heard on an expedited basis and a decision rendered thereon within thirty (30) days from filing.

[Source: Added at 23 Ok Reg 1669, eff 7-1-06; Amended at 24 Ok Reg 1827, eff 7-1-07, Amended at 25 Ok Reg 1569, eff 7-1-08]

