

Achieving Resolution of Disputes Arising from Distressed Government IT Projects

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Agenda

- the nature of public sector decision making, IT and the overlay of statutory responsibility
- characteristics of public sector dispute resolution
- techniques for avoiding disputes derailing the project
- arbitration or litigation?
- ‘platforms for settlement’

Public sector decision making

“Historically, the majority of major projects in government have not delivered the anticipated benefits within original time and cost expectations”

UK National Audit Office 2013

Universal Credit Welfare Reform System

“weak management, ineffective control and poor governance” by IT suppliers



Public sector decision making

- “endemic over-optimism”
- “too often policy draws from too narrow a range of views and evidence, and does not ensure that policy is capable of practical implementation”
- deliberate over-optimism (“strategic misrepresentation”)
“a desire of individuals to protect and boost their own prospects or the desire to secure investment for a project”



Public sector decision making (cont'd)

- too big to fail?

NAO “no IT contract will be allowed over £100m in value”

- “Decision makers seek short-term recognition and rewards, and are often not in the same roles when the project is underway and issues emerge”

Public sector IT

- user base: numerous, flat structure, reluctant, conservative
- large in-house IT function trying to find a role
- supplier management: lacks mandate (or ability?) to make compromises along the way

Statutory responsibility

- “It’s more than my job’s work ...”
- desire of public sector manager to be seen to protect public purse

Transport for Greater Manchester –v- Thales Transport and Security Ltd [2012]

- audit of “records relating to [Thales’] obligations under this Agreement ... relating to the performance of its obligations under the Contract”
- legitimate interests of the Authority

Characteristics of public sector dispute resolution

Markedly different from private sector IT

- government contracts onerous – little if any vendor negotiation
- adherence to timescales less important to public sector procurers
- pragmatic approach to achievable scope issues less likely in public sector IT
- once dispute arises, procurer may prefer Court or tribunal's decision over a commercial settlement

Techniques for avoiding disputes derailing the Project

A. Agree to disagree

- disputed packet of work delineated
- packet not recognised as in scope by vendor agreed to be delivered preserving vendor's right to arbitrate cost later

B. Mediation

- timing crucial; gestation period may be longer, but not too close to main hearing
- importance of authority to settle
- imperative of available robust legal advice to the Authority

Techniques for avoiding disputes derailing the Project (cont'd)

C. Sell the Project

- need to align all parties' settlement interests
 - potentially diminishing value of project, over time
 - progress with project against milestones
 - level of acceptance of customer
 - perceived level of claims being made in relation to project default

Arbitration or litigation?

- lack of specialist judges in Asian jurisdictions
- exacerbated by prevalence of arbitration clauses in both public and private sector IT contracts
- disputants may try to push claims into Court for tactical reasons
- HKIAC, SIAC both well placed to administer IT disputes



'Platforms for settlement'

- tune into the political landscape
 - public statements from politicians pledging full investigation
 - seek out senior source on government side with a level of independence
 - timeline for release of statistics, project updates or legislative hearings





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