



Tips for Nonprofits When Procuring Technology Solutions

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Common IT Procurement Scenarios - You as the Customer

- Development arrangements
- Licenses for existing IT
- Services Solutions
 - Software as a service (SaaS)/cloud computing
 - IT services (implementation, support)
 - Outsourcing/managed services arrangements
 - Some combination of the above
- Most prevalent today are service-based and hybrid options

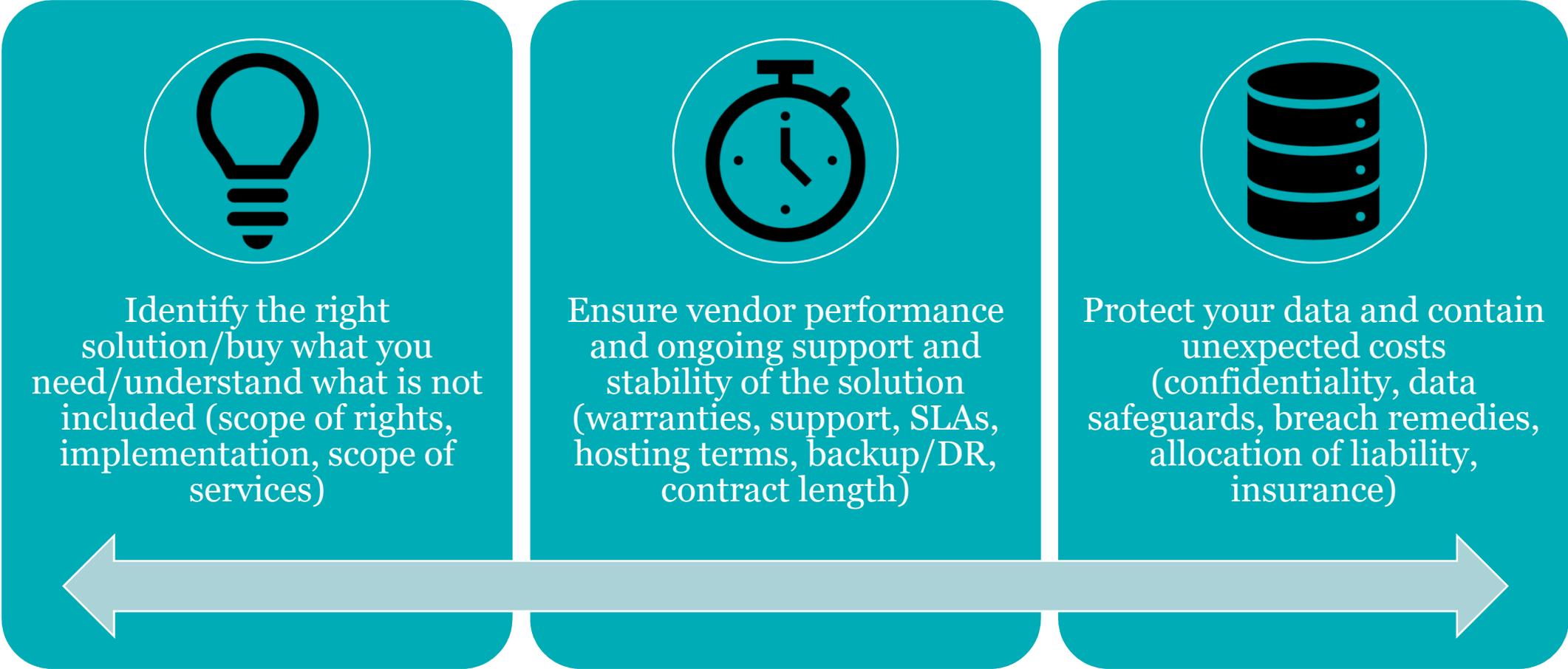
Common Misconceptions

- These contracts are “standard” – there is no such thing as a true standard contract
 - The “standard contract” is actually a strong pro-vendor arrangement, with vague commitments, delivery obligations, or product specifications that will leave you with little recourse
- Ok, so the vendor will use my standard IT contract – not likely unless very high \$ value
 - Your standard terms may also not be the right ones for what you are buying; negotiate terms; at least figure out what is “market”

