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## Large Opportunities and Potential Risks: Renewable and Alternative Energy Companies Competing for the Army's \$7B Contract

By Richard J. Vacura and Susan J. Borschel

Renewable and alternative energy (“**RAE**”) companies will throw their hats into a rich, but potentially risky, ring for an opportunity to contract with the U.S. Army beginning at the end of September 2012. A number of those companies may be selected in November 2012 to belong to a pool of contractors from which some may be selected over the next ten years to help the U.S. Army satisfy a Department of Defense (“**DOD**”) mandate to produce or procure at least 25% of its total facility energy needs from RAE sources by 2025. Over the contracts’ 10-year term, the Army will issue a number of task orders ranging in value from \$500 (the minimum) to \$7B (the total of all task orders to be issued). Some of the task orders will be set aside for small businesses, and teams of contractors are encouraged to participate. Many of the contractors may be experienced at conducting business with the government and others may be dealing with the government for the first time, but all would be well-advised to exercise caution – both for the risks that apply to government contracting in general, but also for risks that are specific to this particular contract.

### THE NET-ZERO ENERGY INITIATIVE

The DOD is the largest energy consumer in the U.S. Government. In 2008, the DOD spent \$20B on energy. Roughly a quarter of that amount was spent on the facility energy needs of the DOD’s approximately 28 million acres. Despite all of the strategies employed to date, the current DOD facility annual energy bill is \$4B. Previous efforts to control energy requirements include Executive Order 13423, “Strengthening Federal Environmental, Energy, and Transportation Management, signed on January 24, 2007, which sets forth requirements for meeting certain energy-related requirements, including a reduction in dependence on fossil fuels. In 2008, a Defense Science Board task force called on the DOD to be more aggressive in reducing the military’s dependence on others for its energy needs. Each of the Army, Air Force and Navy are required to meet at least 25% of their total facility energy needs with RAE sources by 2025. In addition, the Army has set a goal of “net-zero” energy consumption by 2030, meaning each of its installations will produce as much energy as it consumes.

### CONTRACT SPECIFICS

The Army’s Solicitation (W912DY-11-R-0036) was issued on July 30, 2012, and has been amended three times. The Army is free to award an indefinite delivery, indefinite quantity contract (“**IDIQ Contract**”) to as many contractors as it believes will provide the best value to the government. Only those contractors that are awarded IDIQ Contracts will be allowed to participate in the task order opportunities at the different Army installations; however, because it recognizes that new technologies will be possible over time, the Army has indicated that it may periodically solicit new proposals and award additional IDIQ Contracts. Each IDIQ Contract will be for a three-year base period, with seven one-year options.

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In addition to the general requirements that apply to nearly all government contracts (outlined at the end of this Alert), the IDIQ Contract includes the following specific requirements:

- The task orders will be firm-fixed price – The task order proposals must indicate the maximum price per kilowatt hour for the construction, operation and maintenance of the applicable renewable energy facility. The Army will not be buying the facilities; rather, the Army will be buying the energy that it needs, with contractors free to sell excess capacity to other end users. The Army is willing to pay a slight premium for particularly innovative alternative energy solutions.
- Small business set-asides – Plants producing less than 4MW will be reserved for small businesses, and those producing 4MW – 12MW may be set aside if the contracting officer determines there will be adequate small business competition. Those facilities producing more than 12MW will be open for unrestricted competition.
- Subcontracting – 50% of all subcontracted dollars of the IDIQ Contracts must be set aside for small businesses.
- Special Purpose Entities – In order to facilitate financing, the Army will consider awarding the IDIQ Contract to one entity, with a complex process that would allow a special purpose entity to perform a specific task order while the original contractor continues to hold the IDIQ Contracts and compete for other task orders; however, nothing is guaranteed and it is likely that the Army will require a performance guarantee.
- End-of-Term Restoration Requirements – The Power Purchase Agreements and task orders may include a requirement to remove the facility and restore the property to its original conditions.
- Termination for Convenience – Each task order proposal must include a Termination for Convenience value schedule for each year of the task order.
- Off-Ramp – In addition to the risk that a Task Order can be terminated at any time (a termination for convenience), the Army can decide to cancel any contractor's IDIQ Contract for a failure to perform in accordance with the Army's standards.
- Davis-Bacon Act applies – Contractors will have to pay prevailing wages.
- Liquidated Damages – Contractors may be required to pay liquidated damages for a failure to deliver on time.
- Renewable Energy Credits – The Army will own these credits so as to count toward its compliance with the Federal Energy Goals.

## GOVERNMENT CONTRACTING IN GENERAL

The U.S. Army energy contracts impose a large number of burdensome and unique requirements when compared to the requirements for non-government contracts. These governmental requirements impact how and from whom goods and services are acquired, how records are kept and what must be disclosed, how costs are accounted for, and how intellectual property is treated. Government contracts also create unique risks and liabilities, including a government right to terminate at the government's convenience, and the risk of financial, civil and criminal liability, as well as administrative sanctions such as suspension or debarment (temporary or permanent inability to enter into contracts with the government).

