



**SWACCA**

**COLLECTIVE BARGAINING  
GUIDEBOOK**

**2019 Edition**

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## Preamble

The Signatory Wall and Ceiling Contractors Alliance presents this first edition of the SWACCA Collective Bargaining Guidebook to its members in support of successful industry bargaining processes and positive labor relations. It is intended as a basic guide to the collective bargaining process and includes information about preparation for bargaining, details on the bargaining process itself, and considerations for positive bargaining relationships and successful outcomes.

Labor relations in the private construction industry follows a specific legal framework under the National Labor Relations Act (NLRA). This Guidebook addresses select legal subjects such as the contract termination/opening process and the Federal Mediation and Conciliation Service (FMCS) so that readers will understand the interaction between those subjects and collective bargaining; however, it does not offer legal advice. Instead, the Guidebook focuses on the practical aspects of the bargaining process with the goals of familiarizing new negotiators with the collective bargaining process and offering a tool to support the efforts of experienced negotiators and their fellow committee-members.

It is critical to understand that collective bargaining is often a relationship-driven process. Just as each person involved has a unique personality, so does every bargaining committee. Historic practices and customs also vary significantly. As a result, labor-management relationships – and the approaches taken in the bargaining process – can and do differ.

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## Introduction

Collective bargaining is the process of labor and management negotiating a contract, referred to as a collective bargaining agreement, which defines the terms and conditions of employment for workers covered by the contract. In the wall and ceiling construction industry, bargaining typically takes place at the industry level between multiple employers and the union that represents the covered workforce. Frequently, the participating employers use an employer association structure to negotiate a master agreement that all industry employers agree to. This Guidebook generally contemplates industry-level bargaining as opposed to single employer bargaining.

Collective bargaining is a unique negotiation. It is not broadly comparable to most business negotiations because of the labor-management relationships, the complexity of the issues, the unique laws that apply to the process, and the high stakes involved for both parties.

Collective bargaining is part and parcel of the labor-management relationship and one of the most important activities undertaken by the parties. Because it is such an important process, collective bargaining normally results in settlements whether it is handled well or poorly. But poorly handled processes should be expected to produce poor results. A collective bargaining process that is handled well not only produces a better agreement; it supports better industry relationships.

## Opening the Agreement for Negotiation

The collective bargaining process for a new, successor agreement is typically initiated by written notice from one or both parties to the other pursuant to the terms of the expiring agreement and/or the requirements of Section 8(d) of the National Labor Relations Act (NLRA).

### Contract Termination Notice

Collective bargaining agreements typically contain a termination provision that requires at least one party to send notice to the other to formally open the agreement for renegotiation. This provision is generally referred to as the “termination clause.” If the agreement is not properly terminated, it may be renewed or continue for a period of time specified in the agreement. This continuation provision is generally referred to as an “evergreen clause.”

### Section 8(d) Notice

Section 8(d) of the NLRA provides specific notice requirements for the collective bargaining process that applies to bargaining relationships covered by Section 9(a) of the NLRA. The contract termination notice itself may satisfy the requirements of Section 8(d) but they two are separate and distinct requirements. Section 8(d) provides:

[W]here there is in effect a collective- bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification--

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later

A valid 8(d) notice must, pursuant to Section 8(d)(3) above, include notice to the Federal Mediation and Conciliation Service and the equivalent state agency. Without such notice neither party can resort to strike or lockout, respectively, or unilaterally modify the terms and conditions of the contract.

The 8(d) notice may be filed by either party with the same effect, which is to say that the employer may rely on the union's filing and vice-versa. The party who files the notice bears the burden of compliance with the notice requirements.

### Collective Bargaining Formats



Collective bargaining generally occurs under one of three employer committee formats: individual employer, a joint employer group, or multiemployer group. More than one joint employer group or multiemployer group may combine into a single group comprised of multiple units.

### Individual Bargaining

Individual employer bargaining is the simplest bargaining format. As the name implies, a single employer negotiates its agreement with the workforce's labor representative (union). The result is a labor agreement that applies only to that employer. This format is not common within the wall and ceiling industry. However, some markets may support individual employer bargaining by asking or permitting one employer to negotiate an agreement that is ultimately treated as a master agreement by the other industry employers. In this instance, the other industry employers and the union treat the agreement negotiated by the lead employer and the union as a master agreement and sign virtually identical individual agreements directly.

## **Joint Bargaining**

Joint bargaining involves multiple employers who work together in the bargaining process to negotiate similar if not identical contracts through a single process. This structure may also be referred to as “convenience” or “coordinated” bargaining. Employers participating in this process act as one group in the bargaining process but maintain their right to leave the group and revert to an individual bargaining format.

Joint bargaining is relatively common structure in the wall and ceiling industry. It is often coordinated through an employer association which may act as a bargaining agent in the process on behalf of the employers. At the conclusion of the bargaining process, each employer signs its own individual agreement with the union.

## **Multiemployer Bargaining**

Multiemployer bargaining consists of a group of employers that agree to act as one for purposes of collective bargaining. Employers participating in the multiemployer bargaining unit assign their bargaining rights to the group and are generally bound to the outcome of the group’s negotiations. The agreement that results from a multiemployer bargaining process is normally signed by one representative of the association or group that holds the employers’ bargaining rights. All of the employers that have assigned their bargaining rights to the Association or group are bound to the agreement without individually signing it.

