



Tuesday, October 2, 2012

2:30 PM - 4:00 PM

1206 – How Many Lawyers Does It Take to Change a Lightbulb? How to Manage an Electric Generation Project

James Dixon

Vice President, Legal & Compliance Services
ConEdison Energy/ConEdison Development

Dorothy Franzoni

Partner
Sutherland Asbill & Brennan LLP

Craig Johnson

Deputy General Counsel
Caterpillar Inc.

Robert Temple

Assistant General Counsel
The Babcock & Wilcox Company

Charles Whitney

Senior Vice President, General Counsel
Oglethorpe Power Corporation

Faculty Biographies

James Dixon

Jim Dixon is vice president, legal services for ConEdison Energy located in Valhalla, NY, and the compliance officer for all of ConEdison's competitive energy businesses which provide various energy related products and services including energy efficiency improvements, electric and gas commodity, asset management, and development and ownership of solar energy facilities.

Previously, he was the vice president, energy services for ConEdison Solutions, leading a nation-wide team of 100 technical experts delivering energy efficiency projects for a wide variety of federal and municipal customers. Mr. Dixon also served as ConEdison Solutions' general counsel and as an attorney in ConEdison's utility law department's nuclear regulatory and commercial litigation sections. He has held various technical positions in the utility's construction, engineering and system operations departments and is a graduate of ConEdison's Management Intern Program.

He is currently chairman of the National Association of Energy Services Companies which is the leading industry trade organization promoting energy efficiency with over 85 member companies and the resource chair for the ACC's Energy Committee. Mr. Dixon is a retired U.S. Army Reserve Major and very active in his local community, having served as president of the Ardsley Little League and co-founder of a local CYO basketball program.

Mr. Dixon received his electrical engineering degree from Manhattan College and his JD from New York Law School and is an honor graduate of the U.S. Army Engineer School. Mr. Dixon is also a New York professional engineer.

Dorothy Franzoni

Dorothy Black Franzoni is a member of Sutherland's energy and environmental practice group and chair of Sutherland's renewable and alternative energy team at Sutherland Asbill & Brennan LLP. She focuses her practice on commercial transactions, project development and finance transactions in the electric industry, including nuclear, coal, natural gas and renewable energy projects. Her experience includes power purchase and sale arrangements, power plant joint-ownership arrangements, project development for electric generating plants, power scheduling and bulk system operations matters, federal loan and loan guarantee programs, secured and unsecured loan arrangements, tax-advantaged leasing transactions, and publicly issued and privately placed debt financings.

She currently serves as council group member, public utility, communications and transportation law section, American Bar Association (2011-2014); chair, Electricity Committee, and vice chair, Renewable Energy Committee, public utility,

communications and transportation law section, American Bar Association. She is a member of the environmental and renewable energy section, American Bar Association and the Electric Cooperative Bar Association. She is a member of the board of directors of Georgia Women for a Change, and an advisory board member and past president for Genesis Shelter Inc., Atlanta.

Ms. Franzoni received her BA, magna cum laude, from Vanderbilt University and her JD, summa cum laude, from the University of Georgia School of Law.

Craig Johnson

Craig A. Johnson is deputy general counsel for energy and power systems at Caterpillar Inc. He is responsible for legal support to Caterpillar's business units in E&PS related markets worldwide, including electric power, industrial power, rail, marine, petroleum, remanufacturing and logistics. Since joining Caterpillar, Mr. Johnson has held various positions within the law and public policy division of Caterpillar, including foreign assignments in Belgium and most recently in Switzerland, where he was deputy general counsel responsible for legal support in the Europe, Africa and Middle East Region (EAME).

Prior to joining Caterpillar, Mr. Johnson worked in the Washington D.C. law firm of Wiley, Rein & Fielding, where he practiced in the areas of litigation, government contracts and intellectual property.

He is a member of the board of the Peoria Riverview Museum Foundation and currently serves as secretary of the ACC Energy Committee.

Mr. Johnson received his bachelor's degree in physics from the University of California at San Diego, with a specialization in earth sciences. He received his JD from George Washington University Law School where he served as editor-in-chief of the *Journal of International Law and Economics*. More recently, he received his MBA degree from IMD in Switzerland.

Robert Temple

Robert K. Temple serves as the chief legal advisor for Babcock & Wilcox Nuclear Energy, Inc. and Babcock & Wilcox mPower, Inc., as well as the secretary and general counsel for B&W's small modular reactor subsidiary, Generation mPower LLC. He supervises attorneys and staff in Charlotte, NC, and in Cambridge, Ontario, Canada. Mr. Temple joined Babcock & Wilcox from the Washington, D.C. office of Haynes and Boone. During his career he has also worked as an associate and partner for the law firms of Winston & Strawn, Hopkins & Sutter and McGuireWoods.

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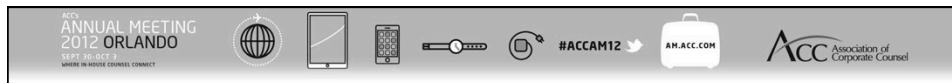
Mr. Temple's in-house career includes service as deputy general counsel, vice president and secretary at CPS Energy, a San Antonio-based electric and gas utility, and as an in-house attorney with Commonwealth Edison (now Exelon). Prior to becoming an attorney, he was a licensed senior reactor operator, he worked for General Electric and served in the U.S. Navy aboard nuclear submarines.

Mr. Temple is a graduate of Illinois Institute of Technology's Chicago-Kent College of Law and he received his BS from Southern Illinois University.

Charles Whitney

Charles W. Whitney is senior vice president and general counsel of Oglethorpe Power. Mr. Whitney's areas of focus are energy, particularly nuclear energy; regulatory; construction and labor law. He has legal experience that spans a broad range of activities in both private practice and as chief counsel to a nuclear generating plant project. He has represented independent power producers and engineering, procurement and construction contractors in the development, construction and operation of power projects in Georgia, New York, Pennsylvania, Ohio, Michigan and Wisconsin. His practice has also included extensive work in labor and employment discrimination; certification, enforcement and rate-making proceedings before state and federal regulators; and general trial work. In addition to practicing law for 20 years, Mr. Whitney has more than ten years of experience in senior management in the electricity industry, including both the regulated and unregulated aspects of the business.

