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### *Using Information Technology Contracts as Business Management Tools*



By: [Raymond R. Bonnabeau, Esq.](#)

IT Contracts are not a necessary evil, although many people see them that way. In fact, the only purposes IT Contracts serve are to protect the organization's investment, expectations and legal and business interests. IT contracting is a process, which consists of three interrelated and interdependent components:

1. business;
2. technical; and
3. legal.

All three components are equally important and equally dependent on the others. Organizations need to think about IT Contracts as business management tools that combine these components, and protect the organization's investment and expectations. The first step is to understand that negotiating IT Contracts begins when a business need is identified and vendors are sought to meet that need.

#### **Pre-Contract**

Many organizations tend to be proficient in identifying IT business needs. When an IT business need is identified, the organization typically selects devoted staff to drill down and find vendors capable of meeting the business need within a definable budget. Then numerous vendor site visits occur and multiple reference calls are made, all in furtherance of the process to find the right solution and the right vendor. Demonstrations of the vendors' IT deliverables are also required and freely provided by each potential vendor.

Many organizations are also usually proficient in drafting and including identified IT system functionality within a request for proposal ("RFP"). Vendors typically respond to the RFP and such responses usually include sufficient information to ascertain the potential success, and potential hurdles, of any future engagement. A vendor is later selected by the organization. All seems well.

A few years ago I received an urgent call from a client's General Counsel. She said, "The Vendor is in the next room talking to my CIO and we would like to get this deal done by the end of this month. We are acquiring an integrated lab system which is critical to my organization." I said, "Send me the Vendor's contract and response to the RFP." While on the call I was e-mailed the RFP response, which had been delivered to my client more than eight months earlier. After a quick look, I commented, "The vendor will not stand behind third-party IT system components, they are AS IS." Her response, "You have to be kidding me, that's a deal breaker."

Drafting and submitting a RFP to potential vendors is only part of the process. Organizations need to review each vendor's RFP response to identify issues early in the process. This will not only reduce the likelihood of having a deal breaker identified after the preferred vendor is selected, but will also reduce the risk of an implementation delay.

#### ***Lesson: Read the response to the RFP early in the process.***

In addition, beyond identifying basic functionality in the RFP, organizations need to begin to internally ask other fundamental questions. The most basic being: Does the organization desire to conduct acceptance testing to make certain the IT system will do what it is suppose to do? The answer is typically, yes, of course. However, I am usually the person asking that question and

pointing out that the vendor's contract not only fails to contain acceptance testing, but has acceptance (and usually a large payment) effective upon delivery.

***Lesson: Discuss acceptance testing with each vendor early in the process.***

Organizations should also internally ask a number of other questions, a partial list of which includes:

- How and when do we expect to implement the IT deliverables?
- Do we want to test the IT deliverables in a test environment and in a subsequent production environment?
- When do we want acceptance testing to commence?
- Do we intend to test in a “big bang” or in stages (either by modality or by site)?
- What are the desired performance criteria?
- What happens if acceptance testing fails? Do we expect to receive all money back?
- How long do we desire the IT deliverable performance warranty?
- Do we expect other warranties? For example, a response time warranty and/or a compliance with laws warranty?
- Do we expect the vendor to provide a minimum support commitment period? How long is the expected support commitment? When do we expect support to start and when do we expect to start paying for support?
- Do we expect to receive the source code from the vendor in the event the vendor fails to perform or goes out of business?

Only after due consideration of these questions, among others depending on the organization's objectives, will an organization understand how to protect its business interests and expectations. The IT Contract is the vehicle for doing so.

***Lesson: Ask these questions, at the very least, and discuss with each vendor early in the process.***

Organizations should convey its IT Contract expectations to each potential vendor early in the process. I recommend including basic contract terms as well as important business provisions within the RFP submitted to each potential vendor. Organizations should advise each vendor that its RFP responses will be used not only to evaluate the vendor's product and the vendor, but that its responses will also, at the organization's discretion, be part of any final IT contract. Remember, read each RFP response.

If these pre-contract steps are followed, organizations will begin to think about IT contracts as business management tools. Such pre-contract steps will:

1. Enable the organization to identify critical issues and risks well before selecting a preferred vendor;
2. Enable the organization to obtain and protect its technical and business objectives (e.g., appropriate acceptance/warranty/support provisions);
3. Enable the organization to manage its implementation (e.g., increase the likelihood that the IT Contract will be executed before the time scheduled for implementation); and
4. Enable the organization to reduce its risks and to protect its investment.

