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Case Study: Complex Information Technology Contracts - Cover Oregon

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Case Study: Bet the Taxpayer Information Technology Projects -Lessons from the Cover Oregon Assessment Report

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In the thirty years since the advent of enterprise level technology contracts began as a mainstay for companies, hard lessons on how to manage "bet the company" information technology (IT) projects have been learned, oftentimes repeatedly. As governments seek to do more with less workers, driven by demographic shifts of retiring workers and reduced payroll budgets, the imperative for increasing information technology is growing and such capital investment must be made. Information technology promises, and delivers (when done correctly) more productivity for lower cost. Recently, large failures have dogged many jurisdictions. This new chapter of information technology is a "bet the taxpayer" dynamic, meaning when these projects fail taxpayer trust is depleted, in addition to state treasuries. The necessity is to go beyond faith-based hopes of IT project success. It is faith-based because policy makers still really don't understand technology, but they *believe* it will deliver without a respect for the issues these large development projects always create. Project management processes and negotiating those technology deals pioneered in the Polaris Missile project seem forgotten. Lessons from the 1950s when the incredibly complex tasks were completed, such as creating new technology for launching nuclear missiles from a submarine, required a never before level of coordination and complexity between vendors and government. Proof those lessons have been forgotten are no more underscored than in the First Data Assessment (the "Assessment") of the Cover Oregon project (a copy of which can be viewed here).

The Assessment

The Assessment found many shortcomings in planning and while the issues raised may seem basic to some, they plague many governments and companies to this day. Though leadership is a recurring void in these projects, the Cover Oregon cases offers a veritable how-to guide to spending lots of money and having nothing to show for it. In the Cover Oregon case, like many failed software projects, they ignored the logical flow of steps necessary for success. They ultimately foundered with "too many cooks" and flawed communications channels.

Help Me SPOC

Politics happens when two people walk into a room. When many agencies manage a single project, the complexity of politics can amplify by an order of magnitude. Problems arise when IT projects have too many leaders, or incorporate inexperienced or weak leaders. A recurring theme in the First Data Assessment is no Single Point of Contact (SPOC). The military construct of intelligence gathering with a general giving orders was never part of this project. The Assessment points out at least eight silos with no vendor and correlating focal point, namely 1. Cover Oregon, 2. Oregon Health Authority, 3. Oregon Department of Human Services, 4. Cover Oregon Board, 5. Department of Administrative Services, 6.

legislative Fiscal Office, 7. the Legislature itself, and 8. the federal Centers for Medicare and Medicaid Services. First Data suggests, among other things, a strong CIO, working closely with the technology procurement group should lead such teams.

Social Proof Failures: White Sheet Approach

Often governments look to "best practices" and the Assessment mentions this several times. The global term "best practice" is becoming a dead metaphor and a failed concept in cases like this where comparable projects are in short supply; however, it is necessary to find best practices specifically for project management. Competent leadership and management are well known practices, yet the technology evolves at a much faster pace. As there has never been an integrated government owned medical market and online system, looking to best practices of other governments is a low sample set for statistical significance, so it is impossible to know a "best practice." Doing what is "consistent with several other states" is a flaw as this project was unique in the United States and under deadlines. Ultimately, this was a leadership and management challenge, not a technological one. Governments look to others for a kind of social proof of what works via the best practice moniker. One may feel secure in seeing what others are doing before we take our own actions; but do we see the reality, and not just our interpretation of that reality. Relevant comparable situations are never truly present. A city may look to other cities for best practice data, but demographics, geography, tax and legal framework are variables that leave best practice data skewed. Once a procurement process and plan are in place, a "white sheet approach" may be better. Governments should start with a very basic white sheet and eight inquiries to determine the strategic trajectory of large-scale information technology projects.

