

12 March 2026

Managing performance and disputes in major government contracts

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Advice | Transactions | Disputes



Why government contracts go wrong?

Context

When was the last time you entered a contract wanting it to end in a dispute?

Contracts don't start with a dispute.

Most disputes start when delivery problems don't get escalated early enough to be fixed.

What will we cover

Practical questions

- How do I spot a contract going wrong early?
- What should I do before it becomes a formal dispute?
- What contract clauses matter?
- How do I manage a supplier that is underperforming?
- When do I escalate a dispute (or consider termination)?

Early warning

Key indicators

Item	Things to watch out for		
Deliverables shifting	Draft deliverables not approved	Partial deliverables submitted	Acceptance with caveats/conditions
Scope ambiguous	Scope defined by specific deliverables not outcomes	Disagreement over inclusions and how tasks are performed	RACI matrix has two people responsible or accountable
Milestones slip	No credible pathway to achieve agreed dates	Red and amber lights	Ongoing flow of contract change requests
Key personnel change	Contract Managers change at key points	High turnover of personnel	No onboarding process
Governance meetings	No decisions	Red and amber lights not escalated	No follow up actions

Pre contract indicators

- Was the contract set up to fail?
 - Assumptions and customer dependencies that are vague or not realistic
 - Partial scope agreed for a fixed price outcome
 - No credible pathway to achieve milestone dates

=> Early and ongoing contract management becomes more critical

Managing underperformance early

Formalise contract management process

- Governance meetings
 - Regular formal contract manager level meetings
 - Agenda and action items recorded
 - Agree escalation pathways
- Formal notices
 - Should reflect what was discussed in governance meetings
 - Use when needed – don't let them become legal threat letters
- Issues / risk registers
 - Keep them up to date
 - Don't ignore them until the next meeting

Don't let this be your contract

'We didn't escalate this/send a notice because we wanted to preserve the relationship'

'We didn't send a delay notice because we've been reporting the delays in governance meetings'

'We proceeded at risk because there wasn't time to do a contract change'

Governance pathways

Options

1. Steering Committees above the contract management level
2. Escalation directly to senior executives
3. Performance reporting through KPIs – what KPIs matter?
4. Service Credits / Liquidated Damages – consider earn back for getting back on track
5. Remediation plans

Contract changes should be agreed to keep the contract up to date with what is required, but be careful – by changing the contract are you agreeing the delivery dates/requirements have moved?

Contract clauses that matter

Performance and contract management

1. Governance meetings

- Who attends them
- Who organises them
- When are they

2. KPIs and Service Level measurements

- Who measures them
- How are they reported
- Make sure you care about the things being measured

3. Reporting obligations

- What is reported
- When is it reported
- How is it reported

Change control process

1. Delivery and payment obligations shouldn't change unless/until the contract is updated
 - Additional work (and payments) should be agreed before it starts*
 - Don't change obligations just because the supplier is late*
 - Invoices shouldn't be issued before a contract change is agreed*
2. Process for scope changes to be implemented (and costed)
 - Clear authorisation and 'written' agreement*
 - Consider a request for quote process if more complex*
3. Consider any assumptions (how to implement / manage them)
4. Consider any obligations on the customer (how to implement / manage them)

Remediation process

1. Escalation outside the 'formal' dispute process?
2. Tell the supplier they are not performing
3. Tell the supplier to explain how they will perform – get back on track
4. Are there step in rights? Do you want to take back scope or propose a change?

Termination and dispute resolution

1. Do not terminate a contract or send a formal dispute notice without talking to your legal team

2. Understand the dispute resolution process
 - Notice of a dispute?
 - Management escalation?
 - Agreement to mediate or other process?
 - Timeframes

3. Consider what the process is for termination?
 - Notice periods?
 - Chance to remedy?
 - Escalation of disputes?

Key take aways

This presentation material is intended to provide a summary of the subject matter covered for training purposes only. It does not purport to be comprehensive or to constitute legal advice. No reader should act on the basis of any matter contained in this presentation without first obtaining specific professional advice.



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