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CHEAT SHEET

Deregulated vs. regulated markets. In deregulated markets, consumers can choose their energy supplier and select a clean electricity provider for all or a portion of their energy. In regulated markets, the consumer typically has one choice in its energy supplier and must work closely with that provider to obtain clean energy.

Going green. The easiest way for a small- to medium-sized company to go green is to work with its existing utility in a regulated market, or with an electricity provider in a deregulated market, to obtain a “green rate” for clean power in exchange for renewable energy credits.

PPA. Large companies can enter directly into a power purchase agreements (PPA) with third-party providers in the same manner as utilities and may be able to procure clean power directly from a provider unlike the rest of the regulated market.

Virtual PPA. Companies that do not have green energy options near them, can enter into a virtual PPA. In this agreement, the company pays a third-party provider elsewhere to produce and sell clean energy, receiving renewable energy credits in exchange but continuing to use traditional energy resources.

Every company procures goods and services as part of its business, though there are some significant issues with procuring clean energy for your company. This article provides in-house counsel with an overview of the procurement process at larger companies, specific clauses in vendor agreements that are important to review before entering into a contract with a vendor, and a guide to procuring clean energy for your company. Also, check out our sidebar on decommissioning coal plants.

Procurement 101 for in-house counsel

Most large organizations have a dedicated procurement department that adheres to applicable regulations, policies, and procedures to acquire goods and services.

To compete or not compete ...that is the first question

When most think of the procurement process, they typically think of the competitive procurement request for proposal (RFP) process used to obtain multiple bids; however, some goods or services have only one vendor and are sole sourced. It is important to understand the supply base for a need prior to going through a time- and resource-consuming bid process for something that only has one source.

One of the main challenges with a sole vendor scenario is the lack of bargaining power. As in-house counsel (or supervisor of procurement professionals), negotiating a contract with a sole-source vendor can be very challenging. The vendor’s position is usually: “If you want it, you can only get it from me on my terms.” However, most goods and services have competition available. Instead of trying to reach agreeable terms with a challenging vendor, it may be a better outcome for your company to create an RFP with a functional requirement rather than purchasing from a sole vendor

or particular brand.

Competitive bidding

Where possible, competition will yield the best outcome for a company; however, not all competition should be equal. Most companies procure a wide variety of goods and services with a significant range in dollar value. For example, a US\$2 box of pens should not be subject to the same process as a US\$10M construction project for a new office building. Recognizing the inefficiencies of a one-size-fits-all procurement process, many organizations have set specific dollar thresholds tied to competition. Several examples are listed below.

1. **Competitive threshold:** Purchases under \$XXX do not require any competition. Just buy the low dollar and low-risk items. This is a dollar amount not worth the buyer, vendors, or in-house counsel time to quote and negotiate terms.
2. **Informal quoting threshold:** Purchases under \$XXX require multiple quotations prior to making a selection. Quotes can be over the phone, email, mail, or fax. This is a basic level of diligence prior to making a purchase selection.
3. **Formal bidding process:** Purchases greater than \$XXX require an RFP. This is under the main procurement department. The process includes issuing a bid package for vendor review, having formal technical and commercial evaluation criteria (usually determined in advance), and retaining proposals to document the selection process.

Individual business requirements drive the no-competition, informal, and formal RFP threshold dollar values. A large organization may require competition for purchases in excess of US\$50, whereas a smaller organization with fewer transactions may require competition for every purchase.

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Electronic bidding tools

Different organizations have different bid procedures; however, one way to improve the request for proposal process is to use an electronic bidding platform (e-procurement tool). Environmental benefits of an e-procurement tool include a paperless bidding process and electronic record keeping. A wide spectrum of technology that offers functionality as basic as a document exchange to as sophisticated as real-time electronic auctions is available.

Form agreements

If you work for a large company, you may have the luxury of creating your own form agreements to provide to vendors when your company procures goods or services. If you work for a smaller company, you may need to review and redline the vendor's form. Regardless, some of the important clauses to consider are discussed below.

