



Legal Issues Arising from Performance Based Contracting



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Your Lawyer's Concerns – Procurement Process

- Compliance with legal requirements
 - RFQ/RFP
 - Other competitive process
 - Objective criteria for selection
 - Clear statement of requirements
- Protests/Litigation
- Understanding of technical requirements
 - Performance defined by measurable outcomes
 - Compensation tied to performance





Addressing Concerns - Procurement

- Plan ahead!
- Develop clear standards that meet the client's requirements
- Consider obtaining expert assistance in development of standards and rating criteria
- Consider including outside counsel in your budget





Pre-Agreement Provider Due Diligence

- Pre-agreement provider due diligence
 - can provide valuable insight as to whether the provider can meet the customer's expectations
- Consider using a provider questionnaire
 - Examples of the items to cover in a due diligence questionnaire:
 - provider's financial condition
 - insurance
 - existing service levels
 - capacity
 - physical and logical security
 - disaster recovery
 - business continuity
 - redundancy
 - ability to comply with applicable regulations
 - Where gaps exist, eliminate them or negotiate through them





What Your Lawyer Can Do - Procurement

- Get started early
- Review RFQ/RFP
 - Consistency with legal requirements
 - Clarity and ability to measure outcomes and standards
 - Objectivity of rating criteria
- Prepare for a contest





Your Lawyer's Concerns – Contracting Process

- Describing the services, hardware and software to be provided
- Setting appropriate performance standards
- Vitiating critical provisions through “outs”
- Establishing appropriate and meaningful remedies





Addressing Concerns - Contracting

- Educate your counsel
- Determine how critical the services are to the client – high degree of importance may warrant additional measures or redundancy





What Your Lawyer Can Do - Contracting

- Prepare the agreement – if possible, do not use other party's form
- Attach agreement to RFP
- Understand goals of procurement – draft contract to achieve these goals
- Know the pitfalls – what “outs” the counterparty may seek to incorporate





Service Levels

- Most common service level issues:
 - uptime
 - service response time
 - simultaneous visitors
 - problem response time and resolution time
 - data return
 - remedies
- 2 main purposes:
 - assure the client that it can rely on the services in its business and provide appropriate remedies if the provider fails to meet the agreed service levels
 - provide agreed upon benchmarks that facilitate the provider's continuous quality improvement process and provide incentives that encourage the provider to be diligent in addressing issues





Service Levels – Uptime Service Level

- Requires that the services will have an uptime (i.e., availability) of a certain percentage, during certain hours, measured over an agreed upon period.
- Ensure service availability is aligned with customer's expectations and business needs (e.g. peak season)
- Example:

Provider will make the Services Available continuously, as measured over the course of each calendar month period, an average of 99.99% of the time, excluding unavailability as a result of Exceptions, as defined below (the “Availability Percentage”). “Available” means the Services shall be available for access and use by Client. For purposes of calculating the Availability Percentage, the following are “Exceptions” to the service level requirement, and the Services shall not be considered Un-Available, if any inaccessibility is due to: (i) Client's acts or omissions; (ii) Client's Internet connectivity; and (iii) Provider's regularly scheduled downtime (which shall occur weekly, Sundays, from 2 am – 4 am central time).





Service Levels – Uptime Service Level

- Downtime
 - Scheduled downtime
 - Customers should receive written documentation of a provider's scheduled downtime
 - Ensure the schedule creates no issues for the customer's business
 - Downtime monitoring
 - Provider should be proactive in detecting downtime (e.g., require the provider to constantly monitor the “heartbeat” of all its servers through automated “pinging”)
- Measurement Window
 - Providers tend to want longer measurement periods (e.g., quarterly)
 - dilutes the effects of a downtime and thus masks periodic performance issues that may temporarily impact the business and eliminates meaningful remedies





Service Levels – Service Response Time Service Level

- Services that fail to provide timely responses to its users are effectively “unavailable”
- Therefore, include a service level that sets forth maximum response times for a customer’s use of the Services
 - a specific service level target depends on the facts and circumstances in each case (e.g., transaction complexity, processing required, whether services are being accessed over an Internet connection or a leased line)
- Example:

The average download time for each page of the Services, including all content contained therein, shall be within the lesser of (a) 0.5 seconds of the weekly Keynote Business 40 Internet Performance Index (“KB40”) or (b) two (2) seconds. In the event the KB40 is discontinued, a successor index (such as average download times for all other customers of Provider) may be mutually agreed upon by the parties.





Your Lawyer's Concerns – Contract Administration/Enforcement

- Remedies that work
 - Money damages may not address the real problem
 - Termination often not a good option
- Mutual understanding of deliverables and standards
 - Where possible, avoid technical language





Addressing Concerns - Administration

- Develop intermediate sanctions, in addition to contract termination
- Monitor provider's performance
- Understand the terms and conditions of the contract
- Set up regular meetings with counterparty, especially at outset of contract





Post-Execution – Ongoing Provider Assessment

- Establish a regular program of evaluating the provider's performance
 - Provider would be required to
 - supply the required information to assess the services,
 - notify the customer of any changes, and
 - provide any recommendations to improve the services
 - Allows the customer to
 - perform ongoing risk assessments during the term of the agreement, and
 - determine whether to continue the provider relationship





Thank you.

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