

## Contract Negotiations for Solar PV Facility Agreements

*Adapted from text by Mike Carroll of North Carolina Cooperative Extension, and Amy McDonough of Borrego Solar.*



The Massachusetts Department of Energy Resources has established the Solar Massachusetts Renewable Target (SMART) program, which will regulate incentives associated with new solar photovoltaic (PV) development in the state, beginning November 26, 2018. A series of fact sheets designed to help farmers navigate the program is available on the UMass Clean Energy Extension (CEE) website, <https://ag.umass.edu/clean-energy>.

Care should be taken to examine all aspects of a contract. Typically, solar PV facility contracts are written to protect the solar company, not the landowner. As such, a contract outlines responsibilities and rights of the two parties, but may protect the developer's rights while limiting the landowner's rights. Remember, the contracting company is approaching the agreement from the perspective of protecting itself from liability and making a profit.

A number of the issues that should be considered are listed below, but this fact sheet cannot cover all considerations of a contract. It is **highly recommended** that you consult with a lawyer familiar with solar development prior to signing a contract.

### Important Contractual Considerations

- **Contract Clarity:** Make sure to specifically outline all activities and responsibilities for all parties and specifically state that no others are implied. Avoid clauses or phrases that are vague, for example, allowing entry of the developer, contractors or assignee to "undertake any activities that are necessary, helpful, appropriate or convenient in connection with, incidental to, or for the benefit of one or more projects." These types of statements could give the solar developer or others open-ended rights, and even the right for future development. It is just as important to consider what is NOT included in your contract as it is to understand what is included.
- **Matter of Public Record:** Consider having the contract publicly recorded. Many contractors not only do not wish for this to occur, the contract may specifically have wording preventing disclosure of terms, operation or any business matters concerning the solar facility. Rather a "memorandum" is executed. Many states do not regard these memorandums as a binding legal agreement and thus they are not as enforceable as publicly recorded contracts.

- **Legal Jurisdiction:** If there is a dispute or legal matter, what state determines the applicable laws? Some contracts specify that all legal matters be handled by arbitration in the state of the contracting company's origin or operation. Insist that all legal matters and disputes follow local state laws and that disputes be settled within the state that the solar farm is physically located.
- **Contractor's Interest:** Does the contract require the landowner to protect the developer or contractor's interest? If so, this broad term may imply legal fees, liability insurance or other matters. Avoid such clauses and terms. Specifically outline exactly what is needed by the contractor rather than providing a general, unclear clause that might increase the landowner's risks.
- **Sub-Contractors:** Who is responsible for disputes with sub-contractors, sub-lessees or others? As a landowner, it is especially critical to separate your responsibility from those of the contractors/developers. Otherwise, legal action which you have no control over may result.
- **Liability:** Who is liable for injury of a person or property during establishment, operation or maintenance of the solar panels? In some cases, landowners may become entangled in legal disputes over worker injury. Make sure to protect yourself against such situations by specifically outlining liability and responsibilities. Evaluate the liability of injury to workers, visitors to the site, potential environmental damage, fire, vandalism, or other unintended consequences. Liability insurance costs and needs for commercial property may greatly differ from liability insurance for farmland. As such, make sure the contract clearly specifies who owns the equipment and who is responsible for damage to equipment or for personal injury. Make sure the developer/contractor is properly insured for the property and liability, and that as the property owner you are listed as an additional insured on all policies. In addition, anyone performing work on the property should have proper insurance and workers compensation coverage.
- **Fencing and Security:** Responsibility for security around the solar array should be clearly outlined in the contract.
- **Property Rights:** Easement privileges, rights of way, permission to enter the property at will, and the right-to-work of other parties should be considered carefully. Leases allow a landowner to provide a tenant exclusive rights for a specific time period. They are easily terminated. An easement provides the owner the right to continue using his/her land but transfers an interest in the property, and associated rights, to a third party. They are often recorded with the deed. As such, they are not easily terminated.
- **Property Access:** Does the contract allow the developer/contractor access to the land at any time? Some clauses allow entry, without notification, at any time during the term of the contract. Specifically outline who has access to property and under what terms or conditions. Failure to do so may allow the contractor, developer, sub-lessee or others access at any time without notification to the landowner.
- **Solar Array Setbacks and Site Usage:** Carefully consider any defined easements around the solar array in case you anticipate building on the property or using land adjacent to the system during the lease term. Any structure built will need to be located outside of those easements, and not shade the array or cause any issues with system production. Understand what limitations, if any, there are to use the property around the solar project. Review where access roads and utility poles will be placed, and any restrictions under and around these structures.
- **Contract Transferal:** Can the contract or any agreement/obligation of the contract be sold, transferred or assigned to another party? If so, what are the terms? The ability to sell a contractual obligation may mean that the company or individual you contract with today is not the same tomorrow. Additionally, if allowed in the contract, the company/contractor to which the agreement is transferred may be limited in liability or simply not agree to all original terms. In some cases, transferal of the agreement may be to a company/contractor that does not have the ability to provide adequate financial backing or proper authority to meet original obligations. Make sure that if a transferal clause is included in the contract, the specific conditions, terms, liability and risks associated with transferal are outlined.

- **Contract Changes:** Make sure that any changes to the contract are in writing and that both parties agree to the changes. Make sure that the party agreeing to contract changes is the party represented in the contract with the legal authority to make those changes. In some cases, a third-party administrating company provides sales or initial contact. These individuals or companies may or may not have authority to accept changes to a contract.
- **Contract Term and Buy-out Provisions:** Does the contract have a limited term, and if so, what happens after the term expires? Is the owner/contractor responsible for decommissioning? Is there a buy-out provision at the end of the contract term, or at certain times within the contract term, whereby the landowner can purchase the solar project from the developer? If so, ensure the terms of that buy-out (price, maintenance contracts, decommissioning responsibilities, etc.) are clearly stated and have been adequately negotiated.
- **Contract Termination:** Do both parties have the right to terminate the agreement without cause? If not, then what are the terms of termination? Solar farms do not generate power equally. In some cases, poor performance may result in an inactive site. If so, as a landowner, you may want the right to terminate the agreement. These issues need to be clearly defined in the contract.
- **Decommissioning:** The owner or contractor of the solar facility should be responsible for decommissioning. The landowner should consider requiring that the owner/contractor maintain in escrow funds sufficient to decommission the project at the end of the contract period. All removal and decommissioning should occur within 12 months of the facility ceasing to produce power for sale. The owner or contractor of the solar facility, as provided for in its lease with the landowner, should do the following as a minimum to decommission the project:
  1. Remove all non-utility owned equipment, conduits, structures, fencing, and foundations to a depth of at least three feet below grade.
  2. Remove all graveled areas and access roads unless the owner of the leased real estate requests in writing that they be left in place.
  3. Restore the land to a condition reasonably similar to its condition before development, including replacement of top soil removed or eroded.
  4. Re-vegetate any cleared areas with plants native to the region, unless requested in writing by the owner of the real estate to not re-vegetate due to plans for agricultural planting.
  5. Provide soil sample reports from a private lab showing soil on the location is free of heavy metals and contaminates and is suitable for agricultural production or other future desired use. If location is near a stream, provide comparable water sample reports.

## Newsletter and More Information

To stay up to date on the latest information from UMass Clean Energy Extension, please sign up for our newsletter at <https://ag.umass.edu/clean-energy>.

Contact River Strong ([gcstrong@umass.edu](mailto:gcstrong@umass.edu), 413-545-8510) with any questions related to solar PV use on your farm.