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Procurement and Construction in Energy Projects

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Introduction

The goal of any developer when negotiating procurement and construction agreements is the delivery of a project on-time and on-budget that meets performance requirements. This article analyzes how developers can meet that goal by addressing key project considerations, appropriate contracting strategies, RFP strategies, pre-execution agreements, and key contractual provisions.

Initial Project Considerations

There is no one-size-fits-all approach to project development. While forms, precedent and referencing prior transactions provide a helpful starting point, using these without proper consideration for a project's unique features can leave a developer with procurement and construction contracts that are misaligned and create issues in implementation and financing.

Development Stage

The first consideration should be why the developer is going to market for procurement or construction services. Put another way, why is this project being developed and what is the stage of development? Is it a merchant project in a deregulated market or has the developer been shortlisted or selected by a utility? Is this an expansion of an existing project or being built to take advantage of local or state incentive programs? Is the developer responding to a request for proposals (RFP) issued by a utility for a mandated project, or is the developer kicking the tires on suppliers to check market temperatures?

The answer will impact contracting strategy, RFP approach, project schedule and commercial and technical terms. A developer building a merchant project without any offtake timing requirements may be able to take advantage of suppliers with longer wait times but lower pricing. A utility mandated project may have detailed technical requirements and mandated subcontractors. This can result in cost savings on engineering but limit optionality with respect to finding lower cost suppliers or contractors.

Developers also should consider internal goals, including reaching project milestones, which may require progress ahead of external stakeholder's expectations. Going to market too early in the development stage can have the same effect as going to market on a compressed schedule. Suppliers and contractors may be hesitant to negotiate if a project is not perceived as being viable or are concerned about locking-in pricing for materials, shipping and labor too far in advance, which will lead to a substantial markup or contingency.

Commercial and Technical Considerations

Commercial and technical considerations will develop over the life of the project. To develop and implement a successful contracting strategy, it is critical for developers to consider before beginning the RFP and contracting planning stage.

The more information that can be collected early in the project, the more the procurement and construction can be de-risked for the developer. Creating a baseline helps measure changes and gives the developer more control, rather than relying on potentially inaccurate contractor assumptions.

Developers should gather any known offtake, interconnection or utility requirements for inclusion in scoping materials. A contractor's standard approach may be to ask for buydowns, thresholds on performance and grace periods on delay. Inclusion of detailed parameters around the technical requirements, including use case and performance, is critical to ensuring that bids are useful and comparable, and that pricing is accurate for the project.

Developers should also consider whether the project is utilizing 'off the shelf' or bespoke equipment and should beware of suppliers copying and pasting specifications from prior transactions without considering the developer's needs or requirements. In the event an off-the-shelf product is being used, there is more latitude to using a supplier's standard description and technical standards, to the extent they are confirmed to be appropriate for the balance of the project.

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