Warranty: How long is the warranty period? A typical timeframe is one year. However, for heavy equipment or large purchases, you may want a longer warranty period. If the vendor is not willing to

provide any warranty, you must ensure your business unit understands they have very limited remedies for defective products. Inform your business unit of the actions (or inactions) that void a warranty typically related to storage, maintenance, and repairs.

Insurance: In-house counsel should discuss the desired vendor coverages with its risk department or insurance broker if the company does not have a risk department. The general guidelines are US\$2M/US\$1M aggregate/per claim in general liability, and US\$1M in auto and statutory workers compensation. However, if the vendor is going to be performing specialized work such as using cranes, dealing with hazardous materials, or performing aviation, higher policy limits or different coverages may be required.

Indemnification: The indemnification clause should be broad enough to cover any acts by the vendor that give rise to a claim whether it is a third party or a company claim. Company claims are very important to include as the most likely claim to occur is on behalf of the company.

Limitation on liability: While a company desires no cap on liability, many vendors desire to include them to limit risk to a known quantity. In this case, in-house counsel must articulate what limit makes sense based on the risk and not the dollar figure of the contract. The dollar figure of the contract may be small compared to the risk if the product or service is not performing as intended. If there is also a risk of bodily injury, death, or significant property damage, in-house counsel should negotiate a liability cap of at least US\$1M and preferably no limit on third-party claims covered under the indemnity provision. Ultimately, the limit on any liability should be discussed and approved by the business as if the cap is reached, the exposure will fall to the business unit.

Dispute resolution: Ensure the contract states the law and venue of any contract dispute. Because both sides usually want to stay in their own jurisdiction and avoid the other side's jurisdiction, selecting a neutral location can be effective. New York and Delaware are common choices due to their interpretation of contractual law. Consider the venue location related to your company's ability to pay for employees' travel related to a case or the cost of hiring outside counsel local to the venue.

Cybersecurity and data privacy: These are increasingly important topics facing companies. In-house counsel should try to ensure that the vendor is responsible for any data breach of company information while such information is under the control of the vendor. In addition, the vendor should indemnify the company for any such breaches. For vendors that process confidential company information or personally identifiable information (such as social security numbers and credit cards information), the company may also desire the vendor to show proof of data security compliance and to carry cybersecurity insurance.

Liquidated damages: For projects that require the vendor to adhere to a strict time schedule, in-house counsel and the business unit should consider a liquidated damages clause. The liquidated damages are usually a per day amount for every day that the vendors are late on delivery or project completion. The liquidated damages must be reasonable in light of the value of the contract, i.e. you cannot charge US\$1M per day on a US\$100,000 contract.

In-house counsel should try to ensure that the vendor is responsible for any data breach of company information while such information is under the control of vendor.

Hazardous materials: For any work involving environmental issues such as cleaning up asbestos, the vendor should represent and warrant that it will abide by all hazardous materials laws and

indemnify the company for any breach of the representation and warranty.

Business ethics: Larger companies often require their vendors to state that they abide by all ethical laws and regulations and do not engage in bribery or other unethical behaviors. Some companies also require their vendors to meet sustainability goals. If you are providing goods and services to a large company, ensure that your company can comply with the requirements.

Even if you don't have a lot of bargaining power with a vendor, it is critical that in-house counsel read the contract in full so that she can brief the business unit as to what it is agreeing to as well as to ensure the business unit can comply with its obligations under the contract.

A renewable energy credit represents one megawatt hour (MWh) of clean-generated energy. For each renewable energy credit, a company can claim an offset from the equivalent MWh from a traditional power plant.

Procurement of clean energy

Now that you are familiar with procurement basics related to goods and service, your CEO wants you to buy clean energy. Wind, solar, geothermal — clean energy is all the rage; but how does your company actually procure clean energy? How are utilities providing clean energy?

