IT Transactions in the Municipal Sector: Current Top 25 Legal and Business Issues

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TOPICS

A. BUSINESS ISSUES

B. LEGAL ISSUES

A. Business Issues

#1 Business Issue: The Business Case

- Many IT transactions fail – Carefully map out business case – engage IT, specialised consultants and legal.
- Customize the legal agreement to fit the business deal not vice versa
- Establish proven strategies and protocols – promote positive outcomes, mitigate against negative outcomes

#2 Business Issue: The “Services”

- Separate design from build
- Detailed specs, functionality should be spelled out – SOW/Service Schedule
- Link performance milestones → payment milestones → acceptance testing
- Service level breach remedies
  - Service level restoration
  - Service level credits

#3 The “Services” in an Outsourced “Services” arrangement

- Trend in Government – In-House vs. Outsourced (Hosted) Solution/Service.
- Structure deal in terms of procuring a Service vs. an Application
  - Clearly define Services, Service Levels, Service Level Remedies and Restorations
- Technology upgrades/ refreshments
  - Include in ongoing outsourcing fee
  - Avoid getting hit with vendor infrastructure cost

#4 Business Issue: Service Reporting

- Service Records and Performance Reporting –
  - Include as a deliverable
  - consider required frequency – real time, monthly, weekly
- Method of ensuring Service Levels are met
- Ask for this upfront in the agreement and not as an afterthought midway through the project
- Establish organization record retention protocols

#5 Business Issue: Maintaining Vendor Resources

- Key Personnel Provisions
  - Dedicated and full-time basis
  - Shall replace such individual promptly with another individual on at least a temporary dedicated and full-time basis who is at least as well qualified and experienced.
- Service Restoration Remedies
  - Obligate vendor to dedicate more resources
- Technology refreshes and upgrades
  - Build into pricing

#6 Business Issue: M&S Services

- Product Warranties
  - Already built into pricing! Consider pricing when considering the M&S “package”
- Upgrade/Updates
  - Consider installation, data migration etc
- M&S Service Levels

#7 Business Issue: City Contributions

- Clearly delineate City's role/responsibility
  - Personnel
  - Work Space
  - Resources
- Avoid cooperative language in agreement – "work together", "cooperate" etc.
  - Bifurcate into Service Provider obligations ("Services") and City Contributions/Responsibilities
- Remember that this is a "service provider – customer relationship" NOT a collaborative or joint venture/initiative

#8 Business Issue: Business Continuity

- Disaster Recovery - Business Continuity
- Termination Transition Services

#9 Business Issue: Contract Management - Documentation

- Document, document, document – performance of service
- Ensure all disputes are documented
- Ensure any contractual concessions (e.g. performance milestones extensions) are narrowly and specifically documented
- Ensure all notices follow the protocols stipulated in the “Notice” provisions

#10 Business Issue: Security Protocols and Processes

- Outsourcing
  - Vendor complies with industry best practices
    - CICA, SAS, Cobit, ISO, etc
  - Physical security mechanisms
- Procured Solutions
  - Encryption
  - Intrusion mechanisms

#11 Business Issue: Monetary Risk Management

- Assess the risk; analyse who can best manage the risk
- Limitation/Exclusion of Liability (LOL/EOL) and Indemnities
- Be sure to “carve out” the indemnities that should be uncapped (e.g. IP Infringement, CI breach, negligence, wilful misconduct, death, bodily injury and property damage) from LOL/EOL provisions

#12 Business Issue: Insurance

- Insurance requirements should fit business deal
- Legal should be familiar with insurance coverage
  - Don't outsource to risk manager at 11th hour for template language, legal needs to carefully consider requirements.
- Remember! Insurance amounts are subject to Limitation/Exclusion of Liability (LOL/EOL) and Indemnity caps.

