

Welcome And Guest Introduction

Julia McIlroy 0:03

Hi everyone, and welcome to NASPO's Pulse, the podcast that focuses on current topics in public procurement. I'm your host, Julia McIlroy. Today I have the privilege of sitting down with the one and only Megan Smyth, NASPO's Director of Legal Education and lead of the Law Institute. We'll discuss how SaaS and subscription-based services are changing the way states purchase, manage, and think about technology. Hi, Megan. Welcome to Pulse.

Megan Smyth 0:32

Hi, Julia. Thanks for having me. I'm excited that we are going to talk about legal things today. So thank you for being interested in the legal side of these issues.

Megan's Legal Path To NASPO

Julia McIlroy 0:44

I'm super glad you're here. So to start, I'd love to hear about your professional background and what led you to NASPO.

Megan Smyth 0:52

Sure. So I practiced civil litigation defense in the Commonwealth of Kentucky for about eight years. That took me many places and I had many uh interesting experiences as a trial lawyer, but that gets uh old pretty quickly. You're doing that type of law. So I started looking for something else where I thought I could be useful and use my skills. And um, a job, a policy job, opened up at NASPO, and I had a friend who worked there, so I applied and I've held many positions here at NASPO, including director of research and innovation. I was general counsel for about three years, but now I'm back to doing what I really love, which is the education piece. Um, so educating the attorneys who do the contracting work in the states, in state government. That is my main audience. And then the CPOs and the staff that they serve, who their clients are, uh, are also, of course, of high interest to NASPO, as they are our primary members and our state members. So the attorneys assist them in doing their work and make sure that everything goes well on the contract side. And that is what I'm focused on at this point in my NASPO uh career.

When Procurement Leaders Have JDs

Julia McIlroy 2:07

Well, you've been invaluable to NASPO, and as you've said, helped many positions, which is great. How common is it for CPOs to also be JDs?

Megan Smyth 2:17

It is, I would say somewhat common. Um, it certainly the the skills that you learn as an attorney, and then if you've practiced at all, um it gives you the skills that are required to be a leader in that sort of high volume, fast-paced environment. Um, and it allows them to sort of serve a dual role in that they sort of know what's going on with the contract side and they understand the legal aspect. That helps them be more of a strategic planner for this the procurement office, generally speaking, um, than if they, you know, just specialized in procurement, which is also its own thing. And when you have a CPO who is who has just done procurement their whole career, they can have a conversation with the attorney that is unique because they've they have a different perspective. And so I think that the attorneys who we have who are CPOs, they bring that their perspective to the other CPOs. And it's a nice sharing of, you know, here's how I interact with my attorneys. And there are a lot of attorneys in the contracting office who are just contracting officers with JDs, they're not necessarily practicing attorneys. Um, so there's a lot of variety out there. There's many things that attorneys can do in state government, specifically in procurement.

Julia McIlroy 3:36

That's a great point. I was speaking to a recent law grad and said to him, you should really consider procurement because you can use all those skills that you learned in law school. He didn't think you wanted to be a trial attorney. I mean, there's many ways that you can use that degree, but he said, consider procurement. And he's in the state of California, which has a robust central procurement office.

Megan Smyth 4:02

Yeah, it is a great option. It's I also push, you know, whenever we speak to law, whenever I get an opportunity to speak to any law students, I tell them, you know, if you get to your third year of law school and you don't necessarily want to sit for the bar, you don't want to practice in a litigation firm, or you don't want to do that. Look at these alternative job um paths for you in state government because you could then do your time in state government, leave and do other things, you know, on the other side of you can have two different careers essentially as an attorney if you if you chose that path. And if you don't want to sit for the bar, being a contracting officer in state government, you would do a lot of good because you bring your whole legal education. I know you've at least had two semesters of contracts, probably more. Um, and that is uh is invaluable. So if you're thinking about taking a year off before you take the bar or looking for something to hone your skills while you study for the bar, honestly, a state procurement office would be a great place to work.

