The Forgotten Legal Conversation that underpins a Successful IT Implementation

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Agenda

• Key elements of a successful technology procurement process

• Common technology contracts

• A bit more detail on:
  - Software Licences / SaaS Agreements
  - Implementation Agreements
What are the key elements of a successful technology procurement process?

- Get all stakeholders involved early
  - **Customer** - project owner, business unit, procurement, finance, legal, IT, management (C-level)
  - **Supplier** - sales / commercial teams, finance, legal, management (C-level)

- **What’s the Customer’s typical procurement plan?**
  - RFI / RFP / RFT
  - Customer will usually attach the contractual terms to the request
  - Customer won’t want to short-list too early
  - Customer will want to keep competitive tension
What are the key elements of a successful technology procurement process?

• As a Supplier responding to an RFI / RFP / RFT
  - Call out Supplier’s assumptions
  - Don’t underestimate face-to-face meeting
  - Don’t over promise
  - Comply with the instructions

• Supplier should understand the Customer’s approval process
  - Varying sign-offs required depending on project value (e.g. Board – Investment Committee – CxO – Legal)
  - Sign-offs for commercial terms, business requirements, expenditure, business and legal risk
  - Build that into Supplier’s planning

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Software Licence

• **Generally, software is licensed not sold**
  - Right to use
  - Not ownership of copyright in software

• **Provides for the right for a licensee and / or end users to use software owned by the licensor**

• **Ensures that:**
  - Licensor’s intellectual property in the software is protected
  - Use of the software is governed by strict parameters
Software-as-a-Service Agreement

• Software delivered “as a service” by licensor to multiple customers

• Licensor hosts software from its own data centres or “in the cloud” (e.g. Office 365, Xero, DropBox)

• Often used for standard back-office functions that do not need specific customisation or integration

• Standard terms, difficult to negotiate

Implementation Agreement

• Provides for software to be installed, configured and / or implemented

• Services carried out by software licensor or service provider

• Typically used in high value / complex solutions, e.g. ERP, CRM, bespoke systems

• Documents what is required to deliver a fully integrated, functional system
Support & Maintenance Agreement

- **Software never error-free**
  - Requires continuous fixes and modifications
  - Developments for new features

- **Support and maintenance ensures software functions in manner required**

- **Examples of support and maintenance include:**
  - Help desk services
  - Raising service requests
  - Diagnosing and resolving faults
  - Planned and emergency maintenance

Service Level Agreement

- **Holds the Supplier to an agreed level of service**

- **Can be:**
  - A standalone contract
  - A schedule that forms part of a support and maintenance contract

- **Examples of service levels include:**
  - Problems / faults - response and resolution times
  - System availability
Outsourcing Agreement

- Similar to a services agreement but on a larger scale
- Generally outsource an entire back-office function of a company (e.g. managed service provider for IT support)
- Provides for the services that will be provided by Supplier and the standard that they will be provided to

Escrow Agreement

- Customer is provided with executable software
- Customer does not get the source code or “software blueprint” - documents how software runs
- Customer may want access to the source code if, say, licensor goes insolvent
- Parties enter into escrow arrangement with escrow agent who holds source code
- Source code released to licensee in certain events
Permitted Use

- Usually licensed on a non-exclusive basis

- Restrictions placed on use. Consider:
  - Authorised users
  - Hardware environment restrictions
  - Purpose for which software can be used
  - Number of users / devices
  - Limits on the number of transactions
  - Remote access (if on-premise software)

- Breach of these restrictions constitutes a breach of the licence
Prohibited Acts

- **Express prohibitions:**
  - Sharing user accounts
  - Copying
  - Modifying
  - Adapting
  - Decompiling / Reverse-engineering
  - Sub-licensing

- **Copyright Act 1994 – ss 80/80A/80B/80C/80D** permit copying, adapting and decompilation in certain circumstances

Fees and Payment

- **Licence fee - on-premise**
  - Initial fee with recurring licence fee / support fee
  - Consider payment of licence fee in instalments, e.g.
    - W% on signing of contract
    - X% on acceptance
    - Y% following a certain period after warranty period (retained amount)

- **Subscription fee - SaaS**
  - Setup costs
  - Subscription
    - e.g. monthly, annually in advance
    - usually includes support costs
Data and Security

• What Customer data does Supplier collect?

