Public Infrastructure, Policy, Practice and Projects: Preparing Municipal Counsel for Renewed Funding & Building Opportunities in a New Era

For the IMLA Spring Seminar – Virtual

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ARRA – THE LAST "STIMULUS"

Lessons Learned – USEPA – Municipal Water and Wastewater Projects

- The workload was intense and EPA and partners used several strategies to address it. EPA HQ, Regions and states all agreed that the workload from the bounty of funding, and the accompanying requirements, was daunting
- Early guidance was helpful, but changes over time created substantial re-work and uncertainty
- ARRA implementation required the most knowledgeable, dedicated people

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ARRA – THE LAST "STIMULUS"

Lessons Learned – USEPA – Municipal Water and Wastewater Projects

- The mandate to spend the funds quickly sometimes conflicted with state priority lists for projects
- Tight deadlines for obligating and spending funds was inconsistent with the timeline for most innovative technologies
- The realities of the financial times changed cost estimates for projects, which were lower than expected due to the fierce competition between companies trying to stay afloat

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ARRA – THE LAST "STIMULUS"

Lessons Learned – Government Accounting Office

- Maintenance-of-Effort and Economically Distressed Area Requirements Proved Challenging
- Obligation Deadlines Ensured That Projects Were Identified Quickly, but Likely Influenced the Types of Projects Selected in Some States
- Better Documentation Could Reduce Challenges to the Integrity of Selection Decisions for High Speed Intercity Passenger Rail and TIGER Grant Programs

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Biggest Lesson Learned:

“There really are no shovel-ready projects”

Barak Obama



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President Biden's American Jobs Plan

Specific Allocations

- $621B in Transportation Infrastructure
- $111B to Provide Clean Drinking Water
- $100B to Provide High Speed Broadband to Every American
- $200B to Build and Improve Public and Affordable Housing
- $137B to Upgrade Schools and Federal Facilities



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President Biden's American Jobs Plan

Notable Transportation Infrastructure Spending

- $115B to Repair America's Roads and Bridges
- $85B to Modernize Existing Transit
- $174B Investment in Electric Vehicles
- $42B to Upgrade Airports and Water Transit



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President Biden's American Jobs Plan

Notable Spending on Drinking Water and Wastewater

- $45B in grants from the EPA's Drinking Water State Revolving Fund to remove lead pipes and service lines
- $56B in grants and flexible loans to states, Tribes, and disadvantaged communities to upgrade and modernize America's drinking water, wastewater, and storm water systems
- $10B to monitor and remediate PFAS in drinking water

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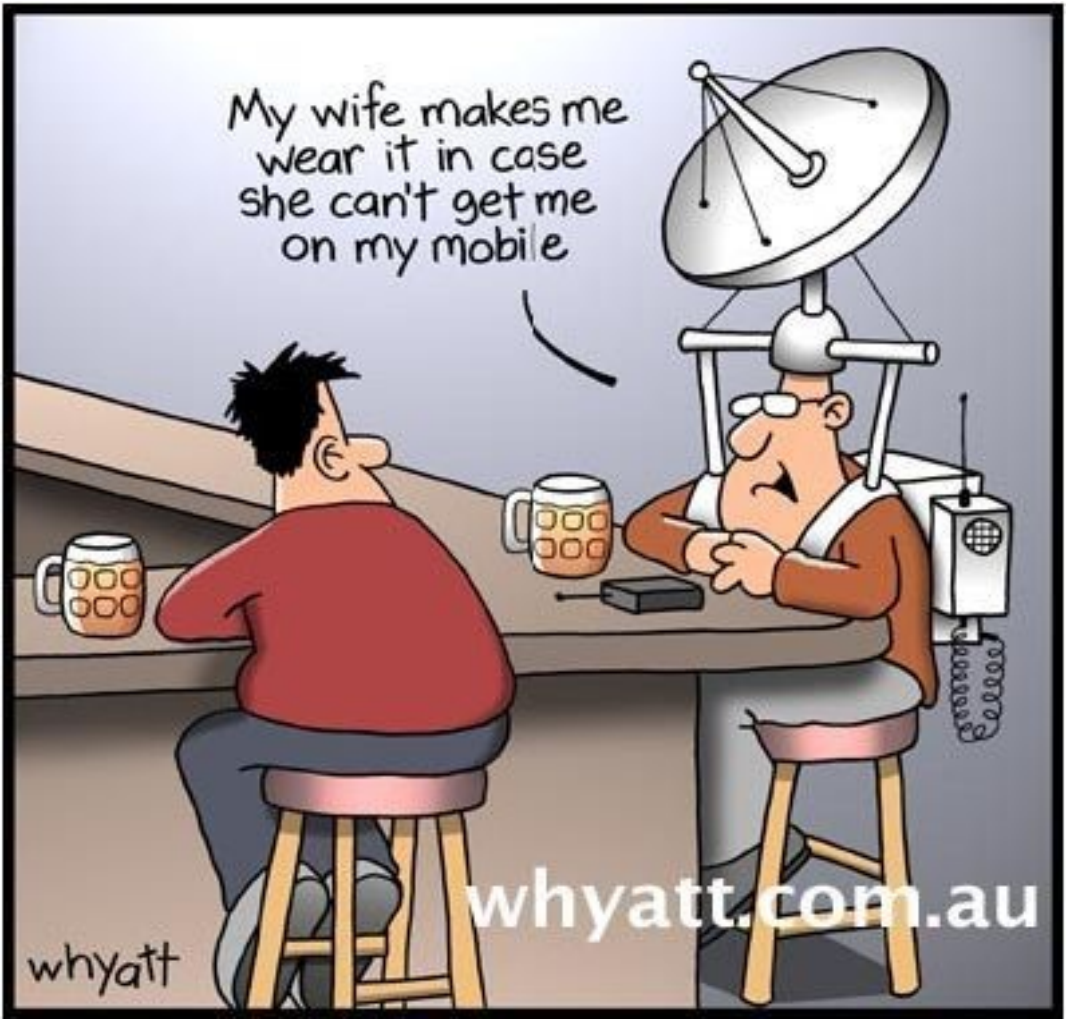
President Biden's American Jobs Plan

