Agenda Date: 10/24/07
Agenda Item: 8C

STATE OF NEW JERSEY

Board of Public Utilities
Two Gateway Center
Newark, NJ 07102
www.nj.gov/bpu/

CLEAN ENERGY

IN THE MATTER OF THE BOROUGH OF HIGHTSTOWN'S POWER PURCHASE AGREEMENT WITH WORLDWATER & POWER CORPORATION	)))))	ORDER DOCKET NO. EO07020089

(SERVICE LIST ATTACHED)

BY THE BOARD:

On December 23, 2005, the Board of Public Utilities' ("Board") Office of Clean Energy ("OCE") received two applications for solar rebates from World Water & Power ("World Water" or "Applicant"), on behalf of the Borough of Hightstown ("Borough" or "Hightstown"). World Water submitted a revised set of applications on January 9, 2006 to correct the installation address. One application sought a rebate incentive of $771,841 for the installation of a 200.93 kW solar photovoltaic system at the Borough's Oak Lane Wastewater Treatment Plant; the other application sought a rebate incentive of $1,620,980 for the installation of a 436.8 kW solar photovoltaic system at the Borough's 156 Bank Street facility (the "Applications"). The OCE staff determined that the applications should be considered pursuant to the procedures for a private sector application. The OCE required a "Signed Letter of Intent to Contract" between customer and installer pursuant to CORE policy, but the Letter of Intent the Applicant submitted did not contain both sets of signatures as required by the CORE policy directive issued May 1, 2005. (CORE Program Update August 17, 2006, page 22 of 24.) The OCE returned the Applications on April 12, 2006 with a letter to Hightstown that indicated a denial for lack of proper signatures.

Applicant World Water contested this denial and subsequently filed an appeal with the Board in August 2006. On February 8, 2007 Applicant filed a Motion for Declaratory Ruling with the Board seeking a determination on the rebate Applications. On May 1, 2007 the Director of the Office of Clean Energy issued a second denial letter to Hightstown and World Water because the CORE Applications lacked a valid contract.

On June 5, 2007 Applicant filed a Notice of Appeal with the Superior Court of New Jersey, Appellate Division. The Board filed a motion for a remand so that the Board could render a Final Agency Action on the Applications. On August 24, 2007 the Appellate Division granted the remand with instructions that the Board make specific findings as to the validity of the contract by October 25, 2007.

This Order serves as the Final Agency Action on the Applications as well as the Board's ruling on the Motion for Declaratory Ruling, consistent with the Appellate Court's remand instructions.

BACKGROUND OF CORE PROGRAM

On February 9, 1999, the Electric Discount and Energy Competition Act, N.J.S.A. 48:3-49 et al. ("EDECA" or "the Act") was signed into law. The Act established requirements to advance energy efficiency and renewable energy in New Jersey through the societal benefits charge ("SBC"), at N.J.S.A. 48:3-60(a)(3). EDECA further empowered the Board to initiate a proceeding and cause to be undertaken a comprehensive resource analysis of energy programs, currently referred to as the comprehensive energy efficiency ("EE") and renewable energy ("RE") resource analysis.

At the conclusion of its first comprehensive EE and RE resource analysis proceeding, the Board issued its initial order, dated March 9, 2001, Docket Nos. EX99050347 et al. ("March 9th Order"). The March 9th Order set funding levels for the years 2001 - 03 and established the programs to be funded. In another order in that docket, issued on the same day, the Board established an Interim Customer-Sited Renewable Energy Program.[1] The program was initially managed by the utilities, but was subsequently transitioned to management by OCE with the assistance of third-party vendors. See I/M/O/ the New Jersey Clean Energy Program—Recommendations for Administration and Fund Management, Dkt. No. EO02120955 (September 11, 2003).

The objective of the CORE program is to support the sustained and orderly development of markets for distributed renewable electric generation in New Jersey. The program offers incentives to New Jersey public utility customers investing in eligible, on-site renewable electricity generation using photovoltaic, wind, biomass, and fuel cell systems. Rebates are offered to make renewable energy investments more cost-effective by offsetting a portion of the initial installation cost as well as a number of market support services, including inspections and the facilitation of registration for renewable energy credits. CORE rebates are not intended to cover the entire system cost; rebates should reduce the installation costs in order to make cost-effective investments available for as wide an array of ratepayers as possible. Rebate levels are calculated on a per site basis and are dictated by the type of applicant and the size of the system installed.

