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 [TRICKS, TRAPS AND TRENDS IN HOTEL CONTRACTS--2013](#)

"The more things change, the more they stay the same." The saying is just as true in meeting planning as it is in everyday life. Hoteliers and meeting planners are always concerned about issues like underperformance ("Attrition"), cancellation, indemnity and insurance. The issues addressed in my 2010 "Tricks, Traps and Trends" article remain just as relevant today as they were when it was written, but there are some other issues that have been "trending" in the hospitality world that deserve examination. This article will review some of the top issues facing hoteliers in 2013.

 [GOVERNMENT GROUPS ARE AN IMPORTANT PART OF OUR BUSINESS. ARE THERE SPECIAL RISKS IN BOOKING NEW GOVERNMENT BUSINESS?](#)

There are a number of hidden perils in government business, the first of which is the process of how many government events are contracted. The best way to contract with a government group is to enter into an agreement directly with the applicable agency. The contract should be signed by the person at the agency with authority to enter into the contract, which may be someone known as a "Contracting, Officer," "Contract Administrator," "Procurement Officer" or something else, rather than the agency head. When negotiating government business it is important to find out who has the authority to sign contracts for the agency, as it may not be the person you would expect.

Unfortunately, however, a great deal of government business is not booked directly. At the federal level in particular, the government is often required to contract with women, minority or veteran owned businesses whenever possible. Since the ownership of few hotels fall into these categories, many federal agencies contract with third party planners that are women, minority or veteran owned to provide their event. The government awards a contract to the planner at a stated price, then the planner contracts with the hotel for the event. The hotel is not contracting directly with government, it is really a subcontractor of the planner. The problem arises when the event has attrition or cancellation issues: who is responsible for paying?

Many hotels working with a planner for a government event fail to properly name the parties to the contract. It is common to see the customer party identified as the name of the government event, with the contract signed by the planner on behalf of the name of the event. As with any contract, the party should not be the name of the event, it should be the correct legal name of the entity that the hotel would expect to pay the Master Account, attrition or cancellation damages. Thus, in events where the planner is

the contractor for the government, the planning company should be listed as the contracting and signing party.

In these cases the hotel often assumes that the government is responsible, but that is not the case. Because the hotel is acting as a subcontractor under the planner's agreement with the government, the government may have no obligation to the hotel.

Sometimes the contract between the government and the planner does provide for compensation to the hotel as subcontractor (called a "pass through claim"), but not always. The contract between the planner and the government may have terms that limit or eliminate the government's responsibility if the event is cancelled or underperforms. In that case, the hotel's only remedy is to try to collect from the planner, but the planner may not have the assets necessary to pay, even though the planner is the responsible party under the contract.

When a hotel is considering booking government business, it should get information about the nature of the agreement between the planner and the government. Asking to see the planner's contract with the government is not inappropriate, and if the planner is reluctant you can agree that the pricing terms between the government and the planner can be blacked out. Why is seeing the planner's agreement with the government important? Because the contract between the government and the planner will make clear what responsibility the government will have if the event does not take place as agreed.

For example, in a recent case handled by this firm, in 2008 hotel "A" entered into contract with planner "B" for a large government event to be held in 2011 and 2013. The 2011 event was held, but in 2012 B advised A that the 2013 event was cancelled. B offered to make a pass through claim to the government on behalf of A if A would agree that if the pass through claim was denied that the hotel would not make a claim against B. It turned out, however, that the contract between B and the government was for the 2011 event on a definite basis with only an option to hold the 2013 event. The government did not exercise its option for 2013 and thus had no agreement with the planner for the second year. Since there was no agreement for 2013 between the government and B, there was no pass through available. Thankfully the hotel had not agreed to B's proposal to accept only what it could get via the pass through. There was a still a valid contract between A and B, but B had no assets and was unable to pay. A would have never entered into the agreement with B had it known that the 2013 event was optional rather than definite, but because it did not review B's contract with the government, it had no idea.

Another issue to be aware of when booking government business that there may be laws that restrict the agency's ability to pay for certain things, like food and beverage. Some government meeting planners suggest that the cost of food and beverage be "hidden" by billing it as room rental or as a package guest room charge. Be extremely cautious in agreeing to such tactics, as despite what the planner may tell you, this could be illegal and expose you and your hotel to legal action.

Finally, there may, or may not be, laws or regulations that restrict other payments that the agency can make, such as agreements to indemnify or pay cancellation or attrition damages. Many government agencies or related entities like state universities claim that they are subject to such restrictions when in fact they are not. It is perfectly permissible to ask the agency to provide the hotel with a copy of the law or regulation which limits its ability to pay. If there is such a law in place, the hotel has to determine whether it is willing to accept the risk that the government event will cancel or have attrition for which the hotel will not be compensated. If so, the hotel has to consider the contract tentative (see discussion on "No Attrition" below).

