

KIRKLAND ALERT

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New Jersey Opens Bidding on Largest U.S. Offshore Wind Power Solicitation to Date

On September 17, 2018, the New Jersey Board of Public Utilities (“NJBPU”) approved an order opening the application window for bids to provide up to 1,100 megawatts of electricity from offshore wind projects. The window opened on September 20, 2018, and will close on December 28, 2018. The NJBPU has 180 days from the date that an application is completed to make a final decision. The NJBPU noted that the timing of its awards would ensure that developers of offshore wind projects would have enough time to qualify for federal investment tax credits (or, if preferable, production tax credits). Offshore wind projects must have “begun construction” (within the meaning of Internal Revenue Service guidance) by the end of 2019 in order to qualify for federal tax credits.

Offshore wind is a growing industry in the U.S., with Deepwater Wind’s Block Island project off the coast of Rhode Island commencing commercial operations in late 2016 and advanced-stage projects in Massachusetts, Maryland, Rhode Island and New York anticipating financial closings in 2019. The New Jersey offshore wind solicitation is the largest state offshore wind power solicitation to date and looks to establish the state as an emerging leader in the offshore wind industry. Following on his Executive Order 8, which established a 3,500 megawatts offshore energy by 2030 target and was signed into effect on January 31, 2018, the New Jersey governor recently called upon the NJBPU to issue two additional solicitations, each for 1,200 megawatts of offshore wind projects, to occur in 2020 and 2022.

Application Process

Applicants are required to meet with the NJBPU staff and representatives of the Division of Rate Counsel no less than 30 days prior to submission of an application. The minimum filing requirements are set forth in the *New Jersey Administrative Code* 14:8-6.5, but the NJBPU issued a *New Jersey Offshore Wind Solicitation Guidance Document* (the “Guidance Document”) providing additional direction on preparing a successful application. The NJBPU indicated that the Guidance Document is intended to simplify the application process, to give all potential bidders equal access and opportunity to ask questions and receive guidance, and to facilitate the evaluation of bid proposals. Developers will be required to provide an application deposit of \$150,000 for reimbursement to the NJBPU and the State of New Jersey for reasonable costs of the review.

The New Jersey offshore wind solicitation looks to establish the state as an emerging leader in the offshore wind industry.

Application Requirements

The minimum filing requirements are significant and should be reviewed together with the Guidance Document in detail by developers and their counsel. Projects that are submitted for application must provide detailed information about all aspects of the project, including but not limited to information on the developer and key personnel, technical specifications and timelines for the project, financial, operations and maintenance, decommissioning, permitting, interconnection, environmental and economic development plans, documentation demonstrating they have applied for all available State and Federal tax incentives, a cost-benefit analysis demonstrating net economic and environmental benefits to the state of New Jersey, and the proposed method of financing the project.

Developers hoping to win the bid must expect to expend significant resources in their solicitation and be ready to present projects that have a contractual framework for the project proposed and the construction and financing timelines that have been scrutinized by technical and financial experts. Key suppliers and counterparties will need to be engaged. The application further requires that progress must be demonstrated in securing required leases and land, and that the applicant provide letters of intent or memoranda of understanding from turbine suppliers and construction contractors, along with declarations from foundation manufacturers and manufacturers of undersea cables of their ability to deliver equipment within the targeted schedule.

As part of the financial plan, the developer should demonstrate evidence of its financing such as a letter of intent to offer credit from credible financiers, a letter of commitment from an equity investor and/or a guarantee from an investment-grade party. The NJBPU may ask an applicant to resubmit the proposal to include “any other information deemed necessary by the [NJBPU].” Developers should also be aware that NJBPU approval will be required for changes to the equipment proposed to be used to construct the project, replacement of key employees, and changes in ownership or a controlling interest in the project.

OREC Funding Mechanism

New Jersey offshore wind projects will be eligible for state subsidies in the form of Offshore Wind Renewable Energy Certificates (“ORECs”). On July 25, 2018, the NJBPU proposed rules to establish the OREC funding mechanism. The proposal is currently subject to a comment period ending October 19, 2018. Suppliers of electricity to retail customers would be required to ensure that their sales in each reporting year include at least the minimum percentage of offshore wind energy required for that year, as set by the NJBPU.

Under the proposed rules, applicants will propose the OREC price for a 20-year period based on projected revenues and cost of equipment, financing, taxes, construction, operation and maintenance, offset by tax or production credits and other subsidies or grants. The OREC price may be a fixed price over the 20-year period or the price may escalate at a fixed rate. Offshore projects would exchange their rev-

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enues from capacity, energy and ancillary services for payments for the ORECs. The applicant can propose that it retain up to 25% of the incremental energy revenues beyond the expected energy output, but environmental attributes and other benefits must be returned to the ratepayers. The payment of ORECs to the projects would work as follows: electric distribution companies (“EDCs”) would act as payment agents for the suppliers to facilitate the exchange of payments from ratepayers to the project and revenues generated by the project to ratepayers. EDCs would make monthly payments to the project based on the megawatt hours generated. Upon receipt of payment for ORECs, the project would transfer ORECs to suppliers through a PJM account and refund revenues to ratepayers through the EDCs. An administrator would be jointly contracted by the EDCs to facilitate invoicing, payment and verification.

Environmental and Permitting Requirements

New Jersey state waters continue for three nautical miles off the coast; thereafter, federal jurisdiction begins. In federal jurisdiction waters, the U.S. Bureau of Ocean Energy Management (“BOEM”) plays the leading role on offshore wind. As a result, BOEM has already been a lead player in the leasing of the offshore areas that are likely to be used for projects able to meet this NJBPU-led market demand. To date, BOEM has issued two commercial wind energy leases off the coast of New Jersey. For one of these projects, the site assessment plan (“SAP”) has been approved; for the other, the SAP is due for submission next year. The SAP is a critical step in the BOEM process and leads to the final phase of review and approval by BOEM, which is centered around its Construction and Operation Plans (“COP”) evaluation and the associated, in-depth environmental analysis that is required under the National Environmental Policy Act.

Successful bidders must navigate a number of environmental and permitting requirements as part of and in connection with the BOEM process. These requirements vary for onshore and offshore project elements, and on whether project elements cross state or federal jurisdictional waters. For example, a project element in New Jersey state waters may require (among others): a waterfront development permit; a tidelands conveyance; a Federal Coastal Zone Management Act consistency determination; a Section 401 water quality certificate and a Section 404 permit under the Clean Water Act; and environmental review under the New Jersey Executive Order No. 215 of 1989.¹ Together, environmental and permitting requirements form a complex, additional aspect that must be managed effectively alongside engineering and financing issues.

¹ See e.g., N.J. Department of Environmental Protection, Permits and Approvals for Construction of Offshore Wind Facilities June 2018, *available at* <https://www.nj.gov/dep/pcer/docs/windoffshore.pdf>.

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