

Contracting from a project manager's perspective

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Why a Project Manager Should be Involved

- The PM is responsible for compliance with the contract
- No one person will be as familiar with the project as the PM
- Defining the contract is an ideal opportunity to both guide and understand the contract
- Applies to
 - Contracting
 - Sub-contracting
 - Ensuring Customer compliance

Contracting – Why is it important?

- Your contract establishes
 - Price
 - Schedule
 - Scope
 - Defined quality level
 - Terms and conditions such as warranty, change control process, etc. . . .
 - Etc. . . .
- Your contract is the opportunity to both address and bound project risks

Negotiating Contracts

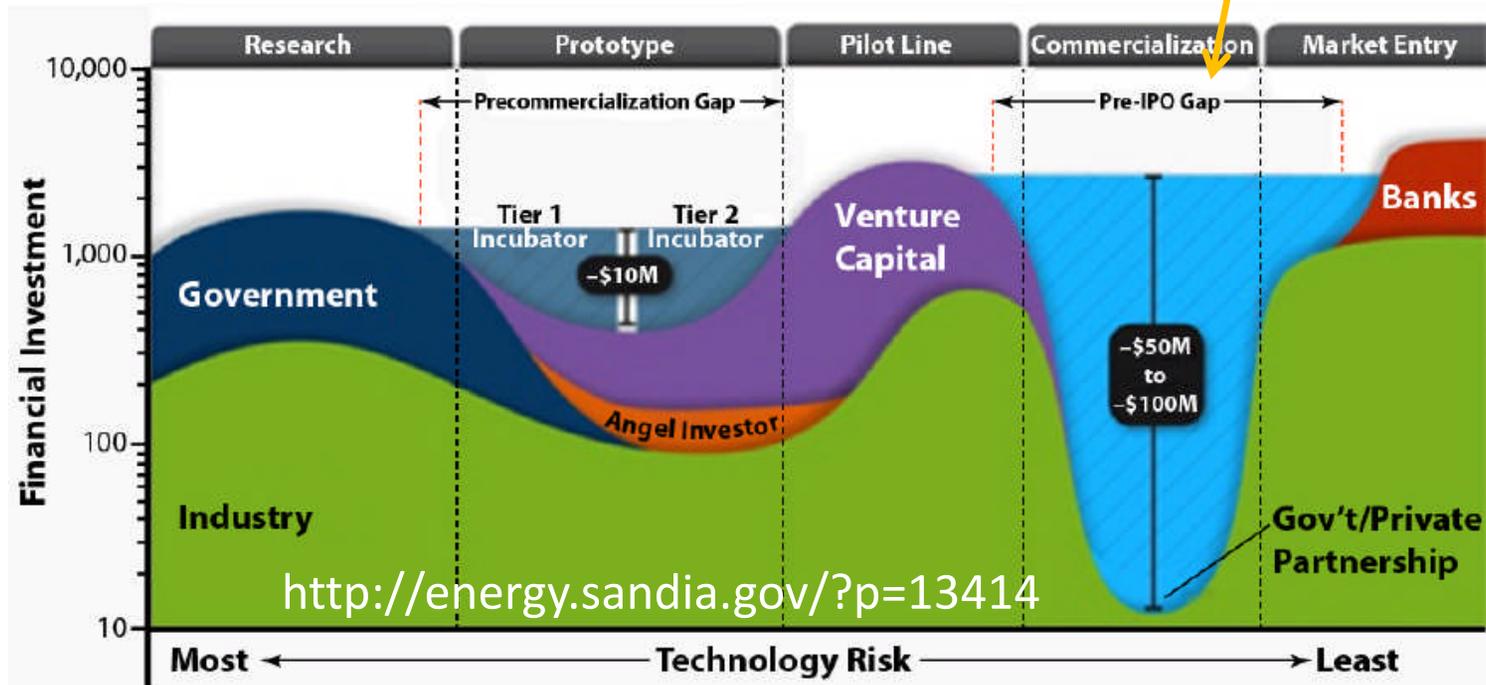
- Contracts typically are negotiable
- Knowing the other parties' degrees of freedom and position is incredibly valuable
- Gaining such knowledge on commercial contracts requires considerable guesswork
- Gaining such knowledge on Government contracts in the US just requires a lot of work and less guesswork

