

**BC HYDRO
CUSTOMER-BASED GENERATION**

CBG – EPA Revision Summary Document November 19, 2002

Background:

BC Hydro received a number of comments relative to the Standard Form CBG EPA, including those advanced at the November 4, 2002 workshop and written submissions from the IPABC and the JIESC. The comments were thoughtful and constructive, and very helpful in identifying risk allocation issues worthy of reconsideration and contract language requiring clarification. BC Hydro is grateful to all participants in the CBG procurement process for their comments.

BC Hydro's fundamental objectives remain the procurement of long-term, firm, competitively-priced electricity supply from non-utility generators to meet future load growth, while assisting its large customers in developing supplementary revenue sources through new power generation. BC Hydro also remains committed to contracting on reasonable commercial terms through a transparent and fair procurement process.

The Standard Form CBG EPA reflects commercial terms, which are for the most part less onerous on generators than comparable contracts in use elsewhere for long-term firm power procurement. A comparison of these terms with those currently offered by Hydro Quebec or embodied in industry-recognised contract forms supports this view. The CBG program offers a unique opportunity for customers and independent power producers to develop new generation, supported by a strong long-term take and pay commitment on reasonable commercial terms. For BC Hydro it reflects our commitment to sourcing an increasing share of future electricity load growth from private generation. But that generation must be physically and financially reliable and should be priced accordingly. The Standard Form CBG EPA represents risk allocation and commercial terms, which reflect this new reality.

BC Hydro believes that some changes should be made in the Standard Form CBG EPA for the current call to mitigate the Seller's risk profile and address many of the most important concerns of customers and independent power producers, without BC Hydro's objectives being seriously compromised. The following is a summary of the changes. The changes will be reflected in a blacklined copy of the Revised Standard Form CBG EPA, which will replace the form issued with the CFT. The revised document will be available shortly on the CBG website.

Capacity Factor Liquidated Damages

Capacity Factor Liquidated Damages, both annual and monthly, will be subject to liability limitations or "caps".

Annual Capacity Factor Liquidated Damages will be limited in each year to an amount equal to \$3,000/MW of average annual Contracted Capacity for that year. Any Monthly Capacity Factor Liquidated Damages paid in that year will continue to be deducted from any Annual Capacity Factor Liquidated Damages.

Monthly Capacity Factor Liquidated Damages will be limited in each month to an amount equal to one third (1/3) of the limitation on Annual Capacity Factor Liquidated Damages for the year in which that month occurs.

The purpose of these limitations is to mitigate the Seller's risk in cases where Capacity Factors suffer, despite the efforts of the Seller to the contrary, for reasons like Forced Outages, which are not a Force

Majeure or a Hardship Event or otherwise excusable under the EPA. However, if or to the extent that Capacity Factors are not met due to a Seller taking planned outages during winter months without the Buyer's consent or otherwise deliberately withholding electricity deliveries when its plant is capable of generating above the GBL, then these limitations will not apply.

Termination Payment

A "mark to market" Termination Payment becomes payable under the EPA, by the Seller when the EPA is properly terminated by the Buyer for the Seller's default, or by the Buyer when the EPA is properly terminated by the Seller for the Buyer's default.

In the case of a Seller default, the Termination Payment is partially secured by the Operating Security in the form of cash, letter of credit or the guarantee of an entity that meets the prescribed creditworthiness test at the time the EPA is signed. The amount of the Operating Security varies over the term and is calculated at any time as \$2,000/MW of average annual Contracted Capacity for the particular year multiplied by the number of years remaining in the term.

The Termination Payment will be subject to a liability limitation or "cap" equal to 150% of the amount of the Operating Security at the time of termination. That is, the cap will be equal to \$3,000/MW of average annual Contracted Capacity for the year of termination multiplied by the number of years remaining in the term. The cap on the Termination Payment will be mutual and apply to both the Buyer and the Seller.

As is the case with caps on Capacity Factor Liquidated Damages, the limitation on the Termination Payment will not apply where the EPA is repudiated or terminated for deliberate breach. Therefore, Sellers will not be entitled to the benefit of the limitation if the EPA is terminated due to a deliberate withholding of electricity deliveries where the Seller's Plant is capable of generating above the GBL.

Transmission Constraints

Under the EPA, where there is a transmission suspension, constraint or curtailment, both the Seller and the Buyer will be excused from their respective delivery and acceptance and payment obligations.

