



## Understand how bargaining power shifts in IT procurement transactions – and its impact *(by Sean Lynch)*

It is not uncommon for the following scenario to come across my desk: the business customer has engaged an IT supplier; the solution has been delivered and implemented but no contract terms have been signed (and may not have even been tabled). The supplier then decides to be a little “difficult” when it comes to concluding those contract terms.

It is well-known that many IT projects are progressed and delivered in great haste. Commercial managers are often driven to “deliver the solution” with little or no regard for the contracting process or good governance generally. The result is often that “the numbers” in the spreadsheet that were sent to the customer business stakeholder at the beginning, and which formed the basis of the decision to proceed, fast become irrelevant and grossly inaccurate - as substantially greater spend is incurred.

Where does this greater spend come from? There are many sources. Items which could have and should have been fixed priced in the contract are essentially left open to be completed on a time & materials basis. There may be costly disputes around delivery scope, detail, quality or timing – with the customer scrambling to piece together its view of what it believes it has ordered. The actual spend from ‘budget’ to ‘actual’ could be double, triple or higher. Furthermore, once the intended system is implemented, consideration quickly turns to the terms upon which the system will be supported, and without having addressed and agreed those terms with the supplier at the very beginning (i.e. before they are selected), then the bargaining position instantly swings in the supplier’s favour.

Customers in this position will cast their mind back to that point in time when they were assessing and shortlisting potential suppliers, and remembering that at that point they had some power. In the above scenario, that power has shifted almost 100% in favour of the supplier - and that likely occurred soon after they were selected and were instructed to commence steps to implement.

Although there are usually some “levers” which lawyers can use with their customer client to attempt to steer the supplier into the domain of “reasonable thinking” (one being that the supplier’s liability is uncapped), there is simply no better time to address these points than before the supplier is engaged.

If you are proposing to spend a sizeable sum of money on some form of technology solution (or even if the sum is not that large) it is essential that you put in place an effective procurement process upfront, including the contracting documentation (or allowing for the negotiation of the supplier’s contract terms) - before the desired supplier is selected and engaged (i.e. their personnel arrive on site or otherwise commence work). If this is not done, then the consequences could be catastrophic, even in the context of smaller spend projects.

For further information or a meeting to discuss your needs, please call +64 9 948 8433 or email [admin@lynchandco.co.nz](mailto:admin@lynchandco.co.nz).