PV RTC



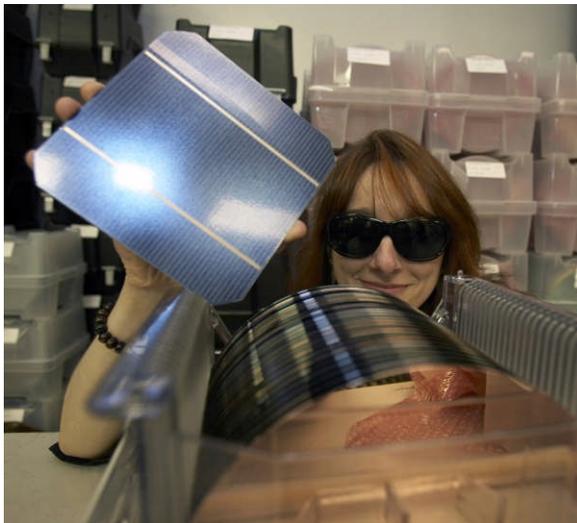
SUNSHOT PV RTC

- Department of Energy (DOE) sponsored program <http://pvrtc.org/>
- Provides an affordable means for obtaining real performance data on solar panels and components
- Goal is to help US manufacturers bridge the gap between prototype/pilot to commercialization/volume



IBM Essex Jct/Williston

- Legacy of environmental leadership at site
- Innovation since 2007 to turn scrap IBM wafers into solar cells <http://www-03.ibm.com/press/us/en/pressrelease/22504.wss>
- Location, expertise, support

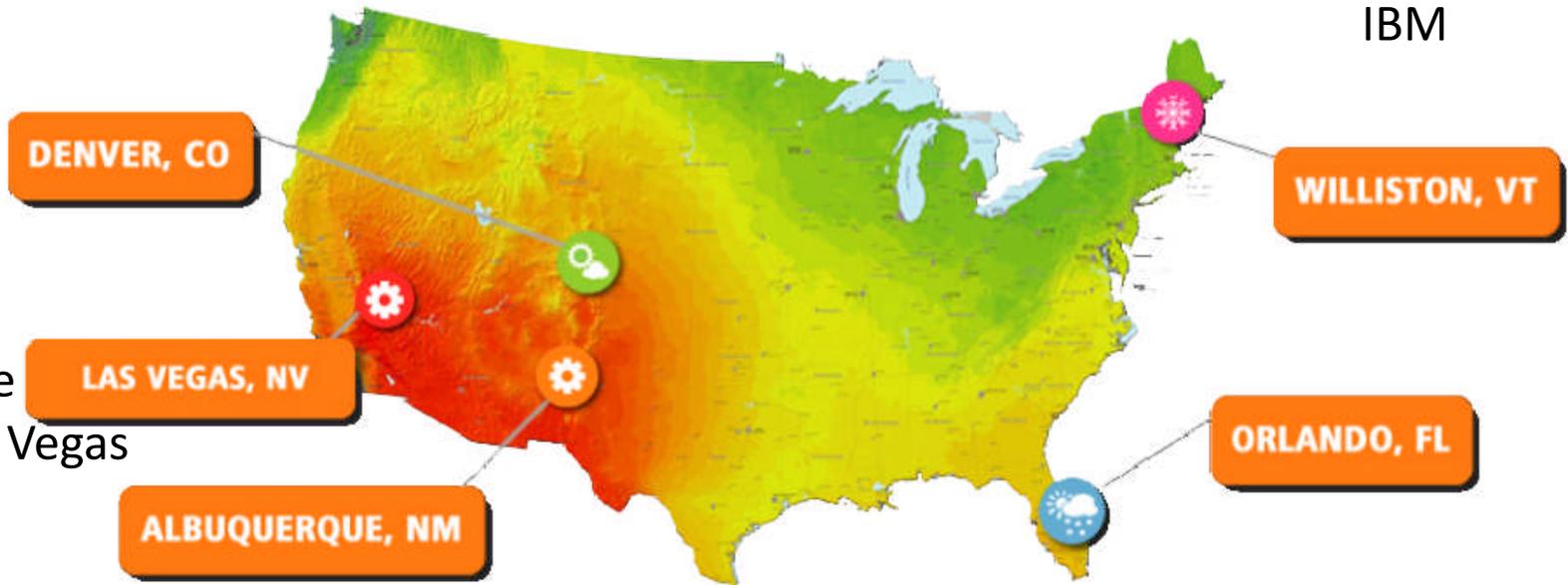


5 PV RTC Centers Across the US

Sites are managed by Sandia

steppe (arid, high-altitude)
climate National Renewable Energy Laboratory

cold, humid climate
IBM



hot, dry climate
Univ. of Nevada–Las Vegas

hot, dry climate
Sandia National Laboratories

hot, humid climate
Florida Solar Energy Center

Unique Challenges

- Compliance with Federal and State Statutes, Laws, Regulations, . . . introduced complexity and uncertainty
- In Vermont, V.S.A. 30 . . . applies to energy, telecommunications, gas and the like
- Vermont Public Service Board (PSB) process