Multiemployer employer bargaining is also relatively common in the wall and ceiling industry. Employer association structures are frequently used to establish multiemployer bargaining units. It is common, then, to have the association’s lead executive or board officer execute the collective bargaining agreement on behalf of participating employers.

## **Multiple Employer Groups**

In the wall and ceiling industry it is not uncommon for distinct employer groups to negotiate similar or even identical agreements with a single labor organization. For example, a general contractors’ group and a specialty/subcontractors’ group may each negotiate similar agreements with a single craft.

It can be beneficial for separate employer groups to coordinate their bargaining efforts. This can be done in different ways. For example, multiple employer groups may work together in the planning process before separating to negotiate their respective agreements. Or, multiple employer groups may establish a joint bargaining structure that negotiates as a single, joint bargaining committee. These joint committee structures may be used exclusively for specific bargaining subjects, or they may be used to negotiate entire agreements. That is, a joint employer committee that consists of two or more employer groups could negotiate a single agreement to which both employer groups are parties, or it could negotiate two technically separate agreements that contain similar or even identical terms.

## Preparing for Collective Bargaining

The process of preparing to negotiate a collective bargaining agreement is similar regardless of the employer bargaining format.

### Forming the Employer Bargaining Committee



A well-prepared and structured employer bargaining committee is arguably the most important component in a successful collective bargaining process. This Guidebook will focus on joint and multiemployer bargaining structures because they are the most common formats in the wall and ceiling industry. It will further focus on the local association – the SWACCA Regional Affiliate – as the coordinator of this process for the industry employers.

#### Establishing the Committee

To be successful, the bargaining committee must have the confidence of the industry employers it represents. Communication with industry employers can help establish or bolster that confidence.

One of the most basic means of engaging industry employers is the use of bargaining surveys. Written surveys are a popular tool for the solicitation of recommendations and feedback from industry employers in advance of the bargaining process. Surveys can be used not only to identify subjects for bargaining, but also to identify individuals willing to participate directly on a bargaining committee.

Results from written surveys can be aggregated for discussion at in-person meetings of industry employers and will prove useful to the employer bargaining committee. Sample surveys are attached to this Guidebook for consideration.

Equal opportunity for direct participation can also support confidence in the employers' bargaining committee. Employer groups should consider using a formal process for selecting bargaining committee members among employers interested in participating on the committees themselves.

#### Committee Structure

There are no hard and fast rules about the composition of a bargaining committee. However, certain considerations should be taken into account.

Committee size will vary according to a variety of factors, including the size of the industry, the number and types of industry niches or business models, and the number of individuals interested in participating. It is advisable that a bargaining committee be representative of the industry itself but also manageable in size. The bargaining experience of the committee members should also be a consideration to support the transfer of knowledge from past to present.

Consider the roles of the committee members within each of their companies, and the participation of senior executives vs. individuals directly involved in daily operations. Note that neither the employers nor the union can dictate to the other who can be at the table, but the parties may mutually agree to limit the number of bargaining committee members.

#### Chief Spokesperson

A designated Chief Spokesperson can help facilitate communication in the bargaining process. This individual may be an industry employer or a third-party representative such as an association executive or attorney. A Chief Spokesperson should have the respect of the other committee members, be knowledgeable about the collective bargaining process and the contract itself, and be comfortable speaking persuasively in a group setting.

It may be helpful to use a designated Chief Spokesperson who represents the employers' bargaining committee but does not employ bargaining unit members or otherwise vote in the employers' decision-making process (e.g. association executive, attorney, or labor relations professional). This arrangement prevents a scenario in which the union's committee focuses on an individual employer. It also promotes higher levels of engagement among all participating employers by treating them as equals in the process.

A Chief Spokesperson does not need to do *all* the talking in the bargaining process; however, he or she should be the primary speaker in meetings with the union and serve as the designated point of contact for the employer committee.

#### Record-Keeper

A designated Record-Keeper can also play an important role on the employers' bargaining committee. This individual should be knowledgeable about the bargaining process and familiar with the collective bargaining agreement. The Record-Keeper is responsible for recording meeting attendance (possibly via a circulated sign-in sheet), tracking proposals exchanged by the parties, recording tentative agreements, and keeping notes about the discussions that take place at the bargaining table. A reliable bargaining record can prove invaluable to the parties through what is often a lengthy and complex process. It may also prove useful in resolving disagreements that occur during or after the bargaining process. It is also an excellent resource in preparations for the next bargaining cycle.

#### Media Contact

Media attention is not common in construction industry collective bargaining but may be a factor in some areas. Some bargaining committees may mutually agree prior to negotiations that neither the employers nor the union will offer comment to the media prior to a ratified settlement.

If the bargaining committee anticipates media attention and plans to offer comments, it will be helpful to identify the individual to whom all such requests should be referred. It is important that the designated media contact has experience in handling media requests or the support of

a media relations professional. Other members of the bargaining committee should not offer comment to the media.

### Preparing the Committee to Bargain



There are generally two stages to the bargaining committee preparation process. The first is the information gathering stage. The second is confirmation of bargaining goals and procedures.

