

**FINANCIAL OVERSIGHT AND MANAGEMENT BOARD
FOR PUERTO RICO**



José B. Carrión III
Chair

Members

*Andrew G. Biggs
Carlos M. García
Arthur J. González
José R. González
Ana J. Matosantos
David A. Skeel, Jr.*

Natalie A. Jaresko
Executive Director

BY ELECTRONIC MAIL

May 23, 2018

Walter Higgins
Executive Director
Puerto Rico Electric Power Authority

**Re: MasTec North America, Inc
Power Restoration Contract – Observations, Feedback not Required**

Dear Mr. Higgins:

In accordance with the contract review policy of the Financial Oversight and Management Board for Puerto Rico (“FOMB”) established pursuant to Section 204(b)(2) of PROMESA, we have reviewed the form of the proposed contract between the Puerto Rico Electric Power Authority (“PREPA”) and MasTec North America, Inc., (“MasTec” or the “Contractor”) which has been submitted to the FOMB for its evaluation (the “Proposed Contract”).

After reviewing the Proposed Contract, the FOMB concludes “Observations, Feedback not Required” because the FOMB has identified areas of risk that do not require feedback from PREPA. It is PREPA’s responsibility to take corrective action based on the observations provided and proceed with the Proposed Contract as it sees fit. Prior to execution of the Proposed Contract, PREPA shall include therein the provisions required by P.R. Laws Ann. tit. 3, § 8615(c) to (f) (inclusive) and P.R. Laws Ann. tit. 3, § 8615(h). Additional observations are set forth in the annex attached hereto.

Please note that our review is solely limited to the compliance of the Proposed Contract with the applicable fiscal plan and the other matters indicated in the annex. The review performed by the FOMB does not cover (i) whether the procurement activities related to the selection of the contractors complied with all the applicable rules and regulations, or (ii) any requirements under the Proposed Contract applicable to the contractors and their compliance therewith. Any material change to the Proposed Contract must be submitted beforehand to the FOMB for its review.

Please note that this letter and its annex do not constitute legal advice nor guarantee that the Proposed Contract complies with all applicable laws, rules, and regulations. This letter is delivered as of the date hereof and we reserve the right to provide additional observations and modify this letter based on information not available when the review was conducted.

This letter is issued only to PREPA and solely with respect to the Proposed Contract.

Sincerely,

A handwritten signature in black ink, appearing to read "Jaime A. El Koury". The signature is stylized with a large initial "J" and a long, sweeping underline.

Jaime A. El Koury
General Counsel

CC: Mr. Gerardo Portela Franco

Contract between the Puerto Rico Electric Power Authority and MasTec North America, Inc. Observations

The Financial Oversight and Management Board for Puerto Rico established a contract review policy pursuant to section 204(b)(2) of the Puerto Rico Oversight, Management, and Economic Stability Act. Accordingly, there was a review of documents submitted by the Government related to the agreements made between the Puerto Rico Electric Power Authority (“PREPA”) and MasTec North America, Inc. (“MasTec” or “Contractor”) for the restoration services at various locations in PREPA’s service area. Under the proposed contract, MasTec shall perform the public work and shall provide the labor, supervision, tools, equipment and materials.

Under the Proposed Contract, The Contractor shall provide all labor, supervision, equipment and materials (except as otherwise noted) necessary to complete the restoration work. The Proposed Contract is to be executed by PREPA and MasTec. After the initial review, there are the following observations:

i. Fiscal Plan Alignment

There is clear strategic overlap between the desired outcomes of this contract, and the goals of PREPA’s Fiscal Plan. This contract arranges for electrical construction services related to Restoration works of electrical installations, e.g. Transmission and Distribution lines, Electrical substations, and provides power restoration services for PREPA. The contract does not have a direct financial impact on the Fiscal Plan so long as the costs to fund this project remain fully FEMA reimbursable. Accordingly, the reimbursement process should be monitored, and if there is less than 100% reimbursement, an analysis on impact on the budget must be carried out.

ii. Competitive and transparent procurement and tender process and consistent with relevant federal regulations

The observations are based on 2 CFR 200 “Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards”, specifically §200.318 “General procurement standards,” and other applicable FEMA documents:

| | General Requirements | Policy Reference | Observations |
|---|---|---|---|
| 1 | Has the Cost Estimate been provided and was the cost estimate prepared prior to the bids being received? | 2 CFR 200.323(a) "The non-Federal entity must perform a cost or price analysis in connection with every procurement action in excess of the Simplified Acquisition Threshold including contract modifications. The method and degree of analysis is dependent on the facts surrounding the particular procurement situation, but as a starting point, the non-Federal entity must make independent estimates before receiving bids or proposals." | It is unclear if a cost estimate was prepared prior to the bids being received, as one was not provided. The cover letter to the OCPC does state that the cost estimate is based on burn rates of contractors currently working on PREPA's restoration of electric grid. However, it is not clear from the documentation provided how much work remains, how the amount of effort anticipated to arrive at the \$700M contract was estimated, nor how the remaining work effort is being divided between the three contractors that have been recommended to receive contracts. Document reference: PREPA's Chief Finance Officer Letter for OCPC (MasTec Contract).pdf |
| 2 | Has the Confirmation that | 2 CFR Part 200 Appendix II(H) | It does not appear that evidence of a debarment check has been provided. However, per the cover |

