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Contract management a contract lawyers perspective

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Flashbacks

- Consumer complaint tribunal in the financial sector
- Documentation procedures in trade



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What is contract management?



Portofolio or project?

- Tool for managing the entire portofolio of contracts?
- Managing the contractual issues through the life cycle of a project?
 - Alerts



All kind of contracts?

- System development?
- Outsourcing?
- Finance?
- Does one size fit all?



British Government Guidelines

- **Contract management activities can be broadly grouped into three areas.**
- Service delivery management ensures that the service is being delivered as agreed, to the required level of performance and quality.
- Relationship management keeps the relationship between the two parties open and constructive, aiming to resolve or ease tensions and identify problems early.
- Contract administration handles the formal governance of the contract and changes to the contract documentation.



What is contract management?

- Contract management includes negotiating the terms and conditions in contracts and ensuring compliance with the terms and conditions, as well as documenting and agreeing any changes that may arise during its implementation or execution.
- It can be summarized as the process of systematically and efficiently managing contract creating, execution, and analysis for the purpose of maximizing financial and operational performance and minimizing risk.



- Contract management is the process that enables both parties to a contract to meet their obligations in order to deliver the objectives required from the contract. It also involves building a good working relationship between customer and provider. It continues throughout the life of a contract and involves managing proactively to anticipate future needs as well as reacting to situations that arise.



What is contract management?

- The central aim of contract management is to obtain the services as agreed in the contract and achieve value for money. This means optimising the efficiency, effectiveness and economy of the service or relationship described by the contract, balancing costs against risks and actively managing the customer–provider relationship. Contract management may also involve aiming for continuous improvement in performance over the life of the contract.



Aberdeen Group

- "The use of templates for contracts development ensures that each new contract is designed with a company-standard template, helping to avoid missing language issues
- Pre-approved contract language can be leveraged to increase compliance to agreements and dreail "maverick" spend. The use of pre-approved terms, conditions, clauses, and business rules reduce the possibility of inappropriate or missing language within the generated agreements."



- It may have a point if we do not have standard contracts
- And an argument in favour of standard contracts
- Contract management is one among many reasons to refuse to deviate from standard contract



What is Contract Management?

- Everything related to a contract?
- Everything tends to mean nothing.



Contract management = Project management?

- I will at least exclude what is not specified in the contract, but is necessary for the supplier to do to meet the contractual obligations.
 - Manage internal resources etc.



A new buzz-word?

- I do not see anything new in the information I have been able to collect on CM.
- What is presented as CM should be well known to anyone working with contracts
- But everyone can of course do better
- Some offer tools and services.
 - Maybe they can help improving CM
 - Difficult to find out what they are doing



Risks

- All commercial transactions impose risks.
- Risks will often imply opportunities
- Avoid the risk or cover its consequences?
 - Security measures or an insurance?
- Lawyers tend to go for avoidance at any costs



- Clearly defined and a common understanding of the goals will reduce the probability of non fulfillment.
 - => Reduce risk
- But a clear definition will in itself not enable the supplier to fulfill
- Contracts are used to shift or distribute risks



Regulating strategies

- Strict or flexible
- Regulating results or process
- For a partnership: Relations are more important than the results
- Commodities: Delivery and price is the only matter
- The more difficult it is to define the targets and results
- ... The more important it is to define the process



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Mismanagement



Preparations

- The customer must be able to identify their needs
- The customer must be able to communicate their needs to the supplier
- The project must be anchored in the customers organisation
 - The supplier may face all the resistance among the customer's employees that should be directed at the management
 - If this creates a conflict between customer employees and the supplier, it is easier for the customer's management to back their employees



Choosing the right contract

- It should be obvious
- Many choose the contract that they are used to choose without considering if it is the right contract for the project
 - A sales contract for an outsourcing project
- Standardisation
 - One among many reasons for not deviating from standards is management
 - You do not want to have different contracts with all your customers



Some issues with fixed price contracts

- Customers often tend to overestimate what they can get under a fixed price contracts
- There may be many ways to deliver the results
- In a fixed price contract the customer have to accept the solutions chosen by the supplier as long as they meet the contractual obligations
 - The price is calculated on this basis
- If the customer wants another solution it is a variation even if the contractual obligations will not be changed



Continuous service

- There is little or no systematised knowledge available
 - Outsourcing
 - Garbage collection
 - Water supply
 - Etc
- Service level
- Performance indicators
- Sanctions



Contract variations

- One need to agree on
 - What should be done
 - If it is a variation of the contract
 - Consequences
 - » Functionality
 - » Progress (delays)
 - » Price



Typical process

- Variation order [from the customer]
- Or
- Variation request
- Variation estimate
- Variation order



Inside or outside the contract?

- Disputed variation orders
- The suppliers claim that what the customer is asking for is outside the contract and demand a variation order.
- The supplier is obliged to do so within a time limit, or they will lose the right to claim payment
- Risk aversion may lead to too time consuming decision processes
 - => The supplier will not stop while waiting for the decision and is trapped.