#### Gathering Information

The committee should consider at least the following documents and information when preparing to negotiate a new labor agreement:

1. The expiring collective bargaining agreement
2. Information for review in developing employer proposals, including:
  - a. The proposals exchanged by the parties during the last contract negotiation
  - b. A summary of significant grievances and other disputes that arose during the term of the expiring contract
  - c. A summary of results from employer pre-bargaining surveys
  - d. A list of any “housekeeping” changes that are necessary to make in a new agreement
    - i. Note that housekeeping changes are those that all parties agree do not change the actual terms of the contract in any way, such as typo corrections and the elimination of expired language.
3. A list of project labor agreements and any other agreements that may apply to the scope of work covered by the agreement being negotiated
4. Economic data, including:
  - a. Historic wage and benefit data from the contract being negotiated
  - b. Any future contribution requirements for benefit plans
  - c. Recent settlements from related
  - d. Wage trends in related industries
    - i. Wage and benefit data from other trades in the region
    - ii. Non-union industry wage data
    - iii. National wage settlement trends
  - e. Industry activity (hours)
  - f. Inflation/Cost of Living Data
  - g. Construction Spending/Permit Data, both historic and forecast

#### Identifying Bargaining Goals

Bargaining goals should be clearly established by the employers prior to meeting with the union. This process often begins via pre-bargaining survey and/or employer association membership

meeting(s). It should conclude with one or more meetings of the employers' bargaining committee at which a clear consensus is reached on the committees' goals.

Employers' bargaining goals may consider short and/or long-term objectives. The goals developed in prior bargaining processes may therefore be helpful to the discussion about the current bargaining process.

The following categories may be considered to identify and confirm the employers' bargaining goals.

#### *Bargaining Themes*

A bargaining theme is a statement that very generally refers to the employers' interests and goals in the bargaining process. For example, "Close the economic gap between union and non-union contractors."

The identification of one or more bargaining themes can be supportive of a consistent and cohesive bargaining process. To preserve effectiveness, the number of bargaining themes should be limited – an ideal number is between one and three.

Bargaining themes inform the tone and tenor of the bargaining process. They inform the statements of the committees' interests and goals. They inform the committees' proposals. In short, they are the common threads that connect the communications and proposals delivered to the union.

#### *Bargaining Objectives*

Bargaining objectives are high-level statements about what the employer committee would like to achieve in the terms of a new agreement and, ideally, why. Bargaining objectives are more specific than bargaining themes, but they are not specific language proposals. For example, "Achieve more flexibility for hours of work to become more competitive in occupied-space remodeling work."

The bargaining committee, with the support of its larger employer group, should agree on clear bargaining objectives prior to drafting specific employer proposals. Bargaining objectives should fit within the committees' bargaining theme(s).

It is advisable to maintain some flexibility in the employers' bargaining objectives – bargaining objectives are not specific proposals. Instead, they are goals that perhaps multiple proposals could support or satisfy. That said, the bargaining committee itself should always familiarize itself with the relevant existing contract language and consider potential modifications or additions to achieve its bargaining objectives.

#### *Employer Proposals*

Employer proposals are the specific, written changes the employer committee wishes to make to the collective bargaining agreement. Employer proposals should be developed in advance of meeting with the Union. A strikethrough/underline editing format (e.g. the "Track Changes" tool

in Microsoft Word) is highly recommended to ensure accuracy in communicating contract language proposals.

The employers' proposals should be connected to the employers' bargaining objectives, which in turn are connected to the employers' bargaining theme(s). It may be useful to visualize a pyramid in developing these three levels of bargaining goals, with the bargaining theme(s) at the bottom of the pyramid, the bargaining objectives in the middle, and the proposals at the top.



A final word about specific proposals: flexibility can be key to accomplishing bargaining goals. Bargaining goals should lead the development and negotiation of specific language proposals. The bargaining committee should, to a reasonable extent, consider maintaining a flexible approach to the specific contract language that accomplishes its goals as opposed to strictly negotiating its written proposals.

#### Assembling Bargaining Materials

Committee binders, whether paper or electronic, produced in advance for bargaining committee members can be extremely useful in organizing information and maintaining records through the bargaining process. Committee members will also benefit from well-organized bargaining materials they can refer to throughout the process. A common format is a three-ring binder with a tab for each content category. Consider the following categories for the materials distributed to each employer bargaining committee member:

1. Current (expiring) CBA
2. Employer Proposals
3. Union Proposals
4. Tentative Agreements
5. Bargaining Notes
6. Wage Data (e.g. wage sheet, industry wage data)
7. Market Data (e.g. industry hours, construction spending data)
8. Information from the Prior Negotiation (e.g. union and employer opening proposals, final settlement)
9. Related Correspondence (e.g. contract termination letters)
10. Other/Misc.

Some of the above categories will be empty at the beginning of the bargaining process but will be added to as proposals are made and agreements are reached. Each committee member may maintain his or her own binder. A "master copy" should be maintained by designated individuals (e.g. the Chief Spokesperson and Designated Record-Keeper).

Cloud-based file sharing services may prove useful in maintaining organized files for committee members. Dropbox, OneDrive, and Google Docs are all examples of such a service. Keep in mind that electronic document sharing should be carefully managed to avoid inappropriate distribution of sensitive documents, which could be disruptive to the bargaining process.

