Municipal Contracting Issues

For Third-Party Financed Renewable Energy Facilities

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Purchase Provisions

- What’s a “good deal”?
  - Starts with project team
  - Need to know what the “deal” is?
    - Electricity purchase price
    - Purchase option values
    - Lease payment
    - Payment of taxes
    - Risk allocation in the agreements
- Look at entire deal, not just one piece
- Only so much “deal” to go around
Purchase Provisions

• What’s a good deal?
  • It depends:
    • Size, type, and location of system
    • Investor/financing party requirements
    • Interconnection requirements/costs
    • Laws, regulations, governmental incentives
    • Market for electricity, RECs & other attributes
    • Risk allocation in the agreements
  • True comparisons difficult to make
Purchase Provisions

- You buy all electricity generated
- Consider:
  - Can you use all electricity—what is your load?
  - Can you use all “net metering credits”?
    - “Paid” by utility for excess electricity fed to grid
    - Use credits to off-set your electricity costs
    - Distribution company may pay cash for large facilities
- 10 MW cap for municipality
- Pricing structure: fixed or indexed?
Payment of Taxes

- Generally, once leased, municipal property is subject to tax 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 taxed as part of the real property or 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)
  - Legislative approval (town meeting/city council)
Term & Termination

- Long-term contracts
  - 20 years typical
- Risks & considerations
  - Termination rights are limited:
    - Due diligence period/Milestone schedule
    - “Uncured” default
    - Ineligibility to receive net metering credits
  - Remember considerations noted earlier:
    - 10 MW cap for municipality/governmental entity
    - Will you have future municipal renewable energy facilities?
    - Will you have Future energy conservation projects?
Default & Damages

- Default: “material breach” of contract
  - Failure to pay for electricity
  - Other
- Insurance: Confer with insurer/risk advisor
- Indemnification: Require developer to indemnify
- Damages for breach can be **significant**
- Liquidated damages (LD) vs. actual damages
- Limitation of liability provisions—good or bad?
Right to Repair

- Rooftop/Landfill:
  - Structural issues: Consider at RFP stage
  - Future wear-and-tear repairs (see below)
  - 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 production
- Request guaranteed production:
  - Allows predictability for planning
  - Incentivizes developer to:
    - Optimize production
    - Design a system that will produce reliable output
  - Developer pays for shortfall (liquidated damages)
  - Level of guarantee will be percentage of “capacity”
Purchase Option

- Do you want option to purchase?
- Consider system quality at procurement stage
- You will be responsible for O&M and removal
- Typically not allowed before sixth year
- Base on FMV of system in given year
  - Parties select independent appraiser, or
  - Schedule of purchase values appended to PPA
    - Ask/understand/negotiate values
    - Base on reasonable expectation of future FMV
Miscellaneous

- **Town Meeting votes, generally:**
  - Yes for land lease
  - No for lease of buildings < 30 years (non-school)
  - Yes for PPA

- **Procurement for 3rd Party Owned Facilities**
  - **How?**
    - G.L. c. 30B, s. 16, if lease value > $25,000, or
    - G.L. c. 25A (contract limited to 20 years)
  - PPA is exempt from G.L. c. 30B
    - Section 1(b)(33): Energy Contract
    - Deliver copy to DPU, DOER, IG w/I 15 days
Miscellaneous

- **Prevailing Wages**
  - May be required – OAG case-specific test
  - Confer with counsel/Labor and Workforce Development

- **Competitive Supplier Agreements**
  - Check for exclusivity requirements
  - Implement consolidated billing

- **Bonds**
  - Performance/payment (during construction)
  - Maintenance
  - Removal
  - Other security?
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