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Offshore Wind: Getting Your Supply Chain Right

Offshore wind – the use of wind farms constructed in the ocean to harvest wind energy to generate electricity – is quickly becoming the new frontier for "clean" (i.e., low carbon) energy.

In recent years, offshore wind costs have tumbled, leading to significant potential growth in the industry. However, US offshore wind developers setting up their supply chains need to be prepared to navigate a complicated regulatory scheme involving overlapping federal and state laws, and adequately protect themselves with contracts that reflect the unpredictability of building wind turbines in the ocean. Offshore wind supply chain ventures will also likely face environmental opposition, despite the clean energy moniker.

As a general matter, a complex framework of laws and regulations has shaped the development of US offshore wind. Federal laws are the primary legal regime governing project development, but state laws also contribute significantly. Section 388 of the Energy Policy Act of 2005 gave the US Secretary of the Interior authority over offshore energy facilities on the outer continental shelf (OCS). The Interior Department's Bureau of Ocean Energy Management (BOEM) then issued the final regulations establishing the offshore renewable energy program in 2009. BOEM issues permits for projects on the OCS – which is exclusively federal jurisdiction. However, the undersea export cables that transport offshore power to onshore substations cross through state territory and trigger state laws and regulations.

On average, offshore wind developers can expect to spend seven to 10 years in the planning and construction process before commercial operations begin, much of it focused on, and directly impacted by, their supply chains. Major components of the federal environmental review process include compliance with the National Environmental Policy Act (NEPA), the Endangered Species Act (ESA) and the Migratory Bird Treaty Act (MBTA), among others. Failure to adequately comply with any of these regulations can result in significant project delays.

Further, the Jones Act requires that the transportation of construction materials or passengers from the US to a construction vessel that is considered a point in the US – a necessity for offshore wind supply chains – use only "coastwise-qualified vessels." Coastwise-qualified vessels are those that (1) were built in the US and never rebuilt abroad; (2) are primarily owned and controlled by US citizens; (3) have primarily US crews; (4) are US-flagged; and (5) have coastwise endorsements from the US Coast Guard. There is an important exception to the coastwise-qualified vessel requirement for installations that remain stationary. This distinction may impact supply chain operations as well. For example, offshore wind developers will need to use coastwise-qualified vessels when shipping building materials to wind turbine building sites from US ports. However, the actual construction vessels that remain at the sites to build the wind turbines need not be coastwise qualified as long as they remain stationary.

Offshore wind developers should also be mindful that offshore construction and operations can involve seamen, maritime employees and other non-maritime employees. For constructing an offshore supply chain – and implementing other offshore operations – this will require insurance tailored to each subgroup of employees. For example, most commercial policies do not cover liability to seamen, so specific Jones Act coverage is necessary. Offshore wind employers should be aware of how each employee is classified in order to effectively mitigate employer liability. Additionally, with many major components manufactured abroad, there can be significant issues regarding transit risk of loss, marine cargo insurance, shipping logistics and uncertainty surrounding current US customs and tariffs. Offshore wind developers can navigate these risks by clearly defining which party controls delivery arrangements and bears the risk. Although offshore wind developers may be tempted to sweep US customs and tariffs issues into general *force majeure* provisions, the better practice is to treat tariffs as a component of pricing, subject to changes in the law. This will help avoid any potential delays in the event that tariffs change from the time of contracting to the time that equipment arrives at the customs port – a risk that has become the norm.

Supply chain contracting practices in offshore wind differ from normal manufacturing supply chain agreements in a number of material respects. For maritime contracts, contract law is dictated by federal admiralty law, not the UCC, which is what governs most US-based supply chain contracts operating on land. There are two primary sources of federal maritime law: common law developed by federal courts exercising the maritime authority conferred by the Admiralty Clause of the Constitution, and statutory law enacted by Congress exercising its authority under the Admiralty Clause and the Commerce Clause. Federal common law often follows the UCC, but some differences exist. For example, oral contracts are generally regarded as enforceable by maritime law, whereas the UCC's statute of frauds generally demands that normal supply chain contracts be (at least in part) in writing. Further, a party who breaches a maritime contract is only liable for the damages caused by its breach, not consequential damages. For UCC contracts, this is not the case, unless consequential damages are expressly disclaimed. As a practical matter, offshore projects are often more "experimental" than normal, dry-land manufacturing, so it may be important to structure offshore supply chain contracts around more frequent milestones and "revisit" points.

In short, offshore developers putting their supply chains together face a much greater degree of difficulty than that posed by normal contracting. Caution and risk management are advised, as the industry continues to develop.

Contacts

Emily Huggins Jones
Partner, Cleveland
T +1 216 479 8509
E emily.hugginsjones@squirepb.com

Sarah K. Rathke
Partner, Cleveland
T +1 216 479 8379
E sarah.rathke@squirepb.com

Marissa Black
Associate, Cleveland
T +1 216 479 8154
E marissa.black@squirepb.com