The CORE program serves residential, commercial, institutional and industrial market segments; it, is available to private and public customers in all rate classes. To be eligible for a CORE rebate, an applicant must be a ratepayer of an electric or natural gas utility regulated by the New Jersey Board of Public Utilities. The program provides support for systems that serve to off-set the customer's own on-site electric consumption and do not produce net excess generation from the site on an annual basis. These are typically net-metered systems. Dependent upon the customer's annual electric consumption, CORE program rebates are available to support photovoltaic systems up to 700 kW and non-solar systems of up to 1 MW of rated capacity

APPLICATIONS FOR THE HIGHTSTOWN SOLAR PROJECTS

On December 23, 2005, the Office of Clean Energy received two applications for solar rebates from World Water & Power on behalf of the Borough of Hightstown. In response to its inquiry, the CORE Processing Team received a revised set of applications on or about January 9, 2006

[1] Subsequently re-named the Customer On-Site Renewable Energy (CORE) Program.

which corrected the installation address. One application sought a rebate incentive of $771,841 for the installation of a 200.93 kW system at the Borough's Oak Lane Wastewater Treatment Plant and the other application sought a rebate incentive of $1,620,980 for the installation of a 436.8 kW system at 156 Bank Street (collectively, "the Applications"). Upon receipt, the OCE commenced review of the applications in accord with the CORE guidelines.

Both Applications requested rebates calculated at the higher public sector level; however, the required Public Resolution to Solicit Bids was not submitted. After further inquiry from the OCE, staff learned that the Borough intended to enter into a Purchase Power Agreement with a vendor which would construct and install a photovoltaic solar system, own the rebated equipment, sell the electricity to Hightstown and be eligible for federal tax benefits from the equipment investment. The OCE determined that the applications should be considered pursuant to the procedures for a private sector application and gave verbal approval for World Water and Hightstown to pursue the application process as a private sector application.

Private sector applicants were required to submit a "Signed Letter of Intent to Contract" between customer and installer. (CORE policy May 1, 2005, CORE Program Update August 17, 2006, page 22 of 24.) At that time, the guidelines required a Signed Letter of Intent with a completed application and a valid, executed contract within 90 days of the approval of that completed application. (CORE policy May 1, 2005, CORE Program Update August 17, 2006, page 23 of 24.) In an email from World Water to the OCE dated January 23, 2006, World Water advised that the Borough Clerk would send the Letter of Intent, World Water also attached a draft copy of the contract. The OCE reported that the Letter of Intent did not contain both sets of signatures as required by the CORE policy directive issued May 1, 2005. (CORE Program Update August 17, 2006, page 22 of 24.) After repeated attempts at resolving the issue with World Water, the OCE returned the application on April 12, 2006 with a letter to Hightstown that indicated a denial for lack of proper signatures.

World Water, in subsequent communications with the OCE and Board staff, asserted that the April 12, 2006 denial was improper. In an email dated August 23, 2006, to Lance Miller of the Board, World Water requested a formal appeal of the April 12, 2006 decision to deny the application. On August 28, 2006 World Water submitted a letter to Mr. Miller setting forth a chronicle of facts and dates, asserting that all requirements related to the applications as listed by the program have been satisfied, and requesting appropriate action to rectify the situation. On August 31, 2006, World Water submitted two rebate applications for the Hightstown project which were conditioned on the denial of World Water's appeal.

HIGHTSTOWN'S AGREEMENT WITH WORLD WATER

On March 20, 2006, the Mayor and Council of the Borough of Hightstown adopted Resolution No. 2006-81 to support competitive pricing for alternative energy for Borough facilities. Subsequently a Request for Qualifications/Request for Proposals ("RFQ/RFP") was issued with a due date of May 8, 2006. On May 12, 2006, a Solar Energy Agreement by and between World Water & Power Corporation and the Borough of Hightstown was executed by the parties ("Agreement"). The Agreement is for a term of ten years and provides that World Water will design, install, own, operate and maintain a system for the generation of solar electricity on property owned by the Borough. World Water will sell and the Borough will purchase the electricity generated by the solar system at agreed upon prices set forth in the Agreement. After the ten-year term of the Agreement, the Borough has the option of purchasing the system at fair market value.

Thereafter, the Agreement was submitted to the OCE staff. The Office of Clean Energy contacted the Division of Local Government Services, New Jersey Department of Community

Affairs ("DCA") for assistance in determining whether the Agreement was the product of a process consistent with the requirements of the Local Public Contracts Law ("LPCL"), N.J.S.A. 40A: 11-1 et seq. In an email dated June 29, 2006, Marc Pfeiffer, Deputy Director of the New Jersey Division of Local Government Services advised Michael Winka, Director of the Office of Clean Energy that DCA had "some concerns."

Upon learning that DCA had concerns about the Agreement, World Water retained the law firm of Potter and Dickson ("Counsel"). In a letter from Counsel dated November 27, 2006, to Marc Pfeiffer, Applicant contends that the Agreement between Hightstown and World Water falls under the exemptions to the LPCL delineated in N.J.S.A. 40A:11-5(1)(v) and N.J.S.A. 40A:11-15(24). The first cited section of the LPCL, N.J.S.A. 40A:11-5, provides exemptions from the general rule requiring public advertising for bids and bidding for all local public contracts. The second noted section, N.J.S.A. 40A:11-15, provides for exceptions to the duration limit of 24 consecutive months for local public contracts. The exemptions cited in Applicant's letter apply to "qualified small power production facilit[ies]," which is a term of art defined in 16 U.S.C. § 796(17)(C). Specifically, Applicant states that "[s]ince the [World Water] PV units produce electricity solely from solar radiated energy . . . and it has a generating capacity that is far below the maximum of '80 megawatts,'" the system should qualify for the exception to the 2-year term limit; therefore, it follows that this solar PV system is one of the statutory exceptions in New Jersey to the 2-year durational time limit for public contracts pursuant to the LPCL. N.J.S.A. 40A:11-15(24). Applicant further reasons that "it must also follow that the contract for the purchase of electricity from [World Water] for a term of 10 years is also exempted from the LCPL's [sic] competitive advertisement and bidding procedures."

