

NEW YORK ANNOUNCES SOLICITATIONS FOR OVER 1,500 MW OF ON-SHORE RENEWABLE ENERGY: WHAT'S NEW AND NOTEWORTHY ABOUT THE NYPA AND NYSERDA LARGE SCALE RENEWABLES PROCUREMENTS

Hodgson Russ Renewable Energy Alert
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On July 21, 2020, the New York State Energy Research and Development Authority (“NYSERDA”) launched its highly anticipated annual procurement of renewable energy credits (“RECs”) from large-scale renewable (“LSR”) energy projects. Simultaneously, the New York Power Authority (“NYPA”) issued its own procurement for large-scale solar and wind projects, seeking both proposals for the sale of RECs alone or bundled energy, capacity and REC products.

The NYSEDA LSR solicitation is the first solicitation of large-scale land-based renewables since the State enacted of the Climate Leadership and Community Protection Act (“CLCPA”), which required the State’s energy consumption to be 70 percent renewable by 2030; passed the Accelerated Renewable Energy Growth and Community Benefit Act, which scrapped the “Article 10” large-scale renewable energy project siting process and instituted the new “94-c” regime, as we discussed in our prior alert here; and the New York State Public Service Commission authorized the use of the “Index REC” structure for on-shore large-scale contracting, which we discussed in our prior alert here. With these significant updates to the New York State large-scale renewables market in the last year, many new elements have been added to NYSEDA’s solicitation and proposers into NYPA’s solicitation should be aware of the overarching updates to LSR project development cycles.

Both solicitations expressly anticipate flexibility as the newly created Office of Renewable Energy Siting (“ORES”) continues to develop the Section 94-c application standards and regulations, which are set to issue in proposed form in the near future. Developers who have participated in previous LSR solicitations and those new to the New York renewable energy market should be mindful of several key themes embodied in these latest solicitations. The CLCPA requires a fast-track, as fleshed out in the recent white paper filed by NYSEDA and the Department of Public Service (“DPS”) staff proposing pathways, to reach 70 percent renewable energy by 2030, which we discussed in detail here. These RFPs are the first concrete indication of how the State will look to achieve those goals – through a consolidated

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bid process with heightened project maturity, site control, interconnection and financing requirements, prioritizing projects that have already carefully considered environmental and natural resource impacts and seek to provide benefits to host and disadvantaged communities, among other important elements. Below, we highlight the new and the noteworthy elements of these solicitations.

I. NYSERDA's Tier 1 REC Solicitation

Consolidated Application Requirements and Streamlined Review

NYSERDA has shortened the competitive bid review process from three to two steps – Step 1 is an Eligibility Application and Step 2 is the Bid Proposal. First, NYSERDA will determine whether the project is a Tier 1 RES eligible resource, and if so, invite bidders to demonstrate project viability based on required minimum thresholds, including evidence of site control, interconnection, and permitting. Upon a determination that the project meets the minimum thresholds, the bidder will be invited to submit an official bid proposal.

In prior solicitations, the initial eligibility step was a narrower inquiry, and a second step considered project viability and a fuller bid proposal. Step three had been the final project proposal and bid price. Now, bidders must include proposer information and bid facility characteristics in their Step 1 applications. If invited to advance to Step 2, bidders will submit proposals demonstrating that the bidder and the project meet the minimum viability threshold requirements, and the price proposal – which may be either a fixed or index REC proposal, but not both. Proposals that meet the minimum requirements will be competitively evaluated based on price and non-price factors.

Embodied Carbon Assessment

The solicitation introduces the concept of embodied carbon as a minimum viability threshold requirement. Bidders are required to describe efforts taken to minimize the carbon intensity of the facility, to the extent it is known at the design, sourcing, construction, and operation and maintenance phases of the project. Bidders should include a description of how they will account for carbon emissions during the life of the project, which could include low-emission component sourcing and construction practices. Bidders cannot earn extra points for going above and beyond in this evaluation category, which will serve as a means for NYSERDA to gather information from the market.

Limitation on Projects with Existing REC Contracts

According to the RFP, "Tier 1 eligible RECs or environmental attributes that are the subject of a current NYSERDA RES contract or that were the subject of an award under NYSERDA's RESRFP19-1 solicitation are not eligible under this RFP." This is consistent with past RFP language, though it is now expressed as a minimum eligibility requirement as opposed to an "Eligibility Limitation." That is, NYSERDA has historically limited projects under existing REC contracts from participating in solicitations, and notwithstanding the new Index REC contracting structure, NYSERDA has included the same language as in prior years without express allowances for contingencies or bid conditions.

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Energy Storage

Consistent with the 2019 LSR solicitation, battery energy storage is eligible as a co-located or stand-alone resource. If the energy storage resource is charged from a co-located renewable resource, the energy discharged from the battery will generate a Tier 1 REC. If the storage resource is separately located and charges from the grid, the storage resource will not be eligible for a Tier 1 REC payment. Stated differently, bidders may propose a Tier 1 renewable resource paired with battery storage resource, but only the renewable resource will generate Tier 1 RECs.

