

renewable energy lawflash

August 8, 2012

\$7B in Contracting Opportunities for Renewable Energy Projects

U.S. Army issues an RFP to secure locally generated renewable and alternative energy.

On August 7, the U.S. Army Corps of Engineers issued its long-awaited request for proposal (RFP) to procure up to \$7 billion worth of locally generated renewable and alternative energy through power purchase agreements and other contractual equivalents. The RFP solicits contractors that can develop, finance, design, build, operate, own, and maintain solar, wind, biomass, or geothermal power generation facilities under energy purchase contracts of up to 30 years.

The RFP calls for the award of multiple indefinite delivery, indefinite quantity (IDIQ) contracts with a base period of three years and seven one-year options (total 10 years). These contracts do not guarantee work and are not project specific. Rather, each contract serves as a “license to hunt,” and the Army intends to award such contracts to all qualified offerors. Individual task orders for specific projects will be issued after qualified contract holders are given a fair opportunity to be considered. To satisfy this requirement, the Army must issue a notice of the task order containing a clear statement of its requirements and allow for a reasonable response period. The winner of each task order will be awarded the work described in the task order’s statement of work.

Project locations are not identified in the RFP but will be specified in subsequent individual task orders. The locations may include private land or installations under the jurisdiction of the Department of Defense located within the continental United States. Renewable energy facilities also may be located on any properties available for use by the contractor that are in the proximity of the location of the federal property for which the services will be provided.

The RFP divides projects into three categories: (1) For projects greater than 12 MW, task order competition will be unrestricted by contractor size; (2) for projects 4 MW up to 12 MW, the contracting officer will consider reserving the task order for small businesses; and (3) for projects less than 4 MW, the task order will be reserved for small businesses. Under the terms of the RFP, a firm is considered small if it is primarily engaged in the generation, transmission, and/or distribution of electric energy for sale and its total electric output for the preceding fiscal year did not exceed 4 million MWh.

The RFP and an accompanying “frequently asked questions” (FAQ) document raise several important issues for contractor qualifications and for projects to be constructed under future task orders:

- The RFP requires all offerors to submit Small Business Participation Plans. It is the Army’s goal to have 50% of the total contract value go to small businesses.
- The RFP requires contractors to offer a maximum price per kWh, project-specific variables notwithstanding. The figure should be based on an offeror’s estimate of the total cost for development, construction, operation, and maintenance of the renewable energy production facility at a location and size that is “suitable, but not ideal for the technology proposed.” The figure is intended to operate as a ceiling price, and a contractor will not be required to submit a task order proposal on a project exceeding its ceiling price.
- The RFP includes a most-favored-customer provision stating that, as a general rule, the government will require that its energy unit price under a task order remain equal to or lower than the unit price offered to any

other customer with a contract containing substantially similar terms and conditions for power generated at the renewable energy facility or facilities.

- The RFP includes a government contract clause requiring certifications regarding the country of origin of photovoltaic devices; requiring proof, at certain total estimated values, of a specified price differential between foreign and domestic devices; and prohibiting, at other total estimated values, consideration of offers utilizing photovoltaic devices from certain countries. Other provisions incorporated in many government contracts will also apply (e.g., compliance with Buy American Act and Davis-Bacon Act labor requirements).
- The RFP FAQ addresses the question of termination liability in the event the government terminates a particular power purchase agreement in accordance with a required Termination for Convenience Clause. Specifically, the FAQ acknowledges contractor concerns and contemplates inclusion, in task orders, of a negotiated floor and ceiling for termination charges as well as additional negotiable elements.
- The RFP also anticipates issues relating to third-party financing through special purpose entities. It suggests these issues can be addressed through government contract novation of the underlying IDIQ contract to isolate a project for financing purposes and through reissuance of a separate IDIQ contract to the original awardee to maintain that contractor in the contract pool.

Comments on the final RFP may be submitted by August 24, 2012; the Army intends to hold a pre-proposal conference at a date to be announced (tentatively in Chicago). The deadline for submission of proposals in response to the RFP is October 5, 2012.¹

Contacts

Morgan Lewis attorneys advise project developers, utilities, investors, and lenders in the renewable energy industries and have served as counsel in developing and financing thousands of megawatts of renewable energy projects. Our Government Contracts Practice provides knowledge of the legal, regulatory, and political workings of the \$320 billion public procurement sector to help clients cut costs and risk—and gain the best possible advantage—in transactions and strategic business planning related to government contracts.

For additional information—including guidance on the RFP requirements and related government contracting issues, risks, and benefits—please contact any of the following Morgan Lewis attorneys:

Philadelphia

Kenneth M. Kulak	215.963.5384	kkulak@morganlewis.com
------------------	--------------	--

Los Angeles

Wayne W. Song	213.612.7385	wsong@morganlewis.com
---------------	--------------	--

Washington, D.C.

Stephen E. Ruscus	202.739.5870	sruscus@morganlewis.com
-------------------	--------------	--

New York

Terrence L. Dugan	212.309.6745	tdugan@morganlewis.com
-------------------	--------------	--

Houston

J. Todd Culwell	713.890.5790	tculwell@morganlewis.com
-----------------	--------------	--

About Morgan, Lewis & Bockius LLP

With 24 offices across the United States, Europe, and Asia, Morgan Lewis provides comprehensive litigation, corporate, transactional, regulatory, intellectual property, and labor and employment legal services to clients of all sizes—from globally established industry leaders to just-conceived start-ups. Our international team of lawyers,

¹ The RFP, Attachment A - Table of Max Unit Price Rates, Amendment 1, and FAQs can be accessed at https://acquisition.army.mil/asfi/solicitation_view.cfm?psolicitationnbr=W912DY11R0036.

Morgan Lewis

patent agents, benefits advisers, regulatory scientists, and other specialists—more than 1,600 legal professionals total—serves clients from locations in Almaty, Beijing, Boston, Brussels, Chicago, Dallas, Frankfurt, Harrisburg, Houston, Irvine, London, Los Angeles, Miami, Moscow, New York, Palo Alto, Paris, Philadelphia, Pittsburgh, Princeton, San Francisco, Tokyo, Washington, D.C., and Wilmington. For more information about Morgan Lewis or its practices, please visit us online at www.morganlewis.com.

This LawFlash is provided as a general informational service to clients and friends of Morgan, Lewis & Bockius LLP. It should not be construed as, and does not constitute, legal advice on any specific matter, nor does this message create an attorney-client relationship. These materials may be considered **Attorney Advertising** in some states. Please note that the prior results discussed in the material do not guarantee similar outcomes. Links provided from outside sources are subject to expiration or change. © 2012 Morgan, Lewis & Bockius LLP. All Rights Reserved.