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Regulatory and Energy Assistance

Contracts Necessary for Market Opening

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Market Opening Depends on Bilateral Agreements

- These agreements do not involve new concepts or practices
- They confirm in writing what is typically done to make the power system work
- Contracts are needed because, with market opening, there will be more participants with specifically assigned roles



- In former structure, there were just two parties – utility and customer
 - Terms of service straightforward and functions bundled
 - No need to carve out particular components
- Now, need to be clear as to **who** does **what**, **when**, and **at what price**
- These and other questions need to be answered for each contract written





- **PPA** between power seller and customer
 - Seller can be DS, SOLR, generator, supplier or trader
 - Buyer can be DS, SOLR, another supplier or trader, or end user
- **Ancillary Services** usually between generator and system operator
- **Balancing** usually between generator and system operator



- **Third Party Access** between supplier (on behalf of customer) and Transmission Company or system operator, depending on country
- **Financial Settlement** usually between system operator and customers (suppliers, end users, DSOs)
- **Connection** network owners and customers (suppliers and end users) (already developed in BiH)



Benefits of Pro Forma Contracts

- Streamline review process
- All parties “speak the same language” – understand the deal
- Standard definitions and terms = clear expectations, fewer disputes, less confusion, lower cost
- Focuses trading counterparties on each transaction’s basic negotiable elements, e.g., price, quantity, location, and duration



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TYPICAL CONTRACT PROVISIONS

- General Terms and Conditions
- Definitions
- Transaction Terms and Conditions
- Obligations
- Force Majeure
- Remedies for Failure Deliver or Receive
- Events of Default
- Remedies
- Payment and Billing
- Limitations on Remedies
- Financial Assurance
- Representations and Warranties
- Dispute Resolution
- Miscellaneous



General Terms and Conditions

- Parties
 - Names, addresses, contract role (Buyer or Seller)
- General description of the subject of the contract
- Sometimes lists all annexes
 - Collectively, contract and annexed documents form the Agreement
 - Can indicate which document takes priority if any conflict



Definitions

- Specific description of material terms – if lengthy, can cross-reference contract provision where term is fully explained
 - *E.g.*, “‘Indemnification’ and ‘indemnify’ have the meaning set forth in Section ___”
- Typical defined terms include: *Business Day, Default, Delivery Point, Delivery Schedule, Effective Date, Termination Date*

See, e.g., EFET General Agreement Annex 1, at www.efet.org



Transaction Terms and Conditions

- Commercial terms: What is the deal?
 - Product (e.g., energy, capacity, services)
 - Quantity
 - Delivery point
 - Price
- Contract formation: When is the deal binding?
- Term: When does the deal start, and when is it complete (contract terminated)? A fixed period or terminable by either Party on reasonable notice?



Transaction Terms and Conditions

- Contract can include process for entering into discrete transactions under a master agreement
 - Individual transactions can be agreed to orally [*important – check local law*]
 - Contract can provide for subsequent confirmation in writing – but need not
 - If so, parties must object to written confirmation “without delay”
- If individual transactions under a master agreement, specify who is authorized to transact on behalf of each party



Obligations

- Most important: Seller must deliver, Buyer must accept delivery and pay
- Delivery terms also include:
 - Who arranges for transmission and scheduling
 - Who is responsible for losses, service interruptions, taxes and other costs, and damages (including injury)
 - *Typically, Seller responsible to the Delivery Point*
 - *Buyer responsible at and from the Delivery Point*
 - Who is responsible for measuring quantity delivered



Force Majeure

- Basic elements
 - Not anticipated at date of Transaction
 - Not within reasonable control of claiming Party
 - Not result of negligence of claiming Party
 - Not able to overcome or avoid with due diligence
- Party affected by Force Majeure must give notice as soon as practicable
- Must take steps to remedy Force Majeure with all reasonable dispatch

Unaffected party not required to perform during Force Majeure



Force Majeure

- Does not include
 - Loss of Buyer's markets
 - Buyer unable to use or resell economically
 - Loss of Seller's supply
 - Seller unable to sell at a profit
 - Economic distress





Force Majeure

- There is no general rule as to whether curtailment of transmission or distribution is Force Majeure
 - Thus, contract terms must be very clear on this point
- Whether customer's decision to shut down manufacturing facility Force Majeure depends on reason





Remedies For Failure to Deliver/Receive

- Seller Failure – Damages
 - Positive difference by subtracting the Contract Price from the Replacement Price
 - Replacement Price = (market price or actual price) + costs + additional actual transmission charges
- Buyer Failure – Damages
 - Positive difference by subtracting the Sales Price from the Contract Price
 - Sales Price = (market price or actual price) + costs + additional actual transmission charges

Principle: Preserves the benefit of the bargain



Remedies For Failure to Deliver/Receive

- Note: May agree in the contract that isolated failures to deliver or accept do not result in a full “default”
- Note limited remedy – not termination of contract
- Invoice amounts for replacement power or replacement buyer due in same manner as regular invoices



