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Details of Alberta's First Renewable Program Competition Announced: A Comment on the Dispute Resolution Procedure and Change of Law Provisions

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Documents Commented On: (1) AESO, Request for Expressions of Interest for the first renewable electricity program procurement (REP Round 1), posted March 31, 2017, and (2) AESO, Key Provisions of the Renewable Electricity Support Agreement, March 31, 2017

The Government of Alberta released the framework for its plans to support the development of renewable energy projects in Alberta in November 2016 and provided the implementing authority for that program with the introduction and recent entry into force (March 31, 2017) of the *Renewable Electricity Act*, SA 2016, c R–16.5 (*REA*). The program adopted was based on a design proposed by the Alberta Electric System Operator (AESO) and the AESO has been charged with its implementation. For discussion of the AESO's proposals and *REA* see my earlier post here.

This post briefly references the first Request for Expressions of Interest (REOI) and then discusses the dispute resolution provision of the Key Provisions of the Renewable Electricity Support Agreement (RESA).

Procurements under *REA* will follow three stages: request for expressions of interest (REOI), a request for qualifications (RFQ), followed by a request for proposals (RFQ) from qualified parties. The REOI is a very preliminary stage in the process designed to gauge the level of interest of possible bidders. Legally, the REOI is of little significance since as the REOI document acknowledges (at 7):

> Submissions in an EOI Form are not evaluated in any way and will neither exclude nor shortlist interested parties.
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> Submitting an EOI Form is not a prerequisite to participating in further steps of REP Round 1.
>
> and
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> This REOI does not constitute an offer of any kind, including an offer to enter into any contract with any person. This REOI does not in any way commit the AESO to, or make the AESO responsible for, anything whatsoever, including proceeding with an RFQ stage or RFP stage, or any other part of REP Round 1.

As anticipated, the first call is for the "renewable attributes" associated with up to 400 MW of renewable capacity. On its face the call is neutral as to the source of the renewable electricity although in practice the requirement that projects must commence commercial operation by

December 2019 will rule out some sources. The call indicates that RFQ and RFP submissions will be evaluated in accordance with set evaluation criteria (yet to be released) by expert panels "comprised primarily of independent external experts" (at 3). The AESO has appointed a "fairness advisor" (P1 Consulting) as the *REA* requires as well as legal and financial advisors (Norton Rose and KPMG respectively). The call indicates that the RFQ will describe parties who are ineligible to participate in the competition "or support the participation of others" (at 5) and that that list will include the legal and financial advisors. The call suggests however that the RFQ "may also describe the process by which interested parties may be determined to be eligible by the AESO notwithstanding perceived conflict." (at 5) At the conclusion of the bidding round the fairness advisor is to issue a public report evidencing its findings.

In announcing the first REOI the AESO has also released what it refers to as the "proposed key commercial terms to be included in each RESA". Almost immediately after the Government's endorsement of AESO plans and preferred mechanism (a contract for difference approach or an indexed renewable energy credit – an indexed REC) the AESO began consultation on the heads of agreement for the proposed renewable electricity support agreement (RESA). The AESO subsequently published a PDF consolidation of those comments. That consolidation no longer seems to be available on the AESO's website. The more recent document presumably represents the AESO's response to its earlier consultation, but, given the above statements as to the status of the REOI document, it is perhaps not a definitive and final response and in any event the more detailed drafting has yet to come.

I will comment here on the dispute resolution provision of the RESA. The clause is of interest because of Alberta's experience with dispute resolution under the terms of the power purchase arrangements (PPA) that were used to help transition the province from cost of service regulation to a wholesale market. The background to the PPAs is discussed in a previous post as is the dispute resolution provision of the PPAs, here. In short, the PPAs and the parties to the PPAs preferred confidential arbitrations as a means of resolving disputes under these arrangements notwithstanding that these arrangements were in standard form and imbued with a strong public interest. It is widely understood that different arbitration panels have reached different conclusions with respect to the same clause of the PPAs; see the discussions in *Transalta Generation Partnership v Capital Power PPA Management Inc*, 2015 ABQB 793 (CanLII) and *Enmax Energy Corporation v TransAlta Generation Partnership*, 2015 ABCA 383 (CanLII).

The original version of the dispute resolution provision of the RESA heads of agreement circulated in November stipulated that disputes would be resolved by reference to the ordinary courts. The current version provides as follows:

> Clause 33, Dispute Resolution
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> In the event of a dispute, the parties' representatives will attempt to resolve the dispute within 10 days after a request by either party, failing which either party may: (i) in respect of certain disputes where a commercial or technical determination (as opposed to a judicial remedy) is preferred, commence binding arbitration (such arbitration to be commenced and conducted in accordance with the rules and procedures specified in the RESA, which rules shall specify that the reasons for decision will not be private); or (ii) in all other cases, commence litigation.

The clause thus provides that litigation in the ordinary courts is the principal mode of dispute resolution should the representatives of the parties be unable to resolve the dispute. There is,

however, a carve-out for disputes "where a commercial or technical determination (as opposed to a judicial remedy) is preferred". In such a case, arbitration under rules yet to be specified will be permitted but it is evident that any "reasons for decision" will be publicly available. This seems to be an appropriate "horses-for-courses" solution, especially for the "technical" issues, although "expert determination" with respect to these might be a better label and indicator of the intended procedure than the term "arbitration". Drafting the carve-out may prove a challenge but it will presumably be possible to list the particular clauses of the RESA to which the carve-out will apply. This may be more difficult with respect to the carve-out for "commercial" issues and it is less clear to me that a carve-out is necessary or appropriate for all commercial matters. In any event the AESO's continuing commitment to the ordinary courts as the principal vehicle for dispute resolution under the RESAs is to be welcomed insofar as it will provide guidance to all parties with reduced transaction costs and reduce the risk of inconsistent decisions over the life of the RESAs.

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