Common Misconceptions (cont'd)

- I don't need due diligence, the contract will protect me from undue liability, costs or business impacts – not quite; buyer beware!
 - For business critical tech solutions, the trend today is more involved due diligence and vendor management efforts ahead of procurements due to increasingly limited remedies and commitments (e.g., system demos, proof of concepts, security/data protection evaluation, reference checks, service level reviews, litigation checks, is the vendor being sold)
 - Further, evaluate if the vendor's solution enables you to meet your regulatory compliance obligations; try but many vendors won't warrant regulatory compliance even for systems designed to perform regulatorily required tasks
- Legal will handle this – Yes, but the IT, finance, and project teams will need to be involved

Key Tech Procurement Goals



What You Are Procuring Will Impact the Contract Terms You Need

Development:

- Software, website, or platform developed/created primarily for you (e.g., an app, company website, member portal)
- Include detailed technical, content, and functionality specifications to measure the resulting work product
- Allow for substantial testing and concrete acceptance procedure
- The resulting work may be installed and hosted on client hardware or client selected data center; vendor often won't operate it for you
- Require vendor to warrant the work doesn't infringe third-party rights
- Require a warranty that the work meets the specifications for X months and add an obligation to correct warranty period errors

What You Are Procuring Will Impact the Contract Terms You Need (cont'd)

Development:

- The contract may involve full or partial transfer of ownership to you; you will need a written assignment of IP rights; work for hire doesn't apply to contractors generally
 - If the work is being done overseas, the IP rights will not be U.S.-based and your IP assignment will need to comport with local law
- If you won't own it, at a minimum you need a perpetual, paid-up license to use, copy, distribute, display, and create derivative works
- You need delivery of the work, including source code; beware of open source and third-party components that you will be responsible for
- This arrangement ends when work is done; consider if you need an ongoing support contract or if you are able to support it
- Fees typically upfront deposit and milestones based on work completion
- Consider what legal requirements impact your new work and define vendor requirements
 - E.g., for an app, app store requirements; for payment engines, PCI/DSS; for health-related, if PHI, HIPAA; for financial, Gramm-Leach-Bliley and state financial regulations

What You Are Procuring Will Impact the Contract Terms You Need (cont'd)

License-Based Procurement:

- You buy a right to install and use existing proprietary or third-party software, platform, portal or system; you don't own it
 - Ask to own or for temporary exclusivity if you paid for large, unique, standalone customizations
- It may be perpetual or time-bound
- It may be “out of the box” or most commonly will require that you do or hire the vendor or a third party to do configuration, implementation, and data conversion work
- You may host it on your premises or at a third-party data center selected by you; the vendor may or may not also offer its own hosting services
- You get a copy but usually not source code; consider an escrow for future code access; likely subject to tax
- Warranty that the solution will perform per the documentation/specifications and obligation to correct errors; we typically see 30-180 days, depending on complexity
- Negotiate a *support* Service Level Agreement (SLA)
- Fees typically a license fee + ongoing support fees

What You Are Procuring Will Impact the Contract Terms You Need (cont'd)

Services-Based Procurement:

- You get a right to *access* and use the vendor's software/application or solution (e.g., SaaS, cloud) for a specified period of time
- Externally hosted by the vendor (they solely determine how), and accessed through the Internet by client
- Software/platform exclusively owned by vendor, you won't get a copy; tax treatment may vary if you receive a copy of software or documentation
- It will need to be configured/implemented and your data migrated to the vendor

What You Are Procuring Will Impact the Contract Terms You Need (cont'd)

Services-Based Procurement:

- The vendor will typically host your data/content that is used with the vendor's solution – key difference
- The warranty of performance per specs/documentation should be for as long as services
- The SLA is not only of support but performance (uptime, speed/latency, batches, reports)
- Fee schemes vary, but typically implementation fees + ongoing service/support fees, sometimes a separate hosting fee; there may be third-party fees passed through

