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POST CONTRACT MANAGEMENT:

WE HAVE THE CONTRACT, NOW WHAT?

Gregory Ross[1]

Abstract: *Winning a contract, whether by direct negotiation, acceptance of a tender lodged, success in an expression of interest process followed by negotiation or otherwise is only the first step.*

Ensuring that the contract works operationally on the ground to achieve its intended purpose is commonly overlooked when so much adrenalin has been invested in "winning" the contract. The paper addresses a range of issues which arise in ongoing management of contracts, particularly those involving Government.

For contracts involving the public sector, the main focus of this paper, one must also recognise that the management of contracts is commonly undertaken by constantly changing staff who are subject to review by oversight agencies[2] *as well as media scrutiny. Contracts involving the simple sales of simple goods or delivery*

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[2] Such as Audit Authorities, Anti Corruption agencies, Ombudsmen and the like.

of simple services aside, the management of any ongoing contract is not only necessary, but if not properly conducted, can lead to downfall.

This paper begins with an outline of the issues associated with the current issues and structures relevant to contract management. These include various publications and their content is not the subject of this paper. This paper, rather, it examines the issue of what is necessary for effective contract management being reclassification of contract management as recognising a relationship in flux, rather than a document set in stone.

The paper then turns to examine various instances, in some of where inappropriate contract management can and has frustrated the fulfilment of the contract's purpose. This is further expanded upon in the context of defining the contract itself, dealing with intellectual property, dealing with confidential information, variations to the contract, performance of the contract, termination of the contract and dispute resolution.

How big an issue?

The complexity and size of the contract management issue is evidenced by the number of "hits[3]" for the various topics listed here:-

• Contract Management	181,000,000
Contract Management Plan	102,000,000
Contract Management Software	82,600,000
Contract Management Courses	33,600,000

As I understand it, from various NSW Government Annual reports, in the year 2010/2011 the NSW Government spent an estimated $12.7 billion on goods and services. State Contracts Control Board[4] organised contracts accounted for about $3.8 billion of that expenditure in that year.

This paper can, accordingly, really only be seen as scratching the surface of a huge topic.

In my view, post-contract management is, without having to be elaborated upon, clearly more an art than a science. What is appropriate for managing one contract will not necessarily be appropriate for another.

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[3] Google search conducted 30 August 2013

[4] A central contracting authority in New South Wales, Australia, since replaced by the NSW Procurement Board which is now is responsible for oversight of the NSW Government's procurement system. It is a policy and directive body which aims to ensure compliance. It issues directions to agencies, makes decisions and monitors the progress of agency compliance. It also accredits agencies to undertake their own procurement of goods and services

However, that does not mean management of contract cannot be done methodically, systematically and often with the benefit of technology.

Topics relevant to management of a contract which I deal with in this paper include:-

- Compliance by the Parties
- Dealing with Intellectual Property and Deliverables
- Confidential & Private Information
- Variations
- Performance
- Termination
- Dispute Resolution

Systems aiding post-contract management

Conceptually all contracts, whether written, oral or partly written and partly oral, involve management steps to do with--

- planning and creation of contract;
- identification and provision for risk issues;
- preparation of documentation;
- contract approval;
- performance monitoring
- dealing with changes; and
- expiration (whether by effluxion of time, termination or otherwise)

It is, of course, a risk management and commercial decision determining upon the extent and degree of management of any particular contract but the aim of any implementation of contract management systems, whether paper based or electronic, is to make monitoring the process easier and more effective. That includes all aspects of performance, tracking milestones and obligations, supervising renewals, terminations and expirations.

Not insignificant is the tracking of cash flows and other relevant financial information.

Any post-contract management system, either manual or electronic, allows organisations of all sizes to manage contracts and the contract cycle. These

systems can provide benefits and can be instrumental in underpinning the key business process of contract management.

However, in order to be effective whatever the system used, it must be keyed or tailored to the particular contract and additionally, to the staff of the entity managing the contract

Both at Commonwealth and at State levels there are various policy documents and publications with respect of contract management.