MOTION FOR DECLARATORY RULING

On February 8, 2007, Applicant filed a Motion for Declaratory Ruling ("Motion") with the Board on behalf of World Water stating that World Water and Hightstown "satisfied all relevant requirements for the receipt of rebates as of the date they were applied for." In its Motion, World Water requested a declaration from the Board that (1) no missing signatures justified withholding approval of the rebates, (2) no outstanding or unanswered legal problems encumbered the contract between Hightstown and World Water, and (3) World Water receive a rebate amounting to $1,856,484.80.

MAY 1, 2007 DENIAL

Following the Motion there was extensive communication among the OCE and its counsel in the Division of Law, the DCA, and counsel for the Applicant concerning the applicability of the LPCL to the Hightstown-World Water Agreement and World Water's status as Qualified Small Power Production Facility ("QF") pursuant to 16 U.S.C. § 796. On April 6, 2007, during this course of communication about World Water's status as a Qualifying Facility ("QF"), World Water filed a Notice of Self-Certification with the Federal Energy Regulatory Commission ("FERC"): "Certification of Qualifying Facility Status For An Existing Or A Proposed Small Power Production Or Cogeneration Facility."

On May 1, 2007, Michael Winka, Director of the OCE, sent a letter to Hightstown and World Water informing them that their CORE rebate Application had been denied for lack of a valid customer contract. The letter stated that, "[u]pon review of this matter[,] the Office of Clean Energy has formed the opinion that the bidding process giving rise to this contract does not appear to meet the requirements set forth in N.J.S.A. 40A:11-1 et seq. Nor do any of the exceptions to the aforementioned bidding requirements . . . appear to apply." In a letter to the Board, dated May 9, 2007, Applicant stated that the May 1, 2007 denial letter was not a

substitute for a determination by the Board on the February 8, 2007 Motion for a Declaratory Ruling.

APPEAL TO NEW JERSEY SUPERIOR COURT, APPELLATE DIVISION

On June 5, 2007, World Water filed a Notice of Appeal to the New Jersey Superior Court, Appellate Division. The Notice of Appeal asserted, among other issues, that "the Board of Public Utilities . . . of the State of New Jersey has failed to respond to, hold hearing upon, grant or deny or act upon the 'Motion for Declaratory Ruling' which was filed by World Water & Power Corp . . . on February 8, 2007, pursuant to the Administrative Procedure Act ('APA'), N.J.S.A. 52:14-8 [sic], seeking an emergent determination of its rights under the Clean Energy Program to receive rebates for the installation of a solar photovoltaic ('PV') system." On July 11, 2007, the Board filed a Motion for Remand, because the Board had not issued a final decision as to the issues presented.

On July 30, 2007, Judge King conducted a conference with the parties. On August 2, 2007, Judge King issued an Order of Limited Remand in which he strongly suggested that, if remand is granted, "the remand render very specific instructions to control the timing of the remand so that the State must make specific and prompt rulings on the validity of the contract and the precise reasons for the rejection of the appellant's application, if it is rejected." Thereafter, on August 24, 2007, the full panel granted the motion for remand and ordered that, "the [Board] must make specific findings as to validity of the contract and the reasons for the rejection of appellant's application. [And further ordered that] the remand must be completed no later than October 25, 2007."

FURTHER SUBMISSIONS BY APPLICANT

In a letter dated August 8, 2007, World Water provided counsel to the Board a detailed chronology of the contested matter with 17 attachments beginning with the December 23, 2005 Applications and concluding with Applicant's letter to the Board's Secretary dated April 25, 2007 in furtherance of the February 8, 2007 Motion for Declaratory Ruling. Applicant urges in its August 8th letter that "the rebate application must be approved 'nunc pro tunc' at the rebate levels then in effect prior to or contemporaneous with the properly filed rebate application on December 23, 2005."

In a letter dated September 26, 2007 counsel for the Applicant advises that he now represents Hightstown in addition to World Water, urges the Board to promptly approve the rebate, and proposes a procedure for resolution of the long-contested matter. With regard to the first denial letter, Applicant "assume[s] that this denial letter is not operable." Nevertheless, Applicant contends that the lack of signatures was "purported." "No explanation was given in that letter, and none was received thereafter – despite numerous telephoned and emailed requests – for clarification as to what signature was missing." Ultimately, World Water and Hightstown argue that the rebate application shows that it was appropriately signed by a representative for Hightstown.

