LEGAL TIPS ON NEGOTIATING CONTRACTS FOR IT PROJECTS

IT projects often go wrong because of badly negotiated, poorly worded contracts and weak project management teams. The following briefing, based on the advice of Kiran Sandford, partner in the IT group of law firm Mishcon de Reya, offers tips on ensuring that supplier contracts for IT projects come in within budget, are on time and meet objectives.

The team

The internal project management team should be in place from the start, and for the duration of the project. It should focus on business objectives. The team should comprise the following individuals:

- IT specialists – include an outside IT consultant who knows your industry well and your IT director.
- Lawyer – he/she will help you put together a contract in plain English that achieves your business objectives and caters for potential stumbling blocks.
- Project manager – select someone to co-ordinate the project and act as a contact point.
- The supplier's team – identify key individuals and ensure they remain involved throughout the contract.

Scoping the project

The contract must reflect the supplier's initial promises. If you leave matters to be agreed down the line, you are likely to be the loser. It is worth spending the time to scope the services/supply in as much detail as possible. Avoid rushing to meet a deadline for contract signature (often to meet a supplier's accounting deadline) and then identifying problems later on.

Business considerations

- Invitation to tender – spell out your requirements succinctly. If the supplier has put forward its own proposal, review it and make changes. This can then be included in the contract.
- Specification of services – include a functional specification for IT procurement projects. Consider having the right to pull out if you are unhappy with the specification where it is produced after signature (though Sandford says that if the specification is clear enough there will be little room for dispute).

Identify performance criteria

- For services, ensure the description is detailed and caters for service hours and service levels. Set out the process for ordering services that vary in scope or volume. Try to build in provisions for service improvement.

Remember, if it's not stipulated in the contract you won't get it or you may have to pay extra for it.

Most of these provisions will go in schedules to your contract. The front-end of the contract sets will be meaningless if the schedules are inadequate.

Responsibilities

Provide sufficient incentives for the supplier to deliver what it has agreed to and adequate compensation for you if things go wrong. Pay particular attention to:

- Warranties/service levels – the supplier should give commitments to the quality of the software or services it supplies that are easy to measure. It must commit to performance criteria and meet timetables.
- Service credits – you should receive service credits to compensate you for your loss if the supplier fails to meet its measurable commitments.
- Damages – consider liquidated damages for serious deficiencies or failure to meet long stop dates on fixed-term projects.
- Acceptance testing – for agreeing acceptance tests, stipulate a workable procedure that is easy to implement. Provide for a full refund where there are serious failures to meet acceptance criteria. This should flush out suppliers that are not prepared to stand behind what they say before you are committed.
- Limitations of liability – these commitments will be meaningless if the supplier has excluded its liability to you or limited it to such a low level that it is cheaper for the supplier to breach the contract than comply with it. Do not automatically agree to an exclusion of liability for loss of profit or management time. Make sure that any cap on the supplier's liability to you is enough to compensate you should a nightmare scenario arise.

Pricing

- Fixed price – there should be no extras (such as training or out-of-hours services) that are not priced and included up front.
- Rates – the contract should stipulate rates for other services.

Management

IT projects are a partnership arrangement. Customers should anticipate how they will deal with problems by providing for reporting lines and project management meetings, and setting out dispute resolution procedures.

Termination

Consider how long the project will last and the long stop date for a systems supply. When can the agreement be terminated early? Termination for convenience is useful when you are no longer satisfied with the supplier's performance, but you cannot prove a breach.

- Exit strategy – the supplier should agree to co-operate on handover. Stipulate the price to be paid and services to be provided.

Change control

Customers should limit the possibilities for the supplier to claw back discounts by charging excessively for project changes.

- Procedure – this should require changes to the scope of the project to be identified at an early stage and require the supplier to carry out those changes if needed. There should be a mechanism for pricing those changes.

Other tips

- Do not commit to one supplier too early. Before you make a final decision, have an outline draft of the contract available.

Too many businesses find themselves in a weak bargaining position because the supplier knows that the business has no other option. If you think a draft contract is not going to deliver the objectives you want, then have another supplier you can turn to in reserve. "There's nothing like it to keep a supplier on its toes," says Sandford.

Tom Berry

A wide range of Briefings can be found at www.financialdirector.co.uk/briefing

Useful links

- **Email Kiran Sandford at kiran.sandford@mishcon.co.uk**