

Technology Procurement Contracts

**The Forgotten Legal Conversation that
underpins a Successful IT Implementation**

Edwin Lim

Partner

25 August 2021

**Hudson
Gavin
Martin**

Technology, Media and IP Lawyers



BUSINESS SCHOOL

Agenda

- Key elements of a successful technology procurement process
- Common technology contracts
- A bit more detail on:
 - Software Licences / SaaS Agreements
 - Implementation Agreements

Hudson Gavin Martin

What are the key elements of a successful technology procurement process?

Hudson Gavin Martin

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

Hudson Gavin Martin

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

Hudson Gavin Martin

5

What are the key elements of a successful technology procurement process?

- **Make sure everyone is on the same page**
 - Understand what the project constraints are, e.g. budgets, timing, quality
- **Prepare contractual documentation**
 - Must reflect the deal
 - Battle of agreements – Supplier's "paper" vs. Customer's "paper"

Hudson Gavin Martin

6

Common Technology Contracts

Hudson Gavin Martin

7

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

8

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**

9

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**

10

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

11

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

12

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**

13

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**

14

Software Licences / SaaS Agreements in Detail

Hudson Gavin Martin

15

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**

16

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**



17

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

18

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?**

19

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**



20

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

21

Implementation Agreements in Detail

Hudson Gavin Martin

22

Implementation

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



23

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)**

24

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

25

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)

26

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**

27

Fees and Payment

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



28

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**

29

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

30

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

31

Thank you

Edwin Lim | Partner
edwin.lim@hgmlegal.com
+64 21 638 445

www.hgmlegal.com

Hudson Gavin Martin