By letter dated October 18, 2007, the Borough clerk submitted a Resolution adopted by the Borough on October 16, 2007 ("Resolution"), which called upon the Board to approve the December 2005 CORE rebate application. The Resolution states that, "on December 23, 2005, the Borough of Hightstown . . . submitt[ed] a complete rebate application to install a solar PV project on certain municipal buildings and properties." Furthermore, the Resolution asserts that Hightstown "engaged in open competitive solicitation among potential solar PV developers to install and operate such a solar electric PV system." Therefore, Hightstown called upon the Board to approve the rebate application dated December 23, 2005. The Borough also

requested an opportunity to make a presentation to the Board at its October 24, 2007 Agenda Meeting.

DISCUSSION AND FINDINGS

As a preliminary matter, the Board has heard the request of Counsel for oral argument and the Borough's request for an opportunity to make a presentation to the Board. The Board HEREBY DENIES these requests. The Uniform Administrative Procedure Rules provide that "[a]ll motions in writing shall be submitted for dispotion on the papers unless oral argument is directed by the judge." N.J.A.C. 1:1-12.2(e). Moreover, as referenced above, there have been numerous submissions by the Applicant and the Board has carefully considered all submissions and FINDS that oral argument is not necessary.

THE APRIL 12, 2006 DENIAL

A "Public Resolution to Solicit Bids" is required of public sector applicants in the CORE rebate program (CORE Program Update issued May 1, 2005 currently contained within the CORE Program Update August 17, 2006, page 22 of 24). A "Public Resolution to Solicit Bids" did not accompany the Customer Onsite Renewable Energy Program Rebate Application Forms submitted by World Water on behalf of the Borough of Hightstown on December 23, 2005 nor was it supplied with the revised Rebate Application Forms submitted on January 9, 2006, despite the fact that the Applications requested a rebate calculated at the higher, public sector rebate level. Therefore, the Applications needed further modification.

During a telephone conversation later in January 2006, Scott Hunter, Renewable Energy Program Administrator, learned from Cassandra Kling of World Water that the Hightstown project was the first public sector application proposed to be procured through a Power Purchase Agreement. In the agreement proposed at that time, World Water or some other third party entity would own the rebated equipment and sell the electricity produced to Hightstown. Since this arrangement would enable World Water or a third party partnering entity to seek federal tax benefits for the equipment investment, staff reasoned that the lower CORE rebate available to tax advantaged applicants would be more appropriate for these applications. Staff further determined that these Applications should follow the procedures required of private sector applicants. Ultimately, staff gave a verbal approval for World Water and Hightstown to pursue the application process as a private sector application.

The Board HEREBY FINDS that the determination by the OCE that the Applications submitted by World Water on behalf of Hightstown should be processed consistent with the procedures required of private sector applicants is appropriate, because the beneficiary of the rebate was a private entity capable of benefiting from federal tax incentives for the project. Accordingly, the higher public sector rebate was not required to make the energy investments cost effective.

Private sector applicants are required to submit a "Signed Letter of Intent to Contract" between customer and installer. (CORE policy May 1, 2005, CORE Program Update August 17, 2006, page 22 of 24.) At that time, the guidelines required a Signed Letter of Intent with a completed application and a valid, executed contract within 90 days of the approval of that completed application. (CORE policy May 1, 2005, CORE Program Update August 17, 2006, page 23 of 24.) World Water submitted a Letter of Intent to Contract to the OCE dated January 23, 2006. However, the OCE reported that the Letter of Intent did not contain both sets of signatures as required by the CORE policy directive issued May 1, 2005. (CORE Program Update August 17, 2006, page 22 of 24.) The OCE returned the application on April 12, 2006 with a letter to Hightstown that indicated a denial for lack of proper signatures.

The Board HEREBY FINDS that the April 12, 2006 denial of the Applications submitted by World Water on behalf of the Borough of Hightstown was consistent with the CORE policy in effect at that time. Moreover, the Board notes that it would not be possible for both the Borough and World Water to execute a "Signed Letter of Intent" as of January 23, 2006 because the Borough had not yet adopted its March 20, 2006 Resolution to support competitive pricing for alternative energy for Borough facilities, nor had the Borough issued a Request for Qualifications/Request for Proposals ("RFQ/RFP"), nor had the Borough received and considered any proposals which were subsequently due on May 8, 2006. Accordingly, it was not possible for the Borough and World Water to both execute the required Signed Letter of Intent to Contract at any time prior to the April 12, 2006 denial. To do so would be contrary to the requirements of the Local Public Contracts Law, N.J.S.A. 40A: 11-1 et seq., which requires advertisement and public bidding for all public contracts unless one of the exemptions applies.

