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CONTRACT MANAGEMENT TRAINING

PRIVATE PROVISION OF COLLECTION SERVICES

(27 October 1993)

INTRODUCTION

As Botswana pursues the provision of certain public, or civic services through private contract, it will be necessary to develop skills in the management of contracts with the private service providers. Lack of proper management of contracts will result in lower levels of service and/or higher costs. This will reduce or even eliminate potential gains in efficiency associated with using the private sector.

This training course was prepared at the request of the Solid Waste Steering Committee of the Gaborone City Council (GCC). The course is designed to help the GCC manage a contract with a private firm for the collection of solid waste in Gaborone South.

Additional private contracts for public service are anticipated in the future which will also require management by the GCC. The pending collection contract for Gaborone South is used as an example of the issues which must be addressed in contract management. However, the same principals apply to the management of any contract.

It is important to note that there are two broad categories of contracts. The first contract is for a specific item, or "good", such as a building, or a road, or a computer. The second type of contract is for the provision of a service, such as collection of solid waste, consulting services, or accounting services. This training course concentrates on managing service contracts, although the same points can be applied to contracts for goods.

The training course is based on a general outline summarizing key points which govern good contract management. Detailed work sheets then follow highlighting the important issues associated with each of the key points.

KEYS TO GOOD CONTRACT MANAGEMENT

Contract Management Begins With the Request for Tenders

Successful management of a private contract begins with a clear definition of what you want the private firm to do. This is often called a Scope of Work. Without it there is great potential for disagreements over what services are to be provided. It is also difficult to compare competing tenders because each tender may be based on different assumptions about the actual services to be provided. For example, a lower tender price may be associated with less service, and a higher tender price associated with a higher level of service. Once the level of service has been equalized the lower tender price may actually be higher.

Contract Management Continues With Successful Negotiation of Conditions to the Contract

The key to a successful long-term contract is satisfaction by both parties with the terms and conditions of the contract. If either party to a contract is unhappy with the contract when it is signed, the chances of success are not great. A public official does not want a contract with a private firm in which the private firm can not make enough money to complete the contract. Conversely, a contract that makes too much profit for the private firm eliminates savings to the public arising from the efficiency of the private sector.

Don't Leave Contract Issues To Chance

It is essential that all issues that are important to the public be carefully and clearly defined in the conditions to the contract. Failure to be specific will inevitably lead to disagreements later on with the private firm.

Clearly Define Performance and Measurement of Performance

It is generally easy to measure how well a firm has constructed something, using physical tests (e.g, concrete strength, soil compaction). It is more difficult to measure the performance of service contracts. Therefore, it is important that the contract carefully spells out, in detail, the level of service that is required, the way it will be measured, and the unit of payment.

Contract Management Relies on Professional Conduct

A private firm must be able to trust the contract manager, who is representing the public institution, and the contract manager must be able to trust the private firm. Mutual trust between the two parties associated through a contract generates respect and courtesy for each other. This requires that the contract manager remain courteous and honest during all

dealings with the private firm. It also means that the contract manager must be honest to his employer and accept no favors from the private firm.

The Public and the Private Firm Are Partners During Contract Implementation

The contract manager and the private firm share a common goal of providing the best service at the most economical cost. This is best achieved by working together to solve problems that arise. Many problems arise at the beginning of the contract, when the government is trying to phase out its operation and the private firm is trying to start a new operation. Therefore, it is important that the contract manager be especially diligent during this time period.

Carefully Monitor Performance

It is important for the private firm to know early on in the contract that the contract manager plans on taking an active interest in monitoring performance. This can not be done from the contract managers office, but requires frequent site visits, a thorough understanding of how the service is being provided, and constant communication with the private firm. Monitoring performance, however, does not mean interfering in the way the private firm manages its business.

A Thorough Accounting of Monthly Invoices Pays For Itself

The private contractor must understand that all invoices will be scrutinized and that only those invoices which are documented and consistent with the contract terms will be paid. The invoices must be matched with performance to assure that the contract terms have been met.