Data Issues

- Most SaaS/cloud/hosted solutions today involve vendor exposure, access, use processing, or hosting of your or your members'/clients'/users' data
 - Data services, i.e., marketing analytics, cloud storage – data as the product
 - Data *about* the services, i.e., usage metrics, anonymized statistics – data as a by-product
- “Personal Data”/“PII” is the most sensitive and regulated, but all of your data is important to you – contract provisions should account for all types of data
- Major IP issues regarding the ownership of data
 - Traditional IP concepts and laws (copyright, patent, even trade secret) don't adequately cover proprietary rights in data
 - Ownership/licensing may depend heavily on the contract language
 - Must specifically describe the data and the parties' obligations regarding data

Data Issues (cont'd)

- Evaluate the required data consents and authorizations
 - Where does the relevant data come from? Is it yours, or a third party's, a mix?
 - Did you obtain it from others only for a particular purpose? Is it covered by a privacy policy that allows your use?
 - Common warranties may result in liability if these issues are not addressed
- Determine what data (if any) has regulatory implications or requires special handling under the laws, and what vendor management obligations you may have
 - Data law may not apply to you (i.e., CCPA exemption), but it may to your members/users/clients
 - If a vendor collects data for you, they must comply with the law (i.e., consents)
- Cross-disciplinary issues – should involve input from IT and insurance/risk management
 - Technical evaluation of vendor security procedures and reports
 - Consider cyber liability insurance

Data – Common Provisions

- Defining “Customer Data” and asserting ownership
- Establish standards for security and protection, with reference to laws and technical standards
- Specify where your data will be stored (U.S. if possible) and where it travels/is processed from
 - Vendor responsible for legal compliance for their processing outside the U.S.
- Minimize the vendor’s license to use data for purposes unrelated to the services (including aggregated data)
- Return/destruction of data – establish specific procedures and time frames
 - Survival of confidentiality and security requirements for retained data
- Vendor must be responsible for processing by affiliates and subcontractors
- Compliance with data laws/regulations
 - Vendor may not agree that laws/regulations apply directly to them
- Vendor assistance with your compliance with laws
 - Allocation of costs/expenses
- Cyber insurance for security breaches and unauthorized disclosure of data
- Disaster recovery/business continuity with details
 - Informed by your IT/technical evaluation
- Service level and warranty concerns
- May require a Data Processing Addendum or other regulation-specific form, depending on which domestic and foreign data laws apply

Confidentiality and Information Security

- Separate, but related, and both are necessary – Confidentiality section is not boilerplate!
 - Common strategy – Confidentiality section covers “Confidential Information” generally, including data, and Data section covers specific procedural/security requirements
- Defining “Confidential Information” – not only if marked, reasonable context of disclosure, third-party materials – should expressly describe Data as Confidential Information
- Permitted disclosures – to whom and for what purpose (personnel, contractors, members, gov’t)
- Return/destruction of Confidential Information and surviving obligations – consider overlap with similar provisions on Data
- Specific procedures for notice, cooperation, and remedy in the event of security breach
 - Defining security breach
 - Reference to technical standards and audit procedures
 - Expenses for responding to breach and dealing with government/individual claims
- Indemnification – specific to security breach
- Liability cap – should not be subject to general limitations on liability
 - Ideally uncapped, but consider alternatives for “super” caps, multipliers, insurance

Selected Key Terms for Licensed and Services Solutions

Critical Item – scope of your license/rights to access/use; more \$ if you exceed scope

- What: Be extra clear on what is being licensed to you; cryptic product names in the order form can create issues, as vendor product names change or are similar; reference the documentation and specs to define items in the order
- Who: Be specific about who can be authorized users now and in the future (you, affiliates, contractors, members, auditors, advisors); get right to assign to your successors if your organization is likely to evolve during the term
- Where: Avoid specific equipment or site limits on your use
- Beware of vendor audits; provide favorable pricing to buy more if you are short

Selected Key Terms for Licensed and Services Solutions (cont'd)

Critical Item – scope and timing of the implementation

- The journey to get the software/solution configured and ready to use (“go live”) with your data
 - Comprehensive Statement of Work (SOW) – who will do what, timing, clearly express what is within and outside the price, amendment process
 - Data conversion, integrations, and interfaces to your other systems are larger risks
- Project milestones to measure progress and payment
- Concept of “acceptance” is one of your best protections – hold money for final acceptance, include multiple stages of acceptance throughout development