Mr. Whitney is a graduate of Wright State University and earned his JD from Case Western Reserve University School of Law.



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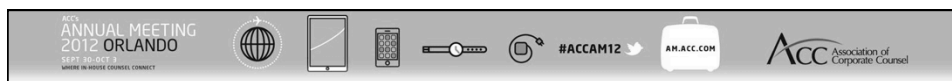
How many lawyers does it take . . . ?

Managing an Electric Power Project

ACC Annual Meeting 2012

Moderator:
Dorothy Black Franzoni - Partner, Sutherland Asbill & Brennan LLP (Energy Committee Sponsoring Firm)

Faculty:
Robert K. Temple - Assistant General Counsel, The Babcock & Wilcox Company
Charles W. Whitney - Senior Vice President, General Counsel, Oglethorpe Power Corporation
James Dixon - Vice President, Legal & Compliance Services, ConEdison Energy
Craig A. Johnson - Deputy General Counsel, Energy & Power Systems, Caterpillar Inc. (Organizer)



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Agenda

- Introductions & Overview
- Audience Participation – Project Issue Map
- Case Study – BrewCo's CHP Project
- Project Phases
 - Development
 - Contracting
 - Execution
 - Post Construction
- Conclusion – Experts' Top 5 Tips for Project Success
- Tools, Checklists & Takeaways, Including Project Map

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Case Study Summary

- BrewCo current: Utility power; self-provides steam
- Low natural gas prices, low interest rates, available labor pool, probable civic support
- BrewCo proposed: on-site natural gas fired power and steam production – self-financed.
 - turnkey EPC contract for construction
 - long-term operations and maintenance contract
 - utility power for limited purposes – maintenance, backup
 - relatively short time-frame (24 months)
- BrewCo’s GC to develop legal support plan

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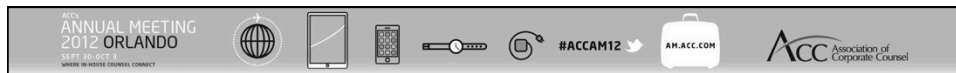
Project Development Phase: Classic Project Management Model

Stakeholder & Politics

Regulatory

Technical


Fail to manage any one and the stool falls down...



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Project Development Phase

- Important issues faced by BrewCo in this phase.
 - Engaging with and considering the interests of stakeholders
 - Understanding the regulatory issues involved with siting, constructing and operating the project
 - Obtaining the necessary expertise and technology
- Key business personnel and functional experts that counsel will work with to address.
- Key milestones/events within this phase.
- How should in-house counsel optimize use of outside counsel in this phase?









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Project Development Phase

- Case Study Project Issues
 - Adjacent landowner concerned about visual changes to landscape
 - Statewide “riverkeeper” group has been actively opposing natural gas fracking, causing heightened local concern about water quality
 - Current electricity supply agreement terminates one year prior to targeted in-service date of new facility
 - BrewCo intends to take advantage of local economic development tax incentives

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Development Phase – Audience Vote

- Please Vote: The most important issue for BrewCo's GC to focus on is:
 1. Adjacent landowner concerned about visual changes to landscape
 2. Statewide "riverkeeper" group has been actively opposing natural gas fracking, causing heightened local concern about water quality
 3. Current electricity supply agreement terminates one year prior to targeted in-service date of new facility
 4. BrewCo intends to take advantage of local economic development tax incentives

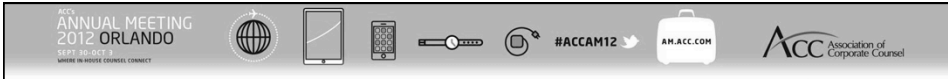
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Project Contracting Phase

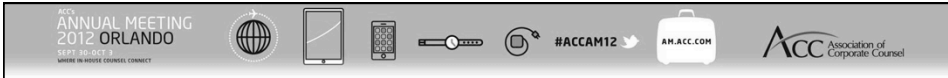
- Important issues faced by BrewCo in this phase.
 - Contractor/Vendor selection and scope of work
 - EPC allocation of risk
 - Schedule coordination among all contracts
 - Cost and dependability of fuel supply and utility services
- Key business personnel and functional experts that counsel will work with to address.
- Key milestones/events within this phase.
- How should in-house counsel optimize use of outside counsel in this phase?



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Project Contracting Phase

- Case Study Project Issues:
 - BrewCo w/o experience, forms for EPC, O&M
 - Water supply and wastewater disposal to be provided by local county water authority
 - Natural gas pipeline serving BrewCo's area is in need of upgrades
 - Nearby manufacturer is also upgrading its on-site generation and planning to sell some power to local utility



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Contracting Phase – Audience Vote

- Please Vote: The most important Issue for BrewCo's GC to focus on is:
 1. BrewCo w/o experience, forms for EPC, O&M
 2. Water supply and wastewater disposal to be provided by local county water authority
 3. Natural gas pipeline serving BrewCo's area is in need of upgrades
 4. Nearby manufacturer is also upgrading its on-site generation and planning to sell some power to local utility

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Project Execution Phase

- Important issues faced by BrewCo in this phase.
 - “Hey – Whadaya doin’?” – Documenting contractor/vendor performance
 - “Whadayamean it doesn’t fit?” – Identifying extras (early and often)
 - “You wanna plug that into what?” – Coordinating utility services and acceptance testing
 - “Just like we thought – skyscrapers and everything!” – Keeping stakeholders informed (and happy)
- Key business personnel and functional experts that counsel will work with to address.
- Key milestones/events within this phase.
- How should in-house counsel optimize use of outside counsel in this phase?