A Contract Manager Must be Prepared To Enforce the Terms of the Contract

Maintaining a good working relationship and working as partners should not get in the way of enforcing the contract. Enforcement must be consistent with the language of the contract

CONTRACT MANAGEMENT

WORK SHEETS

WORKSHEET 1

REQUEST FOR TENDERS

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REQUEST FOR TENDERS

Be knowledgeable About the Service to be Provided

The more the contract manager knows about the service which is to be provided by the private firm, the better the chances of entering into a good contract. If you don't understand the service, find someone who does to help you write the Scope of Work. Better yet, go out and study the service currently being provided by the public sector. Define what works best and identify areas that need improvement.

Be Specific About Performance, Not How To Do It

One of the primary reasons that a public service is contracted to the private sector is to improve efficiency. Improving efficiency means being open to new ideas and methods. If the Scope of Work simply specifies that the service be carried out exactly as it is now, it is not likely that significant gains in efficiency will occur. Instead, concentrate on performance standards which the private firm is to meet. For example in Gaborone South we are interested in twice per week collection of refuse from each plot. We don't care whether the private firm uses 2 laborers or 8 laborers as long as they can perform the service. (For more information on this important subject, see the Work Sheet on Specifying and Measuring Performance)

Use Your Knowledge to Judge the Potential For Performance

While it is important not to specify how the private firm will meet the performance standards it is important for each tender to provide sufficient information so that a judgement can be made as to whether the tender is realistic. If you know that the service can not be provided with two trucks no matter how efficient the private firm is, then this must be taken into account in judging the merits of the tender. This is especially important if the private firm has limited experience in providing the specified service.

If the Private Firm Fails, Responsibility For the Service Falls On the Public Sector

Solid waste collection and disposal is a public necessity. So are most civic services. Therefore, it is essential that sufficient information be provided in the tender document so that a reasonable judgement can be made that the private firm has the financial, management, and technical capabilities to carry out the service. If one of these areas is weak, the other two must be especially strong to compensate. This is particularly the case where strong financial and management expertise is substituted for technical expertise, and the tender presents a well thought out tender proposal. A good rule to follow is that if a tender looks too good to be true, it probably is.

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WORKSHEET 2

SUCCESSFUL NEGOTIATION OF CONDITIONS

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SUCCESSFUL NEGOTIATION OF CONDITIONS

Learn From the Tender Responses

No matter how careful you specify the Scope of Work in the Request for tenders, there will still be areas that have been neglected. A careful analysis of each of the tender responses together with interviews with the all of qualified tenderers will illustrate many of these areas.

Include Tender Documentation

Reference the Request for Tenders and the tender response as part of the contract. Keep accurate records of all discussions with the private firm made during the selection process. Be especially careful to document any promises made by the tenderer prior to selection.

Your Strongest Position Is Before the Contract is Signed

Once a tender is selected and a contract signed, both parties must live with the results. Therefore, ask for everything you want before committing to the private firm. This allows you to use competition with the other firms to improve your position.

Seek Win-Win Situations

Remember that during negotiations there are four possible outcomes to each negotiating point (see Figure 1). These are: (1) the private firm loses and the public wins; (2) the private firm wins and the public looses; (3) both parties loose; and, (4) both parties win. Whenever possible look for win-win solutions to issues that come up. If you must give in on an issue, look for another issue that you can gain on as a trade-off. But always keep in mind that when a contract is finally signed it must be fair to both parties.

Negotiation of Contracts Is All About Sharing Risks

Ultimately both parties to a contract should accept the risks which they have the most control over. If you ask a private firm to accept additional risks which they don't have control over, they will have to increase the contract price to cover that risk. For example, a private firm has complete control over maintenance of its trucks and the efficiency of its labor. However, if you ask a private firm to guarantee that their price will never increase even if the government increases labor rates, then the private firm has to guess what that might be and increase its price accordingly.