THE AGREEMENT AND LOCAL PUBLIC CONTRACT LAW

On March 20, 2006, the Mayor and Council of the Borough of Hightstown adopted Resolution No. 2006-81 to support competitive pricing for alternative energy for Borough facilities. Subsequently, a Request for Qualifications/Request for Proposals was issued with a due date of May 8, 2006. On May 12, 2006 a Solar Energy Agreement by and between World Water & Power Corporation and the Borough of Hightstown was executed by the parties ("Agreement"). The Agreement is for a term of ten years and provides that World Water will design, install, own, operate and maintain a system for the generation of solar electricity on property owned by the Borough. World Water would sell and the Borough would purchase the electricity generated by the solar system at agreed upon prices set forth in the Agreement. After the term of the ten year Agreement the Borough would have the option of purchasing the system at fair market value.

As noted above, the CORE Program policies for private sector rebates require a valid, executed contract. Since the Agreement between the Borough of Hightstown and World Water involved a municipality that is subject to the Local Public Contract Law ("LPCL"), the contract must either comply with the requirements of the LPCL for public advertising and bidding or fall within one of the statutorily prescribed exemptions. Accordingly, after OCE staff received the May 12, 2007 Agreement, they forwarded it to DCA for review and advice as to whether the Agreement was the product of a process consistent with the LPCL. After DCA advised that it had "some concerns," the issue of compliance with the LPCL was pursued further.

World Water, through its counsel, submitted a letter to the Division of Local Government Services, dated November 27, 2006, in which it asserted that the Agreement was exempt from the general provisions of the LPCL that required public advertisement for bids and bidding pursuant to N.J.S.A. 40A:11-5 (1) (v) and was exempt for the durational limitation of the contract to 24 months pursuant to N.J.S.A. 40A:11-15(24).[2] After considerable discussion and

[2] In its November 27, 2006 letter to DCA, Applicant states that N.J.S.A. 40A:11-15(24) provides that if the Director of the Division of Local Government Services "fails to respond in writing to the contracting unit within 10 business days, the contract shall be deemed approved." This position is incorrect when read in the full context of N.J.S.A. 40A:11-15(24) which states: "The purchase of electricity or administrative or dispatching services related to the transmission of such electricity, from a supplier of electricity subject to the jurisdiction of a federal regulatory agency, from a qualifying small power producing facility or qualifying cogeneration facility, as defined by 16 U.S.C. § 796, or from any supplier of electricity within any regional transmission organization or independent system operator or from such organization or operator or their successors, by a contracting unit engaged in the generation of electricity for retail sale, as of May 24, 1991, for a term not to exceed 40 years, or by a contracting unit engaged solely in the distribution of

consultation with the DCA and Applicant's counsel, the OCE issued a denial letter dated May 1, 2007. In that letter, OCE Director Michael Winka stated: "Specifically, your application has been denied because you have failed to provide a valid customer contract. The contract in question, between the Borough of Hightstown ("Hightstown") and World Water & Power, appears to implicate the prohibitions of the Local Public Contracts Law, N.J.S.A. 40A:11-1 et seq. Upon review of this matter the Office of Clean Energy has formed the opinion that the bidding process giving rise to this contract does not appear to meet the requirements set forth in N.J.S.A. 40A:11-1 et seq. Nor do any of the exceptions to the aforementioned bidding requirements, also set forth in the statute, appear to apply. Therefore, the validity of the contract is in question." As noted above, the Applicant filed an appeal with the Appellate Division of New Jersey Superior Court and the Board sought a remand, because it had not rendered a ruling on the request for a Declaratory Ruling. The Court remanded the matter and ordered the BPU to make "specific findings as to the validity of [the] contract" Accordingly, an analysis of the Local Public Contract Law is necessary.

The strong public policy in favor of public advertising for bids and public bidding has long been firmly established. As noted by the New Jersey Supreme Court in Township of Hillside v. Shephard Sternin, "for many years our statutory law has required contracts for the performance of public work involving the expenditure of money in excess of $1,000 to be let upon competitive bidding solicited through public advertisement. It is an almost universally recognized practice and one which is rooted deep in sound principles of public policy." 25 N.J.317, 322 (1957) (citing McQuillin, Municipal Corporations, § 29.28 (1950), Wazen v. City of Atlantic City, 1 N.J. 272, 283 (1949); Tice v. Long Branch, 98 N.J.L. 214 (E. & A. 1922)).

The New Jersey Supreme Court further stated that "*statutory exceptions to public bidding requirements should be strictly construed* so as not to dilute this policy or permit a public body to avoid pertinent legislative enactments." Autotote Limited v. NJ Sports & Exposition Auth., 85 N.J. 363, 369-370 (1981) (citing Pucillo v. Mayor and Council of Borough of New Milford, 73 N.J. 349,356 (1977)).

It is against this well established body of law supporting the strong public policy in favor of public advertising and public bidding along with the Court's directive to strictly construe exceptions to these public bidding requirements that the Board must consider whether the exceptions advanced by Applicant apply in this case. World Water argues in its November 27, 2006 letter to the DCA that the Agreement between Hightstown and World Water falls under the exemptions to the LPCL delineated in N.J.S.A. 40A:11-5(1)(v) and N.J.S.A. 40A:11-15(24). The first cited section of the LPCL, N.J.S.A. 40A:11-5, provides exemptions from the general rule requiring public advertising for bids and bidding therefore for all local public contracts. The second cited section, N.J.S.A. 40A:11-15, provides for exceptions to the durational limit of 24 consecutive months for local public contracts. These exemptions discussed in Applicant's November 27, 2006 letter apply to "qualified small power production facilit[ies]," which is a term defined in 16 U.S.C. § 796(17)(C).

