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contract management IN PRACTICE

Information contained in this newsletter is current as at July 2004

Volume 1 Number 6

Print Post Approved 255003/00769

Business success through effective project planning and control

Segun Faniran and **Voytek Kawecki** JAVELIN ASSOCIATES

The role of project planning and control in contract execution and project delivery is to establish a course of action for achieving project objectives and to ensure that the course of action is maintained and desired objectives are achieved. An increasingly competitive marketplace and the ongoing drive to reduce delivery times and out-turn costs, have made the project planning and control functions critical to successful project delivery.

Figure 1 illustrates the main functional elements of a project planning and control system.

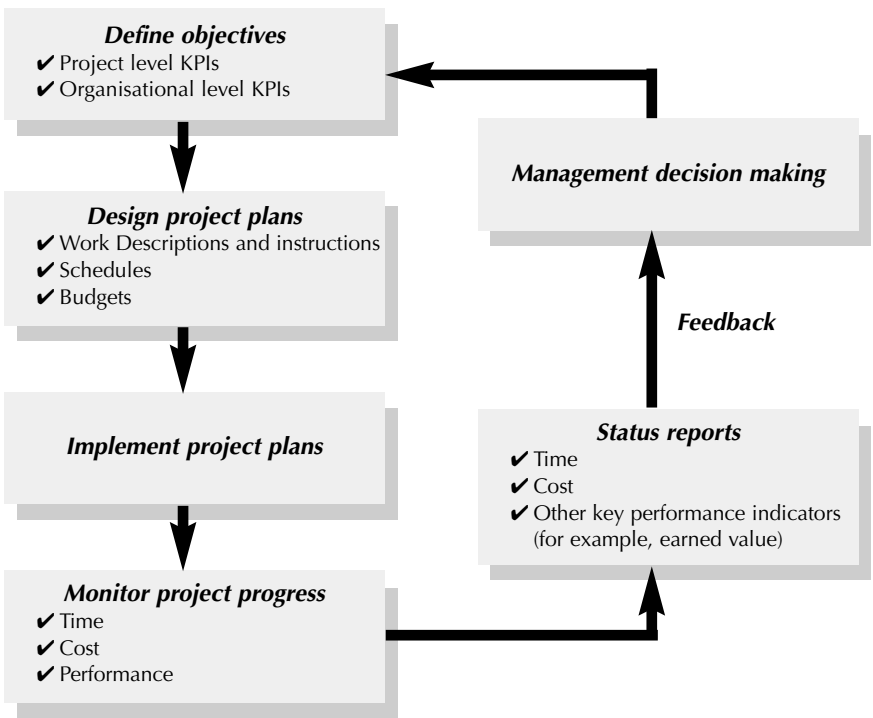

Figure 1. Functional elements of a project planning and control system

contents

In many contracting organisations, the efforts to enhance project performance through improved planning and control has focused mainly on the technical aspects, that is, improving available tools such as software, hardware, planning models and so on. However, this approach only addresses part of the problem, and there remain many costly and time consuming problems in project delivery that relate directly to the inadequacy of planning and control. Some practical examples of planning and control related problems in projects, identified from the authors' own experiences in servicing projects, follow.

- *Unrealistic project plans.* Without realistic planning, project management and control cannot be properly implemented and projects typically end up being late, over-budget and, of course, not meeting the original objectives.
- *Difficult access to data and poor data quality.* Initial data requirements are often misunderstood and therefore resulting plans are not related to often critical contractual information. Later on, controlling the project and updating the program is frustrating and difficult because it doesn't reflect the reality on the ground.
- *Inefficient time and resource management.* The program logic is often too complicated and therefore programs become messy and difficult to understand and implement. There is also often limited use of resource management applications in programs. Consequently, an accurate establishment and analysis of project progress is not possible.
- *Poor understanding of project risks.* Without the proper duration and float analysis, project managers cannot understand the risks to the project schedule or the risks associated with resource allocation and usage.
- *Poor reporting and updating system.* Important information in project reports is often hidden within piles of irrelevant information, which makes the use of reports and program analysis time consuming and frustrating or sometimes even impossible.
- *Projects not meeting business needs.* When project objectives and project implementation plans are not aligned with the performing organisation's strategic plans, the resultant project outcomes do not contribute any value to the long term business goals of the organisation and there is poor utilisation of the organisation's resources and core competencies.

