Locking IT Down: How to Protect Your Business in Technology Contracting

Essential Strategies for IT Service Providers

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TIPS to KEEP in MIND

Most organisations rely on IT to a greater or lesser extent but the process of actually selling technology can be a challenge. Technology contracts are complex, customers can often be highly sophisticated, and there are many traps for the unwary that can catch you out. In this article, we outline 14 tips to stand you in good stead for navigating the choppy waters of selling IT products and services and ensuring an engagement is set up to succeed from the outset.

Tip #1

Be careful with RFP responses and proposals

There can sometimes be a disconnect between what IT service providers promise in their proposals or tender documents and what they're prepared to stand behind in the contract in relation to the technology or solution they're providing. Pre-contract documents usually fall away because of the 'entire agreement' clause. However, there are ways in which a customer can hold its chosen supplier to what was represented in the proposal or response. The customer can either translate the claims and representations made in RFP responses or proposals into content in the agreement schedules, or incorporate the pre-contract documents into the agreement by reference. So it is important not to 'over-sell' in proposals or tender documents.

Tip #2

Define scope clearly and accurately

Without a comprehensively and tightly defined scope, it's very difficult to know what it is you're actually providing, and what it needs to do. In defining scope, the customer may take a requirements-based approach – describing what the solution must do or the results it must achieve, or a specifications-based approach – describing the solution's features, functionality, and any operational constraints. But in either case, clarity is the key if you want to avoid disputes arising from misaligned expectations, as well as the potential need for numerous change requests. Always give the scope as much attention as the 'legal' terms and conditions.

Tip #3

Draft in plain language

An old chestnut but as valid today as ever. Just like any other agreement, a technology contract won't be useful and effective in documenting the agreement the parties have reached if its language is overly technical, verbose or confusing. You want anyone to be able to understand the words on the page, and you should always aim to communicate complex ideas in a digestible and manageable form. Follow the golden rules – for example, active voice not passive voice, no overly long sentences or paragraphs, no repetition and no Latin phrases, to name a few – and not only will the contract be more readable, it should mean disputes and disagreements over interpretation of words or phrases in the contract are avoided.

Tip #4

Focus on security

Whenever you have access to a customer's data, or links into its systems (eg. through APIs), the customer will want to ensure that the technology contract includes appropriate obligations as to data and security - especially if liability for loss of data is excluded under the contract. Consider the type of security measures and safeguards that you can agree to, and any accreditations (eg. ISO 27001) you are prepared to maintain, and be prepared for suitable obligations to be included in the contract. In a world where third party data breaches are an increasing threat to organisations, if an IT service provider is acting as a custodian of the customer's valuable, and possibly regulated, data, it will need to stand behind its offering and agree to look after that data with a high level of care.

Tip #5

Share risk fairly and reasonably

Sadly, it's not unusual for the actions of one party to a technology contract to cause loss to the other through its acts or omissions. How can the contract itself be a vehicle for fairly and reasonably apportioning that risk of loss? Usually, that's achieved through (amongst other things) a combination of limitation and exclusion of liability clauses, and indemnities. You can, and probably will, spend a lot of time negotiating and agreeing these often contentious provisions, and they are often some of the final contractual points to be agreed. However, ultimately the parties will need to reach an agreement on liability and indemnities which they can both live with, if they're to get the deal over the line.

Tip #6

Plan for amicable resolution of disputes

Disputes can, and often do arise, in the course of a technology engagement. Prepare and plan for these by including the right mechanisms in the contract: good governance processes to allow for early visibility of problems and enable the parties to course-correct before a dispute becomes entrenched; a user-friendly contract management regime to deal with internal and external changes effectively; and a well thought-out dispute resolution clause to allow for internal escalation and some form of alternative dispute resolution process to apply before costly and time-consuming litigation can be commenced.

Tip #7

Anticipate and manage the exit

One aspect of a technology procurement that's often overlooked in the excitement of contracting for the provision of a new technology or service is the end of the engagement. Always turn you mind to what happens at the expiry of the term or termination of the agreement include the right provisions and mechanisms in the contract. Does the customer need a transition-out period meaning you will need to provide additional exit services for the customer to move the technology to a new provider or back in-house? Does the customer need its data to be returned? Which clauses of the contract should survive when the agreement ends? Figure all this out at the beginning and set yourself up for an orderly exit at the end.

