

Approaches to Painless Procurement

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Requirements – “What Do We Really Need?”



Requirements:

Step 1 – Document “AS IS”

Break down current operations in (painful ☹️) detail:

- Analyze and document all tasks, functions, and workflows
- Which are automated?
- How do each of the automated functions work?
- Where are the gaps, failures, problems – both technical and operational – in your “as is” world?



Requirements:

Step 2 – Set Goals

- Set goals that reflect your new self-awareness!
- Don't fix things that aren't broken
- Goals are outcomes - Don't confuse goals with functional requirements
- Be realistic



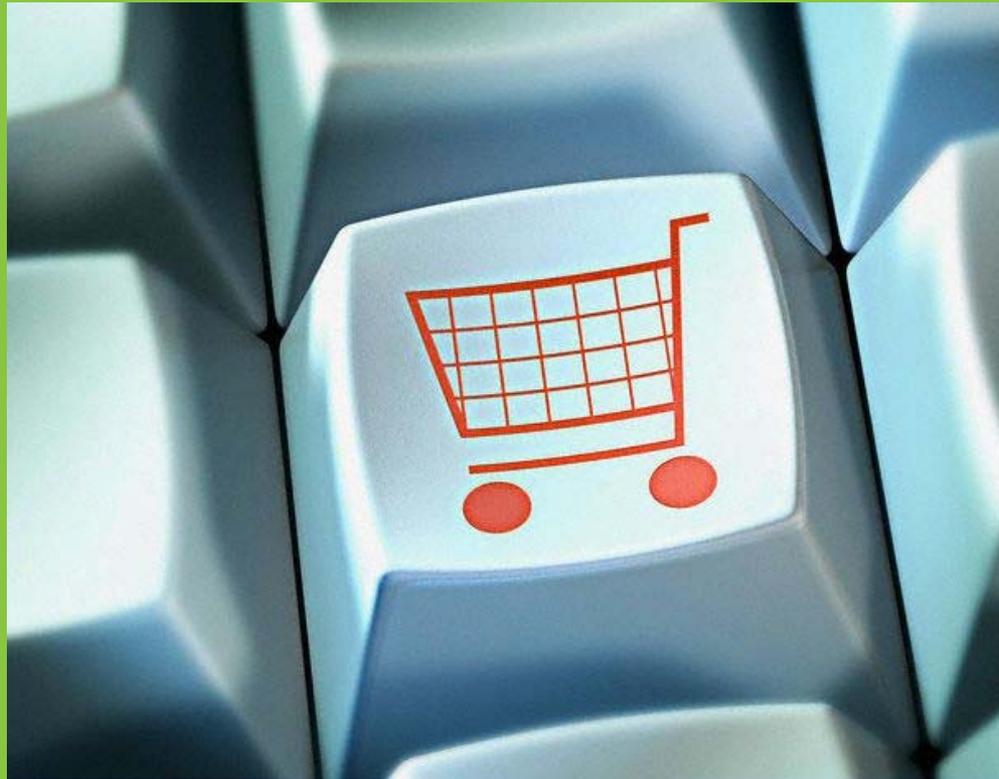
Requirements:

Step 3 – Define Requirements

- Functions, not goals
- What, not how
- Mission driven
- Mandates vs. Preferences



Requirements Drive Decisions



Public – Private Strategies –

“Are We in this Together?”

“Are We Buying the Right Solution?”

Acquisition Strategies: *Are we in this together?*

A Relationship “Checklist”

- ☀ **Adversarial or "Mutually Fulfilling"?**
- ☀ **“Buyer” or “Buyer and Partner”?**
- ☀ **Rule-Based or Goal-Driven?**
- ☀ **Resistant or Receptive to Vendor Ingenuity?**
- ☀ **Risks Avoided or Risks Shared?**
- ☀ **Lowest Price or “Best Value”?**
- ☀ **“*Caveat Venditor*” or Transparent Competition?**

