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ARTICLE

Legal issues involving Power Generation Projects in Bangladesh

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Generation of power whether IPP, PPP, rental, quick rental etc. involves huge investment from investor, bank by providing finance and procuring entity in the form of guarantee, land lease, and tax exemptions etc. However, the journey towards winning an international tender of a power generation plant and running it smoothly in Bangladesh is not always easy particularly for new investors having no previous experience in this sector in Bangladesh.

The disputes may start from the very beginning starting from participating in tender, notification of award, performance bond, customs clearance, import of machinery as per tender bid specifications, financial closing etc. it may also arise on calculating liquidated damages at achieving commercial operation, dependable capacity testing stages etc. Further, roles and performance of third party e.g. O & M contractors, EPC contractors, supplier of HFO, gas e.g. Bangladesh Petroleum Corporation, Pertobangla etc. may give rise to serious disputes. The disputes involving power plant are often taken to arbitration and several related litigation are often filed. Besides, enforcement of guarantee while arbitration is pending is often difficult due to legal position. Further, enforcement of award is often challenging.

It is therefore important that the parties involved must perform all due diligences including legal due diligence before entering into bidding process. Further, the investors must know the local customs including the tender evaluation process, timing of award etc. Besides, legal due diligence cannot be under estimated because pending litigations would surely give some idea to the investors about the area of disputes. This will not only save the investor from possible loss in earning by taking unknown legal risk but may also save the investor from the payment of massive amount of liquidated damages or even termination.

At the tender stages, submission of flawless documentations e.g. power of attorney, authorization, joint venture agreement etc., is the key at the technical evaluation process. Further, draft agreement as annexed with the tender documents are often contain inconsistent clauses, meaningless deletion, and last moment mistakes. The bidders if qualified at technical evaluation are allowed to make minor corrections, remove inconsistencies etc. by bringing these to the notice of the procuring entity.

Further, if bidders are shortlisted before submitting bids, all bidders may make significant contribution in framing the tender documents including agreements by the procuring entity at a pre-bid meeting making the tender financially and technically viable. Once tender is floated, the bidders only allowed negotiating with regard to minor deviations and non compliance etc.

In power project the timing are crucial. There are many hurdles to cross and many deadlines to meet. Accepting notification of award, forming SPV, procuring all permits and consents in case of IPP on time, aching COD, capacity testing, outage schedule etc are only few amongst many deadlines. It is important the investors comply all these requirements.

Political situation, local resistance, change of government, policy, non-cooperation of procuring entity may cause catastrophic effect on the project hence, investors are required to be prepared beforehand by inserting suitable clause in the PPA, LLA and IA. Force majeure clauses are required to be drafted and negotiated with care at the pre-bidding meetings. In the event of actual enforcement of such clauses it is crucial that every steps to be taken with care.

Fortunately, Bangladesh ratified New York convention on enforcement of arbitration award. It is difficult but not impossible to enforce an award passed by an arbitral tribunal local or international. Before such event take place, it is not uncommon that such award is challenged in the local court to cause further delay.

An arbitration clause usually contain in the PPA, IA. However, the terms are not always similar. Hence, it is required to be negotiated and redrafted at the pre-bid meeting. Once tender is issued, the procuring entity does not have the option to bring any major changes.

Like most third world countries investing in Bangladesh does generate much higher return compared to investing in many developed nations, however, such investment always comes with higher risks. Therefore, it is important for the interest of investors and procuring entity and the country as a whole, each project should be properly analyzed and nurtured throughout the whole project tenure.

By **M. Forrukh Rahman**, Barrister-at-Law, ACI Arb, ASI Arb, CEDR (UK) accredited mediator, Advocate, Supreme Court of Bangladesh.

ARTICLE

Common Disputes arising under Shipbuilding Contract in Bangladesh

As a maritime country, shipbuilding is not new in Bangladesh. Although in recent years much attention has been drawn by few companies by successfully completing and delivering a number of medium sized vessels to foreign buyers. The low cost and skilled labour is the key advantage. On the other hand, difficulties in arranging low cost finance and inefficient management of few builders causing failure of timely delivery are considered as important disadvantages.

Disputes arising amongst buyers, sellers in small number of instances are mostly related to failure of arranging finance on time, failure of keeping commitment in terms of quality of work of the vessel, timely delivery etc.

Before placing orders, buyers need to carry out all due diligence including legal as there are a number of ship builders, rated differently, are now involved in this the ship building industry. The shipbuilding contract needs to be properly vetted and negotiated complying both local and international laws and practices. The clauses like force majeure, termination, arbitration, bank guarantee has significant connection with the local laws, experience and practices. Hence, local knowledge cannot be avoided. Besides, buyers should also conduct legal due diligence of the proposed builder.

Government is required to come forward to help the industry by making available low cost finance and also by listing, supervising, regulating and categorizing builders so that buyers are not misled and sellers are not put into disadvantageous position at the expense of the tarnishing the image of the country.

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