

BOSTON PACIFIC'S COMMENTS ON THE 2010 CONTRACTS FOR THE LONG-TERM RENEWABLE RESOURCES PROCUREMENTS

I. INTRODUCTION

Boston Pacific Company, Inc. (“Boston Pacific”) appreciates the opportunity to submit these comments in response to the request for comments issued by the Procurement Administrators. Our comments concern the contracts for the long-term renewable resources procurements of Commonwealth Edison (ComEd) and Ameren Illinois Utilities (Ameren).¹

By way of background, Boston Pacific has served as the procurement monitor for all the 2006, 2008, and 2009 Ameren and ComEd requests for proposal (RFPs), as well as for all of the RFPs issued so far by these utilities in 2010 — this includes serving now as the procurement monitor for the long-term renewable resources procurements. In compliance with the Illinois Power Agency Act’s (Public Act 095-0481) requirement, we participate in the design of the RFP and contracts, the development of bid evaluation processes, the review of bidder comments to contracts, and the development of benchmarks. We also monitor the process by which bidders are qualified to bid, and the submission of actual bids on Bid Day. We independently evaluate the submitted bids and provide confidential reports to the Commission that present the procurement results, our recommendation about accepting these results, and an assessment of bidder behavior and of compliance with the procurement processes and rules.

Our input, along with that of Staff, has been provided to the Procurement Administrators on every step of the process for the current procurement. However, we note that the ultimate decisions about this and all RFP design issues are made by the Illinois Power authority (IPA). Our recommendations on the outcome of the RFPs are provided confidentially to Commissioners, through our Post-Bid Report, for their consideration when deciding whether to approve the procurement results.

¹ Both Procurement Administrators issued announcements on their websites on October 14, 2010 that included invitations to comment on the contract as well as information about the workshops to discuss the contracts.

II. COMMENTS ON THE AMEREN AND COMED CONTRACTS

1. **The terms of the ComEd and Ameren contracts are in great part dictated by Appendix K and differ from those found in more traditional unit-contingent, long-term renewable resources procurements.**

The entire procurement process is dictated by a procurement plan which was proposed by the IPA and approved, with conditions, by the Commission in a final order. This year, the procurement plan included an Appendix K, which dictated many of the rules and contract terms for the long-term renewable resources RFPs.

One area of feedback that we have heard from potential bidders is a preference for a more traditional PPA through which the utilities would buy the facility's output at a pre-determined price for the next 20 years. The energy output would be physically delivered to a utility interconnection point. Lenders are more familiar with this type of unit-contingent PPA which could help the project obtain financing. We understand that the more traditional unit-contingent RFP is not allowed under Appendix K, which explicitly states that the delivery of energy is to be accomplished through a fixed-for-floating financial swap. All of us have had to work within the dictates of Appendix K to make the swap contract acceptable to prospective bidders and lenders.

In general, it is our experience that fixed-for-floating financial swaps are financeable because they, too, can achieve an important goal which is to guarantee a fixed price for 20 years. However, specific contract terms matter. There are two areas of the current swap agreements that could have been changed to make them more attractive to lenders: a) having the node for financial settlement be the same as the node where Seller will deliver its energy. This would eliminate the risk of fluctuations in LMP prices between both nodes, which the Seller faces with the current version of the contracts; b) having settlement be against real-time prices, instead of day-ahead prices, given that intermittent resources are more likely to be sold, as generated, in the real-time markets. Neither of these are allowed under Appendix K which specifies that the floating price will be the LMP at the utility's load zone for each hour in the day-ahead market. We view these as risks that potential bidders will factor into their bid price.

Other areas that are defined by Appendix K include: a) the quantities to be procured for each utility, b) the 20-year term of contracts, c) the product definition, d) a price escalation rate of 2% per year, e) basic REC delivery terms, f) the nature of performance guarantees, and g) financial security requirements for energy and RECs.

2. The previous workshops and process by which bidders submitted comments to the contracts did address significant concerns and resulted in changes to the contracts that made them more acceptable to potential bidders and lenders.

