Request for Information
Federal Government Power Purchase Agreements (PPA) Issues

BACKGROUND:

In order to respond to increasing demand for long term renewable energy, stemming from renewable goals established in the Energy Policy Act of 2005, Executive Order 13423, and the Energy Independence and Security Act of 2007, federal agencies are attempting to facilitate project development and the purchase of electricity from renewable sources on federal facilities.

One means of execution is through the use of long term Power Purchase Agreements (PPAs), whereby a third party funds, develops, operates, maintains and owns a renewable energy project, and the Government commits to purchase the renewable power from the project owner. This method reduces the overall risk to the Government, since it will avoid having to build, own and operate a power project at federal sites. The cost of the project is amortized over a longer term with the expectation of achieving a power price in the PPA that is consistent with today's market price, or possibly lower, for the life of the contract.

While the PPA contracting vehicle is an attractive solution to help federal agencies meet their renewable and other goals, the federal government has encountered significant barriers in implementing PPAs at federal sites. This RFI identifies these barriers and seeks private sector input regarding how to best address them.

PURPOSE AND NEED FOR INFORMATION

The purpose of this Request for Information (RFI) is to solicit input from industry for DOE's consideration in order to improve potential future PPA procurements. DOE is interested in information that will help to promote the use of PPAs that includes topics such as contract term limitations, end of contract, disposition of renewable project, termination for convenience, site access/land use agreement options, and creation of special purpose entities for project development. This is solely a request for information and not a Request for Proposal (RFP).

1. Issue: Contract Term Limitations

Most renewable PPA projects require a long term (typically, at least 20 years) contract in order to be financially viable. A longer term contract allows the PPA provider to charge a lower PPA price since there is more time to recoup their investment and make a profit. Information regarding federal PPA projects is available on the FEMP PPA web site at http://www1.eere.energy.gov/femp/pdfs/afo_ppa_pres.pdf. While there are a few long term contract options, most federal agency PPA projects are limited by Federal Acquisition Regulations (FAR) Part 41's ten (10) year contract authority. The following potential solutions to improve project viability within the FAR Part 41 ten (10) year contract limitation are being explored based on current statutes and regulations:

1) **Ten (10) year PPA contract (using FAR Part 41) with long term land use agreement (LUA).** At the end of the PPA contract, the contractor would give the government a right of first refusal for the electricity at a pre-determined price. If the government elects not

to purchase the electricity, the contractor would be allowed to sell the electricity on the open market.

2) **Ten (10) year PPA contract (using FAR Part 41), with ten (10) year option.** This option must be a "true" option, requiring: 1) No assumption that the option will be exercised and 2) No penalties if the option is not exercised. The price could be negotiated at the time of the option or established in the original contract.
   NOTE: The DOE is still investigating whether this is a legal and viable option under FAR Part 41 and other binding laws and regulations; however, DOE would like input from industry on this topic.
3) **Indefinite term with a one (1) year termination notice.** Using DFARS PGI 241.2 (see http://farsite.hill.af.mil/reghtml/regs/far2afmcfars/fardfars/dfars/PGI%20241_2.htm#TopOfPage), either with or without a long term LUA.

<u>Questions:</u>

a) What are the cost impacts of a ten (10) year term?
b) What are the cost impacts of a ten (10) year PPA contract with a ten (10) year option?
c) What are the cost impacts of an indefinite term with a one (1) year termination notice?
d) Could these options help to reduce the PPA price and/or alleviate the financing risk? If not, what are the specific problems with these options and do you have recommended solutions?
e) If a financier is used, would the financier be more willing to finance projects under any of these options?
f) Do you have financing or any other concerns with long term (greater than ten (10) year) PPAs? Could a long term PPA be financed through a loan that has a shorter term?
g) What are other potential solutions to overcome the current ten (10) year contract term limit?
h) What are other potential risks associated with these options?

2. Issue: End of Contract, Disposition of Renewable Project

End of contract options for some federal PPAs include removal of the energy generating system and restoration of the site to its original condition at the contractor's expense. Some industry players have indicated that since the actual end of contract requirements are determined by the government, the associated costs must be taken into account when developing PPA price proposals and can have a significant impact on PPA price.

<u>Questions:</u>

a) What PPA end of contract options are allowable under IRS regulations so that the company implementing the PPA is eligible for the investment tax credit, accelerated depreciation and other potential tax benefits?
b) Would leasing the Government property and continuing to operate the renewable project and sell the power on the open market be an end of contract option?
c) What are typical PPA end of contract provisions used in the private sector? How do you envision it being the same/different for a PPA with the federal government?
d) What is the typical renewable system removal and restoration language? Does it include a detailed description of exactly what needs to be removed - what infrastructure (such as

conduit, roads, etc) can be left in place, what needs to be restored to the original condition and what can be restored with reasonable wear and tear allowed? Please provide examples.

e) What is the average removal cost, and what is removal cost as a percentage of total investment? How much does a removal requirement typically increase a PPA price?

f) Is there a methodology and/or standard for "reasonable wear and tear" allowed?

g) Would the government need to compensate the contractor for infrastructure that is left in place, or are payments over the contract term sufficient compensation?

