ADJUSTABLE BLOCK PROGRAM APPROACH TO SWITCHING APPROVED VENDORS AND COMPETING PROJECT APPLICATIONS ACROSS MULTIPLE APPROVED VENDORS

The Adjustable Block Program has received inquiries about how two related problems would be handled: (A) whether and how an applicant project with a pending Part I application (including an application included on any applicable Group/category waitlist) could switch its Approved Vendor; and (B) how the Program should handle a situation where two Approved Vendors both submit a Part I application for the same photovoltaic project.

The Agency's proposed treatment of these situations can be found below as well as in the accompanying FAQ document.

A. Switching a Part I application's Approved Vendor

With regard to an existing Part I applicant project changing its Approved Vendor, the Agency believes that a customer (i.e., project host or project owner) should not be effectively given discretion to unilaterally change its Approved Vendor after the Approved Vendor (or an installer designee) has relied on its agreement with the customer while investing resources into developing a photovoltaic project. For that reason, the consent of the departing Approved Vendor is a requirement for switching to a new Approved Vendor. Additionally, both the project host *and* project owner (if different) must agree to the change, to ensure that there is consensus among all involved parties going forward.

Still, the Agency appreciates that in some cases, there should be a clear path for the customer to move forward with a new Approved Vendor without the original Approved Vendor's consent. In that case, the customer could exercise its contractual rights to terminate its relationship with the original Approved Vendor and then work with a new Approved Vendor to submit a new Part I application, as discussed in Part B below – although a new Part I application could have a lower associated Block price.

B. Resolving multiple applications for one project

Regarding multiple Approved Vendors each seeking to represent a project in the Program through separate Part I applications, the Agency believes that the earliest validly executed site control (or, as a tie-breaker, REC control) agreement be used to decide which application the Program should consider.

Several factors inform the Agency's approach. First, the Agency is concerned about creating an incentive for one vendor to attempt to "poach" a customer that has already executed a valid contract with another vendor, as this could discourage vendors from investing resources into project development. The Agency also intends to avoid unjustifiably inducing any party to breach a valid contract; if two site control agreements both appear valid on their face, the earlier-executed agreement should be favored in application review – although the Agency would consider evidence that the earlier-executed agreement was validly terminated.[1] Finally, the Agency is cognizant that whatever policy is now introduced could upset expectations on which prior vendor-customer contracts (including any vendor remedy when a customer breaches a contract) were based; the Agency does not wish to unduly disrupt the market in that regard.

The Agency's policy looks first to the earlier-executed site control agreement because it is installation of a project that ultimately gives rise to the ability to deliver RECs to the contractual counterparty under the Program. Where the project is already built at the time of Part I application, there would not be competing site control agreements (or it would not be relevant to examine competing site control agreements), but there could be competing REC control agreements between the project owner and Approved Vendor, so the Agency would seek and review those. Even when a project is not yet built, there is a possibility that a single site control or installation agreement could give rise to the future project owner entering into two REC control agreements – in which case the Agency would review those agreements.

[1] To be clear, in evaluating the validity of contracts or the validity of contract termination, the Agency would not be adjudicating liability and obligations under the contracts as a trial court would – rather, the Agency would be simply deciding which Part I project application to consider for a state-administered incentive program.