

Seven things to look for in a private power purchase deal

Published: 28/04/2017 at 04:00 AM

Newspaper section: [Business](#)

As the costs of solar photovoltaic (PV) panels decrease, new business opportunities are emerging. In addition to the traditional model of independent power producers establishing large-scale generating facilities to sell electricity directly to public utilities, a new dynamic model of direct electricity selling is beginning to take shape.

Solar PV panels can be installed on roofs to supply electricity directly to a building's occupants, bypassing the need for a local electricity utility. Under a contract between private parties, the customer and power producer negotiate directly on the cost of the electricity supplied. The resulting increase in competition has the potential to reduce energy costs across the market.

Typically, the electricity seller will remain the owner of the solar panels, the inverter and other components of the generating system. As the seller will be financing the installation of the system, the purchaser can sign up with minimal initial costs.

The principal contractual document governing the relationship between the seller and purchaser is the power purchase agreement (PPA). These are traditionally executed between independent power producers (IPP) and a utility such as the Provincial Electricity Authority (PEA), the Metropolitan Electricity Authority (MEA) or the Electricity Generating Authority of Thailand (Egat).

The PPAs with public utilities generally do not allow for much negotiation on the part of an IPP. But with rooftop solar installations, both the seller and the purchaser are private parties, meaning there is greater room for flexibility.

Here are seven issues that both parties should be aware of from the outset:

1. **Ownership of the facilities:** Ideally, the purchaser will be the owner of both the building and the land. However, if the purchaser is leasing the property, it is important to ensure that installation of the system will not violate the lease agreement, or will not result in the system becoming attached to the building as a permanent fixture. If the building and/or land are being leased, the term of the lease should also be confirmed in order to ensure that installation of the system will be economical for the seller.
2. **Minimum purchase requirements:** The purchaser should ideally be required to purchase a minimum amount of electricity each month, failing which, it will still be required to compensate the seller. This "take or pay" model is optimal for ensuring financial predictability for the seller and its financiers. The purchaser should ensure that its minimum commitments are not excessive and can easily be managed in light of anticipated future use.
3. **Clear lines between force majeure and events of default:** A key issue to consider is how to address changes to the environment that are beyond the control of the purchaser. For example, if the purchaser's neighbour to the south erects a tall building, trees or other obstructions, the solar PV system may be rendered worthless. The PPA should clearly outline whether the purchaser is entitled to terminate the agreement in such circumstances.
4. **Ownership of the system:** Since the seller will retain ownership of the system, it will want to affix conspicuous markings on all equipment to ensure that its ownership interests are clear. The PPA should contain a clause that requires the purchaser to assist the seller in the event the seller wishes to register its ownership interests at any government agencies. Furthermore, the PPA should contain covenants on the part of the purchaser that it will take no actions that will result in the system being deemed a fixture.
5. **Mortgages and encumbrances:** The seller must be aware if the land and/or building on which the panels will be placed has been mortgaged. Additionally, the PPA may contain a negative covenant on the part of the purchaser not to mortgage the building, or an undertaking to notify the seller in the event it does so. The seller's lenders may consider securing their loans to the seller by taking the solar PV system as collateral.
6. **Regulatory environment:** As this is a new area of business, the regulatory framework is still evolving. The purchaser and seller must stay apprised of new rules and regulations promulgated by the Energy Regulatory Commission, and the PPA must envision how new rules affecting the transaction will be addressed.
7. **Payment terms:** Delayed payment by the purchaser should ideally result in automatic interest payments being levied. It will not be in the seller's best interests to terminate the agreement immediately in the event of non-payment; however, the purchaser must have a clear disincentive to delay making its regular payments.

Private PPAs for solar PV systems are still in their infancy in Thailand, and best practices will continue to develop. It is important that both purchasers and sellers of electricity are aware of the legal risks involved when negotiating PPAs and have taken all appropriate steps to maximise their bargaining position.

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