Private sector organisations, particularly large organisations, have their own versions.

This paper deals not with these publications but by reference to the practical day to day issues I have seen and continue to see in contract management operations.

Some are successful. Some are not.

Post-contract management systems and government agency staff

Government procurement has and always has been a slightly specialised field. It has its own problems. Ongoing contract management is one of them. Those contract management issues include, not simply checking on performance and paying on invoice, but dealing with the scrutiny to which public sector staff involved in contract management are subject.

The responsibility for contract management for government agencies puts its staff involved in that contract management more in the line of scrutiny for probity type reasons. This, of course, requires the agencies to ensure that their staffs are properly trained in both what they are doing and why they are doing it. Unfortunately and too often, in my observations, agency staff are not adequately trained in contract management and the reasoning behind steps in contract management.

Having advised NSW ICAC and been a member of its internal review board for some period, it is apparent to me that many of the allegations of wrongdoing made in respect of misfeasance or malfeasance in management of government contracts flow from staff not having been properly trained or the agency not having apt contract management resources.

From my experience, the people involved in negotiating public sector procurement contracts, especially in the Public Sector, are likely to move on and are likely to be different from those involved in the ongoing management of the contract.

Accordingly, the contract has to stand or fall on its words with new people involved later on having to manage the contract, so highlighting the need for the actual

ongoing management of the contract to be done properly. They need to know what was anticipated, what is the deliverable and how do they manage it best.

Public sector staff are not only subject of oversight agencies but also, in many instances, political and media scrutiny as to all stages of the procurement and contract management cycle.

Increasingly frequently employers engage staff on a part-time basis and, not infrequently, on a job sharing basis**.** This can have adverse consequences on consistent and ongoing performance, particularly in context of contract management, unless carefully handled. The employees who have fewer difficulties with ongoing management where they use part-time staff make use of appropriate checklists, whether manual or electronic, against which performance can be measured by whoever is on deck at a particular time.

However, whether the staff administering a contract are full-time, part-time or job share, there needs to be an appropriate checklist of performance criteria and timelines, payment, performance, satisfaction of milestones and the like relating to the deliverables under a contract. The checklist, in its most current form, must be relevantly available to all relevant staff likely to be involved in management.

Contract as an Ongoing Relationship

Many years ago, the firm of which I was then a partner sent me to Hong Kong as "*Our Man in Hong Kong*". One of the many things I learnt whilst there was that the Chinese attitude to contract was very different to that to which we of a "common law" tradition held. Whereas common lawyers saw contracts as all but fixed in stone, the Chinese perspective was much more of a fluid and ongoing relationship.

With practical developments in Australia, we have come to recognise much more the importance of proper and ongoing "hands on" contract management.

Various Australian Government and State Government publications on procurement and contract management are now cast in terms which make express reference to the need to maintain open communication and have a relationship sufficiently fluid enough to deal with various exigencies which will arise from time to time. Relevant Commonwealth and State government procurement guidelines manuals and like all have their place. They are an important tool but albeit sometimes dull reading.

There is obviously no one cut suits all answer to contract management, however changing the way we frame post-contract management allows for a more dynamic

and robust period contract negotiation, bedding down, transition in, transitioning and or negotiation out.

Van Halen[5] and The Brown M&Ms

The music group Van Halen had been touring for some time and at some venues had experienced real problems with the setting up and even safety at some of the performance venues.

Band member, David Lee Roth, had a bright idea to improve safety. The band started inserting deep in the "rider" to their performance contracts words prohibiting brown M&Ms from backstage. There was also provision that the consequence, if one was found, was that the promoter forfeited its fee. Obviously David Lee Roth and the band were of the school of thought that the hip pocket nerve is the most sensitive and therefore a good one to use to encourage proper performance

The brown M&Ms were not simply one rather crazy and sometimes excessive requirements commonly found in rock group contract riders but it was a contract performance tool. If the band found brown M&Ms, the band concluded that the promoter had not read the contract and they would probably fail a safety check. From what I've read, David Lee Roth, upon finding brown M&Ms backstage, would put on a real performance.

