Report of Investigation

SUSSEX COUNTY RENEWABLE ENERGY PROGRAM

COUNTY OF SUSSEX

Lowenstein Sandler LLP (Of Counsel)

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I. Introduction

On February 23, 2011, the Sussex County Board of Chosen Freeholders (the "Freeholder Board") voted to authorize Sussex County (the "County") to participate in a Renewable Energy Program involving the installation of solar energy panels on government buildings. The freeholders intended that the County's role in the program would be a limited one. The County would act as guarantor on government bonds in order to facilitate the ability of local governments in the County to seek construction of solar facilities on their properties and thereby reduce electricity costs. Morris County previously had acted in a similar role in the construction of solar facilities in that county, and that program had concluded successfully. In fact, Sussex County would be using Morris County's own consultants to carry out the Sussex County project.

Elected County officials were assured that there was little to no financial risk for the County because the structure of the transaction and the security posted by the contractor ensured that the County guarantee would not be called. The operative legal documents stated that the project would be completed within a year. There were no significant objections expressed at the County and, with minimal debate, the measure was unanimously approved.

Despite the stated one-year time frame, project construction did not end until more than five years after that February 2011 meeting, in December 2016. Even then, the amount of electricity generated by the project was substantially less than intended and expected. Moreover, this project, which was billed as being without financial risk, ultimately may cost County taxpayers more than $26 million in the wake of a County bail-out of the project developer.

This report is designed to assist the County in understanding how it came to face such tremendous financial losses despite the supposed absence of risk on the project, and how to avoid similar missteps in the future. The specific goals of the investigation are set forth below.

II. The Goals of the Investigation

On January 27, 2016, the County engaged Lowenstein Sandler LLP ("LS") as Special Counsel to assist the County in reviewing its participation in the Renewable Energy Program (the "Solar Project"). *See generally* N.J.S.A. 40:20-80 *et seq*. (authorizing county governments to investigate potential misconduct). The engagement called for LS to "conduct an inquiry into the background and status of the County's participation in the Solar Project, including an overall assessment of the planning and implementation of the project as well as of the complications

encountered . . . ." That work was to include, among other things:

- "review of the facts and circumstances leading up to the County's entry into the Solar Project;"
- "review of the factual and procedural history of the County's initial participation in the project;"
- "review of the ensuing litigation among some of the parties to the project and of the eventual settlement agreement to which the County is a party; and"
- "review of the status of the project post-settlement to date."

The engagement contemplated that LS would "determine relevant facts" and provide appropriate verbal or written reports to the County. Ultimately, the aim of the engagement was to assist County decision-makers and the public in understanding from a factual standpoint what had transpired in connection with the Solar Project, to thereafter assist the County in assessing potential civil litigation against third parties, and "to provide advice concerning the method and manner of the County's participation in the Solar Project and similar projects on an ongoing basis." That latter effort was to include a determination regarding "whether best practices counsel in favor of a change in County procedures . . . in similar projects going forward." In other words, the County

sought to ensure that any mistakes it made in connection with the Solar Project would not recur.

This report of factual findings sets forth the results of the investigative steps recounted below. It includes analysis and conclusions as to what transpired in connection with the Solar Project and makes recommendations for the County going forward. In accordance with N.J.S.A. 10:4-12(b)(7) and similar provisions, this written report does not set forth attorney discussions with the County regarding potential civil claims against third parties.

III. Methodology

This investigation employed standard investigative techniques. The initial stages of the investigation focused on a review of pertinent documents. That review included thousands of documents obtained from County files as well as from County employees and other sources. The documents included, for example: a) 12 boxes of internal notes and analyses, advisory materials, initial drafts of project-related documents, and third-party invoices maintained by senior County employees; b) 20 binders of contract and project-related documents; and c) executive and public session Freeholder Board meeting minutes covering a period of approximately five years. Other categories of documents reviewed included arbitrator decisions, court

filings and orders, County financial documents, and project status reports. We also reviewed public documents and reports available on-line. Investigators also completed legal research regarding pertinent legal issues.

In addition, the investigation included review of more than 12,000 emails and electronic files, along with more than 1,000 text messages saved on County mobile hardware. Investigators conducted targeted reviews of those emails, electronic files, and text messages using a combination of key search terms, custodian names, and other data analytics to assess electronic communications as they occurred throughout the Solar Project.

Investigators also interviewed more than 20 witnesses (some more than once), including current and former County employees with knowledge of the Solar Project, current and former members of the Freeholder Board, legal counsel to the County, and other parties involved in the Solar Project as well as their attorneys. Some of those interviews took place after initial objections by the individuals in question, which often led to legal discussions over extended periods of time. Other interviews were delayed by circumstances such as the witness asking for time to engage counsel and subsequent, related conversations with that counsel. Current County staff and Freeholder Board members uniformly were cooperative and helpful in the course of the investigation. While there were frequent

updates and communications between LS and County representatives, at no time were any efforts made by County officials to dictate the outcome of the investigation.

The findings of the investigation are set forth in the ensuing sections of this report. These findings are based on the evidence described above, as discussed in detail with County officials.

IV. Findings

A. Project Origins

The origins of the County's involvement in the Solar Project are found in a dinner meeting attended by County Freeholder Richard Zeoli and John Inglesino, Esq. that took place on November 3, 2010. Zeoli had met Inglesino years before and while they were not close friends, according to Zeoli they would periodically get together to discuss political issues and opportunities. Inglesino was a former Morris County freeholder who had remained active in politics.

The dinner conversation on November 3 primarily concerned New Jersey political issues. Zeoli stated in his investigative interview that he was interested at the time in becoming more involved in state-wide politics. According to Zeoli, during the dinner Inglesino mentioned a solar energy project that his law firm was involved with on behalf of Morris County. Zeoli stated

in his interview that their discussion about that project was brief. Inglesino asked Zeoli if the County would have any interest in participating in such a project. According to Zeoli, Inglesino said that the project would not require the investment of any County funds.

The Morris County solar project that Inglesino had referred to had been led by the Morris County Improvement Authority ("MCIA"), which is a government entity that operates pursuant to the New Jersey County Improvement Authorities Law, N.J.S.A. 40:37A-44 *et seq*. Many New Jersey counties have created such improvement authorities to maintain responsibility for the financing and management of public development projects in those counties. At the time of the November 3 dinner, Inglesino's law firm was legal counsel to the MCIA.

According to the MCIA's December 24, 2009 press release announcing its solar program, the program called for the installation of solar panels on the roofs of several county government facilities and 14 public school buildings in Morris County. The bonds for the project were guaranteed by Morris County, with no debt service to be incurred by the school districts involved, according to the press release. The public-private financing model involved in the project, which is described more fully below, became known as the "Morris Model."

The Morris Model solar project gained national renown, as well as accolades for the MCIA attorney who designed its structure, Stephen Pearlman, Esq. Pearlman was Inglesino's law partner at the time of his November 2010 dinner with Zeoli. The MCIA had been a client of Pearlman's while he was with his former law firm, and Pearlman continued to represent the MCIA after forming a new law firm with Inglesino.

Following the structure of the "Morris Model," in 2010 Somerset County and the Somerset County Improvement Authority ("SCIA") commenced their own solar energy project. That project involved 32 solar energy installations for 15 local governments in Somerset County. Stephen Pearlman served as a legal counsel and key player on the Somerset project, similar to the role he played on the earlier Morris County project.

In response to Inglesino's mention of a potential solar energy project at the November 2010 dinner, Zeoli suggested to him that they set up a meeting with other County officials. County email records show that the next day, November 4, Zeoli sent an email to John Eskilson, the County Administrator, suggesting that he set up a meeting with Inglesino to talk about the potential solar project. In relevant part, the email stated: "I [spoke] with John Inglesino last night. He . . . has some involvement in the solar realm now and [is] closing on

a project for Somerset County next week. I think it would be good to . . . meet with him."

