

Tech/Law

6 Reasons That Tech Projects Go Wrong (And How Your Lawyer Can Help!)

Edition 2 – Not clearly defining what you are buying

In our experience, issues in tech projects often arise simply because the parties have not clearly defined what the supplier is committing to provide to the customer, not to mention how and by when. It may sound like an obvious point, but if the customer has not clearly defined the fundamentals of what they are buying, this can lead to uncertainties rippling through the rest of their arrangements. Disputes about price, scope and performance often follow.

It is not unusual for us to progress through extensive negotiations of the front-end terms of a tech project

agreement, resolving legal aspects around termination and liability, only to find that the description of the project solution itself has not been completed to a sufficient level of detail. There can then be pressure to push ahead and execute the agreement regardless, based on a commitment to build out further detail about the solution in due course. While this may seem like a good idea while the parties remain in a positive and collaborative mindset, in our experience it can also invite disaster should the project not proceed exactly in the manner hoped.



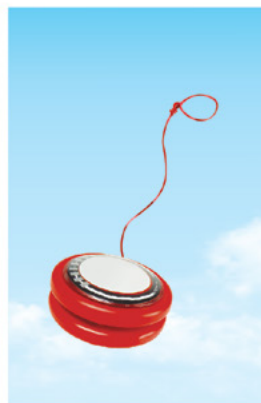
How the customer explained it



How the project leader understood it



How the engineer designed it



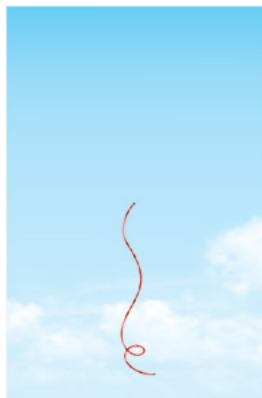
How the programmer wrote it



How the sales executive described it



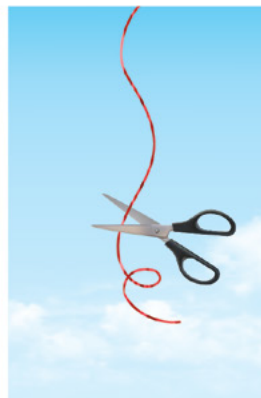
How the project was documented



What operations installed



How the customer was billed



How the helpdesk supported it



What the customer really needed

“It was critical for the agreement to clearly identify the division of responsibility between the customer and the consultant.”

On one recent matter, a client engaged us to prepare and negotiate a development and implementation agreement for the replacement of its core systems. The client had chosen a new cloud-based solution and had separately engaged a consultant to assist with implementation. The implementation was complex and involved the customer's personnel undertaking certain development and testing activities alongside the consultant. Because of the customer's direct involvement in the implementation work, the consultant did not agree to take overall responsibility for the implementation of the system and project timelines. In addition, the customer also agreed to a time and materials fee structure for the project rather than a fixed fee model.

These factors meant that it was critical for the agreement to clearly identify the division of responsibility between the customer and the consultant. However, despite this, the parties signed the contract without a fully completed service description, on the strength of a commitment to build out the description within a defined period. Predictably, the more detailed description was never produced. The project continued, but there were delays and the consultant's costs were much higher than the customer had budgeted for. The consultant also claimed for additional costs and relief from delays in the project from the customer.

The customer would have been in a much stronger position to push back on those claims, and to resist the high fees claimed by the consultant, if the scope of the consultant's role and responsibilities had been more clearly documented. Clearer documentation may also have pushed the parties towards agreeing a fixed fee based on milestone payments for at least some of the project work.

What would an ideal world look like?

To provide maximum certainty for the customer, the best position will usually be for the service and product specifications to be locked down in detail in a form that can be attached to the contract terms at signing.

A good checkpoint is to make sure the contract covers the following key areas.

- **What are we buying or selling?:**

Accurately describe what the supplier is committing to provide and what the customer is buying as part of the agreed price. The details will naturally differ depending on what is being procured, e.g. services, software, products, hardware or a combination of both. For example:

- for services, the description should set out the activities the supplier is undertaking and the deliverables that are being provided in the course of those services being provided (e.g. system designs, configured software, reports, etc);
- for hardware or equipment, the description should set out the specific model numbers and technical specifications for each item, along with the number of items to be delivered and when, along with any obligation to

provide replacement parts or maintenance services; and

- for software, the description should include specifications for the base product along with any customisations being developed especially for the customer, along with any usage restrictions and metrics by which those restrictions will be measured, along with details of any accompanying support and maintenance services.

Specifications for equipment or software need to be set out in enough detail so that if the software or equipment does not do what the customer expects, then the customer can rely on a warranty or other term in the contract to show a breach of contract or require the supplier to fix the issue.

- **How is the product / service being provided?:** How will the supplier perform its obligations under the contract? For example, will the supplier need access to customer premises or systems, and if so should this be by direct or remote access? Will any third party suppliers or sub-contractors be involved? If so, who will be responsible for coordination between all of the different parties?