USG Contracting Intro

- Embarking on USG contracting requires heavy lifting
- Multiple layers of terms and conditions, depending upon the contract type and program origin
 - **FAR** (Federal Acquisition Regulation)*
 - **DFARS** (Defense Federal Acquisition Regulation Supplement)
 - **DEAR** (Department of *Energy Acquisition* Regulation)
 -
- Many complex intertwined terms and concepts require careful consideration
- Many terms flow down from/to sub-contractors
- Reporting requirements, audit compliance, etc. . . .

FAR Acquisition Matrix

- USG contracting officers (CO) are prescribed terms by contract type, each clause is required, when applicable, or optional based on CO discretion
- For example, see FAR matrix on <https://acquisition.gov/far/index.html> . . . ~700 clauses in the matrix!!

52.301 Solicitation provisions and contract clauses (Matrix).

Key:	
Type of Contract:	
P or C	= Provision or Clause
IBR	= Is Incorporation by Reference Authorized? (See FAR 52.102)
UCF	= Uniform Contract Format Section, when Applicable
FP SUP	= Fixed-Price Supply
CR SUP	= Cost-Reimbursement Supply
FP R&D	= Fixed-Price Research & Development
CR R&D	= Cost Reimbursement Research & Development
FP SVC	= Fixed-Price Service
CR SVC	= Cost Reimbursement Service
FP CON	= Fixed-Price Construction
CR CON	= Cost Reimbursement Construction
T&M LH	= Time & Material/Labor Hours
LMV	= Leasing of Motor Vehicles
COM SVC	= Communication Services
DDR	= Dismantling, Demolition, or Removal of Improvements
A&E	= Architect-Engineering
FAC	= Facilities
IND DEL	= Indefinite Delivery
TRN	= Transportation
SAP	= Simplified Acquisition Procedures (excluding micro-purchase)
UTL SVC	= Utility Services
CI	= Commercial Items
Contract Purpose:	
R	= Required
A	= Required when Applicable
O	= Optional
3	= Revision

PROVISION OR CLAUSE	PRESCRIBED IN	PRINCIPLE TYPE AND/OR PURPOSE OF CONTRACT																						
		P OR C	IBR	UCF	FP SUP	CR SUP	FP R&D	CR R&D	FP SVC	CR SVC	FP CON	CR CON	T&M LH	LMV	COM SVC	DDR	A&E	FAC	IND DEL	TRN	SAP	UTL SVC	CI	
52.202-1 Definitions.	2.201	C	Yes	I	R	R	A	R	R	R	R	R	R	R	R	R	R	R	R	R	R	R	R	
52.203-2 Certificate of Independent Price Determination.	3.103-1	P	No	K	A		A		A		A			A	A	A	A	A	A	A	A	A	A	
52.203-3 Gratuities.	3.202	C	Yes	I	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	
52.203-5 Covenant Against Contingent Fees.	3.404	C	Yes	I	R	R	R	R	R	R	R	R	R	R	R	R	R	R	R	R	R	R	R	
52.203-9 Restrictions on Subcontractor Sales to the Government.	3.503-2	C	Yes	I	R	R			R	R									R				R	

USG Contracts = Complexity

- US Government Contract Terms and Conditions (clauses) are numerous and complex
- Many clauses reference other clauses and need to be placed into context (i.e. as prescribed in).

– Random example:

3.502-3 Contract clause.

The contracting officer shall insert the clause at [52.203-7](#), Anti-Kickback Procedures, in solicitations and contracts exceeding the simplified acquisition threshold, other than those for commercial items (see [Part 12](#)).