SaaS Disrupts The Ownership Model

Julia McIlroy 5:02

So, as far government agencies adopt cloud-based tools and subscription platforms, how are SaaS agreements changing the traditional approach to public procurement?

Megan Smyth 5:13

I would say it's a great question. And I would say the biggest, you know, disruptor that that SaaS is bringing is the it's not a traditional buying model. It's not what we're used to. It's not, I'm gonna purchase this thing and it's gonna arrive, and then I don't need any outside maintenance or updates. I just have the thing and it's mine, and that's it. That is not how SaaS works. Um, and it's being disrupted. That that purchasing model is being disrupted by subscription services, not just SaaS, but subscription services built into even your regular contracts. So, for example, you buy a printer now, you purchase the printer, you own the printer, but you're paying a subscription service for the basically the rights to print on that printer to use the proprietary ink and the technology and the software of the printer company. So it's not like you used to buy a printer and then you buy the ink and that's it, you're done. There's there's additional things that need to be considered with regard to the purchase. Um, there's also huge differences in the models that you choose within software as a service.

IaaS To PaaS To SaaS Explained

Megan Smyth 6:19

And we, I like to give the illustration of thinking about it on a on a sliding scale, right? So if you think about on-premises full technology purchases, that's everything. You're in charge of everything as the state, you're in charge of the data, you're in charge of the uh the operation system, you're in charge of the servers, you're in charge of the storage, where the data is housed, you're in charge of the network, you're in charge of everything. If you go toward and then you start going toward software as a service, you see infrastructure as a service. That's where the state is not in charge of things like the visualization, the servers, the storage, and the networking. That is taken off the plate of the state, and they can focus on using the infrastructure itself. Then you've got platform as a service, which is where you've got the software that everything's built on, that is given to you as the service, and then you push it all the way to the software as a service subscription model where everything is handled by the software provider. The state is not housing any data, it's not holding this information on its servers, it's using an outside service. And there, so there's a sliding scale you can go and the state can decide. And every project is different. Every project needs a different level of management. So that huge distinctions between the

levels, even of software as a service. That when people say that, what they you need to say, what do you mean by that? Do you mean uh that we have everything or that we're only working with what's provided to us by the software company and the software provider?

Laws That Lag Behind Technology

Megan Smyth 8:02

It's also important to understand that right now, as we sit here in 2026, our laws do not fit our technology reality. And so these current frameworks and laws that the state has, all the procurement codes, are built around this idea of an ownership model rather than a subscription service access model. What this does is requires you to focus on reseller networks, uh, subcontractors, value-added resellers instead of a single accountability model, which is much easier to manage from a contract perspective. You've got one throat to choke. Over here in this software service, you might have subcontractors and software manufacturers who aren't the person that you contracted with. And that can cause lots of issues. So it's important to understand what type of agreement you're talking about before you even go to the negotiation table because you don't even know what you need to ask them if you don't understand what the model means.

Renting Versus Owning Risk Tradeoffs

Julia McIlroy 9:02

That's a really great point. It almost feels like it's deciding: am I purchasing a vehicle? Yeah. Am I renting a vehicle? Am I leasing a vehicle? Yeah. Am I paying someone to be my driver? I mean, more complex than that, but basically you're trying to, it's still getting yourself from point A to point B, but there's all these different decisions that need to be made.

Megan Smyth 9:25

That's a great analogy. I also like to think about housing in this way, right? So I can rent an apartment and I can rent an apartment in a place where I do nothing, right? They mow the yard, they take care of all the maintenance and appliance. They even come in and change the air filters in my HVAC. I don't even do that. All the way to this is my private property, and I'm in charge of literally every single thing on it. I own the mineral and surface rights. That, like, there's a huge distinction there. And or a hotel. You can think about going to a hotel as using a software model, right? You're going, you're using their services. You're entirely dependent on their water system, their electric system to maintain whatever it is you're doing. Um, so there's lots of analogies and ways to think about this. I think that's really helpful because it feels really complicated, but it's not, because we can apply it to other things in our life that make it make more sense. So we're all dealing with this. Everyone is

dealing with this. Wow, now I have to pay all of these subscriptions. It's a meme at this point on the internet about how many subscriptions we have to pay every month. Um, so it's happening to everyone, but it's happening to the state, obviously, at a bigger and much bigger liability issues at stake.