Promoters quickly learned that if you are dealing with Van Halen, you read contract in detail and comply with it.

In preparing for this seminar, I decided to test the concept, though in a much more prosaic contract context – having my car cleaned.

Rather than take all the usual stuff out of the car before delivering it to the car wash, I left one or two pieces of material under the driver's seat, just check whether they actually cleaned under the seats.

I thought I would see whether they were still there when I collected the car.

Rather pleasingly, the material had been removed from under the car seat and stacked neatly in the boot/trunk of the car.

[5] An American hard rock band.

Obviously that is not a major exercise in contract management but it does give a simple illustration of how doing something simple can be an effective tool in contract management.

When Does Contract Management Commence?

Notwithstanding the title of this paper, the key point to changing the framework of contract management centres on the period of which the contract commences. That is, the contract commences not when it has been secured or executed, but when it is being arranged.

The first question I commonly ask when instructed to prepare a new set of contract documents or a request for tender/proposal is along the lines of "What problems have occurred under the old contract?" This is the first step to management of any contract.

Clarity: The Who, What, When, Why & How of Contracts

In the actual contract and its management, the main and initial issues are to identify clearly who is to do what, for whom, when, why, to what standards and for how much. Doing so is essential for positive contract management in post contract award procedures and key for the consequences that flow from any issues that may arise. Contract outputs or deliverables should be, so far as is possible, crystal clear and certain. It is that very certainty of output which can make contract management easier.

In both the pre-contract and contract management process ensuring transparency of process and resilience of process ensures fairness to would-be suppliers as well as government. The clarity that is necessary is key to reshaping the thinking of contract management; it is imperative that the relationship is defined in no uncertain terms.

Topics relevant to management of a contract include:-

- Compliance by the Parties
- Dealing with Intellectual Property and Deliverables
- Confidential & Private Information
- Variations
- Performance
- Termination
- Dispute Resolution

Necessarily, the length of the term of the contract and the complexity of the contract contribute both to the quantum and difficulties likely to be involved in managing a particular contract.

I have, over the years, been involved in a couple of hospital contracts. Whilst the actual construction of hospitals raises interesting practical management issues, what I want to talk about is the ongoing management of long-term service provision contracts relating to the provision of medical care, particularly in public hospital context.

One such complex contract, with which I was involved, was to do with a private sector organisation building and operating a hospital facility. Part of the patient cohort was to be "public patients" who would be treated at the private facility by the operator under a contract with a State Government Health Authority.

With an envisaged 30 to 40 year term, the obvious issue which arose was how to deal with changes in medical best practice relevant to treating of various diseases. The relatively easy part, given the frequency and speed with which medical treatments develop, was to provide that if, for “public patients”, the relevant treatment did not have a corresponding Commonwealth Government "item number"; it would not be relevantly chargeable.

Decisions, over 30 to 40 years, to do with patient treatment, patient protocols and the thousand and one other issues to be dealt with in operating a major hospital necessarily are subject to immense change.

The contract arrangement necessarily had to provide for regular review and approval processes relating to treatment methodologies and other contingencies that arose. The contract envisaged the creation of a committee which would meet regularly to review relevant developments and implement or approve and document relevant changes in diagnosis and treatment. This was effective to ensure transparency and resolution; an example of effective contract management that also ensured the staff dealing with the contract had ample recourse for review of the contract and a current mode of checking contractual issues.

Intellectual Property and Contracts Management

The tracking and management of Intellectual Property issues is of particular concern in contract management. Too often, things go awry in respect of Intellectual Property because it wasn’t managed adequately in context of a relevant contract.

Some years ago I advised in respect of a situation in which a major organisation negotiated a funding agreement with one of my clients for carrying out certain research. The client was short staffed and had engaged a subcontractor to assist in responding to the request for tender, negotiations and later performance of work under the contract. Accordingly both the client and the subcontractor were totally aware of the provisions of the head agreement which, as is not uncommon, had provisions in the document under which intellectual property in the research report to be prepared was to vest in the party calling the tender.

