

## WELCOME

We hope you enjoy this edition of our newsletter. If you have any comments or questions about any of the articles, please feel free to contact the attorneys in our [construction law group](#). Autry, Horton & Cole, LLP is a construction and energy law firm located in Atlanta, Georgia. With nine experienced attorneys, we provide exceptional service at small-firm rates. For more information about our attorneys or our construction and energy practice groups, please visit our website at [www.ahclaw.com](http://www.ahclaw.com).

## CURRENT EDITION

This edition of our newsletter focuses on the construction of energy projects. These projects involve two often complex areas of law: energy and construction. The intersection of energy law and construction law can cause peculiar problems. In addition, due to the political support of green energy, several incentives are available to assist project participants with financing, but the rules governing the incentives can be cumbersome. As explained in this edition, the problems arising from energy construction can compound if not considered and addressed before the project begins. We hope this edition will shed some light on ways to avoid common problems on energy construction projects.

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### **The Impact of Construction Delay and Performance Standards on Energy Projects**

## THE IMPACT OF CONSTRUCTION DELAY AND PERFORMANCE STANDARDS ON ENERGY PROJECTS

Most renewable energy projects and energy efficiency projects require expertise from multiple disciplines, such as construction, engineering, business, and law. However, the construction aspects of these projects cannot be overstated, as they will impact two very important risks: project delay and failure to meet performance standards.

### **What Are the Risks?**

Among other things, construction controls the project costs, schedule, and quality. A poorly managed project can cost much, much more than original cost estimates. Increased costs can arise from correcting defective work, removing and re-installing out-of-sequence work, delay and acceleration, extended overhead, lost revenues, and inflated equipment and material prices. Other unexpected costs may result from faulty design, deficient specifications, and claims or liens filed by unpaid subcontractors and laborers.

With regard to the construction of energy projects, two risks -- project delay and failure to meet performance standards -- deserve particular emphasis.

### Project Delay

Delay is a compound problem in energy projects. Delay damages arise from the failure to finish construction of a project by a deadline. Project owners usually enter agreements with fuel and feedstock suppliers, power purchasers or utilities, and lenders in which the owner must commence operation of the project by a set deadline. Damages arising from the failure to meet such a deadline are extremely costly.

While delay is an inherently costly problem on any construction project, its effect on the availability of governmental incentives can be devastating for energy projects. Most governmental incentives come with sunset provisions and in-service deadlines that end the incentive unless the project is in service by a particular date. In addition to the in-service deadline, the well-known ARRA Section 1603 grant program requires "beginning of construction" -- which is actually not a high burden -- by December 31, 2011. If the project is not in service, or if construction is not sufficiently begun, by the applicable deadline, the project may lose expected governmental incentives. The loss of governmental incentives ends many energy projects on the spot.

### Performance Standards and Operational Parameters

Some construction contracts, such as many EPC contracts, contain performance standards and operating parameters. Such provisions require the project to operate in accordance with certain criteria. They usually impose consequences, such as liquidated damages, where the project does not function within these parameters. Additionally, utilities may impose certain standards before they are willing or obligated to connect to generation projects. The successful operation of the project within the operational parameters is extremely important, and the failure to satisfy the parameters can result in project delays and other costly consequences.

### Risk Avoidance: An Experienced Project Manager/Superintendent and An Effective Construction Contract

There are a number of ways to minimize the impact of the risks noted above. Two solutions include hiring an experienced project manager and superintendent to manage the project, and ensuring that your contracts adequately protect your interests.

### Experienced Project Manager/Superintendent

Project participants can minimize problems through effective project scheduling and management. The project manager and superintendent are usually the construction personnel who set the schedule and coordinate the subcontractors' work. It is, therefore, imperative to use the most experienced and effective project manager and superintendent available for your energy project.

The project manager and superintendent will use the schedule to communicate their timing expectations with architects and engineers, consultants, subcontractors, and other project participants. The schedule not only includes the various systems of work, it will also include vital information for the coordination of such work. The schedule will also reflect adjustments due to unexpected problems, which will inevitably occur. Therefore, effective project managers and superintendents develop the schedule by incorporating input from each discipline early in the project, and they should frequently update the schedule to reflect any changes.

The project manager and superintendent must enforce the schedule. It is not enough to post the schedule on the project site. They must continually emphasize the importance of staying on schedule. And finally, when the project participants fail to adhere to the schedule, the project manager and superintendent must document the resulting delays for the protection of other project participants.

Project participants will quickly learn that construction controls quality, and quality is largely determined by project management. As noted above, the operation of a project within the established operational parameters is paramount to the project's success. Operational problems could arise from faulty equipment or defective installation. An effective project manager and superintendent will require work to be performed strictly in accordance with the contract documents, including the applicable drawings and specifications. Also, they should vigorously pursue warranties from equipment manufacturers to protect the interests of project participants. With so much depending on the project's successful operation, project participants will find that one of the most important resources is an effective project manager and superintendent.

### **Effective Construction Contracts**

In addition to an experienced project manager and superintendent, project participants can minimize risk through an effectively drafted construction contract. A well-crafted contract identifies and addresses the potential risks in a manner that courts or arbitrators will enforce in the event of a dispute. It also outlines the parties' expectations with regard to the quality of work, including compliance with the plans and specifications. Additionally, it should establish procedures for addressing additional work, changes in the work, differing site conditions, and other construction contingencies. It should include claims provisions, including notification and documentation of claims.

Several types of contract provisions can be used to allocate responsibility for, and encourage avoidance of, the risks noted above. For example, liquidated damages clauses, if properly drafted and implemented, can motivate counterparties to complete their obligations in a timely manner. They can also be used to force compliance with the performance standards and operational parameters. As another example, parties can require performance bonds to protect themselves and other project participants in the event of a counterparty's failure to perform (or failure to perform in a timely manner).

The contract should also require the parties to continue working on schedule despite the assertion of claims. The project must not be delayed because one party believes it is entitled to additional compensation. Nevertheless, the contract should require adequate notice and documentation of claims. Such provisions will provide some protection from false and undocumented claims.

Hopefully, your next energy project will not encounter the risks noted above. But most construction projects will experience some problems. Thus, the responsible approach is to plan and prepare for such contingencies. By retaining an experienced project manager and superintendent, and by drafting an effective construction contract, parties can minimize their exposure when the inevitable happens.

## AHC ENERGY-CONSTRUCTION PRACTICE GROUP

AHC's energy-construction practice group combines the expertise of attorneys in its existing energy and construction practice groups. The energy-construction practice group assists owners, developers, contractors, subcontractors, and utilities with all aspects of energy construction, project development and financing, and renewable energy and energy efficiency initiatives. Contact the practice group at [law@ahclaw.com](mailto:law@ahclaw.com). The group maintains an energy-related blog at [www.ahclaw.com/cooperative](http://www.ahclaw.com/cooperative).

## ABOUT THE AUTHOR



David practices in the construction and energy law groups. He represents construction-industry clients in a wide variety of construction litigation, including breach-of-contract claims, defective and deficient construction, delay and acceleration claims, termination and bond claims, and coverage matters. In his energy practice, he assists businesses and utilities finance, construct, and implement energy projects and energy efficiency initiatives. He recognizes that the key to a successful and long-term attorney-client relationship is to align the interest of both the attorney and client. As a result, David finds practical and low-cost solutions for clients' difficult problems.

Contact [David](#).