Effective implementation of project planning and control functions can reap enormous benefits for successful organisations. It can also be disastrous for organisations that fail to properly manage the implementation process. Two critical questions are therefore pertinent.

1. How can project planning and control be implemented successfully?
2. What are the critical success factors for project planning and control implementation?

Develop a critical success factors framework

To eliminate planning and control related problems, which can put any project at risk of failure, project managers need to realise that project planning and control has multiple dimensions and involves both technical and business aspects. The technical functions involve the application of specialist knowledge, tools and techniques to determine optimal methods, sequence and timing of activities, and required resources for a project. The business functions involve planning, co-ordinating and integrating the interdependent activities that are performed as part of the project planning and control process, and aligning them with the overall business strategy of the performing organisation.

From our experience, we have developed a critical success factors framework that identifies factors needed to maximise the probability of achieving a successful outcome from implementing project planning and control processes. This

framework provides a basis for managers to analyse their current project planning and control practices and identify areas for improvement. The framework also facilitates decision making by identifying the inter-relationship of what at first pass might appear as individual factors; that is, when viewed simply there may appear to be little or no impact on project success, but when viewed holistically the implications may be critical. The framework, illustrated in Figure 2, groups the critical success factors into business and technical factors.

Project planning and control implementation processes

Business factors	***Technical factors***
Top management support	Stakeholder consultation
Investment in planning and control efforts	Client acceptance
Management control	Software configuration
	Personnel
	Monitoring and feedback

Figure 2. Critical success factors framework for project planning and control

Business factors

Business processes in project planning and control involve planning, co-ordinating and integrating project planning and control activities, and aligning them with the overall business strategy of the performing organisation. While the technical outcomes from project planning and control and the requirements for achieving them tend to be very well known, project management practitioners are often unaware of the business process objectives of project planning and control and the requirements for achieving them. Activities that must be performed to successfully achieve the requisite business outcomes from project planning and control processes include the following.

- Senior management support for, and continuous involvement in, the implementation of project planning and control activities is necessary to ensure that: (i) project planning and control processes are adequately resourced; (ii) goals and aspirations of top management are incorporated into project planning and control processes; and (iii) there is organisation-wide acceptance of the outcomes of project planning and control processes.
- The optimal level of investment in project planning and control efforts required to achieve cost effectiveness is: 0.75 per cent of total project expenditure for project planning (planning undertaken prior to project commencement of implementation); and 0.25 per cent of total project expenditure for project control (monitoring, feedback and replanning activities undertaken after commencement of project implementation).
- The project planning and control activities need to be integrated into the organisation's business and management systems through the establishment of an organisation level management policy for project planning that includes a description of how project and business functions within the organisation should interface.

Technical factors

The technical processes in project planning and control involve the application of specialist knowledge, tools and techniques to determine optimal methods, sequence and timing of activities, and the required resources for a project. Activities that must be undertaken to successfully achieve the requisite technical outcomes from project planning and

control processes include the following.

- Key stakeholders need to be consulted during the analysis phase of designing the project plan to ensure that the project scope is correctly defined. This helps to build trust and rapport between planners and other members of the project implementation team, and places functional expertise within the reach of the planner throughout the project development and implementation.
- The client indicates agreement with the project scope definition, and thus authorises and approves detailed design of the project plans.
- The configuration of software used for project planning and control should be project specific, depending on specific project needs and requirements, and the required level of integration into existing systems.
- The planning team should include competent personnel (albeit with compatible personalities and work habits). It is also important to ensure that all key personnel are involved during project planning. This includes functional personnel responsible for implementing the project as well as specialist planners responsible for designing and documenting the implementation plan.
- Key performance indicators selected for monitoring project performance and providing feedback for project control should not only be capable of indicating the 'health and wellbeing' of the project, but should also ensure that the project stays aligned to its original business case objectives.

It is also important to ensure that all key personnel are involved during project planning. This includes functional personnel responsible for implementing the project as well as specialist planners responsible for designing and documenting the implementation plan.