Within the constraints defined by Appendix K, we feel that significant areas of concerns to bidders were adequately addressed through the previous workshops and process by which comments were submitted about the contracts.

First, the most significant concern that was addressed was a provision, specified in Appendix K, through which the utility could terminate the contract if during the life of the contract it was unable to pass through the cost of the contracts to its customers. The real risk here is that any of the annual REC budgets that will be established during the next 20 years may end up being less than the REC contract costs for that year under this and any potential future contracts. Future budgets may be limiting if the utilities experience decreases in load, which would translate into reduced budgets for renewable resources. The contracts were improved by narrowing the instances in which the utilities would be able to deny payment to those cases in which they are instructed or required to do so by law, statute or a ruling from the Illinois Commerce Commission. This may give room for future budget cost caps to be amended by legislation if the renewable budgets are found to be especially limiting.

In addition, if a budget constraint is encountered in the future, a process was defined by which the utilities could reduce the RECs purchased on a pro-rata basis — under all future contracts that allow for pro-ration. If this happens, Seller has an option to: a) terminate the contract without penalty, b) agree to reduce the contract quantity on a permanent basis, or c) agree to accept the reduced quantity only for a specific year (this last option is not available in Ameren’s contract).

Second, to respond to bidder concerns that the Frank-Dodd financial regulation may apply to these PPAs, both utilities added language such that, if derivatives legislation did impact these PPAs (for example, regulations that would require margining by either party), the parties would attempt to modify the contracts. Ameren’s contract further specifies that they would consider converting the agreements to a physical delivery contract that will meet any “forward contract exception” contained in such regulation. Additionally, parties are now able to terminate the contract should such modifications be unsuccessful without triggering an event of default.

Third, both contracts were modified by adding the option for suppliers to assign the contract to lenders as collateral for obtaining financing for the facility. This was added in response to bidders who indicated that the lack of such provisions could make it difficult to obtain financing.

Fourth, provisions were added to the contracts which define what constitutes an event of force majeure, and describe a method for reducing bidders' Annual Contract Quantity in proportion to the extent of the force majeure.

Fifth, bidders also requested that provisions be added to limit their liability in the case there is an inability to find appropriate replacement for RECs, e.g. if no Illinois solar RECs exist to be purchased to replace a shortfall for an Illinois solar REC seller. The contracts were modified so that if a seller could reasonably demonstrate that such a condition exists, that seller would only be liable for an amount of cash equal to the shortfall in the number of RECs times the contract fixed price.

As indicated by the fact that a robust number of bidders were fully willing to go forward with the contract as amended, these changes helped to make the contracts more acceptable.

3. Credit requirements are one area where there may be some limited flexibility to improve the contracts in the upcoming workshops.

The financial security requirements are defined by Appendix K, providing limited flexibility for making changes. For energy, credit requirements are defined as the difference between the contract value and the market value for the next three years. For RECs, it is defined as \$5 dollar per REC multiplied by three times the annual quantity.

The utilities differ in how the financial security is to be provided. Ameren offers unsecured credit up to a maximum of \$80 million to qualified bidders, who may rely upon a Credit Support Provider (guarantor). ComEd does not provide unsecured credit, nor does it allow for bidders to rely on guarantors. ComEd's contract did introduce the concept of having caps on the energy prices that are used to calculate the exposure that would be based on the Seller's credit rating. For example, A-rated Sellers can cap the energy price, for exposure calculation purposes, at 150% of the average fixed price for a three year forward period. We view these as areas where the contracts could be further modified based on additional input from potential bidders in these upcoming workshops.

Similarly, bidders have expressed an interest for the utilities to provide performance assurance, especially in the event of a credit downgrade. This area is not addressed by Appendix K and is an area where input from potential bidders may lead to contract changes in the upcoming workshops.

4. Finally, we suggest that part of the third workshop focus on obtaining input from potential bidders about design considerations for future long term renewable resources procurements.

While many of the terms of the current long term RFP have been defined by Appendix K, we believe that a constructive outcome of these workshops would be to obtain input from potential bidders on design considerations for future long term renewable resources RFPs that would not be constrained by the current Appendix K.