#### Confirming Internal Committee Rules and Procedures

Clear communication between the parties is critical to a successful bargaining process. To support clear communication, the employers' bargaining committee should have a general understanding of how the bargaining process will work before it meets with the union. Consider the following topics for discussion and agreement at a committee preparation meeting:

1. The committee members commitment to the process
  - a. Committee members should be expected to attend all bargaining sessions, understanding that excused absences may occur but should be avoided. This is especially important with a smaller committee.
2. The roles of the committee members, including Chief Spokesperson and Record-Keeper
3. The use of committee caucuses for private discussion and realignment during the bargaining process
4. Internal committee ground rules to ensure successful communication with the union
  - a. Topics for consideration include:
    - i. Role and authority of Chief Spokesperson
      1. Whether and when other committee members should speak in bargaining sessions (note the risks of muddling or confusing messages when individuals speak unexpectedly during bargaining sessions)
    - ii. Confidentiality of internal discussions
    - iii. Communications with the other party about bargaining subjects outside of bargaining session may only occur when authorized by the committee
    - iv. Use of "hallway discussions" or subcommittees in the bargaining process
      1. Whether these processes should be used generally, and who should participate
    - v. Process for agreement upon proposals prior to presentation (i.e. consensus or majority approval)
    - vi. The importance of being respectful of and listening attentively to the union
      1. Committee body language
    - vii. Remaining united through the process (employer disagreements discussed/resolved only in caucus)

### **Bargaining Techniques**



Collective bargaining techniques vary significantly depending on factors such as the relationship of the parties, parties' bargaining objectives, market conditions, and the influences or impacts of related contract negotiations.

Like thorough advance preparation, the application of thoughtful bargaining techniques can support better agreements and more positive long-term relationships between labor and management, which should lead to more successful outcomes for the industry.

### **Basic Bargaining Techniques**

Labor negotiations as a process may involve a variety of techniques for the exchange of proposals. Basic technique categories include:

1. Laundry List – Making proposals about every issue identified in the planning process
2. Strategic Goal – Making proposals only about “important” issues identified in the planning process
3. Reactionary – strictly reacting to the other party's proposals by agreeing to, rejecting or countering them
4. Collaborative – parties jointly identify issues and collaborate on contract language to address them

These basic techniques refer to the process used for the exchange of proposals with the other party. The laundry list and strategic goal techniques require the preparation of specific proposals in advance of the bargaining process. The reactionary technique is just that: a reaction to the other party's proposals. The collaborate technique involves a discussion of issues more broadly with the specific proposals or agreements developed through that process.

### **Interest-Based Bargaining Techniques**

Negotiation in general, and interest-based bargaining specifically, have developed into fields of academic study with dedicated departments at many of the top colleges and universities in the United States and abroad. This Guidebook cannot provide an exhaustive review on the topic but does intend to offer a general overview of interest-based bargaining techniques and specific methods for consideration.

Academic works have broadly identified two categories of negotiation or bargaining techniques that carry various names. This Guidebook will refer to these two categories as positional bargaining and interest-based bargaining.

#### Interests vs. Positions

A basic understanding of interests vs. positions is necessary to inform the discussion of the two bargaining techniques. A position is something decided upon (the “what”). An interest is what caused that decision (the “why”). For example, a cook may determine that she needs one orange (the “what”) for her recipe because she needs the juice (the “why”).

Interest-based bargaining focuses on understanding and communicating about interests – the “why”. An interest based collective bargaining process begins with that discussion, as opposed to a specific proposal. The result is a more collaborative process that, at its best, becomes a problem-solving exercise between the parties.

#### Positional Bargaining

The traditional method of negotiating a collective bargaining agreement involves the basic exchange of positions (i.e. specific proposals), responses/counter-proposals, and a likely adversarial back-and-forth process until an agreement is ultimately reached.

At its best, the basic method produces an acceptable compromise between the parties. At its worst, positional bargaining can produce inefficient, unwise agreements and unnecessarily harm labor-management relationships if not industry interests.

Positional bargaining is often criticized. The positional bargaining method generally encourages parties to make opening proposals that exceed their bargaining goals. Some such proposals may needlessly frustrate or even anger the other party. The process can become ego-driven as parties “dig in” on their positions, not wanting to “lose” even if they didn’t believe in those positions prior to beginning the bargaining process.

Still, positional bargaining is arguably a logical process on its face. More significantly, it is a familiar process to most bargaining parties. Perhaps for these reasons positional bargaining remains probably the most common method of negotiating a collective bargaining agreement in the wall and ceiling construction industry.

#### Interest-Based Bargaining

Considerable research and practice have shown that interest-based bargaining techniques support a more positive relationship between the parties and generally produce better agreements. Clearly, then, an understanding of interest-based bargaining techniques is advantageous to negotiators of collective bargaining agreements.

The Parable of the Orange illustrates the basic concept of interest-based bargaining: Two cooks are sharing a kitchen. There is one orange available. The first cook determines that she needs the orange for her recipe. The second cook determines that he needs the orange for his recipe. They agree to split the orange and each returns to cooking with half of what they needed. The first cook juices her half-orange and throws the rest away. The second cook grates the rind of his half-orange and throws the rest away. Clearly both cooks could have gotten everything they wanted if they had negotiated for their interests (the juice and the rind, respectively) instead of their positions (one orange).

