

Commercial and Contractual Management of Projects (CETM 10)

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Introduction

In the last two decades most countries have experienced exponential growth in their economies and this is partly influenced by the continued investment partnerships that they have made with other countries. A number of fast growing economies in some countries in which they have invested a number of resources in other countries has increased trade relations between one another. For example the UK nuclear power deals with China. Ting-Toomey and Chung (2012) stated that trade between other nations and China will continue to grow in the coming years. Unfortunately, scholars have been quick to notice that the trade relations between China and other nations are hugely skewed in favour of the former. There are some risks missing out on the potential opportunities that come about with the large projects negotiations unless the negotiators adopt favourable negotiating tactics and skills. This report seeks to demonstrate the role played by negotiations and the negotiating tactics and skills that are used by organisations in negotiating large projects.

The role of negotiation in Large Projects

Negotiation is a process of communication used by legal practitioners to resolve arguments and to finish business transactions for client's on-behalf (Guthrie and Robbennolt 2015).

Many organisations have found it difficult to negotiate for large projects today. This has often been attributed to the fact that the way most projects negotiations are being done, which is highly tied to cultural values. Some countries host some of the world's oldest civilisations which are based on ancient philosophies thus differentiating the negotiation traditions from any other country in the world (Dussel, 2009). Despite their unique business culture, most countries have made tremendous progress in learning the cultures in various parts of the world and this has helped their growth in different part of the world. Before getting in to any contracts, negotiations have to be carried as they set the terms of that agreement and this is not just for a specific project but also in any other business setting. The trick with negotiations is that they are shaped by the cultural backgrounds of the parties to the agreement. Most countries have followed the modern style in project negotiations while some have retained their own style of negotiation. This makes the process of negotiating in some countries to be complex as cultural differences enhance the risk of negotiations failure due to cultural misunderstandings (Robbins et al., 2013).

There has been an increase in the research available on large projects negotiations as academic scholars seek to solve the problem of failing negotiations. A majority of the existing academic thinking has looked at negotiations in a commercial setting in some countries without looking at the subgroup cultural factors such as age of the negotiating parties, or whether it is employees or corporations involved in the negotiations. For purposes of this study, the negotiations will be researched from the perspective of the corporations since they are the ones that have commercial and more detailed contracts when compared to the perspective of the employees. In order to understand negotiations in large projects, it is important to understand the negotiations strategies that negotiating parties use as well as the impact of culture in these negotiations (Duan, 2012).

Some organisations have been part of some foreign invested business partnerships in other countries. Foreigners seeking partnerships in some industries may require special approval from relevant government agencies aside from the usual process that involves registering with a local branch of the State Administration of Industry and Commerce (Chan and Shing, 2016). Selecting a partner particularly in restricted industries presented a huge challenge. Factors such as good reputation, legal standing and alignment of strategies and goals are critical universal qualities that are sought after when selecting a partner. For example, investors in the automotive industry in China where partnerships are restricted to state owned entities; such qualities may be extremely limited among legally qualified parties. Lin and Zou (2010) encourage foreign partners to be involved in operations, manage diversities in culture and values, and to be open to conflict resolution early in the process in order to make headway in their partnerships.

Communication in Commercial Negotiations

Chuah, Hoffmann and Larner (2014) cites negotiating contracts with some business partners as one of the most daunting challenges that negotiators can face. For westerners, the stark cultural disparities pour into large projects negotiations and overcoming the associated challenges requires a good understanding of these disparities (Chan and Shing, 2016). The first challenge that needs to become is the obvious language barrier. Even in the presence of a competent translator, there exists a real danger of meanings being lost in translation. Farquhar and Fitzsimons (2011) recommend the use of more than one communication channels by having more than one person in the negotiating team who can speak different languages. When delivering a speech or presentation, it is wise to use straightforward language, as jokes or dramatic presentations may fail to come out clearly in the translated delivery (Farquhar and Fitzsimons 2011). A distinct quality about some people and their culture is that friendship and business tend to overlap seamlessly (Chuah & Hoffmann, 2014).

As such, the “friendship first, business later” approach that is almost a taboo in the West is the natural course of business transactions in some countries. During meetings, especially early ones, a lot of seemingly irrelevant discussions touching on issues like family, leisure and home towns tend to come up quite frequently. Rather than skirting such discourses, it may be beneficial to encourage the client/team as they begin the process of forming commercial connections in some client’s business culture. Moreover, successful negotiations are followed by prolonged sessions of socialisation. Despite this seemingly casual approach to large project negotiation, negotiations tend to be very fast as singular issues are not given too much time. Some negotiators tend to focus more on the whole package than on the details. Rather than dwelling on unresolved issues, they prefer to move ahead and come back to polish up on these later. They prefer to begin the negotiation as swiftly as possible and any unresolved issues are usually catered for by a memorandum of understanding (Chan and Shing, 2016).

Social hierarchy is an important aspect in some culture (Stark et al., 2005). As such, the working level of the negotiators sends an important message to the client/stakeholders regarding the other party’s regard for the project. It is therefore wise to send at least a few high level executives as part of the negotiating team and to make sure that negotiations are carried out with top decision

makers (Ghauri and Fang, 2001). Bargaining and tough negotiation is part of the business approach. However, harmony is a very valuable concept among many clients and negotiators take special care to avoid conflict. Concessions from both sides are usually encouraged as part of the process to smooth things over and stay on good terms. Disputes rarely deteriorate into legal action and where this does happen, legal redress tends to be a protracted and often biased process that is best avoided. Mediation through third parties is a more common course of action (Stark et al., 2005).