Provide A Mechanism For Renegotiation

It is highly unlikely that you can foresee all the conditions that may arise during the term of the contract. Anticipate that there will come a time when either the private firm or the public will want to change some part of the contract. It is best to identify as many potential areas in advance and provide a mechanism for addressing them. In addition, it is important to spell out a fair and equitable means to resolve unforseen differences that might arise. (See Enforcing the Contract Worksheet)

FIGURE 1

POSSIBLE RESULTS FROM CONTRACT NEGOTIATION

PUBLIC	LOOSE/LOOSE	WIN/WIN
	WIN/LOOSE	LOOSE/WIN

PRIVATE FIRM

WORKSHEET 3

DON'T LEAVE CONTRACT ISSUES TO CHANCE

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DON'T LEAVE CONTRACT ISSUES TO CHANCE

Cover All the Issues

While every attempt is made to cover all the issues in the initial request for tenders, in almost every case additional issues will come up during a review of the tenders, during tender interviews, and during negotiation of the final contract. A detailed list of all of the issues should be maintained throughout the process to assure that they are all addressed in the final contract.

Be Specific

Make sure that all issues of concern are in writing and that the list of conditions is very specific.

Define All Important Terms

Don't assume that the private firm will always define a term the same way the public sector does. For example, the amount of time in which you are required to pay an invoice can vary by as much as much as ten days depending on how the term "payment within fifteen days" is defined. At a minimum it means payment within fifteen calendar days from the date of the invoice, which means you only have thirteen days to pay it because it may take two days to reach you via the mail. At a maximum it may mean that you have as long as 23 days, if it is based on the day you receive the invoice, and means fifteen business days, which may exclude weekends.

Specify What Is Meant By Uncontrollable Circumstances

Normally the private firm is excused from meeting the performance specifications if circumstances beyond the control of the private firm prevent them from performing. These circumstances include such obvious circumstances as war, floods, and general strikes. However, there are certain circumstances that really are under the control of the private firm. For example, strikes caused by the poor treatment of the private firm's employees, failure to obtain financing due to poor management by the private firm, and excessive breakdown of equipment due to failure of the private firm to properly maintain equipment or properly stock necessary parts.

Keep It Simple

Covering all of the issues should not result in a contract document which can not be understood by anyone but legal council. Whenever possible keep the language as simple and ~~straight forward as possible. If the person negotiating the contract has a hard time~~ understanding certain parts of the contract, just think how hard it will be for the unlucky person who takes over the job later on, without the benefit of being in on the initial discussions.

WORKSHEET 4

SPECIFYING AND MEASURING PERFORMANCE

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SPECIFYING AND MEASURING PERFORMANCE

Clear Performance Specifications Equalize Private and Public Goals

The primary goal of the private firm is to maximize profits. This can best be accomplished by performing the minimum service required under the contract at as low a cost as possible. The primary goal of the public is to obtain the highest level of service under the fixed price of the contract. It is performance specifications that bring these goals together.

Be Very Specific About Performance

Begin by making a list of all of the goals you are trying to achieve by contracting with a private firm. Then make a list of all of the questions that could be asked about whether you are achieving each of those goals. Use these lists to define what level of performance will be acceptable. These are performance specifications.

The Gaborone South refuse collection contract can be used as an example. The Request for Tenders states that all refuse in bins must be picked up from the yard of each household two times per week. This is specific enough for the Request for Tenders, but still leaves enough questions that it is not sufficient for contract performance specifications. At least the following questions must be addressed to clearly specify the collection performance:

(1) What does "refuse" include? Does it include construction waste, brush, dead animals?
(2) What is a "bin", and does it include boxes or bags?
(3) What is the "yard"? Does it include the garage? What if the gate to the yard is locked, or there is a biting dog inside the yard?
(4) What is "two times per week"? Can it be two days back to back?

Be Specific About How Performance Is Measured

Just as for performance specifications, begin by making a list of all the questions you can think of. Again using the same refuse collection from the yard example used previously:

(1) Has the private firm performed the service if they leave the waste in the yard because a dog knocked over the refuse bin?
(2) What if the private firm left the refuse bin on the curb, as required, but kids took the lid to play a game with it and left it in the street?

Be Specific About Who Will Measure Performance

Three groups of people may have a role in measuring performance. The first is the public receiving the service. It is important to specify whether the private firm or the contract manager has the responsibility for following up on public questions and complaints. It is also important to specify what information on performance will be required from the private firm. Finally, it is important to define what role the contract manager will have in measuring performance, and what access to the private firms' records will be necessary.

Tie Payment of Invoices To Performance

The most powerful tool the contract manager has is the ability to refuse to pay the invoice if performance has not been achieved. It is important to specify exactly how this will managed. Remember that the law usually requires that only part of the payment can be withheld for which the work has not been performed. You cannot withhold a whole months payment because the private firm didn't pick up refuse from 10 households.