• How does Supplier use Customer data?

• How is that data secured?

• What security is in place for the data / software / SaaS platform to protect against cyberattacks, malware?

• Does the Supplier have cyber-insurance?

Term

• Common for business software to be licensed on fixed term basis with recurring licence / subscription fees

• Less commonly licensed on a perpetual basis with one-off licence fees
Termination

• Mutual rights to terminate for breach / insolvency

• Customer’s right to terminate
  - Without cause by giving notice, e.g. if software no longer required
  - If software not installed / implemented / set-up properly

• Supplier’s right to terminate
  - If Customer breaches licence
  - Assignment or change of control

• After termination
  - Customer’s right to export data (usually for SaaS)
  - Transition assistance to a new supplier
Implementation

- **Implementation Agreement** covers the installation/implementation of software, including:
  - Configuration of existing features
  - Provision of specific developments, customisations or enhancements

User Requirements and Specifications

- **User requirements** = what Customer wants
  - Customer to make requirements known to Supplier
  - Often time-consuming and complex parts of project

- **Detailed specifications** = how the Supplier intends to deliver what Customer wants

- **Specifications required for:**
  - Acceptance testing
  - Defining a software “fault” or “error”
  - Software warranty

- **Typically set-out in a Statement of Work** with other relevant details (e.g. implementation method)
Timetable

- Provision of implementation services should be in accordance with detailed timetable

- Should be a realistic timetable
  - Tendency for Supplier to agree to unrealistic timetable to win tender
  - Supplier has an incentive to look for “changes” in project to extend timeframe

- Project should be carefully managed to agreed timetable

- Remedies for delay
  - Financial compensation, seek third party assistance, termination

Customer Obligations

- Customer has an active part to play in implementation

- Set out Customer’s obligations
  - What resources or facilities will Customer provide?
  - Customer should be involved in
    - Determining the acceptance tests to be carried out
    - Participating in those tests

- Supplier will seek remedies for Customer’s failure
  - Extension of time
  - Whether Supplier can claim additional cost (e.g. resources)
Testing

- Once software is installed / implemented, acceptance testing is carried out

- Acceptance testing determines whether software as installed / implemented meets the specifications

- For failed acceptance tests, Customer may:
  - Request re-testing
  - Reject software (refund of fees)
  - Accept software subject to conditions (price reduction)
  - Terminate the agreement (several failed tests)

- Deemed acceptance

Fees and Payment

- Implementation Fees
  - Fixed fee (paid in stages or milestone achievement)
  - Time and materials (blank cheque!)
  - Combination
  - Risk / reward model
Ownership of Intellectual Property Rights

- **Licensed software**
  - Supplier or software licensor owns IP in software
  - Customer has licence to use software

- **Newly developed software**
  - Customer may wish to own IP as it has paid for it
    - But could an exclusive licence suffice?
    - If Supplier does not own and re-use, price could be higher
  - Pre-existing IP belongs to Supplier or software licensor
  - If Customer owns IP, ensure it obtains the source code

- **IP ownership of developments, customisations, enhancements and specifications**

Warranties

- **Software**
  - Functions and performs in accordance with the specifications and documentation
  - Does not infringe the IP rights of any third party
  - Free of viruses, spyware, malware, time-bombs, back doors

- **Implementation and other services**
  - Performed in a professional manner
  - Performed in accordance with the timetable
Limitation & Exclusion of Liability

• Supplier will almost always seek to:
  - Limit its liability to direct loss only
  - Exclude consequential loss, indirect loss, loss of profits, loss of use, loss of data etc.
  - Cap its liability (e.g. to licence / services fees paid)

• Common for Supplier’s limitation and exclusion of liability not to apply to:
  - Breach of IP warranty by Supplier
  - Breach of confidentiality
  - Wilful breach
  - Data loss

Thank you

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