This year, NYSERDA has added a requirement to ensure that the battery storage resource is covered by an operations and maintenance (O&M) agreement for the term of the contract. Successful bidders who are awarded a contract that exceeds 10 years must provide NYSERDA with an executed O&M agreement for the battery storage resource. The O&M agreement must have a contract term that is at least as long as the LSR contract term. Bidders must provide the executed O&M agreement prior to commencing construction.

Opportunities for Bonus Points in the Non-Price Criteria

Consistent with previous LSR solicitations, proposals will be scored based on price (70% of overall score) and non-price (30%) factors. The non-price criteria are divided into three equally weighted categories, each comprising 10% of the overall score – project viability, incremental economic benefits, and operational flexibility and peak coincidence. These are the same non-price criteria from the 2019 LSR solicitation, but the requirements for earning additional points in these categories has changed.

The project viability category includes minimum requirements. This means that bidders *must* meet the minimum requirements for their proposals to be evaluated. Points are awarded for going above and beyond the minimum requirements. Bidders can earn up to 10% of the overall proposal score by demonstrating advanced project maturity, as described in more detail below. There are no minimum requirements for the economic benefits or operational flexibility and peak coincidence categories. All points earned in these categories count towards the total proposal score.

Site Control

The minimum site control requirements have been heightened in favor of more mature projects. All proposals must demonstrate that the bidder has obtained site control of at least 50% of the project site. Site control beyond 50% is eligible for additional points. This differs from the 2019 solicitation, where only those sites greater than 15 acres were required to demonstrate 50% site control. Previously, NYSERDA required demonstration of site control through submission of an executed exclusivity agreement or letter of intent. Now, bidders may submit executed binding options, leases, and/or easements.

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Interconnection

The minimum threshold requirements for interconnection have also been heightened. Bidders are required to have submitted an interconnection request with the NYISO or interconnecting utility and have a System Reliability Impact Study or equivalent interconnection study in progress (NYISO Queue Stage 5). Previously, bidders were only required to have submitted a valid interconnection request to meet the threshold requirements. Additional points will be awarded to bidders who have demonstrated advanced progress in the interconnection process and who reasonably estimate the energy deliverability of the project.

Permitting Plan

Consistent with past practice, bidders are required to identify all permits required for the project, describe efforts to address local prohibitions or moratoria, and conduct a review of the project's impacts on natural, ecological, and historic resources. NYSERDA now requires a robust permitting plan that considers comprehensive measures for mitigating, minimizing, remediating, and offsetting impacts of the project on preserved land and open space, wildlife habitat, and loss of agricultural land and food production. Additional points are available for advanced plans that demonstrate more exhaustive permitting activities and credible plans for obtaining permits within the proposed development schedule.

Mitigation of Agricultural Impacts

In its 2019 RES solicitation, NYSERDA introduced for the first time the requirement that all projects located on prime farmland in a State-Certified Agricultural District comply with the Department of Agriculture and Market's ("NYSDAM") construction guidelines for siting solar and provide a report on mitigation efforts to minimize impacts to farmland. This year, NYSERDA reserved the right to request that report and expand the requirement to projects larger than 25 MW or even to projects located outside of an Agricultural District. All solar projects that receive awards will be required to execute NYSDAM's construction guidelines, and may be required to make an agricultural mitigation payment to a designated fund. NYSERDA notes that the anticipated ORES regulations and uniform conditions will address projects on prime farmland. Such regulations may include an amended set of construction guidelines that would supersede the guidelines posted with the solicitation. NYPA includes similar requirements for projects located in Agricultural Districts in its solicitation, described in more detail below.

Project Financing and Creditworthiness

NYSERDA requires more in-depth information about the bidder's business entity and organizational structure, financing arrangements, and financial disclosures than in the past, which included a description of the project financing structure, evidence of the bidder's financial resources, and the bidder's credit rating. At a minimum, bidders must demonstrate adequate project financing and creditworthiness through a detailed financing plan that lists all committed and potential equity partners, funding obligations, evidence of credit ratings, written expressions of interest from debt lenders, and the anticipated construction and long-term capital structure for the ownership entity,

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among other details. Bidders' financial plans will be evaluated based on relative level of project financing experience, with more points awarded to bidders who have successfully financed projects of a comparable scale and technology to commercial operation.

Community Engagement

The Community Engagement component of the solicitation differs from how it has been approached in the past. Bidders are encouraged to provide economic benefits to communities impacted by COVID-19 in the near term. NYSERDA will evaluate benefits provided any time after the issuance of the solicitation. Bidders are also encouraged to provide economic benefits that will be realized by Disadvantaged Communities, in accordance with the CLCPA goals. At a minimum, bidders must identify the authorities having jurisdiction and ensure that local officials have been informed about plans for the project. Bidders can earn additional points in this category by submitting high quality plans that employ strategies responsive to the needs of host communities. In previous LSR solicitations, prior to bid submission, NYSERDA would meet with local officials in the proposed host communities. This appears to have been removed in this year's solicitation. Instead, the onus is on bidders to engage with the host community, particularly where such projects intend to seek a Section 94-c permit through ORES.