Typical Events of Default

- Non-delivery or non-acceptance for an extended period of time (e.g., 7 days)
- Failure to make payment when due, if not cured within specified timeframe
- False/misleading representations
- Failure to perform any material obligation, if not cured within specified timeframe



- Other common events of default:
 - Failure to meet financial assurance requirements
 - *E.g.*, Guarantor fails to keep guaranty in effect, Party has credit downgrade, or bank security is withdrawn
 - Bankruptcy/insolvency
 - Note: no cure period
 - Party merges with another entity and new entity does not assume contract obligations



Remedies for Default

- Suspension of performance of obligations until default is cured
- Termination of Contract
 - Non-defaulting Party sets early termination date
 - All transactions terminated (no “cherry picking”)
 - Both Parties released from obligations after the termination date, but responsible for amounts due prior to default
 - Non-defaulting Party can net “Termination Costs” against amounts it owes to defaulting party
 - “Termination Costs” typically defined in the contract – includes all expenses reasonably incurred as a result of the default



Remedies for Default

- *Must* provide *written* notice that:
 - Specifies the relevant default, and
 - Describes the selected remedy, e.g.,
 - Necessary steps to cure, with timeframe
 - Termination of contract, with instructions for final settlement





Payment and Billing

- Can agree on billing and payment schedule, but generally based on calendar month
- Invoices are payable on or before a specified date (example: the later of (i) the 20th day of each month or (ii) 5th Business Day after receipt)
- Can provide for netting of payments – can offset mutual debts so only Party that owes excess amount pays
- Or, can expressly prohibit netting of payments



Payment and Billing

- Parties must dispute invoices within a specified time period after the invoice date
- Can elect to require either:
 - Payment of disputed amounts until dispute resolved or
 - No payment of disputed amount until dispute resolved
- Once resolved, refund or payment (plus interest) due
- Interest charges typically set in contract (but local law may determine)



Limitation of Liabilities

- Provide list of items or costs for which Parties are not responsible
 - Typically includes indirect or consequential damages, lost profits, lost opportunities, or punitive damages
 - Can provide maximum “cap” on exposure
 - Often no limitation on intentional or fraudulent acts



Financial Assurances

- Parties specify the financial assurances they require
- Can provide for right to obtain assurances if reasonable doubt arises as to other Party's ability to perform
- Depending on magnitude of transaction, can range from:
 - Providing financial information, e.g., credit rating, assets and liabilities
 - to*
 - Guarantor, Letter of Credit or other security



Financial Assurances

- Failure to deliver financial assurances, properly requested, within specified time period can be Event of Default
- Contract could also provide for ability to audit books and records of other Party to extent necessary to obtain required assurances
 - Duty to maintain confidentiality of information



Representations and Warranties

- Local law matters here – Parties represent to each other, *e.g.*:
 - Each acting on its own behalf and not for third party
 - Each is authorized by law to enter into the contract (including regulatory authorization)
 - Each is authorized by its governing body to enter into the contract
 - Each is making an independent decision based upon its own judgment and not relying upon the advice or recommendations of the other Party
 - Any other representations the Parties deem important (*e.g.*, not currently insolvent or the subject of pending proceedings)



Dispute Resolution

- How will disagreements be resolved between the parties?
- Recommend tiered approach:
 - Good faith negotiation – between senior management of each party – provide minimum time period within which to resolve (e.g., 30 days)
 - Mediation
 - Arbitration – allowing or disallowing additional court action
 - Regulatory dispute mechanisms (or complaint process)
 - Court action



Miscellaneous

- Governmental charges and taxes – local law matters
 - Seller pays prior to the Delivery Point
 - Buyer pays at and from the Delivery Point
- Indemnity
 - Claims arising during the period when control and title vested in indemnifying Party
 - Acts of negligence of indemnifying Party's employees
 - Liability for particular taxes or assessments



Miscellaneous

- Assignment
 - Prior written consent of the other Party generally required and may be withheld in its sole discretion
 - Local law may determine
 - But usually may assign without prior consent
 - (i) In connection with financing
 - (ii) To an affiliate if creditworthiness is equal to or higher than that of assigning Party
 - (iii) To any person or entity succeeding to all or substantially all of the assets and whose creditworthiness and technical capacity are equal to or higher than that of assigning Party



Miscellaneous

- Notices – Be clear to whom contract notices must be sent and how
 - Fax, email and telephone notices require special provisions in contract and usually require follow-up written notice as well
 - Clarify when notice deemed received
- Governing law – venue and jurisdiction
- Confidentiality – agree not to disclose terms of contract to third parties
- Severability, survival of certain provisions



Next Steps

- Market Working Group continues process to define, outline and agree upon pro forma contract terms
- Schedule training on particular contracts as may be needed (balancing, ancillary services, financial settlement)
- Support amendments to Procurement Law to enable market participation



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Hvala!

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