

From: [Submitter 8 representative]
Date: Fri, Jan 18, 2019 at 5:23 PM
Subject: REC Contract Issues
To: comments@illinoisabp.com <comments@illinoisabp.com>
Cc: [Submitter 8 representative]

To whom it may concern,

1. REC Contract is written at the approved vendor level. It should be done at the project level.
2. REC Contract/LC issues: the first sentence of Section 6(d)(v)(i) of the REC contract clearly provides that "Buyer shall draw on Seller's Performance Assurance in the amount of the Aggregate Drawdown Payment." However, the forms of letters of credit attached as Option 1 and Option 2 of Exhibit E provide that the Beneficiary may make draws under those letters of credit under only 3 circumstances: (i) in connection with an event of default; (ii) in connection with an early termination date; and (iii) expiration of the letter of credit prior to its replacement. There is no reference on the face of the letter of credit regarding the beneficiary being permitted to draw against the letter of credit in connection with an Aggregate Drawdown Payment. If the agreed intent under the REC contract is that payment of the Aggregate Drawdown Payment would not be an event of default, though this shows it as a triggering a default. So the two documents appear to be at odds with one another.

First, why must the buyer have the right to draw against the Seller's Performance Assurance under Section 6(d)(v)(i)? Why would the Seller not simply be required to make payment of the Aggregate Drawdown Payment and failing its making of that payment under the REC contract, the Buyer would have the right to then draw against the letter of credit. Developers (account parties under the letter of credit) as well as the issuing banks may have agreements in place and preferences that the letter of credit is not the primary mechanism for making payments in the ordinary course; i.e. that it would instead be additional security for failure of the obligor account party to pay. Second, the language in clause 3. The letters of credit contemplate a "replacement letter of credit" but the paragraph following that clause provides for automatic extensions. Issuing banks' and developers' credit facilities may distinguish between extension and replacement and some lines of credit may not permit e.g. 15 years letters of credit. 15 year LC's are extremely rare in the industry, the more common practice is replacement of LC's 60 days prior to expiration. Sellers as account parties should be permitted to cause issuing banks to provide annual letters of credit, each of which may be replaced by a separate letter of credit rather than a single 15+ year letter of credit. This lack of flexibility will result in developers being unable to secure conforming letters of credit and instead require many developers to post cash collateral, which may interfere with efficient financing.

Best Regards,

[Submitter 8 representative]