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· August 15-18, 2010 · Dallas, Texas ·
· Dallas Convention Center ·

What Do Financiers Want?
PPA Whys and Wherefores
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PPAs versus the FAR

- A PPA contains both contractual and financial guarantees
- The government has a process for awarding a "contract"
- Within that contract, it has provisions for other kinds of guarantees, including "financial" ones
- The two are not meshing well, at least in DOD procurements.

Financier “Terms” in PPAs

- Take or pay
- Rights to sue
- Indemnification
- Lease of site
- Assignment of contract
- Mandatory arbitration
- Payment penalties
- Insurance
- Liquidated damages
- Warranting certain facts/gag orders/etc.

Take or Pay

- Financier wants:
  - Guaranteed revenue stream to repay debt and equity obligations
- Government requires:
  - Termination for convenience
- Possible solution:
  - Better understanding of government's obligations AND "deal structure" by government
  - A priori termination schedule in bids
  - Terms for "partial termination"

Legal Recourse

- Financier wants: Ability to sue and to choose venue.
- The Government has: Sovereign immunity, Limitation on ability to sue the government.

- Financier wants: Liquidated damages.
- Government has right to negotiate any damages, which may not include future profit.

Lease

- Financier wants:
  - Lease filed with the county providing public acknowledgement of its ownership-like rights .
- Government:
  - Does not record leases with the county
  - Has other mechanisms that provide ownership-like rights of access to third party assets
  - Has other procedures to “lease” land.
- Avoid using term “lease” to avoid entanglement in real estate process.

Assignment of Contract and Claims

- Financier wants: Assignment of contract and associated revenues
- Government:
  - Can't "assign" competitively awarded contract to unrelated 3rd party
  - However, it can "novate" contract
  - Can also "assign claims/payments"
- Solution is use a 2-step process, or have 3rd part as party to original contract.

Mandatory Arbitration, Payment Terms and Insurance

- Financier wants:
  - Mandatory arbitration
  - Payment schedule with penalties
  - Its name on Certificate of Insurance
- Government:
  - Doesn't submit to mandatory arbitration, it negotiates
  - Is subject to Prompt Payment Act
  - Self-insures

Miscellaneous Provisions

- Warranty of certain facts:
  - Government can’t warranty transaction isn’t subject to other laws or regulations, etc.
  - Can’t guarantee “someone” won’t characterize a project as “green” if RECs are sold off, and won’t accept penalties for doing so inadvertently
- Won’t subject itself to prior-restraint (self-censorship)

Path Forward

- Government can't adopt industry contracts as is, because it has unique contracting requirements it must comply with.
- Accordingly:
  - Government should include reference to FAR provisions with requirements from bidders, for example, T for C and termination schedules in RFPs.
  - Bidders should include financial principals in bids to avoid having to novate contract.
- Successful execution of PPAs by DOD should provide clarity and comfort to industry over time.

Q&A

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