

PRIVILEGED AND CONFIDENTIAL

P3 Responses to Quanta/ATCO Additional Clarifications re: Addendum No. 6 to RFP & O&M Agreement

Quanta/ATCO Consortium Question: Please confirm our understanding that the RFP and the O&M Agreement will be modified to include the interpretations noted in the CR#1 document and in your response to the questions noted below by attaching CR#1 and your responses to this table as an appendix to the OMA on which the proponents are to base their bids, or that the OMA will be specifically amended to reflect these changes and re-issued in time to allow for review prior to the requirement to submit bids.

P3 Response: The Authority intends to provide all Qualified Respondents an updated O&M Agreement addressing any errors or typographical issues. With respect to other items that are clarifications to contract language, the Authority would propose to address these in a memo to the Selected Proponent memorializing the intent of the Parties, and does not believe the O&M Agreement needs to be adjusted.

Part I: General Clarification Questions re: Addendum No. 6 to RFP

Ref. #	Section	Quanta/ATCO Consortium Question	P3 Response
1.	RFP - Confirmation of Acceptance of O&M Agreement §4.1.3(i)(y), and §4.1.3(ii)	<p>We note the reference to the phrase “subject to further discussion on a limited number of material comments,” is quite vague.</p> <p>Please confirm our understanding that this means that:</p> <ul style="list-style-type: none"> - such material comments must be resolved in a manner that is satisfactory to each party, each acting in its sole discretion; - any such resolution will be subject to the Qualified Respondents' obtaining their respective Board of Directors approval to same within 3 Business Days – and that §4.1.3(ii) is to be read accordingly; and - if no such satisfactory resolution is reached, or if such Board of Directors approval is not obtained by the end of December 2019 then the Bid Security will be returned to the Qualified Respondents forthwith. 	<p>The intent is for Qualified Respondents to submit a Definitive Proposal based on the final form of the O&M Agreement distributed prior to the Proposal Submission Date (with the understanding that minor typographical errors that have been identified will be corrected in advance of the Proposal Submission Date).</p> <p>If a Qualified Respondent includes any material comment in their Definitive Proposal (i.e., the Definitive Proposal includes a condition or revised term that, if not met or included, would prevent such Qualified Respondent from signing the O&M Agreement), the Authority will review and consider such comment together with the related assumptions and impact on the Definitive Proposal. However, please note that the Authority intends that the final form of the O&M Agreement will be the version distributed to the Parties, and to the extent any such changes are included in the Definitive Proposal, the Qualified Respondent may be at a disadvantage to any other Qualified Respondents that do not include material changes to the final form of the O&M Agreement.</p>

2.	RFP - Bid Security §4.1.10	<p>We note the provisions addressing return of the Bid Security do not appear to address other possible alternatives. Please confirm that the following are also conditions when the Bid Security will be returned to the Qualified Respondents:</p> <p>(a) if the Qualified Respondents' Definitive Proposal is accepted by the Partnership Committee, and the conditions to the Effective Date (as defined in the OMA) are not satisfied by the Outside Date, the Bid Security will be returned to the Qualified Respondents forthwith;</p> <p>(b) if the Qualified Respondents' Definitive Proposal is accepted by the Partnership Committee, and PREPA and/or the P3A do not execute the O&M Agreement (perhaps for failure to obtain all requisite approvals), the Bid Security will be returned to the Qualified Respondents forthwith;</p> <p>and</p> <p>(c) if the proposal of a party other than the Qualified Respondents is selected then in addition to the circumstances noted in the RFP, the Bid Security will be released to the Qualified Respondents forthwith on any of the events noted in item 1 above or paragraphs (a) or (b) occurring in respect of such other party.</p>	Confirmed. The Bid Security will be returned to the Qualified Respondents in the event of (a), (b) and (c).
3.	RFP - Certification Requirements §4.1.10	<p>The fourth paragraph of Annex C appears to have a drafting error. Please confirm that Qualified Respondent may submit Annex C with the following revised paragraph 4:</p> <p>We further certify that we are [describe the type of entity or</p>	Confirmed. Annex C should include the suggested drafting changes.

