

Top 10 IT procurements mistakes for local governments

David Downie, Partner

What is IT procurement?

- Hardware
- Software
- Cloud computing
- Managed services
- Other

1. Signing the supplier's contract

- Often 'all care and no responsibility'
- Limited to no ability to recover from the supplier when things go wrong:
 - no clear timeframes or deliverables
 - weak obligations on the supplier
 - exclusions of liability
- You may also be giving supplier exclusivity over extended period, regardless of performance and fees

1. Signing the supplier's contract

- Far preferable to use your own contract
- If not possible, negotiate the supplier's contract to an acceptable position
- Councils may consider using GITC framework when procuring IT services
 - optional for use by Qld local governments
 - need to ensure that use of GITC framework in compliance with contracting requirements under Ch 4 *Local Government (Finance, Plans and Reporting) Regulation 2010*

2. Downselecting before the contract is negotiated

- Don't let the supplier know they are selected until contract terms agreed (once supplier knows they have the job, they are not very willing negotiators)
- Keep competitive tension by starting with three or more candidates
- Negotiate two binding agreements before making a decision
- Emphasise the importance of the supplier's position on contract terms to their selection

3. Not defining what the supplier is to provide you with

- Most suppliers are deliberately vague
 - Detailed specifications should be included with warranty that solution functions in accordance with specifications
 - Clearly state the services being provided or the supplier may try to charge fees for 'additional services'
 - Include service levels for ongoing services (ideally with service credit concept)
-

4. Not holding the supplier to a timeframe

- Most IT projects are late
- Ideally include clear project plan with milestones
- Consider liquidated damages being payable if milestones are not met

5. Not having a right to walk away if it does not work

- Try to obtain a right to perform acceptance testing of solution with refund of the fees if it does not work as planned
- Provides a powerful, practical remedy
- Alternative is to sue for damages if the solution does not work as intended

6. Not clarifying what you are paying the supplier

- Supplier contracts often refer to the supplier's 'then current rate' or allow periodic change of rates
- You should seek certainty as to price or at least ensure what is agreed is clearly expressed
- Price also drives behaviour – consider fee model

7. Not defining the scope of the IP licence

- If you use software outside of scope of your licence, you may be infringing someone's IP
- Pay careful attention to territory, field, number of users and right to sublicense
- Better to have a broad licence with fee consequence of increased use rather than narrow licence that requires negotiation if your use increases

8. Not protecting your IP

- If you want to own IP in software or other deliverables, you will need to obtain an express assignment
- In absence of agreement to the contrary, nothing prevents a supplier from licensing the work you paid them to develop to your competitor

9. Not protecting yourself from IP claims

- Having a software licence won't necessarily protect you from third party IP claims
 - As a customer, you should try to obtain a warranty that the supplier has the authority to grant the licence
 - Customers should also try to obtain an indemnity from the supplier against such claims
 - Also confirm that the supplier has insurance to pay such claims
-

10. Allowing the supplier to limit/exclude liability if they fail to deliver

- If the supplier excludes liability for breaching its obligations, then you may have no right to recover damages
- More customer friendly approach is to agree for supplier to limit fees to 3 times the fees paid or payable under the contract (ideally this would not apply to indemnities for IP claims, personal injury or property damage)

10. Allowing the supplier to limit/exclude liability if they fail to deliver

- Not unusual for a supplier to exclude liability for 'indirect loss', but take care in relation to excluding liability for 'consequential loss' as the term is unsettled at law

Contact details

Presenter: David Downie

Direct line: 07 3233 8842

Email: ddownie@mccullough.com.au