✚ [A GOVERNMENT EVENT THAT OUR HOTEL WAS TO HOST WAS CANCELLED DUE TO TRAVEL RESTRICTIONS OR THE "SEQUESTER." IS THIS CANCELLATION EXCUSED BY THE FORCE MAJEURE CLAUSE OF THE CONTRACT?](#)

There is no definitive answer to this question. The first question you must ask is: who is the hotel's contract with, the government or a third party? Generally if it is directly with the government, the agency will owe, as its decision to cut its budget is not a Force Majeure. But, it does depend on the terms of your particular contract. If the contract is with a third party, the terms of the contract, particularly the Force Majeure, Termination or similar clauses will determine whether or not the contract can be cancelled without payment. The Sequester and government imposed travel restrictions are not laws or regulations which make it illegal or impossible to hold an event, the government is simply making budgetary decisions which are arguably not a Force Majeure.

✚ [MY CUSTOMER REFUSES TO SIGN A CONTRACT WITH AN ATTRITION PROVISION. WHAT ARE THE OPTIONS IN THIS SITUATION?](#)

It is important for both parties to understand the business and legal implications of this position. From a business perspective, what this customer is saying is, "I want the hotel to make a commitment to hold guest rooms and space for me, and give me valuable concessions, but I will not make a commitment to the hotel." While it may

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sound like a harsh statement to make in the customer focused hospitality industry, the truth is that a customer that demands no attrition is being unreasonable and unfair. A contract with an express agreement that the customer will not owe damages if it does not fully utilize its room block is at best a tentative agreement and may not be a legally enforceable contract at all (see, "Dangers of No Attrition," © Lisa Sommer Devlin, Devlin Law Firm P.C. 2012).

A customer that is concerned about its ability to fill a room block or to find sponsors to fund its food and beverage events may want to rethink its event's business model. To avoid attrition risk, it may want to book meeting space at a convention or conference center and not have any hotel room blocks at all, allowing its attendees to find guest rooms at the hotel of their choice. The customer needs to recognize that hotels offer function space in order to sell their guest rooms, so a hotel is not going to commit its space to a customer that will not guarantee to fill those rooms. If a hotel holds its space for a customer that is unwilling to guarantee guest rooms with an attrition clause, it will not be able to sell those unguaranteed guest rooms that the group does not use to others, as it does not have function space left to offer with them.

If a customer is uncertain if it will have sponsors for food and beverage events, and so shies away from a food and beverage minimum, it may have to agree to pay additional meeting room rental, which can be reduced in proportion to the food and beverage revenue that it actualizes. Hotels book business based on the total revenue commitment that the customer offers, so groups that are unwilling to agree to a food and beverage commitment will likely find the hotel unwilling to offer other concessions that the group requires. Again, it is unfair for a group to negotiate rates and concessions for an event based on a claim that it will generate \$200,000 in food and beverage but be unwilling to guarantee that revenue.

If a hotel is willing to accept some risk of reduced performance, a more equitable way to handle the group's concerns is to have a clause providing for regular room block reviews which allow the customer to reduce either a mutually agreed upon at time of review or predetermined amount of the room block based on history, room pick up, pace, or other relevant factors, without payment. These releases might also require a proportionate release of meeting space. These early releases of inventory allows the hotel more opportunity to resell the rooms that the group won't need to reduce its losses than a typical contract which requires the hotel to hold the room block until thirty days prior to arrival. Under such a clause, as of the final review date, the remaining room block is a commitment for which the group is responsible if it is not filled. This method shares the risk between the parties and eliminates the argument that the contract is not enforceable due to lack of commitment.

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✚ MY CUSTOMER TELLS ME THAT ITS ATTENDEES ARE BEING SOLICITED BY "PIRATES." WHAT DOES THIS MEAN AND WHAT CAN BE DONE?

A disturbing trend in recent years has been for third party sellers, like room wholesalers, to solicit attendees to book rooms through them instead of through an event's host hotel or official housing. These third party "pirates" operate in several ways, but typically focus on large or citywide events with significant international or exhibitor attendance. The pirate may look at the event's list of prior or projected exhibitors in the group's promotional material to identify targets to solicit, or simply reach out to likely attendees. The pirate may offer lower rates to exhibitors who are more focused on rate than staying at the headquarters hotel, or guarantee that a group of international attendees traveling together will stay at the same hotel, which is not guaranteed when using the group's official housing company. The pirate usually requires the attendees to book their reservations on a minimum stay, fully prepaid, nonrefundable basis. Sometimes the pirate holds itself out as an official housing source for the group, even though the rooms it is offering are not at the official host hotel. This pirating creates several problems.