| | General Requirements | Policy Reference | Observations |
|-----------------|--|---|--|
| | <p>bidders considered for award are not "debarred" been provided?</p> | <p>"A contract award (see 2 CFR 180.220) must not be made to parties listed on the government wide Excluded Parties List System in the System for Award Management (SAM), in accordance with the OMB guidelines at 2 CFR 180 that implement Executive Orders 12549 (3 CFR Part 1986 Comp., p. 189) and 12689 (3 CFR Part 1989 Comp., p. 235), "Debarment and Suspension."'"</p> | <p>letter to the OCPC, it is indicated that PREPA should verify and retain a copy of debarment or suspension status with SAM.gov.</p> <p>A clause regarding debarment and suspension is included in the draft contract provided.</p> <p>PREPA should complete the check and retain the documentation to support it was completed before entering into the contract.</p> <p>Document reference: PREPA's Chief Finance Officer Letter for OCPC (MasTec Contract).pdf, Contract Draft RFP Restoration Services RFP77844 02 16 18.doc</p> |
| <p>3</p> | <p>Does the Recommendation to Award appear to accurately reflect the results of the technical evaluation results?</p> | | <p>It does appear that, overall, the elimination of proposals as described in the Recommendation to Award reconciles with the scoring sheets and evaluation criteria provided. However, minor differences appear to exist between the evaluation data (scoring sheets) and the information within the RTA. These do not appear to impact the outcome or recommendation to award.</p> <p>PREPA should consider reconciling and retaining the final versión in PREPA's procurement files.</p> <p>Document reference: Appendix_D_Evaluation_Criteria_02.16.18.pdf, Final Proposed grading table.pdf, Initial Grading Tables.pdf, Proposed evaluation and scoring records.pdf, Recent Review of final grading table with fluor's BAFO (no change in result).pdf, Proposed initial evaluation after all 5 companies.pdf, Memorando de Seleccio_n firmado por Comite_n Evaluador RFP77844.pdf</p> |
| <p>4</p> | <p>If the Contract is structured as time and materials, has a determination been made that no other contract is suitable and does the contract include a ceiling price that the contractor exceeds at its own risk?</p> | <p>2 CFR 200.318(j)(1) "The non-Federal entity may use a time and materials type contract only after a determination that no other contract is suitable and if the contract includes a ceiling price that the contractor exceeds at its own risk."</p> | <p>It does not appear that a justification for the time and materials type of contract has been included. The contract does include a NTE amount of \$700M, however it is unclear how this amount was derived.</p> <p>Document reference: Contract Draft RFP Restoration Services RFP77844 02 16 18.doc</p> |

iii. Commercial terms review

There are two main issues that arise in the context of this contract: 1) The scope of the work is not clearly defined or quantified 2) There is a large anticipated value of work, all of which is being given to one contractor.

On the first issue, the structure of the agreement is such that PREPA will be making contract releases as the work gets defined. Therefore, it is not possible to assess the reasonableness or risk level of the anticipated contract value, shown at \$700M. The rigor and detail of the cost evaluation received for the work on distribution and transmission lines is not sufficient for the size (over \$1.4-\$1.7B in total across contractors), and does not provide adequate detail on the methodology behind this estimate. It also does not explain how the work is broken down by each contractor (i.e., Cobra vs. MasTec vs. a third contractor).

Considering that the Scope of work will be defined under individual Contract Releases, it is necessary that each one of these releases address the following points:

- Clear and quantified scope of work and pricing.
- Clear definition of Contractor's and PREPA's obligations.
- Schedule to perform the work.
- Progress reporting requirements.
- Start-up and Commissioning requirements, and completion of work definition.

On the second issue, because of the large anticipated volume of work (\$700M), having a single contractor undertake a contract of this size (without reference to the capabilities of the firm selected) increases overall risk. PREPA should look into the possibility of getting firm prices for Contract Releases for which the scope of work can be clearly defined, in order to reduce the risk of cost and schedule overruns. Contracts should be closely monitored for value assurance.

