



White Paper 2012-20

Unleash Significant Project Value by Overcoming the Contractual Scare

Most projects in the construction industry use a Contract as the basis for the scope. In addition, the Contract rules the relationships between the Contractor and the Client. As any tool, a Contract can be used both in a productive and a negative way. In Project Value Delivery's experience, Contracts are too often used in a way that impedes project success. It is mainly because changing any provision of the Contract induces fear in organizations. Here is why and how to overcome the contractual scare.

What is a Contract for?

“A contract is an agreement entered into voluntarily by two parties or more with the intention of creating a legal obligation” (Wikipedia). In addition in the construction industry, “a contract is a legally enforceable promise or undertaking that something will occur”.

A Project Contract generally contains three different types of contents:

- A precise definition of the scope of work;
- Provisions describing the workings of normal contract execution (payments, contractual acts), the ‘rules of the game’;
- Provisions describing the processes that apply in case of dysfunction (e.g., non delivery, delays, lack of performance, claims etc).

Project Contracts tend to be lengthy and very detailed documents, because:

- A very precise description of the scope of work is important to both parties to try to avoid the other party of taking advantage of imprecisions;
- A detailed description of the ‘normal rules of the game’ allows for a smooth contract execution in the respect of both parties’ internal processes;
- The section concerning dysfunctions intends to cover all sorts of possible events.

Why most of the times Contracts usage impact project execution negatively

Once a Project Contract has been signed, it becomes the rules of the game. Experience shows that all significant projects do lead to unexpected circumstances, nature being generally more inventive than the most creative lawyer. The way these events are treated will impact significantly the overall project execution. Most of the times, both parties behave as if they wanted to use the Contract so to take the maximum advantage of its clauses, barring cooperation in the face of difficult problems. This results in more or less overt confrontational situations which suck the energy out of the project teams and prevents a smooth execution of the project.

Both the contract documents themselves, and the internal rules of the contracting organizations, contribute to this behavior, and even more if one party is a large bureaucracy that does not give the contract holder sufficient initiative and decision-making power.

In effect, most of the times, behaviors in contractual discussions fall back in the fear of participants to appear weak in the face of their organizations, or even the fear of giving the impression to transgress integrity principles by being too kind to the other party.

The confrontational situations that result are most of the times artificial in the light of the overall project execution. In effect, putting the debate back to the general interest of the satisfactory project execution is the only way to escape from this conundrum.

How contracts can even be used to impede project execution

In some extreme cases, we have observed abusive use of Contracts that effectively impeded contract execution, creating ultimately a significant downside for both parties. This often happens in situations where the urgency feeling is not strong: projects with a very comfortable lead time, or project which outcome is not a priority for one party.

Exactly as in the case of a Law or a Regulation, it is absolutely possible to stop any human enterprise in its tracks by applying the Contract wording to the letter, and even more so by arguing forever about the meaning of some terminology.

Contracts should be used for what they are primarily supposed to do: give some rule of the game to protect the interest of both parties in case of abusive behavior of the other party, or in case of the occurrence of a severe unexpected event. And it should stay at that level.

So, can contracts co-exist with cooperative behavior?

Contrary to common held thoughts, in reality, the negotiation between the two parties does not end when the Contract documents are signed. Negotiations are effectively an ongoing process during the project execution and should be considered as such. The only difference is that they are framed by the original Contract, which defines the balance of benefits and accountability that has been agreed voluntarily.

Instead of the defensive terminology of “contract holders”, we should thus rather use a more cooperative terminology like “chief negotiators”. These organization representatives should be given defined negotiation goals and authority as standing orders during contract execution that are consistent with the balance of the original contract, and the final intent of the project. As we argued in the White Paper [2012-10](#) “*What Project Success Really Means*”, at the end of the day, both parties

should have an interest in the success of the project being on schedule and on budget; or if that is not exactly possible because of the challenges and unknowns involved, in the best achievable situation. Any other consideration where one party would take advantage of the other is purely a short term view that will lead to negative long term consequences.

In practice, the negative utilizations of contract documents arise when the contract holders are given goals that are not in line with the intent of the original contract; or when they are instructed not to deviate by any means from the literal application of the contract.

It all boils down to giving enough authority to the project managers (the parties' representatives)

Overcoming the contractual blockage involves overcoming the widespread scare by parties' representatives to exceed their prerogatives and be blamed for it inside their organizations, or even fired.

In particular for large, complex projects of several hundred million dollars it is a shame to have so-called 'contract holders' that are not given any commercial authority or have to refer to other people lower in the hierarchy, in other departments, that are not at all interested in the success of the project, for any authorization to spend one thousand dollars. This is something we observe on a daily basis in particular in large bureaucratic organizations.

In a world where everybody speaks about empowerment and giving responsibility to the right level, fear of malpractice has led to de-facto decreased responsibility in

large bureaucracies, in the wake of Sarbanes Oxley and other similar regulations. This trend needs to be reversed if we want more projects to be executed successfully.

It is always absolutely amazing to observe how many man-hours and meetings can be conducted inconclusively on contractual matters worth a few hundred thousand dollars, when issues worth several dozen million dollars get sorted out in less time and more easily when circumstances warrant it – when the urgency is there. It is

important to remember that a Contract is an agreement between two parties; if the same two parties agree to change part of it, or not to apply some provisions, it is entirely allowable. This is too often forgotten.

The success of large, complex projects lies in empowerment of project managers

We have argued in White Paper [2012-14](#) "*Why Project Managers of Large, Complex Projects Should Have a Higher Status in their Organizations*" why it is crucial to give enough authority to the project manager in large, complex projects. As we discuss here, it is vital to give simultaneously a corresponding authority to the contract holders to enhance the odds of project success.

Giving authority does not mean relishing controls; it means, allowing decision to be taken at the most appropriate level to allow the success of the endeavor.

Overcome the contract scare, be entrepreneurial, give authority to where it belongs to increase the success of your large, complex projects.

There is only one remedy: make the parties' representatives effectively accountable for the success of the project, and give them the authority to decide what it takes within a clear framework.



**We Empower Organizations to be Reliably Successful in
Executing Large, Complex projects.**

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