52.203-7 Anti-Kickback Procedures.
As prescribed in [3.502-3](#), insert the following clause:

ANTI-KICKBACK PROCEDURES (OCT 2010)

(a) Definitions.
"Kickback," as used in this clause, means any money, fee, commission, credit, gift, gratuity, thing of value, or compensation of any kind which is provided, directly or indirectly, to any prime Contractor, prime Contractor employee, subcontractor, or subcontractor employee for the purpose of improperly obtaining or rewarding favorable treatment in connection with a prime contract or in connection with a subcontract relating to a prime contract.
"Person," as used in this clause, means a corporation, partnership, business association of any kind, trust, joint-stock company, or individual.
"Prime contract," as used in this clause, means a contract or contractual action entered into by the United States for the purpose of obtaining supplies, materials, equipment, or services of any kind.
"Prime Contractor" as used in this clause, means a person who has entered into a prime contract with the United States.
"Prime Contractor employee," as used in this clause, means any officer, partner, employee, or agent of a prime Contractor.
"Subcontract," as used in this clause, means a contract or contractual action entered into by a prime Contractor or subcontractor for the purpose of obtaining supplies, materials, equipment, or services of any kind under a prime contract.
"Subcontractor," as used in this clause, (1) means any person, other than the prime Contractor, who offers to furnish or furnishes any supplies, materials, equipment, or services of any kind under a prime contract or a subcontract entered into in connection with such prime contract, and (2) includes any person who offers to furnish or furnishes general supplies to the prime Contractor or a higher tier subcontractor.
"Subcontractor employee," as used in this clause, means any officer, partner, employee, or agent of a subcontractor.

(b) The Anti-Kickback Act of 1986 (41 U.S.C. 203) the Act, prohibits any person from—
(1) Providing or attempting to provide or offering to provide any kickback;
(2) Soliciting, accepting, or attempting to accept any kickback; or
(3) Including, directly or indirectly, the amount of any kickback in the contract price charged by a prime Contractor to the United States or in the contract price charged by a subcontractor to a prime Contractor or higher tier subcontractor.

(c)(1) The Contractor shall have in place and follow reasonable procedures designed to prevent and detect possible violations described in paragraph (b) of this clause in its own operations and direct business relationships.
(2) When the Contractor has reasonable grounds to believe that a violation described in paragraph (b) of this clause may have occurred, the Contractor shall promptly report in writing the possible violation. Such reports shall be made to the Inspector general of the contracting agency, the head of the contracting agency if the agency does not have an Inspector general, or the Department of Justice.
(3) The Contractor shall cooperate fully with any Federal agency investigating a possible violation described in paragraph (b) of this clause.
(4) The Contracting Officer may (i) offset the amount of the kickback against any monies owed by the United States under the prime contract and/or (ii) direct that the Prime Contractor withhold from sums owed a subcontractor under the prime contract the amount of the kickback. The Contracting Officer may order that monies withheld under subdivision (c)(4)(ii) of this clause be paid over to the Government unless the Government has already offset those monies under subdivision (c)(4)(i) of this clause. In either case, the Prime Contractor shall notify the Contracting Officer when the monies are withheld.
(5) The Contractor agrees to incorporate the substance of this clause, including paragraph (c)(5) but excepting paragraph (c)(1), in all subcontracts under this contract which exceed \$100,000.

(End of clause)

