Practical Guidance

Multiple Vendors and the System Integrator Role

A Practical Guidance® Practice Note by Sonia Baldia, Kilpatrick Townsend & Stockton LLP

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Introduction

Many companies expand IT infrastructure on an incremental basis by purchasing computers, acquiring software licenses and subscribing to data transport facilities as business needs dictate and as budgets allow. As the IT infrastructure and its configuration become more complex over time, the customer must be assured that new equipment and software will not only meet the customer's functional specifications, but will deliver that functionality seamlessly and as part of an integrated system. At some point however, whether due to rapid business expansion, the need to comply with new government regulations or obsolescence, a customer may need to rebuild or significantly augment large segments of its IT infrastructure used to support mission critical business operations. The business strategy may call for sourcing new equipment from multiple vendors. It also may call for having the revamped system up and running within a short period of time.

Dealing with multiple vendors presents a number of challenges. At issue is the ability of each vendor to integrate its hardware and software with those supplied by other vendors. Installation and acceptance activities require detailed coordination. The project will be in jeopardy if roles and responsibilities are not clearly defined, delays or impediments not quickly surfaced and fair means for resolving disputes not put in place. It is important for the customer to set the stage and expectation for cooperation and governance among vendors in the purchase agreement, the kick off meeting, and in subsequent status conferences.

Functional Specifications and Compatibility Requirements

In a multiple vendor situation, the vendor must provide a warranty which goes beyond the equipment's and software's standalone functionality. Each vendor must accept the customer's requirements for compatibility set forth in the request for proposal ("RFP") and each vendor should provide a warranty to that effect in the purchase agreement. Otherwise, it will be difficult to hold any vendor accountable for a system failure, and the project may be plagued with the proverbial "finger pointing."

In turn, each vendor must make its assumptions and prerequisites clear for extending a compatibility warranty, and expressly disclaim responsibility for actions by other vendors or the customer which might impair the vendor's ability to make good on that warranty.

Acceptance Testing that Measures Successful System Integration

The contract between the customer and the vendor should call for an interim and final acceptance testing process. The interim or preliminary acceptance test may be conducted at the vendor's site. The customer can observe whether the

equipment and software pass the vendor's standard tests, or if they pass jointly developed acceptance test routines and measurements. This phase of testing would be designed to determine if the equipment and software operate on a standalone basis in accordance with their operational specifications. The next stage tests the equipment and software at the customer's site. This functional test will not only assess whether the equipment and software have been correctly installed, but it will also assess if the compatibility requirements have been met and the equipment and software properly function as part of a larger IT system.

Vendor Buy-In on IT Environment

Each vendor might have slightly different requirements for the environment in which the equipment and software will be housed. Requirements may differ for interconnection / passing off data feeds and the customer should ask the vendor to include its environmental and interface specifications supply in its written presentation to the customer. Consider having each vendor sign-off on the computing environment and any computer to computer, or computer to network connection protocols at an early stage.

Coordinate Deliveries and Keep a Master Scheduling Chart Up to Date

Delays in deliveries are always a cause for concern when securing IT-related products and services. IT delays disrupt business. This risk is even more acute when multiple vendors are in the delivery and installation queue. A delay in one vendor's work not only affects that vendor, but also may have a ripple effect on scheduling other vendors. Making matters worse for the customer is the possibility of having the vendors who are affected by the delay impose a charge or have the rescheduled time pushed out to an unacceptable date. The contract should allow the customer to reschedule an installation without charge when the request is made by the customer within a certain time frame or window, and that option to reschedule lasts only for a certain period.

An updated and current master implementation schedule combined with frequent status meetings is a useful tool to keep the project on track. The contract should also allow for staggered installations so that vendors do not find themselves jockeying for space. Vendors should be encouraged to work around delays. Alerting the vendor to a potential scheduling problem allows the vendor affected by the delay to reorder its activities so the impact is minimized if not eliminated. The payment schedule for all vendors should hold back a reasonable portion of the fee until delivery and acceptance.

