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of Bank Guarantee ... 1 - 2

LAW IN FOCUS

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Power Generation in Bangladesh: Legal Issues

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Investing in Power Generation Projects is always a very costly affair, involving several entities working together. Several policies e.g. IPP, SPP, Rental, PPP etc. have been designed to cater several demands in different times. The Government entities are invariably the power purchaser. The procurement guided by Public Procurement Regulation 2008, ADB guidelines etc. is a complex, time consuming and rigorous process. In solicited projects, international invitation for tender are floated.

The tender documents contain draft Power Purchase Agreement/Off Take Agreement, Gas Supply Agreement and Land Lease Agreement. Along with technical and financial proposals the bidder is required to submit the above Agreements with revised terms and conditions while submitting bid. Bid bond security is submitted to ensure his participation in bidding process till the bid validity period.

Tender evaluation is a defined process in Bangladesh. There are several committees; approving authorities are involved with the process. However,

The contractor as dissatisfied in reply to the instruction of encashment of the Bank Guarantee issued by the Beneficiary to the Bank goes to the court for temporary injunction and writes to the bank requesting not to make payment as the matter is pending before the court, therefore, it is sub judice and/or state that the beneficiary is acting illegally and/or he/she has already obtained a show cause notice from court.

This puts the Bank in dilemma. The Bank without assessing its legal position in depth, stop making payment and/or cause delay in making payment even though the Guarantee stipulates that "payment shall be made immediately without questioning the validity of such instruction". In few cases, the Banks favour their client, the contractor and indirectly assist by not making payment. This is surely not only a violation of the Bank Guarantee agreement, but also a serious flaw in the commercial transactions compared to international standard.

The Bank often favours the clients as there are alleged issues of malpractice within the beneficiary procuring entity, which puts the Bank into the possible failure to recover of Bank dues from contractor. Further, if there is low cash margin or insufficient collateral, this may lead to non payment.

On the other hand, the contractors often do not come up with clean hands. By manufacturing false documents and giving false information or in collusion with the procuring entity etc. the contractor often sign contract which they simply not capable of performing.

This is a total confusion in the system which generally leads to several litigations in both district court and Supreme Court, arbitrations and even criminal cases. Further, the Bank loses its reputation as a Guarantor locally and internationally.

This is also a vital reason for failure to utilise the government fund, delay in development and infrastructural works.

If the technical and financial evaluations are genuine and the procuring contract states the "event of encashment" of Bank Guarantee, this should reduce the said confusion. The contractor are also required to submit power of attorneys, joint venture agreement etc. as required under invitation for tender in consultation with lawyers so that bid is not rejected due to the fault in documentation. The Bank Guarantee may also incorporate clauses similar to the "event of encashment" even though this renders the Guarantee conditional. The tender document containing draft contract, notification of award, bank guarantee should be drafted with care.

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