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# Joint Development Agreements in Renewable Energy Projects

Selection of Partner, Agreement Structure, Planning for Involuntary Early Endings, Avoiding Unintended Consequences

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WEDNESDAY, FEBRUARY 9, 2022

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

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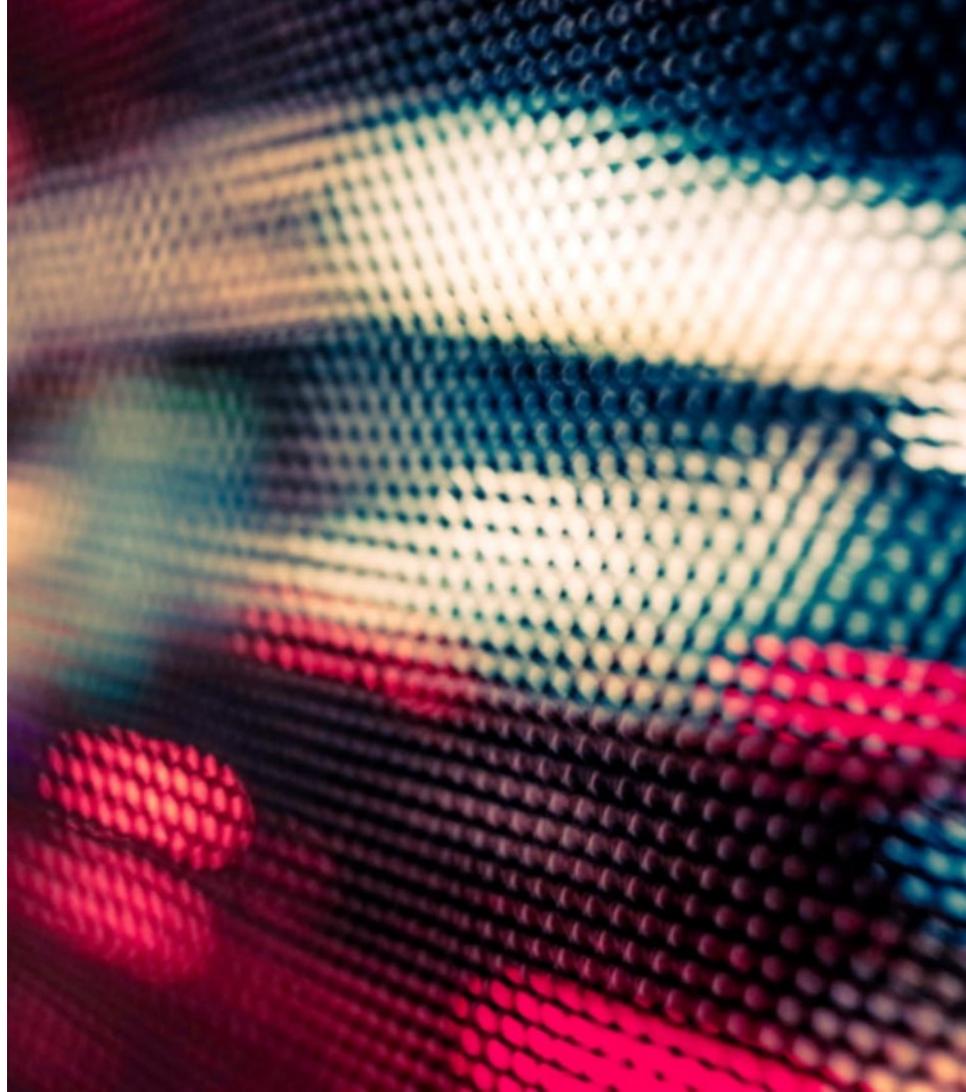
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# **Joint Development Agreements in Renewable Energy Projects**

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# Introduction

- What is the difference between a JDA and JV?
- What is the typical scope of a JDA?
- What are key commercial and legal considerations for counsel when negotiating a JDA?

# JDA Basics: What is it and When to use it

- Developers often look for an equity partner that has something it does not (e.g., technical or commercial expertise, financing, manpower).
  - One common scenario is for an experienced developer to seek out a financing partner
    - Credit support for interconnection, equipment, or offtake
  - Another is two developers coming together (e.g. offshore wind)
  - Utilities can enter into joint development arrangements to secure a portfolio of projects
  - Joint ventures involving safe harbored equipment