Our client was aware of this. The subcontractor was aware of this.

The subcontractor's role was not all that major and it had fallen to a relatively junior officer of our client to prepare the sub contractor agreement. For reasons that I didn't understand at the time and still don't understand, the client had the sub contractor working on the project before the contractor had been formally engaged, literally to negotiate it. Needless to say, the subcontractor, who at all material times knew of the requirement that intellectual property in the project report was to vest in the party calling the tender, decided to play games and did not bother to raise with our client the fact that the form of sub contract used made no reference to transferring intellectual property to our client, let alone the party calling the tender.

A significant fight ensued.

By failing to engage the subcontractor on terms consistent with its obligations under the head contract, the client ended up, not only having to pay the subcontractor for services actually rendered but also having to pay an amount for an assignment of the copyright in text prepared by the sub contractor.

Although the amount wasn't particularly large, the essence of this scenario highlights that a subcontractor must ensure that the back-to-back contracts work in respect of intellectual property. If the client used a staff member, the issue would not have arisen because the relevant Australian Copyright legislation would have vested copyright in the client[6].

Checklists for IP in contract management

[6] Copyright Act 1968 (Commonwealth of Australia) Section 35(6) "Where a literary, dramatic or artistic work to which neither of the last two preceding subsections applies, or a musical work, is made by the author in pursuance of the terms of his or her employment by another person under a contract of service or apprenticeship, that other person is the owner of any copyright subsisting in the work by virtue of this Part." However, the terms of the contract of employment and the nature of the exact relationship as to what is 'in the course of his or her employment" will need close analysis, Edsonic v Cassidy [2010] FCA 1008.and *SRC IP Holdings Pty Ltd v The Australian Council for Educational Research Limited* [2012] FCA 779). The Copyright Act also has provisions (see section 176 Copyright Act 1968) where work is done "*under the direction or control* "of a government agency.

It is recommended that a register of Intellectual Property is maintained during the term of the contract. It can list both background intellectual property brought to the contract and the intellectual property created pursuant to the contract.

The following points regarding Intellectual Property should be reflected in a checklist relevant to management of any particular contract:-

- What is it?
- What is it made from?
- Who owns background IP
- Who owns IP of the contract?
- If co-owned, what about commercialisation and royalty issues?
- Moral Rights, Patents and Registered Designs
- Tracking It – a register?
- Offshore Issues

Copyright and IP is a topic in itself, so my comments on its management in this paper are necessarily very general, a mere general outline

Where, for instance, the Federal funds a State Agency which then causes work to be done through its staff or subcontractors who may include other State Governments, companies, and individuals all of whom may be contributing their own pre existing IP and or contribution to the IP in whatever is being produced, care needs to be taken to ensure Intellectual Property issues are aptly dealt with.

Care is needed in identification at the start of the negotiation process to ensure transparency and reliability of the final contractual outcome. Government agencies too often in my view seem to want to own everything, so there is a need to be careful to try and avoid giving away the party's intellectual property in contracts unnecessarily. If the Government agency has to be able to use something, it is often better to grant a licence, rather than give away ownership.

Moral Rights

Difficulties inherent in managing arrangements for appropriate consents in respect of moral rights must be expected, can raise unusual '"industrial" issue and must be clearly thought through where contractors and or subcontractors and or their staff are used.

Moral rights comprise three types of moral rights. Moral rights conferred in Australia under Part IX of the Copyright Act, effective from 21 December 2000. They apply to copyright works only.

Moral rights are independent, personal rights, not, in my view, strictly IP rights despite being provided for in the Copyright Act, and are designed at maintaining integrity of works. They have origins in European law but long movie credits are sometimes seen as the simplest example.