II. NYPA's Large Scale Renewables Solicitation

Different Product Procurements

Unlike the LSR RFP, NYPA seeks bids only for bundled products from solar and wind resources 20-25 MW or over 100 MW. This eligibility requirement avoids competition with projects 25-100 MW that are eligible for Tier 1 REC contracts under the NYSERDA procurement. NYPA seeks to procure contracts for either energy, capacity, and RECs, or RECs only for contract terms of 15 or 20 years. Eligible projects may be sited with energy storage resources and must be in service on or after January 1, 2021 but no later than December 31, 2024. This is a slightly expedited schedule than the NYSERDA contracts, which require that projects be in service by November 30, 2022, but may be extended to November 30, 2025. Nevertheless, NYPA and NYSERDA both intend to provide award notifications on a similar schedule (see below).

Similar Proposal Elements

Many of the required proposal elements are the same for the NYPA solicitation, but with varying degrees of specificity. As with the NYSERDA solicitation, bidders are required to submit plans for site control, interconnection, permitting, and community support, and demonstrate the financial viability of the bidder company and its capacity to complete and operate the project.

Mitigation of Agricultural Impacts

NYPA's RFP contains almost identical language regarding the obligation of bidders to consider avoiding, mitigating and minimizing the project's impact on prime agricultural land located in State-Certified Agricultural Districts. Like

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NYSERDA's solicitation, NYPA puts bidders of solar projects on notice that they may be required to make a mitigation payment to a designated fund based on the extent to which the project footprint overlaps with prime farmland. Solar projects awarded contracts under NYPA's solicitation will also be required to execute the NYSDAM guidelines for construction mitigation on agricultural lands. Like NYSERDA, NYPA notes that ORES's anticipated standards and uniform conditions may include adherence to set of guidelines that supersede the version posted with the RFP.

Evaluation Criteria

Like NYSERDA's RFP, projects must meet threshold eligibility requirements to advance to later stages of evaluation, which NYPA refers to generally as "quantitative and qualitative" analyses. NYPA does not, however, indicate what weight the various proposal elements will be given in the evaluation process. The economic analysis conducted under the quantitative analysis will be given "significant weight" in the evaluation process and will be used to rank bids from least cost to highest cost.

NYPA will also consider non-price factors in the qualitative analysis, including such criteria as overall proposal completeness, clarity, and organization; relevant developer experience; the viability of the bidder's financial plan and the financial capability of the bidder; relevant financing experience; the reasonableness of the development plan; the technical feasibility of the proposed design and equipment; the level of site control and whether the plan to obtain site control is viable; the adequacy of the operations and maintenance plan; the maturity of interconnection status and permitting; the proposed plan for community support and the extent to which the project drives economic opportunities to the State and local communities; and the reasonableness of pricing and value assumptions. Notably, NYPA will also consider the degree to which the bidder accepts the form Power Purchase Agreement ("PPA") that accompanies the RFP. On the contrary, NYSERDA's solicitation states that an indication by the bidder that it wishes to negotiate the terms of the REC contract will have no impact on scoring or evaluation of the proposal.

Awarded PPAs

NYPA will enter into PPAs with awarded bidders who are selling a bundled product. The PPAs will include an option for NYPA to purchase up to 100% of the assets of the project at fair market value after the federal tax incentives have been fully monetized. While bidders are not required to accept this term in an awarded contract, an indication of acceptance will carry weight in the evaluation process.

III. NYPA / NYSERDA Coordination

The NYSERDA and NYPA solicitations clarify how projects that also respond to NYPA's solicitations will be treated, which was a point of confusion when both authorities issued independent solicitations in 2017, and NYPA sought bids for "pre-paid PPAs". This time around, bidders may participate in both solicitations, but must notify NYSERDA of its intention to apply and/or bid into NYPA's solicitation. NYPA's RFP states that participation does not preclude a proposer from participation in the NYSERDA solicitation as long as the products (energy, capacity, and RECs) associated with a single project are not divided between both solicitations – though NYSERDA seeks only RECs, so

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the limitation is limited. While NYPA does not require notification of an intent to participate in NYSERDA's solicitations, both RFPs expressly state that if the project is selected for award under one solicitation, the project will be removed from consideration under the other solicitation. If the project is not selected under one solicitation, it will remain eligible for consideration by the other authority unless withdrawn by the bidder.

IV. Schedule

The current schedule for proposals may be viewed here. Note that dates are subject to change. Notifications of changes to these timeframes and the solicitation documents will be posted on each authority's website.

(If the link above is not active you may visit <https://www.hodgsonruss.com/assets/htmldocuments/Schedule%20re%20july%2024%202020.pdf> for the schedule.)

To learn more about the State's large scale renewable procurements and the contractual obligations of bidders, please contact Noah Shaw (518.736.2924) or Dan Spitzer (716.848.1420) in Hodgson Russ's Renewable Energy Practice.

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