



Issue 3: Record-keeping matters

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This is the third of a series of fortnightly issues in which we will give practical tips on how to avoid contractual issues arising out of digital transformation and outsourcing contracts. If you'd like to read the first two issues in the series, click [here](#).

Tip 1 - Treat admin as a valuable part of contract management, not just an optional extra.

- Ensure you have someone within the project team who is responsible for dealing with administrative tasks to support the Subject Matter Experts.
- Documents are now usually stored electronically and often in a repository to which both parties' teams have access. If that is the case, consider:
 - agreeing the folder/sub-folder structure so that both parties are clear as to where documents should be saved and so they can easily be located later on;
 - making someone responsible for ensuring that documents are uploaded onto the system in the right place;
 - whether joint access to some material ought to be restricted/controlled (e.g. to protect confidential/sensitive /privileged documents).
- File any hard copy documents in a secure place and organise them to reflect the approach taken to how they are stored electronically, particularly where they contain confidential or sensitive information.

Tip 2 - Clear governance processes

- Most contracts include some form of governance process - become familiar with the escalation steps provided for in the contract.
- Any governance meetings which take place should be minuted. Where any issues with contract performance have been discussed at those meetings the minutes should reflect that, including:
 - details of the issue in question;
 - the actions needed to resolve the issue, who is responsible for taking them and by when they must be taken;
 - the consequences, if the actions are not carried out; and
 - (if the situation is on-going) an update on progress since the last meeting.
- Minutes should always be finalised. Check any minutes produced by the other party for accuracy. If corrections are required, ask the other party to make them. Even if there is a dispute about exactly what was said on a particular issue, the minutes should at the least record the differences between the parties.
- If things become heated, do not try to diffuse the situation by not having minutes at all! That will just provide more scope for argument about what did or did not happen at a particular meeting.

Tip 3 - Maintain complete records

- If there are contract management documents that you are responsible for, such as implementation plans, RAID logs or

RAG status updates:

- diarise their production; and
 - ensure they are kept up to date as the project progresses.
- Where the contract has been subject to change, take steps to produce and agree a conformed copy of the contract so that there is a clear contractual baseline.
 - If input is needed from the other party, or third parties, to update the documents, keep a written record of requests for that input.

Tip 4 - why record-keeping matters!

- It aids effective contract management because it enables each party to track progress against agreed obligations by reference to a recorded set of agreed actions and outputs.
- It encourages timely escalation of any issues which arise which in turn provides the opportunity for early intervention and remedial action, meaning the parties have a better chance of keeping the project on track and avoiding a formal dispute arising.
- If, despite the parties' best efforts, a formal dispute arises there will be a good set of records evidencing what took place between the parties and when which is key for:
 - the parties and their lawyers to recall and understand what happened and to supplement witness evidence when considering how to move forward with an issue;
 - court or tribunal in determining issues between parties including (i) whether a party has breached its contractual obligations; (ii) in case of termination, whether a party has lawfully terminated the contract; or (iii) whether any other legal principles apply, for example waiver, estoppel or misrepresentation.

DLA Piper has developed a toolkit to manage proactively IT Development Projects. Read more about the toolkit.

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