Conclusion

These critical success factors by no means form an exhaustive list — many other factors influence the successful outcome of project planning and control activities. Nevertheless by considering these factors, the chance of completing a project on time and within budget is greatly increased. This means the chances of actually producing the anticipated deliverables that satisfy the project stakeholders are also greatly increased. ●

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Segun Faniran is also a Senior Lecturer in the School of Civil and Environmental Engineering, University of New South Wales and has provided consulting services in the areas of project performance modelling and analysis, and decision modelling for strategic planning and performance control in project based organisations.

Voytek Kawecki has over 20 years of commercial experience in a variety of management roles on high profile projects such as the Melbourne City Link, M5 Freeway in Sydney and naval frigates for Lockheed Martin and the Department of Defence. Voytek has extensive commercial experience in the design and implementation of project planning and control systems, and a strong interest in the development of unconventional techniques for project performance management.

Contract cycles in contract management

Antoinette Brandi
AIPMM

In every large organisation there is a range of participants involved in the management of contracts. The challenge is to achieve a seamless transition between each stage of the contract cycle and this can only be achieved if all participants understand each other's responsibilities and how their roles should interact. Where intrusive personalities or lack of clarity obscures roles and responsibilities, the contract cycle is in jeopardy of functioning ineffectively and inefficiently. Inevitably this leads to conflict within the organisation and damage to the organisation's reputation among suppliers and contractors.

Some of the more common internal positions involved in the contract management cycle include:

- contracts and procurement manager (sometimes separate roles, depending on the size of the organisation);
- commercial contracts manager;
- inhouse counsel;
- project manager or operational area manager;
- contracts administrator;
- management accountant.

Additionally, many organisations procure the services of external counsel or other professionals to provide specific skills and knowledge relating to the development or implementation of complex contracts. This is a common practice for highly specialised areas such as engineering, construction or information technology (IT).

To illustrate how these roles interrelate and what each role could involve, the procurement of IT services for a large service organisation is used as an example.

An example

In this scenario the head of IT is the operational area manager with the responsibility for providing the specifications for the services required, estimating costs through research, gaining budgetary approval, identifying the service levels required and chairing the tender evaluation process. However, the specifications in this case have been prepared by an external IT consultant with specific expertise in the area of the services to be procured.

At this point, it is worth noting that there is a common misconception that contract and procurement managers (CPMs) need to be involved in the development of specifications. Unless they have technical skills or knowledge pertinent to the service or product being procured, such involvement is fraught with danger. Generally speaking, it is best that the CPM concentrates their efforts on the provision of contract and procurement advice only.

The amount to be expended under the contract should be approved by the organisation's management accountant and a cost centre code allocated. Too often this step is overlooked and retrospective budget allocation is sought. This is poor business practice and leaves the organisation in a vulnerable position, especially if the funds cannot be found.

The information provided by the management accountant, along with the specifications, are given to the CPM to include in the request for tender (RFT) documentation and is incorporated, as a schedule, in the final contract.

The CPM, working closely with the head of IT (who is their internal client), sets mutually agreed timeframes for the tender process and contract implementation. It is vitally important that these two staff members communicate their needs and requirements clearly with each other throughout the process.

The CPM is also responsible for managing the tender process, ensuring compliance with internal purchasing and tendering policies and liaising with the inhouse counsel on behalf of the head of IT.

If there is a standard service contract template, it is likely to have been prepared by inhouse counsel in conjunction with the organisation's external counsel. The CPM will make the necessary adjustments to this template reflecting the specific services to be acquired under this contract. These adjustments must then be checked and signed off by the inhouse counsel prior to inclusion in the RFT information package. The CPM and the inhouse counsel must also agree upon timelines for reviewing the

The challenge is to achieve a seamless transition between each stage of the contract cycle and this can only be achieved if all participants understand each other's responsibilities and how their roles should interact.

changes and communicate these to the internal client (who is, as mentioned, the head of IT in this case).

Once the tender submissions have been received the CPM should distribute the submissions to the head of IT and other members of the tender evaluation panel. The CPM is responsible for documenting the process and often acts as an evaluation auditor or observer during the evaluation process, depending on company policy and procedures.

At this stage it is useful for both the CPM and head of IT to revisit the timelines and make any adjustments necessary. When the tender evaluation is complete and the relevant decision maker in the organisation approves the panel's recommendation, the CPM prepares letters to the successful and unsuccessful tenderers.