Things we do before the negotiation deal with these eight basic inquiries:

1. Research the technology, marketplace and players
2. Communications - What are the effective and preferred communication channels and controls (see SPOC, above)?
3. Current IT Infrastructure - What is your current technological state? What are the sources and uses of data? What are my current requirements?
4. Future IT Infrastructure - What does the new system look like to be a "success"? What are my future requirements?
5. Ability to perform - Can the vendors perform? Can the leadership manage the integrator? Can the integrator manage vendors?
6. Writing - Was the contract zealously negotiated and is the contract representative of the deal?
7. Assessing deal durability - Do all parties feel "enfranchised" and do they understand their deal?
8. Ethics - Are controls in place to avoid conflicts or fraud between the players?

This data-driven and requirements-driven approach is the only way to decide if the project is feasible, if a solution exists, or if there is another solution that may not involve IT.
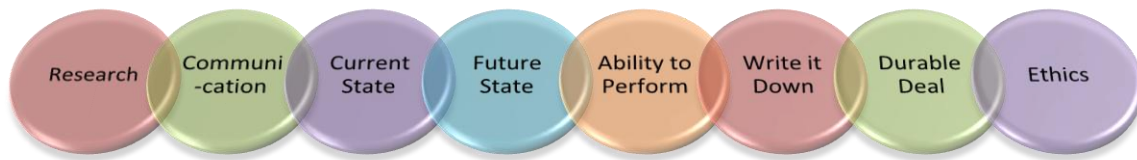
Figure 1. Inquiries in a Process and Plan for New IT Projects

Legal Sufficiency v. Contract Performance Success

The Assessment commented on the Department of Justice review for legal sufficiency, as required by statutory mandate in ORS 291.047 for public contracting. Unfortunately, legal sufficiency has nothing to do with contractual performance, rather the contract is checked for contractual basics: offer, acceptance and consideration; compliance with government contracting standards (e.g., indemnity, insurance, warranties, etc.); and for legal enforceability, as well as other administrative rules. The Attorney General has the power to exempt contracts for legal sufficiency in certain circumstances. It may be time to hold complex contracts to a higher standard that requires a step by step milestone approach to enforceability, making remedies available along the way, to ensure project performance. It seems that success of a contract is not in the words of the contract, but how the words relate to and guide performance. Software contracts that are deliverables-driven, with milestones, remedies, and service levels are the rule (though many are not rigorously enforced, but that is another topic).

The full list of the constellation of contracts used by Cover Oregon were unclear from the Assessment. Initially the state appears to have shoehorned the Oracle contract through, or supplemented it with a Dell master contract (formal requests for the Dell and Oracle contracts from Cover Oregon and the Department of Justice yielded nothing to date). The Assessment opines this may not have been the right vehicle for this project. It may have been used because of the demanding timelines. At some point and for some reason, Cover Oregon established its own contract with Oracle in March 2013, and the Assessment intimates this was a hasty, financially driven handoff as there was not time or funds available to establish a new contract. Cover Oregon attempted to negotiate the contract with Oracle, but ran out of time. Oracle refused to do more work until a contract was in place. This independent negotiation with Oracle may have been a savvy risk mitigation move, or simply another deck chair on the Titanic, we simply don't know at this point.

Systems Integrators Decision

Logical Flaw 1: System Integrators Are Too Expensive

A decision not to use a systems integrator was a fundamental flaw. The Assessment interviews revealed that budgetary concerns lead in part to the decision not to use an integrator. Ironically, integrators are a form of budgetary control. The integrator serves as a work order gate, not only making the various systems work together, but also acts as a governor on budget and serves as an important method of fraud detection by managing the separation of duties. Without a systems integrator, the project had no one capable of seeing the big picture, making feature tradeoffs and hard budget decisions. It was like a

financial tap without a valve; worse, there was no one to stem the risk of feature creep. For Cover Oregon, it seems it was not clearly understood that a systems integrator not only insures functional performance; but also acts as a control on project budget and tasks needed. That said, it remains unclear if any system integrator could have (or would have) been able to provide these checks as the Cover Oregon system requirements were lacking. A system integrator needs requirements just like anyone else. This is like running a company without a COO or piloting a ship without charts.

Logical Flaw 2: Vendor Reliance is a Negative.

