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Risk and contracts: Furniture, fixtures and equipment procurement company perspective

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As an FF&E procurement company we address the risk of working with hundreds, if not thousands, of suppliers on every project. The issue of performance risk has always been present but has surfaced powerfully since the 2008 recession.

An owner contracts with an FF&E procurement agent, as with a construction management firm, and then the procurement agent places orders and contracts with vendors, suppliers, manufacturers and FF&E contractors, in the name of the owner with approved terms and conditions. The questions raised are: What is the procurement agent's responsibility and liability relative to vendors and contractors? Can the vendor deliver? Are they solvent? How do you secure deposits? How much financial due diligence is done on a vendor? Can you put stringent performance terms and conditions in the orders? What is the recourse to offshore vendors? What is the recourse if they default in regards to schedule or manufacturing quality? What are the payment terms? These are all critical questions. What we have recently experienced is the propensity of ownership's legal representatives attempting to eliminate risk by holding every entity responsible for any potential outcome. The contract language and terms and conditions that float down from ownership to the consultants and passing along to subs and vendors are at best intimidating and at their worst stifling. Contracts don't eliminate risk. In fact I will offer my opinion; that in the attempt to "eliminate" risk without understanding the relationship and roles of each contractual party the owner's risk will increase. This attempt to eliminate risk by comprehensive legal language has a diminishing return as the project progresses. For example, in negotiating a recent contract with a publicly held corporation with multi properties, the contract referred to the procurement agent as a contractor and elsewhere in the contract as a consultant. It made reference to the "procurement agent's" vendors and sought to hold the purchasing agent responsible for vendor performance while in another section it referred to the vendors as the "Owner's Vendors". The ambiguity in the legal language actually dilutes liabilities and Owner's recourse when supporting documentation during the administration of performance is inconsistent with the contract. The role and relationship of the parties should be clearly defined with definitions and supporting documents being consistent throughout the contract. This gives the Owner the best approach for the mitigation of risk.

In contract negotiations with another large company for procurement services, the owner's legal representation wanted to tie responsibility for vendor/contractor performance to the purchasing agent. This role would make the purchasing agent a contractor and not an agent. It was clarified that each vendor would have performance requirements directly with the owner, offering ownership recourse for non-performance directly to the vendor, administrated by the purchasing agent. I noted to the owner's legal rep that there are also reciprocal and syncopated performance requirements by the owner, interior designer, and other Owner's consultants to allow the vendor to perform. It is

important to understand these relationships, the process and allow the proper time for performance by all parties so that the documented recourse, in the event of non-performance, can be attributed directly to the non-performing party(ies).

In the event of non-performance, complications arise in trailing back responsibility for delays or inaccuracies from the other parties in respect to timely approvals, payments, etc. Clarification and accuracy of the relationships and performance requirements helps clarify and focus the owner's recourse to the responsible party, instead of taking the shotgun approach with the terms and conditions. With tight deadlines and many situations where funding cannot be provided without a signed contract, the reverberation of acceptable contract terms and conditions can actually put a project further at risk.

In regards to the vendor's terms and conditions, serious challenges arise. Rightfully, the Owner deserves clear performance terms and conditions. With vendor performance being contingent on the timely and accurate flow of information, including: designer to specify, owner approval, purchasing agent's processing of orders and ownership funding/deposit requirements, there is a timeline for processing to enforce consequences of quality or delivery issues with the vendors. In some cases there are fabric cuttings for approval, shop drawing review and approval, all before manufacturing can commence. The recourse for delays or quality issues is well intertwined with other parties' performance requirements. We recently had a client who, after spending 6 months negotiating the contract for our services, wanted to begin negotiating the terms and conditions with each vendor. I reiterate, there are potentially a thousand vendors associated with a typical full service hotel renovation or new build project. For many vendors, if terms and conditions are too stringent, they will refuse the order. Going back to reselecting product or vendors resets the schedule, initiating additional interior design services and puts the project schedule at risk. In this particular case, our client negotiated four orders and logged substantial legal costs, and consequently, two out of the four vendors refused to accept the order based on the owner's stringent terms and conditions. The vendor terms and conditions negotiations were abandoned and standard terms were issued. There are certainly large custom orders where the terms should be paid close attention, however, administrating risk is a more practical approach and sets the environment for allowing vendors and project team the time necessary to perform, saving owners time and money. Further, though business negotiations should remain impersonal, difficult negotiations from the onset of the project raises concern that relationships may deteriorate as the project progresses.

Simplicity, trust and the "spirit" of agreements.

Helen Fitzgerald writes "The best negotiations end with both parties being satisfied." Lopsided contracts will chase away good consultants, vendors and manufacturers. Fair terms will allow both parties to work quickly and be motivated to performance. Certainly proper recourse should be in place for non-performance, but no language will eliminate risk. Business trust has taken a hit in the past few years. Tighter margins, pressure to minimize revenue loss, or perhaps desperation for financing and contract wins are all reasons for an increase in non-performance. Simplifying the language and allowing for the administration of risk is a much better way to mitigate owner risk.

Supply chains are global and therefore are subject to geo political and logistical risk, and moreover manufacturing has gotten more complicated, not simpler. How do you tie up risk if the supply chain is interrupted? Allowing the proper amount of time for supply chain complication is important and allowing for proper manufacturing time impacts quality control as well. The requirements for performance are nearly always related to schedule and quality. These are not mutually exclusive.

Good companies WANT to be responsible and liable for their performance. Irresponsible companies will sign anything to be awarded orders or contracts.

Understanding the risk, roles, and spirit of the works helps the owner's legal team draft contract language with project performance terms and conditions that are fair, responsible and mutually beneficial. I recently invested one hour in a phone call with a client's attorney, explaining the relationship and role between the procurement agent and the owner's other consultants and describing the philosophy behind the terms and conditions of the vendors and suppliers to help create the spirit of the agreements. That time was most productive. It prevented the inclusion of overloaded contractual language that puts discussions and negotiations on the defensive. It produced an expeditious, fair and equitable contract featuring performance requirements that were consistent with the works and the supporting documents that are going to become the permanent project records over the next two and half years. The goal is to make all parties feel secure, and perhaps soon the business world can cycle back towards simplicity, trust and fairness.

Gus Sarff, ISHC is president and owner of GS Associates, Inc., a procurement consulting firm providing FF&E and OS&E services locally, nationally and globally for luxury, convention, resort, limited service hotels, fractional ownership properties, restaurants, and function facilities. For over 25 years, GS Associates, Inc. has continued to develop procurement technology and creative sourcing to maintain its leadership in the industry. GSA's services are transparent, expert, and will make a positive impact on any project.