

IACCM CONFERENCE: SCOTTSDALE APRIL 7-9, 2008
“COLLABORATE TO INNOVATE”

Wednesday, April 9

TOPIC: “NEGOTIATION AND CONTRACTS”

Negotiation break-out session 9:30 - 10:30

DISPUTE PREVENTION

Leader: Jim Groton
Atlanta, Georgia
a “recovering lawyer”

WORKSHOP GOALS:

1. Convince deal negotiators of the need to include in the Contract proactive processes to control and manage any problems or disagreements that might arise during implementation of the deal
2. Introduce deal negotiators to tools they can use during their negotiations to develop these proactive Contract processes
3. Explore a case study that illustrates what can go wrong, and how unexpected problems can be successfully overcome by proactive processes in the Contract.

- Problems and disagreements always arise, even in the best of families.
- “@%#! happens.”
- Don't ignore this reality while you're negotiating the Contract

- Jointly consider what might go wrong during implementation of the deal
- Jointly resolve to include in the Contract processes that will enable the parties to handle unexpected problems.

- The existence and availability of an agreed-upon process in the Contract for handling problems:
 - ◆ absorbs the shock of unexpected events
 - ◆ channels action constructively
 - ◆ discourages game playing and delaying tactics
 - ◆ usually results in the parties mutually resolving the problem quickly

Learn from the construction industry how to handle problems and disputes

- ◆ The construction industry has developed some useful tools and processes that parties can incorporate into their contracts for handling unexpected future problems
- ◆ **Reference:** IACCM *Contracting Excellence* article, November, 2007: “Zero Disputes? Learn from the Construction Industry”

Tool Number 1: The “Disputes Potential Index” (DPI)

- ◆ **Reference:** IACCM *Contracting Excellence* article, February, 2008: “Converting the construction industry ‘disputes potential index’ into a ‘success potential index’ for any kind of business relationship

Disputes Potential Index

- An improvement on “compatibility tests” found in romance magazines
- Questions are designed to identify potential weaknesses and problems in the deal
- Questions cover three areas essential to success of the project or deal:
 - ◆ “People” and organizations involved in the project or deal;
 - ◆ “Project” or “Deal” – its purpose, scope, complexity and required quality
 - ◆ “Process” – how the project or deal is going to be implemented

- Every project leader fills out the questionnaire before implementing the deal
- The answers to the questions are tabulated
- Results from tabulating the answers:
 - ◆ overall ranking to predict a “good, bad or average” experience with problems and disputes
 - ◆ individual score for each of eight project variables, to identify areas with the greatest likelihood of experiencing problems and disputes
- Cumulative results from all project leaders’ answers provide a balanced overall evaluation of the project’s potential for disputes – or success

- **Advantages of participating in the DPI process:**
 - ◆ The parties can take corrective action based on these results
 - ◆ The exercise encourages project leaders to analyze the project realistically and objectively
 - ◆ The results provide a “reality check” to encourage corrective action in advance
 - ◆ The exercise reminds project leaders of “best practices” that are often overlooked
 - ◆ The joint effort is a valuable team building exercise
- In effect the DPI is a “cholesterol test” of the project or deal – administered in advance

- **Application of the DPI to other kinds of business deals:**
 - ◆ To date, no one has ever used the DPI to “test the cholesterol” of a business deal
 - ◆ But with a little imagination, contract and commercial managers can adapt the construction DPI questions to cover the essential ingredients of a commercial business deal

- By analyzing the answers to the questions, they can:
 - ◆ identify problematic areas of the deal
 - ◆ include processes in the Contract that will solve problems and prevent disputes

- Because engaging in the DPI process doesn't involve any of the potentially controversial substantive “deal points” it serves as a “team building” collaborative exercise that builds trust

- In effect, the Disputes Potential Index, coupled with appropriate Contract provisions, can create what amounts to a “Success Potential Index” or “SPI”

Tool Number 2: Include in the Contract processes that will help to prevent and control problems and disputes

- ◆ **Reference:** IACCM *Contracting Excellence* article, November, 2007: “Zero Disputes? Learn from the Construction Industry”

Processes for preventing problems and encouraging cooperation:

- Precise definition of scope and quality
- Allocation of risks to the party best able to manage and control those risks
- Open communications
- Incentives to encourage cooperative behavior
- Partnering

Processes for controlling disputes and achieving “real time” early resolution:

- ◆ Step negotiations
- ◆ Appointing ombudspersons or standing neutrals to provide “real time” resolution of any disputes that might arise

Tool Number 3: Use a “Contracts Coach” or “Dispute Resolution Deal Mediator” to provide expertise

- ◆ Good managers know how to control such important aspects of the deal as supply, production, costs, quality, marketing, transportation, safety and insurance
- ◆ But few managers know how to prevent disputes

There are experienced contract and commercial management experts who know how to:

- ◆ coach parties on which dispute prevention methods best fit their deal
- ◆ navigate through the Contract negotiation process
- ◆ administer the DPI question process
- ◆ advise on appropriate processes to help prevent and control problems and disputes
- ◆ help the parties negotiate Contract terms, whether they deal with dispute prevention and resolution processes, or more substantive terms of the deal

- Deal negotiators who are unfamiliar with the intricacies of negotiating dispute prevention and control Contract provisions can benefit from engaging an expert neutral Contracts Coach or Deal Mediator to assist in crafting the appropriate Contract provisions

SUMMARY

- **Negotiation “Best Practices” for deal negotiators:**
 - ◆ Recognize the reality that problems will always occur
 - ◆ Prepare to deal with that reality by jointly analyzing the kinds of things that could go wrong
 - ◆ Deal with that reality by including in the Contract processes that will handle unexpected events

- **By using the experimental tools of the DPI and a Contracts Coach or Deal Mediator, parties can:**
 - ◆ build into the Contract processes that will solve problems and prevent disputes
 - ◆ create a Contract that represents a true meeting of the minds
 - ◆ develop a team spirit with mutual understanding and trust
 - ◆ form a foundation for a mutually profitable and successful relationship

- **When problems arise, these Contract processes will:**
 - ◆ encourage parties to concentrate on “fixing the problem” rather than “fixing the blame”
 - ◆ keep any disagreements from escalating into disputes.

Coming together is a beginning

Keeping together is progress

Working together is success

-- *Henry Ford*