First, by enticing attendees to book outside the official housing process, pirating can create attrition issues for the group, as well as a loss of commission, housing fees or applicable rebates, not to mention other concessions that are based on room pick up. Second, while it is virtually always possible for an attendee to find a guest room at some hotel at a lower rate without pirating, groups often feel that these solicitations for lower rate rooms makes the group look bad.

The most critical issue is that while many times the pirates are wholesalers who are reselling their rooms to group guests in violation of their wholesale agreement with the hotel, there are also many instances in which the pirates actually never purchased rooms for resale from the hotel at all. When the guest arrives to check in, the guest is told that there is no reservation in his or her name and the hotel has no obligation to assist the guest to find other accommodations as the guest is not being "walked." This creates a terrible situation for the guest who has already paid for a room that does not exist, and now has to scramble to find accommodations in a city that may be fully occupied by the citywide event. The guest is understandably frustrated but the situation is not the fault of the hotel or the group.

What can be done? The first and simplest solution is for the group to require attendees to reserve rooms either through its official housing agent or within its official room block at the hotel in order to be eligible to attend the event, just as attendees must

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pay a registration fee to attend. This method not only thwarts the pirates, it solves a host of other issues, such as guest room audits to find rooms reserved outside the block, attrition fees incurred because attendees booked rooms elsewhere, loss of rebates and commissions, and so on. Many groups are resistant to this solution, but many large associations have started adopting it with success. If the customer wants to allow attendees the freedom to book rooms as they choose, it can encourage booking within the official block either by offering reduced registration fees to attendees that book within the block (the "carrot method") or higher fees for those that do not (the "stick method"). However it is adopted, this will reduce or eliminate the ability of pirates to prey upon the attendees.

If the customer refuses the suggested booking requirements, the hotel and group should work in partnership to monitor internet offerings of rooms for the event and to take action when pirating is discovered. Hotels and groups that have experienced pirating have found that sending a "cease and desist" letter warning the pirate to stop its improper use of the group's and hotel's names and trademarks is enough to send the pirate off to ply other waters. However, the group and hotel should still send reminder notification to potential attendees of the official booking process and warn them that solicitations by third parties are not sanctioned by the group and may not be legitimate room sellers. The group and the hotel should be cautious in their communications not to label the pirates as "fraudulent" or "scams" or similar terms, as such terminology could result in defamation claims by the pirate company.

Most importantly, groups should educate their attendees about the importance of booking rooms within the official room block, so that they understand that the group receives concessions like free or reduced cost meeting space, reduced food and beverage pricing or other things that make the meeting possible and keep registration fees down. When attendees understand that booking outside the official room block may ultimately cost them more, they will be able to resist the siren song of the pirates.

 [MORE AND MORE CUSTOMERS ARE DEMANDING "CONFIDENTIALITY" OR SIMILAR CLAUSES. ARE THESE CLAUSES OK TO SIGN?](#)

Customers often have legitimate worries about competitors obtaining confidential information disseminated at their meeting, or are concerned about the privacy of their attendee's personal information. As a result, it is increasingly common for customers to ask hotels to accept their sweeping confidentiality clauses to guard against these problems. For the most part, these clauses should be avoided by hotels.

When discussing the customer's clause, the first inquiry is: what is the customer concerned about? If the concern is that outsiders or competitors will gain access to secret information discussed during the meeting, the solution is not to place a heavy confidentiality burden on the hotel. Hotels hosts hundreds of events each year, and do not need or want a customer's confidential information to do so. The hotel will provide the same level of service for the customer whether the customer is discussing its secret formula or discussing public information. The hotel cannot be held responsible for any "leaks" of information, as there is no way that the hotel can police what attendees do with information, such as leaving it in public areas of the hotel when it can be picked up, or discarding it in guest rooms to be discovered by third parties who "dumpster dive" when the trash is thrown out. Hotel employees cannot be placed in the position of trying to determine if materials discarded are confidential, and do not have the time or resources to gather such material, secure it and return it to the customer.

