Waste-to-Fuels Conference

April 20, 2010
Jacksonville, Florida

Key Issues in Successful Project Development

Kevin D. Johnson

Stoel Rives LLP

Nationally Ranked
CHAMBERS USA 2009

STOEL RIVES LLP
ATTORNEYS AT LAW

Stoel Rives is pleased to announce that it has received a ***national ranking*** for its **Renewables and Alternative Energy practice**, an honor reserved for very few law firms across the country.

Chambers USA: America's Leading Lawyers for Business annual rankings are a result of extensive independent research conducted among in-house counsel, corporate executives and leading attorneys.

Overview

STOEL RIVES LLP
ATTORNEYS AT LAW

- Current Role of Government Incentives
- Project Development Basics
- Project Finance
- Project Structure
- Project Contracts
- Unique Municipal Solid Waste (MSW) Delivery Issues

Government Incentives

- Governmental Incentives driving many types of project structures
- Many Federal, State and Local Incentives Available
- Key Role of Stimulus Bill (ARRA) and 30% Investment Tax Credit Grant

Stimulus Package Financing Incentives

- Types of Financing Incentives
  - Spending
  - Tax Incentives
  - Loan Guarantees
  - Tax Exempt (Low Interest) Financing
- Applying the Incentives
  - Technology
  - Product
  - Project

Types of Financing Incentives

Spending

- Federal Funding Opportunity Announcements (FOAs) for grants
- Construction, research, development, pilot, demonstration, deployment, education, and evaluation
- Large and small companies and often public entities are eligible
- Generally single solicitations rather than rolling solicitations

Financing Incentives

Tax Incentives

- 30% cash grant in lieu of investment tax credit (spending). Effectively ends after 2010. However, this may change.
- Manufacturing tax credits

Federal Loan Guarantee Programs

- Investment committee of most banks will evaluate whether the underlying loan should be approved on the assumption there is no guarantee.

State and Local Incentives

- Recovery Zone Bonds
- Rebates
- Infrastructure assistance

DOE Loan Guarantee Program

STOEL RIVES LLP ATTORNEYS AT LAW

- Guarantees are generally limited to 80% of project costs. DOE may guarantee 100% of a loan funded by the Federal Financing Bank which may be for no more than 80% of eligible project costs.
- Borrower and other principals must make a significant cash investment in the project.
- DOE may determine an appropriate collateral package among creditors

Stimulus Grant Funding

- Monitor FOAs
- DOE press releases, FedConnect, grants.gov
- Register with FedConnect-usually takes at least one week
- Think of DOE, EPA, USDA, etc as investors
- Case needs to be made to them as to a VC or PE investor
- Job creation impact-number, timing
- Team-credibility with funding agency

Project Development Basics

- **Sponsor with proven track record of execution**
- **Product deployed – proven commercial technology**
- **Financing model-how does the math work?**
  - Project financing startup and recurring (O&M) costs vs. sufficiency of revenue and equity investment
  - Project developer fees
  - Debt service
  - Run scenarios ***with and without*** grant funds and other incentives
- **Reasonable, Dependable Feedstock Agreement(s)**
- **Creditworthy off takers**
  - Focus on contracted for cash flows
  - Structure agreements to minimize burden on project – pass through what you can

Project Development Basics

STOEL RIVES LLP
ATTORNEYS AT LAW

- **Interest rates; cost of borrowed money**
- **Tax benefits vs. real revenue (cash)**
- **Revenue (Cash) Sources**
  - Off Take Agreement payments
  - Cash grant in lieu of ITC
  - State rebates-predictability of receipt; upfront or spread over a period
  - Environmental Attributes: Renewable Energy Credits, Carbon Credits, etc.

Project Development Basics

- **Project location**
  - Land acquisition (customer or third party), permitting, environmental and other government regulation
  - Proximity to feedstock supplier and off taker(s)
  - Transportation access
  - Proximity to transmission lines for interconnection; if applicable

