Municipal Contracting Issues
For Third-Party Financed Renewable Energy Facilities

Richard T. Holland, Esq.
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Why Third Party Facility?

- Advantages:
  - Developer constructs, operates & maintains
  - Reduced energy costs for municipality
  - Lease & tax revenue for municipality
  - Path to ownership

- Disadvantages:
  - You do not own facility
  - You do not own SRECs ("green attributes")
  - Long term contract (15+ years)

Why Developer Offers Savings?

- Answer: To finance the deal
- Revenue sources for developer:
  - SRECs
  - Tax Benefits
  - Electricity/net metering credit sales
  - Developer transfers benefits through discounted electricity/net metering credits
**PPA Contract Issues**
- Purchase Provisions
- What’s a Good Deal?
- Interconnection/Host Customer
- Payment of Taxes
- Term & Termination
- Default & Damages
- Guaranteed Production
- Purchase Option

**Purchase Provisions**
- You buy all electricity/net metering credits
- Consider:
  - Can you use all electricity/credits
  - Will you sell credits to other qualified purchaser
  - Eligibility to receive net metering credits
  - 10 MW cap for municipality
  - Future energy conservation projects
  - Future municipal renewable energy projects
Purchase Provisions

- Pricing Structures:
  - Fixed price
  - Fixed price with escalator
  - Fixed price with maximum cap
  - Variable price
  - Variable price with floor
- Difference: Who bears risk of declining prices

What’s a good deal?

- What is the “deal”? 
  - Electricity/net metering credit purchase price
  - Lease payment
  - Payment of taxes
- Look at entire deal, not just one piece
- Only so much “deal” to go around: E.g., higher lease payment will result in higher kWh rate for electricity/net metering credits

What’s a Good Deal

- True comparisons difficult to make
  - “What the last person paid”
  - Size, type, and location of system
  - Investor/financing requirements
  - Utility upgrade costs paid by developer
  - Laws & regulations
  - Market for electricity, SRECs
Payment of Taxes

- Generally, once leased, municipal property subject to tax to lessee under G.L. c. 59, s. 2B
  - Leased for non-public uses
  - Even if municipality benefits
  - Taxed to lessee as if owner of property
- Generally, electric generating equipment also subject to tax
  - Assessor decides if equipment will be taxed as part of real property or as personal property

Payment of Taxes

- Exception: G.L. c. 59, s. 5, cl. 45
  - Must be primary or auxiliary power for property
  - DOR interprets narrowly
- Require developer to pay taxes in RFP/PPA
  - Will likely result in higher electricity price or lower lease payment, but still “new” revenue
- Miscellaneous:
  - PILOT possible (G.L. c. 59, s. 38H(b))
  - TIF possible (G.L. c. 40, s. 59)

Interconnection/Host Customer

- Developer is “Interconnection Customer”
  - Applies for interconnection
  - Pays for any upgrade costs
  - Pays for insurance
  - Signs interconnection agreement with utility
- Municipality is “Host Customer”
  - Signs Host Customer Agreement with utility
  - File “Schedule Z” with utility
Term & Termination

- Long-term contracts
- 20 years typical
- Risks & considerations
  - Termination rights limited
  - Remember considerations noted earlier:
    - 10 MW cap for municipality/governmental entity
    - Future municipal renewable energy facilities?
    - Future energy conservation projects?

Default & Damages

- Default: “material breach” of contract
- Failure to pay for electricity – Require Notice
- Breach of material provision – Cure Rights
- Insurance: Confer with insurer/risk advisor
- Indemnification: Require developer to indemnify
- Damages for breach can be significant
- Liquidated damages vs. actual damages

Repairs of Leased Property

- Rooftop/Landfill:
  - Structural issues: Consider at RFP stage
  - Legal requirements (e.g., landfill)
  - Removal of all/part of the facility for repairs
    - Removal cost?
    - Curtailment (of energy) cost?
  - Retain right to access and examine property
Guaranteed Production

- Developer has incentive to optimize, but ...
- Require guaranteed production:
  - Level of guarantee will be % of “capacity”
  - Allows predictability for planning
- Incentivizes developer to:
  - Optimize production
  - Design system to produce reliable output
- Developer pays for shortfall (liquidated damages)

Purchase Option

- Do you want option to purchase?
- If so:
  - Consider system quality at procurement stage
  - You will be responsible for O&M and removal
  - Typically not allowed before sixth year
- Purchase Price
  - Parties select independent appraiser, or
  - Schedule of purchase values appended to PPA

Miscellaneous

- Where Does the Money Go?
  - Net Metering Credits (payment in lieu thereof)
  - Lease Payments & Taxes
- Town Meeting votes:
  - land lease
  - PPA
  - Lease of buildings
- Procurement for 3rd Party Owned Facilities
  - Rooftop
  - Open Land
Miscellaneous

- Prevailing Wages: May be required
- Competitive Supplier Agreements
  - Check for exclusivity requirements
  - Implement consolidated billing
- Bonds
  - Performance/payment (during construction)
  - Maintenance
  - Removal
  - Other security?

Contact

Rick Holland
Kopelman and Paige, P.C.
617-654-1816
rholland@k-plaw.com

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