Negotiation tactics and skills

Liu and Low (2009) indicated that there are two negotiation processes which include symbiosis and predation. The two processes can also be referred to as cooperation and competition respectively. The cooperation/symbiosis process of negotiating is informed by the theory of social exchange. The theory asserts that relationships are best established through open communications, revealing all the underlying interests that inform the various positions, and through fulfillment of mutual gain solutions. On the other hand, the competitive process does not consider meaningful relationships as a priority when it comes to negotiations. The approach involves the use of power as opposed to interest on a particular issue which means that the outcome in a negotiation has an outright winner and a loser. These processes will work differently depending on the cultural context. Chen et al. (2013) mentioned that culture is set of shared and lasting meanings, beliefs, and tenets that identify a particular national, ethnic, or any other group of people. Parties in a contract are always people who have a certain cultural background. This means that the parties may also have differing assumptions, differing perspectives and thoughts, as well as differing different behavioral models. Failure to comprehend these cultural undertones sets, the negotiation process is up for failure.

The behavior of some people in negotiations can be deduced through a thorough identification of the unique aspects that shape their cultural identity. Some of the unique aspects include the communist political ideology. Lai et al. (2004) stated in their research that socioeconomic and political culture makes some people (clients) averse to risks and will be unwilling to accommodate any contract that exposes them to risks. They are also very careful not to make mistakes and will want to negotiate every aspect of large projects leaving no room for errors. Some of them in which their belief is moral ethics tends to be highly skeptical about outsiders and are slow to trust anyone they are not familiar with. The foundation of the commercial relationships in some countries was founded on social capital as opposed to the legal framework and this is also explained by the fact that their philosophy does not have as much regard for legal systems as it has for self-regulation. Most individuals are expected to be honorable so as to save their face and protect themselves from shame. Shame and face are highly regarded in some countries (Feng and Lu, 2013).

Most organisations are very careful when deciding on a contractor who will deliver on any large projects and this is even more significant when it involves long term contracts. The choice of a contractor in any organisation is informed by a number of factors including the reputation of the

contractor, the price agreement, the schedule for completion of the project, among other factors. This means that in some organisation setting, the concern is not just the ability to complete a project but proof of similar successful projects carried out by the contractor. Having a good record and having a fair price is likely to result in the award of the contract as this is aimed at ensuring that award of tenders and contracts is done on merit and in a manner that does not accommodate the corrupt elements.

The process of selecting the right contractor is regularly reviewed in the country's law in order to increase efficiency in project procurement. However, the general trend is to pick the contractor who has the lowest price as well as confirmation of the ability to complete the project within the required time length and in the highest possible standards. The ability of the contractor is measured using the assets base, the level of expertise in the firm, the management skills used at the company, as well as a positive reputation. Selective tendering is also common in the long term and high value tenders. In this type of tendering, the client invites a number of well reputed firms for a competitive tender (Richards 2014).

Ordinarily, the negotiation must be done in such a manner that the project goals are explained in the tender documentation which is then followed by submitting tenders that align with the requirements in the tender documents. The bids submitted are usually intended to serve as a distribution that details how the contractor will get the assets needed to complete the project, thus providing contractors with an opportunity to prove their competitiveness (Firth et al. 2010).

Contract Issues

If the process of contracting and negotiating is not well understood, there is the risk of issues arising after the contract has been signed. To avoid such issues, it is expected that the contract is well explained especially when dealing with contract novices or if the contractor is foreign to the processes of where the project will be carried out. The contract should be well explained, simple, precise, and flexible but detailed, while at the same time it should be conclusive (Stark et al., 2005). If the terms of the contract are not well documented, there is the risk that the parties may take advantage of each other and create misunderstandings that make implementation difficult. Some of the issues that often arise when most organisations are dealing with foreign partners include language barrier, different legal framework, and regulations.

Commercial Issues

The tensions that have characterised other countries commercial relationships with western economies tend to spill over into business relationships between non-state parties. Shi and Wright (2003) argue that some foreign clients are easily affected by national feelings of dignity and pride in handling individual-to-individual business relationships. Although it is a highly subconscious effect, it is a very strong factor and the authors encourage western negotiators to divide the relationship into the micro and macro dynamics. The micro section would encompass short-term social aspects of the relationship while the macro section would include aspects touching on the wider national good. For example, Chinese business transactions and relationship are generally

built on the handshake principle, known in Chinese as ‘Guanxi’. Westerners are more inclined towards legally binding agreements and this disparity often leads to conflict in Sino-western business transactions (Shi and Wright, 2003; Ghauri and Fang, 2001). The demand for legal by some investors is often misconstrued as a sign of distrust by other foreign counterparts who are used to informal setups. The principle of conflict avoidance means that emerging issues are easily ironed out as they arise through incremental concessions that may see both parties lose significant ground on their initial bargaining stance. On the other hand some investors tend to maintain a rigid stance, and aggressive legal redress is an often followed course even for minor conflicts (Ghauri and Fang, 2001).

Conclusion

Cross-cultural business present a challenging hurdle to all parties involved. Owing to vast cultural and value-based disparities, most investors approach large projects negotiations in a very different manner to other foreign counterparts. While most of them value patient and non-confrontational negotiations, some negotiators are used to a more aggressive and incentivised approach. Without proper understanding of these disparities, foreign investors looking to score large project contract in certain countries are unlikely to succeed. The laws on bidding and tendering are changing dramatically in recent years to reflect increasing openness to foreign input in their economies. Various subtle negotiating tactics and skills such as conflict resolution, concession making and incentivisation are particularly effective when negotiating for a large project contract.

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