Another approach uses the master schedule and status update process to alert vendors to scheduling or installation issues. This provides the affected vendors with the opportunity to have the matter addressed though the contract's issue resolution process. In that way, the vendor puts the customer on notice that its performance may be delayed.

On the other hand, failure of the vendor to make use of this process means that the vendor cannot later point to the issue as an excuse. This has been called the "estoppel method" because the vendor is prevented from holding the issue up as an excuse later on. It has also been referred to as the "speak now or forever hold your peace" approach.

Consider Appointing a Lead Contractor or System Integrator

Vendors responsible for providing the lion's share of equipment and software may be asked to assume a "Lead Contractor" role. In that capacity the Lead Contractor would flag potential installation delays and operational issues and would support other project management tasks with the customer's IT team and other vendors. If the primary vendor is willing to take on such a role, the vendor would expect to receive a premium for this service, establish boundaries on its responsibility, and would want to limit its liability if those coordination efforts fail and project management efforts fail. Alternatively, a customer may appoint a "System Integrator" to recommend compatible tech stacks and oversee integration across vendors' systems, including connecting the component subsystems to ensure they operate as a cohesive unit in the customer's environment.

Vendor Governance

A rigorous governance process is critical in a multi-vendor environment to ensure performance and manage contractual commitments across vendors. The customer and the vendors participate in periodic joint governance meetings to discuss and resolve operational issues in a coordinated manner to mitigate risk to customer. The governance process frequently

includes a separate committee structure and process for transition and operations. The committee(s) typically consist of operational leads and senior management personnel from the customer's vendor management office and from the vendors' side.

Contractual Considerations

Multi-vendor contracts can be structured as a single prime contract between the customer and the "lead contractor" with subcontracts with other vendors. Or, they can be structured as a set of separate contracts with common "operational level agreement(s)" amongst the customer and the participating vendors to streamline operational interdependencies. In the latter model, the customer may retain a system integrator to oversee integration. Each approach has its own pros and cons. In the lead contractor-subcontract model (also referred to as the "one throat to choke" model), the lead contractor has a single point of responsibility for the entire relationship and the customer typically has limited visibility into subcontractor issues or to directly deal with subcontractors. In contrast, in the multi-vendor contracts model, none of the vendors are responsible for the others' performance, and the customer is required to assume a more active role in managing intra-vendor issues and interdependencies. The governance structure should be designed to suit the multi-vendor contractual structure deployed by the customer.

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Sonia Baldia brings business and technology savvy to her global practice, which encompasses U.S. and international commercial, transactional, and intellectual property (IP) expertise across multiple industries including life sciences, banking and finance, healthcare, energy, information technology (IT), manufacturing, and software. She advises on a wide array of sourcing, technology, and other commercial transactions and helps companies navigate legal issues raised by data, emerging technologies, and digital transformation, both on the buyer and provider side. Sonia routinely advises clients on IP strategy, management, and monetization arrangements, leveraging her technology background and registered patent attorney credentials.

In addition to her U.S. bar admissions, Sonia is also qualified to practice law in India and she leverages that combined experience on behalf of clients in India-related matters.

Prior to rejoining the firm, Sonia was a partner in the Washington, D.C. office of an international law firm where she was part of its technology, IP, international commercial, and India practices. Sonia has also served as a consultant to the U.S. Agency for International Development (USAID) and the U.S. Department of Commerce in Washington, D.C. where she advised foreign governments on IT, telecom and IP-related development projects. She has also served as associate professor of law, teaching courses in IP, technology transfer, and corporate law.

Sonia was ranked in 2022 and prior years by *Chambers USA: America's Leading Lawyers for Business* in Technology & Outsourcing and in 2020, she was recognized for her expertise in outsourcing deals involving India and her broader technology expertise. She has also been consistently recognized by *Legal 500* amongst the leading practitioners in its technology, media, and telecom outsourcing category (2009-2022; and as a "New Generation Partner" in 2020 and a "Leading Lawyer" in 2021-2022). Sonia was recognized in *The Best Lawyers* in America® for Information Technology Law in 2022 and 2023. She is a frequent speaker and writer on digital transformation, global sourcing, IP, and technology topics and she has authored many articles and book chapters.