

TWELFTH NORTHERN MARIANAS COMMONWEALTH LEGISLATURE

FIRST REGULAR SESSION, 2000

PUBLIC LAW NO. 12-1

SENATE BILL

NO. 12-19

AN ACT

To state a public policy that construction of an 80 megawatt power plant facility by phases, beginning with immediate installation of 60 megawatts of generating capacity, is in the best interest of the Commonwealth; to find and declare that phased construction of 80 megawatts of generating capacity is consistent with the Request for Proposals (RFP) under which proposers recently competed for a contract for a new power plant on Saipan; to provide a time period during which proposers may stand by their existing proposals for purposes of project award; to expressly authorize project award and negotiation of a contract based on existing proposals; and for other purposes.

**BE IT ENACTED BY THE TWELFTH NORTHERN MARIANAS
COMMONWEALTH LEGISLATURE:**

Section 1. Short Title. This Act may be cited as the “Energy Sufficiency Assurance Act of 2000.”

Section 2. Findings. The Legislature finds that the Commonwealth Utilities Corporation, at considerable cost, underwent a lengthy Request for Proposals (RFP) process for the construction of a new 80 megawatt electrical power generating facility for the island of Saipan under the build, operate, transfer concept. Until recently, CUC consistently maintained that there is an urgent and critical need for this capacity. Citing the extended economic downturn, however, CUC changed course and proposed to downsize the new plant. CUC then commissioned their consultants, Burns & McDonnell, in what was in effect a \$100,000 sole source procurement, to do a Power Supply Options Evaluation comparing a 60 megawatt facility proposed by CUC with immediate construction of an 80 megawatt

facility as originally envisioned under the RFP. Predictably, this comparison of apples and oranges found that 60 megawatts built right now would cost less than 80 megawatts built right now. Application of simple common sense, of course, would have provided that answer, and the real question is how CUC's 60 megawatt proposal compares with phased construction of existing proposals, beginning with 60 megawatts of installed capacity.

On January 13, 2000, the CUC Board of Directors collapsed the existing RFP and ordered that the process begin anew to contract immediate construction of a 60 megawatt plant. The motion before the Board asserted that this was "as recommended" by Burns & McDonnell. In point of fact, the Burns & McDonnell report made no such recommendation. What the report actually recommended was:

- (1) Install 60 MW of net generation capacity as soon as possible;
- (2) That CUC "advance or delay future unit additions to more closely match the load growth;"
- (3) That "CUC should *investigate the options of reducing the amount of generation procured under RFP 97-0025* or make plans for a solicitation for 60 MW to be installed as soon as possible" (emphasis added);
- (4) That "CUC should adopt a flexible generation expansion plan . . .;"
- (5) That only low speed generator units should be used; and
- (6) That the planned Kagman and San Vicente substations be delayed until load increases in the area.

The report also specifically stated that "[t]he legal and political issues which the CUC must operate within are outside our expertise and should be assessed by CUC and its legal advisors in light of the . . . recommendation[s]."

Moreover, the Burns & McDonnell report expressly concluded that CUC should cancel the existing RFP only if "no opportunity exists to modify the current proposals *and* CUC can finance the direct purchase of generation." Neither of these conditions were met prior to the Board's action, and neither have been satisfied to this day. Clearly opportunity to modify the current proposals *did and does* exist. The leading proposer has made this clear. Legislation to provide for just this sort of phasing was already under consideration by

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the Legislature and had in fact been passed by the Senate. At the Board meeting, these facts were summarily dismissed with the disingenuous argument that the legislation was not yet law. Board members stood on a contention by legal counsel that under the present state of the law, awarding a contract conforming with the Burns & McDonnell recommendations under the existing RFP was, from a legal standpoint, the “high risk” option, despite the fact all such risk could be entirely eliminated by the legislation already under consideration. With the help of the Legislature, it would of course not be a “high risk” option at all.

Likewise, neither had CUC demonstrated the ability to finance the direct purchase of generation prior to the Board’s action, and has not to this day. Indeed, it was only after the Board had voted to cancel the RFP that it then adopted a motion requiring the Executive Director to try to do something about CUC’s problematic balance sheet. Plainly neither of the two conditions Burns & McDonnell had stated for canceling the RFP were met before the Board went ahead and did just that. It therefore simply is not the case that the CUC Board acted in accordance with the Burns & McDonnell recommendations.