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Project Execution Phase

- Case Study Project Issues:
 - No pre-existing relationship with EPC Contractor
 - Some difficulties managing change orders
 - Schedule slipping by a day or two each week
 - Some difficulty resolving disagreements on terms
 - Factory testing of equipment raising performance questions








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Execution Phase – Audience Vote

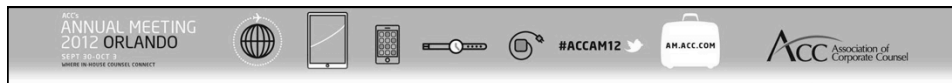
- Please Vote: The most important Issue for BrewCo's GC to focus on is:
 1. No pre-existing relationship with EPC Contractor
 2. Some difficulties managing change orders
 3. Schedule slipping by a day or two each week
 4. Some difficulty resolving disagreements on terms
 5. Factory testing of equipment raising performance questions

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Post-Construction Phase

- Important issues faced by BrewCo in this phase.
 - “It ain’t over ‘til its over . . .” Yogi Berra - Confirming satisfaction of conditions of acceptance, release or payment of bonds/retentions and compliance with regulatory and permit requirements
 - “We know we’re better than this, but we can’t prove it.” Tony Gwynn - Supporting negotiation, preparation and defense of claims and disputes
 - “Well then who’s on first?” Lou Costello –
 - Coordinating transition to O&M and operational duties and responsibilities
 - Tracking/enforcing warranty claims
- Key business personnel and functional experts that counsel will work with to address.
- Key milestones/events within this phase.
- How should in-house counsel optimize use of outside counsel in this phase?

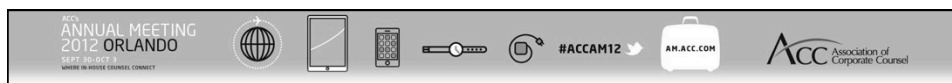


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Post-Construction Phase

- Case Study Project Issues:
 - Contractor change claims (including acceleration to reach “completion” in time for Centennial) pending – several \$Million
 - EPC contractor must hand off project to a separate third party operator
 - Emissions testing failures have delayed final acceptance
 - First six months performance does not meet performance guarantees



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Post-Construction Phase – Audience Vote

- Please Vote: The most important issue for BrewCo’s GC to focus on is:
 1. Contractor change claims (including acceleration to reach “completion” in time for Centennial) pending – several \$Million
 2. EPC contractor must hand off project to a separate third party operator
 3. Emissions testing failures have delayed final acceptance
 4. Performance does not meet heat rate guarantee

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Conclusion –Keys to Project Success

TOP 4 TIPS FOR PROJECT SUCCESS

Expert Opinion

- Key Issue 1 – In Development
- Key Issue 2 – In Contracting
- Key Issue 3 – In Execution
- Key Issue 4 – In Post-Construction

Project Success

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Tools, Checklists and Takeaways

- Audience Project Issue Map
- More Detailed Checklists in Materials for
 - Project Development
 - Project Contracting
 - Project Execution
 - Project Post-Construction
 - Working with Outside Counsel
- Sutherland Example of CHP Risk Allocation Issue Map
- ACC Energy Committee – Membership & Resources
 - Meetings, Legal Quick Hits, Websites, Resources

How Many Lawyers Does It Take to Change a Lightbulb? How to Manage an Electric Generation Project

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Construction Contracting Checklist

Establishing Scope and Schedule

- Do you have the scope and bounds of the equipment, services and materials being provided? (Contract terms: Scope of Work)
- Have you identified appropriate industry standards for performance of that scope? (Contract terms: Workmanship, Materials and Service; Representations and Warranties)
- Which permits must the contractor obtain and which permits must the owner obtain?
- Does the owner have the rights to the site needed for project construction?
- Has responsibility been allocated for infrastructure needed for the project (e.g., transmission, distribution and electric infrastructure, water)?
- Who may perform the work? (Contract terms: Assignment and Subcontracting) Considerations: Why was the contractor selected and what unique skills are brought by the contractor? What flexibility does the contractor need to deliver the project?
- How may the contract be changed? (Contract terms: Changes and Amendments) Considerations: What changes are entitled to relief versus optional changes and directed work?

Warranties

- Have you identified the warranties appropriate for the scope? (Contract terms: Warranty Term; Warranty Scope; Performance Warranties) Considerations: Are there any exclusions from the warranty? What is the extent of the warranty obligation (in and out costs, choice of repair/replace)?
- Are there other continuing obligations after initial contract/project completion? (Contract terms: Warranty; Future Requirements)

Damages

- Have you identified the project impacts for which damages may be ascertained? (Contract terms: Liquidated Damages for Delay; Liquidated Damages for Performance)
- What is the ceiling for ascertainable damages? (Contract terms: Total Cumulative Liquidated Damage Liability)

- What is the outer bound for all contract damages? (Contract terms: Limitation of Liability) Considerations: Should there be exceptions (e.g., breach of confidentiality, patent infringement, third-party property damage)?
- What carve-outs should there be for events beyond the control of the parties? (Contract terms: Force Majeure) Considerations: Is this relief available for one or both parties?
- To what extent should the other party be liable under a contract? (Contract terms: Consequential Damages)

Risk, Insurance and Indemnity

- Has risk of loss been allocated between the parties? (Contract terms: Risk of Loss or Damage)
- Have you identified the risks presented by the other party in the performance of the project? (Contract terms: Indemnity)
- What other significant risks should be allocated given the scope, nature, and duration of the work and the contract? (Contract terms: Adjustable Cost Pass-Through)
- Does your project involve special risks that should be allocated among the parties or that are affected by laws in your jurisdiction? (Contract terms: Nuclear Indemnification)
- Have the environmental consequences of project performance been allocated? (Contract terms: Environmental (Pollution) Liability) Considerations: Pre-existing project site conditions; materials brought on site by contractor; exacerbating a found condition.
- What insurance requirements are particular to your project and how will they be administered? (Contract terms: Insurance) Considerations: Owner-controlled insurance program versus a contractor-controlled insurance program; standard practices for allocation of costs; and carve-outs, i.e., should the other party have rights to claim under insurance in addition to breach of contract?