Providing clean energy

Clean energy starts with a power plant just like a traditional natural gas or coal power plant. However, in this case the power plant is fueled by solar panels or wind turbines. (Note that other forms of clean energy exist, such as geothermal or hydroelectric, but this article will focus primarily on solar and wind as they are the most predominant forms of clean energy.)

The energy from the sun or the wind spins a turbine, just like in a traditional power plant, and creates electricity. The electricity is then moved from the solar or wind plant to consumers through transmission and distribution power lines. Solar or wind plants can be built directly by utilities or by third parties. Currently, most solar and wind plants are built, owned, and operated by independent third parties. Some large names in this field include First Solar Inc., NextEra Energy Inc., GE Power, and Siemens. Traditionally, these companies build large solar or wind plants, dubbed "utility scale," as opposed to smaller projects, such as putting a rooftop solar system on your home.

Utilities across the United States (and the globe) are facing increasing pressure from their state legislatures, consumers, and stakeholders to provide more of their power from clean energy sources. Rather than building their own power plants, which can be costly and time-consuming, the utilities often turn to third-party providers to supply the utility with clean energy. Often the utility will put out an RFP asking bidders to provide project pricing for a certain number of megawatts (MW) of power. The utility evaluates the bids primarily on price but also on the third party's reputation in the industry, past projects, and financial strength, as well as other factors. Once the utility selects a power provider, it enters into a contractual agreement with the power provider called a power purchase agreement (PPA). A typical PPA is for 25 years and obligates the third party to provide a guaranteed amount of

solar or wind MW to the utility per day, month, and year. In exchange, the utility pays a contracted price for the clean energy for the term of the PPA. Once the project is built by the third party and is providing electricity, the utility adds the clean energy to its overall mix of power resources. In addition, the utility receives “renewable energy credits” for the clean power. Many states have statutory requirements that the utilities provide a certain amount (e.g., 30 percent) of its overall power mix from clean resources. PPAs assist utilities in meeting these requirements.

My company wants to go green, but we aren't a utility!

As discussed, many third-party providers of wind and solar provide utilities with large scale projects. How then is a company supposed to procure clean power? A few different options are available depending on the size of your company and whether you are in a regulated market.

Large companies: Large companies have the most flexibility to procure clean power directly from third-party providers. Some behemoths such as Google, Apple, and Facebook enter directly into PPAs with third-party providers in the same manner as utilities. Usually the PPA project built by the third party is dedicated solely to the company. In addition, large companies in regulated markets, such as Nevada, may be able to “leave the grid” and procure clean power directly from a provider when the rest of the regulated market is not able to do so.

Deregulated markets: In deregulated markets, such as Texas, local consumers can choose their energy supplier. Companies of any size can often sign up with a clean electricity provider for all or a portion of their energy. The clean energy provider has usually entered a PPA with a third party “behind the scenes” in a similar manner as a utility. Usually the price of the electricity is more expensive but also provides the company with renewable energy credits and the ability to tout that they have X percent clean energy.

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Regulated markets: In regulated markets, the consumer usually only has one choice in its energy supplier and cannot obtain power on the open market. In regulated markets, companies must work more closely with their utility provider to obtain clean energy. Many regulated utilities offer a special tariff called the “green rider” or “green tariff,” which allows larger companies to pay a premium to receive an allocation of the utility’s renewable energy credits. Consequently, the company can tout that it receives X percent of its energy from clean sources. In addition, utilities may enter into “nameplate” projects in which the PPA is dedicated solely to a large customer. The large customer essentially reimburses the utility for the clean energy under the PPA. The large customer then gets all the renewable energy credits from the project and the ability to say that the XYZ solar plant is now the Company ABC solar plant.

Virtual PPAs: Some areas of the country and the world are not conducive to solar or wind generation. Consequently, companies in those areas often enter into a virtual PPA. This is an arrangement in which the company continues to receive its actual power from a traditional resource in its geographic area. However, the company pays a third-party solar or wind provider for the clean energy that the third party produces and in exchange the company receives the renewable energy credits. Since the company is not receiving the actual power, the third-party provider sells the energy in the market where it is produced.

