

Energy subsidy scrapped; however, there are solutions

In response to the scrapping of the renewable energy subsidy scheme from 1st April 2016, Kirsty Findlater, Commercial Underwriter, looks at how title indemnity can provide solutions to title risks and assist developers in meeting the funding deadline.

According to the UK Wind Energy Database (UKWED), there are over 300 onshore wind farms in Scotland with an operational status. There are 52 currently under construction and circa 300 more which have planning consent. On a national scale, Scotland is host to more than 50% of the onshore wind turbines situated in the UK.

This comes as no great revelation given the inclement weather conditions that the country sees for most of the year. The volume of development can be attributed to the generous funding offered by the renewable energy subsidy scheme. However, what may have surprised this sector is the UK Government's decision to scrap the subsidy scheme a year earlier than was originally planned.

The subsidies are due to end on 1st April 2016 although there will be a grace period for projects which already have planning permission.

Many developers will now be scrambling to push their projects through before the government funding evaporates leaving them with potentially redundant option interests in undeveloped sites. For those developers in the fortunate position to be able to bring their projects to completion before 1st April 2016, the clock is now ticking.

Project risks

Projects of this nature require extensive legal due diligence before the arrival of the first turbine on the site from formalising Option Agreements and submitting planning applications to negotiating supplier contracts and lease terms.

An investigation of the landowner's title to the site forms a large element of the due diligence. Such examination can often identify flaws within the title which, while unproblematic for the landowner, can pose difficulties for developers. These title risks mainly comprise the following:

- Lack of Rights - Often required to create access/servicing roads and for the installation of grid connection infrastructure.
- Restrictions on Title - A burden in historic titles to the site which limits the use of the land for specific purposes and may be enforced by the party with the benefit of that burden.
- Reserved Rights - The site may be burdened by historic sporting, mineral, access and servicing rights, which benefit third parties, but are not being exercised.

- Lack of Title - Issues over ownership of the land due to inadequacies of historic title descriptions, missing or inadequate plans, changing land topography and boundary features.
- Judicial Review – Whilst not a title defect, a judicial review challenge may be made to the grant of planning permission, which frustrates the project.

Implications of a title risk and how to mitigate it

These issues constitute a large proportion of the overall project risk. Failure to mitigate such risks can impact on the timing and overall costs of the project or potentially thwart the development in its entirety. A well-executed third party claim could result in the following:

- An interdict which prevents development.
- An Order quashing existing planning permissions.
- Impact on project costs or cash flow where a ransom payment has to be made to a third party.
- Mandatory decommissions of systems and infrastructure.
- Liability for bank interest and other contractual payments during any project delay.
- Penalty payments due to missed grid connections.
- Additional costs associated with legal defence of claims or settlement negotiations.

These outcomes are avoidable. Title indemnity insurance may not rectify the title defect, but it affords the developer fiscal protection against the outlined impact of a third party claim.

Whilst a site provider's interest in the land lies in its value, a policy specifically designed to cover the losses suffered by a wind farm developer (including irrecoverable upfront costs such as planning, wind measuring, radar mitigation etc) offers a creative solution to the problem which might only be solved by entering into protracted corrective conveyancing or the uncertainty of third party negotiations.

It will cover the developer, any special purpose vehicle and their lender as well as any successors in title during the construction phase (where some risks are at their highest) and throughout the lifetime of the project.

Cover can even be considered on a pre-planning basis for certain risks. Crucially, the policy also includes uncapped cover for legal costs in the event of a claim. Where a developer is willing to accept the risks, cover can be provided on a lender only basis indemnifying the loan amount at a reduced premium rate.

Every renewable energy project encounters issues which can potentially cause delay. However, a title defect which is capable of being covered with a bespoke title indemnity policy should not be the cause of a developer missing the subsidy deadline.

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