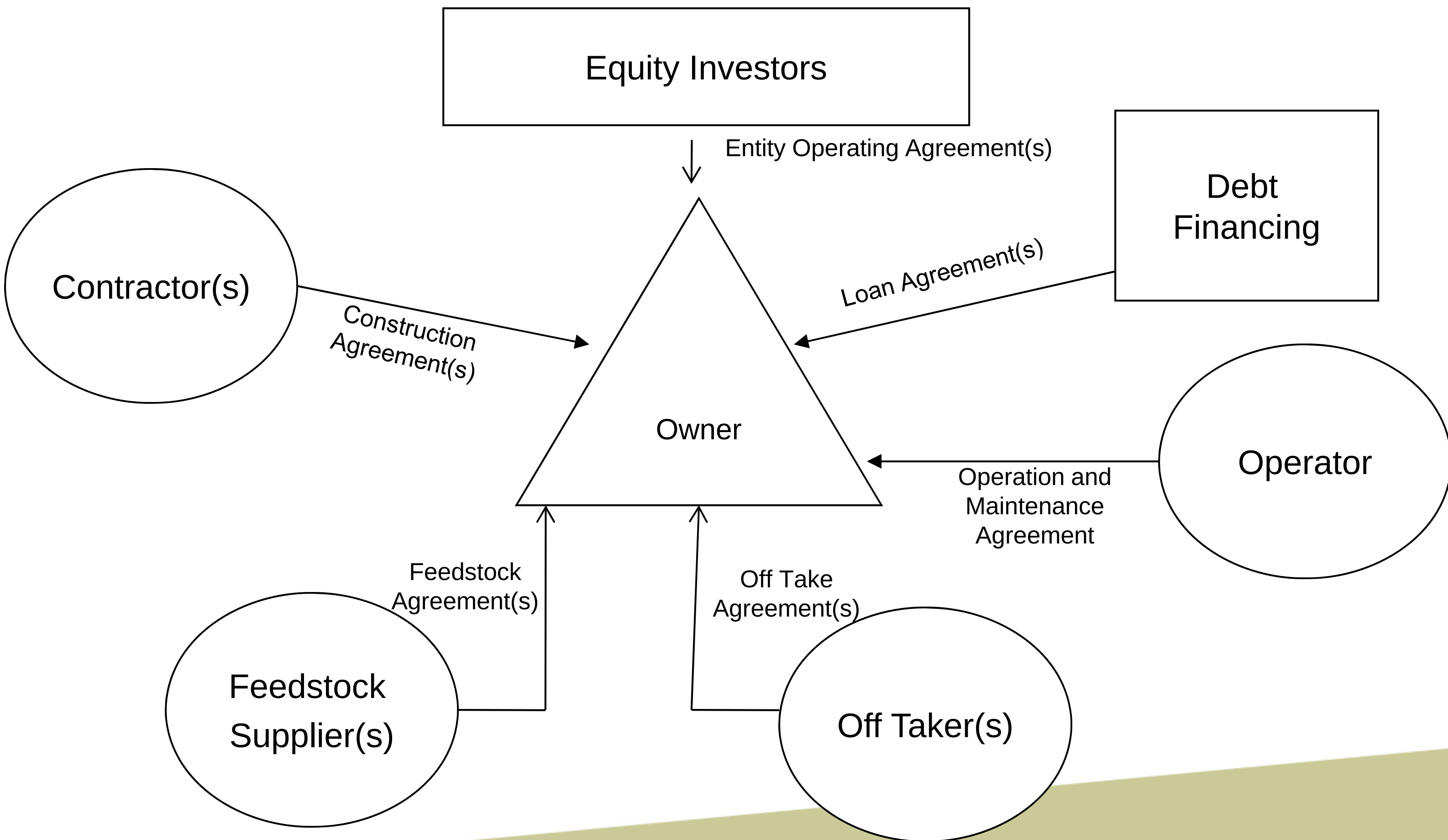
Project Development Basics

- **Feed stock supply and cost**
  - Ability to lock in a long term supply of feed stock
  - Feedstock price and transportation cost
  - Storage and supply logistics

Project Finance Basics

- Bottom line for making the math work is that some equity investment is needed.
- Financeability (bankability) is dependent on predictability of receiving the revenues and benefits. The greater the certainty, the lower the financing risk! De-risk your project! Seek contracted for cash flows!