- **When is the product / service being provided?:** timelines for when activities, services or deliverables will be provided or



completed, particularly any key milestones which are important for the supplier to achieve for the overall project to run to plan.

- **What is the quality required?**

What are the service levels or standards to which the services will be provided? For equipment or products, what manufacturer warranties are included in the supplier's offering? What performance standards must the equipment, software or products meet? Are there minimum experience requirements that personnel involved in the provision of the services must meet? Are there key personnel who must be dedicated to the project?

- **What is the total cost?** Will the project be costed on a variable or fixed fee basis? Will payments be tied to milestones? Usually, whether or not the supplier is comfortable offering a fixed price is, of itself, a good test for determining whether you have an adequately detailed description of the scope of the project. Either way, it is critical to define what is and is not included in the price and the right for the supplier to make price adjustments, including for variations or changes to the services or products being provided. Accurately describing what the supplier is committing to provide for the agreed price is an important part of getting certainty on this question – any changes to scope or activities will in most cases be costed as an additional amount as part of a change control or variation process.

In an ideal world, there would be a project team which was responsible for developing the description of the solution that the supplier will provide, together with all associated commercial and technical details. This team would document this in the form of project documents (such as project plans, milestones, acceptance test plans) that can be attached to the contract on signing, but also used in practice for monitoring the supplier's performance against its contractual commitments. However, in practice, project teams have competing day jobs – including actually getting the project up and running – and there is not always the bandwidth or the expertise to prepare contract-standard documents that are neatly aligned with the legal terms being agreed between the parties.

Challenges and tips for success

There are a number of common missteps we see parties make in developing technical and commercial project documents. Here are some examples, along with tips about how your lawyers can help you to avoid these issues on your next project:

- **The service and product descriptions do not align to the contract terms**

While the project teams should have core responsibility for preparing the service and product descriptions and related documents, it is important to involve the legal teams to confirm that those documents align with the rest of the contract (e.g.

to ensure that the acceptance regime in the contract aligns with the milestones and acceptance test criteria specified in the project documents).

To help ensure alignment, it is important to agree on a format and structure for all documents before drafting starts in earnest. We often prepare templates for key service descriptions and service level schedules which includes fields for the project team to complete in a way that will neatly integrate with the contract terms. We then agree on a timeframe for completing all documents so as to allow enough time to ensure all of the different pieces of the contract fit together properly before proceeding to execution. Lawyers can also help advise your commercial and technical teams on how to structure service level metrics and performance targets, along with associated credit regimes, so as to align with the framework terms in the contract itself.

The supplier may be best placed to prepare first drafts of the project documents, and that may also be desirable from a capacity perspective if the customer is pressed for resources. However, any documents produced by the supplier will require careful review and validation by the customer to ensure that they capture the full scope of the commitments expected from the supplier and do not include any 'get out of jail' options. In particular, the customer should check

for consistency against any representations made as part of any RFP process through which the supplier was selected.

- **The services descriptions and project details are less developed than the contract terms and the parties want to bring signing of the contract forward**

The ideal position is to have the full service descriptions and project details attached to the contract at signing. If there are other commercial drivers for the contract to be signed before those details are fully completed, then then at a minimum the schedules should include descriptions of the key services and deliverables to be provided, a structure for the service levels regime including any service credits and frameworks for other key commercial aspects of the project. For projects involving software development, either the customer's business requirements or the agreed specifications for the software should be attached to the contract. The contract terms can then include a process for the parties to prepare updated versions of those documents within a specified period after signing. The customer should retain a right to cancel the engagement at no or little cost if the parties cannot reach a satisfactory landing – as a customer it is important to note give up any negotiating leverage until all important details have been finalised. In any event, significant project work should not start until the details have been agreed and included in the contract.

- **Customer dependencies are described broadly**

For projects where there is a high degree of interdependency between the supplier and the customer, it is not unusual for

the supplier to seek relief or the right to recover additional costs if the customer fails to provide necessary inputs or otherwise satisfy defined dependencies. This position will be pushed by the supplier even more where there is a fixed price element to the project pricing, as otherwise the supplier's profit margin may get eaten away by delays by the customer.

If this position is agreed, the customer dependencies should ideally be defined as specifically as possible so that the customer is clear when the potential relief or additional costs could apply. Ideally any dependencies would be limited to specific activities which the customer is required to undertake and would be defined in the project documents attached to the contract. Customers should avoid sweeping dependencies that capture 'all obligations' under the Agreement or, even worse, 'all acts or omissions' of the customer as this will give the supplier a broad licence to argue that any failure in performance can somehow be traced back to something on the customer's side. A RACI matrix can also serve as a useful tool for avoiding these types of arguments, by clearly defining the boundaries of responsibility and accountability for each party of the project.

We hope you find some of these tips useful in your next negotiation. In the meantime, stay tuned for our next edition.

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