

KIRKLAND & ELLIS

Kirkland Alert

Offshore Wind + Storage: Electric Distribution Companies in Massachusetts Seek to Purchase Offshore Wind Generation and Paired Storage Capacity

09 April 2019

On March 27, 2019, the electric distribution companies in Massachusetts [filed](#) with the Massachusetts Department of Public Utilities (“MADPU”) a proposed solicitation framework and timetable to procure long-term contracts for up to 800 MW of offshore wind energy generation and associated Renewable Energy Credits (“Proposed RFP”). Assuming the MADPU approves the Proposed RFP (as is expected), it will open bidding in May 2019 and require selected projects to be under contract in December 2019.

This is the second phase of a staggered process in Massachusetts to procure up to 1600 MW of offshore wind generation by 2027, as required by Section 83C of An Act Relative to Green Communities, Mass. Gen. Laws ch. 169, § 83C (2008) (as amended by Mass. Gen. Laws ch. 188, § 12 (2016)). Beyond satisfying that statutory obligation, the procurement is intended to assist Massachusetts with meeting its Global Warming Solutions Act goals.

This *Alert* describes the procurement process, the bid parameters and evaluation process, the environmental and permitting requirements, and some regulatory and legal risks that project developers and investors should consider.

Background

The Proposed RFP is the second phase of Massachusetts’ offshore wind procurement, following on a similar RFP issued in 2017 (“2017 RFP”). The 2017 RFP concluded with the main electric distribution companies operating in Massachusetts – Eversource,

National Grid, Unitil and some of their affiliates (the "Distribution Companies") – entering into power purchase agreements for 800 MW of offshore wind generation. The Distribution Companies have filed those power purchase agreements with the MADPU for requisite approval.

The pending power purchase agreements constrain the pricing for offshore wind generation and/or associated RECs procured in the Proposed RFP. Pursuant to statute, MADPU "shall not approve a long-term contract that results from a subsequent solicitation and procurement period if the levelized price per megawatt hour, plus associated transmission costs, is greater than or equal to the levelized price per megawatt hour plus transmission costs that resulted from the previous procurement."

Accordingly, the Proposed RFP states that the nominal levelized price of any proposal must be less than \$84.23 per MWh, which is equivalent to the \$64.97 per MWh levelized price in 2017 real dollars reflected in the contracts filed in the first phase of the staggered procurement (although this price has not yet been approved by the MADPU). The price cap is expected to be a challenge for potential bidders. An April 1, 2019, report filed by an independent evaluator established by the Massachusetts state legislature to monitor the procurement process (the "Independent Evaluator") suggested that it may be difficult for bidders to clear the \$84.23 per MWh price cap, noting that projects in the Proposed RFP would not be eligible for the investment tax credit or the production tax credit.

As with the 2017 RFP, the Proposed RFP is intended to procure at least 400 MW, and up to approximately 800 MW, of offshore wind generation. Proposals may pair offshore wind energy generation with energy storage systems. If a bidder so chooses, the bidder "should propose Energy Storage operations that demonstrate the most value for Massachusetts ratepayers (e.g., by following the Commonwealth's anticipated load shape or delivering on peak)."

There is a minimum bid fee of \$500,000 per project, with additional fees for multiple pricing offers in or changes to a proposal. Each bidder is required to submit at least one proposal of 400 MW, but bidders may also submit alternative proposals from 200 MW to 800 MW. There is an exception from the requirement to submit a 400 MW bid if a bidder certifies that it is unable to submit a 400 MW bid with pricing that comports with the price cap produced by the 2017 RFP process.

All proposals must provide for a scheduled commercial operation date that is before January 1, 2027.

Procurement Process

The procurement process will be jointly administered by the Distribution Companies and the Massachusetts Department of Energy Resources (“DOER”), and will be overseen by the Independent Evaluator and the Massachusetts Attorney General’s Office.

Each Distribution Company intends to enter into a contract or contracts with the winning bidders for the Distribution Company’s apportioned share of the energy and/or RECs purchased from a bidder’s project. The Distribution Companies will then request MADPU approval of their respective contracts either jointly or individually.

The proposed timetable for the solicitation is as follows:

RFP Schedule Event	Anticipated Date
Issue RFP	May 17, 2019
Bidders' Conference	May 30, 2019
Deadline for Submission of Questions	June 6, 2019
Due Date for Submission of Confidential Proposals	August 9, 2019
Due Date for Submission of Public Proposals	August 16, 2019
Selection of Projects for Negotiation	November 8, 2019
Negotiate and Execute Long-Term Contracts	December 13, 2019
Submit Long-Term Contracts for MADPU Approval	January 10, 2020

Bid Parameters and Evaluation Process

The Distribution Companies and DOER will use a three-stage evaluation process to jointly review proposals submitted in August 2019 and will rank the projects based on the evaluation criteria set forth in the Proposed RFP. The Distribution Companies will then be responsible for selecting the winning bids by November 8, 2019, and then negotiating and executing contracts for filing with MADPU in January 2020.

