



The Canadian Institute: Supply Chain Management –
Day 2 – May 31, 2016 – 3:00 p.m. to 4:30 p.m.

Managing Risk and Avoiding Contract Pitfalls

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Workshop Agenda and Introductions

- A. Overview of the typical Contract Lifecycle – Construction Contract*
- B. Managing Risk – Contract and Procurement Planning Phase*
- C. Execution and Contract Administration Risks*
- D. The Renegotiation*

Break (10 minutes)



A. OVERVIEW OF THE TYPICAL CONTRACT LIFECYCLE – CONSTRUCTION CONTRACT (5 MIN)



Contract Lifecycle – Construction Contract Example

Planning Phase

- Preliminary Investigations by Owner (Project Scope)
 - Engineering and Design Needed for Contract
- Owner Deliverables: Sufficient Scope for pursuing scope

Procurement "Buying" Phase

- Procurement
- Deliverable: Form of RFP/ITB; Signed Contract

Execution and Contract Administration Phase

- Managing Change Construction, Commissioning and Warranties
- Warranty Period
- Dispute Resolution



B. MANAGING RISK – CONTRACT AND PROCUREMENT PLANNING



B.1 Risk Management – General Principles

- Owner owns the risk unless it is clearly transferred to the contractor
- Party best able to manage and mitigate the risk should bear it
- Party who can bear the risk at lowest-cost should bear it
- Party who may best evaluate the risk or benefit from its assumption should take it
- Identify and evaluate risks before forming a contract for use in procurement



B.2 Contract Planning Phase – Managing Risk

- Project Scope and Timing
- Who needs to be involved?
- Project Risks – Best borne by owner? Best borne by Contractor?
- Available Owner Expertise/Resources
- Available Contractors and Risk Appetite For Project (“market”)
- Consequences of Failure on project: Schedule, Cost, Warranty, Reputation

Do my contract and procurement process address the above? If not, fix.



B.3 Procurement Phase – Managing Risk

- Sole Source vs. Competitive Tender
- Legal Obligations arising out of Tender
- Flexibility in Bid Process? Shortlisting
- Time vs. Price Considerations? What is more important?
- Set timing expectations early



B.4 Workshop Problem #1 – Contract Planning and Procurement Phase



Break
(10 min)



C. EXECUTION AND CONTRACT ADMINISTRATION RISKS



C.1 Managing Change - Be Prepared and Follow the Contract

- Know and follow the contract
 - Do you have the latest contract with all of the amendments and agreed change orders?
 - Review and follow key provisions
 - Change order provisions and response time
 - Know your scope and time
 - Ensure contractor is following its obligations – which internal individual is responsible for this?
 - Duty to notify/Don't waive rights
- Ensure Commercial and Legal is aware of the contract admin process and status
- Manage communications – where are your documents? Record keeping
- Prepare for a dispute
 - Consider forming claims team early in contract to deal with issues early



C.1 Managing Change - Why do we care?

- Risks resulting from failure to manage changes:
 - ✓ Project disruption
 - ✓ Schedule delays
 - ✓ Increased costs
 - ✓ Decreased labour efficiency
 - ✓ Warranty claims and rework
 - ✓ Lost profits
 - ✓ Safety Concerns
 - ✓ Disputes, litigation or arbitration
 - ✓ Reputational impact



C.1 Managing Change – the Change Order

- Most likely source of adversarial relationships
- Common changes:
 - ✓ Drawing errors or omissions
 - ✓ Design changes
 - ✓ Direction of extra work
 - ✓ Disputes over whether work is included in contract scope of work or is extra
 - ✓ Unforeseen conditions
 - ✓ Substitutions
 - ✓ Cost changes (materials, etc.)
 - ✓ Force majeure
 - ✓ The 'verbal' instruction....



C.1 WorkShop Problem #2 – Managing Change



C.2 Managing Contractual Defaults

- They happen. How to deal with them is key
- Timely Notice to contractor and cure period
- Common Remedies for default
- Don't ignore the problem



C.3 Managing Contractual Delays

- Concept of schedule, time and breach in a contract
- Common contractual remedies and requirements
- Time at large
- They're going to be late. Now what?



Workshop Problem #3 – Defaults and Delays



D. The Renegotiation



D.1 Why renegotiate? Owner perspective

Pros:

- Realign the Parties
- Settle outstanding claims
- Get a better deal
- Get closer to “market”

Cons:

- Time consuming
- Disruptive
- Better Business Deal?
- Award bad behavior



WorkShop Problem #4 – The renegotiation



Questions and Discussions