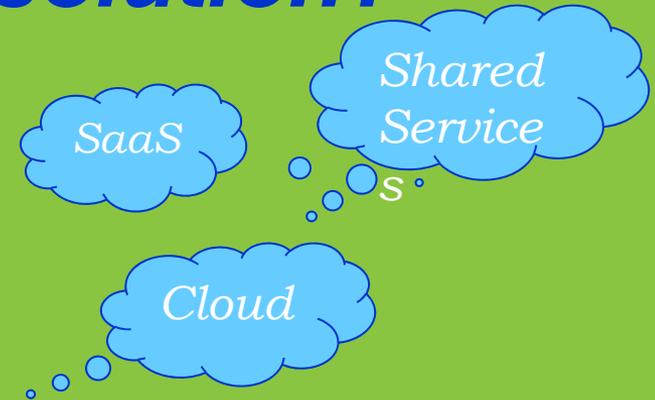
*Is the sum of the relationship
positive or negative?*

Does the acquisition strategy facilitate or frustrate success?

Technical Strategies:

Are we buying the right solution?

- ☼ Contemporary objectives change both what is being acquired and how it will be provided.
- ☼ Fiscal constraints require states to consider new means to acquire solutions and deliver services.
- ☼ Infrastructure-dependent solutions may be an unaffordable anachronism.
- ☼ States must conform service delivery to the “web enabled” expectations of the governed and served.
- ☼ Eliminating remaining barriers which exclude “best in class” providers and solutions serves the public interest.



Principles to Consider:

IT is not a commodity!

Buying solutions is different than buying supplies.

Fair competition can accommodate unique vendor answers to a state's business problem

What Does Everyone Want?

What you want

- ☼ Reasonable cost
- ☼ Low risk
- ☼ Reliable outcome
- ☼ Happy Execs
- ☼ On time
- ☼ Happy customers
- ☼ No bad press

What they want

- ☼ Good references



The Acquisition Process

- “How Are We Really Going to Get This Done?”

IT Procurement in Georgia

- ⚙ IT projects are first vetted with Georgia Technology Authority (GTA) to ensure compliance with state IT standards and principles.
- ⚙ Projects > \$1M in value receive project oversight through Internal Verification & Validation providers, a 3rd party that monitors the project through to completion.
- ⚙ Flexible procurement methods, terms and policies allow sufficient maneuverability in the contracting process resulting in successful technical implementations.
- ⚙ Our 7-Stage Strategic Sourcing process ensures sufficient planning for proper needs assessment and technical qualifications are clearly defined.

Seven Stages of Procurement



- Identify need for purchase
- Start selecting cross-functional team

- Identify cross-functional team
- Decide on required analysis
 - Develop Factor profile
 - Generate Vendor Portfolio
- Identify most appropriate purchasing method

- Develop Sourcing strategy
- Develop Bid Factors for sourcing
- Generate questions for RFP
- Generate evaluation criteria
- Create RFP according to format

- Post eRFP advertisement or bid notice on GPR
- Conduct Q&A session
- Conduct offeror conference
- Select Implementation path
 - Develop Evaluation/negotiation plan
- Receive bids

- Select Vendors
- Conduct administrative review
- Evaluate technical proposal
- Analyze cost proposal (TCO calculation)
- Conduct Negotiation
- Finalize contract

- Issue intent to award
- Handle vendor protests
- Implement new agreement
 - Issue notice of award
 - Document and store contract/purchase details

- Create contract administration plan
- Sustain results
 - Track contract performance
 - Track vendor performance

Contracting Methods and Terms – “What’s The Deal?”

Impacts to Competition, Creativity, Cost?

- ⊗ Do the T&Cs facilitate competition and accommodate competitors?
- ⊗ Do T&CS frustrate or enable excellence and innovation?
- ⊗ Do T&Cs lead to price premiums without commensurate value?



Would You Commit to This?

- ⊗ Do T&Cs reflect realistic assessment of risks and risk mitigation techniques?
- ⊗ Does the contract accomplish mutuality in risk and responsibility?
- ⊗ Are vendors able to address T&C problems without risk of disqualification?
- ⊗ Could the T&Cs be selection-determinative?
- ⊗ Is a means provided to tailor T&Cs through negotiations while retaining essential fairness of competition?



What are We Shooting at?

