

PURPOSE: This overview provides energy customers an understanding of why, when, and how to engage outside counsel during clean energy procurement. It may be especially relevant for virtual power purchase agreement (VPPA) project execution, and includes the typical legal issues counsel will address, when in the process counsel are most engaged, and how to select the right partner.



AUDIENCE: Energy customers that have not yet engaged outside legal counsel, or those that are seeking insights to help refine their approach to procuring external legal services, will benefit from this overview. It may be of particular use for establishing a baseline for discussion with legal, finance, communications, and other teams within the energy customer organization. This resource may be considered a supplement to the Engaging a Buyers Advisor overview.

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KEY TAKEAWAYS:

- Outside legal counsel provides invaluable support to energy customers, especially for those new to the procurement process working on complex deal structures like VPPA projects.
- CEBA's community of experienced energy customers is an excellent resource for newer customers seeking insights on procuring external support for VPPA and other clean energy projects.

INTRODUCTION: VPPAs are complex, long-term, and legal-intensive contract structures. It is unlikely that an energy customer's internal legal team, or even existing outside legal counsel, has the required expertise to oversee a VPPA project. Therefore, most energy customers engage outside legal counsel with specific clean energy experience when executing a VPPA. Experienced outside counsel will have familiarity with the details of long-term energy projects, underlying rationales and acceptable variation for most contract terms, and project financing requirements.

THE ROLE OF OUTSIDE COUNSEL: Outside legal counsel can play various roles on an energy project team depending on the needs of the client, including:

- Interface with inside counsel and outside consultants.
- Lead the Definitive Agreement phase which includes drafting, reviewing, negotiating, and managing legally binding agreements between the energy customer organization and seller that set the terms and conditions of the clean energy transaction.



- Negotiate a contract consistent with the client's timeline, risk tolerance, and budget.
- Support internal socialization of deal structure/features and approval processes.
- Ensure the client correctly understands the transaction's potential for risk and reward.
- Share risk with energy customer organization and provide an avenue for recourse.

KEY LEGAL ISSUES IN CLEAN ENERGY DEALS: Several key legal issues that can arise during the execution of a clean energy procurement transaction that outside counsel may help with.

- **Development risk:** Will the project be built?
- **Performance risk:** Will the project operate as expected?
- **Credit risk:** Will the seller be able to pay for repairs, pay liquidated damages, pay termination damages if necessary?
- **Termination risk:** Does the energy customer have fair rights to get out — and get paid — if the seller does not fulfil its contractual obligations?
- **Alignment risk:** Is the seller properly incentivized to perform? Are there any hidden loopholes in the deal?

DEAL STAGES: WHEN IS OUTSIDE COUNSEL INVOLVED?

Different stages of a clean energy transaction require different levels of effort for outside counsel.

STAGE	EFFORT
Pre-Request for Proposal (RFP)	Low
RFP to Term Sheet	Low but valuable
Term Sheet to Definitive Agreement	High
Approval and Execution	Low

OUTSIDE COUNSEL VS. BUYER'S ADVISORS

In addition to outside counsel, an energy customer will likely engage consultants and/or brokers, commonly referred to as buyer's advisors, when executing a clean energy agreement. Buyer's advisors are higher touch throughout the execution of a deal and sometimes serve as co-business leads on the project. They design and manage the RFP process with the client and are highly involved in the procurement process from the outset. For instance, buyer's advisors may coordinate weekly calls and internal reviews with their clients. It is often valuable for an energy customer organization to engage with a buyer's advisor in addition to outside legal counsel, depending on the experience and needs of the team.

FINDING AND SELECTING OUTSIDE COUNSEL

Finding an appropriate partner to serve as outside counsel is important when pursuing a complex transaction like a VPPA. When selecting and budgeting for outside counsel, it is important to focus on experience and quality, as there is often not much to be saved in price competition. Some energy customers choose to run a legal services RFP, though many do not. Selection processes depend on the energy customer organization's budget, protocols, and other project considerations.