At that time, Sussex County had been looking into solar energy and, according to County employees, would frequently receive proposals from solar energy vendors, but the County had not moved forward with any of those projects. According to then-County Chief Financial Officer ("CFO") Bernard Re, the County had rejected each of those proposals because they did not make financial sense for the County. The Director of the County's Division of Facilities similarly stated in his investigative interview that the County and his department in particular had been exploring various solar energy options, but had rejected all of them for financial reasons.

In fact, according to County Administrator Eskilson and CFO Re, earlier in 2010 Eskilson and Re personally had met with Morris County representatives about a potential solar energy project. Specifically, according to Re, Eskilson had asked Re to join him for a meeting with Morris County Administrator John Bonanni and Stephen Pearlman in the Morris County Administration Building. Following that meeting, Eskilson and Re decided not to present Morris County's solar proposal to the Freeholder Board or to others in Sussex County. Re stated in his investigative interview that he and Eskilson felt that the Morris Model project was simply "too rich" for Sussex County.

Re further felt that there was risk associated with the project. Eskilson similarly stated in his interview that he and Re were not enthusiastic about the project at that time.

Nonetheless, from the time that Freeholder Zeoli emailed Eskilson with the request to meet with Morris County officials, the County's entry into the Solar Project proceeded without objection. In January 2011, Zeoli became the Director of the Freeholder Board and, as described by Re, Zeoli "ran the Board with an iron fist." Re stated that Zeoli was interested in the County participating in the Solar Project and everything fell into place from there.

Records indicate, as confirmed by witnesses, that on February 10, 2011, Pearlman and Inglesino as counsel for the MCIA met with a group of representatives from the County, specifically, Zeoli, Eskilson, Re, the County's budget director, and another County freeholder. According to Zeoli, he had not previously met Pearlman. At the meeting, the participants discussed the County's possible participation in the Solar Project. Pearlman spoke about how the Morris Model works, and what the County's participation would entail. According to Re, Pearlman did most of the talking at the meeting and pitched the solar energy project as a "cannot lose" project. After the meeting, Zeoli directed County staff, particularly Eskilson, to proceed with formal action to move ahead with the project. From

that point, Pearlman stepped forward as the County's primary contact with the MCIA on solar energy issues and Inglesino stepped back. Pearlman participated in a series of meetings with County representatives to bring the project to fruition.

While Zeoli introduced the solar proposal to the County, in his investigative interview he disputed the notion that he acted aggressively in pushing the idea on others. Eskilson disputed that notion as well. Zeoli recalled that it was the MCIA lawyers who were aggressive in pushing the deal. According to Zeoli, he had reservations about the project. In particular, he felt the project was potentially inconsistent with his philosophy about the limited role of government. Nonetheless, he stated, he did not want to stand in the way of the project because, based on what he was being told, the project would be financially beneficial. Specifically, he viewed solar energy as a means to help local governments in the County reduce electricity costs and thereby keep their expenses low, which would help them in dealing with state property tax caps.

According to Zeoli, none of the professional staff at the County expressed any opposition to the County participating in the Solar Project. To the contrary, Zeoli described Eskilson as an enthusiastic proponent of the project. Eskilson's administrative assistant similarly stated in her investigative interview that, at least initially, Eskilson indicated to her

that he thought the project was a good idea. Zeoli further stated that CFO Re and County Counsel Dennis McConnell, as well as others, reassured him that this was a low-risk project. Moreover, Zeoli stated, none of the other County freeholders spoke out against the project or expressed concerns. In addition, Zeoli stated that Morris County's consultants repeatedly told him that there would be minimal risk to the County. Freeholder Board meeting minutes similarly indicate that the County's entry into Solar Project was not a controversial subject at that time. The project received relatively little attention relative to other Freeholder Board matters.

According to then-County Counsel McConnell, he and Re expressed reservations to each other about the project, but he could not recall sharing any of those concerns with the Freeholder Board. McConnell said the Freeholder Board simply did not ask him for his opinion about the project. McConnell elaborated that his concern at the time was that the County was guaranteeing the debt on the project, but the financial benefits of project performance would for the most part be received by municipalities and school districts in the County as opposed to County government itself. McConnell said he asked the MCIA's consultants why those municipalities and school districts were not providing the guarantee on the debt, but he never received

an answer. McConnell stated that he ultimately went along with the project without objection because Stephen Pearlman assured him that the County's guarantee would never actually be called.

Similarly, Re stated in his investigative interview that he originally was opposed to the Solar Project, but he did not formally register his objections because no one, including the County freeholders, ever asked him for his opinion. Re noted that from a statutory standpoint, his supervisor at the County was the Freeholder Board itself, implying that he simply adhered to the wishes of the freeholders to commence the project. Re explained in his interview that there were a number of reasons why he believed the County should not participate in the Solar Project, including: the large size of the project, the complexity of the project, the minimal benefit to be received by the County itself even if the project were to be successfully completed, the project was outside of County's core mission, the project was unusual, and the County had no experience with a project like this. Lastly, Re noted his discomfort in the County being totally dependent upon one man, Steven Pearlman, for information on and understanding of the project.

In response to questions about whether he was being driven by political goals, Zeoli stated in his investigative interview that he did not feel pressure, politically or otherwise, to "go with Inglesino and Pearlman." Zeoli further said that he never

spoke to Morris County Administrator John Bonanni about the project, stating that all communication with Bonanni was through County Administrator Eskilson. Zeoli similarly stated that he had no discussions with any Morris County freeholders about the project.

While Zeoli may not have been pressured to enter into the project, he acknowledged that he was looking at that time to foster good relations with Inglesino. Sending business to Inglesino's law firm could certainly be a way to further those relations. In any event, once Zeoli sent signals at the County that he was interested in the Solar Project, the project took on substantial inertia. There is no investigative evidence, however, that Zeoli personally sought or obtained anything of financial value in return for the County's participation in the project.

Once the substantive planning began for the Solar Project, Zeoli described his role as "hands off" with regard to project execution. He stated in his investigative interview that, in hindsight, he was too passive and trusting of the professionals handling the project. Zeoli stated that he put his trust in County staff to ensure that everything was being properly vetted and reviewed.

B. Vendor Selection and Execution of Contract Documents

In 2011, following the success of the above-mentioned earlier solar projects in Morris and Somerset counties, those counties and their respective improvement authorities commenced a second solar energy program. Sussex County joined Morris and Somerset counties in their efforts, and thereafter the three counties coordinated their efforts and jointly administered their respective solar energy programs.

As Sussex County does not have its own improvement authority and had not previously engaged solar-energy consultants, on March 1, 2011, Sussex County entered into a shared services agreement with the MCIA, through which the County was permitted to call on the expertise and services of the MCIA's professionals in connection with the solar project being developed. Those professionals included the MCIA's energy consultant, its engineering firm, its financial advisor, and its legal counsel. Specifically, the shared services agreement provided that "Sussex County hereby authorizes and directs the [MCIA] and the [MCIA] Consultants to take all actions in connection with the Renewable Energy Program . . . as if the [MCIA] Consultants were hired directly by Sussex County or a county improvement authority created by Sussex County."

The shared services agreement permitted Sussex County to hire its own professionals on the Solar Project as well, but the

County did not do so at that time. That decision would prove to have significant impact, as discussed later in this report. Sussex County did not vet the qualifications of the MCIA's professionals and had no information as to the process through which they had been selected or hired. In practice, the County found that it had only limited control over the MCIA's professionals. County officials reported in their investigative interviews that they had trouble obtaining information from those professionals during the project, including critical documents. CFO Re further alleged that Pearlman "misinformed" the County in response to questions County officials asked him about the project.

