

PSEG-PREPA OMA Contract concerns (11-7-2019 2:00pm)

Note – We believe that the contract has made significant progress over the year, and that we have worked very well together in a collaborative and transparent fashion during that process. However, our view is that the draft contract received on October 28 was one step forward, two steps back and we have a number of serious concerns. There were a number of provisions that were not previously discussed and a number of the protections we requested in our prior-mark-ups and appeared in P3's draft agreements that have now been rejected in the October 28 draft. Our most serious concerns are identified below and there are a number of other issues which will be addressed in our mark-up and clarifications we will be seeking to the RFP addendum.

1. **Funding** – Our primary concern which we have clearly stated throughout this entire process is ensuring that we have sufficient funding to properly operate the system and bring it to industry standards from its present position.
 - a. **FEMA** - A CP for commencement of operations services that a specified and substantial amount of FEMA funding (obligation) has been removed in the most recent draft. Our meeting with FEMA, while positive, is no substitute for contractual protection. We require a CP (and ongoing level) of sufficient Federal funding.
 - b. **Initial Budgets** –In your latest draft it appears that mutual agreement by the parties as to the initial budget is no longer a CP, rather, PREB must ultimately approve the initial budget and if we disagree with PREB's decision, we would be in a dispute process where PREB, as an administrative agency, will be afforded deference by the Puerto Rico courts-- a very unbalanced position for us. As further noted below, we want mutual agreement with respect to budgets with referral to an impartial technical expert if there is a dispute. If a budget requires a rate increase we recognize that PREB approval will be required, and it should be generally consistent with the budget policy provision we proposed for the parties to reach agreement.
2. **Termination and 'put'** – Section 16.3 -your latest draft states that in a termination or expiration event, the ability of us to 'put' (i.e, automatic transfer) ServCo to the Owner is at Administrator's option. If a termination or expiration event occurs, we need a pre-planned exit path and require this put.
3. **Guarantee** – The guarantee should be for Management Company's potential payment obligations, not performance. The guarantor will be a wholly-owned investment grade entity that is incorporated in the US (or an LC) and will specify a maximum liability amount consistent with the defined term Operator Security Amount which appears in the draft but is not used in the form guaranty.
4. **PREB** – We have concerns about PREB's broad oversight and our potentially relatively weak position in disputes regarding budgets, rates, performance metrics and other matters. As it stands, you get 'two bites at the apple', by us having to agree with Administrator (subject to technical dispute process), then obtaining PREB approval, where any disputes would go to Puerto Rico courts and PREB, as an administrative agency, would be afforded deference. Our prior suggestions to try to level the playing field in the dispute process and to expedite that process so that it does not negatively impact operations were rejected. The Technical Dispute process should include PREB so it is more balanced and efficient.
5. **Transition duration and Review time by parties** – The Initial Budgets, System Remediation Plan (SRP) and Performance Metrics each require a 60-day review by Administrator, followed by a 120-day review by PREB. That is six months of review. If we actually started transition on January 1, 2020 (i.e., you have all PR approvals prior to that so we can start transition) and if it somehow only took us an equal amount of time to actually prepare these budgets, plans and metrics as you require to review it (six months), then the earliest mathematically possible date to go live would be January 1, 2021. We recommend narrowing the scope of the SRP and metrics to a Phase 1 covering the first 2-3 years, which will enable a shorter review period for Administrator and PREB (30 days each), which will enable the possibility of an earlier transition. We would update the SRP and metrics for the long term in the subsequent budget cycle.

6. **Prefunded accounts** –
 - a. **Investment grade rating** enabling step-down of funds. Insert symmetrical provision that if investment grade rating were subsequently lost that you will immediately replenish back to the 4.5 months and the contingency reserve fund.
 - b. **Contingency reserve account – 7.5(f)** – change the funding replenishment to ‘within ten days’ not ‘as soon as Owner has sufficient funds to do so’.
 - c. **Control** – You have repeatedly advised that the Servicing Agreement will give us comfort as to control of accounts. We have not seen it, please send the draft. If a draft is not available at this point in time then insert the requirement for a control agreement.
 - d. **Unfunded amounts (7.7)** – reinsert our clause that provides “all parties acknowledge Operator/ManagementCo has no obligation or responsibility to incur or pay any costs or make expenditures in providing O&M services....” Otherwise it could be read that Operator/ManagementCo could be required to fund certain costs when the accounts are not funded, which will not be the case.
7. **Pass-through costs** –
 - a. **Affiliates** – we intend to leverage our Service Company in NJ for certain matters – i.e, install a new ERP, outage management system, dispatch system, etc. We expect those costs (no margin) to be pass-through costs. Section 4.2(1) and 5.2 prohibits that. This is an important tool for us to leverage our expertise and bring that value to PREPA, at no profit. (fyi – same as LIPA).
 - b. **Employees for FEMA** – You have informed us that this agreement is not FEMA compliant. We would like to find a way to have our Puerto Rico employees work on FEMA projects and have costs reimbursed by FEMA. It will be more cost-efficient and a better workforce development path. Let’s discuss.
8. **Environmental – pre-existing conditions** - Change language back to the broader definition, include Operator in assessment process, change responsibility of addressing those to Operator, who will keep Administrator informed.
9. **Termination rights** – Change in Law appears to have been erroneously removed.
10. **Insurance** – We should be a named insured on the policy, the cost of which will be a T&D pass-through expenditure. (fyi – same as LIPA)
11. **Genco** – We want to reconfirm the general scope you envision, specifically, that the scope is for IRP, entering into generating contracts as agent, dispatch and, for up to three years, providing administrative support services to the generation fleet that PREPA will operate, i.e., we will not run the generating stations, nor procure fuel supply for Genco, rather PREPA will retain employees to run and oversee that part of the legacy business itself.
12. **Section 9.9** – this addition in this draft expressly requires compliance with Act 120. We believe this Act cited the \$0.20/kWh customer rate target. We know that rates are currently in excess of this target and will continue to increase to address the RSA, pension underfunding and investments needed for the system. Reinsert the sentence that we proposed regarding this target to address the apparent conflict.
13. **Conditions to execution** - This draft requires that the conditions to execution be reasonably acceptable. We do not want to be in a position where approvals contain modifications from the Puerto Rico agencies which could be adverse to us that we find unacceptable and then potentially be in a dispute as to whether we have acted reasonably with \$30 million in bid security at risk.