Private generation: Some companies, large and small, are interested in owning their own clean energy generation located on or adjacent to their operations. This is typically in the form of a small-scale solar project. Although in-house counsel may view a small solar build the same as any other construction project, special consideration must be paid to the performance expectations for the life of the project (typically 20 or 25 years).

If you are in-house counsel for a small-to medium-sized company, the easiest way to “go green” is to work with your existing utility in a regulated market, or with an electricity provider in a deregulated market, to obtain a “green rate” for clean power in exchange for renewable energy credits. This allows your company to make substantive representations regarding its clean energy usage while minimizing the hassle and risk of trying to enter into your own PPA or nameplate project. Larger companies have more choices but also have the in-house teams or capital to spend on outside teams to manage sophisticated PPA transactions. Companies that cannot obtain direct green energy in their geographical region should consider a virtual PPA.

Tips for decommissioning coal plants

On the flip side of clean energy is what to do with coal plants that have either naturally reached their end of life or are being proactively decommissioned to satisfy consumer expectations. It is important to note that despite all the rhetoric in the news about the resurgence of coal, most utilities find that coal is uneconomical, a fact that has hastened the rate of decommissioning outside the environmental debate.

Most utilities that face a decommissioning do not attempt to do the work themselves but rather hire a third-party contractor that specializes in this type of work. The contract between the utility and the contractor is usually done pursuant to an Engineer, Procure, and (De)Construct (EPC) agreement. While a typical EPC contract form for large projects is a good starting point, in-house counsel should carefully focus on the following clauses.

SCRAP: A primary commercial consideration related to decommissioning or demolition of a power plant is the value of the scrap material. Some scrap is viable equipment that can be sold by the contractor on the open market, and other scrap may be a valuable recyclable material like steel or copper. In-house counsel should make sure the price paid to the contractor is reasonable in light of the valuable scrap material the contract will be hauling away or that the company gets a share of the scrap residual value defined in the contract.

WARRANTY: The contractor should warrant its work for at least one year after full decommissioning; five years is preferable if you can obtain it.

INDEMNIFICATION: The indemnification clause should be broad to cover any acts by the contractor that give rise to a claim whether it is a third-party or a company claim. Company claims are very important to include as the most likely claim to occur is on behalf of the company.

INSURANCE: In-house counsel should discuss the desired contractor coverage with its risk department or insurance broker if the company does not have a risk department. Usually a contractor in this space needs significantly higher limits than the average cleanup company. Lack of proper insurance should be a “deal killer.” A company with low coverage is not typically a contractor that you can trust to handle this type of work.

LIMITATION ON LIABILITY: While a company desires no cap on liability, large scale projects usually include one because the contractor desires to limit its risk to a known quantity. In this case, in-house counsel must think carefully about what limit makes sense based on the risk and not the dollar figure of the contract. The dollar figure of the contract may be small compared to the risk of regulatory fines and reputational harm that the company would face if the contractor did not properly decommission the site.

ENVIRONMENTAL: The contractor should represent and warrant that it will comply with all federal and state environmental laws, including laws regarding disposing of hazardous waste. Coal plants tend to have a lot of asbestos in them, not to mention the coal considerations. In-house counsel should also research which environmental laws actually affect the project or hire outside counsel on a limited basis to advise on this issue. In-house counsel should be willing to engage in good-faith negotiations with the contractor to tailor the clause to the laws that affect the project as contractors justifiability do not want to sign up for open-ended obligations.

Conclusion

In-house counsel may work with a large procurement team to obtain goods and services for the company or may be involved in a more informal process. Regardless, in-house counsel should aim to support a process that attempts to procure goods and services for the lowest possible cost at terms that align with the organization's risk profile. Moreover, in-house counsel should prepare form agreements for vendors to sign or carefully review vendor agreements. It is important to review key clauses in detail and try to negotiate for better terms as necessary. With regards to clean energy, most companies are best served by working with their existing utility provider or an energy provider in a deregulated market to obtain green energy.

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