The second flaw was the perception that relying on vendors is a negative. Certainly there is much to be said about risk reduction in diversity, system redundancy, and ongoing vendor choice competition, however, governments must rely more on vendors, staffing, offshore and near shore technology providers for at least four important reasons: 1. labor supply; 2. demographics; 3. budget; and 4. the impossibility of self reliance.

The United States knowledge worker labor supply issue is a direct result of our immigration policy, or lack thereof. Our policy no longer supports the knowledge economy as it once did in the 90s and in the early 21st Century. Specifically, the current H1B visa policy effectively limits the number of qualified information technology workers in the United States. Consequently companies and governments compete worldwide for qualified information technology professionals, but Americans are largely limited to domestic labor supplies. Looking broadly to third party support is essential, other organizations have found support by searching on a national or global scale. The Assessment does note that reliance on temporary IT workers was an issue. The second issue is a demographic one. Government professionals with twenty, thirty, and forty years of experience are now retiring. That knowledge and experience walking out the door is not easily replicable, so new systems and ways of thinking will have to be explored as those experts leave the scene. Third, the budget is limited and no amount of tax increase can make a government reliant on its own technology. The Assessment says the bid was for Commercial Off the Shelf Technology. Oracle claimed only 5% would need customization, yet the amount of customization turned out to be larger (almost by an order of magnitude), as scope creep and requirements were not managed by anyone looking at the big picture. The budgets simply do not exist for customizing governmental systems. They must acknowledge that even if you can do something, budgets dictate that you should not try to do everything, rather focus on doing fewer things well and outsource the rest. Finally self-reliance is impossible in the modern information economy. Apple Computer does not manufacture the iPhone - Foxconn does. Apple designs and markets it. If governments want to do more, they must figure out how to manage and work with the vendor community, perhaps beyond current comfort levels.

Payment Terms

All procurement professionals know that cost risks are allocated in the contract. A forward contract for steel limits risk on price increases; a flat fee tied to specific deliverables allocates the risk of cost increases from the buyer to the seller; a time-based fee contract allocates cost risk from the seller to the buyer of services. The Assessment states that most purchase orders on the Oracle contract were not flat fee, but rather hourly fee. Flat fees and "not to exceed" deliverables-based type of purchase orders focus on cost containment. Here, the negotiation should never end; each purchase or work order is an

opportunity to control costs. For Cover Oregon, their failure to zealously negotiate for performance caused a contractual performance failure. But one may argue Oracle was behaving rationally, the Assessment shows that there was no clear definition of success; it is nearly impossible to do a fixed cost bid when the project definition and requirements are unknown or dynamic. So the negotiation should never end. Defining terms and deliverables along the way (within a structured change order process) is a discipline that can lead to cost stability when wielded by a professional negotiation team (like a procurement group).

The Assessment concludes that the "decision to not use an overall system integrator for the project departs from best practices." So while technological best practices may have a small data set as opined, complex project management by a systems integrator has many best practices. Having a system integrator in place, acting as a clearinghouse for purchase orders, may have reduced the contractual carnage.

Conflict-Based versus Objectives-Based

The Assessment discusses conflicts within the departments' various initiatives that ran against priorities, such as the "Exchange and Modernization" project. It seems this competed with the Cover Oregon rollout for resources. Staffing levels, detailed requirements, and infrastructure integration challenges created much conflict. The Assessment suggests organizational politics played a role, leading to what seems to be a conflict-based problem solving strategy - *known* to be unsuccessful in IT projects. Unfortunately, this is typical in large organizations where many meetings and internal negotiations drive the project. Unfortunately, it is also silo and politically-based rather than objectives-based where organization's leaders either fall into the roles or even tend to see themselves as diplomats of process. If a strong leader can focus these meetings on an objectives-based level, it is possible to overcome these issues. This was not the case with Cover Oregon. The "too many cooks" problem seems to have come up again.

