JPFC JP FISHER CONSULTING

CASE STUDY – PROJECT RECOVERY

An international client approached us to provide an independent report on the validity of a claim that it had received from a contractor for additional costs incurred on construction of a remote road. The original contract was in the tens of millions of dollars and the claim was double the value of the original contract.

On investigation we found that neither side had performed brilliantly. The contractor had made four changes to its project manager and the client had appointed three superintendents. Contract documentation was less than perfect on both sides with significant design changes made after award. The individuals involved had, for the most part, left their respective organisations and in short, they had left a mess. Worse still, the project was incomplete, having been suspended for the period of the rainy season. There was no clarity as to when it would be completed. Trust between client and contractor had broken down almost completely and the contractor had given notice that it was commencing arbitration.

The claim was an early version with not a huge amount to commend it but it was clear that there were substantial issues which had arisen, some costs were obviously due and, with further elaboration, other costs might be due.

JP Fisher Consulting produced the report which clarified the heads of claim that had been made, recognised that there were further heads of claim that could be made and recognised that there were payments due that could be made immediately. It documented impartially the inadequacies of both sides. Most importantly it recognised that the legal costs of arbitration were likely to be several millions for each side.

As an alternative to slugging it out over several years, we proposed that all would win if trust was re-established and the parties tried to work together to finish the project. In consequence it was essential to re-establish communications between both sides. As a way of re-establishing communications JP Fisher Consulting proposed that an uncensored copy of the report to the client, showing warts and all, should be sent to the contractor.

That action achieved a meeting between the CEO's and ourselves. With much reluctance on both sides we persuaded the parties to put the arbitration on hold and engage in a collaborative, facilitated, interests based process. To that end all negotiations were to be without prejudice in order that parties could revert to their positions if negotiations failed. As an olive branch the client waived its rights to refuse to entertain claims not put to the Superintendent within the strict time limits stated in the contract. Meanwhile the contractor remobilised and worked well to get the job finished.

Each side brought in fresh negotiators who were road construction specialists. JP Fisher Consulting acted on behalf of the client during the negotiations. The negotiators had no previous on-site knowledge of the particular project but were able to retain those who did have that knowledge in their back office team. The advantages of using fresh negotiators were that they carried no emotional baggage and that they had a joint goal of successfully achieving a settlement rather than defending a cherished but often unsustainable position.

No lawyers were allowed at the negotiating table but each side had available a legal team to provide specialist advice on contractual interpretation. The advantage here was that engineering, by its nature, seeks a common outcome accommodating various technical requirements in a solution acceptable to all. The nature of lawyers in arbitration is to act positionally to seek a win for their clients. The negotiating teams, while recognising their loyalties to their own organisations, rapidly formed a bond with a common objective in settlement success.

The various construction programmes which had been developed at the construction stage were of limited value. In order to establish fair extensions of time, and flow on costs, it was agreed that the contractor would develop a new resourced construction programme as if starting again and agree it in fair discussion with the client negotiators. This was then used as the baseline programme from which delays and consequent effects on resourcing could be measured and also to complete the site works.

The team jointly teased out from the existing documentation a list of 68 individual claims. These formed the basis of all further negotiations. The negotiators met fortnightly, settling some claims, agreeing to withdraw others and using the time in between meetings to establish necessary evidence to be provided prior to the next meeting.

Where the negotiators could not agree on the contractual basis of a claim either party could put the issue to an independent expert who would provide a non-binding opinion. The fact that the opinion was non-binding was of great help. Non-binding opinions do not force people to accept but carry great moral weight. As a result in all cases the parties voluntarily accepted the opinions of the expert. Such voluntary acceptance created team spirit among potential rivals.

The parties agreed to keep the quantum of claims away from independent opinion. Value was resolved in workshops where the teams could jointly evaluate data on spreadsheets and diagrams projected on the wall. This produced remarkably good natured competition. Each side naturally wished to maximise or minimise financial amounts but in the context of agreed engineering parameters it was mostly possible to achieve fair resolution.

At two points within the entire negotiation process the parties came back together at corporate level, facilitated by an independent mediator, to see if an early deal could be reached. In neither case did this happen but the mediations gave great comfort to the CEO's and their legal advisors, who had been kept out of the front line, that the process was working. This comfort was vital since at any time either side had the option to revert to arbitration.

Out of the 68 claims all but eight were settled and paid over a period of 9 months from start to finish. This represented about 80% of the value in dispute. At this point it was time to bring the CEO's back in to swallow hard and offer a handshake over a cup of coffee to settle the rest. The essence of a deal is that nobody is entirely happy but no one is entirely disappointed either. Deals at CEO level are as much about strategy as money. Arbitration would have cost $3 million on each side and taken senior staff out of productive work for upwards of two years. The negotiating process cost $750,000, including extensive travel costs since the negotiating team members operated from widespread locations, and was completed in 9 months, along with finishing the works on site.

The icing on the cake was that the CEO's agreed to work together again on the next project.

Call John Fisher if you need help in project recovery.