Contractor Update: Renewable Energy Project Checklist

There is a growing market for construction contractors who can successfully implement renewable energy projects. The following is a short checklist for contractors involved in this market:

The Developer

The single biggest factor when considering a renewable energy project is the qualifications of the developer. Considerable research should be conducted on the developer and its associates and business partners before making the leap into negotiation of a construction contract or alliance agreement. The following is a short summary of items to consider and investigate:

Who is the developer?

- What is the developer’s reputation? Take the time to dig into the developer’s background and investigate who they are, their experience, etc.
- What experience does the developer have with renewable energy projects or other projects generally?
- Who is the executive team of the developer and what are their backgrounds?

What is the developer’s history with renewable energy projects?

- Has the developer successfully completed any prior projects?
- Were they successful (completed on time, completed on budget, etc.)?
- Where were the prior projects? Developing a project in New Jersey can be considerably different from developing a project in California.
- What size were the prior projects compared with the current project? Going from a commercial scale project to a utility scale project can be a big leap.
- Who was the previous contractor and did they have disputes with the developer? Consider searching for any litigation that might have arisen from the previous transaction. Note that the litigation might have been due to the contractor’s actions.

Bankability of the Transaction

No contractor wants to spend the time and resources negotiating an engineering, procurement and construction (EPC) contract or alliance agreement only to later find out that the financing fell through. However, construction or EPC contracts are commonly expected to be completed before financing has been locked in by the developer. Indeed, in these tight economic times, it is only the airtight, completed projects that get the attention of banks and other financial institutions. Before a contractor pursues an alliance agreement, construction contract or EPC contract with a developer, a contractor should do as much due diligence as possible on the financing. The following is a partial list of items a contractor should investigate before negotiating with the developer:

How far along is the developer on the project?

- Where is the developer in its talks with the financing entities and how is the deal structured?
- Does the developer have a power purchase agreement (PPA)? The lack of an off-take agreement will often be a show-stopper for financing.
- Is the PPA subject to regulatory approvals that are uncertain? Either the developers or the power purchasers may be required to obtain governmental approvals, which, if not granted, can scuttle the transaction.
If the developer is procuring power generation equipment, has it completed the procurement contracts? Supply has at times been a problem in solar, wind and other renewable technologies.

**How is the project going to be financed and how is it structured?**

- Who is providing the financing? *Knowing that the lender or financing party(ies) is capable of paying the contractor is essential to a transaction.*
- Is the project financed as a nonrecourse debt financing? Public-private partnership? Municipal financing? Equity financing? *Closing on each of these financing structures has different risks and issues.*
- Will the financing documents adequately protect the contractor? *Although the specifics might not have been negotiated yet, the early positions of the developer and lender are important considerations for a contractor.*
- Will the lender be required to release funds directly to the contractor? *Contractors don’t want developers directing money intended for them elsewhere.*
- What are the conditions potentially limiting the lender or developer from making payments to the contractor?
- Will the contractor be notified of events or defaults potentially limiting payments?

**Feasibility of the Site**

The site of the project can have a significant impact on a contractor’s decision whether to pursue a project. A poorly located site, complex interconnections, overly burdensome permitting requirements and other factors can significantly decrease the predictability of cost and timing, thus making turn-key contracts less appealing. A contractor is thus well-advised to investigate the following conditions:

**Where is the project to be located?**

- Can the site be easily accessed? *Difficult-to-reach sites increase costs and can delay projects.*
- In solar projects, are the modules to be located on a roof? *Rooftop projects often require contractors to determine the structural integrity and structural capabilities of the roof, limit contractor activities and construction time, and otherwise increase cost.*
- Does the proposed site pose any safety or security problems?

**What are the local project laws and requirements?**

- Are local zoning requirements favorable or will they need to be addressed? *Developers often prefer to put the burden of obtaining permits and dealing with local zoning and related laws on the contractor, adding to development cost.*
- Will there be local or NIMBY (“not in my back yard”) resistance? *Many promising deals have been abandoned due to local resistance.*
- Does the applicable state have any special or unique laws or regulations that might adversely affect the project? *Some states look at renewable energy projects more favorably than others.*

**Project Factors**

It’s not until the RFP goes out and the details of the transaction are released that some of the most important factors can be reviewed and evaluated. The extent to which the project is a true “turn-key” transaction can have a significant bearing on the contractor’s ability to submit a realistic bid. The following are common factors, usually described in the RFP, that are vital to understanding the desirability of a renewable energy project:
Project Size

- Commercial scale vs. utility scale. *Is this a project that is in the contractor’s preferred range? Some contractors have a niche with smaller solar, wind or biomass projects. Other contractors specialize in larger utility-scale projects.*

Technology

- Who will procure the wind turbines, solar PV modules, solar thermal tube and other technology required to complete the project? *If the contractor is required to procure this technology, appropriate disclaimers and other contingencies will need to be incorporated into the contract. Moreover, in wind, solar and other renewable technologies, demand may be high and access to technology may be difficult.*
- Does the RFP contemplate that the contractor takes the risk for delivery?
- Is the contemplated technology sufficiently proven?
- Does the contemplated technology raise any integration or installation issues? *Certain renewable energy technologies have been known to cause electrical and installation problems.*

Timing

- How flexible are the schedule milestones? *A tighter schedule will raise the risk premium and require greater scrutiny of other factors.*
- Does the installation schedule conflict with other contractor responsibilities?
- Can equipment and materials be delivered in time to meet the schedule?

Operations and Maintenance

- Are O&M services included with the project? *Some developers want the contractor to provide O&M services, others don’t. Although there are subcontractors who will perform these services, the contractor should determine whether O&M services are part of its business plan.*

Payment

- What payment guarantees is the developer willing to sign up to? Parent guarantees? Letters of credit? Advance payments or other guarantees?

Risk Assignment

- What risk does the developer intend to pass to the contractor? *This is generally the focus during negotiation of the alliance agreement, construction contract or EPC contract. However, the RFP and other obtainable information should give the contractor an idea of what the developer will ultimately require. If it is clear that the developer will insist on an unreasonable amount of risk-shifting, and not enough risk premium to accompany that shift, then it may not make sense to pursue a deal.*
- What liquidated damages for delay will the developer require?
- To what extent will the contractor be held responsible for performance of the technology?
- Will the developer accept OEM warranties, or will the contractor be expected to warrant the performance of PV modules?

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