#### *Interest-Based Method vs. Interest-Based Processes*

Interest-based bargaining techniques can be used to negotiate an entire agreement, or certain sections of an agreement. Certain subjects – those where the parties have significant overlapping interests – lend themselves to interest based bargaining techniques. Consider worker safety as

an example. Both labor and management have a clear interest in worker safety. As a result, it is not uncommon for labor and management to instinctively engage in interest-based bargaining on the subject. The process begins with agreement on the interest: maintaining worker safety. The focus of the subsequent discussion, then, is on that mutual interest. The parties exchange ideas for improving worker safety, often referring to information from third-parties about preventive measures or certain equipment that has resulted in safety improvements. Through that discussion, they formulate an agreement – a single position – that both parties agree upon to satisfy their mutual interest.

It is significantly more difficult to apply interest-based bargaining techniques to certain other subjects, such as wage rates. There, the parties may feel as though they are battling to gain as much as they can in a zero-sum game.

This phenomenon has been researched thoroughly, perhaps most notably in the 1965 book *A Behavioral Theory of Labor Negotiations* by Richard Walton and Robert McKersie. Those authors described issues such as worker safety as “integrative” subjects and issues such as wage rates as “distributive” subjects.

Integrative subjects are bargaining subjects with more obvious overlapping interests and variable-sum outcomes. They may be anecdotally referred to as “labor-management” subjects in modern collective bargaining processes.

Distributive subjects have less obvious overlapping interests or even adverse interests among the parties. They appear to be fixed-sum in nature.

Bargaining parties may choose to use interest-bargaining techniques as a method of negotiating an entire agreement. Or they may choose to use interest-based techniques as a process to negotiate only subjects that are more integrative in nature while using positional techniques on more distributive subjects.

#### *Interest-Based Bargaining Principles*

Interest-based bargaining is a category of bargaining techniques that share similar fundamental qualities. Other labels have been applied to interest-based bargaining, or variant techniques or processes within the broader category. Other such labels include: principled negotiation; collaborative bargaining; and mutual gains bargaining.

Interest-based bargaining is not a “soft” negotiation method. In fact, a negotiator who is too accommodative can undermine the interest-based process by contradicting the stated objective. Instead, interest-based bargaining is a technique that forces the parties to better understand their true negotiating objectives and should result in *less* compromise than a positional bargaining technique. The technique should therefore produce a better agreement through a process that supports positive, long-term labor-management relationships.

The popular book *Getting to Yes* by Roger Fisher and William Ury is a seminal work on the interest-based bargaining method and recommended reading for any negotiator. It outlines the following principles for implementing the technique:

1. Focus on Interests not Positions
  - a. It is critical to understand what you truly want or need (the “why”).
  - b. For every proposal or position you are considering in bargaining preparation, ask “why” you want it. Keep asking that question for every answer until you determine your true underlying interest.
  - c. The bargaining process begins with a discussion of the parties’ underlying interests determined through that process.
  - d. Spend time in bargaining preparation discussing the potential interests of the other party. This can prove invaluable in engaging the other party in a related discussion.
2. Separate the People from the Problem
  - a. Be hard on the merits but soft on the people.
    - i. Attack the issues you are negotiating, not the people you’re negotiating with.
  - b. Separating the people from the problem is easier when the parties have:
    - i. Thoroughly discussed their interests; and,
    - ii. Assembled and reviewed meaningful objective criteria
3. Invent Options for Mutual Gains
  - a. Options for mutual gain present opportunities to “enlarge the pie” through which both parties gain more than they otherwise could.
    - i. Keep in mind that 50% of a larger pie may be a more significant gain than 100% of a smaller pie.
  - b. Options for mutual gain are frequently discovered through the discussion of interests.
    - i. These may appear as “easy gives” at the bargaining table.
  - c. “Brainstorming” is a cliché; consider the use of issue-specific bargaining subcommittees to explore discreet bargaining subjects and bring ideas back to the full committees for consideration.
4. Insist on Using Objective Criteria
  - a. “Objective criteria” refers to information such as industry standards, numeric data, third-party evaluations, etc. that are understood to be legitimate and unbiased. They are “external standards of legitimacy.” Examples may include industry facts and figures, wage settlement data, and scientific studies.

- b. References to objective criteria not only help formulate good agreements, they also help the parties separate the people from the problem by allowing them to disagree on the value or meaning of the objective criteria rather than focusing negative treatment on the people delivering the related message.

These principles from *Getting to Yes* illustrate tried and true methods of implementing interest-based bargaining techniques. They should be considered for parties wishing to implement an interest-based method for an entire agreement, or an interest-based process for specific bargaining subjects.

#### *The Importance of Preparation*

Interest based bargaining requires more preparation and effort in the early stages than traditional, positional bargaining processes. Well thought-out and fully formed committee bargaining goals, including specific proposals, are critical.

Any collective bargaining settlement will necessarily include specific changes to contract language. Simply put, a committee that has achieved consensus on its bargaining goals, including desired contract changes, will be better prepared for a discussion about its interests and the relevant contract terms. A committee that has not established clear bargaining goals is unlikely to benefit from interest-based bargaining techniques. Worse, an ill-prepared committee may find that its attempt at interest-based bargaining does more harm than good to the employers' bargaining process and labor relationships.

#### *Engaging the Other Party in Interest-Based Techniques*

Interest-based techniques are more easily implemented with a party that has agreed to engage in such a process. However, the commitment of the other party is not absolutely required for the use of interest-based techniques.

