

# **AVOIDING CONTRACTUAL MINEFIELDS**

**NAESCO WORKSHOP  
OCTOBER 23, 2007**

**DEREK A. DYSON  
DUNCAN, WEINBERG, GENZER & PEMBROKE, P.C.  
202-467-6370  
dad@dwgp.com**

# THEME OF THE DAY

Conflict avoidance, while an art unto itself, very few can achieve it. Recognizing how to minimize conflicts is the next best thing. Where neither of these are possible, resolving conflicts to achieve the needs of the participants is the next objective.

# DISCLOSURE

The comments provided today are for educational purposes only. The comments do not constitute legal advice or establish an attorney-client relationship as a result of the comments or any response to questions about the comments. If as a result of the comments provided today a party has a specific issue that requires legal consultation please contact your counsel.

# AVOIDING CONFLICTS

## Pre-Contract Efforts

- Do your homework on the customer.
  - Has the customer been in major litigation with other contractors?
  - Does the customer have a propensity for slowly paying or disputing invoices contractors?
  - What is the customer's knowledge base on the technologies to be used in the performance contract?
  - Does the customer have an accounting system capable of accurately tracking both costs and cost avoidance attributes conceived by the performance contract
  - What is the customer's preferred dispute resolution process? Does it follow a local, state, or federal statute?

# AVOIDING CONFLICTS

## Pre-Contract Efforts

- How do you do your homework?
  - Has your firm done business with that customer in the past? If so, share lessons learned.
  - Utilize the resources of industry trade associations.
    - No prohibition on creating a past performance database on customers.
  - Ask questions during the solicitation process.
  - Inquire about the technical and accounting expertise of the primary point of contact under the contract.
  - Propose your preferred dispute resolution process

# AVOIDING CONFLICTS

## Pre-Contract Efforts

- Educate your market
  - Don't assume your customer knows what you know.
  - An educated consumer will make a better customer.
  - Fewer disputes arise with educated customers

# **ALTERNATIVE DISPUTE RESOLUTION**

**CONTACT DRAFTING**

# AVOIDING CONFLICTS

## Contract Drafting

- Add alternative dispute resolution methods in your agreement with the customer
  - Include an informal resolution method in the agreement:

“The parties to this Agreement hereby agree to exercise their respective efforts to resolve in good faith any differences in the interpretation and enforcement of this Agreement. Each party shall inform a senior manager regarding any dispute and such senior managers shall have a period of not less than 15 days to resolve any dispute between the parties.”

# AVOIDING CONFLICTS

## Contract Drafting

- Add alternative dispute resolution methods in your agreement with the customer
  - Add formal arbitration provision in the agreement:

“If negotiation is not successful, the Parties agree the dispute will be resolved by binding arbitration. The Parties will mutually agree upon one or more arbitrator(s), not to exceed three, who will conduct the arbitration under the then current rules of the American Arbitration Association ("AAA"), unless otherwise provided herein. The arbitrator(s) will be selected in accordance with AAA procedures from a list of qualified arbitrators maintained by AAA. The arbitration will be conducted in New York City, New York and all expedited procedures prescribed under AAA rules will apply, and discovery shall be limited to a period of fourteen calendar days. Unless the Parties otherwise agree, the proceedings will be completed within forty-five (45) calendar days of the Parties' receipt of Notice of arbitration. Each Party will bear its own costs and attorney's fees and disbursements, and shall share equally the costs of the arbitrators. ”

# AVOIDING CONFLICTS

## Contract Drafting

- Don't forget the jurisdiction provision:  
“In the event that the parties cannot agree on an amicable resolution of differences, the parties agree that all actions to: (i) enforce, interpret, or construe this Agreement, (ii) recover damages for breach thereof, or (iii) seek relief of any kind arising from the obligation or rights created pursuant to the terms of this Agreement, shall be filed and prosecuted exclusively within the State of Pennsylvania. Both parties hereby agree to submit themselves to the jurisdiction of any court of record, state or federal located within the State of Pennsylvania and having jurisdiction over the subject matter and for which venue is proper, for the resolution of actions arising out of the rights or obligations created pursuant to the terms of this Agreement. ”

# AVOIDING CONFLICTS

## Contract Drafting

- Incorporate mutual insurance and indemnification provisions.
  - Some failure of performance savings may be due to actions of the customer; the customer should be made of aware of the pain caused by such failures.
- Incorporate terms to limit damages that may be assessed to the savings that could be obtained (Limitation of Liability provisions).

# AVOIDING CONFLICTS

## Contract Drafting

- Contract Oversight and Customer Participation Provisions
  - Include language that requires customer sign off and approval for actions; the administrative burden on this can be accomplished by terms that allow for approval after a set period of review by the customer.
  - Dependent on the customer this may require more work from the contractor during the contracting phase, but with this effort and proper documentation, disputes if they arise may be reduced.

# **ALTERNATIVE DISPUTE RESOLUTION**

METHODS

# METHODS

- Negotiation/Mediation
- Arbitration
- Litigation (Non-ADR)

# Negotiation/Mediation

- Most disputes are handled through informal negotiation
- Mediation results occur when a third party is asked assist the parties in negotiating a resolution.
- Any negotiation/mediation results must be expressed in contract law to be binding.

# ARBITRATION

- State or Federal statutes may dictate the terms
- Binding or Non-binding
- Selecting an arbiter
- Appeals
  - Even if an arbitration decision is binding, parties typically do have the right to appeal before a Court.

# ARBITRATION FEDERAL STATUTE 9 U.S.C. § 2

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

# ARBITRATION

## SELECTING AN ARBITER

If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator. See 9 U.S.C. § 5.

# LITIGATION

- Parties can agree to have “mini-trials” to expedite the resolution of particular items.
  - Mini-trials are structured settlement negotiations typically headed by a magistrate or selected advisor.
- Summary disposition
  - Reserved for issues that can resolved on the arguments put before the court in writing; the parties could agree to resolve some or all issues by stipulating to certain facts.
- Appeals
  - Even if after protracted litigation, parties will have the right to an appeal.

# AVOIDING CONFLICTS SCENARIOS

- Disputes over payment due to amount of cost savings
- Disputes over performance measures to be delivered
- Monitoring and verification disputes
- Overall contract performance and compliance disputes

# AVOIDING CONFLICTS

## SCENARIO QUESTIONS

- What to do when a verbal agreement goes awry?
- A disgruntled customer, are there ways to salvage the relationship?
- What happens if it is the contractor's fault?
- What happens if it is the customer's fault?

# REVISIT THEME OF THE DAY

Conflict avoidance, while an art unto itself, very few can achieve it. Recognizing how to minimize conflicts is the next best thing. Where neither of these are possible, resolving conflicts to achieve the needs of the participants is the next objective.

# FINAL THOUGHTS

## CONTACT INFORMATION:

Derek A. Dyson

Duncan, Weinberg, Genzer & Pembroke, P.C.

1615 M Street, NW

Suite 800

Washington, DC 20036

202-467-6370

[dad@dwgp.com](mailto:dad@dwgp.com)