Once Sussex County confirmed its interest in participating in the Solar Project, County representatives conducted outreach meetings with municipalities and school districts in the County, led by Eskilson. According to Pearlman, he assisted in putting together this pool of local government units where solar sites would be constructed. Once a local government indicated interest in participating in the program, the MCIA's energy consultant stepped in to assess sites in that municipality or district.

In July 2011, the Freeholder Board voted on a County ordinance guaranteeing the bonds to be issued to fund the project. According to the minutes of that Freeholder Board

meeting, Eskilson “mentioned there are lots of safeguards built into this process” and referenced that there was “minimum risk moving forward.” Freeholder Director Zeoli similarly stated, according to the meeting minutes, that he was “convinced that the risk to the County is minimal.”

On September 8, 2011, the MCIA issued a Request for Proposals (“RFP”) on behalf of the Sussex County solar program, which was drafted by Pearlman and another attorney at his law firm. The RFP sought proposals for “a Developer of Photovoltaic Systems with respect to certain Local Government Facilities in the County of Sussex.” The RFP stated that the County’s solar program “seeks to develop photovoltaic and other renewable energy systems . . . for certain local government buildings, parking canopy and other structures, and lands . . . owned or controlled by local governments within and including the County.” The RFP set forth the participating 14 local governments and the corresponding 18 sites where solar panels were to be installed. Earlier in 2011, the MCIA and SCIA had issued their own solar RFPs, representing for those two counties the second tranche of solar panels to be installed.

The County’s RFP included extensive technical specifications for the project and referenced the contract documents that would need to be executed. The RFP set October 13, 2011, as the deadline for the receipt of proposals and

further established dates for site visits by potential bidders. Like the Somerset and Morris RFPs, the RFP issued on behalf of the County noted that the RFP's design concepts and technical specifications were "only a preliminary guide."

The County employs a Purchasing Agent whose job responsibilities include reviewing RFPs and related specifications before they are issued. In this case, however, the County's Purchasing Agent, Thomas Gildersleeve, as he explained in his investigative interview, was not consulted regarding those documents and never reviewed them. Joseph Biuso, the Director of the Division of Facilities at the County, who is responsible for overseeing construction, renovation, and facilities-related projects and vendors for the County, similarly stated that he had no involvement in the RFP process. He never saw the RFP before it was issued. Biuso said he suspected that he was not consulted because County decision-makers did not want anyone presenting any impediments to the project moving forward.

Although, according to an MCIA consultant, approximately six potential bidders had attended a pre-bid conference, Sussex County received a total of one response to the RFP as of the response deadline. That response was from a joint venture of two companies: Sunlight General Capital ("Sunlight") and Power Partners MasTec ("PPM"). The numerous other solar energy

companies that had approached the County in recent years with solar energy proposals did not submit responses to this RFP.

The Sunlight/PPM response provided that Sunlight would be the "lead entity" on the project and would sign the applicable legal agreements with the MCIA. Sunlight proposed that it would, in turn, execute a contract with PPM to act as the construction contractor on the project.

Sunlight had been formed less than two years before, and was comprised of five former directors at a large multinational bank headquartered in France. Those individuals had decided to form Sunlight to enter the growing solar energy market and develop solar energy projects. Sunlight ultimately participated in the Solar Project through various component companies operating under the parent Sunlight entity.

Power Partners was a contractor in the business of constructing wind and solar power collection systems. It had a corporate affiliation with MasTec, Inc., a national, publicly traded construction company. The Sunlight/PPM joint proposal included a price component, conceptual plans for the sites in question, and a chart reflecting expected production.

None of the County witnesses we interviewed recalled there being any discussion about the fact that only one proposal was received in response to the County's RFP, and what that might mean regarding the effectiveness of the RFP, the viability of

the project, or generating appropriate price competition among the vendor community. *See, e.g.*, NIGP: The Institute for Public Procurement, *Does the Procurement Process Always Result in the Best Bids,* at 6-7 (2013) (discussing importance of receiving maximum number of responses to RFPs and causes of failing to do so). In his investigative interview, the Director of the Division of Facilities at the County called moving forward after receiving just one proposal on a complex project like this "a prescription for failure."

In terms of why only one proposal was received, Pearlman stated in his investigative interview that getting the attention of solar developers at that time was challenging, especially for a complex program like this one. He stated that solar companies were generally very busy at that time. Pearlman also noted the uncertainty at the time associated with the market for solar energy credits, which is described more fully below. The attorney for another company that had considered submitting a proposal, but did not do so, told us that his client determined after a thorough analysis of the RFP that the finances on the project would not work as the project was framed.

Documentation indicates that a "Sussex County Evaluation Team" was created to evaluate any proposals received and make a recommendation as to the contract award. The members of that team were: Stephen Pearlman, another attorney at Pearlman's law

firm, two individuals from the MCIA’s engineering firm, two individuals from the MCIA’s financial advisory firm, three individuals from the MCIA’s solar consulting firm, and Eskilson, Re, and McConnell. Thus, 9 of the 12 members of the Evaluation Team stood to gain financially if the County were to move forward with the project.

Moreover, despite being listed as Evaluation Team members on the Evaluation Team’s October 2011 “Evaluation Report,” in their investigative interviews Eskilson, Re, and McConnell each stated that they had no awareness that they supposedly had been part of such a team. For example, McConnell stated that he did not have a role in putting the Evaluation Report together, he never reviewed it, and he did not attend any Evaluation Team meetings. He stated that he is disappointed that his name is listed on the document as being part of the Evaluation Team when he was not. Similarly, Re stated that he does not remember being a part of the Evaluation Team or ever meeting with other team members. He stated that he does not know why his name is listed on the document.

Pearlman stated that he believed that the report was probably drafted by someone at the MCIA’s solar consulting firm. Thus, the County’s assessment of the proposal received, including the benefits and risks of going ahead with the Solar Project, was put together by individuals who were County

outsiders who stood to gain financially from the project proceeding.

The Evaluation Report stated that the proposal that was received contemplated the MCIA issuing $26 million in bonds on behalf of and to be guaranteed by Sussex County, combined with "self-financing" by Sunlight through an equity capital investment of $7.6 million. Ultimately, however, that equity consisted of PPM's agreement to defer payment on 30 percent of its estimated construction price until receipt of certain federal grant funds. The Evaluation Report stated that by including that self-financing, the "Respondent provided a financial structure limiting the financial risk to Sussex (as the guarantor of the bonds)." Protections such as the self-financing and other project investments made by Sunlight would, the report stated, "virtually eliminate the potential for a Sussex deficiency should Sunlight/MasTec default." The report recommended accepting the proposal, noting that the project would result in energy cost savings for participating local government units.

As set forth in the RFP response and project documentation, the Solar Project was designed such that various school districts, municipalities, and other public entities would allow the MCIA to engage a contractor to construct solar facilities on buildings or land owned by those entities. In return, the

entities contracted to purchase electricity generated by those solar sites for 15 years at an agreed-upon discount. The construction of the solar sites was to be paid for, in part, by a series of bonds to be issued by the MCIA.

As part of that arrangement, Sunlight was to manage sales of "solar energy credits" it received under the solar renewable energy credit ("SREC") market in New Jersey, with credit prices fluctuating based on principles of supply and demand. New Jersey requires electric utility companies to buy these SRECs on an open market from SREC owners, which are usually developers of solar projects. In that context, solar project developers like Sunlight and others entered the New Jersey solar market creating an available supply of SRECs.

In addition, Sunlight would be able to take advantage of a federal government grant made available under the American Recovery and Reinvestment of Act of 2009, equal to 30 percent of the eligible costs of solar energy projects. This grant was known as a "section 1603" grant. As the beneficial owner of the solar projects for federal tax purposes, Sunlight (as opposed to the counties or the MCIA) was entitled to collect this federal grant money.