Further, the manner in which the CUC Board proceeded in its January 13, 2000 meeting raises serious questions about whether Board members exercised the due diligence required of them in performance of their fiduciary duty and about compliance with other requirements of Commonwealth law. One Board member was just sworn in at the meeting and proceeded to participate in the decision. Further, the Board refused to hear public comment until after the vote, despite the presence of a great many interested and concerned persons, and despite the express request of one Board member that public comment be heard. The Open Government Act, 1 CMC § 9904, expressly requires that “[t]he governing body shall afford all interested persons an opportunity to submit data, views, or arguments, in writing, . . . [or orally] on any agenda item.” The purpose of this requirement is plainly defeated by a refusal to accept “data, views, [and] arguments” until after the decision has been made. These irregularities with regard to the January 13, 2000 meeting of the CUC Board clearly expose the actions taken there to legal attack.

The Legislature finds that the action of the CUC Board on January 13, 2000, canceling the RFP was contrary to the public interest. The Legislature rejects the notion that

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Saipan does not need a new 80 megawatt power plant. There can be no doubt about the long-run need for this capacity. The Burns & McDonnell report acknowledges as much. The issue is not the size of the plant but of the proper time frame for adding the new generating capacity. Again, this is what Burns & McDonnell said.

A flexible, phased project will assure that Saipan will have the generating capacity when it needs it. The surest way to stifle or prevent economic development is to fail to have power capacity available when it is needed. Investors cannot come to the Commonwealth if they will not be able to get the power they need. Failing to contract for sufficient generating capacity on grounds of a poor economic prognosis is a sure way to create a self-fulfilling prophecy. In addition, the existing generators are aging, as Burns & McDonnell expressly found, and will need to be replaced over the long haul. Capacity not needed to support economic growth is needed to replacing existing generators and increase efficiency. Burns & McDonnell call for the immediate retirement of the generators in Plants II, III, and IV, to reduce costs. Collapse of the RFP provides no meaningful benefit and can only lead to substantially increased cost and further extended delay of this important project.

Section 3. Purpose. It is the purpose of this Act to declare public policy as to the amount of new generation capacity that is in the best interest of the Commonwealth to support economic development and realize the most efficient infrastructure base possible. It is also the purpose of this Act to eliminate any and all legal impediments to proceeding with immediate award based on proposals submitted pursuant to RFP 97-0025 and negotiation of a contract calling for immediate construction of a new power plant containing 60 megawatts of new generation and expandable consistent with the Burns & McDonnell recommendations. This Act is also intended to protect the CUC Board from possible litigation based on irregularities in the January 13, 2000 board meeting, by mooted the decision to cancel the RFP.

Section 4. Public Policy. It is hereby declared to be public policy of the Commonwealth that construction of an 80 megawatt power plant under the build, operate, transfer concept, beginning with immediate installation of 60 megawatts of generating

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capacity, is in the best interests of the Commonwealth and the people of the CNMI, particularly Saipan.

Section 5. Consistency with RFP; No Contest. The Legislature finds and declares that phased construction of 80 megawatts of generating capacity is consistent with the Request for Proposals (RFP) issued by the Commonwealth Utilities Corporation and under which proposers have been competing for a contract for a new power plant on Saipan. Notwithstanding any regulation or other law, no procurement protest or legal challenge may be brought or prosecuted based on a decision to award a contract calling for phased construction or implementation of the project rather than one that does not, or modified in accordance with this Act; neither shall phasing of construction or implementation be considered in any protest or challenge alleging other, additional grounds, absent a showing that such phasing provisions are material to a showing of discrimination or improper motive. Nothing in this section shall be construed as creating any right of action or protest that would not exist in the absence of this section.

Section 6. Option to Extend Duration of Proposals. Every proposer who had an active proposal under RFP 97-0025 before CUC on January 12, 2000, shall, notwithstanding any expiration date stated in such proposal, or in the RFP, or in any other way established by CUC or a proposer, have the opportunity to extend the validity of such proposal and stand by it for purposes of award and negotiation of a contract. Any proposer who does not elect to extend the validity of their proposal in this manner shall be ineligible for award and shall have no cause of action or grounds for protest in connection with any award made based on a proposal so extended. Except as provided in Section 7 of this Act, CUC shall make an award under RFP 97-0025 and this Act within 60 days of the effective date of this Act, absent clear and convincing evidence that such an award would not be in the best interest of the utility. CUC is expressly authorized, consistent with this Act, to award the project and negotiate a contract based on existing proposals under RFP 97-0025.

Section 7. Low Speed Generators Required. CUC shall not make any award based on any proposal that does not provide for low speed generators as recommended by Burns & McDonnell.