Julia McIlroy 10:36

And we haven't discussed it yet. We will, I'm sure, a little later here, but risk is a large component. Like how much risk are we willing to take on in the I want to rent versus I want to own this property.

Megan Smyth 10:52

Yeah. And I think people understand that because they go through that decision-making process in their own lives, right? Do I want to buy a house and deal with all of that, or do I want to stay like there's advantages to both? I don't think the distinction of, you know, you're lighting your rent money on fire every month is even true anymore because you're getting benefit out of being a renter, right? You don't have that mental load. You don't have to think, you don't have to save money for huge purchases, you don't have to worry about that stuff. And that is directly analogous to how the state should think about these, right? How much of our attention capabilities do we want to put toward this versus a trusted supplier that we think can provide this service to

Click-Through Terms And Update Traps

Megan Smyth 11:32

us?

Julia McIlroy 11:32

Click-through agreements are everywhere today, but many procurement professionals may not realize the legal and operational risks hidden in standard terms and conditions. So, what are some of the biggest concerns agencies should be paying attention to?

Megan Smyth 11:47

Well, I would say that this is one of the places where I always say think about the end at the beginning when you're contracting. Um, because you shouldn't have a term and con a term or condition change that is material in any way to the contract without getting notice from the supplier that that particular term or condition has changed. And that is something that you're gonna have to write into your contract at the very beginning. So you say to the supplier, if you are changing a material aspect of this contract, such as delivery date or scope, um, you have to notify us within, let's say 30 days, 60 days, 90 days. Um, and then

we get an opportunity to say, oh, I don't think, I don't like that. I think that that violates something else, that's against our state law. We get you get as the state get an opportunity to respond before that change just happens and you can't do anything about it. So that's definitely an upfront requirement you need to put on your vendors and suppliers that they are gonna notify you when they make those changes. You don't want click-through terms and conditions, you want static, consistent terms and conditions that everybody understands and have agreed on and that are gonna be consistent through the life of the contract. Now, that is unrealistic to think that things aren't gonna change, but that's why you need to write in the requirements of notification. Additionally, sometimes in an update or a click-through that your so it's not necessarily a click-through, right? It's your state employee logging into the system in the morning and it's saying, Hey, it's time for an update to X software. We're gonna update. Are you would you do you accept all these updates and terms and you click yes and you let it update? What can happen there is that may be adding additional capabilities that might be a risk to your data, to your systems, that you're not aware of because it's happening in an update. It's being, it's the software is being changed, it's being modified. You need to understand what that change is doing and what is happening when those updates are coming through. And again, that's something you need to contract for to require that type of notification. So we all get, you know, your your computer wants to update, you sort of mindlessly go, okay, and you click on it and let it do it, right? And that's how we all are, because you just assume that, well, it's you know, nothing's huge going to change, and I probably won't even notice it. That's right, you won't notice it, and that's what they want is you not to notice it. So it's important that you have the team, the legal team, the that the practitioners, that the end users of the software understand what's in the contract. Contract management does not end when you put the wet signatures on the paper. That's when it just starts. You are just then needing to explain, and I tell my attorneys, sit your clients down with the end users and the agencies and explain to them what this contract means. They should be able to read the plain language of the contract and understand it. And if they cannot, you have not done your job. Like your job as an attorney is to make sure that they understand what they're agreeing to and signing at all times. And you should modify the language if they don't understand it, if it doesn't make sense, if it doesn't comply with your other terms of art and definitions. Finally, I will say that um with click-through agreements, um, it's important to think about what you've put in your contract with regard to performance metrics and specifically and data security specifically. So you don't want any changes to your performance metrics or your data security without you knowing about it. Those are two very specific areas I would call out specifically in my contractual requirement that they notify me of material changes. Another thing I would encourage everyone to look out for with SaaS agreements is boilerplate language for the suppliers who want to get around contractual disagreements with the

