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# 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

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

**Michael Young**



**Partner  
Herbert Smith, LLP**

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# 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

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# Changes to the Project Delivery Method

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

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# 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 all 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**

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# 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?**

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# 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

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

**Jimmy Slaughter**



**President  
S&B Engineers &  
Constructors, Ltd.**

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# 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 public sector
  - Tools not being adequately used

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# 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



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# 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

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# Practices That Do NOT Decrease Claims

- **Share Risk Contracts**
- **Contract / Owner Alliances**

Source: Independent Project Analysis

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# 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

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# Why Prevention Practices Are Not Used

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

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

**Gary Berman, PE,  
FCMAA**



**President/CEO  
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# 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)

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# What is the single largest “root cause” of disputes?

Just about every  
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**

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# 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

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# 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”

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# Options Before/During the Project

- Contractor and Owner select a 3<sup>rd</sup> party to review all issues as a **neutral** and facilitate a solution
- Owner engages a 3<sup>rd</sup> 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”**

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# 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”

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# 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...”

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# Questions & Answers

**Please Provide Your Name and  
Company Affiliation**

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