Owner Rights to IP and Other Data/Records

- Who should own intellectual property, copyrights or trade secrets that (1) existed prior to the contract; (2) were developed during the contract execution; or (3) that are made after project completion based on information developed during contract execution? (Contract terms: Rights in Data) Considerations: What continuing use rights should the other party have? Should that party be able to share data with third parties for a limited purpose or for all purposes?
- What records, information or cost data should you have rights to (1) during performance of a contract, or (2) following project/contract completion? (Contract terms: Audit/Access to Records) Considerations: Term of audit rights; whether the contract is fixed price, target price or time-and-materials; whether the rates are "industry standard" or whether there is a representation regarding the build-up of costs (e.g., rates do not include fees, risk or contingency).

Compensation

- How should performance under the contract be compensated? (Contract terms: Price and Payment) Considerations: Do you know enough to perform the work at a fixed or firm price? What exposure is taken by letting a time-and-materials price for the project? What is "industry standard"?
- How is a party paid under the contract (frequency, means, amounts, invoices) and how can an improper invoice get rejected or reconsidered? (Contract terms: Price and Payment) Considerations: Time for review and rejection versus time for payment; re-invoicing; project cash flow requirements; schedule and milestones versus schedule of values or earned value.
- What assurance of performance or payment security is needed from either party? (Contract terms: Bonds; Retainage; Letters of Credit; Parent Company Guarantee) Considerations: What is the substance and performance record of the other party? Have you performed adequate due diligence on the contracting party? What are the consequences of the other party failing to fulfill its obligations? What are the consequences of the other party defaulting?

Claims and Remedies

- How are claims identified, who must be notified, what form of claim notification is adequate and when is a claim timely? (Contract terms: Claims) Considerations: What are the legitimate reasons for seeking or obtaining relief from price, schedule or performance obligations?
- What happens when the parties cannot agree on how to settle a claim or if one party fails to perform? (Contract terms: Dispute Resolution and Governing Law)
- What are the local impacts of performance under the contract? (Contract terms: Dispute Resolution and Governing Law) Considerations: If performing work in a jurisdiction where you are not licensed to practice, get local counsel involved.
- For what reasons may either party's performance be suspended and what are the consequences of a lengthy or indefinite suspension? (Contract terms: Suspension and Termination) Considerations: Time to keep a work crew available; allocation of costs for demobilization; will the specialized workers be available upon remobilization?
- For what reasons may either party end the contract and what are the consequences of a contract termination? (Contract terms: Suspension and Termination) Considerations: Who may terminate at will (for convenience) and who has the risk of loss in the event of termination? Given the circumstances of the termination, what costs should the non-terminating party be able to recover?

General

- Do you understand the contracting climate in the jurisdiction in which the work will be executed? (Contract terms: Compliance With Laws; Governing Law)
- What general obligations should the performing party have? (Contract terms: Compliance With Laws)
- Which takes precedence, terms in the contract or a purchase order? (Contract terms: Order of Precedence of Contract Documents)
- Have you appropriately considered bid documents and other references? (Contract terms: Workmanship, Materials and Service; Representations and Warranties)

Outside Counsel Management – Project Management for In-house Counsel

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Matter Kick-off Meeting

Before the Kick-off Meeting

Inside Counsel and Outside Counsel discuss:

- General overview of the matter.
- Who are the leads?
- Who is on the team?
- What are the roles for the people on the team?
- What prep needs to be done before we get the team together?
- Who is going to schedule the kick-off meeting?
- Who will capture the important information at the kick-off meeting and place the information into a scoping document?

Kick-off Meeting Agenda

1. Brief Overview of the Project

- This project means _____ for the company.
- The best possible solution for the company on this matter is _____.
- The consequences of an unfavorable result are _____.
- The most important things to consider are _____.
- The least important things to consider are _____.
- The expected time frame is _____.
- If applicable, provide a brief overview of previous projects similar in nature, including best practices and lessons learned.

2. Scope

- Are there phases? What are they?
- What are the tasks?
- Who is handling what?
- What is the timeline?
- What are the milestones of the project?
- What are the "deal-breakers"?
- Are we tracking an issues list? Where will it be kept so everyone has access to it?
- What is the expected deliverable?
- What are the priorities?
- What is the communication plan?
- How do we avoid surprises (in scope and budget)?
- What is the schedule for status meetings?
- Where is scope creep most likely to happen?
- How do we address an increase in scope?

3. Budget

- How much do we think the phases/tasks/project will cost?
- How often are we tracking the budget?
- How are we reporting on the budget?
- What strategies are we putting in place to ensure we stay on track re: budget?
- What happens if we go over budget?

4. Post Project Review

- Who's in charge of scheduling the PPR and making sure the lessons learned and best practices get shared across the team?

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Project Completion and Transition to Operation Checklist

Contract Closeout

- Have the conditions for transfer of care, custody and control been met?
- Have the conditions for final completion been met?
- Have all project liens by contractor and subcontractors been removed?
- Is there a bondholder and, if so, what conditions precedent exist for release of the bond and what notification is required for release of the bond?
- What outstanding claims must be resolved?
- Have records associated with claims been preserved?
- What are the conditions precedent to the release of retainage?
- Have warranty obligations been appropriately identified so continuing obligations following project completion are understood?
- Is a system in place to capture and track resolution of warranty claims?
- What documents must be filed with federal, state and local officials upon completion of the contract?
- Has training required under the contract taken place as needed to operate and maintain the facility?
- What paperwork must be transferred as part of project completion (quality assurance documents, operating procedures, construction records)?

Transition to Operations

- Are all permits in place to commence operations?
- Does the operator have the necessary licenses and personnel to operate the facility?
- Is the long-term fuel supply contract in place?
- What are the back-up plans in case the fuel supplier fails to deliver?
- Does the fuel supply contract need to be hedged?
- Are contracts in place as needed to support plant operations?

