

Challenges in Contracting for Environmental Dispute Resolution

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I. Introduction

Over the past six years, CONCUR Principals have provided services in facilitation and mediation of public policy dialogues, site-specific disputes, and development of organizational priorities. In addition, we have combined our expertise in substantive environmental policy matters with our process skills to complete assignments in environmental analysis and natural resource planning. Our clients have included local, state, and federal agencies in the US and abroad, corporations, nonprofit organizations, and international development banks.

This forum presents a valuable opportunity to reflect on our experiences, and to think critically about some of the challenges inherent in securing contracts for work in environmental and public policy mediation. We draw these comments primarily from our own first-hand experience as practitioners, and from stories and anecdotes we have exchanged with colleagues. In Section II of this working paper, we discuss some distinctive features of environmental and public policy mediation. In Section III, we outline some preconditions for successful contracting. In Section IV, we analyze the recurring challenge of responding to a Request for Proposals (RFPs), and in Section V we review three types of "phantom" consulting opportunities. We conclude the paper in Section VI with some advice to practitioners. Also included here is an addendum "More About CONCUR".

II. Distinctive Features of Environmental and Public Policy Mediation

In our professional practice we have found that environmental and public policy disputes have a few features that distinguish them from other types of disputes: among them are that 1) usually, these disputes involve several interests groups, including at least one public agency; and, 2) frequently, they have more than one issue at stake. Naturally, the complexity

inherent to these disputes carries through into contracting for work in this field.

For example, often when a government agency plays the lead role in hiring a contractor, it exacts substantial paperwork from interested applicants. Also, the multifaceted nature of these disputes gives rise to numerous debates that must be settled before any conflict resolution work can even begin: what kind of experience and expertise should be required of the mediators?; what is the scope of their assignment?; and how long and expensive will the negotiation process be allowed to be?

III. Some Preconditions for Successful Contracting

In reflecting on the diverse kinds of projects we have undertaken, it is possible to identify a handful preconditions for successful contracting. Perhaps the most vivid conclusion is that there is no substitute for working with top quality counterparts in the client organizations. Simply stated, it is almost impossible for a team of professional dispute resolvers, working alone, to deliver an agreement. Support of all kinds (administrative, clerical, sometimes technical and scientific) must reside in the organization that serves as the convenor or host auspices for a facilitated dialogue.

Willingness of the Service Provider to Undertake Some Advance Preparation Upfront

Most successful contracts require that the service provider do some homework about both the substantive issues and the parties involved. Often, this takes the form of tracking an emerging dispute, and perhaps beginning a Stakeholder Analysis on a speculative basis. Other kinds of preparation that may be required could include reviewing annual reports or other documents that describe the roles and missions of parties to a dispute.

Willingness of the Client to Work in a Collaborative Fashion to Frame the Scope of the Work

From time to time we asked to undertake facilitation or training that is framed in a sort of "take it or leave it fashion." We seldom pursue such leads. Instead, we find that we almost always work in a collaborative fashion to negotiate both the scope of work and the associated budget. This means that there is some give-and-take about the preparation time required, the steps that typically must be followed in a negotiation process, and ways of crafting a realistic budget that meets both our needs as service providers while respecting the financial constraints of the client. Occasionally, this collaboration may require both parties to think creatively about how to bring more resources to the table in order to build an adequate budget.

Willingness of Both the Client and the Service Provider to Learn About How Dispute Resolution Tools Can be Applied to the Case

collaborative problem solving process, the involvement of multiple stakeholders increases uncertainty for the applicant.

Not surprisingly, competing agendas often surface in these interview panels. In at least two such interviews, we have stood by while the interviewers engaged in bitter and divisive discussions about how to proceed with the work program!

All in all, we believe that responding to RFPs should be an integral part of a balanced business development strategy, but we find that the other pathways for securing contracts--discussed above--represent a better use of our time.

V. Three Kinds of Phantom Opportunities

For every success story about securing a new contract, there is probably at least one failure. The challenge, of course, is to learn from these experiences and to begin to spot patterns. In this section, we present three short vignettes that highlight what CONCUR has learned about the sometimes illusory nature of mediation opportunities.

Lack of Commitment of the Parties to a Specific Outcome

In some cases, certain possible parties to a facilitated ~~dispute~~ are interested in giving the appearance of collaboration than in working towards a tangible agreement. We have had two experiences with such potential clients.