Among the many government requirements are the following:

- *Cost Principles.* Government contractors may only charge to a government contract those costs that are (a) allowable, (b) allocable, and (c) reasonable. Notably, many costs typically allocated to commercial contracts by companies may not be charged to government contracts (e.g., interest expenses and selling costs). The contractor

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must structure an accounting system that can prevent these costs from being charged to the government. Federal contracting agencies can recover from contractors any costs that were paid but otherwise were not allowable, allocable, and reasonable.

- *Cost Accounting Standards ("CAS")*. The CAS dictate the way in which a contractor must maintain its accounting system and how the contractor must account for certain types of cost. Depending on the type of CAS coverage applicable, the contractor may be required to (a) comply with all nineteen cost accounting standards; (b) prepare a "Disclosure Statement" that describes the contractor's accounting practices and practices; (c) adhere to the disclosed accounting practices consistently in estimating, accumulating, and reporting costs; and (d) agree to a contract modification if the contractor fails to comply with the CAS or its disclosed practices. These requirements are *complex and burdensome* and require the establishment and maintenance of *Government contract-unique systems and procedures*.
- *Truth In Negotiation Act ("TINA")*. TINA requires that, for covered contracts, companies submit certified cost or pricing data. Cost or pricing data is any information that prudent buyers and sellers would reasonably expect to affect price negotiations significantly. The government uses the offeror's cost or pricing data to determine the reasonableness of the offered price. If the contractor fails to provide "current, accurate, and complete" data, the government is entitled to a contract modification to reduce the contract price to reflect the defective pricing impact.
- *Audit Requirements*. The Government enforces the cost principles, the CAS regulations, and TINA's requirements through its right to audit a contractor's books and records. This right generally may be exercised within three years after final payment under the contract, so contractors must maintain their records for at least this period of time. The government may conduct an audit at any reasonable time.
- *Bribery and Illegal Gratuities*. Contractors are prohibited by criminal statutes and regulations, with limited exceptions, from providing gifts or gratuities to federal employees. This prohibition encompasses many activities that are common in the commercial arena (e.g., providing meals or holiday gifts to customers). Employees must be trained to avoid providing illegal gratuities.
- *Conflicts of Interest*. Contractors are prohibited by criminal statutes and regulations from discussing employment with certain federal employees. Similarly, former federal employees are limited in the types of services they may perform if later retained by a contractor. Compliance with these requirements involves the establishment and use of comprehensive screening procedures by Human Resources personnel.
- *Anti-kickback*. Contractors are prohibited from receiving a kickback, the purpose of which is to improperly obtain or reward favorable treatment in connection with a federal prime contract or subcontract. Materials Management (purchasing) personnel must be trained to identify and refuse kickbacks.
- *Lobbying Restrictions*. Contractors are prohibited from using federal appropriated funds to lobby for the award of government contracts.
- *Procurement Integrity*. Contractors are prohibited from obtaining contractor bid or proposal information, or sensitive agency procurement information, prior to the award of a federal contract. Employees must be trained to refrain from soliciting or obtaining this type of information.
- *Service Contract Act*. Service contractors must pay their service employees not less than the wages set forth in the applicable Department of Labor wage determination. Contractors must implement procedures to ensure that all service employees who perform services under the contract are paid as required by the wage determination. In addition, service employees should be assigned to only those labor categories for which they qualify based on contract requirements (i.e., the job descriptions for the services to be provided under the contract should closely match the service employees qualifications and capabilities).

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- *Equal Opportunity and Affirmative Action.* Contractors must not discriminate against minorities, women, disabled individuals, disabled veterans and Vietnam era veterans. Contractors must establish written affirmative action programs and comply with the extensive regulations promulgated by the Department of Labor (including reporting requirements).
- *Subcontracting.* Contractors must establish a written subcontracting plan which details the efforts the contractor will make to assure that small business, small disadvantaged business, and women-owned business concerns will have an opportunity to compete for subcontracts. The contractor must strive to meet the total and percentage dollar goals for subcontracting to these entities identified in the subcontracting plan. Evidence of small business market research and solicitation efforts should be retained in the contract files.
- *Human Trafficking.* Contractor employees, subcontractors, consultants and other agents and representatives that work directly or indirectly on any U.S. Government contract are prohibited from engaging in or supporting any trafficking in persons, use or procurement of commercial sex acts, or use of forced labor. Contractors must establish written anti-trafficking policies, identify a senior-level person as the designated person to call with questions, and, depending on the size of U.S. government contracts, provide training on these policies.
- *Drug-Free Workplace Requirements.* Contractors must undertake various actions, including establishing a drug-free awareness program, to keep the workplace free of illegal drugs.

There is no question that the Army's RAE initiative offers tremendous opportunities, but because of the extensive specific and general requirements associated with this government energy initiative, energy companies should exercise caution and not hesitate to seek assistance from outside counsel so as to not run afoul of the many governmental requirements.

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