Outside Counsel Management – Project Management for In-house Counsel

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Managing Outside Counsel: Checklist of Conversations

1. Discussing the Scope of a Project:

- This problem means _____ for my business/company.
- The best possible solution for my company in this matter is _____.
- The most important things to consider in this matter (to inside counsel) are _____. The least important things to consider in this matter (to inside counsel) are _____.
- We expect this matter to be resolved by _____ (time frame).
- We have/have not handled a matter similar to this, and the result was _____.
- _____ are the people at my company who are key stakeholders. Their position on this matter is _____. _____ are those with settlement authority or a final price on a deal.
- The consequence of an unfavorable result from my company's perspective is _____.
- The phases of this project are _____.
- The tasks of each phase are _____.
- The deliverables of each task are _____.
- Outside counsel's primary responsibility in this matter is _____. We will handle _____ internally.

Best Practices

- Document the scope of the project in writing, and include the phases, tasks in each phase, expected timeline, persons responsible, expected deliverables and specific deadlines.
- Identify areas where the scope is likely to creep. What are the unknowns?
- Identify what is NOT in the scope of the project.
- Identify up front how to handle a new task outside the initial scope of the project.
- Meet regularly (as defined for client/firm) to talk about progress and any new developments.
- Determine whether or not there is a technology solution that will maximize the team's efficiency.
- Establish a communication strategy on who will talk to whom and when.

2. Discussing the Budget:

- Inside counsel: This project is worth _____ to us.
- We think the case will actually cost _____.
- The factors we think might impact the budget are _____.
- What are the unknowns? Does a "phase" approach to budgeting make sense?
- "Scope creep" is most likely to happen _____, _____ and _____.
- Inside counsel to outside counsel: This is how we manage our internal budgets (approvals, monthly update requirements, change orders, etc.).
- The fee arrangements that make the most sense in this case are _____ and/or _____.

Best Practices

- Discuss previous matters similar in nature and the budgets used.
- Review the "hot wash" from the previous matter to identify ways to improve efficiency.
- Document the budget in writing and be as descriptive as possible (assign number of hours to each task, who will have primary responsibility and what the hourly rate is or agreed fee for each task).
- Define roles for each team member, including the expectations for how much time each task should take.
- Monitor the budget weekly and monthly, and communicate it to all outside counsel and inside client team members according to client preferences and standards.
- Plan for risks and allocate time associated with the unknowns.
- Inside counsel and outside counsel should decide ahead of time how to handle overruns and address any potential overruns early and directly.

3. Conducting Post Project Reviews (FMC: Say it, See it, Share it, Decide it):

- Did the project meet expectations?
- What went well (with outside counsel and in-house team)?
- What improvements should be made or what should be done differently next time?
- What were the tasks or other surprises not anticipated in the original scope? How could those be avoided in the future?
- Did we handle the changes in scope effectively? What could we do better next time?
- Did we use technology efficiently?
- Did we communicate well across the teams (internally and externally)? What could we do better?

Best Practices

- Conduct PPR immediately after the matter.
- Include primary members of the team in the discussion (inside and outside counsel).
- Identify any factors, deliverables, or knowledge insights in this matter that may be relevant in future matters.
- Document what went well and any processes that need to be improved.
- Share discussion points with the team and keep the written documents in an accessible location for all.

4. Establishing Lines of Communication:

- Who will communicate with whom, when and how? (Be clear on what type of information is most important to each side.)
- What is the most effective way for us to share information as developments occur?
- Who needs to be informed when there is a change in scope (increase or decrease)? And what is the most efficient process for addressing a change in scope (workload, budget, etc.)?
- Does it make sense to schedule a regular (weekly, biweekly) meeting time for the team?
- Would formal reports be helpful? If yes, what information should they include and how often should they be provided?
- How often should we discuss updates in the budget?

Kick-off Meeting Sample Agenda

1. Brief overview of the project (by team leaders).
2. Brief overview of previous projects similar in nature (if they exist), including best practices or lessons learned.
3. Discuss team members and their roles.
4. Describe phases, tasks, timelines, deliverables and budget.
5. Discuss milestones and potential deal breakers.
6. Establish a process for keeping the team updated on developments and/or regularly schedule team meetings. Decide who is responsible for establishing the agenda for those meetings.

How Many Lawyers Does It Take to Change a Lightbulb? How to Manage an Electric Generation Project

Presented by: **James Dixon**, Vice President, Legal & Compliance Services, ConEdison Energy/ConEdison Development; **Dorothy Franzoni**, Partner, Sutherland Asbill & Brennan LLP; **Craig Johnson**, Deputy General Counsel, Caterpillar Inc.; **Robert Temple**, Assistant General Counsel, The Babcock & Wilcox Company; **Charles Whitney**, Senior Vice President, General Counsel, Oglethorpe Power Corporation

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Project Execution Checklist

Work Responsibility and Schedule

- Do the people who will be managing the work understand their obligations in the contract, including the contract change and dispute resolution processes?
- Are the subcontracts appropriately aligned with the prime contract (e.g., back-to-back to the extent of scope, payment terms, liabilities and communication requirements between subcontractors, the prime contractor and owner)?
- Is there a clear division of responsibilities between the parties and the contractors/subcontractors that is written and shared?
- Does the schedule have enough detail to assure the work is completed on time, work performance conflicts are resolved, and required personnel with ties to required equipment, materials and resources are in place?

Planning and Management

- Has equipment and material procurement (including supplier approvals) been adequately planned to support project execution?
- Has the project execution plan been appropriately reviewed and approved? (Do you need third parties to review to ensure your review was adequate?)
- Is the project being executed in accordance with well-understood business processes/process maps?
- Is the project being executed and overseen by properly trained and qualified personnel (management, supervision and craft)?
- Do those managing the work understand the work rules for execution (e.g., local union or legal requirements)?
- Is the project being executed with properly reviewed and approved work instructions?

Compliance Monitoring

- Are there adequate means for monitoring project performance (e.g., earned value management system and project performance metrics)?

