Oracle Utilities' Comments RE Draft Standard Terms and Conditions for Third Party Contracts

Introduction and Summary

Oracle Utilities (formerly "Opower, Inc") appreciates the opportunity to provide feedback to the IOUs regarding their draft standard terms and conditions ("Draft"). It is critically important that these standard terms and conditions be agreed upon by both the program administrators and the implementer community, and we encourage the IOUs to seek as much consensus as possible ahead of the March 19 filing deadline in order to avoid a protracted regulatory process at the CPUC.

At a high level, Oracle is concerned that the Draft provided by the IOUs for review by stakeholders contains a great deal of language that is more appropriate for a particular type of program implementation. Specifically, the Draft appears to be targeted primarily at contractors and implementers providing in-person energy audits, equipment maintenance and installation and construction services at a utility customer's site (e.g. a residence or business). While these types of activities are certainly relevant within the portfolios, there are many other types of implementers delivering energy savings by very different means, including via software solutions. Increasingly, innovative approaches to DSM are being delivered by non-traditional service providers. Standard terms and conditions that are tailored for on-site contractor work will severely hamper the ability for the PAs to procure innovative solutions to meet the state's increasingly ambitious energy savings targets.

Recommendations

Oracle recommends the IOUs work with the CA Energy and Demand Management Council (CEDMC), which represents the vast majority of third party implementers, to substantially modify the Draft before filing these terms and conditions in order to ensure a much more amicable and streamlined approval process at the CPUC. These terms and conditions should either be sufficiently broadened so as to accommodate the myriad different types of delivery models, or they should clearly indicate which terms and conditions are specific to which type of delivery model.

While it is critical to ensure that any contractors working on a customer's premise are appropriately licensed, fit for duty, following all applicable safety protocols, and clear of criminal convictions that would disqualify them from performing the work at hand, it must be recognized that many of these provisions do not apply well to software delivery models. Oracle offers our specific comments, by section, below.

A. Eligibility

1. <u>Licenses, Insurance and Bonding Requirements</u>

Concern:

It is unclear what the insurance requirements will be, as there is only a placeholder for "IOU-specific" appendices. This creates a great deal of uncertainty around what insurance requirements might entail.

Recommendation:
These requirements should be commensurate with the size of the contract and the specific kind of work being performed by the contractor/implementer.

B. Safety Requirements

1. Safety

Concern:
Oracle understands the importance of safety in the workplace, and just like any other company, it has many rules and procedures in place to ensure safety in its facilities. That said, this section appears to apply primarily to work taking place on the premises of utility customers and does not translate well to a software delivery model.

Recommendation:
The IOUs should clarify the specific type of contracts this section is intended to apply to.

2. Background Checks

Concern:
This section appears for tailored to concerns around contractors who are performing on-site work at utility customers' premises. These provisions would be challenging or impossible for many companies to comply with, particularly companies with employees based in other countries. These provisions would also require employers to monitor their employees in ways that are not feasible from either a logistical or, in some cases, legal standpoint. For example, if an employee in another country is charged with a crime, it is entirely likely that his or her employer would not know about it. Even in the U.S., employers are not likely to know whether any of their employees are charged with a crime during their tenure. Requiring companies to notify the utility if "any of its personnel" is charged with or convicted of a serious offense during the term of the contract is effectively impossible, especially for large companies with a global workforce. Furthermore, these provisions place an undue burden on companies to perform drug screens for an indeterminate number of employees working in various countries and states with different laws regarding SAHMSA 5 drugs. Also, for background checks, requiring checks to go back 7 years in each employees history before being hired is not feasible and many employers' background checks cover a shorter period of time than this.

Recommendation:
Clarify that this section is meant to apply only to specified types of work in which concerns around drug use, criminal convictions, DUIs, etc are of critical importance. At minimum, this section must not apply to software delivery models for energy efficiency.

3. Fitness for Duty

Concern:

It is not possible for companies with a distributed workforce to enforce these provisions. Many businesses have a substantial number of employees who work from home, for example. It would not be possible to monitor these employees at all times to know whether they are complying with these provisions, nor should it be necessary for delivery models such as software as a service.

Recommendation:
Strike the first sentence entirely and/or clarify that this provision only applies to specified types of EE delivery (e.g. on-site installation, etc.)

C. Dispute Resolution

1. Disputes

Concern:
This section discusses good-faith negotiation between the utility and the contractor, which should be sufficient for purposes of these contracts. However, the fifth sentence includes mediation despite there being no mention of mediation as a form of dispute resolution anywhere else. Mediation would cause great concern around intellectual property rights, and mediators are oftentimes not well versed in the complex and niche types of work involved in these contracts.

Recommendation:
Strike "and any mediation" from the 5th sentence of this section.

D. Termination Process

1. Termination for Convenience

Concern: It is unclear exactly how this would apply to SaaS delivery models, as these subscription fees are paid annually for the following year's services. If a utility were to terminate for convenience, this would be done ahead of the next year's renewal date, and more than 10 days advance notice would be required. It is much more common for SaaS contracts to require a minimum of 30 days advance notice ahead of an annual renewal for cancellation. It is also unclear how a utility would "take possession of any portion of the services paid for by the company" (last sentence, 1a.) in a SaaS delivery model.

Recommendation:
Increase the advance notice to at least 30 days and clarify the types of EE delivery models these provisions are intended to apply to.