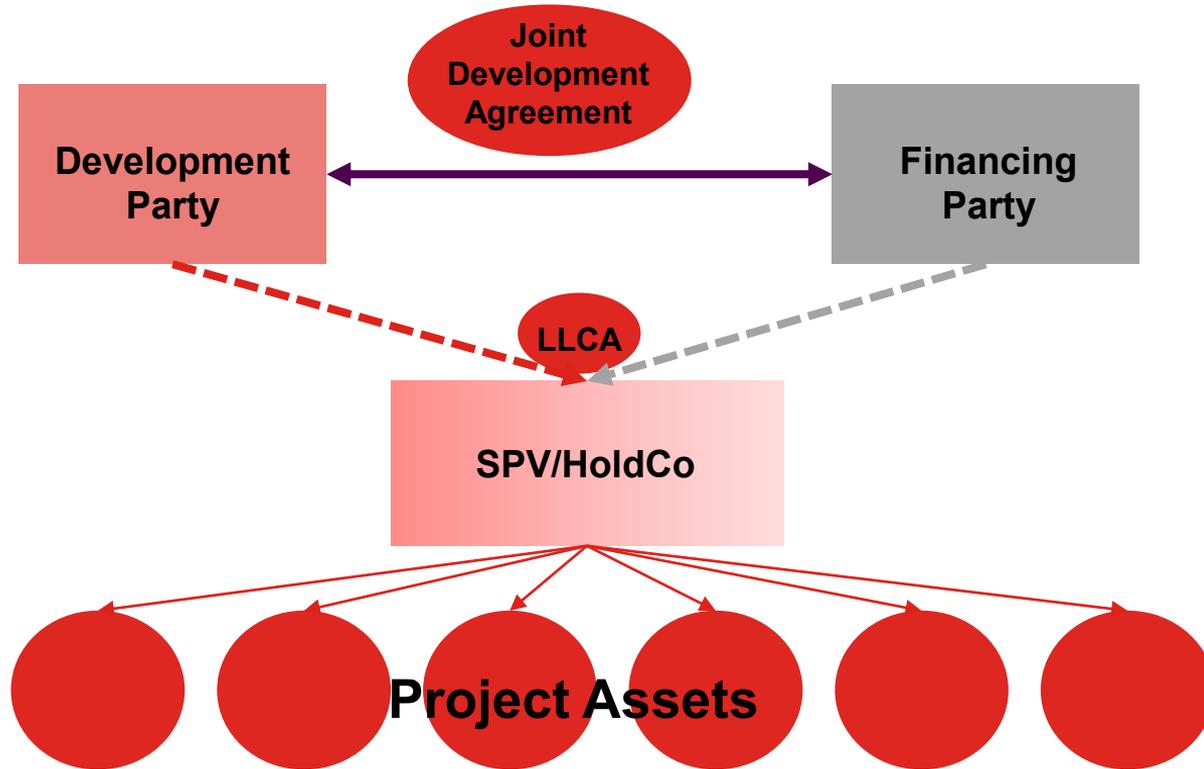
# JDA Basics: What is it and When to use it

- JDAs are exactly what they purport to be – an agreement governing the joint development of a project.
  - Outlines the rights and responsibilities of the parties during development
  - Clearly sets out expectations and procedures
  - Provides a framework for termination/dissolution of working relationship
- The importance of trust
- Start with “why?”
- Look ahead to the end game

# Stand-Alone JDAs

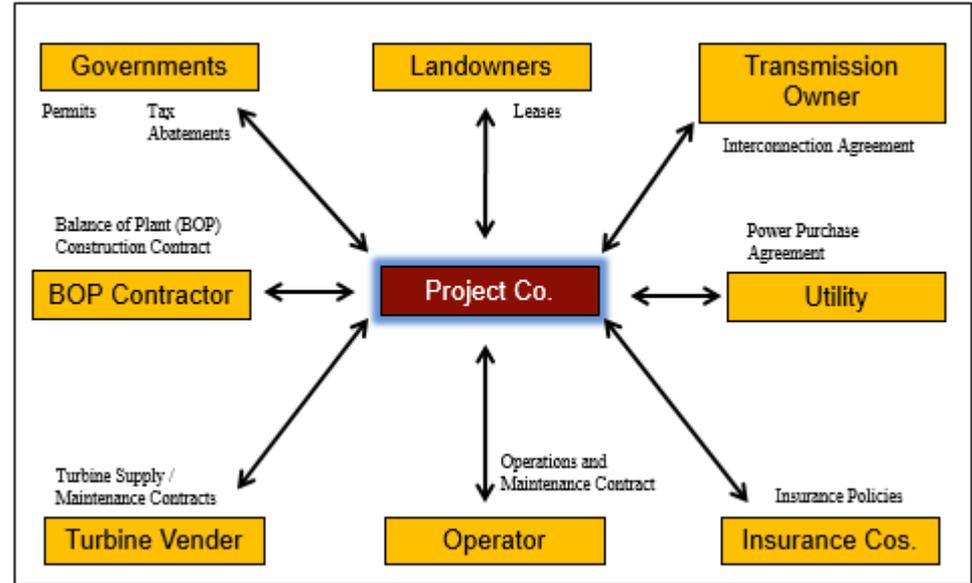
- No joint ownership
- May have aspects of a framework agreement whereby the non-developer will be committed to acquire the projects once certain conditions are met.
  - Presentment process
  - Required conditions precedent
  - Consider attaching form of purchase agreement
    - Consider how extensive reps & warranties should be depending on role of the parties
  - More commonly seen with utilities or private equity who are looking to build and own a portfolio