Our assumption going into the interviews for both projects was that our dual expertise would be asset, as would our focus on developing concrete products leading to implementation. In this respect, we tend to use an active mediation style. In other words, we are committed to producing a well-informed, tangible agreement that stands a good chance of being implemented.

In fact, we got neither of the jobs, and found out later that a much "softer" style of facilitation was preferred. Though we can't we completely sure about what happened, we posit that parties who are reluctant to engage in serious negotiation may find it easier to stall when working through complex ideas with a generalist facilitator. In addition, a facilitator who takes no responsibility for the quality of the outcome may be more apt to let a dialogue conclude without securing an implementable agreement.

In one of these cases, a local politician who had played a quasi-mediator role was anxious about losing control of the process. As a member of the selection process, this person was able to exert strong influence, and insisted on the choice of a softer, more process-oriented facilitator. In the other case, one member of the selection committee worried that our substantive knowledge of the subject matter could be "intimidating." to the professional staff already working on the project.

An Inquiry as a Justification for a Prior Contracting Decision

Certain government agencies are required to demonstrate that the contractor they have chosen is proposing to complete work for the lowest bid, or is at least offering services for well within standard market rates. From time to time we get inquiries from contract officers who are seeking bids merely to justify a decision to hire another service provider. Of course, the only way to find out if these inquiries are reasonable is to ask a number of questions: "Has a tentative decision been made?"; "Who is the decision maker?"; or, if we know the staff, "Is this contract wired?"

An Inquiry as a Vehicle for Obtaining Free Advice or Defending Turf

Yet another type of phantom opportunity arises when a potential user of dispute resolution services invites a proposal in order to gather ideas, but probably has little intention of actually using the services. Facilitators and mediators should be prepared for requests for services that are actually motivated for defensive purposes. For example, an agency staff person may be pressured to improve the quality of interaction in a consensus building process, but might feel that yielding the task to an outside facilitator would be taken as admission of a professional shortcoming. In such instances, the staff person might be looking for access to the "language" and "look and feel" of a facilitated process without a budget to pay for it.

In several other cases, we have been contacted by organizations who "are very interested in training", but when pressed, have no budget whatsoever to underwrite this work. Once again, the lesson here is to be prepared to answer pointed questions, particularly about the available budget, the internal decision making process, and the likelihood that a contract for services will be let.

VI. Advice for Practitioners

Be Prepared to Clearly Explain Facilitated and Mediated Processes and Their Relationship to Formal Decision Making Procedures

Providers of dispute resolution services should anticipate that one of their ongoing roles is to educate potential users about the benefits of facilitation and mediation. A common need is to distinguish their essentially voluntary processes from arbitration. Another is to deal wisely with skepticism and resistance from some parties who view the intervention of another professional, even one with a neutral assignment, as an infringement on their turf. It is absolutely crucial to convey the idea that mediation of face-to-face negotiation is a supplement to the formal decision making process and not a replacement of it. It also helps to publicize a few successful case studies, especially those that revolve around issues or fact patterns that are analogous to the dispute at hand.

Design Negotiation as a Phased Work Program that Produces a Stepwise Series of Agreements

It is seldom possible to craft a solution to a complex public policy and environmental issue in a single meeting. Moreover, we find that successful facilitation and mediation requires that we do considerable preparation in order to become well versed on the substantive issues at stake and to complete an analysis of the stakeholders involved.

On a more philosophical level, we find that efforts to reach "grand accords" usually fail unless they are built upon a series of smaller agreements. These agreements might include such steps as 1) adoption of groundrules; 2) scoping a short research agenda for a fact-finding process; 3) preparation of a list of policy options to be investigated; and 4) agreement to a series of broad goals or vision statement to guide more specific terms of an agreement.

Thus, it is necessary to propose a phased work program. For example, we might initiate a stakeholder analysis and conflict assessment for a modest fee, and then report the results and recommend the next steps in a negotiating process. Included in these steps might be a second phase of work in which groundrules are developed, an initial dialogue is convened to enable parties to discuss their interests, and a joint fact-finding process is completed to share relevant technical information and develop new information as needed. Then, negotiation of concrete solutions and preparation of an implementation strategy would follow the pre-negotiation tasks.

Consider Reframing the Scope of Work

Don't assume that a work assignment, even if it appears in an RFP, is the last word. Be willing to take the risk of suggesting how work could be reframed to produce a more orderly, realistic set of expectations.