Beware, however, of pushing the interest-based bargaining technique too hard with a disinterested party. Strict adherence to interest-based techniques in the face of resistance, especially when the negotiator has limited experience with interest-based techniques, can exacerbate the suspicions and frustrations that can be inherent to the process.

Consider the core-concept of interest-based bargaining: the primary discussion of interests as opposed to positions. When one party comes to the table prepared to discuss its interests but the other opens by presenting its positions, the first party may respond by engaging the other side in a discussion about their interests to steer the process in an interest-based direction. Even a discussion or explanation of interests prior to the exchange of specific proposals can achieve some of the benefits of the interest-based bargaining technique. No doubt this is easier said than done but the results can be both productive and enlightening.

## The Bargaining Process



Collective bargaining processes vary greatly. In some cases, an agreement can be negotiated in one meeting by one employer representative and one union representative (possibly even via phone or email). In other cases, large teams meet in numerous sessions over months or sometimes years before reaching an agreement. The common thread is an exchange between parties that results in an agreement to move forward.

Most industry-level collective bargaining processes in the wall and ceiling industry involve bargaining committees that meet over several bargaining sessions. Those processes follow a general pattern, which is outlined in this section.

### Third-Party Neutrals

By mutual agreement, the parties may select to use a neutral, third-party facilitator or mediator to support their bargaining processes. These services are available from both private and public sources.

#### Facilitated Bargaining

Facilitated bargaining involves a third-party neutral facilitator who actively guides the parties through the bargaining process. Facilitated bargaining takes various forms but generally involves an individual who sits together with the parties and leads their bargaining process.

A facilitated mutual-gains bargaining model utilizes a facilitator to guide the parties through an interest-based bargaining process throughout their negotiation. In this structure the facilitator generally works with the parties to ascertain their interests and ensure that they are clearly communicated to the other. From that point the facilitator works with the parties to develop contract modifications – proposals – that satisfy the parties’ interests. The facilitator typically continues to lead the parties through that process until a settlement is achieved.

Facilitators may join the parties after they have commenced the bargaining process, but typically they provide the most value when they are engaged prior to the first bargaining session.

#### Mediated Bargaining

Mediated bargaining involves a third-party neutral mediator who works with the parties to assist them in reaching an agreement. Like facilitated bargaining, mediated bargaining takes various forms. A mediator may sit together with the parties and/or the mediator may shuttle back and forth between the employer and the union committees in lieu of them communicating directly. Mediation is frequently used to assist parties that are nearing or have reached a deadlock in their bargaining process.

## The Federal Mediation and Conciliation Service

The Federal Mediation and Conciliation Service (FMCS) is a federal agency with the express purpose of assisting labor and management to settle their disputes through mediation as well as to promote the development of sound and stable labor-management relationships. FMCS is funded by the federal government and its services are free of charge.

FMCS will normally assign a mediator to a collective bargaining process when it receives a NLRA Section 8(d) notice, although the parties may or may not actually connect with that person. FMCS will also respond to specific requests for its services from the bargaining parties. FMCS's participation in the bargaining process normally occurs only by mutual agreement between parties.

FMCS offers a variety of facilitation and mediation services among other offerings. Those services can be used during the collective bargaining process or the contract administration period. FMCS mediators received specialized training to provide facilitation and mediation services and typically have labor relations experience prior to joining the agency. Bargaining parties that are interested in or even curious about FMCS's services are encouraged to contact their local FMCS Field Office to discuss the services available. Contact information is available at <https://www.fmcs.gov/aboutus/locations/>.

### **Ground Rules**

Some employer and union bargaining committees find it useful to agree to specific ground rules that will apply to the parties' bargaining process. Ground rules are normally discussed prior to or at the first bargaining session between the parties. Ground rules may specifically apply to the parties' conduct during bargaining or they may more generally address mutual understandings about the bargaining process. Topics for consideration include:

1. Bargaining schedule
2. Confidentiality
  - a. Media inquiries
3. Bargaining order
  - a. Which party will present proposals first
  - b. Order of bargaining subjects presented (e.g. non-wage and benefit subjects first followed by economic proposals)
4. Caucuses
  - a. Either party may call a caucus at any time for any reason
  - b. Parties will "check in" at the X minute mark after calling a caucus
5. Use of written vs. verbal proposals (e.g. all proposals must be made in writing)
6. Process for confirming tentative agreements (e.g. all tentative agreements must be confirmed in writing)
7. Process for settlement ratification
  - a. Union

## b. Employers

The use of extensive ground rules may appear attractive to some bargaining parties, and some find that detailed ground rules provide helpful structure. However, it is generally a good idea to preserve flexibility by avoiding unnecessary constraints on the bargaining process.

### **The First Bargaining Session**

The first bargaining session will significantly impact the parties' perspectives on the larger negotiation, whether intentionally or unintentionally. It is therefore an opportunity to lay the groundwork for a successful bargaining process.

#### Setting the Tone

The first bargaining session will establish a tone for the collective bargaining process. Following introductions and a discussion about ground rules, if applicable, consider the use of an opening statement to communicate the committee's broad bargaining goals and its view of the collective bargaining process. An opening statement may include:

1. A verbal commitment to take the bargaining process seriously and conduct the process in a respectful, businesslike manner
2. A statement about the current market conditions
  - a. If such a statement is made, a supporting reference to objective criteria may be helpful
3. A statement about the current state of labor-management relations
4. A statement of the committee's broad (big picture) bargaining themes and objectives.
5. A statement of the committee's commitment to a successful process

Even in a well-established and generally positive labor-management relationship, and even where the union chooses not to make an opening statement, an opening statement from the employers' committee can be helpful to inform future communications between the committees.