Inhouse counsel should then be provided with details of the successful tenderer so that they can commence preparation of the final contract. In many cases negotiations are required on some of the contractual clauses. To avoid any confusion and to minimise time spent in resolving issues, the successful tenderer should provide the name of its counsel — this ensures that both parties are legally represented. Inhouse counsel have a responsibility during these negotiations to keep the CPM and head of IT well informed of progress. The estimated time for contract finalisation, in particular, is crucial where the organisation is dependent on the commencement of services under the contract in question.

The CPM manages the contract again when both parties' counsels have agreed on all terms. The CPM obtains signatures and advises all internal stakeholders, including the organisation's contract administrator, when the contract has been executed.

The contract administrator is provided with an original of the contract, so that details such as term, value, parties and so on can be entered on a contract register. It is common practice to scan the contract and to provide relevant internal stakeholders with an electronic copy of the contract, while the original would be stored in a safe place. In this case, the head of IT, the IT contract manager and inhouse counsel would be recipients of electronic copies of the contract.

The contract administrator then liaises with the IT contract manager at regular intervals during the contract's term to seek details of outcomes of any performance requirements set out in the contract. These outcomes would be stored on file with the original of the contract. A few months prior to the conclusion of the first term of the contract, the contract administrator or the CPM would meet with the IT contract manager or head of IT. This meeting is held to review all documentation and to review the need to extend or terminate the contract, leading to the commencement of another contract cycle or the end of the contract.

A lesson for all in contract management

So what can you take from this example, especially if your organisation or client's organisation has a completely different structure?

Every organisation will have its own permutation of the roles described above, but there is a clear universal lesson to be learnt. From the example provided, the critical point is that each internal stakeholder understands how their role interrelates with others involved in the management of contracts in their organisation. Clear communication and a mutual respect for each other's roles are integral to effective and efficient contract management. ●

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Avoiding the pitfalls of tendering

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At some stage, all businesses will face the challenge of seeking competitive tenders from the market when purchasing plant or equipment. If the article involved is a mass produced item and readily available from a number of potential suppliers, the tender process is relatively straightforward. You can describe it and even go and look at it if you like, and when assessing tenders, your consideration will be focused on the product's features and cost.

But if what you are looking for is not so readily available, it may need to be manufactured for you by the successful tenderer, often to your special design requirements. A tender process for this can be much more complex.

Here we describe some aspects of the tender process which will help make that process run more smoothly and efficiently and result in the delivery of a product meeting your specifications.

A successful tender process will result in bids from prospective suppliers which show how your technical requirements will be satisfied in a form that, should you choose to accept that bid, will result in a binding contract for supply. The more clearly you set out your technical requirements and the commercial terms upon which you are prepared to contract, the more likely you are to receive bids that you can compare, and which will show how your requirements are met, or highlight any departures (both positive and negative) from what you intended. This avoids time consuming and frustrating negotiations which often result in the price going up, and the commercial terms becoming less favourable as you try to pin your supplier down to a contract.

Confusing technical requirements, conflicting commercial conditions and unclear requirements generate concern to tenderers, who increase their prices to cover the risks such documents may cause them. An unsuccessful tender process will leave you with tenderers who ignored or did not understand your requirements, offers you cannot compare, and prices with so many qualifications that you cannot accept any proposal without further negotiation.

So how can you improve your chances of getting what you want?

Tender documents — what goes into them?

Where the tender is for purpose built equipment, the tender documents will comprise the following.

- *Tender conditions* tell the tenderers how the tender process will be conducted, what they need to do to submit the formal tender and what you may do when considering it.
- *Contract conditions* describe the commercial terms of the contract once the tender is accepted. These need to be included so that tenderers know what obligations the tendered price needs to take into account.
- The *Specification* describes the technical details of your requirements.
- A collection of *returnable documents* need to be completed by tenderers to enable you to assess the quality of the equipment offered, the suitability of the tenderer as someone you would consider contracting with, and any variables (like the contract price, the form of any guarantees and so on) which would ultimately be included in the finalised contract.

What can go wrong?

