



PROJECT FINANCE FOUNDATIONS

Off-take Contract

Before you sign on the dotted
line...Can you answer these
questions?

www.learnprojectfinance.com

Off-take Contract- Can you adequately answer these questions?

Off-taker

- Is the Off-taker a legal entity?
- What is within the Off-taker's power to commit to?
- Is it duly authorized to enter into the agreement?
- Does the Off-taker have any over-arching rights to amend the agreement unilaterally (e.g. under emergency powers/essential services legislation)?
- Is credit enhancement necessary to support the creditworthiness of the Off-taker?
- Is a Host Government guarantee required?

Regulatory Regime

- What is the regulatory regime that applies to the Project?
- Which activities are regulated and which are not?
- What access will Project Company have to the regulator and to challenge the decisions of regulator?
- Is the regulator independent?
- What regulatory changes are likely over the project life?

Legal Framework

- Are existing local laws and legislation adequate for developing/implementing the project or will new laws need to be passed?
- Are there any restrictions on currency transfer?
- Is there a need /potential to choose an alternate jurisdiction for resolving disputes?
- Does the legal system support Lenders rights to take and exercise security in a way that is "bankable"?
- Is an Implementation/Support Agreement required with the Host Government to overcome any issues?

Completion

- Is the Completion Testing regime acceptable?
- Does it match the regime under the EPC Contract?
- Is the certifier independent?
- How will a replacement certifier be selected?
- Is the time allowed to reach Completion reasonable?
- Are reasonable extensions to time awarded for Off-taker caused delays, Force Majeure etc. ?
- Are the performance obligations consistent with the Project capacities (at Completion and over the Term)?
- Are there reasonable buy down provisions if the plant does not meet contracted requirements?

Liquidated Damages

- Are Liquidated Damages payable to the Off-taker for a delay in Completion ?
- If damages are payable to the Off-taker can these be recovered from the EPC Contractor ?

Off-take Quantity

- Is the Off-take for a fixed quantity or does it vary within a range?
- What are the consequences for the project if the Off-take is consistently at the bottom of the range?

Tariff & Abatement

- Does the tariff structure generate the required revenues under different operational scenarios?
- Are the escalation indices acceptable? Are they based on real data or are they politically influenced?
- Is the price likely to be politically acceptable?
- Is there a mismatch in the currency of the revenues, operating costs, input costs, capital costs, liquidated damages and termination payments?
- How will the mismatch be resolved?
- Is the abatement regime acceptable?
- Can the loss be recovered from the O&M Operator?

Bonding

- What security needs to be provided in support of its obligations under the Off-take Contract?
- When will this security be released?

Insurance

- What is the Insurance Package that needs to be put in place under the Off-take Agreement?
- What happens if the required insurance is commercially unavailable?
- If there is a total loss, will insurance proceeds be available to Project Company or to lenders or Off-taker?

Force Majeure

- Is the definition of Force Majeure acceptable?
- Are the force majeure provisions consistent with other agreements?
- How is uninsurable Force Majeure risk allocated between the Off-taker and the Project Company?
- Are fixed costs and debt service covered by Off-taker payments if uninsurable Force Majeure prevents operations?

Exclusivity

- Is a government undertaking required that a competing project will not be allowed?

Choice of Law

- What law governs the contract?
- What are the implications of this choice of law?

Change in Law

- How is Change in Law risk dealt with?
- Is the Project Company protected against general changes in law and/ or changes targeted specifically at the project / project sector?

Dispute Resolution

- Is the court system appropriate or should there be an alternative form of dispute resolution?
- How are disputes resolved under the Off-take Contract?
- Is the regime acceptable?
- Does the Off-taker benefit from sovereign immunity? If so, is it possible for it to waive such immunity?

Modifications and Expansions

- How are Change Orders dealt with?
- How is the compensation/extension of time determined?
- Is there a de minimis that needs to be met before compensation is payable?
- Will compensation be achieved through adjustment of tariffs or otherwise?
- What happens if the Project Company cannot finance the 'Change' ?

Change of Control

- Is a minimum equity investment required from the Sponsor?
- What are the restrictions on transferability and Change in Control of the Project Company?
- What is the protection against privatization of the Off-taker?

Refinancing Gain

- How will any refinancing gain be dealt with?
- How will it be calculated / shared/ paid?

Direct Agreement

- Is the Off-taker able and willing to enter into a Direct Agreement with the Lenders?
- Will the terms of the proposed Direct Agreement be acceptable to Lenders?
- Is the Off-taker obliged to enter into Direct Agreements with any replacement financiers on a refinancing?

Hand Back Provisions

- Are the "Hand Back" requirements at the end of the Term acceptable?
- Does the Off-taker have the right to withhold payments towards the end of the term?
- Are the amounts acceptable? What is the impact of this short-fall on cover ratios?
- Can equivalent payments be withheld from the O&M Contract?

Assignment

- Can the Off-take Contract be assigned to a third party by the Project Company / Lenders?
- Is Project Company consent required before the Off-taker can assign the contract to a third-party? If not, what other protection is there from a deterioration in credit quality of the Off-taker?
- Is the Off-taker obliged to enter into Direct Agreements with Lenders including any replacement lenders on the occurrence of a refinancing?

Termination

- Are the default triggers reasonable?
- Are the cure periods adequate? How are they determined?
- Do lenders have Step-In Rights?
- How do they mesh with the Off-taker's Step In rights?
- Are the Termination triggers acceptable?

Is the method of calculating Termination Payments reasonable for:

- Termination Payment for Off-taker Default
- Termination Payment for Convenience
- Termination Payment for Force Majeure
- Termination Payment for Project Company Default

Will the overall Termination Regime be acceptable to Lenders?