

New Approach to Outsourcing Agreements Yields Reduced Legal Costs

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Today's business and economic climate requires a new approach to the negotiation, structuring and drafting of outsourcing agreements. Contracts should be shorter, negotiations more focused, and the order in which agreement documents are prepared changed. In addition, new pre-contract procedures should be adopted, including, for example, the use of data rooms to provide vendors with the detailed information they need to more fully assess the risks of the transaction in order to allow them to more accurately price the services. Such steps can reduce both the customer's outsourcing costs and legal fees. They can also expedite the contract process for both the customer and providers.

Use Shorter Contracts

The current trend in outsourcing is toward short terms for agreements and more limited scope of services. This is especially true in the Business Processing Outsourcing space. One way for customers to control contract costs in such circumstances is to retain law firms that use sophisticated but shorter contracts specifically designed for these types of transactions. A "modular" approach should be used so that the basic form agreement can be adapted to particular business transactions by adding specific provisions that "plug in" to the master form without requiring extensive redrafting.

Prepare SOWs and SLAs First

Statements of Work ("SOWs"), Service Level Agreements ("SLAs", which are often schedules rather than true independent agreements), Project Plans and other similar documents should be finalized before the Master Services Agreement ("MSA"). The advantage of giving priority to these documents is that it requires the parties to focus on the core business objectives of the deal early in negotiations, and to reach a clear agreement on what services are in-scope and what the governing service levels, milestones, acceptance criteria, costs, penalties and other key performance terms will be. Finalizing these documents first avoids the expense of rewriting the MSA as the scope and requirements change during negotiations. In addition, addressing SOWs and SLAs at an early stage identifies the important issues that the parties' executives need to resolve to reach an agreement.

Moreover, as a practical matter, most outsourcing disputes arise under the SOWs and SLAs rather than the MSA. Therefore, it is important to make sure that the SOWs and SLAs cover the key issues in a clear manner. The agreement should provide prompt escalation paths from project managers to senior executives, and involve data managers and energy efficiency managers as well, as those subjects become more important. SOW and SLA documents should also be prepared by or under the supervision of a lawyer to ensure that the provisions are enforceable, internally consistent, and avoid the types of ambiguity that give rise to disputes. SOWs and SLAs are not only contract documents, but they are key contract documents with respect to the allocation of responsibilities between the parties.

Design a Process to Give the Parties the Opportunity to Fairly Assess the Transaction Risks

Each party fears certain risks when negotiating an outsourcing deal. Procedures should be adopted that give each party timely access to the information it needs from the other party in order to assess these risks and propose contract terms that address them. For example, a provider may propose a high price out of concern that unknown factors may drive up its internal costs. To address this, a secret data room should be set up to allow providers to conduct the due diligence necessary to address pricing risks. Providers should meet and assess the capabilities of the customer's operations personnel (as opposed to the customer's transition teams). Providers

should be able to use their own subject matter experts as part of this process. Similarly, customer operations teams should have the opportunity to evaluate the provider's ability to deliver steady state services after transition. They should also have the ability to provide checklists of their key criteria before the vendor down-select process is completed. All of this makes it important to enter into confidentiality agreements as part of the RFP process to protect company secrets and prohibit their unauthorized disclosure.

Conclusion

The steps above represent a new approach to contract negotiation, and are designed to respond to current business needs to make it faster and less expensive to complete outsourcing agreements. They focus on identifying and reaching agreement on key business terms as early in the process as possible, with the goal of reducing the legal costs of finalizing the agreement.

Published in the November 2008 issue of the Shared Services & Outsourcing Network's Mature Services Delivery e-Alert

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