WORKSHEET 5

PROFESSIONAL CONDUCT

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PROFESSIONAL CONDUCT

Be An Honest Public Servant

It should go without saying that a successful contract manager must, first and foremost, be an honest public servant. This begins by never accepting a favor from the private firm. Even little favors, such as allowing the private firm to pay for your meal at a restaurant, or a ticket to a sporting event, can compromise your position as a representative of the public in two ways. First, it may lead to enticements for larger favors. Second, even if the favors remain small it will compromise your ability to enforce the contract.

Be Honest With the Private Firm

The private firm must be able to rely on your commitments. This requires that you always be honest in your dealings with the private firm.

Know the Limit of Your Authority

If you are not authorized to commit to a decision, make sure the private firm understands this.

Keep Your Supervisor Informed

It is inevitable that problems will develop with the contract. As soon as a problem is identified develop a plan of action with the private firm and inform your supervisor of the problem and the plan to solve it. Never let problems continue without addressing them in hopes that they will go away. They hardly ever do.

Be Accessible

It is essential that the private firm know how to reach you on a daily basis. If you are not going to be in, leave a message as to when you will return and how to reach you in case of an emergency. If you are going to be away for one or more days on business, leave a phone number where you can be reached, or designate someone to take messages for you and call in to get those messages. If you can't call in, then designate someone to represent you while you are away.

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WORKSHEET 6

CONTRACT IMPLEMENTATION

NOTES:

CONTRACT IMPLEMENTATION

One of the most critical times in contract management is between the time the contract is signed and the first few months of private provision of the service. During this time period the public service must be phased out and the private service phased in. If new capital equipment is necessary it must be ordered and placed in service. This time period can be called the contract implementation period.

Private Contractor and Public Are Partners

During contract implementation the contract manager and the private firm are partners, sharing the same goal of efficiently and smoothly making the transition from a public service to a private service. During this time period it is essential that the contract manager and the private firm be available to meet on almost a daily basis, or as frequently as necessary to quickly address and resolve implementation problems.

Develop and Maintain a "Punch List"

As soon after the contract signing as practical the contract manager should develop a list of all of the work tasks which must be undertaken to make the transition. The contract manager should require the private firm to do the same. An initial meeting can then be arranged where all of the tasks are discussed and a formal list developed. Each task which must be completed is listed along with the party responsible for completing the task, and the time period for completion. This list is often called a "punch list".

At each meeting of contract manager and the private firm the punch list should be reviewed. Items that have been completed should be crossed off, and a new punch list developed containing items that still need to be completed, along with new tasks which it is now recognized need to be completed.

This punch list serves as an early indicator of the ability of the private firm to manage his affairs. If there is constant slippage of times to complete tasks, then the contract manager should begin to worry about the private firm, and should require that the private firm take steps to rectify the situation.

The contract manager must also be very diligent in assuring that the tasks he has agreed to perform are completed on time so that the private firm can not accuse the contract manager of slowing the process down.

Time Line and Critical Path

The Gaborone South collection contract will require new waste collection trucks and up to 300 new skips. The private firm will not have this equipment on hand and will not be able place an order until the contract is signed. It will then be necessary for the suppliers to fabricate the trucks and the skips. It is likely this will take between two and three months.

If the private firm were to concentrate on finding an office first, even though this might only take two weeks, instead of ordering the trucks, then the time when the private firm could begin collecting waste would be delayed by two weeks. Therefore, it is important that a simple chart be developed (see Figure 2) which allows the contract manager to determine which tasks are critical- that is the contract service can not begin until the task is completed-and then identify how long it will take to complete each of those tasks. This then becomes the "critical path" which must be followed.

Once this first critical task has been initiated, then a second one will become the critical task, and then a third, etc. This will continue until the collection service has been fully implemented and all of the initial problems resolved.

