How to Structure a Successful Mediation

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How to Structure a Successful Mediation

- Mediation Purpose
  - Provides an expert with an objective viewpoint
  - Allows an expert to help facilitate resolution of the dispute by the parties in the dispute
  - Provides a non-threatening and informal atmosphere at lowered costs
  - Maintains confidentiality
  - Provides a venue for the parties to discuss their goals with the objective expert

How to Structure a Successful Mediation

- **Mediation Timing**
  - ➢ Early in dispute resolution process
  - ➢ After negotiations have failed
  - ➢ Last step before expensive arbitration or litigation

How to Structure a Successful Mediation

- Success Rates
  - Range of 85% successes
  - Most settle at mediation
  - Some settle afterwards but before next step in formal dispute resolution process

How to Structure a Successful Mediation

- Atmosphere
  - Parties already in adversarial relationship
  - Have spent some time building the "case"
  - Looking for a venue to explain their side
  - Generally have spent significant amount of money already, but recognize that much more will be spent if mediation fails

How to Structure a Successful Mediation

- Technical Component
  - Generally have job costs reports
  - Usually have in-house analysis of some type
  - Often have experts on board already
  - Always have attorneys
  - May have a litigation or arbitration calendar
  - May have some depositions or witness statements underway

How to Structure a Successful Mediation

- •Typical Mediation Process
  - ➤Introductions
  - ➤Process description
    - ➤Note confidentiality of process so door is open for all discussions
    - ➤Discuss success rate but note that both parties must shift positions
    - ➤Looking for a mutually acceptable solution

How to Structure a Successful Mediation

- Typical Process
  - Role of Mediator
    - Acts as a "neutral"
    - Decisions are made by the parties, not by the mediator
    - Mediator will not provide legal advice

How to Structure a Successful Mediation

- Typical Process
  - Presentations by each party
  - Questions, discussion or sometimes "debate"
  - Separate into private rooms

How to Structure a Successful Mediation

- Typical Process
  - Mediator engages
    - Visits each room
    - Reminds everyone of the goal – to settle
    - Encourages reconsideration of positions
    - Encourages offers
    - Delivers offers

How to Structure a Successful Mediation

- Typical Process
  - Conclusion
    - Settled - brief meeting to conclude final deal
    - Determination that process needs more time (next day or hiatus)
    - Determination that process will not work

How to Structure a Successful Mediation

- Typical types of mediators
  - Water Carriers
    - Simply delivers any offers
  - Horse Traders
    - Pushes to increase offers in order to move process
  - Debaters
    - Wants to promote debate about issues
  - Partnering
    - Attempts to gain a win-win situation

How to Structure a Successful Mediation

- •Recommended Structured Approach
  - ➢Enables partnering-type mediator
  - ➢Look at lessons learned from actual mediation
    - ➢Usually some principled stand involved that may not be revealed easily
    - ➢Fairness is an important part of most disputes
    - ➢Original relationships have been destroyed or damaged
    - ➢Often part of the battle is just determining which way the cash arrow will point

How to Structure a Successful Mediation

- Structured Approach
  - Lessons learned from partnering
    - Team building
    - Problem solving

How to Structure a Successful Mediation

- Structured Approach
  - Use team building skills to modify mindsets
    - Put participants in the relationship that they had at the beginning of the project
      - Everyone was excited about project
      - Parties had some greater level of trust
    - Ask why each was selected originally
      - Owner chose CM or Contractor for good reasons
      - CM or Contractor chose Owner for good reasons
      - GC/subcontractor cases are same

How to Structure a Successful Mediation

- **Structured Approach**
  - **Team Building**

    ➢ Remind participants why the project was conceived

    ➢ Discuss successes of the project (choose goals reached; on budget, on time, good quality, useful product)

    ➢ List things each party did correctly or well during project

    ➢ Identify original risks prior to construction

    ➢ Identify program failings that contributed to the dispute (moves the discussion from personal to process)

