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FOR SOLID WASTE MANAGEMENT

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POWER PURCHASE AGREEMENTS
FROM THE MUNICIPAL PERSPECTIVE

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ABOUT THE SPEAKER

WILLIAM M. BUCHAN, ESQ.

Bill Buchan combines a strong technical background, expertise in business and law with thirty years of diverse experience in the environmental industry. He has served as environmental counsel to Madison County in connection with its solid waste management and recycling programs for over 20 years.

He has extensive experience working with municipalities on the development of a wide range of alternative energy projects such as landfill gas to electricity, MSW fired incinerators, geothermal energy, ocean thermal energy, wind energy, ocean hydrokinetic energy, micro-hydro energy, anaerobic digestion, solar thermal and solar photovoltaic projects. Many of these projects are based upon contracts that are essentially long term "power purchase agreements."

Bill is a successful entrepreneur with a portfolio of businesses operating in the environmental and energy markets domestically and internationally. He is a founding partner of Buchan & Sutter, P.C. a Central New York based law practice specializing in environmental and energy matters with emphasis on solid waste management. He is the co-owner of Operations & Maintenance, Inc. ("OMI") a water and wastewater operations firm that provides environmental services under contracts with municipalities and industries that manage high strength wastes such as landfill leachate, food, beverage and pharmaceutical wastewaters, as well as contaminated groundwater. Bill is a founder and shareholder of DSS Environmental, Inc. a subsidiary of Covanta Energy a global leader in the MSW Waste-to-Energy markets. DSS is the owner of a patented tertiary wastewater treatment technology that is used extensively throughout the New York City watershed for the protection drinking water reservoirs. He serves as Senior Vice President for Water and Environmental Resources at Ocean Thermal Energy Corporation, a global leader in Ocean Thermal Energy Conversion, Seawater District Cooling, Sustainable Aquaculture and Seawater Desalination. Bill has worked internationally to license a portfolio of water treatment technology patents to businesses located in the European Union and India. Through Ensource, Inc., Bill provides private tax credit driven investors opportunities to invest in public and private solar power purchase agreements.

Bill earned a Bachelor of Science in Biology and Chemistry from SUNY Brockport and a Juris Doctor, *Cum Laude* from the University of Toledo

PREVAILING WAGES

“Public works” contracts are subject to Labor Law Articles 7 & 8. This law imposes the requirement that contractors pay “prevailing wages” to its employees. Is a PPA a public works project?

NO! as per NYSDOL in case of Madison County Solar Liberty 50 kw project

De La Cruz v. Caddell Dry Dock & Repair Co., NY Slip Opinion 04842 (2013). The New York Court of Appeals articulated a new 3 prong test for determining whether a project is “public works”

- 1) A public agency must be a party to a contract involving the employment of laborers, workmen, or mechanics, and
- 2) The contract must concern a project that primarily involves construction-like labor and is paid for by public funds, and
- 3) The primary objective or function of the work product must be the use or other benefit of the general public.

NYSDOL would not issue a written opinion to confirm...

A-9149A Proposed NYS Legislation will make PPA > 250 kW subject to prevailing wages.

Beware use of “Piggybacking” Law for procuring Solar PPA’s

New amendment to General Municipal Law § 103(16) (amended by Chapter 497 of Laws of 2013) allows piggybacking only where the procurement process is “consistent with” GML § 103 competitive bidding process, i.e. advertisements, sealed bids to a common specification and award is to lowest responsible bidder. Not Energy Law Article 9. See, <http://www.osc.state.ny.us/localgov/pubs/piggybackinglaw.pdf>

PPA Negotiation Strategies

Prefer site access agreements vs. land leases and easement agreements

Keep the Renewable Energy Credits if NYSERDA is not involved

Explore prepayment options to improve the project economics.

Prefer cellular monitoring systems over use of municipal data networks

POWER PURCHASE AGREEMENTS FROM THE MUNICIPAL PERSPECTIVE

Procurement of PPA's.

1. Purchasing electricity under the PPA over 15 – 25 years likely exceeds the State mandated threshold for discretionary spending without a competitive procurement process. While each municipality has a different policy regarding its discretionary spending threshold, as a general rule a competitive procurement process is required when a municipality is purchasing goods and services. Article 5-A of the General Municipal Law (“GML”) generally governs contracts for public works, goods and services.
 - a. Article 5-A imposes a number of requirements that can be significant hurdles to a PPA. Section 109-b limits the use of “installment purchase contracts.” The issues that arise in connection with §109 are as follows:
 - i. Contract must be limited to monies appropriated and available for the purpose of the contract,
 - ii. Contract is not the general obligation of the local government backed by its full faith and credit or taxing powers,
 - iii. Total of all periodic payments made during each year throughout the term of the contract must be substantially level or falling,
 - iv. Contract is subject to competitive bidding to the extent applicable by law, and
 - v. Term of the contract, including all renewals, is limited to the period of probable usefulness of the goods being purchased as set out in Section 11.00 of the Local Finance Law.
2. What form of competitive procurement is required?
 - a. As a general rule, GML § 103 imposes a competitive bidding process that requires a “specification” with enough particularity to allow the bidder a fair opportunity to tender a responsive bid. This requirement increases the cost of the transaction and tends to limit the ingenuity of the responses.
 - i. Who can develop a technically competent specification with respect to a solar energy project and what are the costs?
 - b. Under GML § 103 the agency must accept the lowest responsible bidder. Negotiations with any bidder other than the apparent low bidder are prohibited. Cost is the primary criterion for selection of the successful bidder.

Article 9 cures several other structural problems as follows:

9-103(1) authorizes a 35 year contract provided the term does not "exceed the reasonably expected useful life" of the equipment. Compared to the limitation of "Period of Probable Usefulness" standard under Article 11 of the Local Finance Law, this is a much preferable standard.

EL 9-103(5) authorizes municipalities to lease public lands for a period coextensive with energy performance agreement. Absent this provision, County Law § 216 limits the period of a ground lease to 5 years.

While Article 9 of the Energy Law solves many fundamental structural problems, it contains the following provision that greatly complicates third party financing:

"Any energy performance contract entered into by any agency or municipality shall contain the following clause: "This contract shall be deemed executory only to the extent of the monies appropriated and available for the purpose of the contract, and no liability on account therefor shall be incurred beyond the amount of such monies. It is understood that neither this contract nor any representation by any public employee or officer creates any legal or moral obligation to request, appropriate or make available monies for the purpose of the contract." See, EL § 9-103(2).

The term "executory contract" means a contract under which both sides still have important performance remaining. Put another way, if either side stopped performing the contract it would be an actual breach of contract. In the context of a long-term PPA between a municipality and installer the municipality is only obligated to pay to the installer the funds that it has actually "appropriated" through its annual budget process effectively rendering the PPA a year-to-year contract. More importantly, if the municipality does not budget the funds to pay for the electricity delivered by the solar array, neither the installer, its third party investors nor a subsequent holder of the PPA (whether through sale, securitization, etc.) have a remedy at law or equity to collect the future revenue stream. Simply put, if the PPA revenue stream is not legally enforceable it is not marketable.

S-7727 Proposed NYS Legislation will strengthen Energy Law Article 9 by specifically including solar PPA's in the definition of Energy Performance Contract. However, it does not change Executory Contract provision...