Keep Records of Meetings and Telephone Conversations

It is important that the contract manager keep a daily log with notes on each telephone conversation with the private firm, as well as prepare a written summary of each meeting with the private firm. This written documentation will be very helpful if problems develop in the future. In fact, in case of litigation between the public and the private firm, written records are the only acceptable records

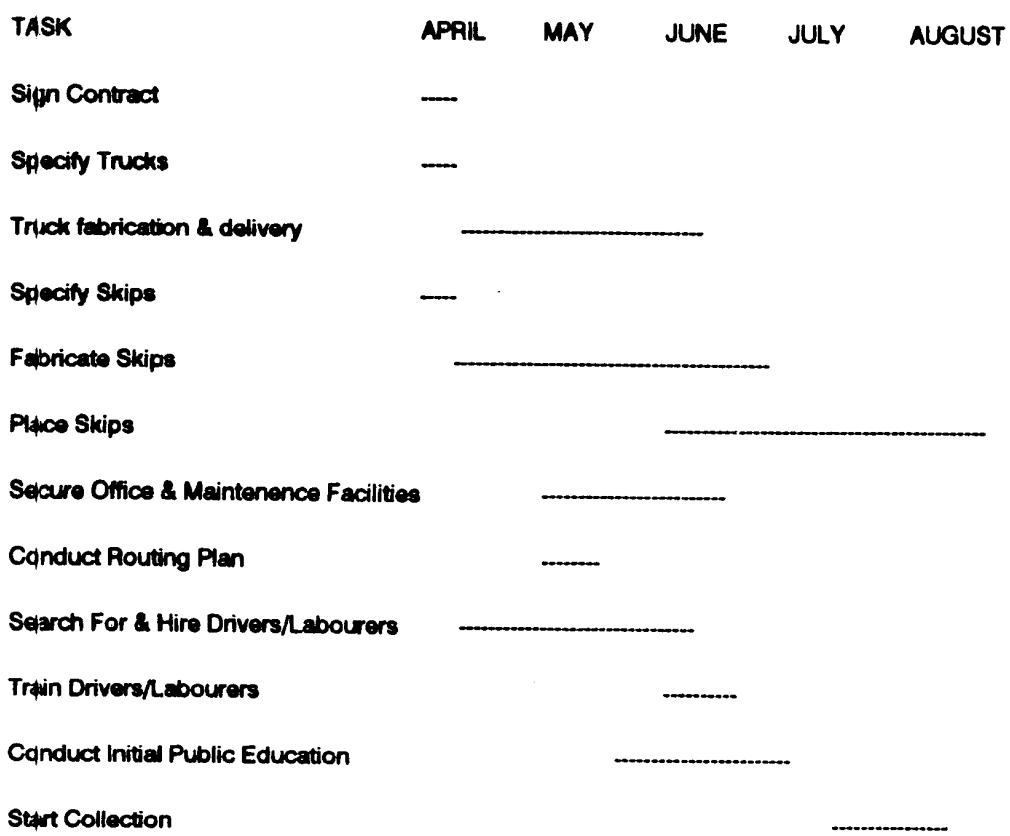
Request An Opportunity to Review Operating Plans and Equipment Specifications

It is important for the contract manager to verify that the equipment being ordered meets the performance specifications, and that the operating plan will result in satisfactory performance of the service. Equipment specifications should, at a minimum, meet industry standards.

Do Not Make Decision For the Private Firm

The contract manager must refrain at all times from directing the private firm to purchase a specific piece of equipment or operate in a specific way, unless these are spelled out in the contract. This is because the contract manager does not want, and should not take any responsibility for failure of the private firm to perform, as long as the public has lived up to their side of the contract. The contract manager should, however, document in writing to the private firm specific concerns that the contract manager has about the performance of a specific piece of equipment, or concerns about the operating plan. It is then up to the private firm to decide whether to change the equipment or the operating plans.

FIGURE 2. TIME LINE USED TO EVALUATE CRITICAL PATH FOR IMPLEMENTATION OF GABORONE SOUTH REFUSE COLLECTION CONTRACT



WORKSHEET 7

MONITORING PERFORMANCE

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MONITORING PERFORMANCE

Contract Performance Can Not Be Done From Your Office

It is essential that the contract manager spend sufficient time in the field to be able to judge if the private firm is performing.

