Renewable Energy M&A Transactions: Keys to Negotiation
Sutherland’s Renewable Energy Experience

- Sutherland has a broad renewable energy practice with experience in counseling independent power producers, energy traders, developers, lenders, investors and utilities in virtually every type of renewable and alternative energy source, including:
  - Biomass
  - Wind – Onshore and Offshore
  - Solar
  - Geothermal
  - Waste to Energy/Landfill Gas
  - Hydro
  - Wave/Tidal
Keys to Negotiation: Takeaways

- Identify relevant risks and considerations
- Allocate risks efficiently
- Align interests between parties
- Document deal to reflect intent

Understanding unique aspects of renewable projects is key to maximizing value.
Overview of Key Considerations

• Transaction structure
• Utilizing due diligence to identify and allocate risks in the Purchase and Sale Agreement (PSA)
• Valuation and balancing upside/risks between buyers and sellers
Transaction Structure

- Asset transaction vs. stock or merger transaction
- Joint Venture/Strategic Alliance
- Critical issues when structuring transactions for renewable generation assets:
  - Financial strength of counterparty
  - Assignment of key contracts (e.g., PPA, BOP EPC, O&M agreement, etc.)
  - Issues with government incentives
  - Transfer of permits and licenses
  - Federal and state/local tax considerations
  - If project is under development, who will be responsible for completing project?
Transaction Structure

- If acquiring a minority interest in a renewable project, consider the following types of provisions in a JV agreement:
  - Standard provisions to protect value
  - Provisions regarding transfer and exit rights
  - Consider whether acquirer will want to “put” back the project to the majority owner if certain conditions are not met
  - Treatment and allocation of tax incentives
Know What You’re Buying: Utilizing Due Diligence as a Negotiating Tool

- Critical to assemble experienced diligence team (e.g., regulatory, tax, commercial, environmental, etc.)
- Buyer’s due diligence investigation may yield liabilities which should be taken into account when structuring the transaction and valuing the assets
- Interplay between due diligence and PSA to protect buyer
Know What You’re Buying: Utilizing Due Diligence as a Negotiating Tool

Understand the Landscape – for example:

• Tax Incentives
• Renewable Portfolio Standard (RPS) Issues
• State and Local Issues
• Political Risk
• Understand the Market For Renewable Energy Assets
“Bridging the Valuation Gap”: Aligning the Interests of Both Buyer and Seller

• More than ever, there is a valuation gap between sellers and buyers of renewable generation assets
  ▪ Falling deal multiples as acquirers heavily discount development portfolios
  ▪ Lenders remain conservative given permitting, construction, technology and change of law risks that may detrimentally impact development stage projects

• The market for renewable assets has forced both buyers and sellers to structure M&A transactions to creatively align interests
“Bridging the Valuation Gap”: Examples of Creative Structuring for Buyer

- Use of escrow / holdbacks
- Closing conditions
- If acquiring renewable generation assets under development, consider:
  - Tying purchase price to actual output
  - Creating “installment” payments based on completed project milestones
  - In portfolio acquisition, capping development payments to set “ceiling” expectation for both parties
“Bridging the Valuation Gap”: Protections for Seller

• If buyer controls the development process from and after closing, how does the seller protect itself?
  ▪ Consider performance assurance from buyer/developer
  ▪ Provisions to accelerate payment upon trigger events
  ▪ Exclusive development obligation?
  ▪ Performance standards for development
  ▪ Obligation to expend funds per approved business plan

• Option to repurchase project(s) upon either buyer default or negotiated “drop dead date” if projects have not met certain milestones
“Bridging the Valuation Gap”: Examples of Key Provisions in PSAs

• R&Ws allocate risk between the buyer and seller – seller is typically in best position to bear risk. R&Ws can cover:
  ▪ Eligibility to receive treasury grant or other incentives
  ▪ Construction/development of project
  ▪ Accuracy and completeness of development/operating records
  ▪ Confirming commercial operation has been achieved
  ▪ Seller’s compliance with NERC reliability standards
  ▪ Title to renewable energy credits of offsets

• Other R&Ws to consider
“Bridging the Valuation Gap”: Examples of Key Provisions in PSAs

- Other covenants that buyers may seek include:
  - Securing buyer’s access to the project site for purposes of conducting due diligence (including, for example, environmental assessments)
  - Non-compete covenant
  - Seller’s compliance with tax and government incentives
  - Other covenants based on results of due diligence may be necessary
Knowing What You’re Buying: Post-Closing Surprises and Indemnification Rights

• Importance of caps and baskets or deductibles for indemnification
  ▪ Limitations are different when structuring transaction with milestone payments
  ▪ Specific indemnities to address liabilities identified in the course of buyer’s due diligence

• Survival of R&Ws and covenants

• State “quirks”
  ▪ Texas’s express negligence rule
  ▪ “Sandbagging” and “Anti-Sandbagging” provisions – lessons from New York
Meet the Presenters

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