



KIAH  
CONSULTING

# RESOLVING DISTRESSED PROGRAMS

Programs, large or small, public sector or commercial, will almost certainly be faced with a level of disagreement at some stage. It is a natural part of doing business, but it is when disagreement and misalignment is not resolved in a timely manner that the issues become problematic. At Kiah, we deal with deadlock, disputes, rapid establishment, re-alignment and recovery: public, private and across the divide as neutral facilitators and mediators or as advocates.

## Is my program OK?

There are a plethora of scholarly works describing why things go wrong but few provide broad indicators on how to recognise a program is heading for trouble. We offer three, commonly observable, indicators that programs might be heading into difficulty.

### A lack of change

A contract is a static representation of the deal at the time of signing. Most programs, other than the simplest, continue to evolve over time. Consequently the agreement needs to evolve or it diverges from reality. While it may be accommodated in the short term, it is a recipe for disaster long term. We have observed multi-million dollar design and service programs operate for years without an approved Contract Change Proposal (CCP). Agreement just could not be reached and they ended in dispute where the contract and the reality of the product delivered did not match.

If you have a major contract with a backlog of CCPs or are not seeing a regular progression of CCPs, you need to assure yourself that it is not a sign of trouble on the horizon.

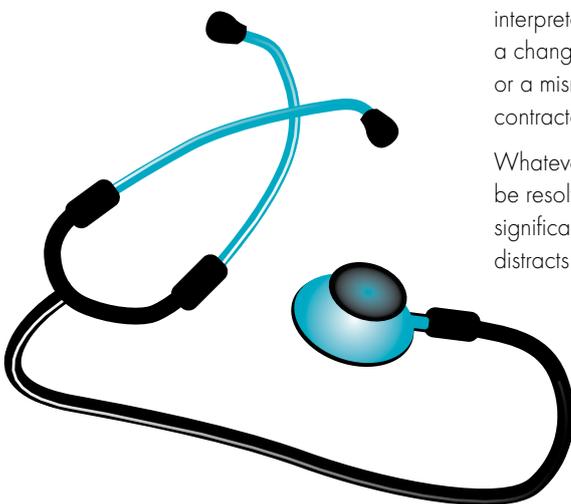
### Forecast payment profile unmatched

Divergence from the planned spend profile indicates either: deliverables are delayed, an unplanned change in services has occurred or invoices are not being paid. A lag in invoice payments can reflect discomfort in the contract management team. It may result from a change in contract interpretation, perhaps accompanied by a changeover of staff, a failure in delivery or a mismatch of current expectations with contracted obligations.

Whatever the cause, these issues need to be resolved before they escalate into a significant rift that threatens delivery and distracts effort from the organisations goals.

### A general unhappiness

Sometimes there is no immediately identifiable cause but an element of discomfort or tension that pervades. Do not ignore your intuition but seek to understand what is behind the discomfort.



## Resolve to resolve

The temptation might be to ignore the signs but we can unequivocally advise that the problems will not go away, they will only worsen. Most issues are resolvable through negotiation and, if done well, to the advantage of both parties.

It takes courage to face difficult programs, but the rewards can be markedly positive and the pathways quite safe. Some options are described here.

If you are feeling discomfort but can't explain why, your experience and knowledge are sending you an alarm signal. Don't ignore it. Tensions could be personality-based, result from poor communication or some underlying issue that is not immediately obvious. Relationship issues can arise from either side and often both; sometimes it is the way the team behaves or a cultural mismatch, which is every bit as destructive as poor performance—especially in long-term services contracts.

Pressure may arise from internal issues that have little to do with the contractor. Requirements may no longer reflect the contractual obligation especially where the end users expectations mature over time. We have seen development programs in dispute where the contractually correct delivery was rejected as not 'fit for purpose' despite meeting technical specifications. Another common cause is external budgetary pressure arising from broader organisational imperatives, and a feeling that the contractor will be unwilling to compromise.