While putting these four documents together into a tender package seems simple enough, in some cases it can become very complicated, confusing and time consuming. There are two common reasons for this:

- the various documents making up the tender package deal with matters which ought be (and are) covered by the other documents, and address the matter differently in each case; and
- the tender documents being prepared in isolation so that, for example, the commercial conditions envisage something being stated in the technical documents, which the technical documents overlook.

The first difficulty can be avoided by ensuring that each of the components of the tender package address issues solely related to their particular function. Two examples follow.

- The *tender conditions* should not explain what the *contract conditions* say in order for the tenderer to understand which costs and obligations its contract price should take into account. Any attempt at such a summary will inevitably throw up inconsistencies between the two documents, allowing uncertainty to creep into any subsequent dispute about what the contract arrangements really were.
- The *specification* should deal only with technical issues describing the equipment. Proper contract conditions will deal with the commercial issues in a co-ordinated fashion. Having the technical specification addressing only some of these issues in isolation will only confuse the process.

The second difficulty can be avoided by proper project management of the documentation process. Someone needs to take responsibility for ensuring the technical documents and the commercial terms work with one another. A common example arises where the contract conditions require tests to be undertaken as described in the specification before the equipment is delivered. This requires a clear statement in the specification as to what those tests are. Often, because the specification has been prepared by a different consultant before this commercial decision was made, the contract package will not describe what those tests are.

Things to look for in your tender conditions

Finally, to give you better control over the tender process, when setting the rules for the tender process, you should consider including at least the following in the tender conditions.

- Make sure the tenderer is required to keep its tender open for your acceptance long enough for you to consider it. For significant tenders, consider requiring tenderers to supply a bond which would be forfeited if they fail to proceed to contract following acceptance of the tender.
- If the tender documents include information which is confidential to your business, prospective tenderers should be required to sign a confidentiality agreement before receiving the tender package. Statements claiming confidentiality in the tender conditions may not be sufficient to protect this information if the recipient of the information does not subsequently submit a tender.
- Decide whether you need to insist that tenderers submit conforming tenders if they wish to propose a non-conforming one. Will you be able to sensibly compare the offers received and accept one that meets your needs if all the offers are different and none of them give you a price for what you specifically required?
- Give yourself the flexibility to assess, reject or accept any tender. The more rigid you make any published assessment criteria, the more grounds you provide for an unsuccessful tenderer to challenge the process you used.
- Do not fall into the trap of saying no contractual relationship has been established by the tender conditions as a means of escaping claims from unsuccessful tenderers. Reserving flexibility in the assessment process, thereby removing any basis for such claims, is best. Remember, you may need to enforce the tenderer's obligation to keep the tender open for acceptance and its warranties that what you were told in the tender was true.

The more rigid you make any published assessment criteria, the more grounds you provide for an unsuccessful tenderer to challenge the process you used.

A little understanding of what the tender process involves and the role of the documents in the tender package will smooth your way to a successful selection. ●

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This is an edited version of an article which originally appeared in Clayton Utz Project Insights of 3 June 2004.

Government tenders — lessons from the Privy Council

Dr Nick Seddon BLAKE DAWSON WALDRON

The law of tendering has been through substantial changes in Australia over the last 10 years or so. Traditionally, the law treated a tender as an offer. The request for tender (RFT) was thus an 'invitation to treat' (in traditional contract analysis), and could not be the basis for a contract. The consequence of this approach is that the terms and conditions of the RFT are not enforceable, despite the fact that they are often very prescriptive. Developments in the law of tendering, principally in public tenders, have sidelined this traditional analysis.

Hughes Aircraft decision

Inspired by cases from Canada, New Zealand and the UK, Finn J broke new ground in *Hughes Aircraft Systems International v Airservices Australia* (1997) 146 ALR 1 in which it was held that the pre-award period of a government tender process *is* governed by contract, contrary to the traditional approach. Finn J called this contract a 'process contract', that is, it governed the process of receiving and considering tenders. The RFT is, on this analysis, both an invitation to treat for the main contract and an offer for the pre-award 'process contract'. That offer is accepted by each tenderer who puts in a bid. Finn J held that an implied term of such a contract is that the government party will treat all tenderers fairly and even-handedly.

This development immediately solved the problem of the illusory terms and conditions typically found in RFTs, which are not themselves contracts. The terms and conditions were now contractually enforceable as part of the process contract.