It appears that the unique structure of the Solar Project, which was set up in a way such that the contractor and not the public entity landowner itself was technically the owner of the

project, resulted from the fact that Sunlight as a private operator would be entitled to receive the section 1603 grant while public entities were not legally permitted to do so. In other words, while the applicable federal law was seemingly designed to entice solar investment in the form of private capital, the complicated deal structure used in this transaction allowed the project to receive those federal incentives even though it was largely public money ultimately at stake.

Aspects of the section 1603 grant program were set to expire by the end of December 2011. Therefore, any qualifying project had to close before then and establish that a certain amount of materials for the project had been acquired by that time. As a result, the time frame for the Solar Project's RFP process, the receipt and review of proposals, the sale of the bonds, and the execution of contract documents was very limited. At a May 2011 Freeholder Board meeting, County Administrator Eskilson referred to the schedule as "extremely aggressive," according to the minutes of the meeting. Biuso noted in his investigative interview that the County's quick progression through the steps needed to enter into the Solar Project contrasted with the more ponderous approach the County usually adopts in taking on new projects.

None of the County officials or employees we interviewed stated that they are aware of any due diligence that anyone at

the County performed with respect to Sunlight, PPM, or the relationship between those two companies. Freeholder Zeoli acknowledged that, in hindsight, he should have had a better understanding of those issues. He stated that he regrets not being more involved.

From October to late November 2011, Sunlight and the MCIA negotiated the contract documents for the Solar Program. In December, the parties entered into a series of lengthy and notably complicated legal agreements, consisting of hundreds of pages, to effectuate the County program. Those agreements included: (1) site License Agreements between the MCIA and each local government unit, (2) a Power Purchase Agreement between the MCIA and Sunlight, and (3) a Lease Agreement between the MCIA and Sunlight.

Each License Agreement provides, among other things, that the local government unit has licensed or will license to the MCIA and its designees one or more properties for the construction, operation, and maintenance of a solar generating facility ("SGF"). The local government units also agreed to pay for the electricity generated from the SGFs at discounted, pre-determined rates for a period of 15 years.

The Power Purchase Agreement ("PPA") provides, among other things, that: (1) Sunlight, its contractors, and subcontractors would be designated as permitted licensees under the respective

License Agreements, (2) SunLight would complete the design, engineering, permitting, acquisition, construction, start-up, testing, operation, and maintenance of all SGFs, and (3) MCIA would nominally purchase the electric power generated by the SGFs at fixed rates set forth in schedules to the PPA, but would assign the right to purchase, and obligation to pay, to the local government units under the License Agreements.

The Lease Agreement between the MCIA and SunLight provides, among other things, that: (1) Sunlight will design and construct all of the SGFs, (2) the MCIA will finance a portion (approximately 70 percent) of the costs of the development, design, and construction of the SGFs through the issuance of taxable municipal bonds, (3) the MCIA will take title to the SGFs, (4) the MCIA will lease the SGFs to Sunlight for a minimum of 15 years, and (5) Sunlight may purchase the SGFs at the end of each Lease Agreement for nominal consideration.

Though it agreed to guarantee payment on the project bonds, Sussex County was not a party to any of these agreements. Similarly, though PPM was the company that would handle the solar construction, it did not enter into any agreement with the counties or their improvement authorities. PPM's contractual obligations were directed solely to Sunlight, through a contract between those two parties known as the Engineering, Procurement and Construction ("EPC") contract. The EPC contract provided

that PPM was required to design, engineer, construct, and install all Sussex County SGFs by December 14, 2012. The EPC contract contemplated that Change Orders could be used to adjust the scheduled completion date.

The SCIA and MCIA subsequently issued municipal bonds in the aggregate principal amounts of $26,790,000, $34,300,000, and $27,700,000 for the Somerset, Morris and Sussex solar projects, respectively. The bonds carried an interest rate that is lower than a solar developer could otherwise access in the private debt market, primarily because the counties each guaranteed the bonds issued for their respective solar program.

The primary source of repayment of the bonds was to be the lease payments to be made by Sunlight under the Lease Agreement. The County guaranties would thus be called upon only if Sunlight did not make its lease payments on time and in full. The lease payments under the Lease Agreement were set to equal the payments on the bonds. In turn, the lease payments (and thus the bond payments) were to be funded by revenue earned from the solar facilities. Sunlight expected that the funds to make these lease payments would come from the sale of electricity to the local units at a fixed price, along with the sale of SRECs to utilities at a market-based rate. As the arbitration panel later called upon to arbitrate the ensuing dispute among Sunlight and PPM noted, it was therefore of vital importance

that the SGFs were built and turned on in a timely fashion, and that they generated the expected amount of electricity. Under the contract documents and bond documents, Sunlight was provided with approximately one year from the date of the issuance of the bonds to complete development of the solar projects and bring them on-line.

At a Freeholder Board meeting on January 11, 2012, Eskilson reported, according to the meeting minutes, that a kickoff meeting on the Solar Project had taken place on January 10, that the developer would be proceeding to make visits to all of the projected solar sites to inspect ground conditions, and the project would be completed within one year.

C. Project Performance

As found by the panel later called upon to arbitrate disputes between Sunlight and PPM[1], disagreements quickly arose between those two companies. Construction progress was slow. The project's size and geographic scope, the non-viability of a number of the solar sites that initially had been selected, and the number of parties involved in obtaining permits and approving specific work for the sites all contributed to delays, and then led to finger-pointing between Sunlight and PPM. One witness further described that the engineering firm initially

[1] Many of the facts set forth in this section are recounted from the findings of the arbitration panel.

being used by Sunlight seemed overwhelmed by the amount of work it needed to complete with regard to design drawings, and their initial drafts had to be re-worked. Timing issues associated with the school year in connection with placing solar panels at schools added another layer of complexity to the construction process.

According to Stacy Hughes, one of the principals of Sunlight, these issues were exacerbated by personnel changes at PPM. Specifically, many of the people at PPM who Sunlight had been dealing with left the company following the merger between Power Partners and MasTec. Thus, as the above-mentioned construction challenges were arising, the people at PPM with whom Sunlight had a relationship were no longer there, according to Hughes. Yet, the two companies were tied together by virtue of their joint proposal.

While the two companies were trying to manage these challenges, SRECs, whose market price was more than $600 at the time of Sunlight's proposal submission, fell to approximately $200 in December 2011 and to approximately $50 by October 2012. This resulted in a drastic decrease in the revenue to be generated by the construction of the solar sites and overturned the financial models that had served as the basis for the project. Sunlight tried various cost-cutting and other means to compensate for this loss, which led to further disputes between

Sunlight and PPM. The solar locations themselves continued to be changed throughout these discussions, and the parties could not reach agreement on key issues, including how to address the fact that the amount of electricity the sites would generate was turning out to be less than anticipated. Sunlight began assessing damages for what it viewed as PPM's delays and deducted those damages from amounts it paid to PPM. The project continued to experience substantial delays in construction.

In view of the above and limitations concerning permitted uses of project funds, the counties and Sunlight amended the program's contract documents in December 2012, through what was referred to as Consent Amendment No. 1. That amendment expanded the permitted uses of project bond funds to include, among other things, certain legal fees, lease payments, and administrative expenses, and extended the anticipated completion date for the project to July 1, 2013.

Following a series of unsuccessful attempts to resolve their ongoing disputes, Sunlight and PPM ultimately commenced arbitrations against each other. In addition, in early 2013, PPM filed lien notices on the solar projects, leading to extensive litigation among the parties regarding the propriety of those liens. Those parties thereafter litigated other peripheral aspects of their dispute as well in various state and federal court proceedings.

In May 2013, PPM notified Sunlight that it was suspending work on the solar projects in all three counties. Sunlight and PPM each contended that the other had defaulted on its obligations under the EPC contract.