- Is there adequate oversight of project execution and objective means of determining compliance, e.g., quality standards or program?
- Is there a method and process for making and managing claims (point of notice, methods to ensure timely submittal or review, appropriate approval of the claim disposition, and timely communication with the other party)?

Communication and Record Keeping

- Is there a clear means for communication of required information among all the parties involved in project execution?
- Is there a formal means of reporting progress, events, delays and other project impacts both internal and with the other party?
- Are there regularly scheduled meetings to exchange information about the project?
- Is there an appropriate method for transfer of information between shifts or work crews?
- Are there controls on the documents and drawings to ensure that the work is performed to agreed-upon standards and specifications, and there is a complete record of the as-executed (as-built) project?
- Is there an appropriate document management and retention program for project documents?
- Is there a formalized means to transfer and share project documents (agreed-upon platforms, formats, software and project controls)?

General

- Does the project have adequate support from non-line disciplines (e.g., accounting, human resources)?
- Does the project execution team know circumstances when it should stop work (e.g., safety event, accident)?

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Project Preparation/Development Checklist

Stakeholder & Politics

Identifying Significant Stakeholders

- Have all aspects of the project site (plant site, electric switchyard, transmission line route, fuel line route, water supply route, wastewater discharge, construction laydown area, construction access, etc.) been taken into account in assessing community impact and cost?
- Is zoning appropriate for the project? What zoning restrictions (setbacks, etc.) apply to the site? Is a variance, re-classification or special use permit needed?
- Is the commercial and residential population density appropriate for the project?
- Does the scope of any existing easements, leases or other land use agreements allow expansion or alternate uses needed for the project?
- Is there community support for (or at least manageable opposition to) the project?
- Have public safety and liability prevention/avoidance been properly considered?
- Was appropriate consideration given for environmental and construction impacts?
- Is a commitment from the relevant roadway authority (state or local) to improve roadways necessary to support construction? Operations?
- What, if any, railroad services will the project need?
- What land use rights (easements, leases, fee simple title) with respect to the project site and other related lands are needed to support the project, and the financing for the project?

Space Requirements

- Is the proposed location adequately sized for your project?
- Do the topography or other characteristics of the land (wetlands, etc.) present obstacles (legal or practical) for the desired footprint of the project and use of the surrounding land?
- Do you have parking as needed for the construction crews and for plant operations and maintenance staff following project completion?
- Is there sufficient access for maintenance purposes and to house any auxiliary equipment?

- Does the location allow space for storing additional fuel (e.g., additional boiler backup fuel), lubricants and other items necessary for effective plant operation?
- Does siting of building level and exhaust within a community need to allow for the appropriate installation of a flue/exhaust above the height of the tallest building in the immediate vicinity?
- Is there an adequate buffer between the project and residential or community property (e.g., school, church, sports fields)?
- Is there a special need for cooperation from local fire and police authorities?
- What are the project's security needs (fencing, access, on-site security personnel)?

Stakeholder Interaction

- Has management met with federal, state and local elected officials to consult prior to announcing the project?
- Are public incentives or tax waivers to be obtained before pursuing the project?
- Are there any other public constraints or benefits for the project?
- Will permitting processes require public hearings?
- Will it be necessary or desirable to conduct community informational meetings?
- Have you researched and identified other active community members or organizations with whom/ which prior consultation may be beneficial?
- Is there a communications plan for the project?

Regulatory

Environmental Assessment

- Does your project require an environmental impact assessment?
- Is modeling required for permits, e.g., exhaust/emissions modeling?

Nuisance / Noise

- What nuisance law considerations (state and local, noise, dust, light, sound, vibration) need to be taken into account in determining the size and location of the site?

Permitting

- Have you identified all of the permits required for your project, including:
 - Air permits from state and/or federal agencies;
 - Water permits for any discharge (e.g., Wastewater Discharge Disposal Permit (TPDES / NPDES));
 - State approval for electric supply facility (e.g., Certificate of Convenience and Necessity);
 - Storm water run-off permits for construction;
 - Chemical storage;
 - Federal Aviation Administration (FAA) (depending on building and exhaust stack height);
 - Building demolition permits (for existing structures); and
 - Other state and local building, sign, land disturbance, heavy haul route, and operating permits?
- What level of project design is necessary to have completed to support permit applications?
- Are there other federal or state agency consultations required for your project (e.g., U.S. Fish and Wildlife Service for threatened and endangered species and impact on protected avian species consultation or U.S. Army Corps of Engineers for disturbance of wetlands or navigable waters?)
- Do you have the internal or consultant support and expertise for permitting?

Site Conditions

- What is the history of prior use of the property?
- Was there a prior industrial use for the site?
- Is there evidence of prior structures or underground storage tanks?
- Are there identified stained or corroded floors, drains, bare ground, hazardous or petroleum contaminated soils?
- What type of vegetation is on the site?

- Are there streams, lakes or standing water on the site?
- Is there unusual weather (temperature extremes, flooding, tornados or hurricanes) that should be factored into siting this project?
- Are there any caves, evidence of mining, or karst features on the site?
- Are there any faults; is area seismically active, landslide prone, land susceptible to liquefaction, or collapsible soils?
- Has the site been back-filled?
- Are there wells, sumps, drains, septic systems, pipes of unknown origin, utility piping or easements on the property?
- Is there solid waste, drums, containers or debris on the site?
- Are boring samples required to confirm the civil conditions?

Technical

Technology, Contractor Selection and Contracting

- Does your project team have the expertise needed to select appropriate technology for your project?
- Does your team have the skills and ability to provide adequate project oversight?
- Do you need to retain an Owner's Engineer?
- Does that analysis include a "no build" option?
- What type of engineering, procurement and construction contracting arrangement is desired (design-build, design-bid-build, etc.)?
- What is the project scope for each proposed contractor to be involved in engineering, procurement or construction?
- Which contractors will be required to provide performance guarantees and warranties, and is there a potential for a gap between warranty providers?
- Will construction or operating personnel be provided through organized labor unions? Will this impact operations at existing facilities?
- Will schedule or cost reduction incentives be included, and how will they be measured?