Apart from the law of contract providing a vehicle for enforcing rights in a tender process, other possibilities exist. It may be possible to complain of misleading conduct, relying on the trade practices legislation (an alternative ground used in the *Hughes Aircraft* case); or possibly base a complaint on estoppel. In public tenders, administrative law remedies also provide a basis for challenging the conduct of a government tender if it does not accord procedural fairness to a party. All these avenues have been explored in Australian case law.

One of the difficulties arising from these developments is the extent to which a duty to treat tenderers fairly, whether based on private law (for example, an implied term) or public law, brings with it the whole administrative law 'package'. For example, does the duty include an obligation to ensure lack of bias? Is the government party obliged to give a tenderer an opportunity to put its case if some adverse inference has been drawn against that tenderer?

As occurred in the *Hughes Aircraft* case, Australian courts regularly look to decisions from other common law jurisdictions for guidance. The Privy Council has provided some guidance on these difficulties.

Pratt Contractors decision

The Privy Council case was an appeal from New Zealand. *Pratt Contractors Ltd v Transit New Zealand* [2003] UKPC 83 (1 December 2003) made some important points about tendering procedure. The judgment was delivered by Lord Hoffmann.

Background

Pratt's tender price was the lowest but it was eliminated on non-price grounds. The tender evaluation committee comprised at least some people who knew of Pratt's past record of low bidding and aggressively arguing for extra money because of alleged changes to the contract. There is little doubt that Pratt's reputation played a part in the final decision.

Pratt alleged various breaches of a pre-award process contract, arguing that internal manuals used by Transit were mandatory procedures and that any departure from those procedures constituted a breach of the pre-award contract. It also argued that the consideration of its tender was affected by bias because of the presence of people who considered that Pratt had a bad reputation.

Decision of the courts

The New Zealand Court of Appeal and the Privy Council did not agree with Pratt's arguments. They held that internal working manuals are not mandatory in the sense that a departure necessarily entails a breach of the pre-award contract. The RFT made no reference to the manuals and they could not be impliedly incorporated as rules of the tender process. This part of the decision makes it clear that the drafting of an RFT is important and that care should be exercised in stating exactly what the rules of the competition are.

Second, they concluded that the duty to act in good faith in the conduct of a tender does not mean that the administrative law precept of bias should be entirely absent. A government body conducting a tender is entitled to act commercially. Transit was entitled to take into account Pratt's track record. The commercial nature of the decision thus tempered the strictness normally embodied in administrative law standards.

Lord Hoffmann captured the dilemma nicely in the following passage:

> At the centre of the dispute lies the question of the extent to which the procedure for competitive tendering should be judicialised. Tenderers naturally want to be judged independently on their merits by an impartial selector and given the opportunity to rebut any suggestions of demerit which they regard as unfair. The parties who invite tenders, even if they

are public authorities like Transit, want to be able to choose in what they consider to be their best commercial interests and not be hobbled by quasi-judicial procedural rules [3].

Conclusion

This rejection of the wholesale importation of public law precepts into a government tender process is entirely consistent with what Finn J had to say in the *Hughes Aircraft* case and with the view of Adams J in a New South Wales case, *Cubic Transportation Systems Inc v New South Wales* [2002] NSWSC 656 (26 July 2002) BC200204151. In making the award decision, a government is entitled to act in its own interests and, though under a duty to act fairly, is not obliged to eliminate bias where it is relevant to the decision, or to provide an opportunity to a tenderer to put its side of the case when an adverse finding has been made against it by the evaluation committee. ●

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News News News

Research grant targets blowouts in software development costs

Curtin Business School (CBS) has been awarded an Australian Research Council Linkage Grant to drive innovative research into ways of better understanding and measuring software development costs.

The grant was awarded to a project being undertaken by CBS called 'Optimising value for money in software development through standardised cost metrics in the procurement, development and project management phases'.

The research will be led by CBS's Chair of Leadership in Strategic Procurement, Professor Guy Callender, and Senior Research Fellow, Diane Jamieson. Two other WA universities — Murdoch University and Edith Cowan University — are also partners in the project.

