

Avoiding Construction Minefields

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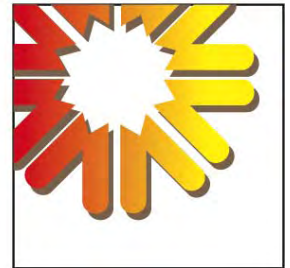
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Topics

- Section One: Schiller List for Avoiding Conflicts
- Section Two: Arbitration
- Section Three: Example ESCO/Client Dispute

Section One



Avoiding Conflicts

1. Be a professional, do good work, do not be sloppy
2. Communication, Communication, Communication
 - Litigation results from a breakdown of understanding
 - Minor disputes are cumulative
 - Establish rapport and trust by being pro-active
 - Establish multiple means of communication and regular meetings
 - Disputes are inevitable (part of life) consider a formal dispute review mechanism short of a mediation, arbitration
3. Documentation
 - Record keeping is a pain, but is the best defense when there is a problem and a third-party (mediator, arbitrator, judge) needs to figure out what happened

Avoiding Conflicts, continued

4. Identify areas of risk upfront with clients
 - What are risks, who is responsible, how each party can avoid the risks
 - Be clear about who has responsibility on job site for decisions

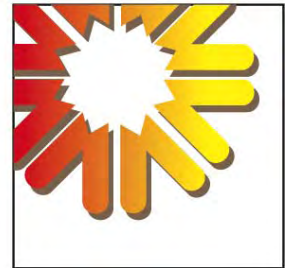
5. Use care in the language you use in contracts and documents. Avoid words that are extreme (e.g., all, each) and have multiple meanings. Avoid errors. Avoid libel or slander. Examples:
 - Inspection/Supervision \neq periodic observation of work in progress
 - Or equal \neq or equivalent
 - Satisfactory operation \neq operation as specified
 - Cost and savings estimates \neq Opinions of probable costs and savings

6. Establish Business Procedures
 - Protective marketing
 - Technical Procedures
 - Oversight and internal due-diligence/quality assurance

Crisis Management

- Remain Clam
- No matter what the facts appear to be, do not just assume that you are responsible (work to resolve, irrespective of responsibility – avoid the “good guy” syndrome)
- Communicate
- Call for outside help when you suspect professional liability
- Document and photograph
- Keep seeking alternatives and solutions
- Seek to resolve the conflict in coordination with others involved: *Acknowledge problem, explain why it happened, explain how you are dealing with it, and explain how you are attempting to keep problem from reoccurring.*

Section Two



Arbitration

- Form of Alternative Dispute resolution (ADR)
- A loose term with various rules
- Various Types
 - ◆ Binding/non-binding
 - ◆ Voluntary/non-voluntary/court-ordered
 - ◆ Expedited/specialized (large commercial)
 - ◆ Mediation-arbitration (combined)

Hierarchy

- Informal dispute resolution/partnering
- Mediation
- Arbitration
- Litigation

- Mediation is different than arbitration
 - ◆ Mediator facilitates resolution
 - ◆ Arbitrator decides resolution

Why Arbitrate

- Privacy
- Choice of decision-maker
- Flexible Rules
- Reduced cost and time
- Recovery of costs
- Business-like atmosphere
- Finality and enforcement
- Neutral forum

Why Not To Arbitrate

- Limitations on discovery
- Difficulty in acquiring preliminary relief
- Relaxed standards for decision, and limited review
- Awards are reviewed only if it can be shown there was:
 - Corruption
 - Evident partiality
 - Clear misconduct by arbitrator(s)
 - Arbitrator(s) exceeded their power

When Is There Arbitration

- Arbitration clause in contract triggered (by one party, both parties, or a court)

Example clause: Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrators) may be entered in any court having jurisdiction thereof

- Parties may decide to arbitrate even if there is no contract clause
- It is common for only certain types of disputes to be covered by arbitration clauses

Arbitrators

- Number: 1 or 3
- Background: Lawyer or Professional
- Key issue: bias or conflicts of interest

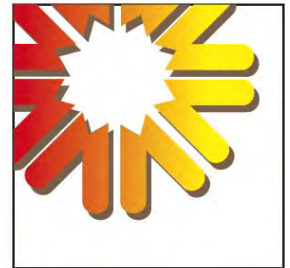
Arbitration Steps (Large Cases)

- Claim
- Answering statement (counter claims)
- Conference with administrator (e.g., AAA)
- Selection of arbitrator by parties
- Preliminary hearing
 - ◆ Schedule, discovery and evidence, document control, subpoenas, hearing recording, etc.
- Pre-hearing statements
- Discovery
- Hearings - testimony of witnesses, evidence, arguments, statements
- Award - reasoned or not

Mediation/Arbitration

- Can start with either mediation or arbitration first
- Either:
 - ◆ Mediator becomes arbitrator or arbitrator become mediator
 - ◆ Or different person selected for mediation and arbitration (this is recommended)

Section Three



Example Source of ESCO Disputes

In both federal and MUSH markets, a primary motivation for customers to install projects is the need, as several interviewees put it, “to get new stuff”. Public/institutional facilities in the U.S. often suffer from inadequate capital budgets to replace old and/or failing infrastructure, and performance contracts are a way to finance new equipment. For the MUSH markets, all the ESCOs we interviewed agreed that this is the primary driver.

From: **Public and Institutional Markets for ESCO Services: Comparing Programs, Practices and Performance**,
Nicole Hopper, Charles Goldman and Jennifer McWilliams, Lawrence Berkeley National Laboratory
Dave Birr, Synchronous Energy Solutions
Kate McMordie Stoughton, Pacific Northwest National Laboratory
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