- Does the selected Contractor have demonstrated successful experience with the scope of contracted work on the specific technology you intend to deploy?
- Do you have Engineering Technical Specifications for your project?
- Do the Engineering Technical Specifications match the permits and permit boundaries you intend to acquire?

Project Financing

- What federal, state or local grant options are available, and what are the qualification requirements?
- What federal, state or local tax incentives are available, and what are the eligibility requirements?
- What federal, state or local taxes will apply to sales of electricity or steam from the project?
- What federal, state or local taxes may be a material portion of the cost of goods or services provided for construction? For operation? (e.g., fuel taxes)
- Are there any import duties applicable to goods to be used for construction? For operation?
- What control rights will equity investors require? What will the capital contribution, distribution and income/expense allocation rights and obligations be?
- What security (liens, credit support) and financial covenants will lenders require?
- What consent agreements with project participants (EPC contractor, power or steam offtaker, etc.) will lenders require?
- What legal opinions will equity and debt investors require? (Federal and state regulatory, environmental, etc.)
- Will power, steam or renewable or carbon credits be sold from the project to the local utility or other third parties? What are the basic business terms of those sales?

Electrical Grid Connection

- Is there ready access to distribution or transmission lines appropriate for the size of the project?
- Can a line extension be completed in time to meet project needs?

- What arrangements for "station service" power from the local utility are needed – during construction? During operations?
- Do you need a power purchase agreement with the local utility for excess power?
- What is the plan for electric service during periods when the plant is out of service; a back-up power supply?

Fuel Supply

- Does the power plant have access to a steady, secure supply of the chosen fuel, particularly if this fuel is not currently supplied to the site?
- Is a line extension (if natural gas/oil) needed to bring fuel to the site?
- Is there a plan for a back-up fuel supply if the primary fuel is unavailable or becomes too expensive?

Water Supply and Wastewater Discharge

- What access/easement or other land rights are needed for water delivery?
- Is an analysis of the adequacy of water supply needed?
- What access/easement or other land rights are needed for wastewater discharge?

Contractor-provided Facilities and Services

- Does your project plan allocate responsibility for what you expect Contractor will provide for the project, e.g.:
 - Contractor-provided permits;
 - Contractor-provided insurance;
 - Project schedule;
 - Project, site and civil engineering;
 - Long-lead project equipment procurement;
 - Qualified project management, supervision and craft personnel;
 - Project labor agreement (if applicable);
 - Security and safety (during construction);
 - Materials and bulks procurement as needed for construction unless Owner-provided; and
 - Construction tools and equipment?

Owner-provided Facilities and Services

- Does your project plan allocate responsibility for what you expect Owner will provide for the project, e.g.:
 - Owner-provided permits;
 - Project site;
 - Project insurance (Owner-controlled insurance program);
 - Laboratory equipment (for analyses required for permit compliance);
 - Maintenance and operations facility;
 - Desktop computers during construction and for maintenance and operations;
 - Training facility;
 - Warehouse space for use during and following construction;
 - Fuel supply;
 - Water (including potable water), electric lighting, electric power, fire protection, sanitary facilities, and sanitary waste disposal (with Contractor providing temporary distribution systems for such items during construction); and
 - Switchyard and utility interconnection facilities?



ACC's 2012 Annual Meeting Competitive Solicitation Process

- RFQ →
 - * Usage Profile
 - * Pre-Qualified Bidders
 - * Detailed Proforma Term Sheet
 - * Clear Performance Security Requirements
- Indicative Proposals →
 - * Pricing
 - * Non-Price Terms & Conditions
 - * Financing Commitment
- Selected Bidder; Executed Term Sheet →
 - * Selected Bidder & One Reserve
 - * Term Sheet with Agreed Performance Security

Property Rights/Land Use

- CHP Site →
 - * Purchase
 - * Ground Lease
- Zoning/Land Use Permit
- Easements/ ROWs →
 - * Site Access
 - * Delivery Laterals
- Title Insurance

Taxes/Incentives

- PILOT Agt (Prop Tax)
- Sales & Use Taxes →
 - * Fuel
 - * Equipment
- State/Fed Econ Incen
- Franchise Fees for Energy Sales

Ancillary Service Agreements

- Delivery of Project Support Services →
 - * Make Up Water/Fire Water
 - * Natural Gas (other fuel)
 - * Wastewater Disposal
 - * Steam Condensate Return
- Electric Grid Interconnection (if power exported to the grid)
- Station Service/Back Up Power

Buyer Purchase Option(s)

- Minority Interest at COD
- Full Purchase Option at Designated Juncture

Firm Supply/Firm Purchase

- Seller Firm Supply Obligation: Instantaneous Demand up to Defined Maximum Facility Output →
 - * Excused Performance Conditions
 - * Replacement Steam
- Buyer Obligation: Full Requirements up to Maximum Facility Output

Permits/Regulatory Approvals

- CHP Fac. Develop. →
 - * ESA - Phase I and II
 - * Wetlands/Cultural Resources
 - * Site Remediation for Brownfield > State/Fed No Action Letter
- Energy Approvals →
 - * Siting Authority
 - * PUC/FERC Sales Authorization
 - * Local Electric Provider Distr./Trans. Approvals
- Air Emissions →
 - * State Air Permit
- Wastewater →
 - * NPDES
- Water Supply →
 - * Surface or Ground Water
 - * Public Source

Core Transactional Documents

- Energy Sales Agreement
- Ground Lease
- Performance Security Documents

Setting Final Capital Cost with Open Book Review Process

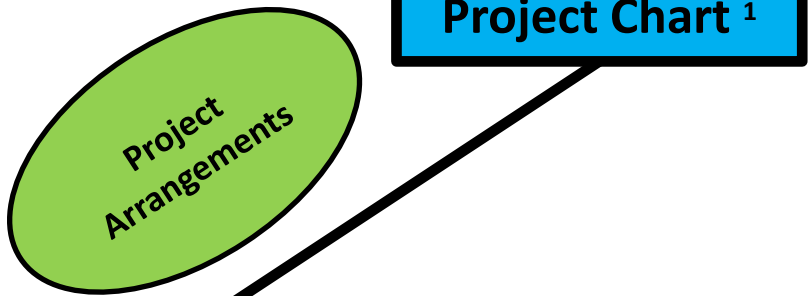
- Executed Contract on Indicative 3rd Party Pricing
- Revised Pricing on Negotiated Bid Packages with 3rd Party Vendors
- Buyer Participation in Open Book Process