"Right of integrity" essentially means author's right not to have his or her work subjected to "derogatory treatment", meaning treatment that is prejudicial to the author's reputation or honour, for instance, a material distortion of a work. What is prejudicial is difficult to define because of the inherently subjective nature and there is little guidance in the Copyright Act on the point. Moreover, the changes are so recent that there is little or no case law to guide us and one can only look at overseas experiences.

One issue to be taken into account is what is "*reasonable*" for the terms of the consent in the situation, which takes into account the nature of the work, the purpose for and manner in which it is used, industry practice, whether the work was created in the course of employment or another type of contract, nature of any consent, whether it was paid for and so on.

Moral rights always remain with the original author or creator, not the employer (unlike most copyright). They cannot be waived or assigned. They expire with their owner. However, consents can and should be obtained. These should always be in writing and set out the specific nature and scope of the consent.

Where texts or policies are being written, the consent will have to envisage updates changes and or replacement.

Often the "Work" is specified in a schedule or annexure.

That is fine but where you have more than one party owning the product issues can arise as to who can do what with it.

Confidential Information

Intellectual property laws do not protect "ideas" of themselves but there can be confidentiality provisions which go some way to protecting ideas. However the law's mechanism to do with protecting ideas as an example of confidential information is primarily contractual.

What is "confidential" in a given situation depends not only on the terms of the relevant contract but also privacy legislation, whether State or Federal.

Successful management of confidential information issues in often involves a process of tagging relevant material to highlight its status. Ideally, a party will require all people relevantly involved in a contract involving confidential information sign a confidentiality agreement to keep information confidential. With the increase in outsourcing by both state and federal agencies the frequency with which the need to manage contracts involving use of private or confidential information has significantly increased. Tracking and management of confidential and/or private information in ongoing contracts is all-important. Freedom of Information and or Government Information Provision Act laws can, of course, have an effect upon when and how some information might be disclosed,

Variations

Changes of contract scope and the like, have implications on price as well is what is to be delivered. Any change to arrangements should be appropriately thought through, and diligently documented, preferably pursuant to an express provision in the base contract.

An aspect of changes which I have increasingly seen is the propensity of changes of name to occur without explanation, which invariably reduces the integral component of transparency in effective contract management. Where circumstances confronted by an ongoing contract change, the parties need to manage change. Sometimes that change involves formal or informal variation of the contract.

By way of example, often upon some sale of business or restructure of a corporate group, the name on the invoice is altered. Too often have I seen that explained as being to do with a change of ownership of or sale of a business? Contracts are not simply assets which can be bought and sold like chattels.

Whilst properly documented change in name of an entity is neither here nor there, the problem is that, and especially in context of contracts where one party is public sector entity, often businesses are sold and those involved in the transaction failed to appreciate [or do they just ignore the fact?] Contracts are not simply widgets transferable by delivery or the like.

In a Government contract context, this can lead to a new contractor totally unacceptable to government being in a position to influence the provision of goods and services to Government.

If an organisation uses checklists, for contract management, one of the items on the checklist should be to query any change of name which might suggest that the new contractor may have taken an assignment of the contract without legal niceties being satisfied. Names will need to be checked each time an invoice is received.

All too frequently, where there is a dispute, there are changes in the name of the contract party.

Too often when businesses are sold, those involved in the transaction failed to appreciate [or do they just ignore the fact?] that Contracts are not simply widgets transferable by delivery or the like.

Deeds, historically, should only be varied by Deeds, though Deeds should only be needed rarely.

Exchange of letters can be as good as formal contract, they too can deal with default termination.

Whilst some people suggest that “variations” should become “schedules” attached to the base contract, my view is that schedules can only exist at the time any contract was entered into. Accordingly, I tend to avoid describing variations as “schedules” but there is nothing to stop an agreed variation being stored with the base contract.

In negotiating any such change or variation, particularly in the public sector, there is a real need to have available and preferably involved in the negotiations the staff member whose delegation is appropriate for approving or disapproving of the proposed variation.

