

Client Alert

September 2013

Renewable Energy in Japan - Recent Developments (Newsletter No. 15)

In this newsletter, we will briefly update you on significant new reporting requirements imposed by the Ministry of Economy, Trade and Industry (“**METI**”) of operators of solar power generation facilities (“**PV facilities**”) in Japan.

1. Communication from METI

Throughout September, operators of PV facilities with a planned capacity of over 400kW have been receiving written communications from METI with regards to their facility authorizations (“**METI Authorizations**”) granted to them by METI pursuant to Article 6 of the *Law on Special Measures Concerning the Providers of Renewable Energy* (the “**Renewable Energy Law**”). Within such communications is an obligation for operators to report to METI, within a specified date (usually one month or less from the date of communication (not receipt)), information and relevant materials regarding the progress of construction and operation of their facilities.

Depending on the information provided and the progress shown, METI may conduct further inquiries to and on-site investigations of the PV operator. Failure to respond to such communications within the specified time frame, providing misleading information or refusing further investigation will result in the imposition of a JPY300,000 fine. Further, it is understood that those operators who do not have concrete plans to construct (and are unable to provide satisfactory evidence of their ability to construct) in the near future will put their current feed-in tariff (“FIT”) price in jeopardy. METI may potentially seek to cancel their METI Authorizations pursuant to Article 6(6) of the Renewable Energy Law (which states that METI may cancel an operator’s METI Authorization if that operator is not seen to be an “efficient” or “reliable” provider of electricity over the procurement period).

As signaled previously by METI, it would like to avoid a situation arising in the Japanese market whereby operators simply lock-in relatively high FIT prices under the Renewable Energy Law whilst not undertaking actual construction of their facilities for lengthy periods of time (essentially until construction costs are reduced). This recent move by METI can be seen as its first direct step in an attempt to officially discourage such activities. Although in early stages, the grandfathering in of specific rules regarding time limits for commencing operations of facilities are also rumored to be planned by METI in the short-medium term. Accordingly, it is recommended that operators, investors, and financial institutions connected with the Japanese PV market pay close attention to announcements by METI moving forward.

2. Overview of the Reporting Requirements

Specifically, METI requires the following information be provided within the specified time frame:

- (1) Whether rights over land and necessary equipment have been obtained and operation of the PV facility has begun. If operation has begun, suitable documentation evidencing operation (such as written receipts from the relevant utility in the operator's name and setting out the address of the site described in its METI Authorization) must be submitted.
- (2) Whether installation of the facilities has been abandoned. In the event that installation has been abandoned and the applicable METI Authorization is to be cancelled, written notification pertaining to such cancellation shall be submitted pursuant to Form 6, as referred to under Article 11 of the Renewable Energy Law.

In the event that neither of the above two questions are applicable, an operator will have to also provide:

- (3) The contracted date for commencement of construction in the event that construction is expected to begin (the commencement date of foundation works, etc.) or the date for commencement of construction and the date for commencement of operation (as set out in the relevant PPA executed with the utility).
- (4) Whether the purchase agreements or order forms have been executed with the PV module maker, among others, specified in the METI Authorization. If so, evidence of the execution date or effective date of such executed purchase agreements or order forms, together with the makers' names, model numbers and contracted quantity to be supplied shall be provided (copies of such agreements or order forms executed by all relevant parties shall suffice). In addition, evidence should also be provided that a system integrator or construction company will install such equipment on the relevant site upon delivery thereof. A lack of willingness from suppliers to provide written acknowledgement of orders from operators will not be accepted. It is recommended that those wishing to simply submit executed order forms (rather than executed purchase agreements) to METI make certain that the contents thereof sufficiently establishes certainty of contractual rights and obligations between the parties with respect to the items to be delivered. Those operators whose executed order forms lack sufficient agreement between the parties are recommended to pursue further negotiation and reach a written agreement before making the required submissions to METI as soon as possible.
- (5) Whether the operator has decided to carry out the PV facility on the site specified in the METI Authorization, and provide evidence of the date (or expected date) of the requisite rights over the land and buildings on the site in order to achieve operation, were (or will be) acquired. With regards to this request specifically, the following information shall be provided to METI:
 - (a) Copies of all relevant land and building registration certificates for the site from the National Land Registry ("**Registration Certificates**") in the case of ownership or surface rights (whereby such rights have been registered);