Tip #8

Don't be afraid to negotiate

It's a fact of life that almost all technology deals will involve some form of negotiation. In most cases, regardless of which party initially puts forward their standard form / preferred document, that won't simply be accepted by the other party. A negotiation typically ensues, with the aim of not only documenting what the customer is buying and the price it'll pay for it, but also to apportion legal and commercial risk and come up with final positions each side can live with. Factor that process into the deal timeline – the higher the value and complexity, the longer the negotiation will take – and accept that a period of (hopefully amicable and professional) negotiation is part of the process and key to successfully concluding the transaction.

Tip #9

Don't agree to agree!

How many times have you kicked the can down the road and written in a contract that the parties will agree something "as soon as reasonably practicable after the Commencement Date"? It's tempting, when something is too hard to pin down and document or agree with the other side, but there are real issues with this approach. If the subject matter to be agreed later on is essential to the entire contract, there is a risk the whole agreement may not be enforceable for uncertainty! Even if that's not the case, post-execution, there may simply be no appetite or bandwidth to revisit something that was too hard to finalise first time round. So stay the course, and avoid agreements to agree.

Tip #10

Consider legal and regulatory requirements

Technology contracts don't exist in a vacuum – always consider the legal and regulatory framework applicable to the parties and their business when drafting and negotiating the agreement. Consider the extent to which you may be required to take on specific obligations to allow the customer to comply with laws applicable to the customer or its business. For example, entities subject to the Privacy Act will need to include provisions which set out the obligations of the parties in the event of an eligible data breach, whilst APRA-regulated entities will likely need to include a raft of provisions to enable their compliance with Prudential Standards such as CPS 234 (Information Security) and CPS 231 (Outsourcing).

Tip #11

Find the balance on liability

During the negotiation process described above, it can often feel like an inordinate amount of time is given over to the liability clauses, and you can understand why. Each party needs to limit its potential exposure and make sure it's not held liable for any and all losses it could cause the other party to suffer. But this shouldn't be exclusively prioritised at the expense of the many other tools and mechanisms under the contract to drive a successful and mutually beneficial engagement, which can be used to effectively and practically guide the engagement and manage the relationship. Liability clauses will likely only ever become relevant in the worst-case scenario of litigation. Consider cutting to the chase with your baseline position, and using the time you've saved for documenting other important aspects of the procurement and the relationship.

Tip #12

Address contract management and governance

Your technology contract should be the 'manual' for governing the engagement and the parties' broader relationship, not something to be signed then put away in a bottom drawer to gather dust. Be sure to include in the agreement clear and workable contract management and governance processes. This is key to enabling a customer to optimise the value from its IT investments, and can also facilitate better relationships and improve risk management. On the flip side, poor contract management and governance can lead to a heightened risk of project delays, unexpected cost increases for the customer or legal disputes between the parties. So turn your mind to what forums, mechanisms and tools should be put in place to facilitate and enable contract management and good governance as a whole.

Tip #13

Monitor case law and legislative change

Case law and legislation are not a constant – they change and the law evolves. For example, think about how the meaning of 'indirect/consequential loss' – liability for which is usually excluded in the contract – has changed over time. In Australia we went from applying the 'accepted wisdom' in relation to 'indirect/consequential loss' (ie. it being loss under the 'second limb' of the description of loss in the old English case *Hadley v Baxendale*) to having a very different meaning under the 2008 Victorian Peerless case, with a liability exclusion then operating far more broadly. And consider the overhaul of the Privacy Act which is underway and which will have far-reaching consequences for APP entities. Always stay across any developments in the law and consider how they impact your technology contract.

Tip #14

Don't draft in silos

Finally, always make sure that everyone involved in the actual process of creating a technology agreement, whether in the technical, legal, commercial or any other workstream, works with each other to ensure the end result agreement is one single, coherent and internally-aligned whole. Too often we see schedules to an agreement which bear only a faint resemblance to the main body, using different terminology and even setting out contradictory positions. If you don't want to end up with a number of disparate and inconsistent documents posing as one agreement, be sure not to draft your technology contract in silos.