Unfortunately a seemingly simple contract variation arrangement can fall apart because the agency representative negotiating the change did not have delegation, either as to power or financially, to sign off on the variation and the relevant delegate was not available within the timeframe required for compromising the contract in question by the envisaged variation.

Checklists and dealing with variations

If a contract involves or envisages changes, whether a change of law or change of circumstances, the best contracts will have a mechanism for dealing with those changes built into it. The parties should agree upon a process to manage the change, rather than launch straight into sometimes acrimonious change negotiations. Needless to say, proper documentation of variation negotiations, including the date of commencement of the contract variations is crucial in the proper, management of a contract which has gone off the rails.

These checklists must be utilised, but can only be utilised properly where it is established that the parties know what is wanted not only before a contract is prepared but also in any management negotiations and for some “fallback” position acceptable to the agency to be known before it embarks on any variation

negotiation. On tactics, it can only be suggested contract negotiators have fall back options.

Performance

The clearer and more objective the performance criteria and deliverables are the less room there is for dispute.

Commonly contract outputs or deliverables / defined as the “work” should be set in a schedule or annexed. As standards change, there is a need for a mechanism for agreeing and adopting changes.

Wherever there is an inadequacy in performance, it should be advised to the contractor at the earliest possible date, preferably before any invoice relevant to that work is paid. If and when it is necessary to rely on a default clause, perhaps with a view to terminating, it is going to be much easier if there is a clear paper chain drawing the inadequacies to the attention of the service provider at the earliest possible date.

All too frequently, when I go through a client file where there is a dispute, I find that there are changes in the name of the contract party.

Whilst properly documented change in name of an entity is neither here nor there, the problem is that, and especially in context of contracts where one party is public sector entity, often businesses are sold and those involved in the transaction failed to appreciate [or do they just ignore the fact?] Contracts are not simply widgets transferable by delivery or the like.

There is a need for some formality in the management of an assignment of the contract. Public sector agency staff must comply with finance legislation as the authorisation of invoices. In that context change of name of an invoice should be a red flag.

Sometimes managing a non-performance issue involves thinking outside the square. Sometime ago I was involved in resolving something of an impasse which have arisen between a major overseas technology contractor in three government entities with which it was engaged under one contract.

The three government agencies all had their own list of wants and reasons they thought the contractor was in breach of the contract and also, to a lesser extent, why the needs and wants of some of the other agencies involved were getting in the way of what had to be done.

I sat and listened to the more for a while and that she had to point out to them that being three agencies of the same government it was probably better to recognise that we were on the same side and not air their own dirty linen in front of the

contractor. That helped because they then started focusing on the practicalities what was going on with the contractor.

It fairly quickly became apparent to me, having spent time living and working in Asia, that a goodly part of the problem with the management of the contract was a personality clash between the contractor's head representative in Australia and the lead manager on behalf of the three agencies in the curing the personality clash might help the contract.

I recommended a letter, from upon high in government, to the managing director of the contractor in its own country expressing concern as to this unfortunate personality clash.

Surprise, surprise! The contractor's management was similarly concerned about the contract going around and around in circles and quickly took the chance to have its organisation fronted in Australia by different individual.

The contract fell into place quite quickly.

It is emphasised that the contract terms and making allegations of breach of contract is not always the best way of managing the contract, especially where the underlying issue must involve a degree of mutual commitment by not just the contracting entities but also by the staff of each involved in the project.

Termination

Termination is rarely the most preferred contract management option. Termination and or threats of termination should be something of a last resort. Probity is relevant not simply to the decision as to choosing whom a Government will contract with, but is particularly relevant to the ongoing liaison/monitoring under a contract, especially if there is ever a need to rely on variation or termination provisions.

All the following points on Termination should be reflected in a checklist relevant to management of any particular contract:-

- Probity in termination
- Timetable for delivery
- Tie to objective criteria
- Consequences of poor performance
- Satisfaction of performance criteria
- Link to default clause

- Monitoring & report mechanism

A question often arises about what to do about payment in context of early termination. It is common, especially in Government contracts where there are often provisions allowing early termination, for the clauses to go on to provide for part payment for work done and accepted prior to the termination.