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distribution of electricity for retail sale for a term not to exceed ten years, except that a contract with a contracting unit, engaged solely in the distribution of electricity for retail sale, in excess of ten years, shall require the written approval of the Director of the Division of Local Government Services. If the director fails to respond in writing to the contracting unit within 10 business days, the contract shall be deemed approved." It is clear from the plain meaning of subsection 15(24) that the requirement for Director's approval within 10 business days only applies when the contracting unit seeks to extend the durational limit of the contract to a term in excess of 10 years. The Agreement and the Applicant make clear that the Agreement is limited to a term of 10 years. Accordingly, since Hightstown is not seeking a term in excess of 10 years, the 10 day rule is not applicable.

Specifically, Applicant states that "[s]ince the [World Water] PV units produce electricity solely from solar radiated energy . . . and it has a generating capacity that is far below the maximum of '80 megawatts,'" the system should qualify for the exception to the 2-year term limit; therefore, it follows that this solar PV system is one of the statutory exceptions in New Jersey to the 2-year durational time limit for public contracts pursuant to the LPCL. N.J.S.A. 40A:11-15(24)." Applicant further reasons that "it must also follow that the contract for the purchase of electricity from WW&P for a term of 10 years is also exempted from the LCPL's [sic] competitive advertisement and bidding procedures."

Public advertising for bids and bidding is not required when the contract is covered by N.J.S.A. 40A:11-5(1)(v), which exempts contracts for the purchase of electricity "from a *qualifying small power production facility* . . . as defined pursuant to 16 U.S.C. § 796." (emphasis added). In order to qualify for the exemption, the plain language of the New Jersey statute requires that the facility first meet the requirements defined in the federal statute. In turn, the federal statute contains two definitions relevant to the New Jersey statutory exemption. Section 796(17)(A) defines a "small power production facility" as a facility that produces energy by renewable resources and has a maximum power production capacity of 80 megawatts. Building off the previous definition, § 796(17)(C) describes a "*qualifying* small power production facility" as "a small power production facility that the [FERC] determines, by rule, meets such requirements . . . as the [FERC] may, by rule, prescribe." (emphasis added). Therefore, the New Jersey statutory exemption requires the facility to comply with the federal regulations defining a qualifying facility ("QF").

Under the title "General requirements for qualification," 18 C.F.R. § 292.203(a) states that a small power production facility becomes a QF if it:

> (1) Meets the maximum size criteria specified in § 292.204(a);
> (2) Meets the fuel use criteria specified in § 292.204(b); and
> (3) Has filed with the [FERC] a notice of self-certification, pursuant to § 292.207(a); or has filed with the [FERC] an application for [FERC] certification, pursuant to § 292.207(b) (1), that has been granted.

The requirements in 18 C.F.R. § 292.204(a)-(b), referenced above, parallel the definition of a small power production facility found in 16 U.S.C. § 796(17) (A). Thus, in light of the two federal statutory definitions and the applicable regulations, the crucial element that distinguishes a small power production facility from a *qualifying* small power production facility, the phrase used in the New Jersey statute, is the filing of a self-certification or an application for certification with the FERC.

In the instant matter, World Water and Hightstown assert that neither improprieties nor instances of non-compliance with the LPCL taint the validity of their contract. In his November 27, 2006 letter, counsel for World Water and Hightstown, refers to § 796(17)(A) and argues that, "[s]ince the [World Water] PV units produce electricity solely from solar radiated energy . . . and it has a generating capacity that is far below the maximum of '80 megawatts,'" the system should qualify for the exemption. In a September 26, 2007 letter, Applicant again alleges that that the contract qualifies for the exemptions, "[s]ince the WorldWater solar PV system is a 'qualifying small power production facility." In addition, the parties claim that any lingering questions about the facility's status as a qualifying small power production facility "are moot after World Water obtained QF certification from the Federal Energy Regulatory Commission ('FERC')."

Notably, the contract at issue was entered into on May 12, 2006 and World Water filed a notice of self-certification with FERC on or about April 6, 2007. On May 1, 2007, the OCE issued a

second denial, which stated that no exceptions to the bidding requirements appeared to apply. Thus, the validity of the contract, at least in part, hinges on whether the proposed facility was a qualifying small power production facility pursuant to the New Jersey statutory exemption at the time that World Water submitted its response to the RFQ/RFP, May 8, 2006.