- ⚙️ Have eligible vendors been aware of and had equal access to face-to-face meetings and on-going dialogue regarding your upcoming procurement?
- ⚙️ Have you shared your budgetary and technical constraints or preferences?
- ⚙️ Is there room for creative approaches or alternatives?
- ⚙️ Does your scoring accurately reflect your priorities?
- ⚙️ Have you reflected people needs as well as functional/technical?



Terms and Conditions – “Where are the Hard Points?”

Critical Terms & Conditions

The Issue

The Vendor View

- ⚙️ **Limit of Liability:** *Risk exposure can be far greater than contract value; Won't contract with states unwilling to accept LoL*
- ⚙️ **Indemnity:** *Obligations must be insurable and related to contractor fault; can't accept "enterprise exposure"*
- ⚙️ **IP:** *States do not need to own contractor IP; vendors cannot confer ownership of core assets of enterprise*
- ⚙️ **Warranty:** *Obligations must be bounded, affordable and of reasonable duration; primes cannot warrant more than what they can acquire from software sources*
- ⚙️ **Retention:** *High performance bonds and withholds add costs (usually passed on) & limit competition*
- ⚙️ **Mutuality:** *For IT solution contracts to succeed, States must accept their share of performance responsibilities*

Limitation of Liability: Converging Views?

(Subject to specific state
legal requirements)

- ⊗ All companies must balance financial risk with potential gains.
- ⊗ “Risk Managers” view with great concern contracting with states that refuse to limit LoL or set high limits.
- ⊗ Equal concern arises where states refuse to exclude consequential, punitive or other “special” damages.
- ⊗ *LoL can produce higher bid prices and dictate “bid/no-bid” decisions.*
- ⊗ Industry believes a “commercial approach” – linking liability risk to performance value – will enhance competition and lower prices.

NASCIO 2010:

56% (28 states) include limits on liability clauses – “a drastic change” from 2004.

32% (16 states) have unlimited liability.

“For state CIOs to be able to provide quality IT services, at an affordable rate, many states have begun to provide limitations on liability for IT contracts.”

A state should not hold vendors responsible for indirect damages, including special or consequential damages.

Indemnity:

The Issue & the Oregon Example

- ⊗ Some states demand indemnity for “intangible injury” claims and regardless of vendor fault (“strict liability”).
- ⊗ Industry is willing to indemnify but on certain limiting principles:
 - ⊗ *Limit indemnity to 3d party claims due to death or injury and loss or damage to real or tangible personal property.*
 - ⊗ *Limit indemnity to “willful misconduct” or “negligent acts or omissions”.*
 - ⊗ *Seek contractor control and management of defense.*
 - ⊗ *Avoid scope of indemnity negating any limitation of liability cap.*

Oregon § 10.2:

IP indemnity extends to claims that the “Deliverables or the System” infringe.

A right of refund is not provided as it was not thought to be an adequate remedy in all situations.

The IP indemnity provides for a variety of remedial measures as the contractor may propose (subject to Agency consent, not to be unreasonably withheld).

Remedies include replacement or modification of infringing IP or obtaining a necessary use license.

Intellectual Property: *Fundamental Choices*

- ⊗ The issue is ownership vs. license.
- ⊗ For IT solution providers, IP issues are enterprise-critical.
 - ⊗ *To protect initiative and preserve shareholder value, technology firms often insist on retained ownership of IP.*
 - ⊗ *Many states, however, assert “ownership” of IP delivered, developed or used on state contracts.*
- ⊗ Vendors uniformly believe that ownership is neither necessary nor in the public interest. A “Government Purpose” License can convey all rights needed
- ⊗ Insisting on ownership will drive away “best in class” firms

Alternatives:

- ⊗ Vendor owns IP/Licenses State
 - ⊗ State obtains “government purpose” license. *As adopted in California (GSPD 401-IT ¶ 37) and Oregon (§ 6)*
- ⊗ State owns IP/Licenses Vendor
 - ⊗ State grants vendor a license to use with other customers, to create derivative works, etc. without duty of “accounting.”
- ⊗ State Owns IP/No License to Vendor
 - ⊗ State owns data where developed at state expense. Absence of license poses risk to future vendor “freedom of action”
- ⊗ Joint Ownership
 - ⊗ Perhaps attractive in theory, unwieldy and risky in practice

Q&A