From my time working with the New South Wales Independent Commission Against Corruption, I must emphasise the need for clear documentation in respect of managing bad performance and termination. Termination without cause clauses are relatively common in government, especially where projects are depending upon the existence of particular government policy or a particular funding arrangement which may not persist long-term.

In context of contracts with an entity where there is need to comply with specific standards, consider attaching standards as a schedule which marks or denotes the responsibilities of either party for their respective obligations and provide for updates and changes.

Dispute resolution

The cost of dispute is not to be ignored and parties should try to minimise it in managing issues and disputes which arise under contracts. I offer the following as my recommendation as to Alternative Dispute Resolution (ADR):

- Discussion between parties & Elevation in Hierarchy
- Conciliation
- Mediation
- Arbitration (where appropriate[7])
- Court

So far as dispute resolution is concerned, where parties are dealing with another government agency, try to avoid the cost of more common commercial dispute resolution clauses. It is almost always preferable to have an initial negotiation between the parties with a view to resolving disputes rather than revert initially to external service providers.

Where another Government agency is involved, try referring disputes, after an attempt at resolution by discussions between officers of the agencies, for resolution

[7] In the author's experience arbitration can be just as costly as resort to a court.

in accordance with relevant Governmental directions for resolution of disputes between government agencies.

Where dealing with a commercial entity, try to have an ADR provision which seeks remedy in discussions first, before resort to formal and sometimes expensive ADR. However, there are some situations where resort to a Court is an imperative.

In that respect, I refer to the 2011/2012 Taxi Council challenge to a NSW Department of Education and Training (as it then was) Request for Tender[8] for transport services for children with mobility issues. The Taxi Council asserted, in effect, that transportation of the children fell within the definition of "public transport", with the consequence that only bus companies and taxis could do the work. Discussion failed to resolve the issue, so Court proceedings were commenced. The Department of Education opposed the assertion and its view was upheld by the Court, but the time taken to finalise the proceedings involved delay which was disadvantageous to the Department.

Some General Comments

Contracts can take many and varied guises. Oral contracts can be entered into but, especially in the public sector procurement context, oral contracts and their management raise much more significantly difficult issues as to proof of what is or is not agreed and what the terms of the contract are. They are much more difficult to manage, primarily because there is little or no evidence of the actual terms of the contract. But any contract may be as simple as a written offer letter and a signed acceptance or even acceptance by conduct.

The clearer and more objective are contract requirements, the less room for dispute there is.

Contracts are not simply about "widgets". There is no such thing as a standard form contract appropriate for all circumstances. Similarly, there is no universal standard contract management template. Careful preparation, storage, use and updating of precedents for appropriate situations is paramount both for formation of contract and for management of contracts.

Increasingly, the best way to deal with who owns what is to be specific about it. If there is any doubt, have a schedule. So far as public sector agencies are

[8] TEAMCARD PTY LTD v STATE OF NSW [2011] NSWSC 1008

concerned, related contract management issues include how things are described, internal delegations and authorisations and changes of authorised officers.

If contractor is to be able to use the deliverable produced under the contract, what license terms and conditions will the agency impose and document? Where the contract involves reports, texts and course related papers which will have to be updated or changed from time to time, it is all the more important to address moral rights consents initially to minimise problems with 'moral rights". IP rights and their sharing, if appropriate, need to be set out clearly. Jointly owned and used rights create their own issues and problems, not the least of which where are an agency co-owns product with a contractor and the contractor is allowed to use it, what liability might the agency suffer which has to be protected against?

Difficulties inherent in managing arrangements for appropriate consents in respect of moral rights must be expected. They can raise unusual '"industrial" issue and must be clearly thought through where contractors and or subcontractors are used.

For Public Sector bodies, the prohibition on assignment is very important. Key person involvement can drag a contract over the line to being an employment contract, so be careful about doing that without good cause.

