

## Be As Green As You Can Be: Army Corps' RFP For Renewables

*Law360, New York (August 20, 2012, 1:18 PM ET)* -- On Aug. 7, 2012, 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 U.S. 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 megawatts (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 megawatt hours (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 percent of the total contract value go to small businesses.
- The RFP requires contractors to offer a maximum price per kilowatt hour (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 Aug. 24, 2012; the Army intends to hold a pre-proposal conference on Aug. 22, 2012, in Huntsville, Ala. The deadline for submission of proposals in response to the RFP is Oct. 5, 2012.[1]

--By Kenneth M. Kulak and Stephen E. Ruscus, Morgan Lewis & Bockius LLP

*Kenneth Kulak is a partner in Morgan Lewis' Philadelphia office. Stephen Ruscus is a partner in the firm's Washington, D.C., office.*

*The opinions expressed are those of the authors and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.*

[1] The RFP, Attachment A - Table of Max Unit Price Rates, Amendment 1, and FAQs can be accessed at [acquisition.army.mil/asfi/solicitation\\_view.cfm?psolicitationnbr=W912DY11R0036](http://acquisition.army.mil/asfi/solicitation_view.cfm?psolicitationnbr=W912DY11R0036).

All Content © 2003-2012, Portfolio Media, Inc.