During January and February of 2014, the arbitration panel held twenty days of hearings with witness testimony. The arbitration panel ultimately described the problems encountered by PPM and Sunlight with project construction as follows:

> [N]either party appeared to completely understand the scope and complexity of this project nor the performance requirements set forth in the contract when they negotiated and entered into this agreement. This is especially true in light of the parties' . . . decision in December 2011 to enter into two additional large projects, Morris and Sussex, which involved additional scores of SGF's despite the challenges and obstacles that were being encountered during the first four months of th[e Somerset] project. Trying to design, construct and connect, within a year, the proposed ninety SGF's at sites where everyone knew an unknown number of them would have to be modified or replaced was a daunting task to say the least. Trying to accomplish this while dealing with schools, local governmental authorities and innumerable administrative bodies became almost impossible within the proposed time frame. Both parties appeared to be so desirous of getting involved in these projects, which because of the Federal government grant program had to start before the end of 2011, that they never adequately focused on what would be entailed. . . .
>
> [N]either party appeared to have a sense of urgency during the first several months of the project. This, in part, was probably because the parties had little or no experience with

> this type of multi-site solar generating project. Furthermore, Sunlight did not have its own technical or construction expertise involved in this project until the end of October. . . . PPM was in the process of an intra-corporate reorganization that appeared early on to affect the supervision and planning needed for the project. . . .
>
> [W]hen confronted with the economic realities that their SREC price assumptions underlying Sunlight's obligation to make payments pursuant to the respective lease agreements had so negatively changed that it could not meet this obligation without finding other sources of revenue, [Sunlight] started a program to find those monies in the bond funds . . . and the 1603 grants, both of which were meant to be used to pay PPM's construction costs.

In August 2014, the arbitration panel concluded that Sunlight was required to pay PPM more than $60 million in damages.

D. The County's Response to Project Performance Issues

As the above-described disputes between Sunlight and PPM became increasingly significant, the role of Sussex County officials in the project itself continued to be a limited one, despite the significant amount of public funds that had been committed to the project. Witnesses we interviewed agreed that there was simply no County official or employee who was managing the Solar Project on behalf of the County.

Then-County CFO Re noted that Joseph Biuso, who, as discussed above, is generally charged with overseeing County

construction projects as Director of the Division of Facilities, was not involved in the project, which seemed strange to Re. In this regard, Biuso stated in his interview that he had offered his help to Eskilson, but Eskilson stated that the MCIA was taking care of those responsibilities. Biuso stated that the absence of a role for his division on a project like this was unusual.

Similarly, the County's Engineering Department was entirely uninvolved in the project. In his interview, William Koppenaal of the Engineering Department noted that his department had no involvement in the decision to participate in the Solar Project or in overseeing construction. The department instead focused its efforts on unrelated road and bridges issues. County management did not solicit the Engineering Department's views on the Solar Project until several years into the project, when the department was asked about issues relating to project management after PPM had ceased its construction efforts. Despite the enormous complexity of the project, witnesses described Eskilson, Re, and McConnell as having sought little or no help from anyone else at the County with respect to administrative, financial, and legal issues connected to the project.

County employees who were interviewed as part of this investigation frequently stated that the project management/ construction management function was being carried out on behalf

of the County by the MCIA's energy consultant, Gabel Associates ("Gabel"), who was providing services to the County through the shared services agreement the County had executed. Along these lines, scope-of-services proposals submitted by Gabel to the MCIA state that Gabel would "oversee project construction" and provide "project management services" such as providing "weekly supervision and management specific to construction projects." However, a (now former) Gabel vice president who worked on the Solar Project stated in his interview that Gabel actually had not performed that particular function. He stated that he had understood that Gabel's role was simply to be a liaison or intermediary between the County and the vendors performing the work, and that Gabel did not provide any project direction or similar oversight as part of its efforts. Similar admissions are found in Freeholder Board meeting minutes.

Eskilson and Re told us, moreover, that no one at the County was directly supervising the work of the MCIA's professionals on the project. Eskilson could not recall, for example, anyone at the County who was reviewing those professionals' fee invoices.

Along those lines, County Counsel McConnell stated in his investigative interview that he began to question what exactly the County was paying the MCIA's professionals for and what work was being performed by them. "Large sums [of money] were being

paid out and [no one] could . . . justify what for," he stated. "We were not sure what we were paying for." As Re similarly noted in an internal County email on April 3, 2013, "What concerns me is that our legal fees and engineering fees continue to go even when the construction is slowing to a snail's pace."

One reason for the lack of County oversight of the project is that no one on staff at the County had the necessary expertise to do so. The investigation did not identify any County official or employee with any degree of expertise in the area of solar energy. Nor did the investigation identify any County official or employee with knowledge of the SREC market, whose performance was of vital importance to the success of the Solar Project. For example, when we asked County Administrator Eskilson if the performance of any of the MCIA professionals working on the project was subpar, he responded by stating that he does not know what subpar would be for those professionals. Eskilson further stated in his interview that he does not recall there being any discussion at the outset of the project regarding the manner in which the SREC market operated.

Similarly, CFO Re acknowledged having minimal knowledge of the SREC market, including as to whether the County could have locked in an SREC rate early in the project. Re stated that even the size of the project was unusual for the County, noting that this was the largest public project he had ever worked on.

According to records of a Freeholder Board executive session that took place in 2014, Re ultimately conceded with regard to the solar transaction that he "found out after the fact how it really works."

Other County contractors similarly acknowledged in investigative interviews the absence of necessary expertise at the County with regard to the Solar Project. For example, the County's bond counsel, John Cantalupo, Esq., noted that Re, Eskilson, and McConnell were acting for the County on the project, but they clearly were not comfortable with the subject matter. As far as Cantalupo could discern, there was no one who was advising the County on the financial aspects of the project. Re similarly noted in this regard that in theory the MCIA's financial consultants were available to the County, but these consultants "stiff armed" Re on information requests when he was trying to review financials related to the project.

It was only once the project had essentially collapsed that the County brought in its own financial advisor. Re acknowledged that, in hindsight, the County should have engaged its own advisor far earlier in the project. Ultimately, according to Cantalupo, County employees simply tried to do too much on their own.

Similarly, David Weinstein, Esq., the outside counsel who was later hired by the County to assist with settlement of the

solar dispute, noted that he had the sense that McConnell was overwhelmed by the legal issues confronting him, as there was a lot of money at stake and the issues were complex and vast.

The information that the County received regarding the project generally was provided by Stephen Pearlman, who was counsel to the MCIA and was providing advice to the County as well, as permitted by the above-referenced shared services agreement. Re described the County's approach to the Solar Project as "All faith in Steve." Cantalupo, in his role as the County's bond counsel, told us that he advised Re and McConnell several times that they needed to hire their own advisors to assist them, as opposed to relying on Pearlman. Nonetheless, the County continued its singular focus on Pearlman for project information and assistance. County Counsel McConnell said his role on the legally complicated project was fairly minimal, describing the project as Pearlman's "ballgame, not mine."

The County officials we interviewed uniformly viewed Pearlman as the County's lawyer on the project. Other parties involved in the project said the same in interviews. When we asked Pearlman himself whether he was acting as counsel for the County, however, he replied, "Good question." He contended it was a "grey" area. Nonetheless, Pearlman billed the County for his services. Specifically, he divided his legal fees among the three counties such that each county was charged one-third

of his total fee, unless Pearlman or his firm completed work that was limited to a specific county.

The ability of the County to intercede or assist in the dispute between Sunlight and PPM was further hindered by the County's lack of legal standing in the operative contract documents. For example, the County had no contract with Sunlight, only the MCIA did. The County was even further removed contractually from PPM; neither the County nor the MCIA had a contract with PPM, only Sunlight did. Thus, though a number of witnesses we interviewed criticized the actions of PPM, the County was two levels removed from having any explicit contractual ability to act on those issues. In short, the County was underwriting the Solar Project, but was not in a position to affect it or protect it.