For example, we occasionally we get inquiries from potential clients who want us to facilitate a dialogue but are unwilling to pay for preparation time. With such clients, we explain that all successful facilitation requires preparation, and that we normally use a rule of thumb of three preparation days for every day of facilitation. We then give examples of the kinds of projects we have completed, and show how the pre-meeting interviews, review of documents, and joint development of an agenda and meeting materials are absolutely essential to success.

Alternately, we might be told that there is a deadline for a resolution at some point in the unrealistically near future. In such a case, we suggest how some interim agreements might be reached by the deadline, and propose that the parties take stock at that point to determine whether additional resources should be committed to continuing the dialogue.

Build Coalitions with Advocates of Dispute Resolution

While it is tempting to engage in a debate to deflect the the concerns of the skeptics, it is a mistake to spend all one's professional capital trying to bring the most recalcitrant parties on board, thus achieving the ultimate "conversion experience." Instead, in trying to gain

entry into a dispute, it makes sense to build coalitions with those staff of convening organizations or those parties who are convinced at some level about the merits of dispute resolution.

Be Prepared to Bring Resources to the Table in Building a Budget for Mediation of a Complex Dispute

We believe that one of the attributes of a good mediator is to bring resources to the table. These may take the form of ideas for suitable auspices, in-kind services (meeting space, clerical support), access to expertise in evaluating technical issues (universities, private "think tanks"), and suggestions for additional funding sources (trade associations, foundations). By taking initiative on these subjects, dispute resolution providers can often help overcome resistance to mediation.

Build Strategic Alliances with Compatible Practitioners

CONCUR is actively working to build a series of strategic alliances with other dispute resolution providers and professionals in allied fields such as law, public policy, social services, and environmental planning and engineering. We are doing this to leverage opportunities for work on interesting new projects and to build a network of colleagues whom we might call upon in the future. One practical benefit of such alliances is to spread the work in briefing new clients about dispute resolution services and in responding to RFPs. It can also create new work opportunities by building teams with multiple strengths.

MORE ABOUT CONCUR

CONCUR Services

CONCUR provides services in environmental policy analysis and conflict management. Our portfolio of conflict management services includes mediation and facilitation of public policy dialogues, conflict assessments and issue audits, and strategic planning. We also lead a variety of training courses in negotiation and mediation.

CONCUR Principals

CONCUR Principals Scott McCreary and John Gamman each earned their doctorates at the Massachusetts Institute of Technology where they emphasized environmental policy and dispute resolution. They also serve as Associates at the Harvard Program on Negotiation. Prior to their PhD work, Scott and John both worked as practicing environmental planners in California and have over 25 years of combined experience. As part of their professional work, they have prepared case studies of negotiations for the Hewlett Foundation, the NY Academy of Sciences, and USAID.

Upcoming Training Course

Our next training course is scheduled for February 3 and 4, 1993, at UC Berkeley. This course is strongly recommended for dispute resolution professionals who want to learn more about how dispute resolution techniques are applied in the environmental arena. The course format is a dynamic mix of short lectures, simulation exercises, debriefing, and discussion of several actual case studies. The course is also well suited for professionals in the environmental planning and policy field who want to learn more about collaborative problem solving and dispute resolution techniques.

Other CONCUR Working Papers Available

CONCUR has other working papers available for a cost of \$2.50 each, or \$8.00 for the set.

Working Paper 92-01 "Mediating A Statewide Environmental Dialogue in Louisiana." March 15, 1992.

Working Paper 92-02 "Using Joint Fact-Finding Techniques to Resolve Complex Environmental Policy Disputes." September 22, 1992.

Working Paper 92-03 "Using Case Studies of Actual Negotiations to Evaluate Dispute Resolution and to Design More Effective Dispute Resolution Systems." September 24, 1992.

Working Paper 92-04 "Ratification of Informal Agreements and Their Linkage to Formal Binding Agreements." December 9, 1992.

For More Information

To receive more information about CONCUR's services or to order copies of working papers, contact Scott McCreary at the Berkeley office at 1832 Second

Street, Berkeley, CA 94710. The office phone is (510) 649-8008 or fax (510) 649-1980. You may also contact John Gamman at 107 Nevada Street, Santa Cruz, CA 95060. His phone is (408) 425-3962; his fax is (408) 547-8610.