Seller & Buyer Performance Security

- Scope of Coverage →
 - * Payment
 - * Performance
- Level/Type of Security →
 - * Industrial Site Viability
 - * Rated Entity/Credit Worthiness (backed by Financial Covenants)
 - * Letter of Credit
 - * Parent Guaranty
- Date Posted

Facility Development

- Define Configuration & Equip.
- Conditions Precedent
- Target COD/Req COD
- Step In Rights for Failure to Develop
- Performance Security for Development Obligation



Buyer Project Operational Support

- * Make Up Water/ Fire Water
- * Steam Condensate Return
- * Wastewater Disposal
- * Fuel Supply
- * Back Up Power
- * Delivery Laterals (if not owned by Seller)
- Seller Excused Performance Condition for Buyer Failure to Provide Support Services

FM/EFM

- Scope →
 - Excluded:**
 - * Equipment Failure w/o Direct FM Cause
 - * Economic/Supply & Demand Conditions
 - Included:**
 - * Third Party Vendor FM
 - * Failure of Utility Services
- Payment/ Performance During FM
- EFM →
 - * Demarcation from FM
 - * Termination Rights & Termination Payment

Seller Guaranteed Performance Standards

- Steam Production →
 - * Delivered Pressure/Temperature
 - * Failed Delivery Measures
 - * Condensate Return
 - * Fuel Cost Adjustment for Failed/Exceeded Perf. > HRSG Avail. (Waste Heat/Fresh Air Fired)
- Electricity Production →
 - * Annual KwHs
 - * Fuel Cost Adjustment for Failed/Exceeded Perf. > CTG Avail. and Heat Rate
 - * Electricity Purchase Adjustment

Change in Law

- Shared Risk Mechanism
- Scope of Changes Included/Excluded
- Termination for Cost Impacts Exceeding a Cap

Indemnification

- Scope →
 - * Third Party Claims (incl. Gov't.)
- General/ Environmental →
 - * Symmetrical vs. Imbalanced
- LOL →
 - * Applicable to Indemnity Claims
- Insurance Coverage

EODs/Remedies/LOL

- EODs vs. Non-Default Failures
- Remedies →
 - * Cover Damages (LD or Calculated) vs.
 - * Default Purchase
 - * Step In Rights w/ Cost Recovery
- LOL →
 - * Fuel Cost Adj./Elec. Purchase Adj.
 - * Replacement Facilities
 - * Cap on Damages
 - * Exclusions from Cap
 - * LDs & Specified Damages
 - * Exclusion of Consequential Damages

¹ CHP projects initially can be categorized according to:

- ❖ CHP Facility Configuration/Production Capacities
 - Industrial energy envelope vs. broader energy market service
 - Within industrial energy envelope: dominant thermal needs or electric needs
 - Required level of thermal production reliability/redundancy
- ❖ CHP Project and Transactional Structure
 - Third party DBOOM (design, build, own, operate and maintain)
 - Industrial DBOOM
 - Third party DBT (design, build, transfer O&M) with third party O&M
 - Third party DBT without third party O&M

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Energy Project Development – Legal Management – Case Study

Background Facts:

- BrewCo has been supporting its existing distilling and brewing operations in Smalltown, USA with power from the local utility and steam produced from natural gas-fired package boilers.
- The US economic downturn has increased demand for BrewCo's "Whatever" Pale Ale, and decimated other manufacturing operations in Smalltown, leaving a large, untapped local labor pool.
- Inspired by record-low natural gas prices and interest rates, and civic pride, BrewCo has decided to significantly expand its operations in Smalltown, and manage its power and steam production costs by building an on-site natural gas-fired power and steam production facility
- BrewCo needs a "turnkey" engineering, procurement and construction (EPC) contract for construction of the new steam and power plant, and a long term operations and maintenance contract with an experienced power plant operator
- BrewCo plans to coordinate planned outages of its brewing operations with planned maintenance outages of the power and steam supply facility. As a result, it will need a much smaller amount of power supply from the local utility (enough to provide power for office functions and lighting in the brewery) when the new facility is out of service.
- Thanks to steady demand for its products, BrewCo will be able to finance the project on the strength of its balance sheet.
- BrewCo's CEO has made clear that he wants to cut the ribbon on this project with the Mayor during Smalltown's Centennial Celebration in 24 months.
- You are BrewCo's General Counsel, with a leanly staffed in-house legal department, and the CEO has asked you to develop a legal support plan for the project.

Getting Started (The "Development" Phase):

- BrewCo needs to use additional land adjacent to its manufacturing site to make room for the new power and steam supply facility and create a noise buffer
- BrewCo will need firm supply of substantially larger quantities of natural gas and water
- BrewCo will need an air emissions permit and a wastewater disposal permit
- BrewCo will need back-up electric supply from the local utility

Lining Up the Major Players (The "Contracting" Phase):

- RFPs for, and negotiation of, EPC contract and long-term O&M contract
- Site access/control for adjacent land
- Natural gas transportation and supply
- Make up water supply
- Ongoing and backup power supply and power plant interconnections from the local utility

Constructing and Completing the Facility (The "Construction" Phase):

- Enforcing the terms of the EPC Contract
- Managing change orders
- Staying on schedule
- Resolving small disputes (before they turn into big ones)
- Performance testing and BrewCo's acceptance of the facility

Operating the Facility (The "Post-Construction" Phase):

- Coordinating the hand-off from the EPC Contractor to the Operator
- Preserving, and resolving, unresolved claims under the EPC Contract
- Enforcing the terms of the O&M contract