Selected Key Terms for Licensed and Services Solutions (cont'd)

Critical Item – securing vendor's ongoing performance and predicting future costs

- This is your day-to-day operational risk
- 4 typical buckets: help desk, fixes/support, maintenance/upgrades, and hosting services
- Help desk – Is it unlimited or hours bound, what is in scope, escalation, require any extra charges to be pre-approved; we are seeing a trend to narrow scope of help desk function
 - Updates/fixes, upgrades, and versions (if not included, more \$), define each of these carefully (not overlapping); try to limit vendor discretion to categorize
 - Always get updates/fixes, and push for upgrades; versions probably out
 - Are regulatory updates included?
 - How far back will the vendor support the service? When will the next version come out?
 - How often will I have to upgrade or do a new version?
 - How much will that cost me? Do I have a say on upgrading?
 - Are there costs associated with deploying updates and upgrades?
 - Add term that you won't lose functionality or features on a new update, upgrade, or version (need to repurchase what you had at one point)

Selected Key Terms for Licensed and Services Solutions (cont'd)

Critical Item – securing vendor's ongoing performance and predicting future costs (cont'd)

- Include SLAs/Performance Guarantees (support/performance)
 - How/where are service levels and availability measured?
 - Don't allow many exclusions from uptime (except maintenance window)
 - Provide a recovery time and point objective for hosted and cloud solutions
 - Reporting? Remedies (not just a credit but prompt correction)
 - Right to terminate for recurring SLA issues
- Hosting services description should be comprehensive – manage, upgrade, scale up and refresh the infrastructure, security monitoring, patching, increasing capacity; get usage metrics; ability to do analytics/reporting; comply with laws
- Push back on general statements that vendor may charge extra
- Avoid incorporation by reference of other vendor terms; those typically will be drafted to narrow liability and remedies and may conflict
- Vendor indemnification/liability limits impact performance and your cost
- Force majeure clause is not boilerplate! Can't waive disaster recovery, can't waive the SLA (except for time to DR), no performance, no pay, don't exclude obligation to pay

Selected Key Terms for Licensed and Services Solutions (cont'd)

Critical Item –continuity of use; term, renewal and termination

- Term - Fixed, auto-renewed
 - calculate end date from go live for longer term
 - term of the contract and of the licenses/services may be different (different SOWs, different products, may be able to end hosting and continue license on prem)
 - Define when ongoing hosting/service/support fees start (preferably on go live)
 - If optional items are of interest, provide for pricing now and a period of time to bring them into the contract
- Renewal - Negotiate renewal rights now (try for at your election for x years); mutual right to non-renew can be problematic and gives vendor leverage to renegotiate terms
 - Avoid price increases during the “initial” term; provide pricing caps for renewal terms (even small annual increases can become material over time)
 - When will you get notice of renewal pricing/pricing changes?
 - If each party can non-renew, provide for ample advance notice so you can implement a replacement system or solution
 - Provide that you can get a copy of your data from the hosting/cloud vendor upon request and minimize charges for that; can you import your own data?
 - Avoid language that renewal must be on vendor’s standard terms at the time

Selected Key Terms for Licensed and Services Solutions (cont'd)

Critical Item – continuity of use; term, renewal and termination (cont'd)

- Termination
 - Consider what would cause you to want to exit this solution/contract and provide for that (regulatory changes, program elimination, decrease in usage, vendor unexpected charges)
 - If you want T4C, provide for a termination fee
 - Avoid any rights to terminate “immediately”; you have nowhere to go if that happens; you need a right to cure and dispute without suspension or termination of use
 - Termination for breach in 30, 60, 90 days is problematic; you usually can’t transition in that time
 - Push back on right to terminate your license/hosting if there is an infringement claim unless last resort
- Transition – Termination must allow transition time; always add a transition provision; what needs to be transitioned? How/when will vendor return your data? What transition assistance will vendor provide? Costs? Do I have to pay if terminate for breach; can I withhold money? May be able to negotiate a right to extend the termination period for x months.

Questions?



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