Poor strategic alignment can lead to dissatisfaction. The purchaser often anticipates contractor engagement beyond the servicing of a transactional purchaser-provider arrangement. Contracts tend to focus on delivery and actions where problems arise, failing to establish mechanisms that exploit potential synergies. This fundamental mismatch leads to the oft heard utterance, 'they satisfied the contract but they didn't satisfy me'.

Almost universally our experience suggests that the parties' reflect each others' discontent: a recipe for continuous decline unless the underlying causes are addressed.

## ADR—Appropriate Dispute Resolution

**While alternate was the original term, appropriate is often now used to signal that all approaches are valid and do not naturally lead to litigation. We prefer appropriate, for approach and process ought to be part of the choice of the disputants.**

**ADR is now a common obligation in commercial contracts prior to considering litigation. There are two broad ADR streams: evaluative and facilitative.**

### Evaluative

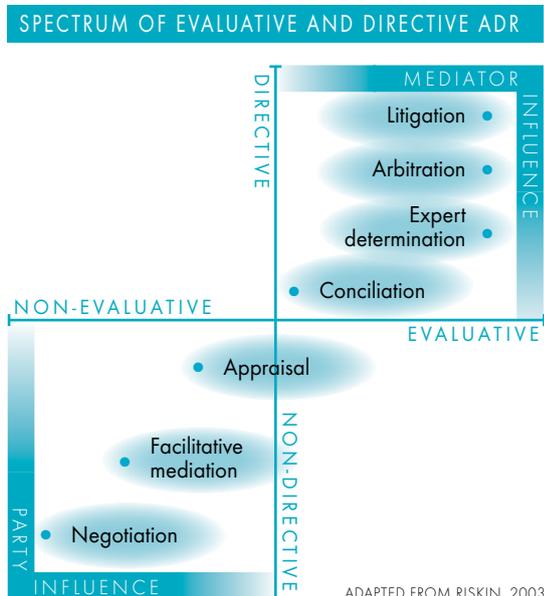
Litigation, arbitration and expert determination are processes where a third party determines the outcome. These are quasi-legal approaches that require each party to present their arguments and the matter is determined on the 'rights' by the adjudicator who must provide reasons for the decision.

Neither the process nor the outcome is in the control of the disputants though decisions can be appealed. Costs can approach those of litigation. The proceedings are confidential, can be more speedy than litigation and overcome cross jurisdictional difficulties in international disputes.

### Facilitative

Mediation and its variants provide control to the disputants over the acceptability of the outcome. Proceedings are confidential, outcomes are self-determining and non-prejudicial, and the process is speedy and cost-effective. If agreement is not reached the parties can revert to other remedies including litigation.

In all instances the mediator/conciliator is a neutral party who manages the process and facilitates discussion. Purist mediators do not offer any view on possible solutions. Conciliators propose. Mediation is done in caucus with few if any private sessions, conciliation may involve 'shuttle diplomacy' without parties meeting.



## Our approach

We offer a blended mediation approach that is determined by the disputants. Some flexibility can be useful as the acceptability of mediator recommendations can vary during the process, though the right of the parties to self-determination is inalienable.

While legal support is recommended, our approach provides for a business led negotiated resolution owned by the participants, not a legal, rights-based outcome determined by a third party. The process commences by the disputants agreeing to seek ADR, followed by individual client conferences to establish the preferred approach.

We can act for one party as an advocate or we can provide the independent mediation and facilitation services. Our role has often extended to the development of sustainable and aligned governance and business processes that uncovers hidden benefits, cost savings and concealed, dormant, issues.

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## Disagreement and deadlock

**Disagreement and deadlock can and ought to be addressed before contractual dispute clauses are exercised. Of course disagreement and deadlock also occurs where a commercial contract doesn't exist— such as in internal programs.**

### Avoiding deadlock

We see deadlock arising more often in internal public sector programs than in commercial arrangements. We suspect they arise for two predominant reasons:

- There is often no compelling event to drive to closure, unlike commercial negotiations where project deadlines and individuals' 'take-home pay' is affected.
- Negotiations are based on defensive positional bargaining- defence of budget, control, influence, power or a political principle—and entrenched positions are difficult to overcome.

