

GEE WIND v. SPINPOWER NEGOTIATION

Counsel for SpinPower, Inc.

Your client is SpinPower, Inc. ("SpinPower"), a privately held ten-year-old company that designs, manufactures, and installs wind turbines. Its track record has been impressive, perhaps because SpinPower was able to iterate on earlier, less refined versions of wind turbine technologies and learn from their failures. As a result, SpinPower's wind turbines are state-of-the-art. SpinPower is also on the bleeding edge of turbine research and development, designing technology for turbines embedded in automobile tunnel walls that convert the movement of cars past the turbines into energy.

Some months ago, SpinPower bid on a proposal by the largest agribusiness in the Midwest, All-Ag Co., ("All-Ag"), to purchase rights to install wind turbines all over All-Ag's extensive agricultural acreage. At the time it submitted the bid, SpinPower projected annual revenues of \$100 million from wind energy generated and sold, with net profits of \$15 million per year for the first five years after capital investments in construction and infrastructure are expensed, and \$25 million per year after that.

While several competitors put in bids, All-Ag narrowed the field to SpinPower and GEE-Wind Co., ("GEE-Wind"), a veteran in turbine manufacturing and a division of the behemoth conglomerate, GEE-Co. Both SpinPower and GEE-Wind were invited to make final presentations to All-Ag corporate leadership over a two-day period. SpinPower was slated to present on the first day, and GEE-Wind the second.

SpinPower's team thought their All-Ag presentation on day one went well. They were delighted to find that an All-Ag executive at the pitch meeting was a college buddy of SpinPower's founders who, perhaps more than coincidentally, participated in the presentation. At the end of the meeting, the All-Ag President commented: "That was tremendously impressive! But you know we are scheduled to hear GEE-Wind's pitch tomorrow. Isn't GEE-Wind the gold standard for wind turbines? After all, they are part of GEE-Co., and we all know GEE-Co. scoops up the best engineers in the business."

The SpinPower founder with the other college connection responded: "We all know business etiquette frowns on badmouthing your competitor in a bid situation. But you've asked the question and I must diplomatically respond. We believe GEE-Wind's turbines depend on older technology. SpinPower's technical capabilities and installation process were designed from the ground up, with a different approach. We install the turbines much more efficiently, with minimal disruption to the land. Because our technology is robust and reliable, we can prove our turbines require far fewer repairs, have less downtime, and are much quieter machines overall. Our engineering team that designs these turbines are second to none and are much better to collaborate with.

Two days later, SpinPower received a call from someone on the All-Ag team. They said, in effect, that GEE-Wind's proposed dollar offer was just a bit more generous, and a few of the



contract terms were more attractive to All-Ag. "Frankly, we would rather work with you," the All-Ag representative said. He added:

"We've heard GEE-Wind uses some sharp business practices and can't always be trusted. We've done some due diligence and found that the GEE-Wind folks aren't necessarily so easy to deal with once the proposal is signed and their turbines are up, and revenues are coming in. They don't respond quickly to noise complaints. And we've confirmed their turbines often need repairs, which causes economic damage to the surrounding farmland when a technician crew is dispatched to the installed turbines. "

Not surprisingly, SpinPower took All-Ag up on its invitation to sweeten the price and a few contract terms in order to win the contract. A week later, SpinPower received official word that they had won the All-Ag deal. The whole SpinPower team, including one former GEE-Wind engineer, celebrated at a local bar and raised a glass to stealing All-Ag away from the big guys.

While they knew GEE-Wind wouldn't be pleased, SpinPower's General Counsel was shocked to receive a courtesy copy of GEE-Wind's complaint seeking \$200 million from Spin Power, claiming slander, tortious interference with contractual relations, tortious interference with an advantageous business relationship, and stealing business secrets. The GC's immediate thought was just how ridiculous the GEE-Wind complaint was on its face. GEE-Wind didn't have a right to the All-Ag deal, and All-Ag was entitled to seek a better offer from SpinPower.

SpinPower's GC called opposing counsel to ask if they would delay filing suit and perhaps be open to negotiation after SpinPower completed its own internal investigation.

In the meantime, SpinPower referred the matter to you to investigate, with the charge to eventually negotiate a settlement, or defend SpinPower in litigation. The bottom line is that nothing SpinPower said to All-Ag was untrue. GEE-Wind's turbines had a reputation for being noisy and requiring frequent repairs. That would matter to All-Ag, as repairs involve expensive on-site property visits that destroy crops and noisy turbines mean more complaints overall. GEE-Wind's long history with wind turbines may lend them a reputation that unfairly haunts them, but it is still their history. According to your client, GEE-Wind's management is indeed known for being difficult to work with. All-Ag was within its rights to negotiate with SpinPower and ask them to match GEE-Wind's terms and did not violate any laws in doing so.

You have explained that GEE-Wind's claims are without merit, based on what information you have. Still, you also explain that discovery is intrusive and sometimes turns up unwelcome facts and dangerous witnesses. GEE-Wind's President may actually be angry enough to file their lawsuit, regardless of its lack of merit, considering how humiliating it is for a large conglomerate to lose a lucrative bid to a smaller and relative newcomer to the industry. SpinPower is aware of at least one or two major parcels of land in the Midwest likely to be available for leasing within the next year. SpinPower wouldn't have enough



manufacturing capacity in the short term and would prefer if GEE-Wind bid on those and took that business.

Even though SpinPower understands its legal position to be strong, they do NOT want to be embroiled in litigation or discovery. Unless they succeed on a motion to dismiss, which is not guaranteed, discovery might require them to reveal their projected profit margins and the advanced technical design of their turbines. SpinPower's engineers recently had a design breakthrough that will greatly reduce installation time and costs, minimize repairs, and increase electricity generation. This breakthrough means this All-Ag contract win will be about 50% more lucrative over time than SpinPower projected when putting together its proposal. While the client hasn't admitted it directly, based on a few comments, you strongly suspect there may be skeletons in their closet relating to these technology breakthroughs. In the course of your investigation, you learned that a few GEE-Wind engineers migrated to SpinPower over the last five years after negotiating to shorten their non-competes. You wonder if some confidential and privileged information is involved in SpinPower's success. Though Spin Power's management hasn't said so, the optics of the technological breakthroughs that occurred soon after the arrival of GEE-Wind engineers may be another reason SpinPower wishes to avoid any discovery process.

Suspicious aside, you have explained that All-Ag would likely be dragged into the fight through discovery, even if GEE-Wind doesn't sue them directly. All-Ag owns a lot of land and seems intent on acquiring more. All-Ag might decide SpinPower, by indirectly dragging All-Ag into potentially costly litigation, is troublesome. All-Ag could decide not to deal with SpinPower again. Perhaps most importantly, SpinPower's owners want to take the company public within a year. A \$200 million dollar suit would have to be disclosed. That is the last thing they need as they near an initial public offering date.

Given these circumstances, SpinPower has asked you to negotiate a settlement, preferably as low as possible. The SpinPower President's words to you were:

“Really, by rights, we should just offer enough to buy GEE-Wind a case of scotch to drown their sorrows. On the other hand, our profits from this deal, combined with the new design will be so strong that, we can easily afford to pay them as much as \$20 million. But to go that high would be highway robbery by the petulant children at GEE-Wind. I hate to pander to their egos so, don't agree to pay anything close to that, unless you absolutely must. And whatever you pay, there had better be ironclad confidentiality and non-disclosure clauses. I don't want to jeopardize the All-Ag contract, the technical superiority of our turbine design, or SpinPower's public offering.”