#13 Business Issue: Approved Spend

- Do you have the spending authority?
- Change Orders, Amendments, renewals – Authority to bind
  - Any change to Scope of Services, pricing, term
  - Over $??k → Go to Materiel Management
- Work Orders, Order Forms – Authority to bind
  - Structure so that authority to spend previously obtained
  - Take proper advantage of Master Agreement

B. LEGAL ISSUES

#1 Legal Issue: Ownership of Deliverables

- City hires an independent contractor to create, fix, enhance, customize, update or improve "work".
  - By operation of law independent contractor owns the "work" it creates (e.g. software, designs, plans, processes etc.)
  - No U.S. "work made for hire" concept in Canada.
  - The contractor must transfer ownership rights in writing – i.e. written assignment

#2 Legal Issue: Protecting City owned Intellectual Property

- Vendor creates work for the City. City agrees to grant vendor a license to use work outside the project.
  - Clearly delineate the conditions and restrictions –
    - Exclusive vs. Sole – ***be careful!***
    - Irrevocable, perpetual – ***be careful!***
- City allows vendor to create derivative works from City IP
  - Vendor will be owner of derivative works - Structure agreement to convey proprietary rights in the derivative work when created back to the City.
  - Avoid Joint ownership of IP - complicated and problematic

#3 Legal Issue: Licensing of Vendor owned Intellectual Property

- City licenses Vendor IP
  - Clearly delineate the conditions and restrictions
  - Enterprise vs. Seat
  - Ensure irrevocable and perpetual subject to very specific termination events e.g. Breach vendor IP rights
  - Obtain licensing rights for redundant and testing environment – “Hot swappable”

#4 Legal Issue: Licenses and Bankruptcy

- City licenses technology/software from vendor
  - Canadian Legislation introduced to protect licensees against the trustee in bankruptcy (representing the bankrupt licensor) from setting aside the license
  - Legislation not perfect – e.g. only protects the right to "use" (not defined in legislation)
  - Contractual mechanisms to protect licensee
    - conveyance of license as an IP Right
    - take a tiny proprietary interest in vendor IP

#5 Legal Issue: Penalties

- Punish vendor for breached service or performance levels or non-compliant system or solution operational and functional levels through penalties

  - **Penalties are not enforceable at law**

  - Monetary service level breach remedies (service level credits) must state that they are **"liquidated damages" -** a fair and reasonable assessment of damages that are difficult to quantify in the circumstances of the transaction

#6 Legal Issue: Mandatory vs. Optional Requirements – Bid Stage

- City Procurement documents contain requirements for the provision of service or service levels
  - "Shall" vs. "May"
  - Carefully consider what is mandatory and what is optional – impact on evaluation, price and contractual performance

#7 Legal Issue: Confidentiality

- Clearly define what is included in confidential information. Always include Personal Information and “City Data” in the definition of “Confidential Information”
- Ensure the return/destruction of Confidential Information upon termination or expiration of the contract at no additional cost

#8 Legal Issue: Use of Certain Terminologies

- **Cooperative language** – "We will work together"...Avoid such language.
- **Onerous obligations** – Customer must carefully consider its obligations.
  - Terms including "ensure", "shall" and "must" may impose unattainable obligations on the customer
  - "Best efforts" obligation is extremely onerous, and may require a party to do everything it can to achieve the objective – even at great financial or business risk to itself
  - Always consider using "reasonable commercial efforts"

#9 Legal Issue: Entire Agreement Provisions

- City licenses software from vendor through license agreement. City then downloads software application.
  - Downloadable Software may have EULA that may contain different terms from written agreement
  - License Agreement should take precedence over any other agreement, including any “click wrap” agreements related to the software

#10 Legal Issue: Personal Information in City Custody

- Obligations under *MFIPPA*
- City IT Systems – identify any personal information processed or stored in those systems
  - Security requirements
  - Personal information should only be used for the purposes collected
- Personal Information leaving City custody
  - IT Outsourcing, data migration or processing
  - Security requirements negotiated in agreement
  - Cross border issues

#11 Legal Issue: Privity of Contract - VARs and Resellers

- Top tier IT manufacturer engaging VARs and Resellers on a more frequent basis
- Downstream relationship (City and reseller) vs. Upstream relationship (reseller and manufacturer)
- City's contractual privity is usually with the Reseller! The Reseller not the Manufacturer is on the "contractual hook!"
  - Ensure payment held in trust for upstream manufacturer
  - Ensure downstream risk management and warranty provisions are independent to and not negated by upstream manufacturer's provisions
  - Bonus – if City can obtain contractual assurances from upstream manufacturer – eg. Performance guarantee.

#12 Legal Issue: Customer-Vendor Relationship

- Independent Contractor – NO employee-employer relationship
- No principal-agent relationship
- Non-solicitation clauses – ***be careful!***
- Non-exclusive relationship