click-through agreements with clarification as to who has the authority to bind the state. So when you are as a procurement professional clicking on a click-through agreement or an update, you are you may not even have the authority to agree to what you are agreeing to. And there are states who are now legislating contract statutes to basically say if X thing is not in the contract, actually it is, and we're going to read the contract as if this term or condition was in the contract to begin with, because the state employee does not have the authority to bind the state in that way. It nullifies the modification or the update. So that is something else that everyone needs to look out for because suppliers put that in their contracts for their private entity uh clients, but the state can't agree to that. Are you saying that suppliers aren't always transparent?

Julia McIlroy 16:46

I'm joking. For all the suppliers listening, we love you. I would never suggest that. Absolutely not. Quick question could they argue, could the supplier argue apparent authority by that procurement person?

Megan Smyth 17:01

Yeah, they can try. But if the states, especially if they've legislated about this, um, and it's pretty clear to everyone that end user John Doe in the education office doesn't have the authority to bind the state. You know, there they can.

Julia McIlroy 17:18

It should be obvious, is what you're saying.

Megan Smyth 17:20

It should be obvious. And they can try. I I I say they there probably is a set of facts under which a supplier would be successful, but I'd have to hear that set of facts.

Julia McIlroy 17:34

Always the lawyer. That's what we love about you.

Megan Smyth 17:36

Yeah.

The Battle Of The Forms

Julia McIlroy 17:37

So public procurement is built around transparency, compliance, and negotiated terms, while SaaS suppliers often prioritize speed and standardize contracts, as we've discussed. So, where do you see the biggest points of tension between those two worlds?

Megan Smyth 17:54

So I think it's this is an important point for the state, for the procurement officials and the attorneys to understand that look, they're not the supplier community is not being entirely unreasonable as we all wish they were being. So we could just say, well, you're being entirely unreasonable. Because they're not. They both have an interest in consistency for liability purposes and many other internal business reasons inside any corporation. So you've got to think about the number of contracts that a supplier like uh Hewlett-Packard has, right? 10,000 contracts, one of their attorneys once told me. So the state has that many contracts too. So it's really two entities who care about their viability and their long-term success. And what we call that is the battle of the Forbes, right? I've got my terms and you've got your terms, and my terms are better than your terms, and I want to use my terms, and so I'm gonna red line your contract until you can't even see the black and white anymore because I want my language in there because it's good and I know that. Now, that's every attorney I've ever met is gonna say that, is gonna say that their choice of language is better. But what's important is to get everyone in the same room, or at least on the same page, of discussing where the rubber really meets the road. So you've got to ask yourself sort of like a series of questions, right? What is it that the state needs for this to work? What does the supplier need for this to work? And where is the compromise point? Where do those things cross over each other? And where can the state compromise and where can the supplier compromise based on getting government contracts, which is can be a huge boon to your company in many ways. Um, they're always a consistent client, right? The government's always gonna be there to buy from you even in difficult economic times. It is advantageous for companies to go for government contracts, but you've got to do it in a different way than you approach the private sector. So every time I get an opportunity to talk to suppliers or supplier attorneys, I encourage them to create a state-friendly set of terms that you have already sat down internally and had a discussion about what you can give on and what you cannot when it comes to contracting with the government. And that needs to be, you know, the company needs to have a you know a moment where they say, is this for us or is this not? Because contracting with the government is not for everybody, it's not right for every company. And so if you're not set up for it and you're not prepared, you're showing up, you know, uh with the wrong tool for the for the wrong job. So the battle of the forms doesn't really help anybody. Uh, I encourage everyone to sort of come with their best state-friendly or government-friendly terms, um, and then read the actual language. Is there a difference, or are we just talking about

verbiage, semantics, um, term definitions that we could come to an agreement on that don't really affect the major points in the contract?

Julia McIlroy 21:03

I think you have a great point about whom whoever wrote the contract, whether it's the supplier, the state, or another entity, they really like their contract. And they think all the terms and conditions are, you know, fantastic, and they don't want to change. So I think that's great advice to suppliers to understand when you're doing doing business with the state, it's not the same as doing business with Acme Inc.

