



IT PROJECT DISPUTES MANAGEMENT – MANAGING THE CLOUDY SKIES

*Gowri Kangeson, Partner
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- Life on the leading/bleeding edge
 - To win work, tenderers make offers:
 - at the very limits of what they can deliver
 - for a price they think will win the bid
 - in a period which meets the customer's stated requirement
 - without real clarity on the final product
 - It is not surprising that things sometimes go wrong and disputes result
 - This presentation will consider:
 - why disputes occur in technology contracts
 - how to reduce the likelihood of them occurring
 - how to manage them when they do

Why do disputes arise?

- Misalignment of goals or expectations
 - Unrealistic RFTs
 - Unrealistic bids
 - Unclear specifications
- The conspiracy of optimism
- Unanticipated changes in technology
- Unanticipated technical difficulties
- Failure by the supplier to perform
- Failure by the customer to perform

- Designing RFTs and contracts to minimise the likelihood of things going wrong
 - Alignment of goals or expectations
 - Early engagement
 - Listening
 - Ensure RFTs are realistic and specific
 - Encourage bids that are deliverable and specific
 - Avoiding the conspiracy of optimism
 - Designing for changes in technology
 - Mechanisms to overcome technical difficulties
 - Contractor failure to perform
 - Customer failure to perform

- Spotting the symptoms
 - The schedule starts slipping
 - Insufficient instructions from the customer
 - Technical reviews start showing problems
 - Issues with subcontractors
 - Budget problems
 - Contractor or customer distress
 - Ambiguities in the contract start to emerge

- Some strategies:
 - Ensure early detection/recognition of problems
 - Acknowledge/deal with all issues quickly
 - Collate and preserve evidence
 - Elevate the issue internally to bring in objective assessment, and as necessary, take legal advice
 - Determine a clear way forward
 - Eg use fast track expert resolution for ambiguities
 - Manage personnel related problems
 - Escalate quickly
 - Do what you say you will do & manage expectations

- Major delay (or budget blow out)
 - Usually starts with 'creeping delay'
 - Consider available contract management mechanisms
 - Assume it will get worse, not better
 - Decide early if it is worth persevering and terminate if not, work out an achievable management plan if it is
 - Carefully consider the ability to terminate
- Major design/technical/developmental problems
 - Same as above: Assume it will get worse; act early and decisively – be realistic

- What does the contract provide?
- Negotiation and escalation
 - Develop a strategy - Assume the worst/it may go further and manage on that basis
 - Is there a first mover advantage on the notice of dispute?
 - Open v without prejudice discussions
- Mediation
- Expert determination
- Arbitration
- Litigation

- Variation of contract
- Suspension and step-in rights
- Managing transition out
 - IP and confidentiality issues
 - Data
- Associated claims:
 - Misleading conduct claim – pre-contractual representations
 - Possible claim for quantum meruit
- Think tactically
 - Protection of legal professional privilege when investigating
 - Reserve your legal rights when deciding your approach (in correspondence & discussions)