

Municipal Contracting Issues

For Third-Party Financed Renewable Energy Facilities

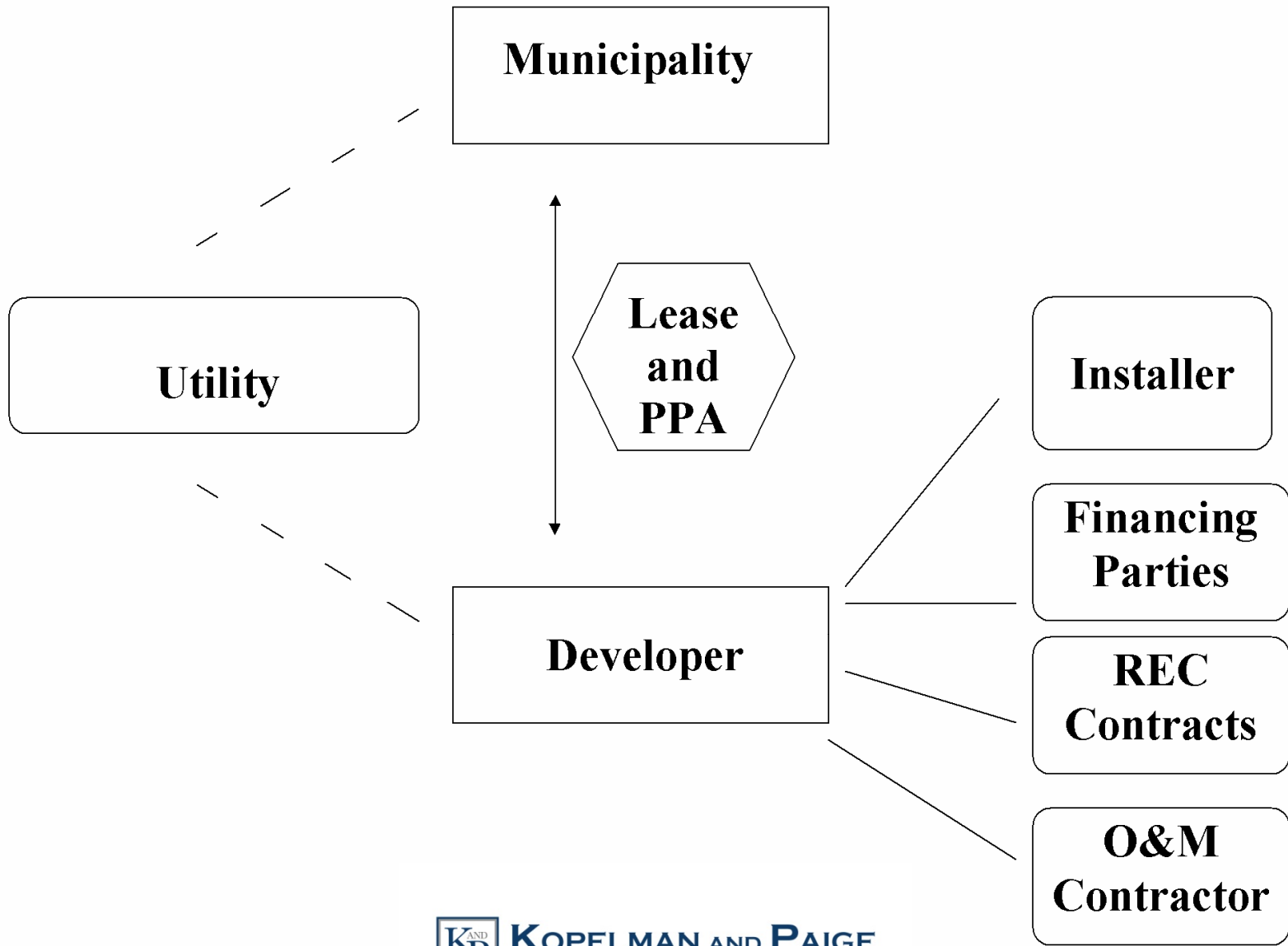
Richard T. Holland, Esq.
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Purchase Provisions

- What's a “good deal”?
 - Starts with project team
 - Need to know what the “deal” is?
 - Electricity purchase price
 - Purchase option values
 - Lease payment
 - Payment of taxes
 - Risk allocation in the agreements
 - Look at entire deal, not just one piece
 - Only so much “deal” to go around