Megan Smyth 21:28

Correct.

Why Contracts Fail In Real Life

Julia McIlroy 21:29

And to be prepared to maybe give on something like indemnification, for example. I think that's a challenge for every state to agree to. Absolutely.

Megan Smyth 21:38

Indemnification is ironically probably the thing that we talk about the most, but it gets litigated the least. And and the answer to that is complicated as to why. But the main thing I can say, and this is uh spoiler alert for probably later on in our conversation as well, but contracts don't fail because the contract language was bad. Contracts don't fail because you forgot to put in a term. Contracts don't fail for those reasons. It fails in the contract management phase and the implementation and the people working together and the actual humans having to talk and work together. That's where these things fall apart. Not because we went to court and the George said, the George, the judge said, this contract is unconscionable. That that never rarely, I won't say never because I'll get in trouble if I do, but that rarely happens, right? And anytime you're going to litigate about liability, things have gone so bad at that point that no work is actually getting done, right? There's no actual, this is we're just cut, we're just sweeping up after the tornado has come through, right? We're not actually fixing anything at that point. So I find that we spend a lot of time talking about indemnity, and we just spend more time talking about things like data and cybersecurity and um, you know, what the actual remedies that we're gonna have if things go wrong, but not thinking about the complete collapse of the contract. Because it's gonna be smaller issues along the way that you need to work out and talk about. And hopefully you've contracted for those things to happen and you have laid out, you know, here's what we do, A, B, C, D, E.

Julia McIlroy 23:20

In my experience, when I had an end user come to me and say, I want to look at the contract, I know things were going badly. Yes. And because those are almost fighting words. Like, let's take a look at the contract and see what it says. And of course, I would ask, what's happening? What were the expectations? What's not being met? Let's see if we can work our way out of this instead of going to the attorneys. Because yeah, it that never goes well.

Megan Smyth 23:48

Yeah, and honestly, like no shame. But honestly, I would have said, why didn't you know that before now? Like, are you telling me you you don't you haven't read this contract? Like, because I find that the state ought likes to punish suppliers all the time by saying, Well, you didn't read the RFP, you weren't responsive, et cetera, et cetera, et cetera. Well, I would ask the same question back at them. Are you reading the contracts? Like, do you understand what's in the contract? Because the time when something has gone wrong and you're unhappy, like you're unhappy with this supplier, and you come to the attorney and you say, I want to look at the contract, you're right. You're already mad, something's already gone wrong. And the fact that you don't know what's in the contract tells me that you've just been winging it up until now, which is not great. So I would sort of go back to the fundamentals there and say, your end users and your contract managers need to understand what's in the contract before you get a problem. Because think about the communication going back and forth between the supplier and the person at the state. If they get the the gist that you don't even know what's in that contract, you don't even know what their obligations or requirements are, it's going to be way easier for them to get out of whatever situation they're in.

A Desk Stain And A Reality Check

Julia McIlroy 25:01

I had an end user come to me one time and say that they wanted the university to essentially fire the state's correctional industry. Every state pretty much has correctional industry, they make furniture in many states and garments, other things. And I had to explain to them why that was not going to happen, number one. And number two, let's work out the problem because we're not going to fire correctional industries.

Megan Smyth 25:26

Right. Right. Yeah. And that's and look, how much is it going to cost to rebid that contract, go through all everything all over again when you could just work with the supplier that you have within the contract that you have if you've done it right from the beginning?

Julia McIlroy 25:43

Yeah. I think they didn't like the the color of the stain on the desk, is what it was. But anyway.

Megan Smyth 25:48

Yeah. Okay. Well,

Part Two Tease And Closing

Megan Smyth 25:51

I know.

Julia McIlroy 25:51

What are you going to do? Megan, thanks for joining me today. I appreciate it. And to our listeners, please join us for part two of the outstanding conversation with Megan Smith. And remember, we work in the sunshine. Bye for now.