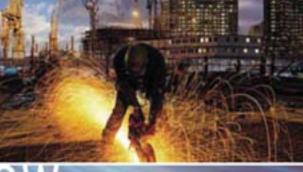
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TODAY & TOMORROW



Project Disputes: Techniques to Avoid or Resolve Them Before or During Your Project

Panelists:

- Michael Young
 - Partner, Herbert Smith
- Jimmy Slaughter
 - President, S&B Engineers & Constructors
- Gary Berman
 - President/CEO, GREYHAWK



Project Disputes – Techniques to Avoid or Resolve Them Before or During Your Project

Michael Young



Partner
Herbert Smith, LLP



Common Causes of "Major Project" Disputes

- Changes to the Project Delivery Method
 - e.g. fixed-price conversion to cost plus
 - Partial or total contract conversion
- Change Orders & Approvals
- Interim "without prejudice" payments
- Penalties / Relevance of delay
 - with practical (real) examples of each



Changes to the Project Delivery Method

- Be cautious of interim changes
- Document the change carefully
- Assume that <u>all terms</u> of the original contract need to be reviewed
- Practical (real) examples
 - Supervision and reporting structures
 - Labor rates



Change Orders and Approvals

- Obviously, care needs to be taken in drafting change orders:
 - Tie-back clearly to the language of the contract
 - Assume that <u>all</u> the clauses of the contract might be impacted by the change, and review accordingly
- Silence is rarely golden
 - do not ignore requests for approval
- Constant dangers of waiver or estoppel



Interim "Without Prejudice" Payments

- Can be a useful method of facilitating the course of a project
- However, danger of waiver or estoppel
 - in-house legal teams should be involved from the outset
- Realistic prospect of recovering sums in a subsequent dispute?



Penalties / Relevance of Delay

- Awareness of differing legal approaches to penalty clauses
- Conflation of delay claims with penalty clause claims
 - and the risk of under (or over) recovery
- Taking care when complaining of "delay" throughout the course of the project



Project Disputes – Techniques to Avoid or Resolve Them Before or During Your Project

Jimmy Slaughter



President
S&B Engineers &
Constructors, Ltd.



Key Thoughts on Dispute Avoidance

- Participated in 2 yr study on dispute avoidance with NAC
- Findings:
 - Ample dispute tools available (CII best practices)
 - Private industry behind publics sector
 - Tools not being adequately used



The Owner / Contractor Relationship

- Partnering & team building
- Incentives for cooperation
- Realistic risk allocation
- Disputes potential index
- Competent engineering
 & documentation

- Constructability analysis
- Dispute resolution clauses
- Training and development
- Honesty in contracting
- Continuity of personnel

Prevention



Practices That Increase Claims

- Fast Track Schedule
- Budget Too Tight
- Contractor Accepts Too Much Risk
- Aggressive Contractor Bid
- Poor Contracting Strategy
- Lump Sum EPC
- Competitive Bidding

Source: Independent Project Analysis



Practices That Do NOT Decrease Claims

- Share Risk Contracts
- Contract / Owner Alliances

Source: Independent Project Analysis



Practices That DO Reduce Claims

- Functionally integrated teams
- Thorough understanding of site conditions
- Involvement of the owner/contractor project team in the contracting process
- Contractor controls & reporting quality
- Projects with major design changes (not a good thing)
- Expectations of future work
 Source: Independent Project Analysis



Why Prevention Practices Are Not Used

- Lack of data (UT, IPA)
- Education
- Lack a dispute prevention champion
- CEO not informed



Project Disputes – Techniques to Avoid or Resolve Them Before or During Your Project

Gary Berman, PE, FCMAA



President/CEO GREYHAWK



Where are we?

- Young: Best practices legal
- Slaughter: Best practices technical / relationships

- Berman: Options
 - 1. take your chances
 - 2. take some proactive steps (just in case)



What is the single largest "root cause" of disputes?

Just about <u>every</u>
dispute and conflict on a
major/mega project can be traced back to....

A lack of communication by one or more parties to the contract



Conflict During the Project...

- Distracting from getting the project built
- Residual friction among stakeholders
 - Can lead to "continuous" mistrust
 - Everything is now suspiciously scrutinized
 - Can cause future conflict on "legitimate" changes.
 - Egos get in the way of progress.



Worst Case Consequences

- Project may be held hostage if contractor is not satisfied
 - Owner may feel obligated to "settle"
- Contractor may get terminated
 - Contractor may feel obligated to "settle"



Options Before/During the Project

- Contractor and Owner select a 3rd party to review all issues as a neutral and facilitate a solution
- Owner engages a 3rd party to perform periodic audits
 - "Snap-shot" audits: random or set intervals
 - "Threshold" audits: based on cumulative value or quantity of change orders
- Project employs a Dispute Review Board
 - One member from the Owner and the Contractor and the two of them select a neutral third
- 10 day "Step Negotiations"



Conflict Avoidance Mechanisms from Real Experience

- Reasonable apportionment of risk
- Incentives that can be earned and penalties that are grounded in reality
- Proper contingency management of time and money
- Get the design right the first time!
 - Configuration management
- PM training for key Project Stakeholders
 - One topic: "What to do when a disputes arises"



Conflict Avoidance Mechanisms from Real Experience (continued)

- No surprises!
 - Lack of communication is at the root of most disputes.
 - Bad and good news.
- Better language for contract changes
 - e.g. conversion from a fixed-price to a cost-plus price basis
 - "what happens if..."



Questions & Answers

Please Provide Your Name and Company Affiliation

Panelists:

Michael Young -Jimmy Slaughter -Gary Berman -

Herbert Smith

S&B Engineers & Constructors

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