Providing High-Speed Broadband to America



- Goal of reaching 100% high speed broadband coverage in America
- Prioritizes support for broadband networks owned, operated, or affiliated with local governments
- Emphasis on right to unionize and collective bargain

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President Biden's American Jobs Plan

Building and improving Affordable housing

- Call on Congress to pass the Neighborhood Homes Investment Act (NHIA), offering $20B in NHIA tax credits over 5 year period
- $40B in funding to improve the infrastructure of public housing

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President Biden's American Jobs Plan

Upgrading Schools and Federal Facilities

- $50B in direct grants
- $50B in funding leveraged through bonds
- $12B to invest in community college infrastructure
- $25B to upgrade child care facilities
- $18B to modernize Veterans Affairs hospitals and clinics



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What to Expect / What to Plan For

- Congress may pass the Protecting the Right to Organize Act (PRO), guaranteeing union and bargaining rights for public service workers
- Employers seeking contracts under the Plan may be required to adhere to specific labor standards and remain neutral when employees seek to unionize
- President is asking Congress to tie federal investments in clean energy and infrastructure to prevailing wages
- Possible increase in penalties when employers violate workplace safety and health regulations

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Forms of Infrastructure Projects

- Public Buildings/Schools



- Renewable Energy
- Bridge and Highway
- Water/Wastewater
  - Treatment



  - Collection/Distribution
  - Storage

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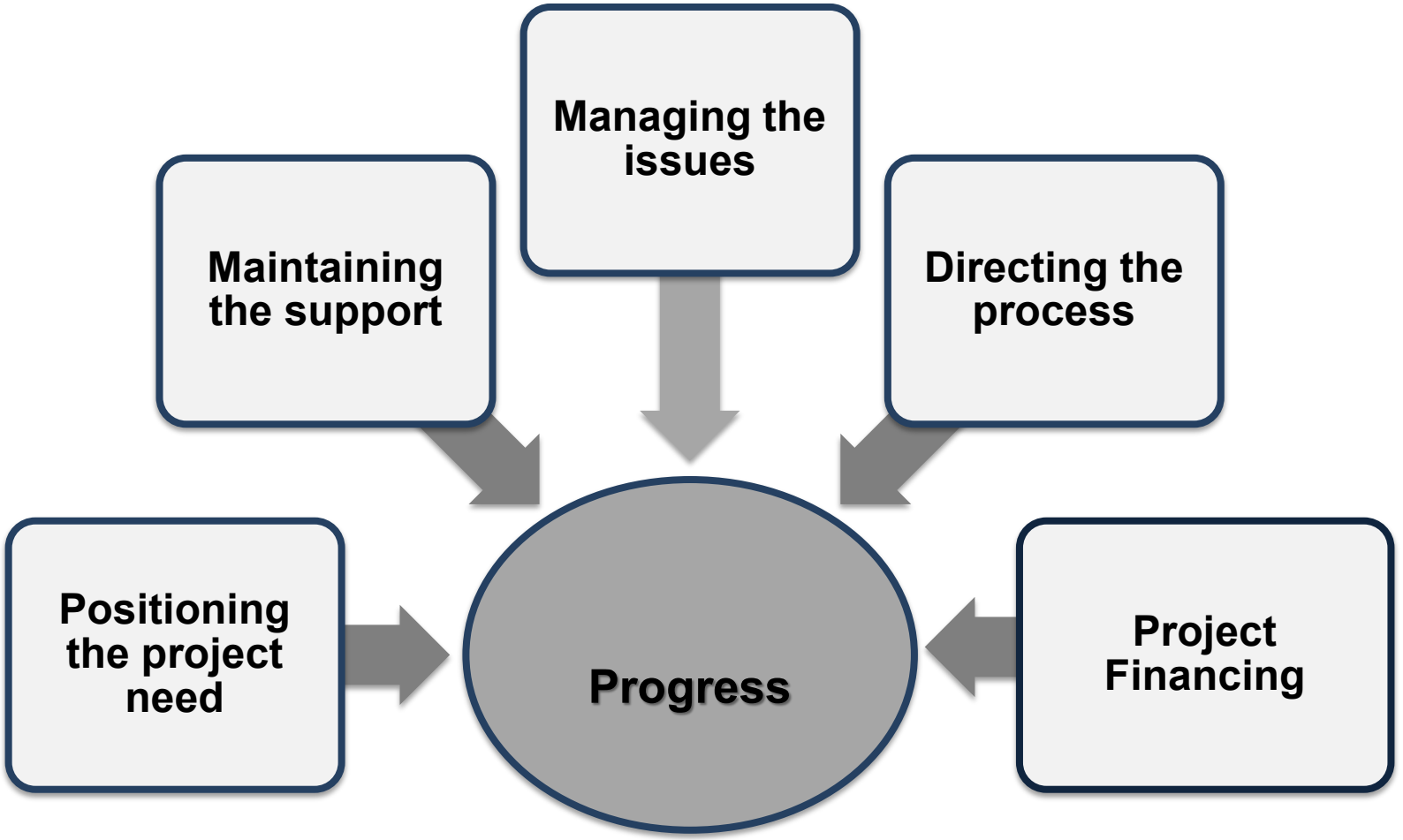
The Balancing Act: What, When, How

