

# Avoiding and Resolving Project Disputes

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# CAUSES OF DISPUTES

- Customer non-compliance with contract requirements is common
- Failure to educate new customer staff who have responsibility for the contract
- Customer orally approves some project decision, without a written record
- Customer attempts a project performance review many years after the fact

# MORE CAUSES OF DISPUTES

- Insufficient involvement of customer staff in the project
- ESCO provided reports lack critical technical information
- Savings verification accounting is not accepted by the customer
- Undocumented customer actions lead to lower project savings

# MORE CAUSES OF DISPUTES

- ESCO revisions to specifications without written approval
- Estimates of operation and maintenance savings are poorly defined

Baseline adjustments are not agreed to by customer

- Inaccurate or lost savings data

# STILL MORE CAUSES OF DISPUTES

- ESCO proposes cost increases without adequate documentation
- Poorly monitored customer provided O&M services
- Customer seeks to apply a performance standard not defined in the contract
- ESCO or customer takes too long to resolve a problem

# OBJECTIVE STANDARDS ARE THE BEST TO PREVENT AND RESOLVE DISPUTES

- Clear project performance standards are the best way to avoid disputes
- Project standards should be defined by the contract
- Standards should provide clear methods for measuring compliance
- Standards should be fair, efficient, technically sound, transparent, constructive, and consistent with standard industry practices

# EFFECTIVE COMMUNICATION PREVENTS DISPUTES

- Full and timely communication is essential
- Develop a broader set of contacts with key customer staff, rather than a single person
- Timely and effective documentation of ESCO problem resolution actions
- Effective commissioning of complex systems avoids performance issues

# PRACTICES WHICH PREVENT DISPUTES

- Provide supporting calculations for customer review and approval
- Clearly define all economic contract terms
- Define in detail the process for measuring project performance
- Fully document and explain all baseline adjustments

# MORE PRACTICES WHICH PREVENT DISPUTES

- Keep a complete file of all customer correspondence
- Be realistic about the customer's capability to fulfill their contract responsibilities
- Keep a comprehensive data file on project performance
- Clearly identify responsibility for customer service

# MORE PRACTICES WHICH PREVENT DISPUTES

- Keep copies of customer operation and maintenance logs
- Encourage the culture of cooperation and shared responsibility for project performance
- Comply with NAESCO ethical guidelines
- Avoid practices which do not conform to industry standards

# COST EFFECTIVE DISPUTE RESOLUTION

- Litigation and formal arbitration are usually prohibitively expensive
- Mediation with the option to go to a single party binding arbitration is much more cost effective
- Goal is to fairly and efficiently resolve the dispute

# STEPS FOR MEDIATION

- Focus on the problem, not the personalities
- Focus on your interests, not on a rigid position
- Generate a variety of feasible options to address the problem
- Evaluate the merits of specific options against objective standards that both parties approve

# ADVANTAGES OF VOLUNTARY SYSTEMS

- Cheap and speedy resolution
- Avoids adverse publicity
- Better evaluation of settlement options
- Preserve business relationship
  
- Avoid uncertainty of pending claims

# CHOOSING A SINGLE MEDIATOR OR ARBITRATOR

- No conflict of interest, respected and perceived as fair by all parties
- Sufficient expertise to understand the disputed issues
- Good negotiation skills
- Able to design a process perceived as fair by all parties to the dispute

# CHOOSING A SINGLE MEDIATOR OR ARBITRATOR *(continued)*

- Ability to think clearly and rapidly under pressure
- Articulate, persuasive, good listener, patient, objective, emotionally calm, flexible
- Ability to help parties understand their real interests

# WHEN WILL VOLUNTARY SYSTEMS WORK TO RESOLVE CONFLICTS

- When parties work in good faith
- When they are willing to share key facts early
- Willingness to commit resources to the process
- Before significant legal fees are incurred
- When parties base their decisions on their real interests and objective standards
- Inadequate expertise to understand complex issues results in poor decisions

# WHAT PREVENTS VOLUNTARY SETTLEMENTS

- Competitive culture spurns compromise
- Poor negotiation skills
- People lose sight of their real interests
- Dispute is delegated to an attorney or experts
- Key facts are not presented until a formal hearing

# DISADVANTAGES OF MOST BINDING SYSTEMS

- Very high costs ( e.g. legal and expert fees )
- Long delays in conflict resolution (years)
- Inadequate expertise to understand complex issues results in poor decisions

# DISADVANTAGES OF MOST BINDING SYSTEMS *(continued)*

- Adverse publicity and poor references
- Vast majority of cases are settled prior to judicial decisions, leading parties to ask:
- Could the conditions leading to settlement have been created earlier and less expensively?

# WHEN ARE BINDING SYSTEMS LIKELY TO BE NEEDED

- When one party is acting in bad faith
- When emotions are very heated
- When it is to the economic advantage of one party to delay dispute resolution
- Parties are convinced their claims are invincible
- When a complex question of law is involved

# EXAMPLES OF CLAIMS

- Serious equipment performance problems
- New elected official not party to the original contract conducts a performance review
- Customer can not find the guaranteed energy savings on their utility bills
- ESCO baseline adjustments are not well documented
- Impacts of rate increases on guarantees