How to Structure a Successful Mediation

- Structured Process
  - Problem Solving
    - Acknowledge pain & frustrations to date
    - Note necessity to set aside emotional feelings to focus objectively
    - Note the complexity of the case
      - Simple delay – generally is easiest to resolve
      - Disruption – complicated and hard to prove, requires good records and analysis capable of showing lack of production
      - Acceleration – requires good records and analysis

How to Structure a Successful Mediation

- Process
  - Problem Solving
    - Note presence or absence of contemporaneous documents; few cases have good project records
    - Look for any common ground or canceling claims
    - Identify areas of disagreement
    - Tell at least one "horror story" about cases where costs have well exceeded any claims
    - Discuss risks issue – often disputes arise from allocation or acceptance of risks (performance and cost)

How to Structure a Successful Mediation

- Process
  - Problem Solving
    - Remind everyone about personnel demobilization
      - Experienced personnel cannot move freely to next job
      - If personnel get involved with new project, case will be inadequately developed
      - This cost is often ignored

How to Structure a Successful Mediation

- Process
  - Problem Solving
    - Discuss how escalation happens within the project
      - Problems are ramped up in the project level
      - By the time they get to senior management, they are already disputes and hard to resolve
    - Roughly approximate costs to litigate
      - Compare to opportunity gain
      - This is the reality check
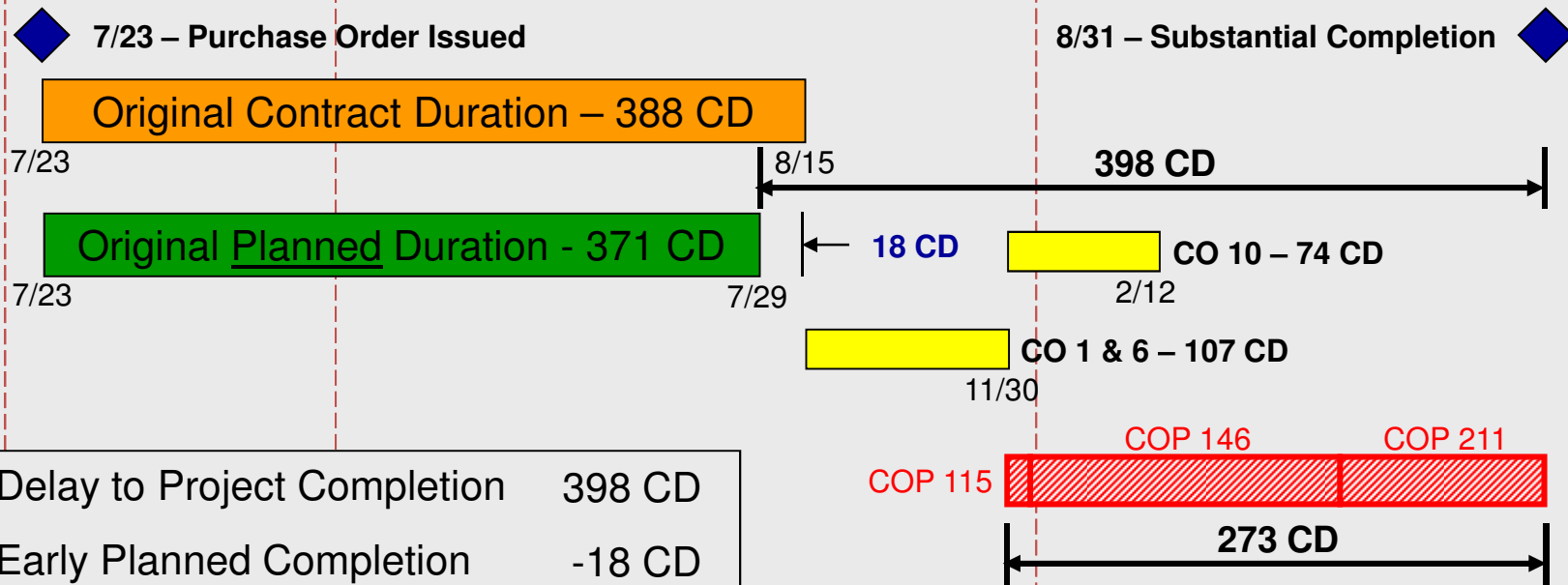
How to Structure a Successful Mediation
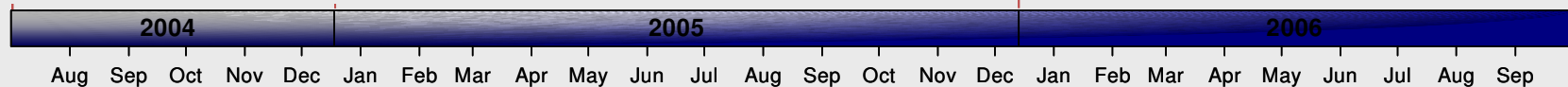
- Process
  - Presentation
    - Maintain big picture
    - Provide good overview graphics
    - Don't get into minute detail
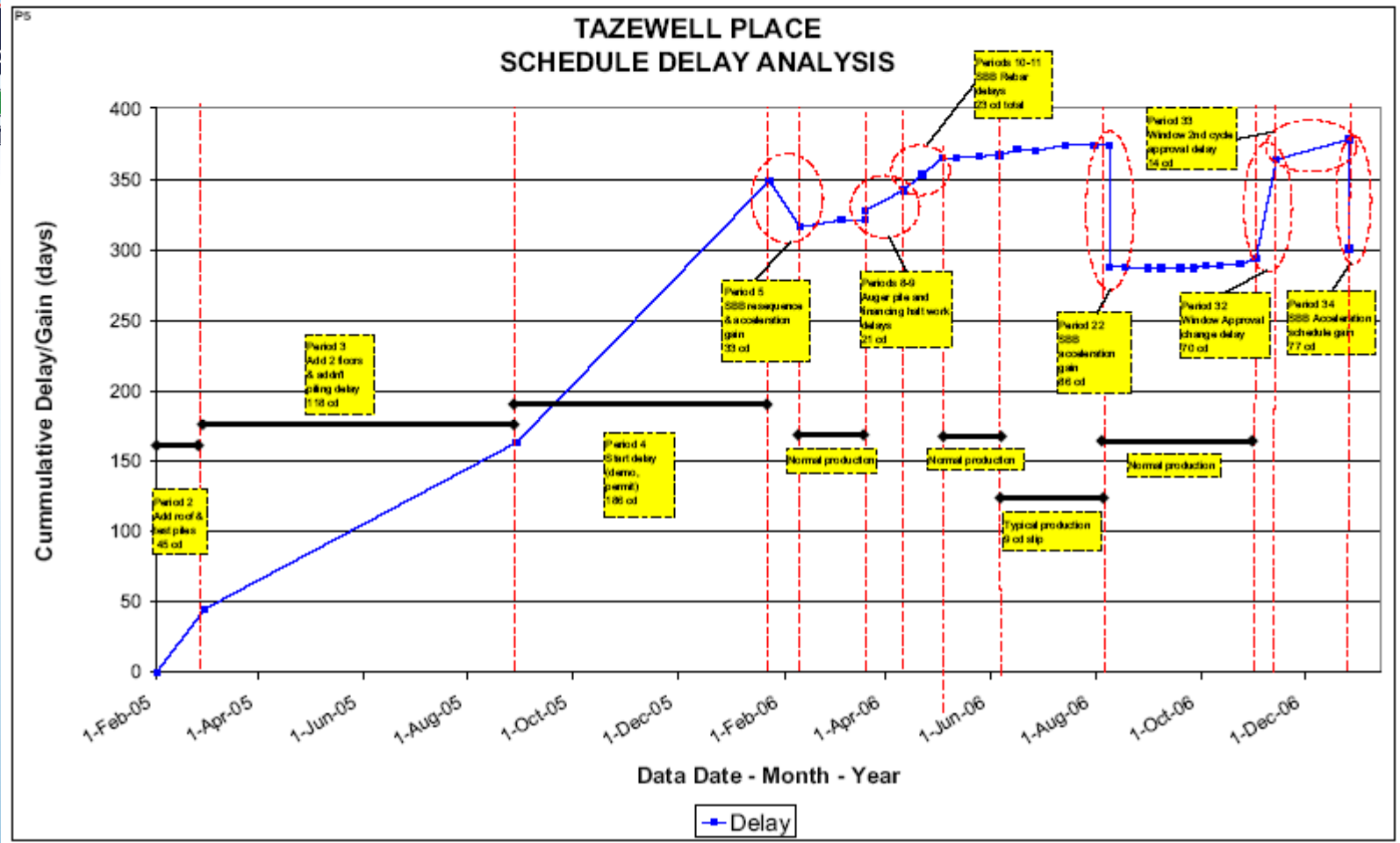   - Identify what went well

