



The VOICE

The official magazine of The Construction Users Roundtable
Fall 2014



Are Your Contractors
Committed to Workforce
Development?

ARE YOU?



On the Cover:

This issue's cover of *The VOICE* asks two important questions: are you contractors committed to workforce development and are you? On page 26, a guest article from Don Whyte, President of NCCER, introduces a new tool that will enable owners to see just how much their contractors are committed to developing the workforce. The feature story on page 31 also discusses workforce. It includes key take-aways from keynote speaker Mark Breslin, Owner and President of Breslin Strategies, Inc., who told attendees at a recent CURT workshop that if you think you're short workers now, you haven't seen anything yet.



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- 11** Nelson Almond, CURT 2015 Conference Chairperson
- 13** Gregory Sizemore, Esq., CURT Executive Vice President

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FIRED UP *and* Ready to GO

The Linden Cogeneration Plant in Linden, New Jersey, during operation hours. Originally constructed in 1992, the Linden 760MW Natural Gas/Butane Gas Fired combined cycle co-generation plant is operated by G.E. Energy Services.

By Judah Lifschitz and Daniel A. Kapner; Shapiro, Lifschitz & Schram, P.C.

Owners of power plants are traditionally granted the right under engineering, procurement and construction (EPC) contracts to begin generating power only after the care, custody and control of the facility transfers from the EPC contractor to the owner following mechanical completion and substantial completion. Therefore, typically a power plant owner cannot begin commercial operations until after substantial completion.

Consider the following scenario. An EPC contractor constructs a power plant fully capable of safely generating power but has failed to satisfy all of the conditions of mechanical completion and/or substantial completion. Because of this, absent a contractual provision that allows the owner to commence commercial operations before substantial completion, the owner cannot begin to sell power until the contractor satisfies all outstanding mechanical completion and substantial completion requirements.

This can create difficulties for an owner if, for example, it has a commitment to sell

power under a power purchase agreement that provides penalties or liquidated damages if the owner fails to commence the sale of power timely. The owner is in a catch-22; the plant is capable of generating power but the owner cannot commence commercial operations without giving up substantial rights bargained for with regard to mechanical completion and/or substantial completion.

But does this catch-22 have to exist? The answer, as discussed in the following article, is no.

Typical EPC Contract Approach for Transferring Care, Custody and Control to the Owner

Although the specific terms and definitions in EPC contracts can vary, they traditionally provide that the EPC contractor maintains care, custody and control of the project until it achieves mechanical completion and then substantial completion. The following is a typical definition of mechanical completion that contains

conditions commonly appearing in such a provision:

Mechanical completion means when, except for minor items of work that would not affect the performance or operation of the facility, as applicable, such as painting, landscaping and so forth, (a) all materials and equipment for the facility have been installed in accordance with the plans and Exhibit A, Scope Book, calibrated and checked for alignment, lubrication, rotation and hydrostatic and pneumatic pressure integrity; (b) all systems required to be installed by the contractor have been installed and checked out on both fuels and operated on natural gas; (c) the systems have been flushed and cleaned out as necessary; (d) all the equipment and systems have been fully operated in a safe and prudent manner and have been installed in a manner that does not (i) void any subcontractor equipment, system, or other warranties, or (ii) violate any governmental approval or governmental rule; (e) all systems necessary for power generation are ready to

commence testing and operations; and (f) a punch list of the uncompleted items has been established and mutually agreed upon by the owner and contractor; provided that the owner may waive completion of punch list items.

In this example, mechanical completion is achieved only after (1) all systems, materials and equipment are installed; (2) all equipment and systems can be safely operated; (3) all systems necessary for power generation are ready for testing and operations; and (4) both parties agree to

a punch list. Thus, in the event equipment unrelated to power generation is not mechanically complete or if the parties do not agree on the punchlist, mechanical completion has not been achieved.