At the same time, BC Hydro accepts that it is obliged to arrange adequate "take away" transmission capacity to enable it to accept electricity deliveries under the EPA, or alternatively to pay for electricity that could have otherwise been generated and delivered.

To give effect to this take away obligation, and to alleviate concerns that BC Hydro, as Buyer, could be relieved of its obligations due to its own actions as a competing generator and supplier of electricity, the EPA will provide that the Buyer will be excused from its acceptance and payment obligations for transmission suspension, constraint or curtailment only where (i) transmission is impacted by an event of Force Majeure or a Forced Outage, or (ii) the suspension, constraint or curtailment was implemented by the Transmission Authority, independent system operator, or other entity or person having responsibility for operation of the transmission system, pursuant to a filed tariff governing transmission service, for reasons not attributable to actions of the Buyer as a generator and supplier of electricity (unless and to the extent that such actions would themselves be excused for reasons of Force Majeure or Forced Outage), or for reasons not attributable to the failure of the Buyer to arrange for adequate firm transmission capacity to perform its obligations throughout the Term of the EPA.

In either case, the Seller will be obliged to use commercially reasonable efforts to mitigate the impact of the suspension, constraint or curtailment.

Sale of Electricity in Excess of Contracted Capacity

Under the EPA, bidders must declare their Contracted Capacity for the term of the EPA, and if awarded a contract, they may deliver only up to 110% of that Contracted Capacity for payment at the contract price. Deliveries in excess of that are not permitted and no payment is provided for such deliveries.

The purchase of “firm” electricity is fundamental to the CBG program. Excess generation may be consumed by the Seller or sold to its electricity host or third parties, including Powerex.

However, BC Hydro encourages customers and independent power producers to finalize design and equipment sizing and selection on the basis that will result in the lowest possible cost of reliable generation. Therefore, bidders will be permitted to increase their Contracted Capacities from that specified in the bid to reflect the optimum final design of their plants. This increase must be notified before the end of the Initial Period under the EPA and may not exceed 120% of the Contracted Capacity originally bid.

Bidders should bear in mind that a number of commercial terms in the EPA are driven by the Contracted Capacity, including the required amounts of Development Security and Operating Security, liability limitations described above and other matters. If the Contracted Capacity is increased, the increase will apply for all purposes under the EPA. It is the Seller’s responsibility to address all issues resulting from an increase in the Contracted Capacity, including interconnection requirements, impacts on the project’s greenness, impacts on the project’s GHG intensity, etc. and to provide appropriate information on these issues to BC Hydro.

Hardship Relief

The EPA entitles Sellers to relief from Liquidated Damages in the case of a Hardship Event, as defined in the EPA. This relief is intended to address situations beyond the control of the Seller which are not caused by a Force Majeure event, and which threaten the long-term economic viability of the Seller’s plant. The hardship clauses are not designed to deal with short-term impacts.

In order to simplify, and enhance the risk mitigation afforded by, the hardship clauses, the following changes are made:

- The 5 year moratorium precluding reliance on a fuel shortage or price increase as a Hardship Event will be reduced to 3 years.
- Hardship relief will take effect 15 days (rather than 30 days) following notice.
- A Seller may be denied relief for a Hardship Event on the basis that the event was “reasonably foreseeable” only when it can be established that the Seller, the Customer, the Owners or their Affiliates had knowledge, or ought reasonably to have had knowledge, that the particular event was scheduled or likely to occur. Sellers will not be denied relief for a Hardship Event on the basis that they should have forecast future market events or conditions, based on assumed general, rather than specific, knowledge pertinent to their particular operation.
- During a Hardship Event, a Seller must reduce electricity deliveries *pro rata*. The specific contractual requirement for a *pro rata* reduction of steam or other energy sales will be deleted. However, a Seller will continue to be required to contract prudently – that is, to make prudent fuel supply and other contractual arrangements with a view to performing its EPA obligations without regard to the availability of relief for a Hardship Event. It will remain the intent of the EPA that Sellers cannot take advantage of a Hardship Event to increase steam sales at the expense of electricity deliveries contracted to BC Hydro, but the foregoing changes will eliminate any

contractual restriction that would prevent cogeneration plants from meeting normal demands of steam hosts during a Hardship Event.