Require Performance Accounting From the Private Firm

The private firm knows how they are doing, and they are in the best position to collect data on performance. Require that they supply performance reports on a regular basis (monthly, quarterly) on pertinent issues. For example, in the Gaborone South collection contract the GCC might require:

(1) Complaints received per week, and the location of the complaints;
(2) Households missed per week, and reasons;
(3) Skip lifts per month; and
(4) Quantity of waste delivered to the landfill each day

Communicate Lack of Performance Early and In Writing

Be specific to private firm about performance concerns. Sit down with the private firm and discuss solutions. Follow-up with written letters on solutions and time frame for resolving problems.

Follow Up On Problems

The contract manager must make sure to keep close tabs on progress of the private firm in resolving performance problems.

Remember What the Private Firm Has Been Contracted To Do

Despite a need for the contract manager to be involved and to require reporting of performance and resolution of problems, remember that the private firm has been contracted to do a specific job. They need the freedom to do the job without undue interference and without undue paper work. Therefore, the contract manager must make sure that his monitoring activities do not hinder the private firms performance, or cause excessive paper work.

WORKSHEET 8

THOROUGH ACCOUNTING OF INVOICES

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THOROUGH ACCOUNTING OF INVOICES

Specify the Invoice Format In Advance

It is very important that the private firm submit invoices that the contract manager can understand, and which are consistent with the way the government pays invoices.

Carefully Check Each Invoice and Compare Against Performance Standards

It is important for the private firm to know that the contract manager will be carefully checking invoices. Make sure to ask questions if something is not clear.

Process Invoices In A Timely Manner

Remember that the private firm will, in many cases, already have paid labor and capital charges before receiving a check from the government. Therefore it is extremely important to the private firm that invoices be processed as specified in the contract.

Provide Clear Documentation If Withhold Funds

Nothing gets a private firms attention faster than withholding payment - but the contract manager must make sure that there are sound reasons for withholding the funds, and that the private firm has been warned in writing about those reasons.

Track Contract Expenditures

The contract manager should develop a system to track contract expenditures on a monthly basis. That way, if expenditures exceed the budget this will be identified early enough to rectify the problem. It is much easier to cut P 5 000 per month for nine months then P45 000 in the last month.

Watch Out For Contract Adjustments

If a private firm is not doing well on a contract, they may try to make up their losses when an opportunity arises to adjust the contract (e.g., a statutory increase in fuel prices). Make sure that the private firm clearly documents to your satisfaction that the adjustment has not been inflated to cover other costs. Bring in an expert to help if you have questions.

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WORKSHEET 9

ENFORCING THE CONTRACT

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ENFORCING THE CONTRACT

The Contract Manager Must Have the Courage To Enforce the Contract

Despite the partnership that should develop between a good contract manager and the private firm, ultimately the contract manager must represent the best interests of the public. It should be noted here that this is the time when the acceptance of even small favors from the private firm in the past will compromise the ability of the contract manager to enforce the contract.

Provide Ample Warning In Writing To the Contractor

The contract manager must be able to demonstrate that the private firm has received ample warning in writing of its failure to perform.

Specify the Contract Terms

Enforcement must be based on the language of the contract, which should be referenced in any enforcement notice.

Involve Your Superiors

The contract manager should not be expected to take enforcement action alone. The contract manager's supervisor must take responsibility for approving and supporting the contract manager's decision.

Seek Legal Advice

The Council Attorney should be consulted with and should assist in drafting the enforcement notice.

Decide Whether the Private Firm Is Deliberately Not Performing Or Incapable of Performing

If the private firm is trying but having problems performing, then the enforcement action may be less severe than if it is deliberate. There may be a need to modify the contract to reflect the problems the private firm is having.

There Is More Than One Way To Settle A Disagreement

If ultimately the private firm and the contract manager can not agree on whether performance has been met, there are four primary ways to solve the problem.

First, there is direct negotiation between the private firm and the contract manager.

Second, a independent third party can be brought in to help with the negotiations. This is called mediation. In mediation, the disagreement has not been resolved unless both parties agree to the solution.

Third, the two parties can arbitrate their differences. In this case, a third party is brought in who not only helps with the negotiations, but also ultimately judges which side is correct, and how the problem should be solved.

Fourth, there is litigation, where the difference is solved in a court. This is generally the most expensive and time consuming solution, and should be avoided until all other avenues have been discarded.