The Supreme Court of New Jersey has stated that "[w]hen interpreting a statute or regulation, we endeavor to give meaning to all words and to avoid an interpretation that reduces specific language to mere surplusage." DKM Residential Props. Corp. v. Twp. of Montgomery, 182 N.J. 296, 307 (2005) (citing Franklin Tower One v. N.M., 157 N.J. 602, 613, 725 A.2d 1104 (1999); Norman J. Singer, 2A Sutherland Statutory Construction § 46:06, at 190-92 (6th ed. 2000)). Here, the plain language of the New Jersey statute indicates that it applies exclusively to *qualifying* small power production facilities, which are defined by the statute and regulations as facilities that "ha[ve] filed with the [FERC] a notice of self-certification." World Water and Hightstown do not give meaning to the term "qualifying," but focus on the federal statute's definition of a small power production facility. However, the statutory language plainly states that, to establish the exemption under the LPCL, the vendor must be a QF.

World Water did not file the self-certification form with FERC to become a "Qualifying Small Power Production Facility" until April 6, 2007, more than a year after the Borough of Hightstown adopted Resolution No. 2006-81 to support competitive pricing; 11 months after the May 8, 2006 deadline for responding to the RFQ/RFP; and more than 10 months after World Water executed the Agreement with Hightstown on May 12, 2006. Therefore, the Board HEREBY FINDS that World Water did not meet the statutory requirement of being a Qualifying Small Power Purchase Facility at the time it entered into the Agreement with Hightstown on May 12, 2006. Because Qualification is a legislatively prescribed prerequisite, which World Water failed to meet until 10 months after it executed the Agreement, the Board HEREBY CONCLUDES that the statutory exemption from public advertising and bidding set forth in N.J.S.A. 40A:11-5(1)(v) may not be invoked in this situation.

Moreover, the asserted statutory exemptions apply to the purchase of electricity, but the scope of the Agreement reaches well beyond the purchase of electricity. Section 16.1 of the Agreement provides that Hightstown has the option to purchase the system at a mutually agreed upon price equal to the Fair Market Value of the System. The Board HEREBY FINDS that the Agreement expressly provides the option to purchase its system at the end of the Hightstown 10-year term and the LPCL does not provide an exception for the purchase of a Solar PV system in N.J.S.A. 40A:11-5. Hightstown may not secure, through an option in a contract, which it asserts is exempt from public advertising and bidding, that which would otherwise fall within N.J.S.A. 40A:11-4, the provision requiring public advertising and bidding. The Board CONCLUDES that the LPCL does not exempt the purchase of a Solar PV System from the public advertising and bidding requirements of N.J.S.A. 40A:11-4.

The LPCL also limits contract durations to 24 months unless the contract falls under one of the statutory exemptions. In the instant matter, World Water and Hightstown claim that their contract falls under the statutory exemption provided in N.J.S.A. 40A:11-15(24). Like the aforementioned bidding exemption, the duration exemption applies to contracts for the purchase of electricity "from a *qualifying small power production facility* . . . as defined pursuant to 16 U.S.C. § 796." (emphasis added). As previously noted, a qualified small power production facility is defined by the federal statute and the federal regulations as a small power production facility that "has filed a self-certification" with the FERC. 18 C.F.R. § 292.203(a)(3). Once again, the statutory language unambiguously establishes QF status as a legislatively prescribed prerequisite to the statutory exemption.

The Board's finding that World Water and Power did not meet the statutory requirement of being a Qualifying Small Power Purchase Facility at the time it entered into the Agreement with Hightstown on May 12, 2006 is equally applicable to the exemption to the 24 month durational limit on local public contracts. Thus, the Board HEREBY CONCLUDES that the Agreement between World Water and Hightstown does not fall within the statutory exemption for a contract in excess of 24 months as set forth in N.J.S.A. 40A:11-15(24). The Board FURTHER CONCLUDES that the Agreement between Hightstown and World Water for a term of 10 years is not permitted pursuant to the LPCL and therefore is not a valid contract for the purposes of obtaining a CORE rebate.

The Borough stated, in its October 16, 2007 Resolution to the Board, that it "engaged in a competitive solicitation among potential solar PV developers to install and operate such a solar PV system." Without the benefit of a statutory exception, discussed above, the Borough must comply with the general provisions of the LPCL.

The Local Public Contract Law requires that "[e]very contract awarded by the contracting agent for the provision of goods or services, the cost of which in the aggregate exceeds the bid threshold, shall be awarded only by resolution of the governing body of the contracting unit to the lowest responsible bidder after public advertising for bids and bidding therefore, except as provided otherwise in this act or specifically by any other law." N.J.S.A. 40A:11-4. With respect to the statutory requirement that contracts be awarded to the lowest bidder, N.J.S.A. 40A:11-6.1 further directs that "[a]ll purchases, contracts or agreements which require public advertisement for bid shall be awarded to the lowest responsible bidder."

The Borough's RFQ/RFP states that proposals were evaluated based on criteria, other than price, which included the bidders' qualifications and experience in developing solar energy projects; the bidders' project team and organizational approach; and the bidders' technical approach to the site-specific projects. These criteria impermissibly expanded the Borough's discretion in the evaluation of proposals beyond the statutorily prescribed standard of "lowest responsible bidder." See N.J.S.A. 40A:11-6.1. Accordingly, the Board HEREBY FINDS that the Borough did not comply with N.J.S.A. 40A:11-4 and N.J.S.A. 40A:11-6.1, which require that contracts be awarded to the lowest bidder.