Failure to include these basic pre-contract steps as part of the IT Contract process will almost inevitably lead to an accelerated negotiation which may unnecessarily compromise the organization's financial and business interests. Absent these pre-contract steps, the organization will often find itself discussing important objectives and terms with the preferred vendor much too late in the process, in a way that disappoints the expectations of the organization's executives, administration and staff.

Such pre-contract steps directly play a role in the negotiation and ultimate terms obtained in the IT Contract.

***Lesson: During the pre-contract period, view the contract as a business management tool.***

**Conclusion**

IT Contracts are not a necessary evil. They are an organization's most effective tool for managing the enormous business risks associated with the organization's increasing reliance on IT Systems to perform critical functions. Organizations should start to think about IT Contracts as business management tools. The first step is to understand that negotiating IT Contracts begins when a business need is identified and vendors are sought to meet that need. By viewing IT Contracts as the vehicle to protect expectations, organizations will reduce their risks.

***It's just semantics, right? How a few words affect your coverage***



By: [Katheryn A. Andresen](#)

***“What's the difference between these two additional insured coverage certificates?”***

Both certificates covered claims for damages “caused in whole or in part by” the insured or someone acting on behalf of the insured. However, one certificate also covered damages “arising out of or caused in whole or in part by . . . .” Either version satisfies a requirement that a company carries commercial general liability insurance that names you as an additional insured. From a coverage perspective, however, these two certificates are quite different.

"*Arising out of*" allows for claims that are not based directly on the services provided under the contract. For example, if you contract with a company to provide on-site computer network support and the service provider damages items in your office, this would be "caused in whole or in part by" the provider and covered under the policy. On the other hand, if the service provider installed a network component according to the manufacturer's specifications, and the component subsequently fell and damaged items in your office, it may not be deemed "caused in whole or in part by" the provider. The insurance provider may deny the claim and require litigation to determine if this damage was caused by the provider. A policy which includes "*arising out of*" would clearly encompass this damage because even if it was not deemed attributable to the provider, it definitely resulted (i.e. arose out of) from the provider's actions.

For a company acquiring services, "*arising out of*" broadens what injuries or damages would be covered. From a provider's perspective, "*arising out of*" may have negative consequences because this coverage may not be offered on the additional insured certificate from your insurance company or such coverage may be more expensive.

Besides naming you as an additional insured, both parties should check that the insurance coverage that is needed is fully covered by the amount of insurance actually carried under the policy. In addition, consider ensuring that the coverage is both primary and non-contributory. Most additional insured certificates contain default language that unless the contract expressly requires these elements, the coverage is secondary and requires contribution.

Below is one suggested insurance clause to address these elements:

Insurance: Contractor shall . . . furnish Company with certificates of insurance and a copy of the actual policy and applicable endorsements evidencing that he has obtained the following insurance . . . . Such coverage must provide (i) that Company, its subsidiaries and affiliates, as applicable, are named as additional insured as their interests may appear with respect to the coverage listed below; (ii) that such insurance is primary insurance for all such additional insured including, without limitation, Contractor's indemnification obligations, for injury or damages arising out of or caused in whole or in part by either Contractor's or others working on Contractor's behalf acts or omissions under this Contract; (iii) that such coverage shall be deemed the primary insurance for the additional insured; and (iv) is deemed non-contributory . . . .

As it turns out, a few words can make all the difference . . . .

#### *H&J Announcements*

##### **H&J Adds New Attorneys ...**

**Russell "Mick" Spence, Jr.** has joined the firm as a partner in the Business & Corporate practice group. He litigates and counsels entertainment, intellectual property and business clients in a wide variety of legal matters. Combining his passions for creativity, commerce, advocacy and success, Mick has established a reputation as the go-to attorney for both creative talents and entrepreneurial businesses. We look forward to his complimentary practice strengthening the business services we provide, while expanding our growth to benefit both existing and new clients.

**Joshua R. Ward** has also joined the firm as an associate and is a member of the IT & eCommerce and Business & Corporate practice groups. He obtained his JD from William Mitchell College of Law where he served on the Editorial Boards of the *William Mitchell Law Review* and *Cybaris: An Intellectual Property Law Review*.

This newsletter provides general information on legal matters, and should not be relied upon as legal advice. A qualified attorney must analyze the relevant facts and apply the applicable law to provide specific legal advice. If you require legal advice or want additional information regarding the services we offer, please contact David Hellmuth at 952-941-4005 or [dhellmuth@hilawfirm.com](mailto:dhellmuth@hilawfirm.com)



Hellmuth & Johnson, PLLC • 8050 West 78th Street • Edina, MN 55439 • T 952-941-4005 F 952-941-2337

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