PART 12—ACQUISITION OF COMMERCIAL ITEMS

- 12.000 Scope of part.
- 12.001 Definition.
- Subpart 12.1—Acquisition of Commercial Items—General
 - 12.101 Policy.
 - 12.102 Applicability.
 - 12.103 Commercially available off-the-shelf (COTS) items.
- Subpart 12.2—Special Requirements for the Acquisition of Commercial Items
 - 12.201 General.
 - 12.202 Market research and description of agency need.
 - 12.203 Procedures for solicitation, evaluation, and award.
 - 12.204 Solicitation/contract form.
 - 12.205 Offers.
 - 12.206 Use of past performance.
 - 12.207 Contract type.
 - 12.208 Contract quality assurance.
 - 12.209 Determination of price reasonableness.
 - 12.210 Contract financing.
 - 12.211 Technical data.
 - 12.212 Computer software.
 - 12.213 Other commercial practices.
 - 12.214 Cost Accounting Standards.
 - 12.215 Notification of exercise of options.
 - 12.216 Unenforceability of unperfected obligations.
- Subpart 12.3—Solicitation Provisions and Contract Clauses for the Acquisition of Commercial Items
 - 12.300 Scope of subpart.
 - 12.301 Solicitation provisions and contract clauses for the acquisition of commercial items.
 - 12.302 Tailoring of provisions and clauses for the acquisition of commercial items.
 - 12.303 Contract format.
- Subpart 12.4—Unique Requirements Regarding Terms and Conditions for Commercial Items
 - 12.401 General.
 - 12.402 Acceptance.
 - 12.403 Termination.
 - 12.404 Warranties.
- Subpart 12.5—Applicability of Certain Laws to the Acquisition of Commercial Items and Commercially Available Off-The-Shelf Items
 - 12.500 Scope of subpart.
 - 12.501 Applicability.
 - 12.502 Procedures.
 - 12.503 Applicability of certain laws to Executive agency contracts for the acquisition of commercial items.
 - 12.504 Applicability of certain laws to subcontracts for the acquisition of commercial items.
 - 12.505 Applicability of certain laws to contracts for the acquisition of COTS items.
- Subpart 12.6—Streamlined Procedures for Evaluation and Solicitation for Commercial Items
 - 12.601 General.
 - 12.602 Streamlined evaluation of offers.
 - 12.603 Streamlined solicitation for commercial items.

- Many clauses can not be evaluated on their own and require the context of the project to be evaluated for acceptance to your company
- Tools are needed to navigate and document this complex space!

Building Tools - USG Contracts

- Availability of USG Contract Rules enables copy to spreadsheet or other database tools for lookup and analysis
- Company positions for each clause/contract type can be documented in database fashion
- New contracts can be quickly digested/analyzed

FAR #	Provision or Clause	Clause	Description	Position	Prescribed In	p or c	ibr	u
52.202-1	52.202-1 Definitions.	https://www.acqui	2.201	Acceptable without comment. Provides	2.201	C	Yes	
52.203-2	52.203-2 Certificate of Independent Price Determination.	https://www.acqui	3.103-1	Acceptable without comment. Provides	3.103-1	P	No	
52.203-3	52.203-3 Gratuities.	https://www.acqui	3.202	Acceptable without comment. not appli	3.202	C	Yes	
52.203-5	52.203-5 Covenant Against Contingent Fees.	https://www.acqui	3.404	Acceptable without comment. The clau	3.404	C	Yes	
52.203-6	52.203-6 Restrictions on Subcontractor Sales to the Government.	https://www.acqui	3.503-2		3.503-2	C	Yes	
Alternate	Alternate I	#VALUE!	3.503-2		3.503-2	C	Yes	
52.203-7	52.203-7 Anti-Kickback Procedures.	https://www.acqui	3.502-3		3.502-3	C	Yes	
52.203-8	52.203-8 Cancellation, Rescission, and Recovery of Funds for Illegal or	https://www.acqui	3.104-9(a)		3.104-9(a)	C	Yes	
52.203-10	52.203-10 Price or Fee Adjustment for Illegal or Improper Activity.	https://www.acqui	3.104-9(b)		3.104-9(b)	C	Yes	
52.203-11	52.203-11 Certification and Disclosure Regarding Payments to Influence.	https://www.acqui	3.808(a)		3.808(a)	P	Yes	
52.203-12	52.203-12 Limitation on Payments to Influence Certain Federal	https://www.acqui	3.808(b)		3.808(b)	C	Yes	
52.203-13	52.203-13 Contractor Code of Business Ethics and Conduct.	https://www.acqui	3.1004(a)		3.1004(a)	C	Yes	
52.203-14	52.203-14 Display of Hotline Poster(s).	https://www.acqui	3.1004(b)		3.1004(b)	C	Yes	
52.203-15	52.203-15 Whistleblower Protections Under the American Recovery and	https://www.acqui	3.907-7		3.907-7	C	Yes	Y

Christian Doctrine

- Federal Acquisition Regulation (FAR) court case
- "If a mandatory clause that implements fundamental procurement policy is omitted from the contract without a deviation, it is included in the contract by operation of the Christian Doctrine"
- Net: ensure federal contracting knowledge on your team!