- The EPA will continue to encourage Sellers to mitigate the impact of a Hardship Event. Accordingly, the contractual restriction on remarketing contractual thermal fuel supply during a Hardship Event will be deleted, but without in any way diminishing the obligation of a Seller to contract prudently as outlined above.
- The right to terminate the EPA due to excessive cumulative Hardship Hours will now be mutual, and can be exercised by the Seller. The Termination Payment does not apply when the EPA is terminated for excessive cumulative Hardship Hours.

Joint and Several Liability

It is common in commercial agreements undertaken by two or more parties acting as a joint venture, or in a similar relationship, that the liability of each of those parties be joint and several, and not several only. Persons contracting in that way must make their own arrangements to allocate and secure among themselves their proper share of liability, whether based on ownership interests or otherwise. BC Hydro does not wish to become involved in the allocation of risks and liabilities among multiple parties who execute an EPA as Seller.

However, in order to mitigate the joint liability risk for minority project owners, where multiple parties sign the EPA as Seller, for example in a joint venture between a customer and an independent power producer, the liability of a minority party holding an ownership interest in the project equal to or less than 20% will now be limited to 20% on a several basis, provided that one or more other parties hold greater than 20%, with those other parties continuing to be jointly and severally, and not severally only, liable under the EPA.

Plant Ownership

Some bidders may wish to structure their project on a design, build, finance and operate (DBFO) basis, or on some other basis under which the Seller does not hold legal title to the plant.

BC Hydro recognises that DBFO or other options may optimize returns for bidders and other involved parties. Therefore, the EPA requirement that the Seller entity own the plant will be deleted. The condition subsequent requiring that the Seller demonstrate tenure to the site will be modified. Under the revised condition subsequent, Sellers must demonstrate before the end of the Initial Period that, either:

- They have acquired, or hold the right to acquire, the site and will own the plant, or
- A third party or parties have acquired, or hold the right to acquire, the site and will own the plant, and have entered into an agreement with the Seller giving the Seller all necessary contractual rights to operate the plant and perform the Seller's obligations under the EPA for its term.

Where the second option applies, BC Hydro will also require certain commitments from the third party owner of the plant to ensure that if the Seller's right to operate the plant and perform the EPA are terminated, then a qualified replacement operator will be installed to continue performance of the EPA over its term.

Hydrology Limitation

The benefit of the optional hydrology limitation will be extended to generation projects utilizing municipal water supply systems to recognise the fluctuating demands of those systems and the impact of those demands on generation.

Minor Revisions

The Revised Standard Form CBG EPA contains other minor revisions for greater clarity and to address certain suggestions made by customers and independent power producers, all of which are evident upon a review of the blacklined Revised Standard Form CBG EPA.

Process – the Standard Form CBG EPA

While the Standard Form CBG EPA has been carefully prepared to accommodate a variety of technologies and operating scenarios, BC Hydro recognises the possibility that it may contain specific provisions that have an unintended effect on a particular project. Some process flexibility is necessary to accommodate this risk, without compromising the transparency and fairness to which BC Hydro is committed.

A bidder will be permitted to submit, with its bid, revisions required to the standard form to accommodate technology and operating scenarios particular to the project. The revisions must be directed to correcting only unintended consequences of contract language, which would be unworkable in the context of a specific project. Proposed revisions must be limited to those, which **will not have a material adverse impact on the benefit of the contract to BC Hydro**. For example, revisions to the price structure, the inclusion of flow through charges, a change in the latest permitted Target COD, revisions to liquidated damages calculations, termination payments, Green Criteria and other material matters will be rejected.

Proposed revisions must be **specific** and include specific contract language changes, must be **limited in number**, and must be accompanied by a **brief explanation** of why the change is considered necessary.

A bidder may submit proposed project-specific revisions **before** (but not after) the bids are filed, with BC Hydro responding to the bidder for clarification or to advise whether the revisions are excessive in number or will or will not result in a disqualification, all in accordance with the schedule referenced below. Proposed revisions and BC Hydro responses will not be posted to the CBG website, although BC Hydro may post an addenda advising of revisions of general application that it has determined to be acceptable. In order to accommodate this process change, to allow for the impacts of the December holiday season, and to provide additional time for bid preparation, the deadline for submission of Tenders and Tender Security will be deferred.

New key schedule dates are:

- Deadline for submission of proposed project-specific EPA revisions: 2003 January 15.
- Deadline for BC Hydro responses to proposed revisions: 2003 February 15.
- Deadline for submission of Tenders and Tender Security: 2003 March 15.
- Latest COD is 2006 September 30.

A complete revised procurement schedule incorporating these dates will be posted shortly to the CBG website.