		<p>entities (corporation, partnership, LLC, etc.)] organized in [indicate the jurisdiction of organization] and <u>that</u> the entity contemplated by Qualified Respondent and Team Members to be the one that shall execute the Partnership Contract shall be authorized to do business in Puerto Rico and shall have no impediment, and shall be authorized to do business in Puerto Rico and to enter into a contractual relationship with government entities in Puerto Rico, as well as to comply with any other applicable Puerto Rico or U.S. laws and/or requirements.</p>	
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Part II: General Clarification Questions re: O&M Agreement

Ref. #	Section	Quanta/ATCO Consortium Question	P3 Response
1.	General Question re Cost	<p>Re response #1 in the CR#1 – “A and your request that we clarify what is intended by “capital management costs” – please note:</p> <p>These would be the costs of managing Capital Improvements (including Federally Funded Capital Improvements and Non-Federally Funded Capital Improvements, including the project management costs, associated with any such Capital Improvements.</p> <p>Please confirm these would be included as Capital Costs.</p>	<p>Project management of capital projects will be done by ServCo Employees and will be a T&D Pass Through Expenditure. Capital planning for capital projects should be done by Management Co. as part of the management services provided in exchange for the Fixed Fee. To the extent that any of the project management costs incurred by ServCo can be reimbursed by Federal Funding as a capital cost, the parties would seek reimbursement of such costs from Federal Funding.</p>
2.	Environmental §5.10(b)(ii)	<p>Please confirm that the requirement that Operator submit a sworn certification that:</p> <p>“to the best of its knowledge, after due inquiry, the alleged Pre-Existing Condition did not arise from facts, circumstances, conditions, actions or omissions first occurring after the Service Commencement Date”,</p> <p>does not require Operator to perform any additional studies (including any Phase I or Phase II Studies) but that it may rely only on the knowledge it has of the type and location of work performed by Operator on the T&D Site.</p>	<p>Confirmed. The requirement in Section 5.10(b)(ii) that Operator submit a sworn statement does not require Operator to perform any additional studies (including any Phase I or Phase II studies).</p>
3.	T&D Pass- Through Expenditures §7.2	<p>We understand that T&D Pass-Through Expenditures made over and above Budgeted amounts will be paid by Owner provided they are not Disallowed Costs, subject to Owner’s termination pursuant to Section 14.5(e).</p> <p>Please confirm</p>	<p>Confirmed, provided that if Operator becomes aware that T&D Pass-Through Expenditures are expected to exceed a Budget for such Contract Year, Operator has the obligation under Section 7.3(e) to (i) notify PREB and Administrator and (ii) seek an amendment to any Budget. In addition, in the event of Force Majeure Event, Owner</p>

			<p>Fault and other similar circumstances described in the O&M Agreement, Operator has the obligation to consider any necessary adjustments to the Budgets.</p>
<p>4.</p>	<p>Environmental §18.2(a) and (b)</p>	<p>We note that Section 18.1(a)(viii) provides:</p> <p>“(viii) Pre-Existing Environmental Conditions, other than an exacerbation of such Pre-Existing Environmental Conditions to the extent caused by the gross negligence or willful misconduct of any Operator Indemnatee.” [emphasis added]</p> <p>Section 18.2(b) then provides:</p> <p>“Owner’s indemnification obligations hereunder shall not be limited by any coverage exclusions or other provisions in any insurance policy maintained by Owner which is intended to respond to such events. Notwithstanding the foregoing, other than with respect clause (vii) of Error! Reference source not found. (Indemnification by Owner – Generally), to which the following statement shall not apply, Owner shall not be required to reimburse or indemnify any Operator Indemnatee for any Losses to the extent caused by or due to:</p> <p>(i) a Force Majeure Event, other than to the extent caused by the gross negligence or willful misconduct of any Owner Indemnatee in responding to such Force Majeure Event; (ii) the negligence (including gross negligence) or willful misconduct of any Operator Indemnatee;” [emphasis added]</p> <p>The provisions of Section 18.2(a) highlighted in bold above conflict with the provisions of Section 18.2(b) noted above.</p> <p>Please confirm that the sentence in Section 18.2(b) that reads:</p>	<p>Confirmed. Section 18.2(b) should refer to both clause (vii) and clause (viii) of Section 18.2(a).</p>