Industry partners in the project are:

- ADI Ltd, Australia's largest defence supplier, with a significant Perth based software development capability;
- Defence Materiel Organisation, a support and acquisition unit within Australia's Department of Defence;
- Total Metrics, a Melbourne firm specialising in cost estimation for software development; and
- Praetorium, a Perth based specialist IT company.

Professor Callender said that cost overruns are the bane of software development companies. However, the risk of cost overruns is also very high for senior executives in the private and public sectors who are responsible for signing off software acquisition, yet these people have very few tools available for managing that risk. In many cases, these problems are not disclosed for fear of adverse publicity, and those that are often prove to be highly embarrassing.

The CBS research project is unique because it will apply the skills of a truly multi-disciplinary team to resolving the problem of achieving value for money in software projects.

'We believe it is the first time anyone's tried to tackle the problem in such a multidisciplinary way,' Professor Callender said.

Ms Jamieson said: 'The aim is to develop guidelines that can be more consistently managed by all the various parties involved.

'This includes the supplier's project managers, the software developers and, most importantly, the senior managers who order the software and are accountable for the outcome.'

For more information about this project see: Jamieson D and Vinsen K 'Is software development a Value for Money proposition?' (2004) 1(1) CMP 6. ●

In this regular column **Christine Lithgow** of CLLC Contract Lawyers examines an area of contract law, reducing it to easily digested bite sized chunks.

CONTRACT LAW in practice

Reading contracts: more unwritten terms

Last month's column looked at cases where a duty to act in good faith was implied into contracts. This column looks at other examples of implied terms, providing lessons we can apply in the drafting and management of our contracts.

Of course, as was noted in the last issue, an unwritten term is only implied into a contract if:

(1) a court considers the term is obvious and necessary to make the contract work; or

(2) it is a legal incident of the particular type of contract (implied by law or by statute); or

(3) it is implicit in the words used in the contract.

The examples given below are best regarded as examples of the first type.

More unwritten terms

No appointed contract administrator

A subcontract (based on AS2545-1993) contained the following provisions.

- The main contractor was required to appoint a 'main contractor's representative'.
- Payment claims were to be assessed by the main contractor's representative.
- The main contractor was to pay the subcontractor the amount of the subcontractor's claim in full 35 days after submission of the claim if the main contractor's representative had not by then processed the claim and issued a certificate.

The main contractor did not appoint a main contractor's representative, so the subcontractor submitted claims to the main contractor. The main contractor assessed and paid the bulk of the claims. However, when the subcontractor submitted a series of variations claims, the main contractor refused to pay them, arguing that the variations had not been directed by the main contractor's representative and that the claims had not been properly submitted since they were not submitted on the main contractor's representative. The main contractor argued that because there was no main contractor's representative, the obligation to pay the subcontractor's claim within 35 days did not apply. The Court came to the subcontractor's rescue, finding that that there was an implied term that, if no main contractor's representative was appointed, the main contractor would assess and pay the claims.[1]

Co-operation to give effect to a contract

The parties entered into a written contract for supply of digging equipment. The purchase was conditional on the equipment passing tests to be carried out at the purchaser's premises. The contract did not detail the responsibilities of the parties in relation to the conduct of the tests.

The Court held that it was implicit in this contract that the supplier would transport the equipment to the purchaser's premises for testing and would do all that was necessary for carrying out the testing. Similarly, it was implicit that the purchaser had an obligation to make the premises available and to assist so as to allow fair testing of the equipment. The Court said that:

> … as a general rule … where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect.[2]

Obligation to take reasonable care

The parties entered into a contract for a shipowner to discharge and load his vessel at the jetty owners' wharf. For the purposes of the contract, the vessel was to be moored at the jetty owners' nearby jetty. During low tide, the vessel would rest on the mud at the bottom of the river. The vessel suffered damage as a result of a ridge of hard ground beneath the mud.

The contract was silent as to who was responsible for this risk, but the Court held there was an implied term that the jetty owners would 'take reasonable care to find out in what condition the bottom is, and then either have it made reasonably fit for the purpose, or inform the persons with whom they have contracted that it is not so'. The jetty owners were in breach of this implied term and hence were liable for the damage.[3]

Applying the lesson

The first case study shows implied terms being used to defeat a technical argument which would otherwise have operated unfairly. The last two case studies illustrate the importance of identifying and allocating risk in contract documents so that it is not left to the courts to decide. ●

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Endnotes

1. *Devaugh Pty Ltd v Lamac Developments Pty Ltd* [1999] WASCA 280 (8 December 1999) BC9908660.