The Board HEREBY AFFIRMS the denial of the Applications from World Wide and Hightstown for the reasons set forth above.

With regard, to World Water's Motion for a Declaratory Ruling, the Board, for the reasons set forth above, FINDS that:

1. The CORE policy in effect at that time the Applications were denied on April 12, 2006 required a Letter of Intent to Contract be signed by both parties. The Signed Letter of Intent to Contract submitted by the Borough of Hightstown did not and could not contain the signature of both parties at the time it was issued on or about January 23, 2006. The Board HEREBY CONCLUDES that the missing signature from the Letter Of Intent to Contract justified the withholding of approval of rebates as applied for by World Water on behalf of Hightstown on December 23, 2005.

2. The outstanding legal issues with the contract between Hightstown and World Water have been addressed herein.
3. The Board HEREBY AFFIRMS the denial of the Applications from World Water and Hightstown for the reasons set forth above and as stated in the OCE letter to Hightstown and World Water, dated May 1, 2007. Accordingly, World Water is not entitled to receive rebates for the Hightstown project.

Accordingly, after careful consideration of the record in this matter, including all submission by or on behalf of Hightstown and World Water, and analysis of the applicable law, the Board HEREBY:

1 FINDS that the determination by OCE that the Applications submitted by World Water on behalf of Hightstown should be processed consistent with the procedures required of private sector applicants is appropriate because the beneficiary of the rebate was a private entity who may also benefit from federal tax incentives for the project. Accordingly, the higher public sector rebate was not required to make the energy investments cost effective.

2. FINDS that the April 12, 2006 denial of the Applications submitted by World Water on behalf of the Borough of Hightstown was consistent with the CORE policy in effect at that time.

3. FINDS that World Water and Power did not meet the statutory requirement of being a Qualifying Small Power Purchase Facility at the time it entered into the Agreement with Hightstown on May 12, 2006. Because World Water did not meet the legislatively prescribed prerequisite of being a Qualifying Small Power Production Facility until more than 10 months after the public contract was executed, the Board HEREBY CONCLUDES that the statutory exemption from public advertising and bidding set forth in N.J.S.A. 40A:11-5(1)(v) may not be invoked in this situation.

4. FINDS that the Agreement expressly provides the option to purchase its system at the end of the Hightstown 10-year term and the LPCL does not provide an exception for the purchase of a Solar PV system in N.J.S.A. 40A:11-5. Hightstown may not secure through an option contract which it asserts is exempt from public advertising and bidding that which would otherwise fall within N.J.S.A. 40A:11-4, the provision requiring public advertising and bidding. The Board HEREBY CONCLUDES that the LPCL does not exempt the purchase of a Solar PV System from the public advertising and bidding requirements of N.J.S.A. 40A:11-4.

5. FINDS that World Water and Power's failure to meet the statutory requirement of being a Qualifying Small Power Purchase Facility at the time it entered into the Agreement with Hightstown on May 12, 2006 also is applicable to the exemption to the 24 month durational limit on local public Contracts. Therefore, the Board CONCLUDES that the Agreement between World Water and Hightstown does not fall within the statutory exemption for a contract in excess of 24 months as set forth in N.J.S.A. 40A:11-15(24).

6. FINDS that the Borough's RFQ/RFP lists evaluation criteria other than the lowest responsible bidder. Therefore, the Board CONCLUDES that the evaluation criteria utilized to award the contract did not comply with N.J.S.A. 40A:11-4 and N.J.S.A. 40A:11-6.1.

7. CONCLUDES that the exceptions to the LPCL, N.J.S.A. 40A:11-5(1)(v) and N.J.S.A. 40A:11-15(24), upon which Applicant relies, do not apply in this case for the reasons set forth above and the competitive solicitation utilized by the Borough is not consistent with the requirements of the LPCL, N.J.S.A. 40A:11-4 and N.J.S.A. 40A:11-6.1, for the reasons set forth above. The Board, therefore, CONCLUDES that the Agreement between the Borough and World Water is not a valid contract for the purpose of obtaining rebates from the Board's CORE program.

8. CONCLUDES that the Agreement between Hightstown and World Water is not permitted pursuant to the LPCL and, therefore, is not a valid contract for the purpose of obtaining a CORE rebate based on the applications submitted on December 23, 2005 and on August 31, 2006 for the reasons set forth above.

9. AFFIRMS the denial of the Applications for CORE rebates from World Water for the reasons set forth above.

DATED: 10/25/07

BOARD OF PUBLIC UTILITIES
BY:

JEANNE M. FOX
PRESIDENT

FREDERICK F. BUTLER
COMMISSIONER

JOSEPH L. FIORDALISO
COMMISSIONER

CHRISTINE V. BATOR
COMMISSIONER

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

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