The role of a mediator is the facilitation of negotiation: to open the dialogue to consider alternatives that are in the interests of the parties and to bring the negotiation to a conclusion which is acceptable to both.

Whether it is the establishment of an MoU, affecting changes to the machinery of government, internal restructure or indeed a commercial arrangement that has reached deadlock—seek assistance by using the tools of mediation.

### Resolving disagreement and discomfort

A contractual 'dispute' is a formal situation that arises under the terms of a contract. Characteristically it develops from multiple unresolved issues and minor disagreements. Discomfort arises because the contract no longer meets the needs of the purchaser, but the contract appears inviolable. Better these issues be addressed before they reach *dispute*.

Communication can be constrained by concerns that information sharing might identify a weakness and the information might be used against you later. Many just wish, understandably, to avoid confrontation.

### A problem that isn't told can't be solved!

Mediation creates a safe place in which issues can be discussed, argued, negotiated and resolved. The proceedings are without prejudice and confidential. They can't be used in court or in any further action. The mediator can reduce the tensions and assist in constructive dialogue. Consider using mediation as a safe, facilitative tool to address disagreement and discomfort before formal *dispute*.

### Avoidance and advantage

Strategic and contractual agreements, commercial or internal, usually have a dispute management process and some form of partnering arrangement that is contractually elegant but practically inadequate. They deal with what actions to take when the program has gone wrong, but offer too little on how to get it right. In our resolution work we have sought to leave clients with sustainable outcomes—dealing with the cause not just the symptom.

To support good governance we have developed a structure that fosters early identification of disagreements, resolution at the lowest level and timely escalation, diversionary approaches to resolve before dispute. The most difficult of disputed programs now work more smoothly. We have extended the governance to a strategic framework that has both parties agree the condition of the relationship and commit to combined actions to improve. This combined process has been extended to encompass strategic activity rather than the more usual commitment to strategic intent.

## Pathways to resolution

### No problem gets better with age

If you have a program that exhibits signs of distress we recommend that you address it. Unfortunately incumbent teams, while necessary to the resolution, could be part of the problem. Emotional positions will almost certainly be entrenched if the problems have been festering for some time. Our experience with incumbent legal advice is similar, it becomes defensive (often because they drafted the contracts) and rights-based which tends to obscure a commercial or business outcome.

### Benefit beyond resolution

By applying a commercial and flexible dispute resolution approach to a poorly performing contract with a tense relationship you will restore the value gained from the management effort and funds expended. Our experience is that the effort applied to resolving disagreement, if approached appropriately, can deliver more than resolution. It can provide a sustainable future and tangible realisable efficiency savings, if considered properly.

### Pathways review

Kiah offers a rigorous and independent review service of distressed programs and projects to rapidly identify the causal factors and alternative pathways to resolution.

This can be done for one party or a facilitated program with both participants involved, and can often be undertaken for a fixed fee.

Contact us for a confidential discussion about options and approaches tailored for your challenge.

## Kiah Consulting

Kiah Consulting primarily provides support in the development of concepts and strategy, project initiation and the recovery of misaligned projects. Our focus is delivery in the public sector.

We work in the zone of ambiguity, providing our expertise to clearly articulate the concepts, define the outcomes and structure delivery. We undertake strategy development, concept definition, feasibility studies and business case development. We manage effective project execution through strong leadership and direction.

We provide the foundations for successful delivery through the establishment of project teams with appropriate contracts, resources, structure and processes.

With a mix of permanent staff and associates we can assure access to the right skills at the right time. Our model recognises that no one person or company has all the answers or skills, so we make it easy to access what is required.

Independence of contractors and suppliers, independence of internal organisations and politics allows us to offer untainted advice.

## PATHWAYS REVIEW PROCESS

### PREPARE AND ENGAGE



### PROPOSE



## NEGOTIATION OR RESOLUTION ENGAGEMENT

## CLOSE