Typically, when a contractor on a public construction project is unable or unwilling, for financial reasons or otherwise, to complete the project, the public entity may resort to the performance bond that has been posted by the contractor. A performance bond is a commitment made by an insurance company or bank, known as a "surety," to compensate the contracting entity financially or otherwise carry out the completion of the project in cases where the contractor defaults on its obligations. *See Ribeira & Lourenco Concrete Const. v. Jackson Health Care Assocs.*, 254 N.J. Super. 445, 451 (App. Div. 1992).

Under New Jersey law, a performance bond must be posted for public works projects, including for improvements being made to public buildings. *See* N.J.S.A. 2A:44-143; *Unadilla Silo Co. v. Hess Bros.,* 123 N.J. 268, 277 (1991). The contractor is required to secure the performance bond commitment from the surety at the outset of the project. The bond is designed to protect public agencies (and laborers) from issues such as insolvency of the general contractor. *Unadilla Silo Co.,* 123 N.J. at 276-77.

In the case of the Solar Project, a surety bond was posted that contained a commitment from a well-known, national insurance company. While the bond technically complied with legal requirements, the terms of the specific bond that was posted made the County's invocation of the bond difficult, if not impossible. First, despite the massive financial commitment the County had made on this project, the County was not listed as a beneficiary (known as the "obligee") on the bond. Instead, the MCIA and a Sunlight-related entity were listed as the obligees. Thus, the County had no explicit standing to invoke the bond or to seek compensation under the bond. It was reliant in this regard on the MCIA. *See* N.J.S.A. 2A:44-143(b) ("Only the obligee named on the bond, and any subcontractor performing labor or . . . providing materials for the construction . . . shall have any claim against the surety under the bond.").

The bond itself further stated, "No right or action shall accrue on this bond to or for the use of any person or corporation other than the OBLIGEE named herein or their heirs, executors, administrators, or successors of the OBLIGEE."

Second, as per the terms of the bond, the entity whose non-performance would have entitled the MCIA to invoke the bond was not Sunlight, which was the entity the MCIA had a contract with, but rather was PPM, which had posted the bond and was listed as the "principal" on the bond. Put more directly, the entity with whom the MCIA had contracted (*i.e.*, Sunlight) did not post the bond. In an investigative interview, counsel for Sunlight noted his understanding that the counties had not expressed any preference regarding which party posted the bond.

Third, by its terms, the bond covered only those obligations set forth in the Power Purchase Agreement, and not those set forth in other operative agreements. However, PPM, the principal under the bond, was not even a party to the Power Purchase Agreement. Thus, arguably, the surety could be called upon to save this project only if it could somehow be found that PPM defaulted on a contract to which it was not a signatory.

Fourth, the bond explicitly permitted the surety, as an option in responding to an alleged default by PPM, simply to "notify the OBLIGEE of the denial of liability in whole or in part citing reasons therefor." Thus, if MCIA had pursued a

claim against the surety, the surety could have declined to act on the claim by citing the arguments that PPM already had raised in its arbitration against Sunlight, most of which the arbitration panel ultimately endorsed.

The terms of the performance bond posted by PPM were consistent with the parameters set forth in the RFP issued by the MCIA on behalf of the County. Thus, the terms of the bond should not have been a surprise to any of the County officials involved with the project. We therefore asked County representatives what led them to agree to these particular terms. Those interviewees, including Eskilson, Re, and Zeoli, told us uniformly that they were not aware of these terms and that there had been no discussions of these issues in connection with the RFP or at any other time leading up to the commencement of the project. For example, Zeoli stated in his investigative interview that he was simply aware that a performance bond was in place. His understanding was that the bond was adequate from the perspective of the County, and without someone flagging a concern from a legal perspective, he would not have known or noticed otherwise.

These statements raise questions as to why these issues were not raised by McConnell in his capacity as the County Counsel. In reviewing County emails, it was noted that at McConnell's request, a copy of the performance bond was emailed

to him by an attorney at Pearlman's firm on June 12, 2014, more than two-and-one-half years after the bond was executed. In his investigative interview, McConnell confirmed that until he received that June 2014 email, the County did not have a copy of, and McConnell had not seen, the executed performance bond. In other words, only when problems on the Solar Project began to threaten the viability of the project did McConnell request and review the executed bond.

McConnell admitted in his interview that he had believed that the County had an adequate performance bond in place but in reality it did not. He further stated that the fact that the principal on the bond was PPM as opposed to Sunlight "killed the County" in its efforts to address the problems on the project.

With McConnell entirely unaware of the problems with the performance bond until 2014, the investigation's focus on this issue turned to Stephen Pearlman, who was the primary drafter of the project documents. In his interview, however, Pearlman declined to answer most questions regarding the performance bond, citing the attorney-client privilege in connection with his representation of the MCIA. Specifically, he declined to answer questions regarding who posted the bond and why, whether he believes the performance bond was appropriate and adequate, whether he believes the County or the MCIA could have or should have invoked the bond, and why the MCIA did not invoke the bond.

Pearlman stated that both Sunlight and PPM had requested that the performance bond not be invoked, but he declined to provide further details as to these issues based on the attorney-client privilege.

Pearlman did, however, provide historical information that sheds some light on the origins of the performance bond that was posted on this project. He noted that before the first Morris County solar project in late 2009 (discussed above), Morris County had attempted a similar solar project earlier that same year. Pearlman stated that that earlier procurement was terminated after the bids came back on the project. Specifically, because the bids came back higher than expected, it was determined that the deal would not be economical for Morris County. In the wake of that failure, Pearlman explained, he met with members of the developer community and learned that a considerable portion of developers' bid price was connected to the cost of posting financial security on the project, which was substantial because of the risky nature of these projects. Pearlman stated that as a result, he became more flexible regarding the nature of the financial security required to be posted on future solar projects.

E. Settlement of the Parties' Legal Claims

In the wake of the arbitrators' decision that Sunlight was required to pay PPM more than $60 million, Sunlight faced possible bankruptcy. In the investigative interview of Sunlight principal Stacy Hughes, she noted that Sunlight and the three counties were by that time "burning through a lot of money" and "that got everyone to the settlement table."

According to witnesses, during the course of those settlement negotiations it became clear that Sussex County's representatives had a different strategic view than that of Morris and Somerset counties. That is, while Sunlight, Morris County, and Somerset County indicated considerable willingness to continue to press their position against PPM through litigation, Sussex County's representatives were more anxious to arrive at a deal with PPM that would re-start solar construction as soon as possible. That may have been a result of the fact that as of the time PPM ceased project construction, fewer solar facilities had been constructed in Sussex County as compared to the other counties.

The counties' varying settlement views became particularly obvious during a settlement-related meeting that took place around Labor Day of 2014. During that meeting, according to witnesses, PPM rejected a settlement offer that was made by the counties, which caused representatives from the other parties to

leave the meeting, except Eskilson, who on behalf of Sussex County stayed behind to speak with PPM's counsel about a possible deal. As recounted by Eskilson himself to the Freeholder Board in an executive session shortly after that Labor Day meeting, according to County records, "[P]aths were starting to diverge; Sussex County's circumstances are entirely different from Somerset and different enough from Morris County to make a difference. . . . Sussex County has gone along with the other two counties and up until now it is not as noticeable until you put the numbers in front of you that Sussex County is different . . . ."

Even with the benefit of hindsight, the various parties to the settlement discussions continue to have very different views as to the wisdom of Sussex County's settlement approach and subsequent efforts. One lawyer involved in those negotiations stated in an investigative interview that Sussex County "threw up the white flag very quickly" and ultimately paid more in the settlement than it would have had it remained more closely aligned with the other counties. On the other hand, a different approach might have rendered construction of the solar facilities even more out of reach. The bottom line is that by that point in time, Sussex County had no "good" options, as a result of the situation it faced following all of the issues discussed above.