#### Opening Proposals

Frequently, but not always, opening proposals are delivered by at least one party in the first bargaining session. It is common but not required that the union makes the first proposals in collective bargaining. Consider which party wants changes to the agreement in determining who will present the first proposals. Market conditions may be influential.

#### Bargaining Agendas

The parties may agree to bargain over certain subjects prior to others. The parties may agree to exchange proposals related to a single subject on a single day. They may agree to negotiate one or more categories of subjects prior to others. Bargaining agendas structured in this fashion can be used to facilitate interest-based bargaining processes by focusing the parties on more integrative subjects, such as safety and training, during the first stages of the bargaining process.

The parties then agree to exchange proposals on more distributive subjects later in the bargaining process.

Simple structures such as “labor-management” or “non-economic” proposals during the first bargaining stage followed by “economic” proposals are popular in some bargaining cultures. Under this arrangement each party determines for itself which of its proposals should fall into which category. Occasionally there are disagreements about the placement of a subject in the “non-economic” category. Those disagreements may be resolved by tabling the proposal to the economic bargaining stage.

Parties should only employ limited subject bargaining agendas by mutual agreement. It is generally understood that the parties will deliver all proposals at once unless otherwise explained or agreed.

### **Receiving Union Proposals**

It is the employers’ responsibility to understand the union’s proposals so they can be properly evaluated and considered. Listening to the other party not only demonstrates respect, it is a fundamental part of effective communication. Employer bargaining committee members should listen attentively when the union delivers its proposals. Recoding notes of key statements about the proposals is also important. Questions should be asked to clarify the goal of the proposal (the “why”), especially when the goal is not readily apparent.

It is generally advisable to avoid criticizing or otherwise responding to the union’s proposals immediately upon delivery. Immediate substantive responses – accepting or rejecting a proposal – are particularly ill-advised in most cases. Responses delivered prior to an employers’ caucus may indicate a lack of thoughtful consideration to the union. Such responses are more likely to be incomplete or even erroneous. And they can undermine the credibility of the employers’ committee by giving the appearance that one person can make a decision for the entire group.

### **Delivering Employer Proposals**

The employers’ committee should take care to explain and justify its proposals. This can only be effectively accomplished with sufficient preparation by the Chief Spokesperson with the other committee members. If an answer to a question from the union about an employer proposal isn’t known, it should be recorded, discussed in the employers’ caucus, and answered thereafter.

A consistent, cohesive presentation of the employers’ interests is generally supportive of effective communication and successful outcomes in collective bargaining. Consider previously discussed bargaining themes, statements made about employers’ interests, and positions taken on other subjects in formulating the presentation of employer proposals.

The presentation of proposals can be more effective if it is specifically connected to one or more employer interests. Consider presenting the employers’ interests to the union either as a package prior to the specific proposals, or in conjunction with the specific proposals. When each

employer proposal is presented, it is then verbally connected to one or more employer interests. While this method doesn't rise to the level of true interest-based bargaining, it does stem from the same principles and will support effective communication and reasonable flexibility in the bargaining process.

### **Package Proposals**

Depending on the customs of the bargaining parties, they may bargain over proposals as a comprehensive package or they may bargain over proposals on a single subject or set of subjects before moving on to the next.

The use of package proposals may support a more efficient bargaining process simply by combining the delivery and presentation processes that might otherwise occur for each proposal. Package proposals may also, for better or worse, support a notion that each side should drop or accept proposals in equal measure.

The package proposal concept may be used to present all proposals at once, a subset of proposals, or as a tool in the later stages of bargaining to focus parties' attention on a few key or the last remaining subjects.

### **Responding to Proposals**

Responses to proposals, whether verbal or written, are a fundamental part of clear communication in the collective bargaining process.

Employers should ordinarily use caucuses – a private discussion among the committee members – to develop clear responses prior to delivering them to the union at the bargaining table. As the negotiation unfolds this process will naturally become more efficient.

Proposal responses generally fall into the following categories: agree/accept, reject, counter-proposal, or need more information. If the employers are not prepared to respond to a proposal, the committee may request to table a proposal for consideration at a later time. An explanation for the employers' position on a specific proposal can be an important part of the employers' response but should be thoughtfully developed and clearly stated to avoid causing confusion.

It can be uncomfortable to reject a proposal, as it may feel undiplomatic, uncooperative, or impolite. However, do not be tempted to soften a rejection too much. Doing so can sacrifice the clarity of the employers' response. Clear responses to proposals, even when they are uncomfortable, support positive outcomes and better bargaining relationships by avoiding confusion and the frustrations that result from it.

Following the union's responses to employer proposals that are not accepted, the employer committee will need to consider whether to maintain its original proposal, modify its proposal, or withdraw/drop the proposal. These employer responses also should ordinarily be developed in the private caucus before being communicated to the union.

## **Tracking Proposals**

Like clear communication, organized recordkeeping is a critical function of the collective bargaining process. Tracking proposals (and counter-proposals) exchanged by the parties is especially important.