If the customer is concerned about keeping information private, the parties should agree on precautions that actually protect the customer's privacy, rather than putting unnecessary and unproductive responsibility on the hotel. For example, they should ensure that the events are held in meeting rooms that do not have members of the public passing by, and that the group has personnel stationed outside the door of the room to make sure that no one is able to eavesdrop. The hotel can agree that its personnel will not enter the meeting rooms while confidential information is being discussed. The hotel's AV providers should be required to sign confidentiality agreements if they stay in the room during presentations, and to not download presentation materials onto hotel equipment. Finally, the group should arrange for shredders to be placed in the room to safely dispose of meeting materials and should conduct a sweep of the room at the conclusion of the event to ensure no material has been left behind or disposed of inappropriately.

If the customer is concerned about attendee privacy, it should be explained that hotels have to safeguard guest information in compliance with applicable laws and the Payment Card Industry standards, but they are not subject to laws which may govern their customer's use of personally identifiable information. Thus, when financial institution customers insist that hotels must handle attendee information as required by the laws applicable to banks, that is not correct. When a guest checks into a hotel, the information that the guest provides becomes the property of the hotel. It is input into the hotel's database and is treated the same as every other customer. Hotels cannot "flag" the information of attendees of a particular event to be treated differently than other guests, and should not agree that attendee information will be purged at the end of the customer's event. The names of the attendees are not proprietary or confidential to the customer holding the event if they become registered guests of the hotel. Thus, a hotel

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should not agree to any confidentiality provisions that pertain to attendee information other than that such information will be protected consistent with the hotel's Privacy Policy.

#### ARE "NO LOWER RATE" CLAUSES REQUIRED?

A "No Lower Rate" clause is similar to a "No Attrition" clause, in that the customer is unfairly asking the hotel to make a commitment to it, but the customer is unwilling to make a commitment in return. An event contract is a type of "futures" agreement: the customer is agreeing to buy a portion of the hotel's inventory at a date in the future at a stated price, and the hotel is obligated to provide that inventory, regardless of prevailing market conditions. If a hotel agrees in 2013 that it will provide rooms in 2015 at a rate of \$150, it cannot require the group to pay \$200 if that is the prevailing rate when the dates arrive, nor can the customer demand that the hotel lower the rate if the prevailing rates turn out to be \$100. No customer will ever agree to a clause that would require it to pay either the contracted rate or the prevailing rate, whichever is higher, yet they expect the hotel to agree that they will pay the contracted rate or the lowest available rate.

Hotels and customers need to recognize that a hotel has the right to sell its inventory at whatever rates it chooses. It is often helpful to compare the situation to buying a car. If you buy a particular make and model today for \$30,000 and find out tomorrow that the dealer sold an identical car for \$25,000 you are not entitled to demand the same price. A customer demanding a no lower rate clause is doing exactly that.

Customers insist that they need "rate integrity" because if their attendees are able to find a lower rate than the conference rate, it makes the customer "look bad." The easiest way to avoid this claim is for the customer to require attendees to reserve rooms through the customer's web site or official housing (see discussion of "Pirates" above). In addition, customers need to educate their attendees that the conference rate is agreed upon as part of a package that provides valuable things to the group. The rooms that may be offered at a lower rate do not come with free or reduced rate function space; they do not have complimentary suites for VIPs, reduced price rooms for staff, free fitness center use, and so on. The hotel would not offer the meeting space and concessions that the group requires if the group would only pay whatever is the lowest rate offered on line.

If the hotel feels that it must agree to the customer's request in order to book the business, it needs to ensure that the clause is appropriately drafted to avoid disputes.

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Will it apply to any lower rate, or just lower group rates? If only to lower group rates, does it apply to any group or only to groups of the same size booked over the same dates? If it applies to all rates, the clause should define what lower rates will be exempt from the provision, such as crew room rates, corporate volume rates, wholesale rates, or other rates not available to the public. Your clause should also exempt rates offered on "opaque" sites that do not identify the hotel until the room is purchased. The clause should not refer to "published" rates, as what is considered "published" in the internet world is not clear--would it include a rate available only by booking through another group's event web site?

The most critical consideration in a no lower rate clause is what happens if the hotel breaches the clause. Is the hotel required to stop offering the lower rate, or must it extend the lower rate to the customer's attendees as well? Obviously the former is the far better choice from the hotel's perspective. If the lower rate is withdrawn, the customer no longer has "rate integrity" issues, and the hotel does not suffer a significant loss of revenue. If the customer insists on being offered the lower rate, then the parties must agree in the clause on whether concessions will be adjusted based on the lower revenue generated by the event.

The explanations in this article are designed to give hoteliers and their clients general information about some of the contracting trends in the industry, but cannot be substituted for specific legal advice on a particular issue. Every contract issue is dependent upon the wording of the applicable clause and the facts of the case. This article is for information and educational purposes, and is not intended to be legal advice.