Sussex County continued to be hindered during this time by its reliance on the MCIA's professionals. More specifically, as the counties' respective motivations and interests began to diverge, the person who Sussex County had viewed as their attorney on the Solar Project, Stephen Pearlman, also was the attorney for the MCIA. Thus, from the County's point of view, its own lawyer was now representing a position in settlement discussions that the County itself did not endorse and, in fact, specifically opposed. For example, CFO Re stated in his interview that he felt that Pearlman was acting contrary to the County's interests in the course of settlement discussions. As Pearlman himself acknowledged in his investigative interview, at that point the County essentially stopped calling him for legal advice.

Pearlman stated in his interview that the counties' interests had been aligned until that point, but he acknowledged that by Labor Day of 2014 that was no longer the case and that the situation had become adversarial. Pearlman stated that following that shift, he did not act as counsel for Sussex County. Eskilson stated, however, that even during settlement discussions he viewed Pearlman as the County's lawyer. He further stated that, in hindsight, he perceives problems with Pearlman having served, in Eskilson's view, as counsel to Sussex County and the MCIA. Eskilson said he does not recall Pearlman

at any time alerting the County to these dual representation issues, including during the settlement talks that landed Pearlman's clients on different sides of the negotiating table.

Sussex County finally engaged its own solar legal counsel in September 2014, after PPM commenced an action in federal court to confirm its arbitration award. Specifically, the County engaged the services of the law firm of Archer & Greiner ("A&G"). A&G filed a motion on behalf of the County to intervene in that federal court action so that the County could assert its own position regarding the disputes between the parties. The court denied that motion. Thus, once again, the County's legal separation from much of the solar transaction limited the County's ability to affect the resolution of the program in which substantial public funds had been invested.

In his investigative interview, the lead A&G counsel on this matter, David Weinstein, Esq., said he advised the County to hire its own financial advisor to conduct financial modeling in connection with the settlement analysis. The County then engaged a financial advisor for those purposes. Weinstein and the financial advisor counseled the County regarding potential settlement terms, and McConnell remained engaged in the settlement negotiations and decisions as well. Ultimately, the parties came to an agreement on settlement terms, in which the three counties essentially agreed to bail out the project.

Specifically, at a public meeting on February 25, 2015, the Freeholder Board passed Resolution 109-2015, which authorized the settlement agreement by a vote of three to two. Under the terms of the agreement, Sunlight was required to pay approximately $521,000 to PPM in back payments owed. Moreover, Sunlight would pay the County approximately $1 million. In turn, the County was required to make a payment of approximately $12 million to PPM, in addition to the payments to be made to PPM by Morris and Somerset counties.

For technical reasons associated with applicable federal grant rules, the counties needed Sunlight to remain, at least in name, associated with the Solar Project to maintain the project's eligibility for the section 1603 grants. Thus, as part of the settlement, Sunlight agreed to cooperate in submitting section 1603 grant applications as required for solar facilities that had been constructed as well as for the then-unbuilt portions of the project.

As to those unbuilt portions, the settlement agreement provided that the decision whether to continue the solar build-out would be made by the County. The County received the ability to select subcontractors to perform the build-out work and to determine the scope of that work.

The settlement agreement also contained provisions regarding existing, unused solar panels and how they would be

paid for and credited to the County. It further made a bridge loan from PPM available to the County. The settlement-related documents further referenced additional bonding to pay for the project and set forth circumstances under which after the solar projects are completed, the County can become the owner of those projects if it chooses to do so. The agreement also gave the County control over the sale of project SRECs.

The settlement agreement contained typical release language pursuant to which the County agreed not to bring further claims against Sunlight or PPM and vise-versa. In addition, according to witnesses, shortly before the finalization of the settlement documents the MCIA presented to the County an additional Release of Claims, under which the County would release the MCIA itself, as well as Morris County and its "attorneys," "financial advisors," and "consultants."

McConnell said in his interview that the latter release was added to the settlement at the "last minute," and that it came from Pearlman. McConnell believes that Pearlman drafted the release. The release almost "blew up the settlement," according to McConnell. Re noted that the County was told that the MCIA would not settle unless Sussex signed the release. Thus, at a moment when time was of the essence in consummating this complicated, multi-party transaction, these County employees explained, the County was presented with a release by someone

who had been the County's own lawyer on the Solar Project, with provisions designed to protect that lawyer and his other client from liability.

Weinstein noted that McConnell attempted to persuade the MCIA/Pearlman to re-negotiate the terms of the release, but they refused, though Pearlman's new law firm instead agreed to a 20 percent reduction in outstanding legal fees owed to it by the County. The County then executed the MCIA release.

F. Post-Settlement Build-Out

Following the settlement, the County opted to move forward with construction of the solar sites that had not yet been built. County officials reported in investigative interviews that even after the settlement, the project continued to face substantial and oftentimes frustrating challenges.

Within several months of the February 2015 settlement, the County administrator, County counsel, and County CFO each ended their employment at the County. Current County staff reported having difficulty seizing effective control of the project. For example, County Counsel John Williams noted that when he began his employment with the County, the County did not have a complete set of the final, legally operative project documents, which he ultimately was able to obtain from Stephen Pearlman's law office. Similarly, County officials had trouble obtaining

information about how vendors that had been engaged for the post-settlement build-out had been selected.

Vanguard Energy Partners LLP (“Vanguard”), a national solar construction firm, took over from PPM and completed the solar build-out. As had been the case in the initial set of contract documents signed in 2011, the EPC contract signed by Vanguard was not with the County, but with Sunlight, who in name remained associated with the project for the reasons stated above. Similarly, the newly appointed “owner’s representative” on the project, whose responsibilities included “bi-weekly supervision and management” of the remaining construction, contracted with Sunlight, but not with the County. County Counsel Williams reported that the County continued to have minimal control of the project under these contracts. He stated, for example, that public officials were disappointed with, and unable to address, aspects of the manner in which the solar panels were situated at some sites.

Completion of the construction was further hindered by local governments continuing to drop out of the project. The Solar Project had become a subject of substantial derision in the County by this time, which had an effect on the willingness of third parties to participate in it. As a result of the drop-outs, the County had to identify alternate sites for solar panels in order for the project to generate the projected

electricity. That, in turn, led to consideration of inferior locations that previously had been rejected because of, for example, solar line-of-site issues. The ultimate results were further delay, increased costs, and decreased kilowatt output.

Construction of the project finally came to an end in December 2016, with approximately 80 percent of the anticipated post-settlement build-out able to be completed in terms of electrical output. The total electrical output for the project is approximately 90 percent of what was expected at project inception.

While kilowatt output was less than projected, the cost to the County exceeded all expectations. Specifically, though the Solar Project was not expected to result in any County expenditures, in total the County has paid or will pay out in future years more than $26 million in connection with the project. Most of those expenditures represent the County's fulfillment of its guarantee on bond commitments that had been made. The County will be making payments to fulfill those obligations for the next decade.

The current County CFO reported in his interview that aside from that financial commitment itself, project expenses have made County budgeting challenging because of the difficulty of predicting future financial consequences of the project, stemming, for example, from volatility in the SREC market. The

above-mentioned County costs also do not include imputed expenses associated with the thousands of hours County staff has devoted in recent years to attempting to manage the Solar Project and its consequences. For example, County Counsel Williams estimated that he has devoted 40 percent of his time at the County to the Solar Project.

V. Conclusions

In the course of the Solar Project, the County was the victim of misconduct, negligence, and various other failings by multiple parties. As noted above, potential civil claims against those parties have been addressed with the County.

The failures of the construction aspects of the Solar Project resulted from a combination of factors, as found by the panel of arbitrators. These factors included the crash of the SREC market; personnel turnover within PPM; the massive size of the tri-county solar project itself; latent issues with construction sites causing change orders, cost overruns, and delays; ensuing confrontations between Sunlight and PPM; and the need to move quickly through these challenges and various other complicated issues in light of federal grant deadlines.