A basic time stamp on any written proposal or counter-proposal will prove helpful and may consist simply of three lines written in the corner of the document exchanged at the bargaining table: [Union/Employer] Proposal, Date, Time. Verbal proposals or responses should be clearly recorded in bargaining notes.

In addition to the proposals themselves, the verbal exchanges that take place between the parties about proposals are an important part of the bargaining record. In addition to specific verbal responses to proposals, key comments and exchanges should also be recorded in bargaining notes. Specific comments about the goals of a proposal, the rationale for a position or response, and other clarifying statements can be especially important.

Finally, a proposal log is highly recommended as a tracking tool. This is a single document that lists all proposals made during the bargaining process, the date on which the proposal was made, a short description of the responses at each meeting, and the current status of the proposal. This record should be updated after each bargaining session.

## **Tentative Agreements**

The use of tentative agreements is a common practice in many bargaining cultures. The tentative agreement or “TA” concept permits parties to reach agreement on one or more subjects while leaving other subjects open for negotiation. The phrase itself may be used to refer to a single contract modification or a collection of contract modifications.

Tentative agreements should be mutually understood to close discussion on the related proposals, even when parties reserve the right to modify proposals and agree that “nothing is final until everything is final.” Parties should be extremely cautious about attempting to reopen items under tentative agreement. Reopening previously settled items without valid reason can amount to regressive bargaining and may constitute an unfair labor practice in a NLRA Section 9(a) relationship.

Like proposals, tentative agreements must be carefully tracked throughout the bargaining process. They should be reduced to writing, ideally with initials and/or signatures from both parties on a document showing the agreed-upon contract language.

## **Tentative Settlement**

When the parties have resolved all outstanding proposals and concluded their bargaining process, they will have reached a tentative settlement. It is good practice to assemble and mutually agree upon a tentative settlement document that reflects all contract modifications. This document is then used to present the tentative settlement for ratification.

## **Ratification**

Ratification refers to the process of final approval of the tentative settlement reached by the bargaining committees.

It is common that the union bargaining committee presents a tentative settlement to its membership or a delegate body for ratification. An employer bargaining committee may also reserve ratification of a negotiated settlement for an official body that is not at the bargaining table, such as an association board of directors. If a ratification process will be used by the employers, it must be communicated to the union at the commencement of the bargaining process.

It is common for bargaining parties to agree to maintain the confidentiality of settlement terms prior to ratification.

## **Conclusion**

The SWACCA Collective Bargaining Guidebook is intended as a basic guide to the collective bargaining process offered in support of successful industry bargaining processes and positive labor relations. The SWACCA Board of Directors and Labor Committee appreciate your questions and feedback for future editions.

## **Contact Information for Further Discussion**

SWACCA's General Counsel, John Nesse of Management Guidance, LLP, is an experienced labor negotiator and the primary author of this Guidebook. SWACCA members are encouraged to contact John directly at (651) 253-4818 or [jnesse@mguidance.com](mailto:jnesse@mguidance.com) to discuss any questions about this Guidebook or the collective bargaining process.



ATTACHMENT 1 – SAMPLE PRE-BARGAINING SURVEY

[ORGANIZATION NAME]  
Pre-Bargaining Survey  
2019 Collective Bargaining

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[CBA TITLE/DESCRIPTION]

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The [ORGANIZATION NAME] is preparing to renegotiate its collective bargaining agreement (CBA) with the [UNION NAME]. We need your input to best represent your industry.

*Please complete this survey and return it at your earliest convenience.*

1. How has your company's local construction market changed over the past three years?

Dramatically Declined	Declined	No Change	Improved	Dramatically Improved
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2. In your company's local market, how has your company's competitive position **relative to non-union competitors** changed over the past three years?

Dramatically Declined	Declined	No Change	Improved	Dramatically Improved
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3. What forecast do you predict for your company's local market over the next three years?

Dramatic Decline	Decline	No Change	Improvement	Dramatic Improvement
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4. Are you concerned about recruiting enough skilled labor over the next three years?

Not Concerned	Slightly Concerned	Very Concerned
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5. If you are concerned about recruiting enough skilled labor, what change(s) could be made to the CBA that would help address your concerns?

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6. What are the top three items in the CBA that your company values most – the things you want to keep in the agreement?

1. \_\_\_\_\_

2. \_\_\_\_\_

3. \_\_\_\_\_

ATTACHMENT 1 – SAMPLE PRE-BARGAINING SURVEY

7. What are the top three items in the CBA that create challenges for your company – the things you would like to remove or change?

1. \_\_\_\_\_  
2. \_\_\_\_\_  
3. \_\_\_\_\_

8. What other CBA issues should be addressed in this year’s collective bargaining process?

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

9. Please offer any additional feedback you would like to share with the bargaining committee:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

10. Would you be willing to serve on the [ORGANIZATION NAME] employers’ bargaining committee, which will meet with the [UNION NAME] to negotiate the new labor agreement?

Yes      No

11. Your \_\_\_\_\_

Name:

Company: \_\_\_\_\_

Email: \_\_\_\_\_

Phone: \_\_\_\_\_

**Please return this survey to [NAME] by email at [EMAIL]**

**Thank you for your feedback!**

Please contact [NAME AND CONTACT INFO] at any time to further discuss the bargaining process, now or in the future.