

# *Mediation is a Process Not an Event!*



**John Bickerman**

**(202) 289-0400**

**[jbickerman@bickerman.com](mailto:jbickerman@bickerman.com)**

**United States Army  
Corps of Engineers  
October 18, 2016**

# Overview of Presentation

- **Will focus on the use of mediation**
- **Will cover:**
  - **The Basics**
  - **Preparatory Considerations**
  - **Nuts & Bolts**
  - **Practice Tips**



# The Basics

## *What is Mediation or Facilitation?*

- A confidential process
- A neutral person facilitates a negotiation
- The neutral has no power to impose an outcome on the disputing parties
- If the parties reach an agreement it is usually placed in the form of a settlement agreement and is binding like any other contract



# The Basics

## *What are Interests?*

- What parties really care about (needs, goals, desires, concerns)
- Underlying factors motivating each party
- Positions are the “what” (often demands); interests are the “why” (reasons for positions)



# The Basics

## *What is an alternative?*

- What a party can do away from the table, without the consent of other parties
- **BATNA = Best Alternative To Negotiated Agreement**
- Any agreement should be better than your BATNA



# The Basics

## *Approach*

- **Separate the people from the problem**
- **Focus on interests, not positions**
- **Invent options for mutual gain**
- **Insist on using objective criteria**



# Barriers to Settlement

## *Why do some negotiations break down?*

- High emotions
- Unrealistic expectations
- Differences in negotiation style
- Culture / Values
- Distrust
- Historical context/relationships
- Lack of or dispersed decision making power



# Preparatory Considerations

## *Different Roles for the Corps*

- **Corps as Trusted Neutral**
- **As Adversary**
- **As Moving Party**
- **As Innocent Bystander**



# Preparatory Considerations

## *Assessment*

- Isolated v. repetitive disputes
- Relationship of the parties (long v. short term)
- Single v. multiple parties



# Preparatory Considerations

## *Assessment*

- **Monolithic or not**
- **Linkages – more than one issue involved?**
- **Is an agreement required?**
- **Consequences of agreement v. no agreement**



# Nuts and Bolts

## *Selecting a Mediator*

- Finding help / Selecting a mediator
  - First collaborative process
  - Setting selection criteria
  - Interviewing
  - Checking references



# Nuts and Bolts

## *Selecting a Mediator*

- **Organizations and Rosters**
  - U.S. Institute for Environmental Conflict Resolution
  - International Association of Facilitators
- **Word of Mouth**
  - Other Project Managers
  - Counsel's Office



# Nuts and Bolts

## *Selecting a Mediator*

- **Styles –**
  - **Facilitative**
  - **“Evaluative”**
  - **Directive**
- **My Approach – Combination – Adjust the style depending on what the parties need at any particular time in the process.**



# Preparatory Considerations

## *The Mediation Process*

- **Selecting the Mediator**
- **Preparing**
- **Organizational Call**
- **Acquiring Information**
- **Individual Meetings**
- **Designing the Process**
- **Joint Meetings / Caucuses**
- **Follow-Up**
- **Finalizing the Settlement**
- **Implementing the Settlement**



# Preparatory Considerations

## *What are your goals?*

- Does the solution reflect your “real” needs, goals and interests in both the short and long term?
- Does it reflect the other party’s “real” needs?
- Is the solution better than your BATNA?



# Preparatory Considerations

## *Intra-Party Organization: Getting your team on the same page!*

- **Prioritize issues**
- **Prioritize needs or interests**
- **Identify needs of other parties**
- **Negotiation strategy**
- **Dispersion of authority to negotiate**
- **Bringing the larger community along**
- **Who speaks?**



# Preparatory Considerations

## *Defining Success*

- **Determining in Advance “Success”**
  - **Substantive Outcomes**
  - **Relationship Outcomes**
  - **Process Outcomes**
  - **Public / Precedential Outcomes**



# Nuts and Bolts

## *Information Gathering*

- Do the parties have sufficient information to bargain effectively?
- If not, how can the necessary information be obtained efficiently?



# Nuts and Bolts

## *Initial Tasks / Pre-Joint Session*

- Individual meetings with parties
- Written reports back to parties
- Building trust with the neutral



# Nuts and Bolts

## *Ground Rules*

- Who sits at the table?
- Who speaks?
- Confidentiality / Open meeting laws
- Dealing with the press
- Public meetings / Public consultation
- Sharing cost for process
- Need for breaks



# Nuts and Bolts

## *Clear and Effective Communication*

- Think about the message you want to send
- Listen well
- Ask questions to clarify; ask “why” to determine the other’s needs and goals
- Summarize your understanding of what the other party has said frequently



# Nuts and Bolts

## ***Clear and Effective Communication***

- Be aware of your body language
- Explain your thoughts and what they are based on
- Make clear and concise commitments



# Nuts and Bolts

## *Joint Sessions*

- Agenda (public distribution?)
- Logistics – food, food, and location
- Caucuses
- Making and receiving concessions
- Grandstanding / Dealing with the outrageous person



# Nuts and Bolts

## *Joint Sessions*

- Less than meets the eye
- Large group dynamics
- Small group dynamics / One-on-one dynamics
- Deadline effect
- Managing expectations
- Building trust



# Nuts and Bolts

## *Caucuses*

- Prepare proposals to present to other party
- Brainstorm and evaluate options
- Evaluate other party's proposals and prepare response
- Discuss any disagreements within the team



# Deciding Whether to Settle

## *Evaluating Success*

- Does the solution promote the desired relationship?
- Have all possible solutions been explored?
- Is the solution achievable? Are the parties committed?
- Do both parties feel the solution is “fair” or “just”?



# Nuts and Bolts

## *Implementation*

- Clear assignments
- Funding
- Approval by governmental bodies
- Public attention
- Enforcement
- Dispute resolution provisions



# Nuts and Bolts

## *Practice Tips*

- **Not a straight line**
- **Ice breakers – meals, group excursions**
- **Recording progress – celebrate success**
- **Secret of negotiation – trading issues of different value**