3. Issue: Termination for Convenience (T4C)

Some renewable developers have expressed concern with termination clauses in federal PPAs. The Government does not terminate for convenience without a legitimate reason/cause. All costs associated with a termination for convenience shall be resolved in accordance with FAR Part 49.

Questions:

a) What are your specific concerns with the government's standard T4C clause language in FAR 52.212-4(L)?

b) What problems are associated with including termination ceiling schedule(s) with initial PPA proposals?

c) What types of termination ceiling schedules are typical (e.g., early termination during construction; before tax credits are utilized; after tax credits are utilized; partial termination; other)?

d) Are there any other comments or potential solutions regarding T4C and/or termination ceiling schedules?

4. Issue: Site Access/Land Use Agreement Options

Questions:

a) Is it acceptable to include site access language in the PPA, rather than a separate contract such as a lease, easement or other land use agreement (LUA)? If not, why?

b) What are key site access terms and conditions that should be included in either the PPA or a separate LUA?

c) Is there a specific type of LUA that is preferred by industry and financiers (lease, easement, license, other)? If so, why?

d) Is FAR Part 41.501c4 (52.241-5 Contractor's Facilities), acceptable as an alternative to a lease, easement or other LUA (see https://www.acquisition.gov/far/current/html/52_241_244.html#wp1128693)?

e) What are the impacts of not attaching the LUA to the PPA?

5. Issue: Creation of Special Purpose Entities for Project Development

Some offerors have proposed the creation of a Special Purpose Entity (SPE) for PPA project implementation. This causes problems as the Government may not award to a company that did not submit an offer to the solicitation. Here are some proposed options that are being explored to determine whether or not they are allowable:

1) SPE is created, submits the PPA proposal, and is awarded the contract if selected.
2) Contract novation after contract award. Note that there is no novation guarantee and the novation process can take some time.
3) The offeror subcontracts to the SPE. The original offeror is ultimately responsible for renewable project performance and fulfilling all contractual requirements.
4) If financiers have issues with payment under any resultant contract, an Assignment of Claims can be initiated in accordance with FAR 32.802.

Questions:

a) Please comment on each of the options described above. If the government determines that they are allowable, are they viable solutions for your company? If not, what are your specific concerns?
b) What are industry concerns with setting up an SPE ahead of time so that the SPE can submit the PPA proposal?
c) What are other PPA ownership structures and financing approaches that are used in typical non-federal PPAs, besides using an SPE? Sale and leaseback would be one example.
d) Are there any other comments or potential solutions regarding SPEs?

RESPONSE INSTRUCTIONS

Responses are limited to nine (9) pages total (12 point font, 1 inch margins). Include a brief, one (1) page summary of company background and PPA experience with your responses. The remaining eight (8) pages shall be used to respond to the RFI questions. Respondents may submit responses to all or a portion of the RFI questions. A copy of your template PPA can be included as an attachment, with key terms and conditions highlighted as appropriate.

DUE DATE

Responses are required to be submitted no later than **10:00 a.m. Mountain Time, April 11, 2011**.

BUSINESS SENSITIVE, PROPRIETARY, OR OTHERWISE CONFIDENTIAL INFORMATION

Because information received in response to this RFI may be used to structure future solicitations and/or otherwise be made available to the public, respondents are strongly advised **NOT** to include any information in their responses, which may be considered business sensitive, proprietary, or otherwise confidential. However, if your company chooses to submit any business sensitive, proprietary, or otherwise confidential information, it must be marked as proprietary or restricted data in the response.

Questions and Answers

Questions regarding this RFI shall be submitted through FedConnect as soon as possible, but not later than **1:00 PM Mountain Time on March 9, 2011**.

EVALUATION AND ADMINISTRATION BY FEDERAL AND NON-FEDERAL PERSONNEL

Government civil servant employees are subject to the non-disclosure obligations of a felony criminal statute, the Trade Secrets Act, 18 USC 1905. The Government may seek the advice of qualified non-Federal personnel. The Government may also use non-Federal personnel to conduct routine, nondiscretionary administrative activities. The respondents, by submitting its response, consent to DOE providing their response to non-Federal parties. Non-Federal parties given access to responses must be subject to an appropriate obligation of confidentiality prior to being given the access. Submissions may be reviewed by support contractors and private consultants.

DISCLAIMER AND IMPORTANT NOTES

This is an RFI issued solely for information and program planning purposes; this RFI does not constitute a formal solicitation for proposals or abstracts. Your response to this notice will be treated as information only. In accordance with FAR 15.201(e), responses to this notice are not offers and cannot be accepted by the Government to form a binding contract. DOE will not provide reimbursement for costs incurred in responding to this RFI. Respondents are advised that DOE is under no obligation to acknowledge receipt of the information received or provide feedback to respondents with respect to any information submitted under this RFI. Responses to this RFI do not bind DOE to any further actions related to this topic.