2. *Mackay v Dick* (1881) 6 App Cas 251 per Lord Blackburn at 251.

3. *The Moorcock* (1889) 14 PD 64 per Lord Esher MR at 66.

calendar

LexisNexis conference Contracts 2004 Melbourne

25-27 August 2004
Stamford Plaza, Melbourne

The conference features two days of presentations (one each on contract law and contract management) and another of workshops. Each day is separately bookable.

Day one: Contract Law

- Negotiating and drafting indemnity and insurance provisions to ensure an acceptable division of risk.
  James Fahey, Partner, Mallesons Stephen Jaques.
- Pre-contractual negotiations, memoranda of understanding and unexecuted contracts — knowing where your exposure begins and ends.
  Cameron Macaulay SC, Victorian Bar.
- A practical guide to exclusion and limitation of liability clauses.
  Melanie Noble, Senior Associate, Minter Ellison.
- Good faith obligations in Australian contract law.
  Jeffrey Goldberger, Special Counsel, Blake Dawson Waldron.
- Negotiating intellectual property clauses in contracts.
  Michael Whitener, Chief Legal Counsel Asia Pacific, Bearingpoint Inc.
- Termination of contracts — a practical guide to ensuring lawful termination and avoiding potential liability for repudiation: construction law perspective.
  Bryan Thomas, Partner, Rigby Cooke Lawyers.
- Update on remedies for breach of contract to ensure up to date knowledge of entitlements and liabilities.
  Andrew Monotti, Partner, Mallesons Stephen Jaques.

Day two: Contract Management

- Establishing and maintaining effective long term, sustainable relationships with suppliers to enhance business outcomes and optimise contract performance.
  Antoinette Brandi, Contracts and Procurement Manager, VLine Passenger and member of the editorial panel of Contract Management in Practice.
- Achieving whole project success through strategic negotiation of commercial contracts.
  Paul Archer, Group Manager, Legal & Commercial, Clough Ltd.
- Contracting and the business of building shopping centres — the Westfield way.
  Michel Maingard, Contracts and Administration Manager, Westfield Design and Construction.
- Ensuring the efficient and effective monitoring of service level agreements.
  Dr Nick Beaumont, Senior Lecturer, Department of Management, Monash University.
- Using alliance contracting as a means of improving performance through shared goals.
  Peter Lyons, Civil Manager, Qld/NT/Pacific, Thiess.
- Contracting in a highly regulated environment — checks and balances to ensure contract compliance.
  Neil Hubbard, Supply Manager, Crown Casino.
- Ensuring value for money in the tendering process.
  Tony Butler, Contract Services and Risk Management, Department of Infrastructure (Vic).
- Implementing effective systems for ongoing measurement and monitoring of contract performance.
  Noel Irwin, Supply Chain Manager Corporate Services Australia/NZ, UnitedKFPW.

Day three: two workshops

- 'A practical approach to drafting contracts' to be presented by *Martin Kudnig and Grant Rowlands, both of whom are partners with Blake Dawson Waldron*. The workshop addresses fundamental techniques involved in the preparation for and the drafting of commercial contracts to promote clear translation of business intentions into the language of contract.
- 'Developing a strategic supply alliance — understanding alliance principles and contractual obligations' to be presented by *Michael Tucker, the managing director of the Owen Davies Consulting Group, fellow of the AIPMM and associate fellow of AIM*. This workshop will challenge participants to question traditional supplier–customer relationships and consider strategic supply alliances as a way to significantly increase competitiveness for both the organisations involved.

For further information and bookings visit <www.lexisnexis.com.au> or phone 1800 772 772.

PUBLISHING EDITOR: Kerrie Tarrant MANAGING EDITOR: Elizabeth McCrone PRODUCTION: Alys Martin
SUBSCRIPTION INCLUDES: 10 issues per year plus binder SYDNEY OFFICE: Locked Bag 2222, Chatswood Delivery Centre NSW 2067 Australia
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ISSN 1449-2938 Print Post Approved PP 255003/00769 Cite as (2004) 1(6) CMP