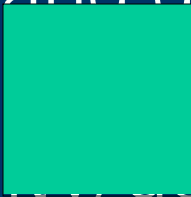



Addressing Fuel Quality in Design-Build and Other Biodiesel Agreements

2008 National Biodiesel Conference

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February 5, 2008

Lindquist & Vennum, PLLP

- Minneapolis, Denver
- Assist farmer cooperatives, public and private corporations, LLCs in renewable energy development and finance, food and ag-processing facilities, mergers & acquisitions, securities filings and private offerings, and governance matters
- > 2 billion  renewable fuel; > \$2 billion equity  debt

Topics Covered

- Warranties in D/B
 - Quality
 - Quantity
 - Yield
- Design/Build Agreements Basic Terms
 - very important
- Quality Controls in Related Agreements
 - Easy to paper responsibility for quality control, less easy to pinpoint given chain of custody issues

At Issue

- Quality remains paramount
- Industry standards for biodiesel quality
 - ASTM D6751
 - BQ-9000 Accreditation/Certification

Design/Build Agreement - Basics

- Purpose – provides how, when and for how much \$ plant will be designed/built
- Sets forth Owner's and Design/Builder's responsibilities
- Covers startup through testing and warranty periods

Design/Build – Basics (cont.)

- Owners'/builders' responsibilities
- Ownership of work product/risk of loss
- Schedule – commencement/completion
- Price/payment procedures
- Changes in scope of work
- Termination/stop work – step-in rights
- Warranties – work product and product

D/B Basics (cont.) – Design/Builder's Responsibilities

- Perform the “work” – all design, engineering, procurement, construction, inspection, testing, to complete project
- Provide design materials
- Obtain certain permits
- Responsible for subcontractors
- Submission of reports
- Compliance with safety/environmental requirements
- Training to owner/employees

D/B Basics (cont.) – Owner's Responsibilities

- Preliminary permits and approvals (site, geotechnical, zoning, easements, utilities, roads, rail, etc.)
- Environmental review – e.g., Phase I and II reports
- Permits – typically air permit
- Site security

D/B Basics (cont.) – ownership of work product

- While D/B provides the “work,” they remain protective of “work product” – specifications, data, etc.
- “As built” plans limited to the owners’ use for that plant – not other plants
- Technology licenses – passed through to owner, but limited to plant

D/B Basics (cont.) – schedule (commencement/completion)

- Sets forth time project to be completed – e.g., large projects (30mgy), up to 12 mos.
- Begins with notice to proceed
- Ends with final completion
- Key term is “substantial completion”
tension between owner and D/B

D/B Basics (cont.) – “substantial completion”

- D/B perspective – defined as work sufficiently complete and plant ready for intended purpose – but not producing fuel
- Owner perspective – substantial completion means that it is producing fuel, and consistently
- Negotiated

D/B Basics (cont.) – standard warranties

- After substantial completion, warranties kick in
- Standard warranties – plant needs to be free of defects in materials and workmanship – should included pass through warranties from vendors/subs
 - Express warrant – does plant do what was intended
- Warranty period – for materials/workmanship – 1 yr from substantial completion

D/B Basics (cont.) – process warranties

- Process warranties (performance guarantees) addressed
- Require technical assistance
 - Quality
 - Throughput
 - Yield
- Product specification – plant must produce ASTM 6751 (as updated) biodiesel; generally for continuous period of time
- Throughput – how much biodiesel will plant produce – e.g., gallons per hour; gallons per year
- Yield – feedstock specific; achieve minimum yields based on pounds of feedstock – e.g., x pounds of feedstock = y gallons biodiesel

D/B Basics (cont.) – damages (in the event warranties not followed)

- What happens if “substantial completion” not met within contract time?
 - Liquidated damages – agreed on amount paid by D/B for each day beyond substantial completion
- Where process guarantees not met?
 - Again, some form of LDs
 - Typically includes cap – not unlimited exposure

Other Contracts - From Production to Distribution, Consumption

- Easy to paper responsibility for quality control, less easy to pinpoint given chain of custody issues
 - production, distribution, transportation, storage, end use
 - Quality can be impacted at any point
- Because difficult to identify where quality impacted, contracts work to minimize risk, incentivize good practices

Chain of custody

- Person in chain of custody will want to push responsibility upstream
- Producer – push responsibility on Design/Builders – process guarantees
- Producer should understand how marketer assures fuel quality
 - Record keeping/testing protocols?
- Require marketer to be BQ-9000 certified
 - NBB quality assurance program (sampling, testing, storage, shipping)

Chain of custody

- Marketers – require producers
 - Meet ASTM D6751
 - BQ-9000 certified
- Distributors (end use)
 - Require marketer to be BQ-9000 certified/understand how fuel quality addressed
 - Rep/warrant biodiesel sourced from BQ-9000 producer

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