Risks

- Focus on med/high impact & med/high probability risks
- Determine response for each (e.g. transfer/accept/mitigate/etc)
- Include appropriate responses in the contract Terms and Conditions (e.g. transfer a risk)

Category	Owner	Risk Description	Impact	Mitigation	Pre-Mitigation		Post-Mitigation	
					Probability (Pre)	Impact (Pre)	Probability (Post)	Impact (Post)

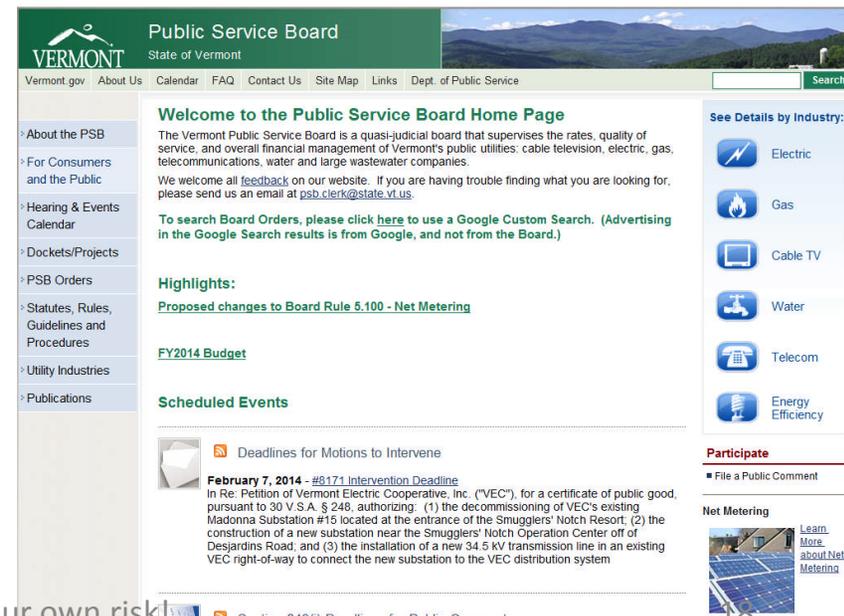
Contingency

- Make an informed decision regarding contingency
- Size raw cost for each line item, carry contingency as separate estimates with rationale for each
- Review contingency in context of the full project sizing
- Use prior projects of similar nature as a guide
- Include unique contingency for specific risk areas as a line item (otherwise contingency is a full project item)
- Don't be overly conservative, the responses can aggregate very quickly!

Vermont PSB Process

Vermont Legislation

- Vermont state statutes can be found at <http://www.leg.state.vt.us/statutesMain.cfm>
- “The Vermont Public Service Board is a quasi-judicial board that supervises the rates, quality of service, and overall financial management of Vermont's public utilities: cable television, electric, gas, **telecommunications**, water and large wastewater companies.”
<http://psb.vermont.gov/>
- V.S.A §248a establishes rules for telecommunication facilities
- Local town zoning is pre-empted



PV RTC PSB Experience

- April 19, 2013
 - Petition filed by International Business Machines Corporation("IBM")
- All comments from the public or parties were due to PSB by June 14, 2013
 - May 17, 2013, the Clerk of the Board issued a memorandum requiring IBM to respond to several questions regarding the Project.
 - June 3, 2013, IBM filed responses to the questions contained in the May 17 memorandum
 - June 13, 2013, the Town of Williston's Planning Commission filed a letter supporting the Project and requesting that the Board take note of the landscape mitigation plan agreed to by the Planning Commission and IBM
 - June 14, 2013, the Vermont Department of Public Service ("Department") filed comments on the Project with the Board. The Department concluded that the petition does not raise any significant issues with respect to the substantive criteria of 30 V.S.A. § 248.
 - June 17, 2013, IBM filed a letter from the Vermont Division for Historic Preservation ("VDHP") regarding the Project site.
 - No other comments were received regarding IBM's petition.
 - <http://psb.vermont.gov/sites/psb/files/orders/2013/2013-06/8045FinalORD.pdf>
- PSB ORDER ENTERED June 21st, 2013
 - 8045 FINAL ORDER and CERTIFICATE OF PUBLIC GOOD In Re: Petition of International Business Machines Corporation for a certificate of public good, pursuant to 30 V.S.A. Section 248(j), authorizing the installation of a 300 kW net-metered solar electric generation regional test center to be located in Williston, Vermont
 - <http://psb.vermont.gov/sites/psb/files/orders/2013/2013-06/8045CPG.pdf>
- PSB ORDER ENTERED AUGUST 8, 2013
 - 8045 ORDER RE: COMPLIANCE FILING In Re: Petition of International Business Machines Corporation for a certificate of public good, pursuant to 30 V.S.A. Section 248(j), authorizing the installation of a 300 kW net-metered solar electric generation regional test center to be located in Williston, Vermont