During the first stage of the evaluation process, the Distribution Companies and DOER will evaluate bids to determine whether they satisfy certain “eligibility and threshold requirements.” In addition to the offer size, price cap and commercial operation date

parameters discussed above, other notable criteria to be assessed at the first stage include, but are not limited to:

1. Pricing must be designed to recover all costs associated with the proposal.
2. Pricing must be based on a fixed \$/MWh and/or \$/REC basis, with no lump sum payments, pre-payments or other fees.
3. Contract term must be 15 to 20 years.
4. Each bid must satisfy numerous interconnection-related requirements, including requirements imposed by the regional transmission system operator, ISO New England Inc. ("ISO-NE"), and also must commit to accommodate third-party requests for interconnection service on the bidder's interconnection facilities.
5. Bidders have discretion to decide whether their proposed projects will participate in ISO-NE's forward capacity market. If they choose to participate in that market, bidders will retain any forward capacity market revenues received from ISO-NE.

The second and third stages are designed to evaluate the costs and benefits of each proposal. In the second stage, bids will be evaluated based on specified criteria to determine their "direct and indirect economic and environmental costs and benefits to ratepayers." In the third stage, the remaining bids will be further evaluated based on the second-stage criteria as well as additional, discretionary criteria (e.g., the proposal's overall impact on Massachusetts's policy goals). The objective of stage three is "to select the proposal(s) that provides the greatest impact and value consistent with the stated objectives and requirements of Section 83C, as set forth in [the Proposed RFP]."

Environmental and Permitting Requirements

Environmental considerations and permitting requirements are integral to the Proposed RFP, impacting both the threshold eligibility and the competitiveness of all submitted proposals.

As a threshold matter, under Section 83C of the Green Communities Act, for a resource to qualify as "offshore wind energy generation" it must operate in a designated wind energy area for which an initial federal lease was issued on a competitive basis after January 1, 2012. The Proposed RFP also requires each bidder to demonstrate that it has such a lease, for a "site located on the Outer Continental Shelf and for which no turbine is located within 10 miles of any inhabited area."

Massachusetts 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 is a lead player in leasing rights to offshore areas likely to be used by wind project developers responding to this procurement.

To date, BOEM has issued seven commercial wind energy leases off the coast of Massachusetts. Of the leases issued to date, BOEM has approved only three Site Assessment Plans (“SAPs”).¹ The SAP is a critical step in the BOEM process and leads to the final phase of review and approval by BOEM, which focuses on a project’s 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 Massachusetts state waters may require (among other things): 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 Massachusetts Environmental Policy Act. These environmental and permitting requirements are complex, and must be managed effectively alongside engineering and financing issues.

As noted above, the Distribution Companies and DOER have included environmental considerations as a specific element of the bid evaluation process. For example, at the second and third stages of the evaluation process, bids will be assessed qualitatively to determine the “[e]xtent to which a project avoids, minimizes, or mitigates, to the maximum extent practicable, environmental impacts.” As a result, a bid’s competitiveness may depend, in part, on the underlying project’s environmental impacts.

Regulatory and Legal Risks

The Proposed RFP arises at a time of rapid evolution for the legal and regulatory framework governing state-sponsored power procurement and has significant implications for New England’s wholesale electricity market and transmission system, over which the Federal Energy Regulatory Commission (FERC) has jurisdiction.

Accordingly, developers and investors should be aware of specific regulatory and legal risks relevant to this procurement.

In 2018, FERC approved ISO-NE's [redesign](#) of its forward capacity market to accommodate the entry of state-sponsored resources (such as off-shore wind under the Proposed RFP). Under the 2018 ISO-NE redesign, a state-sponsored resource's ability to enter the capacity market now depends, in part, on whether an existing resource is willing to retire and transfer its capacity supply obligation to the new resource. This means that the ability of offshore wind projects developed under the Proposed RFP to earn capacity market revenue is contingent on the retirement of existing resources.

Also in 2018, FERC issued Order No. 841, directing Regional Transmission Organizations and Independent System Operators to change their wholesale market rules to facilitate the participation of electric storage resources. Last December, ISO-NE filed proposed rule changes in response to that directive; FERC has not yet acted on that compliance filing. Those proposed market rules, which are intended to facilitate the participation of electricity storage resources in the New England wholesale market, could affect a developer's or investor's decision about whether to pair its proposed offshore wind generation with electricity storage systems.

