



State and federal governments seek to embrace alternatives to fossil fuels

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If you will forgive the bad metaphors, the sun is shining brightly and a new wind is blowing as our state and federal governments seek to embrace alternatives to fossil fuels for power generation. Despite the present financial crisis, money for projects that generate electricity from alternative sources, such as wind, solar, wave, geothermal, biomass and even nuclear power, is becoming more available. In fact, recent headlines in the Wall Street Journal have declared, "Alternative-Energy Companies Grow Even as Others Falter" and "First Solar Long-Term Outlook Still Shines Bright."

In New York City, there is a new property tax rebate at the rate of 8.75% per year for four years, up to a maximum of \$62,500 per year, for buildings that install solar power systems. Similarly, New York State has expanded existing legislation to give condominium and cooperative owners state income tax credits equal to 25% of the cost of a solar power system installed on their buildings up to a maximum credit of \$5,000.

Once the funding has been obtained, however, there are many issues that need to be addressed in the contracts for the construction, operation and maintenance of these alternate energy projects to make them successful for all of the parties involved, including the developer and its investors, the contractors and vendors, and the utility customers and their rate payers. Traditional contract principles are a good starting place. When combined with provisions dealing with the specific technologies and hoped for results, well crafted agreements can provide a level of certainty that will be attractive to investors and end-users alike.

Basic provisions, with which everyone should be familiar but that should not be overlooked, include: price and payment terms; scope and schedule; and risk sharing, including insurance and indemnity clauses. More specialized provisions that are essential to achieving a mutually successful project include performance warranties and guarantees, such as availability, reliability and capacity. Crucial differences in the technology being used will translate into differences in the performance warranties and guarantees that can be negotiated. Such differences likewise may have a substantial impact on the overall economics of the project.

One example is in the solar power industry where there is a discrepancy between the stated rating (e.g. 200 watts) and the actual performance. A solar panel with a "negative tolerance rating" of 10% results in a minimum warranted power of 180 watts. The language in the contractual warranty, therefore, is important in order to determine what you actually are buying.

Wind turbines are typically warranted for five years after installation. The express written warranty in the contract, however, often excludes: 1) towers, equipment, materials, or supplies not manufactured by the turbine generator vendor; 2) equipment that has been modified or altered without prior factory approval; 3) damage or loss of function sustained during periods with wind

speeds exceeding certain stated limits; 4) repairs performed by other than the vendor's service personnel; 5) acts of God; and 6) incidental or consequential damages.

To avoid unpleasant surprises, which should be the goal of every contract negotiation, the parties need to spell out the scope of the work (i.e. what is being bought/sold for the agreed price), the warranties (i.e. remedies for defects) and the performance guarantees that will apply (i.e. how it will function). A typical scope of work clause from the buyer's perspective might include provisions covering: the scope of supply and itemized prices; technical characteristics, technical conditions and guarantees of the equipment; technical documentation to be supplied; technical services and personnel included in the price; and spare parts availability and future price guarantees.

A separate warranty clause should address the express warranties being given on the work, both for the labor (installation and erection) and for the equipment. Typical warranty language should include the warranty period, remedies for breach of warranty (including response times if applicable) and any warranty exclusions.

The express, written warranties should be compared with performance guarantees and other obligations of the seller concerning the nature of the product being sold. Contractual guarantees of capacity, output, reliability and the like are important to assure the buyer that the project will generate power at some agreed upon level. For example, at present wind turbines generally run only 60% to 80% of the time since wind is intermittent and unpredictable. Solar power also is not constant, but rather depends on the amount and intensity of the sunshine at any particular moment.

As we move into a new era of power generation by alternative means, buyers, sellers, lenders and utilities all will be looking to protect themselves by adherence to good contracting practices, including drafting and negotiating detailed, technology specific agreements.

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