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ACQUIRING A BANGLADESH RENEWABLES PROJECT DURING ITS DEVELOPMENT PHASE: WHICH PROJECTS ARE AVAILABLE FOR INVESTMENT OR ACQUISITION? WHAT ARE THE KEY THINGS TO KNOW?

Which Renewable Power Projects in Development May Be Open to Investment or Acquisition?

At this point in time, we are aware of at least 10 to 12 renewable power projects which have some kind of Government preliminary approval, but which have not yet reached financial close or commenced major construction. The majority of these are open to investment or sometimes, a financing solution.

In the 2016-2020 period, the Government, through the Bangladesh Power Development Board (“BPDB”), has prioritized getting sufficient power generation online to meet existing and expected future demand. This resulted in a series of preliminary project approvals granted to developers. The project owners are both foreign and local developers, often in cooperation with EPC providers.

Here are some examples, obviously with identifying information omitted:

- **Project A:** Mid-sized wind project with BPBD Letter of Intent (“LOI”) with a relatively high tariff. Owners are foreign investors without any local shareholder. Land -probably around 50 acre- is not yet secured, but land is available in the

Highlights of this note

- ▶ Which Renewable Power Projects in Development May Be Open to Investment or Acquisition?
- ▶ Which Government Approvals Have Already Been Secured by the Brownfield Projects?
- ▶ How Long Is a BPDB “letter of Intent” Valid?
- ▶ Can a Brownfield Project Be Transferred to a New Owner?
- ▶ How Does the Land Acquisition Work?
- ▶ What Are the Key Commercial Terms of Bangladesh PPAs for Renewables?

area. Some data on the resource is available, indicating good velocity, but more data is probably needed. Group of investors having some differences of opinion on the direction of the project, wish to exit.

- **Project B:** 40-60 MW solar project, land already secured, with only foreign investors and with BPBD LOI. This project was previously tendered, and won by the current owners. Land lease by the Government at low cost, but requires some water management measures.
- **Project C:** 40-60 MW solar project with a foreign and a local partner, and with BPBD LOI. Land is available as capital contribution by the local partner. Relatively high tariff.
- **Project D:** 15-30 MW solar project with local developer, and with BPBD LOI, seeking exit or equity and finance. Land is available but not yet acquired due to lack of funding. Relatively high tariff.
- **Project E:** Small solar project with BPBD LOI. Land is available but not yet acquired due to lack of funding. Relatively high tariff.
- **Project F:** Small to mid-sized solar project with BPBD LOI, 90% of the land has been acquired. The owners may consider partial disposal or financing arrangement to raise the remaining project cost. Relatively high tariff.
- **Project G:** 200 MW solar project with storage as a co-investment, land provided by Government, No LOI yet, but high tariff is expected.

For ease of reference, we will refer to the above projects and others like them as “the Brownfield Projects” which is of course a slight misnomer because typically nothing physical has been constructed yet for these projects. They

are all in the development stage, although they did already secure at least preliminary project procurement.

Which Government Approvals Have Already Been Secured by the Brownfield Projects?

In general, for unsolicited power projects (i.e. non-tendered ones) in Bangladesh the project procurement happens with a number of milestones:

*Milestones in project procurement:
Unsolicited projects*

- i. Feasibility study is prepared by the sponsor, submitted to and reviewed by the BPDB;
- ii. Preliminary land acquisition by the sponsors;
- iii. **Letter of Intent** is issued by the BPDB; This is the in principle and binding project approval by the BPDB. Most of the Brownfield Projects have this type of approval already received.
- iv. Parties negotiate and agree, sometimes initialize the PPA and Implementation Agreement (“IA”)
- v. **Execution of PPA and IA** (generally this starts a 6 month time period by which the next step, the financial close, must be achieved, and a 9 month period by which construction must be completed);
- vi. Financial Close
- vii. Construction
- viii. Testing and Commissioning
- ix. Commercial Operation Date (“COD”)

The LOI is a key milestone in the project procurement. It is a 4 or 5 pages letter which recites the key aspects of the project such as location, generation, tariff, offtake commitment, etc.

In addition, some Brownfield Projects have the PPA and IA in agreed state or initialed. It would not be common to see a project with the PPA already executed, as that would trigger hard deadlines for reaching financial close and COD.



How Long Is a BPDB “letter of Intent” Valid?

There are LOIs which actually set out a specific date by which the PPA and IA must be executed, and there are LOIs which, on the contrary, just mention that the sponsor will have to come sign the agreements upon request by the BPDB.

In practice, we see that often the parties to the LOI will tacitly or explicitly extend the LOI beyond such a date, if there is one, if needed. Particularly in the COVID era there appears to be some flexibility with respect to projects for which actually the PPA could or should have been executed at some time in the past. On the other hand, the BPDB keeps a regular watch on the progress of projects that are in the planning stage, and sometimes issues ultimatums or cancels projects that are not moving forward.

Can a Brownfield Project Be Transferred to a New Owner?

Bangladesh power projects typically have contractual restrictions on the transfer of shares in the project. For many projects, a “lead shareholder” must maintain at least 51% ownership until COD, and at least 40% for up to 6 years following that. An “operating shareholder” or “technical partner” must maintain at least 20-30% ownership until COD, and 10=20% for 6 years afterwards.