The Proposed RFP may also face legal challenges down the line. Since the 2017 RFP, there have been multiple challenges to other state-sponsored power procurement initiatives. Although the state programs at issue in those cases have to date fared well in the U.S. Courts of Appeals,² the legal framework concerning the intersection of state and federal jurisdiction in this area remains relatively unsettled. The degree of uncertainty may soon increase or diminish, as the U.S. Supreme Court is scheduled to discuss pending petitions for writs of certiorari in two of the recent cases involving state-sponsored power procurement at its conference on April 12, 2019.

The outcome of the ongoing 2017 RFP proceeding will also impact the Proposed RFP. The MADPU eventually will either approve, reject or revise the prices in the contracts filed in response to the 2017 RFP. Its choice of action in that proceeding could change the price cap in the Proposed RFP. Bidders should also pay attention to efforts by Distribution Companies to amend the terms of the power purchase agreements, including the introduction of "regulatory-out" clauses that would permit the Distribution Companies to suspend or terminate those power purchase agreements if the companies are not able to fully recover their costs through rates charged to wholesale and retail customers.

The recent and ongoing court and regulatory activity may impact the economics of proposals selected through the Proposed RFP and the potential return for developers and investors.

* * *

Initial comments on the Proposed RFP are due on April 11, 2019, and reply comments are due on April 18, 2019.

If you have any questions about the matters addressed in this *Alert*, please contact the following Kirkland authors or your regular Kirkland contact.

1. The three existing SAPs are for leases OCS-A 0486 (issued in 2013), OCS-A 0500 (issued in 2015), and OCS-A 0501 (issued in 2015). The lessee of lease OCS-A 0487, the other lease issued in 2013, requested an extension and its SAP is now not due until July 1, 2023. BOEM issued the three remaining leases, OCS-A 0520, OCS-A 0521, and OCS-A 0522, in December 2018, and the lessees have one year to submit their SAPs. Of the approved SAPs, the one for lease OCS-A 0486, approved on October 12, 2017, allows for the installation of an AXYS FLiDAR 6M™ meteorological buoy within the lease area. Similarly, the SAP approved for lease OCS-A 500, approved on June 29, 2017, allows for the installation of two floating light and detection ranging buoys (FLIDARs) and one metocean/current buoy, while the SAP for lease OCS-A 501, approved on May 10, 2018, allows for the installation of up to two Fugro SEAWATCH Wind LiDAR metocean buoys. ↵

2. Three U.S. Courts of Appeal have upheld state programs supporting preferred generation resources since the 2017 RFP. See *Allco Renewable Energy Ltd. v. Mass. Elec. Co.*, 875 F.3d 64 (1st Cir. 2017); *Coal. for Competitive Elec. v. Zibelman*, 906 F.3d 41 (2nd Cir. 2018), petition for cert. pending sub nom. *Elec. Power Supply Ass'n v. Rhodes*, No. 18-879 (filed Jan. 7, 2019); *Elec. Power Supply Ass'n v. Star*, 904 F.3d 518 (7th Cir. 2018), petition for cert. pending, No. 18-868 (filed Jan. 7, 2019). ↵

Authors

[Robert S. Fleishman](#)

Partner / [Washington, D.C.](#)

[Brooksany Barrowes](#)

Partner / [Washington, D.C.](#)

[Brian Greene](#)

Partner / [Washington, D.C.](#)

[Ali A. Zaidi](#)

Of Counsel / [Washington, D.C.](#)

[Nicholas Gladd](#)

Of Counsel / [Washington, D.C.](#)

Related Services

Practices

- [Energy & Infrastructure](#)
- [Environmental](#)
- [Transactional](#)

Suggested Reading

- [08 April 2019 Kirkland M&A Update Choose Wisely – Drafting Governing Law and Forum Selection Clauses](#)
- [08 April 2019 Kirkland Alert Passage of Senate Bill 19-181: New Era of Change and Uncertainty for Oil and Gas Operations in Colorado](#)
- [05 April 2019 Press Release Kirkland Advises Francisco Partners in Acquisition of EG for DKK 3.7 Billion](#)

This publication is distributed with the understanding that the author, publisher and distributor of this publication and/or any linked publication are not rendering legal, accounting, or other professional advice or opinions on specific facts or matters and, accordingly, assume no liability whatsoever in connection with its use. Pursuant to applicable rules of professional conduct, portions of this publication may constitute Attorney Advertising.