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Be painstaking first and optimistic after

Contracts are seen too often as a tedious formality that has to be endured, rather than an essential tool for getting what you want

The sight of lawyers entering the executive suite is often one that sends a chill down the spine.

By and large, lawyers understand that and know that however often they might be bringing good news, it is their endless potential for delivering the bad that shapes the reputation that precedes them.

But when negotiating contracts for information and communications technology projects, spending some quality time with your legal advisers at the start may spare you less pleasant confrontations later.

At present a great many companies are jeopardising the success of their strategic IT projects by negotiating inadequate contracts with suppliers and failing to heed the warnings of their legal team.

Meltdown of a company's IT systems has serious consequences for its business. In its widely-reported dispute with ICL – now owned by Fujitsu – the Co-operative Wholesale Society claimed £11m for a failed software upgrade. Only as the dispute unravelled did it become clear that Co-op and ICL had very different views about what the latter was expected to deliver.

There were no winners in the eventual settlement, which followed two expensive and lengthy court cases. Co-op was left without the systems it had expected and Fujitsu was reportedly left with unpaid fees.

Elsewhere, a firm of stockbrokers was brought to the verge of collapse, when its new trading systems failed because they were beset with technical prob-

lems; and a call centre operator found that its new business-critical system did not perform as expected.

Both companies continued to work with – and pay – their suppliers with the aim of bringing the systems up to their expectations. Neither company was able to correct the problems nor to recover the losses it had incurred.

Such problems could have been avoided if the procurement contracts had been drafted differently.

The firm of stockbrokers was successful in demonstrating that its supplier had failed to deliver the system it was supposed to, but this amounted to a Pyrrhic victory, as the limitations on the supplier's liability in the contract meant that the firm was unable to recover its true losses.

The call centre operator discovered – too late – that the contract only obliged its supplier to provide a specified number of hours work, with no guarantee that this would deliver the system desired.

So what should companies do to get the best out of their IT procurement contracts and avoid such problems arising? Rather than treating the contract as a hurdle to be overcome before installation of the chosen system can begin, companies should treat each procurement contract as a key tool for delivering that project on time, and within budget.

In fact, a well-thought through contract will also serve as a roadmap for both sides to follow throughout the project to ensure its success. So, both parties will

benefit from sharing as much information as possible about their expectations and ensuring they are reflected in the contract.

This means allocating sufficient time for the contract negotiation and selecting the right project team. It should include everyone, from the company's IT consultants and lawyers to those who will be involved with running the systems once they go live.

That team will then gain the in depth knowledge of the company's objectives they need to recommend how to structure and negotiate the procurement contract so that it underpins the success of the project.

Key steps to securing a successful contract include:

- Not being committed to one supplier until the contract is signed. Otherwise, the customer risks having to enter into a contract it is unhappy with. If the supplier has started work, there will be uncertainty over what will be delivered.
- Ensuring that the project specification spells out the customer's requirements in sufficient detail and reflects all the supplier's initial promises. There should be no room for dispute over what is to be delivered.
- Reviewing the contract to see where budget overruns may occur. For fixed price contracts, the customer should check how extras such as training are priced.
- Incorporating practical and legal remedies to protect the customer if something does go wrong. Companies should consider the implications of any proposed limitations on the supplier's

liability, as its commitments will be meaningless if it is cheaper to breach the contract than comply with it.

The board should play an active role throughout the negotiation process and receive regular reports from the project team, so it can influence significant key contract points.

The board should also demand a report on the key technical and legal risks before signing the contract. Many projects fail because the customer relies on what it expects will be delivered rather than the letter of the contract, so the board should examine the consequences of accepting the risks carefully.

It should be in a realistic position to turn to an alternative supplier if the risks are considered unacceptable at this stage. However, allowing extra time for negotiating the contract, rather than rushing to sign it to meet a deadline for work to begin, may allow both sides to reach a compromise.

It is surprising that many companies do not invest the same time and resources in their strategic IT procurements as in their other acquisitions.

With both customers and suppliers recognising the importance of a well drafted contract, that is changing.

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