- (b) Copies of all relevant written agreements or reservation agreements evidencing such ownership rights or surface rights over the site in the case that such rights have not been registered, together with all relevant Registration Certificates. In the event that such agreements cannot be provided in the interim for such reasons as confidentiality, written notification from the operator should be provided to METI (in addition to all relevant Land Registration Certificates) clearly stating such reasons (a “**Notification of Written Reasons**”). In the future, it is recommended that appropriate carve-outs are included in confidentiality provisions in order to avoid such issues from reoccurring;
- (c) Copies of all relevant written agreements or reservation agreements evidencing lease rights (including rights to sub-lease) over the site, together with all relevant Registration Certificates. In the event that such agreements cannot be provided in the interim, a Notification of Written Reasons should be provided. Further, in the event that the counterparty to the relevant contract is different from that set out in the Registration Certificates, written explanation adequately describing the reasons for such a discrepancy should also be provided. This is to ensure agreements are concluded with the appropriate counterparties. As mentioned above, any misleading information provided will result in fines; or
- (d) A written notification should be provided to METI outlining the legal rights obtained by the operator with regards to the site, together with all applicable Registration Certificates.

Those operators who are able to provide the requested information under items 3-5 above to METI’s satisfaction shall be deemed “reliable” and shall, for the time being, have no further obligation to provide additional information regarding their respective PV facilities. Conversely, those unable to do so should expect further inquiries and investigation by METI and run the risk of having their METI Authorization canceled pursuant to Article 6(6) of the Renewable Energy Law.

- (6) Finally, in the event that an operator expects to start construction but for some reason has not yet begun, the operator should provide METI with the expected effective date, evidenced by the executed equipment order form (if it has not provided ample information under item 4 above of the contracted effective date) or the expected date for commencement of operation of the PV facility on the site specified in its METI Authorization (if it has not provided ample information under item 5 above of the contracted date for commencement of operation). In the event that either or both items 4 and 5 are not be provided to the satisfaction of METI for the following reasons, the following items shall also be provided:
 - (a) In the event that information could not be provided due to substantial consultation with the relevant utility not being concluded:
 - i. A copy of all relevant application documents (power purchase agreement and connection application) should be provided in the event that it has submitted such documents to the utility but has not yet received approval thereof; or

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- ii. A copy of the relevant approval document received from the utility should be provided in the event that it has received approval but has not been able to fix a date for the commencement of operation.
- (b) In the event that information could not be provided due to administrative procedures for obtaining necessary permits (such as those required for the conversion of agricultural land and forestry development) being incomplete, copies of all relevant applications in relation thereto should be provided;
- (c) In the event that information could not be provided due to due diligence not being completed by an operator's proposed financiers, the names (entity name, branch name, and responsible person) of those financiers and date upon which consultation began should be provided. It is important to note that this reason is only applicable to financiers an operator is consulting with (to avoid fines being imposed for providing misleading information, those financiers who have refused or who are not likely to provide financing should not be listed); or
- (d) In the event that information could not be provided for any other reason, an explanation together with evidence objectively supporting such reasoning should be provided.

Those operators who cannot provide the information requested in item 6 concerning the expected operation date due to the reasons set out above shall be required to furnish appropriate information and supporting documentation to METI in the form of a business plan. As stated above, failure to provide a satisfactory amount of information or lack of progress will result in further inquiries by METI and potentially, the cancelation of an operator's METI Authorization.

In the event that the information furnished to METI by an operator does not match with what approved under an operator's METI Authorization, the operator will be required to either promptly rectify the inconsistency or submit an application to change its METI Authorization.

3. Important Considerations

While such measures have been signaled by (and expected from) METI since the beginning of the implementation of the Renewable Energy Law, operators must take note of the tight time frames imposed for reporting and providing all necessary documentation to METI. To avoid further scrutiny from METI and the associated uncertainty that comes with it, it is crucial, particularly for operators that currently do not have dates fixed for the commencement of operation of their facilities, to adhere to METI's requests sufficiently. In light of the fact that the cancelation of METI Authorizations is now a reality, it is recommended that advice be sought in this regard. Finally, it is recommended that those considering future acquisitions of existing METI Authorizations tread carefully as METI is unlikely to disclose information to third parties for the purposes of due diligence due to privacy concerns.