Similarly, the following is a typical definition of substantial completion:

Substantial completion shall be achieved if and only if, with respect to the project as a whole: (a) mechanical completion of the project has been achieved; (b) all requirements of mechanical completion were waived by the owner until sub-

stantial completion has been completed; (c) the contractor has performed all of the work, other than any uncompleted items on the punch list that do not affect the safe and continuous operation of the project; (d) the contractor has concluded all performance tests on the project, demonstrating that at least the minimum project performance guarantees, and the project reliability guarantee have been achieved and has delivered all required reports and test results relating to such performance tests to the owner; (e) all undisputed late completion payments due have been paid as required; (f) the continuous emissions monitoring system is fully operational and has been certified; (g) the contractor has filled all lubricant and chemical storage tanks constituting part of the work with appropriate materials procured from approved manufacturers or other suppliers for whom the owner's written approval has been obtained; (h) the contractor has delivered to the owner copies of all permits that the contractor is obligated to obtain herein; (i) the contractor has delivered to the owner, and the owner has approved, all system turnover packages constituting part of the work; (j) all training required herein has been completed; and (k) all quality assurance documentation with respect to the commissioning and testing of each system has been provided to the owner in accordance with the QA/QC manual.

This provision also contains multiple requirements that are not directly related to power generation; although necessary and important for the owner to obtain. For example, the contractor's delivery and approval of all system turnover packages is important but does represent a physical restraint to power generation. Clearly, an owner wants and needs quality system turnover packages and in the typical substantial completion clause, failure to deliver them means a failure to achieve substantial completion.

If substantial completion, in turn, is a condition precedent to the transfer of care, custody and control to the owner, then the owner who insists on satisfaction of all such substantial completion requirements will not be able to commence commercial operations until after the EPC contractor has satisfied all substantial completion requirements.

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Alternative Approach for Permitting Early Commercial Operations

One way to address this issue is to provide in the EPC contract an express limited right for the owner to begin commercial operations prior to the date of substantial completion. Consider the following provision:

Commercial Operations Prior to Substantial Completion. Notwithstanding any other provision of this contract, the owner shall have the right to cause commercial operations of one or more combined cycle combustion turbine-steam turbine-heat recovery steam generator units ("unit" or "units") to commence prior to the facility turnover date to the extent that the unit is capable of safely generating electric energy as follows:

The owner may commence commercial operations of one or more units or with respect to the facility prior to the date of substantial completion, unless the contractor reasonably objects to such operation for safety reasons. To the extent that substantial completion or final completion requires further performance tests after commercial operations have commenced, the owner shall cooperate, or shall cause the operator to cooperate, in the performance of such performance tests; provided, however, that performance tests to accomplish final completion or performance guarantees shall be subject to the owner's commercial operations requirements. The contractor shall be entitled to an equitable adjustment, pursuant to a change order, (i) to the performance test results to account for degradation of the unit(s) from commercial operations of the unit(s) through substantial completion and (ii) for cost, schedule, or other relief, in each case, as may be appropriate under the circumstances.

Under this provision, the owner may begin operating individual units or the entire facility once power can be safely generated, provided however, that (1) the EPC contractor does not reasonably object to operations for safety reasons; (2) the owner cooperates with the EPC contractor in conducting performance testing as may be necessary; and (3) the EPC contractor obtains adjustments to the contract price, schedule, deadlines and performance guarantees in the event the owner's operations degrades the units.

By incorporating such a clause into an EPC contract, an owner can protect itself and ensure that technical requirements of mechanical completion and/or substantial completion do not unnecessarily prevent generating power as soon as practicable. ●

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The advertisement features a large, weathered concrete block standing on a sandy beach. The block is oriented vertically, with the words "Construct with Confidence" written in large, white, sans-serif font across its front face. On the side of the block, the name "Sedgwick LLP" is carved into the concrete in a similar font. The background shows a calm sea and a cloudy sky.

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