However, these prescriptions do not exactly apply during the period prior to signing the project agreements with the Government. During the development phase, when the PPA and IA are not yet executed, there are no specific contractual restrictions.

Nevertheless, the LOI sets out in detail who the sponsors are. Although nothing is mentioned on changes to the sponsors in the terms of the LOI, it goes to reason that the BPDB commitments in the LOI might not remain in force if the beneficiary of the LOI has changed somehow without BPDB consent.

Securing BPDB consent for a transfer of owners will in our experience depend on a number of factors, most important among which is the ability of the transferee to complete and operate the project.

Projects held by foreign investors are typically under an offshore SPV, which makes the transfer of the entire structure a possibility.

How Does the Land Acquisition Work?

In the large majority of projects in Bangladesh, the sponsors will be responsible to find and acquire the site for the project. Exceptionally, the Government may have arranged public land to lease to the project.

Interestingly, in Bangladesh the BPDB will as a matter of policy usually not proceed to issue an LOI if not at least a certain percentage of the site has been acquired by the sponsors. How much that percentage is has evolved over the years. Presently, 70% to 80% of the land must have been signed up by sponsors before the LOI will be issued. This presents sponsors of course with a risk, as at least some cost will be attached to securing land, even if it is on a preliminary basis.

In our experience, when a power project is unable to proceed in Bangladesh, it is usually because of land issues. There are a number of examples where this happened, and even cases where litigation and arbitration between the sponsors and the BPDB has occurred, caused by failure to secure land. In one notable case, the sponsor failed to acquire more than 5% of the needed land by the deadline for the financial close, blaming the Rohingya refugee crisis. According to the BPDB, this was just an excuse as the crisis had started long before and no refugees were anywhere near the site.

One of the key reasons of the troublesome land acquisition process is that land disputes are incredibly common in Bangladesh, reportedly affecting 25% of all households, which dwarfs the problems in also notorious jurisdictions India and Indonesia. If there are already that many conflicts about land, aside from any project related pressures, this means the starting situation is already unstable to begin with. Furthermore, there is no centralized land titling system so parties need to refer to a long chain of deeds to corroborate their ownership. Finally, the population registration system is not comprehensive, so a large

measure of uncertainty is injected into the process by false or mistaken transfers in connection with succession.

Nevertheless, the majority of projects do succeed to secure land, even with all of these challenges. In our experience, much will depend on the quality of the local team, which is for foreign sponsors not easy to assess in advance.

The land acquisition by a sponsor will proceed in two stages:

1. Prior to obtaining the LOI, temporary rights will be acquired against a partial payment, with an unregistered but written agreement, called “*hand baina*”. The BPDB will examine these agreements with the land title documentation of the land owners;
2. After the LOI, before the FC, the company will convert these to “*registered bainas*”, with full payment being owned to the land owners/seller. A common problem is that the owner may want a multiple of the agreed sales price by the time we get to stage (2), and *hand bainas* are not easily enforced.

Under Bangladesh law, a foreign owned project company may in fact purchase land rights as well as lease land.

What Are the Key Commercial Terms of Bangladesh PPAs for Renewables?

Here are some key commercial terms of Bangladesh PPAs for renewable power:

- **Purchase of energy:** Most PPAs for renewable energy in Bangladesh are on an energy basis. If the Generator does not deliver energy, there is no payment. It is usually agreed that all produced energy will be purchased.
- **Tariff:** The tariffs are usually in US\$ and agreed on a case-by-case basis. There are differences depending on the time period when the PPA was agreed, with a downward trend reflecting the decrease in cost of the plant itself.

Year	Tariff in US\$ (Indicative Only, Depending on Various Factors)
2017	0.12 to 0.14
2018	0.11 to 0.13
2019	0.10 to 0.11
2020	0.70 to 0.10

- **Currency:** Payments are made in Bangladesh taka (“BDT”) based on the currency exchange rate published by a large state-owned bank
- **Term:** Usually 20 years
- **Security provided by the Offtaker:** 2 months worth of payments Letter of Credit
- **Interconnection:** Usually at the cost of the Generator
- **Payment rights during force majeure (“FM”) period:** The main rule is that only energy payments apply during the FM period. If there is any damage to the facility caused by political FM, the uninsured portion will be compensated. In addition, for political FM, there is a payment which equals a fraction of the tariff that would otherwise be payable, plus debt service to the lenders.
- **Termination payments**

	Situations	Rights	Amount
1	Termination by Government/Generator default (e.g. failure to achieve FC, construction start, COD on time)	Option for Government to purchase the project, no obligation	Before FC, none. After FC, amount of senior debt + other approved debt less insurance proceeds in case of FM + prepayment/costs
2	Termination by the Generator/Government default (e.g. expropriation, certain change in laws,	Option for the Generator to transfer the project to the Government	Above amount to lenders + 5% of equity minus certain deductions + 2 to 5 years of net cash flow at NPV + certain additional amounts in case of Restoration
3	Termination following change in law, failure to receive permits		
4	Termination following political event		

- **Sovereign guarantee:** In several projects, a guarantee will be extended by the Government for any amounts which are due but unpaid by the BPDB.

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