Presentations

7/23 – Purchase Order Issued

8/31 – Substantial Completion

Original Contract Duration – 388 CD

7/23

8/15

398 CD

Original <u>Planned</u> Duration - 371 CD

7/23

7/29

18 CD

CO 10 – 74 CD

2/12

CO 1 & 6 – 107 CD

11/30

COP 146   COP 211

COP 115

273 CD

Delay to Project Completion	398 CD
Early Planned Completion	-18 CD
Change Order 1 & 6	-107 CD
Total Time Requested	***273 CD***

(CO 10 - COP 115, 146, 211)

2004	2005	2006

Aug Sep Oct Nov Dec Jan Feb Mar Apr May Jun Jul Aug Sep Oct Nov Dec Jan Feb Mar Apr May Jun Jul Aug Sep

College of Scheduling

Presentations

How to Structure a Successful Mediation

- Process
  - Presentation
    - Maintain even temper to keep discussion objective
    - Be objective; don't be afraid to show responsibility where it occurs
    - RARELY is all the responsibility due to one party
    - Keep presentation focused on facts, not personalities or actions

How to Structure a Successful Mediation

- Process
  - After Presentation
    - Offer further discussion (Q&A) between experts
    - Identify any areas of agreement
    - Identify where and when the project went into conflict
    - Identify main issue(s) that caused the initial conflict

How to Structure a Successful Mediation

- Process
  - After Presentation
    - Attempt to state other party's case to show that you understand their position
    - Ask other party to state their understanding of your case
    - See if the experts see anything differently from before presentations and discussions

How to Structure a Successful Mediation

- Process

  ➢ Breakout Sessions

    ➢ Encourage partnering type of mediation

    ➢ Avoid water-carrying or horse-traders

    ➢ Avoid debaters, although those are better than the water-carriers or horse-traders

How to Structure a Successful Mediation

- Process
  - Breakout Sessions
    - Mediator suggestions:
      - Keep the team building issues in the conversation
      - Review weaknesses in each case with that party
      - Remind parties of problem solving issues (complexity, availability or lack of documents, canceling claims, personnel demob issues, escalation)
      - Look for those principled stands that may impede resolution
      - Discuss the fairness of the opposition case
      - Try to reiterate future cost risks

How to Structure a Successful Mediation

- Conclusions
  - Mediation requires use of soft skills, such as team building, problem solving, that are not often used
  - The identified issues may not be the real roadblock to settlement
  - Litigating the case in mitigation is not usually fruitful
  - Mediations are often successful just due to the recognition of the predicted cost to continue in formal dispute resolution

How to Structure a Successful Mediation

- Conclusions
  - Mediation should be very successful, and lead to improved relationships that promote win-win solutions
  - Most cases that did not settle in mediation and go to litigation would have been better served by settlement offers on the table

Thank You
For Attending!