Observations on compliance with applicable Contracting Laws and Regulations

The Agreement was evaluated to confirm compliance with applicable Puerto Rico government contracting laws and regulations. Following are some key observations applicable to each contract:

- The contract does not state its name nor its representative as per P.R. LAWS ANN. tit. 3, § 8613(c). Neither the recital nor the signature page of the Proposed Contract contained the Contractor's name or its representative.
- The Contractor's articles of incorporation were not submitted as per P.R. LAWS ANN. tit. 3, § 8613(d). The Contractor is not a corporation. Thus, it does not have to comply with this section requirement. Nevertheless, PREPA shall require from Contractor its Operating Agreement and submit the same to FOMB for review.
- The contract does not state the Contractor's employer social security number as per P.R. LAWS ANN. tit. 3, § 8613(e). However, the vendor registration form as well as the sworn statements attached for review does have the Contractor's employer social security number.
- The contract does not indicate the dates of its execution and effectiveness as per P.R. LAWS ANN. tit. 3, § 8613(f). However, Sec. 2.7.11. of Exhibit 1 to the RFP states that the Proposed Contract shall be effective the date of its execution and it would last for one (1) year with an option to be extended for one (1) more year. This information was not inserted in Proposed Contract Template.

- The contract does not state the maximum amount to be paid by the government entity as per P.R. LAWS ANN. tit. 3, § 8613(h). However, Resolution No. 4580 states that the contract amount will be for \$300M, but that amount has not been inserted in the Proposed Contract. Moreover, multiple documents report a contract value of \$125M, but the new estimate is to be \$700M. The misstated documents need to be corrected before moving forward.
- The contract does not comply with the Standard Contracting Act as per ACT NO. 218-2010, P.R. LAWS ANN. tit. 22, §61 et. seq, & Regulation #7998. In reviewing the RFP Package, PREPA did not insert the “Uniform General Conditions for Public Work Contract in Puerto Rico”, as they were approved into law as per Act. No. 131-2010. Since the purpose of Act No. 218-2010 is to safeguard the general wellbeing and fiscal resources of the people of Puerto Rico, PREPA should consider utilizing them, and making them part of the contract documents.
- The contract does not include a clause stating that certifications issued by the Treasury Department, one on the absence of tax debts or the existence of a payment plan and the other certifying that income tax returns have been filed in the last five years, were attached to the contract or that the party had been granted a reasonable term to obtain it as per P.R. LAWS ANN. tit. 3, § 8615(a)(1). However, the Proposed Contract does contain a clause, whereby the Contractor acknowledged its obligation to provide the necessary documentation.
- The contract does not include a clause stating that the certification from the Municipal Revenues Collection Center on the absence of any tax debt or the existence of a payment plan was attached to the contract or that the party had been granted a reasonable term to obtain it as per P.R. LAWS ANN. tit. 3, § 8615(a)(2). However, the Proposed Contract does contain a clause, whereby the Contractor acknowledged its obligation to provide Municipal Collection Center Certification, but the same was not in the package provided for review.
- The contract does not include a clause stating that a certification from the Department of Labor and Human Resources on the payment of unemployment insurance, temporary disability, or social security, as applicable, was attached to the contract or that the party had been granted a reasonable term to obtain it as per P.R. LAWS ANN. tit. 3, § 8615(a)(3). However, the Proposed Contract does contain a clause, whereby the Contractor will certify and warrants that it has made all payments required under P.R. Laws Ann. titl 3, §8615(a)(3). Furthermore, the sworn statement “Non Conflict of Interest” certifies the aforesaid.
- PREPA did not inform the Contractors about the FOMB Board’s policy of reviewing contracts as per FOMB Board Policy Review of Contracts (“BPRC”). The recital does not indicate if the Contractors were informed by PREPA about the FOMB Board’s policy.
- The Proposed Contract does not contain a clause certifying that no employee may execute a contract in which any of its officers or employees have an economic interest in the contract as required per P.R. Laws Ann. tit. 3, § 8615(c). It should be noted that PREPA has confirmed that this clause will be included prior to execution.
- The Proposed Contract does not contain a clause certifying that no executive agency may execute a contract in which any of its officers or employees have an economic interest in the contract as required per P.R. Laws Ann. tit. 3, § 8615(d). It should be noted that PREPA has confirmed that this clause will be included prior to execution.

- The Proposed Contract does not contain a clause certifying that no public officer or employee is a party or have any interest in profits as required per P.R. LAWS ANN. Tit. 3, § 8615(e). It should be noted that PREPA has confirmed that this clause will be included prior to execution.
- The Proposed Contract does not contain a clause certifying that no public officer or employee who has the power to approve or authorize has any economic interest in it as required per P.R. LAWS ANN. Tit. 3, § 8615(f). It should be noted that PREPA has confirmed that this clause will be included prior to execution.
- The Proposed Contract does not appear to include a clause certifying that the executive agency is not executing a contract with or in benefit of an ex-public official as required per P.R. LAWS ANN. Tit. 3, § 8615(h). It should be noted that PREPA has confirmed that this clause will be included prior to execution.