Press Event



1/22/2014

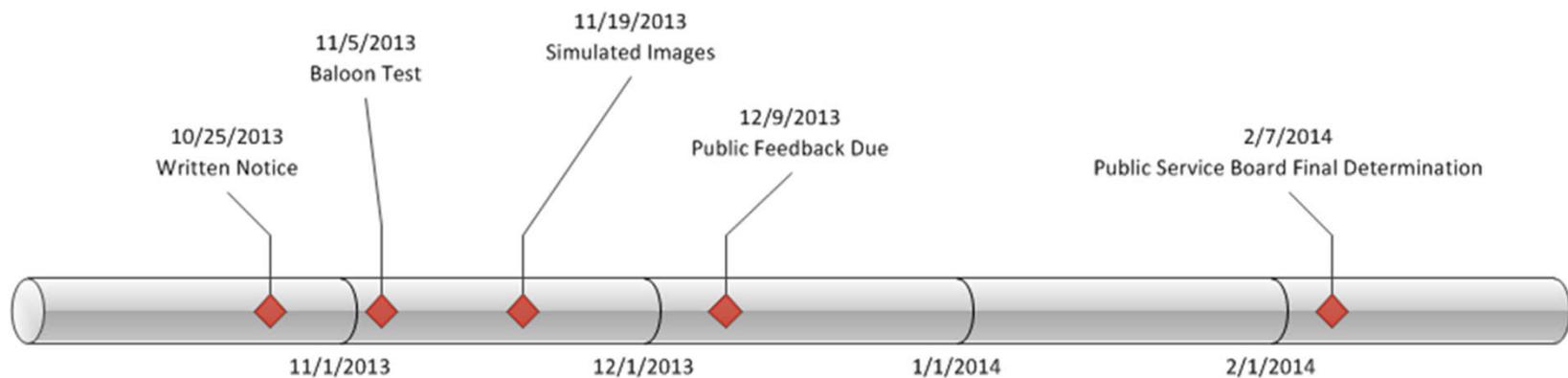
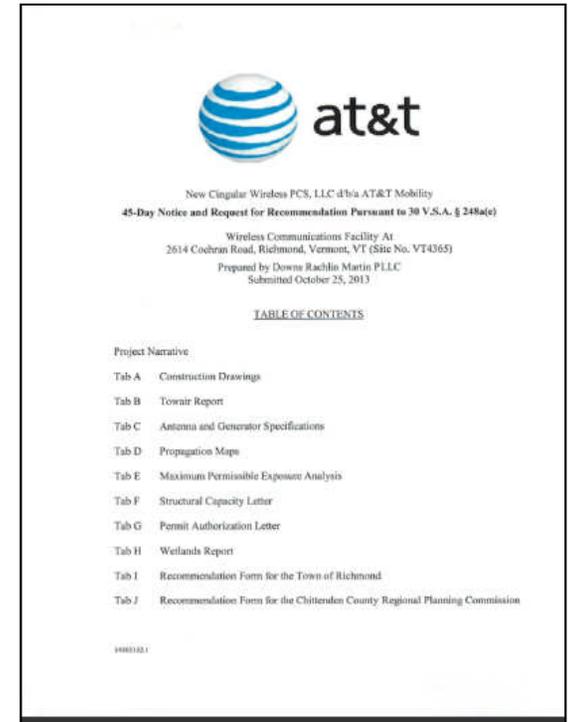
No guarantee or warranty, use at your own risk!

20

Telecommunications Tower Personal Experience

Notice

- On 10/25/2013 a written notice was sent by AT&T's attorney, advising of a proposed 140 foot tall cellular tower to be located off 2614 Cochran road
- This tower is not considered "limited in size and scope" with a proposed location in close proximity to a residential neighborhood
- Many residents in this neighborhood strongly objected
- The original timeline associated with the proposal is shown below