# Sample Simplified Project Development Structure



# The Project Company

- **Utility or Offtaker.** Buys electricity under long-term, fixed contract. This may also be a corporate offtaker or a financial institution offering a hedge.
- **Transmission Owner.** Permits connection to electric grid.
- **Landowners.** Grant site control to Project Co.
- **Government(s).** Issue permits; negotiate tax payments.
- **BOP contractor.** Engineers, procures, and constructs (other than turbines).
- **Turbine vendor.** Provides and (during warranty period) maintains wind turbines.
- **Operator.** Operates project once built. There may be separate O&M, Asset Management, and Energy Management Contractors.
- **Insurance Cos.** Issue insurance policies.



# Common Developer Responsibilities and Rights

- Perform development activities, which may include:
  - negotiating and executing development, supply, service and interconnection agreements;
  - site acquisition and title curative work;
  - contracting with consultants to perform studies, surveys and reports;
  - obtaining and maintain insurance; and
  - managing permitting obligations.
- Provide notice to Equity Partner of development events/milestones, material discussions and negotiations, contract drafts
- Propose and manage Budget
- Question of CONTROL
- Standard of care – can't guarantee successful development

# Common Equity Partner Responsibilities and Rights

- Secure and provide financing
- Provide support to Developer Party to perform its development activities, including (where applicable):
  - maintaining existing relationships with governmental authorities or landowners;
  - providing “back office” support; or
  - introducing additional equity partners.
- Receive information about the status of development activities and participate in material negotiations, including providing comments on material agreements (e.g., supply contracts, service contracts)

# Key Provisions of the JDA

Provision	Considerations
Development of Project	<p>Includes description of the Project:</p> <ul style="list-style-type: none"><li>• description of size of the Project, proposed phases, development responsibilities (including funding obligations), budgeting considerations and plan</li><li>• development exhibits typically attached (site map, plan, development budget)</li><li>• Budget and plan for funding are key</li></ul>
Exclusivity	<ul style="list-style-type: none"><li>• Typically tied to development milestone (e.g., NTP or COD)</li><li>• Specifically set out what is and is not a permitted activity</li><li>• Build-out restrictions – limitation on development of additional projects within a certain distance</li><li>• Non-compete and non-solicitation</li></ul>
Confidentiality	<ul style="list-style-type: none"><li>• What information can be shared by the parties and under what circumstances?</li><li>• Consider disclosure requirements of both parties (investors, legal, etc.)</li></ul>
Dispute Resolution	<ul style="list-style-type: none"><li>• Notice</li><li>• Executive Discussion/Negotiation before filing</li></ul>
Termination	<ul style="list-style-type: none"><li>• What is the term of the agreement?</li><li>• Who can terminate and for what reasons?</li><li>• What rights/obligations survive termination?</li></ul>

# Underlying LLCA of the SPV

Provision	Considerations
Ownership and Management	How will the JV be managed (member or manager managed, boards, subcommittees)?
Minority Protections	Majority/Supermajority/Unanimous approval typically required for specified actions.
Capital Contributions	Typically includes an initial capital contribution and a process for additional capital calls.
Budget Process / Distribution	Initial agreed budget (typically with allowed overages) – can cover certain periods and a process for additional budgets.
Disputes/Dispute Resolution	Deadlock mechanism (buydown)
Transfer Restrictions	<ul style="list-style-type: none"><li>• Common transfer restrictions include lock-up periods, ROFO/ROFR, and Tag/Drag Rights.</li><li>• “Qualified Transferee” concept (e.g., with respect to experience or credit)</li></ul>

# Transfer Restrictions

- Key to any transaction where two parties are working together
- Carve outs for financing
- Change of Control
- Affiliate transfers
- ROFO/ROFR
- Drags & Tags
- Put & Call rights

# Withdrawal/Termination of Relationship

- Right to Terminate
  - Events of Default (bankruptcy, breach of reps/warranties/covenants, payment defaults)
  - Extended Force Majeure
  - Mutual Agreement
  - Abandonment of the Project
- What happens to the Project?
- Survival
  - Confidentiality
  - Exclusivity

# Additional Considerations

- Consider seeking out specialist help with respect to tax, regulatory, real estate and intellectual property considerations
- Distinct issues depending on the stage of development
- Commercial considerations with respect to control (i.e., how much input should an equity partner have with respect to development decisions)



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