Many of the significant failures on the part of the County itself, however, happened before construction even began. First, the County entirely failed to understand the significant

risks associated with this project. In multiple respects, the project was highly speculative, particularly in its dependence on the strength of the volatile SREC market. Yet, no one at the County had a comprehensive understanding of the operation of the SREC market or its speculative nature. No one at the County, moreover, made any effort to become adequately informed about that market or to look for ways to mitigate the related financial risks. Similarly, from a legal standpoint, perhaps in part because of the complexity of the operative legal documents, no one at the County understood the nuances of the solar transaction itself and the various ways in which the County faced legal and other risks. More generally, no one at the County, even though they were acting in good faith, appears to have fully understood the gamble being made with the tax dollars of Sussex County residents.

The New Jersey Local Fiscal Affairs Law, N.J.S.A. 40A:5-1 *et seq.*, contains provisions designed to preclude local government entities from engaging in high-risk investments. *See, e.g.*, N.J.S.A. 40A:5-15.1. This solar transaction, though legally permissible, nonetheless exposed the County to significant market risk, which no one at the County appeared to recognize.

Even though it faced such financial risk and was essentially underwriting the project, the County was so removed

from the transaction from a legal standpoint that it became little more than an observer of the project, unable to affect project performance. As a result, when there were problems with contractor performance, the County was not in a position to respond. Even late in the project, responsible County officials did not seem to recognize that dynamic or understand its implications. There is no evidence, for example, that the County's legal counsel at the time had a discussion with other County officials regarding these issues.

Moreover, the County made no effort to re-insure the tremendous risk that it was taking on. For example, it allowed the performance bond on the project to be drafted in a way that, though legally permissible, did not mirror usual conventions. The County was not listed as a beneficiary under the bond, and was three levels away from a contractual standpoint from the only entity whose default could trigger invocation of the bond. That entity, moreover, was itself not a party to the contract it would have to default on in order for the bond to be invoked. No one at the County was aware of any of these issues. Several years into the project the County Counsel did not even have a copy of the executed bond itself.

Nor did County officials have enough experience with a complex project like this to be in a good position to manage it. Through the course of much of the project, there was simply not

enough expertise brought to bear from the County's perspective when solar decisions were made by the County. Among County employees, that expertise was lacking from a legal perspective, a financial perspective, and in terms of the solar energy market itself. Employees at the County who could have assisted, or at least advised the County as to what outside resources would be needed to assist, were cordoned off from the transaction, apparently intentionally, including Facilities personnel, Engineering personnel, and Purchasing personnel.

Thus, when only one response was provided by the entire solar marketplace to the RFP on the project, no one involved in the project knew enough to express, or had an interest in expressing, a concern. No one at the County "kicked the tires" to understand why the many companies in the booming solar energy business declined the opportunity to participate in the project. No one at the County thoroughly vetted the transaction itself or the companies behind the one response that was received. Moreover, no one at the County made any responsible attempt to serve as a project manager, or point of accountability, on the project, or to ensure that someone else was doing so.

Instead, the County relied on third parties whose fiduciary responsibilities to the County were unclear. When those individuals made assurances about the project involving minimal risk, County officials accepted those representations at face

value, seemingly without question or analysis. The County became completely reliant, for example, on counsel for the MCIA for project information and related legal and financial assessments. As former Freeholder Zeoli succinctly noted in his investigative interview, “In hindsight, we could have been better stewards of many things.”

By the time the County brought on its own legal and financial professionals for advice, the financial consequences of the project’s failure could not be avoided. By that time, the decisions to be made by the County merely differentiated between degrees of financially disastrous consequences. Those professionals faced significant disadvantages, moreover, in trying to catch up on years of legal and other disputes between the parties in attempting to provide advice regarding this exceedingly complicated transaction and construction.

VI. Recommendations

In view of the findings set forth above, it is recommended as follows:

1. Understand Risk/Reward

County decision-makers must fully understand the risk/reward calculus associated with a project before embarking on the project. To ensure adequate consideration of those issues, the cost-benefit analysis regarding a complex project

should be committed to writing or at least placed on the record at a Freeholder Board meeting. To that end, the County should consider creation of a risk committee to review such transactions and assess related risk to the County. In the case of the Solar Project specifically, County decision-makers failed to understand the significant financial risks associated with guaranteeing the bonds that were being issued for the project. The County guaranteed the debt for this entire program, while the County's involvement in the program itself was otherwise minimal.

2. Delegation of Project Review and Approval

The County should ensure that decisions and analysis of whether to move forward with a project are made by the County itself, as opposed to delegating that analysis to third parties with independent profit motives. It is important that project evaluations are undertaken without bias to the extent possible.

3. Beware of Unusual Project Complexity

The County should not take on any project in which County decision-makers and responsible officials do not fully understand the legal rights and responsibilities of each of the parties, and the way those roles interconnect. The biggest financial risks on complex projects are often obscured, sometimes intentionally, within legalese or other unnecessary complexity. Effective decision-making and project management

can occur only where even the nuances of a project are fully understood by responsible staff. The County should further ensure that if it takes on a project of unusual complexity, County personnel are able to dedicate the time and attention needed to maximize the chances of project success.

4. Beware of Market Dynamics

The County should be particularly sensitive to involvement in projects that introduce market-based risks to public funds, such as the Solar Project whose success depended on the strength of the SREC market. Direct County investments in high-risk securities are not permitted under the law; guaranteeing a high-risk investment implicates similar issues relating to proper uses of taxpayer funds.

5. Mitigate Risks

If the County decides that it is in the public interest to take on a level of risk in a project, it should ensure that the County has adequately reinsured against that risk. That may include, for example, ensuring that the security posted on the project is sufficient. Furthermore, the County should ensure from a legal and contractual standpoint that it has sufficient control over the project so that it does not, in effect, cede control over County funds to a third party. That is, contract documents should be drafted in a way that best enables the County to protect the investment it has made in the project.

6. Contingency Planning

As part of the planning process set forth above, the County should understand the worst possible outcomes on a project and have a plan to deal with those outcomes. Undertaking that analysis forces decision-makers to avoid the temptation of presuming everything will proceed as planned. In other words, on a project-by-project basis, the County should plan for rainy days, not just blue skies.

7. Effective Marshaling of Expertise and Input

At the outset of every complex project, the County should ensure that County officials, or their agents, have the expertise and experience necessary to accomplish the project. The County should rely on the expertise of its staff, including its Purchasing, Engineering, and Facilities personnel, and solicit their views when appropriate to do so. If a particular project requires skill sets not possessed by County personnel, the County should consider whether it is nonetheless prudent to proceed with the project. If there is a need on a given project to supplement the skills of County staff with outside professionals, the County should review the qualifications of those professionals, and obtain legal commitments from those professionals regarding their responsibilities to the County, particularly where significant public funds are at risk.

8. Project Management

For every project that is undertaken, the County should have a clear management plan in place and a delineation of who is responsible for oversight of that project. That project manager should understand that he or she is expected to be "hands-on" in his or her oversight approach and remain personally responsible to the County and the Freeholder Board in particular. Unambiguous accountability will foster more aggressive stewardship of County resources.

9. Maintaining Project Control

The County should be particularly wary of project agreements that limit the County's oversight authority while presenting the County with financial or other risk, in the shared services context or otherwise. One important component of risk mitigation is proper reservation of rights within project documents, and the County should avoid project structures that require it to cede its ability to control conduct for which it is paying. Responsibility for that effort rests largely with the County's legal counsel. For that reason, among others, the County should review closely any project in which it would be obtaining legal counsel from a lawyer who also is representing another party in the same transaction. While many services can efficiently be shared by multiple government

agencies, attempting to share legal services can present unique challenges.