Basic Project Structure



Basic Structure Points

- Revenues of project pay for operating expenses and debt service
- Non-recourse debt (lenders look only to the project revenue streams for repayment)
- Developers and investors liability limited to investment in the entity
- All project agreements must be financeable

Basic Structure Points

- ITC grant has allowed developers to reduce initial equity
- Lenders willing to provide bridge financing based on anticipated receipt of ITC grant

Project Contracts

STOEL RIVES LLP
ATTORNEYS AT LAW

Partnership/Limited Liability Company Operating Agreement

- Agreement by which the Developer and Investor become partner/members in the Company that will own the facility. The Parties agree to contributions, allocation and distribution of income, gains, and loses (including terms driven by the financing structure), and management and control rights;
- Obligation of Investor to contribute its investment is often set forth in separate equity contribution documents and agreements

Project Contracts

Additional Equity Contribution Agreement

- Capital Contributions – timing, conditions precedent, milestones
- Value or Price Calculation and agreement on financial model

Project Contracts

STOEL RIVES LLP
ATTORNEYS AT LAW

Land/Lease/Easement

- Control of Site

Construction Contracts

- Equipment Supply Agreement
- Warranty
- EPC/Balance of Plant/Installation

Project Contracts

Off Take Agreement

- Sells Output
- Price paid, including escalators
- Term must cover financing period

Interconnection Agreement; if applicable

- Access to Grid

Financing Agreements

- Security Interests

O&M Agreement

- Remedies for Owner

Feedstock Supply Agreement

- Just as important as Off Take Agreement
- Price paid and variance factors
- Supply flow
- Supply guarantee
- Remedies

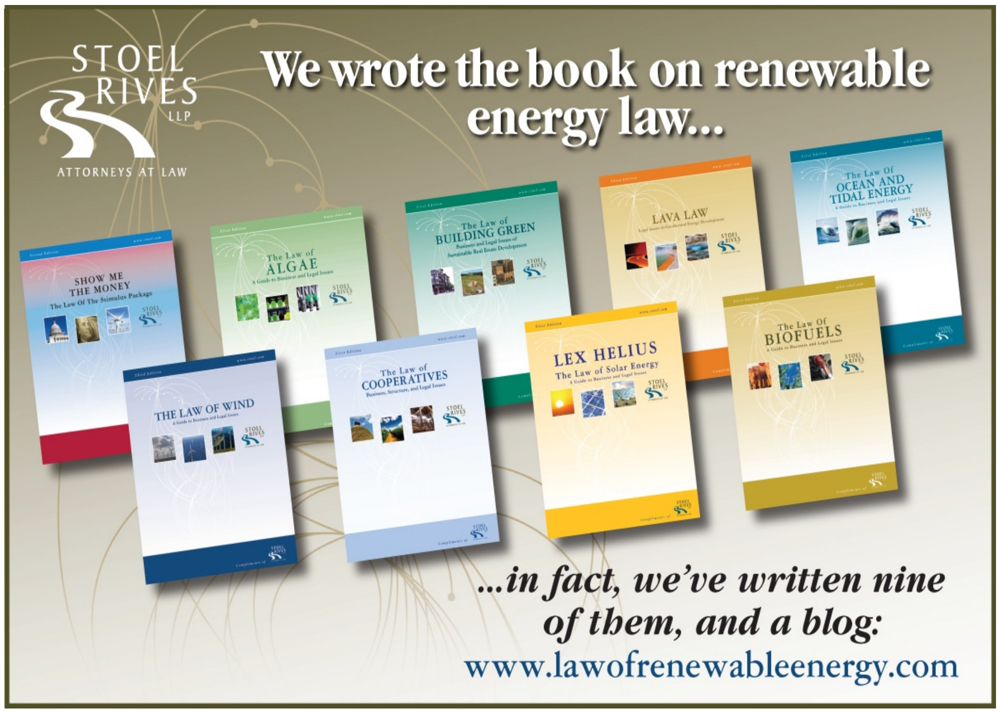
Unique MSW Delivery Issues

- Municipal Solid Waste “Flow Control” Cases
- Key Role of Private MSW Haulers
- Commerce Clause Implications
- Local Government Control of MSW Collection
- Market Participant Cases
- Economic Flow Control Options

Summary

- Ability to finance project depends on how you structure the deal so as to take advantage of sources of funding, which requires that you de-risk the project by eliminating or reducing cash flow uncertainty – much easier said than done!
- Predictability (certainty) of receiving project revenues and benefits is key to the financing math – so deal in hard dollars and contracted for cash flows – bake in grants and rebates as probability driven scenarios to your model.
- Get comfortable that some level of equity investment is needed – seek matched expectations with all counterparties!

To order any of these books, please contact us!



KEVIN JOHNSON
Partner
612-373-8803
kdjohnson@stoel.com
33 South Sixth Street, #4200
Minneapolis, MN 55402