Warning Signs Ignored

The Assessment notes that assurances were made at all levels of the project. The various stakeholders supported the notion that the project was "on track" even in the face of the quality assurance vendor Maximus labeling red flags on critical problems. These were largely ignored "due to desensitization of the alarms." Maximus said in a September 2012 letter "the Q.A. is sounding an alarm that this project is in substantial jeopardy of being Oregon's next multi-million dollar I.T. project fiasco." The bell was rung, but evidently no tympanic membranes moved. An escalation procedure would have helped the state with the Maximus contract.

Assessment Recommendations

The Assessment sets forth seven recommendations. The first five are easily adaptable to any IT project, government or otherwise. The first is increasing statewide oversight authority for IT projects. Does this recommendation seem short of what is needed or possible? The authority should rest with the state Chief Information Officer with appropriate approvals and power to direct statewide technology procurement in concert.   Cross-platform knowledge and strategies on how to reduce the number of vendors to aggregate buying power seems to be what plagues this and other areas, such as telecom and

data network services for jurisdictions coast to coast and forms much of the daily work of the CIO. The second issue the Assessment points out is that SB-99 removed procurement oversight of the Oregon Health Authority. The 1990s saw an expansive growth in centralized professional procurement groups that are trained in negotiation, contracts, and technology. More importantly, they were not subject to direct project stresses, so they can objectively explain the risks for their "clients," the operating departments. The third Assessment recommendation is establishing a SPOC for projects. This has long been a staple in *Fortune 500* IT contracts since the 1980s, and in many federal government contracts since World War II. The fourth recommendation is the state IT does not have a plan defining minimum effectiveness standards. Though this did not directly contribute to the Cover Oregon debacle, it is of critical concern to any IT project as security and privacy necessitate an integrated long-term approach. The fifth noted that IT project staffing is a critical function as there is an innate resource risk with reliance on temporary positions. This may be a nationwide symptom of a labor supply; however, before initiating any project, it is important to consider the availability of necessary skilled labor. Not mentioned in the report, yet just as crucial, is obtaining not just adequate duration, but also adequate skill level. While the Assessment is helpful in looking backwards, it had to deal with a relatively novel and narrow set of circumstances, an integrated approach to complex contract negotiation and management is a broad skill. A solution will require stakeholder enfranchisement and buy-in led by strong leadership.

Conclusions on Drafting a "Bet the Taxpayer" Contract

Large scale IT contract failures have plagued governments coast to coast for years and the knowledge we now have can greatly reduce the likelihood of failure. First and foremost: A focus on contract performance is absolutely essential. Having a contract performance focus means allowing for

1. good communications (always have a SPOC);

2. an empowered cross functional team (one cross department liaison, chief information officer, legal counsel, procurement, risk management and the treasurer for financial controls) and the right IT workers;

3. legal counsel directed to focus on contractual performance in drafting the deal, including relevant service levels and performance metrics; pricing terms that deal with limiting budget overruns; effective change order and amendment mechanisms; and a communication single point with a defined escalation plan;

4. use and effectively manage more vendors, not less; and finally

5. trained negotiators in procurement to assist in monitoring performance.

Some of the softer negotiation skills are strong leadership at the top and an objective-based meeting agenda bias, not a siloed conflict-based agenda. The soft skill imperative, perhaps the most difficult to obtain project success, is to do this with all people on board. A well drafted contract assists all stakeholders and serves as a mechanism to manage IT vendors. The contract can become the focal point around which all stakeholders can form a solution to the objective issues. Research at the Washington University in St. Louis shows that contracts that end up in litigation are not well planned

and the parties feel like it was not their deal, that it was imposed on them. Not surprising, but getting stakeholders on the same page with processes greatly reduces the probability of gambling with taxpayer money further in front of a jury. Though contracts will continue to be litigated, the vast majority disputes can be dealt with by effective project management, effective leadership, and performance focused contracts.

About the Author: Martin Medeiros has been drafting, negotiating, mediating and litigating enterprise wide technology contracts for companies and governments since 1993. He now is president at Heekin Medeiros PC, a Portland, Oregon law firm, he can be reached at 503-222-5578 or martin@heekinmedeiros.com.