Just as tailoring of contract templates is the key to efficient contract writing for public sector agencies, so tailoring of appropriate management templates is the key to proper, efficient and economical ongoing management. It is very important to work from last approved precedent or template, not from something used a while ago, which may have had something important deleted from or varied in it.

Confidential information is, increasingly lending itself to being listed in a schedule where capable of identification at the time of entry into a contract. Where identified after entry into a contract, it can be labelled.

As agencies develop standard agreements and refine their management of contracts, I don't see why they should not go into contract negotiations making the contractor aware of their base performance checklist against which performance will be measured. Indeed, in some cases, it would seem the best option.

It is more than surprising how commonly arrangements for payment are inadequately provided for. Wherever possible, my recommendation is to tie the obligation to pay to some objective event or milestone, and / or to satisfying specified measurable contractual output requirement. Try to avoid contracts which involve commitment to pay by reference to a rate but have no real parameters as to what the price will be and no mechanism for terminating the relationship and payment obligation. Annexing or extracting from a quote can help to tie to a fee. Expenses and on costs can be an unwanted expensive addition, if not properly provided for. Wherever possible, try to exclude them. Where they cannot be

excluded, seek a provision under which they are to be managed by having to be approved before being incurred.

It is sometimes possible to limit the obligation to pay so the obligation does not arise unless and until the government purchaser is satisfied that the goods or services provided comply with requirements of the contract. If so, the relevant contract and checklist should make express reference to the time within which any acceptance rejection period has to be made and notified to the contractor to ensure compliance. This issue of provisioning, to ensure one's ability to satisfy one's resourcing obligations under a contract, may seem relatively self-explanatory. However, I am constantly puzzled by contracts involving work over a number of years which have no real tie to the availability of funds to enable the project to be carried out and paid for.

Commonly contract outputs or deliverables / defined as the "work" should be set in a schedule or annexed. As standards change, there is a need for a mechanism for agreeing and adopting changes. Wherever there is an inadequacy in performance, it should be advised to the contractor at the earliest possible date. If and when it is necessary to rely on a default clause, perhaps with a view to terminating, it is going to be much easier if there is a clear paper chain drawing the inadequacies to the attention of the service provider at the earliest possible date.

It is, of course, a commercial / risk management decision, as to what "standard" items can be included or excluded from or varied in a particular contract checklist.

In consortium arrangements, it is particularly important for the respective roles of all participants to be known and set out in the relevant agreement. It is possible to have separate schedules in the relevant contract checklist for each player which lists the respective obligations and performance criteria of each player.

There are many policies with which Government requires contractors to comply; Therefore, as a matter of ongoing management, contract checklist should include provisions for updating the contractor of any changes to relevant policies.

The Freedom of Information (FOI) / Government Information Provision Act (GIPA) legislation deal in some detail with Government obligations as to what is can and how it can release information about contracts. This paper is not the place for detailed discussion of FOI/GIPA obligations but they exist. As a matter of management of a contract affected by FOI/GIPA, I recommend close liaison with your agency FOI/GIPA team.

Over the years, I have to say I have been surprised in the FOI days how few dispute crossed my desk about 'commercial in confidence". It is still a bit early to

say whether GIPA, with its change of policy to be more in favour of disclosure than was the case in an older FOI context, will change that.

Conclusion

Just as contracts, particularly those involving Government, should clearly set out the obligations to be undertaken by each party so that, as if and when something goes wrong, not only can Government assert its position but, from a political perspective, it is important for an agency's Minister to be able to stand on the floor of Parliament and justify the contract, not just its concept and content but also its ongoing management..

Effective contract management is necessarily in the glare of publicity which descends upon Government in the event of an oversight authority or media perceived inadequacy in the formation, management and or termination of a contract.

Contract procedures, contract terms and conditions and contract management cannot proceed upon the basis of the old Australian saying "*she'll be right mate*".

Proper and tailored contract management processes, manual and computer based, and documents are the key tools to successful management of a contract but are of little value if not in the hands of adequate numbers of adequately trained staff.

26 September 2013

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