Purchase Provisions

- What's a good deal?
 - It depends:
 - Size, type, and location of system
 - Investor/financing party requirements
 - Interconnection requirements/costs
 - Laws, regulations, governmental incentives
 - Market for electricity, RECs & other attributes
 - Risk allocation in the agreements
 - True comparisons difficult to make

Purchase Provisions

- You buy **all** electricity generated
- Consider:
 - Can you use all electricity—what is your load?
 - Can you use all “net metering credits”?
 - “Paid” by utility for excess electricity fed to grid
 - Use credits to off-set your electricity costs
 - Distribution company may pay cash for large facilities
 - 10 MW cap for municipality
 - Pricing structure: fixed or indexed?

Payment of Taxes

- Generally, once leased, municipal property is subject to tax under G.L. c. 59, s. 2B
 - Leased for non-public uses
 - Even if municipality benefits
 - Taxed to lessee as if owner of property
- Generally, electric generating equipment also subject to tax
 - Assessor decides if taxed as part of the real property or personal property

Payment of Taxes

- Exception: G.L. c. 59, s. 5, cl. 45
 - Must be primary or auxiliary power for property
 - DOR interprets narrowly
- Require developer to pay taxes in RFP/PPA
 - Will likely result in higher electricity price or lower lease payment, but still “new” revenue
- Miscellaneous:
 - PILOT possible (G.L. c. 59, s. 38H(b))
 - TIF possible (G.L. c. 40, s. 59)
 - Legislative approval (town meeting/city council)

Term & Termination

- Long-term contracts
 - 20 years typical
 - Risks & considerations
 - Termination rights are limited:
 - Due diligence period/Milestone schedule
 - “Uncured” default
 - Ineligibility to receive net metering credits
 - Remember considerations noted earlier:
 - 10 MW cap for municipality/governmental entity
 - Will you have future municipal renewable energy facilities?
 - Will you have Future energy conservation projects?

Default & Damages

- Default: “material breach” of contract
 - Failure to pay for electricity
 - Other
- Insurance: Confer with insurer/risk advisor
- Indemnification: Require developer to indemnify
- Damages for breach can be **significant**
- Liquidated damages (LD) vs. actual damages
- Limitation of liability provisions—good or bad?



Right to Repair

- Rooftop/Landfill:
 - Structural issues: Consider at RFP stage
 - Future wear-and-tear repairs (see below)
 - Legal requirements (e.g., landfill)
- Removal of all/part of the facility for repairs
 - Removal cost?
 - Curtailment (of energy) cost?
- Retain right to access and examine property

Guaranteed Production

- Developer has incentive to optimize production
- Request guaranteed production:
 - Allows predictability for planning
 - Incentivizes developer to:
 - Optimize production
 - Design a system that will produce reliable output
 - Developer pays for shortfall (liquidated damages)
 - Level of guarantee will be percentage of “capacity”

Purchase Option

- Do you want option to purchase?
- Consider system quality at procurement stage
- You will be responsible for O&M and removal
- Typically not allowed before sixth year
- Base on FMV of system in given year
 - Parties select independent appraiser, or
 - Schedule of purchase values appended to PPA
 - Ask/understand/negotiate values
 - Base on reasonable expectation of future FMV

Miscellaneous

- **Town Meeting votes, generally:**
 - Yes for land lease
 - No for lease of buildings < 30 years (non-school)
 - Yes for PPA
- **Procurement for 3rd Party Owned Facilities**
 - How?
 - G.L. c. 30B, s. 16, if lease value > \$25,000, or
 - G.L. c. 25A (contract limited to 20 years)
 - PPA is exempt from G.L. c. 30B
 - Section 1(b)(33): Energy Contract
 - Deliver copy to DPU, DOER, IG w/I 15 days

Miscellaneous

- **Prevailing Wages**
 - May be required – OAG case-specific test
 - Confer with counsel/Labor and Workforce Development
- **Competitive Supplier Agreements**
 - Check for exclusivity requirements
 - Implement consolidated billing
- **Bonds**
 - Performance/payment (during construction)
 - Maintenance
 - Removal
 - Other security?



Contact

Rick Holland

Kopelman and Paige, P.C.

617-654-1816

rholland@k-plaw.com

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