		<p>“Notwithstanding the foregoing, other than with respect clause (vii) of Section 18.2(a) (<i>Indemnification by Owner – Generally</i>), to which the following statement shall not apply,”</p> <p>Should read (see added wording in bold type):</p> <p>“Notwithstanding the foregoing, other than with respect clause (vii) and clause (viii) of Section 18.2(a) (<i>Indemnification by Owner – Generally</i>), to which the following statement shall not apply,”</p>	
5.	Annex X, 10.	<p>“...provided that any (i) income taxes imposed on ServCo by the PRIRC or Act 29, (ii) payroll taxes on ServCo or (iii) other taxes imposed on ServCo as a result of the establishment of its operations in the Commonwealth or the continuation thereof (including sales and use taxes and excise taxes on goods or services that are not required to be acquired by Operator on behalf of Owner for the performance of the O&M Services under the Agreement) shall not be T&D Pass-Through Expenditures;” <i>[emphasis added]</i></p> <p>You have confirmed in CR#1 Part I, item 15 that the references to ServCo should be replaced with references to Operator.</p> <p>As you know, payroll taxes are not imposed on an employer directly. Rather, an employer is required by law to withhold payroll taxes from the compensation it pays employees. Our understanding is that the text above is not intended to suggest that the portion of the Operator’s employees’ compensation that is subject to withholding will not be treated as a T&D Pass-Through Expenditure (and therefore must be paid by Operator the Service Fee). We understand that the intent is that if PREPA pays the full compensation and then Operator fails to withhold as required by law, then any deficiency must be paid by Operator directly, and not as a T&D Pass-Through Expenditure (as such amounts were already paid by PREPA).</p> <p>Please confirm.</p>	<p>Payroll taxes include portions paid by employees (withheld by the employer from the employee’s salary), as well as portions paid by the employer. For example, the employer is responsible for paying a portion of the FICA payroll taxes.</p> <p>The intent is for the portion of the payroll taxes paid by the employees (withheld by the employer) to be a T&D Pass-Through Expenditure, since this is part of the employee’s salary. However, any payroll taxes imposed on the employer should be paid by Operator (and not be a T&D Pass-Through Expenditure).</p>

6.	Exhibit D – Guarantee §2.1(e)(ii)	<p>We note the addition of the reference to “Owner” in subsection (ii) of this representation. As it is uncommon for a Guarantor to provide representations in respect of the party in whose favour the guarantee is being given we assume this was meant to refer only to Guarantor.</p> <p>Please confirm.</p>	Confirmed. Section 2.1(e)(ii) of the Exhibit D should refer only to Guarantor.
7.	Exhibit D – Guarantee §3.4	<p>With regard to this Section we understand that Guarantor would be entitled to the limitation of liability and caps on liability provisions in the OMA in addition to the other provisions noted in this Section.</p> <p>Please confirm.</p>	Confirmed. Guarantor should be no worse off than Operator under the O&M Agreement. To the extent there are caps on the liability of Operator under the O&M Agreement, they apply to Guarantor as well; provided that to the extent there is no cap on the liability of Operator (e.g., with respect to gross negligence and willful misconduct), there will be no cap applicable to the Guarantor.
8.	Exhibit D – Guarantee §4.1	<p>We note that this Section was revised to include references to “amalgamate”, “amalgamation” and “merger”, but that the references are inconsistent in that in some places a reference is made to both, and in others only one such term is used.</p> <p>As we understand that the terms have essentially the same meaning, “amalgamate” or “amalgamation” being more a Canadian term and “merger” being more a US term, that any reference to one should be joined with a reference to the other.</p> <p>Please confirm our understanding that where there is a reference to “merger” it also means “amalgamate” or “amalgamation” as applicable and vis versa.</p>	Confirmed. References to “merge/merger” should include references to “amalgamate/amalgamation.”