



EITF News

November/December 2013



SECURING ARMY INSTALLATIONS WITH ENERGY THAT IS CLEAN, RELIABLE AND AFFORDABLE

From the Desk of the Executive Director

Clearing the Air on Termination for Convenience



As mentioned in the first issue of EITF News, the intent of this newsletter is to keep stakeholders informed about specific topics relevant to the Energy Initiatives Task Force's (EITF) large-scale, renewable energy projects. One of the topics that keeps surfacing as I'm out talking to developers, financiers, and others in industry is the Termination for Convenience (T4C) clause that is required by the Federal Acquisition Regulations (FAR) for all EITF contracts. In

several cases, I've heard senior executives from established development companies say they would be reluctant to bid on an EITF or other government project because of the T4C clause. It's been clear, based on these discussions that many are misinterpreting the content and the implementation of this part of the FAR. So I'd like to devote a few paragraphs as part of this newsletter to help clear up misconceptions on T4C and talk about what the EITF is doing to use this clause to help make the Government a good business partner.

The requirement for use of the T4C clause is contained in FAR Part 49 (Termination of Contracts) and the associated contract language is given in FAR Part 52 (Solicitation Provisions and Contract Clauses). T4C is applicable to all Federal government contracts, not just military contracts. The ability of the Government to terminate a contract for convenience is so fundamental that courts have determined that a termination for convenience clause should be read-in to a contract even if the clause is not expressly included. For energy contracts that may span up to 30 years, it is essential for the Government to include a T4C clause to provide for unspecified contingencies. However, a termination for convenience, either partial or complete, is only to be executed after a thorough analysis and assessment of all aspects of the termination action. It is not intended to be executed arbitrarily. In addition, it is well settled that the Government has a duty to act in good faith, and may not use the T4C clause to avoid contractual obligations with impunity. More to the interest of developers is the fact the T4C regulations can be used to establish fair cost recovery, up to the formal notice of termination, as well as a process for compensation for costs incurred as a result of the termination itself. Generally, these provisions are contained in FAR 52.241-10 and 52.249-2.

FAR 52.241-10 provides a cost recovery process that is based on a pre-negotiated termination value schedule that becomes part of the contract. This schedule can include known obligations such as project debt. The EITF is working with procurement officials to see how other structured obligations such as tax equity can be included in this schedule. FAR 52.249-2 provides for a compensation process that reimburses the contractor for costs incurred in the performance of the work terminated and reasonable

continued

costs of settlement of the work terminated, including accounting, legal, and clerical costs resulting from the T4C – all of which would be a part of a negotiated settlement. In this area, the EITF is also working with Army procurement officials to develop guidelines to speed settlement of other capital costs, such as those related to direct equity investments.

In addition, the T4C process specifically allows for salvage of the renewable energy assets in calculating the Government's termination liability. In cases where an installation may be subject to closure or reduction in mission, it may be preferable to all parties for the contractor to find a new off-taker that can bear some, or all, of the Government's obligation through a new off-take contract. The specifics of these types of settlements obviously cannot be foreseen at contract signing, but should be considered as part of a negotiated process.

So to summarize, the T4C clause should be viewed as a mechanism for both the Government and developers to minimize uncertainty, if properly structured. The EITF is working to make sure that the process we implement reflects the unique features of Army renewable energy projects. We specifically asked for comments on the T4C provision as part of the Renewable Energy Service Agreement (RESA) template, which we released for comment in the spring, and will continue to make refinements through industry input.

Finally, as we close out 2013, I want to thank all the members of the EITF team and our Government partners for all their efforts to make this organization successful this year. In the next issue of the newsletter, we will devote more time to those successes as well as work that is ongoing to further improve the Army's renewable energy project development process. I also want to thank members of industry for their engagement and feedback throughout the year. Our intent is to continue this dialogue going forward so that we can clearly address project risks, keep project costs down, and provide renewable energy opportunities that are appealing to the private sector and beneficial to the Army. Best wishes for 2014.

– **John Lushetsky**, Executive Director of the EITF

EITF Updates

The EITF continues to move forward with large-scale renewable energy projects and the current EITF pipeline of projects totals 175 megawatts of power capacity from a mix of technologies.

Fort Detrick Notice of Intent to Award: The Defense Logistics Agency (DLA) Energy, working with the EITF, recently issued a [Notice of Intent to Award](#) to Ameresco, Inc. for an [18.6 megawatt solar photovoltaic \(PV\) facility](#) at Fort Detrick, Maryland on November 22, 2013. The Army has initiated discussions with the developer to finalize all actions and contract terms required for final award.

Renewable Energy Service Agreement (RESA) Performance Work Statement template: With valuable input from industry, the EITF released the latest draft [RESA Performance Work Statement template](#) and will continue to accept feedback on this document. The RESA was developed to standardize and streamline the acquisition process by providing clear and concise instructions for future renewable energy contracts.



ENERGY INITIATIVES
TASK FORCE
Securing Army installations with energy
that is *clean, reliable* and *affordable*

2530 Crystal Drive, 8156 C
Arlington, VA 22202
Phone: 703-601-0568

www.armyeitf.com



EITF News is published bi-monthly. It is a publication created to inform and engage stakeholders regarding EITF's large-scale renewable energy projects and current hot topics.