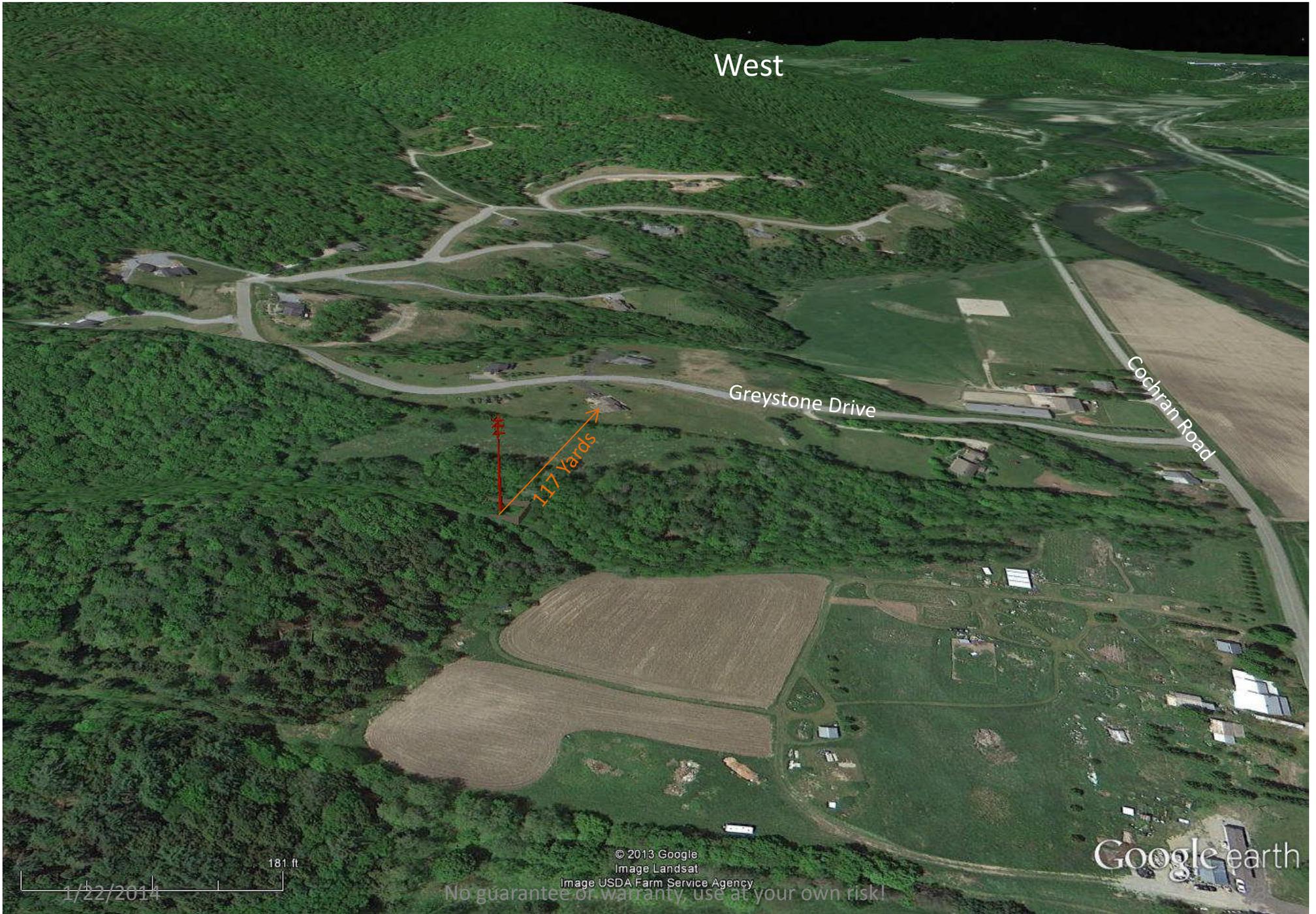


10/1/2013
1/22/2014

No guarantee or warranty, use at your own risk!

3/1/2014

Simulated Views



Balloon Test Views



1/22/2014

No guarantee or warranty, use at your own risk!

50mm equivalent focal length



Citizen Intervention

- Neighbors formed a group
- Local media was leveraged
 - Fox 44
 - WCAX 3
 - Seven Days
 - Burlington Free Press
 - Front Porch Forum
- A renowned landscape architect was contracted
- Group met w/AT&T in Dec, counter proposal presented
- Proposal was accepted by AT&T in Jan, 2014
- Process is underway for new location

Summary

Observations from PM Perspective

- Local, state, and federal requirements apply to certain projects and represent risk
- A comprehensive risk assessment is necessary prior to contracting
- Project risks should be addressed in your contracts and sub-contracts
- Outside influences can impact your project!
- However, you must be willing to take risks so strike a balance!