Without a Framework, Projects Fail



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Procurement Fundamentals



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Mechanics and Logistics

- Project Identification and Selection
  - Needs Analysis
  - Permit Compliance/Service Area Growth
  - Cost Benefit Analysis
  - Alternatives Analysis
- Project Funding Sources – GO/Revenue/
- Project Procurement
  - Request for Proposals – RFP
  - Invitation for Bids - IFB

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Performance: Ensuring the ‘Deal’

- Guaranteed construction schedule
- Acceptance standards
- Construction guarantees
  - Design requirements
  - Review standards
  - Environmental guarantees
- Operational guarantees
  - Performance guarantees
  - Maintenance requirements
- Regulatory Compliance



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Performance: Securing the 'Deal'



- Payment & performance bonds
- Operations Bond
- Creditworthiness
- Letter of Credit
- Guarantor
- Insurance

Remedies

Damages
- Liquidated damages
- Actual damages
- Indemnification for fees and penalties

Breach
- Bright-line default event
- Curable vs. non-curable

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Design and Permitting

- Design
  - Company and municipality
  - Joint design planning [including site selection]
- Permitting responsibility:
  - Company responsible for obtaining all Federal, State and local permits and approvals
  - Municipality will support the Company in obtaining permits and approvals

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Municipal Counsel Role in Infrastructure Success

- Regulatory and Legislative Compliance
  - Bond Conditions
  - Special Purpose Projects
- Procurement Vehicle Guidance
  - Traditional Design-Bid-Build
  - Alternative Project Delivery
    - Design-Build
    - CMAR
    - Multiple-Primes –
- Project Labor Agreements

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Municipal Counsel Role in Infrastructure Success

- Procurement Document Development/Compliance
  - Bid Documents/Instructions to Bidders
    - General Conditions of Contract (GCC's)
    - Special Conditions – Applicable to this Project and Your Municipality
  - Performance Bonds & Security
  - Template Contracts Released with Bid Docs
  - Strong/Defensible Evaluative Criteria
    - Minimum Requirements (avoid unqualified/unwelcome low bidder)
    - Comparative Evaluative Criteria (When applicable)

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TRAPS for the UNWARY

- Missing a Qualifying Requirement
- Slipping a Filing or Submittal Date
- Using unmodified/Standard Form Contracts (AIA, EJDC)
- Permitting Binding Arbitration of Disputes
- Ineffective Forum Selection Clause or Waiver of Removal
- Warranties from Substantial Completion / Final Acceptance
- Limitation of Liability Clauses that are not on/after
- Procurement Docs not Accompanied by Final Contract

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Now What do I do Now? Municipal Counsel Next Steps

- Follow/Track Federal Infrastructure Legislation
- Understand your Municipality's Capital Plan
- Outline Allowable Project Delivery Models & be prepared to advise/recommend options by type (vertical/Horizontal/Utility)
  - Design Build/CMAR/Concessions & Tolling
- Begin Dialogue with Bond Counsel
  - Know what they expect
- Position Yourself as Part of the Project Team
- Develop Checklists and Compliance Matrices

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Questions & Answers – Tip's Three Rules

- Don't ask a question if
  you already know the answer
- Don't ask a question to show how much
  you know
- Don't ask a question to show how little I know



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