Defining the Solution in Technology Contracts

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When negotiating technology transactions, such as software licenses, cloud transactions and IT or business process outsourcing deals, the parties often fail to clarify the scope of services or describe accurately the product being acquired. In fact, the most frequent type of dispute in these deals relates to the scope of work.

Disputes result when the scope of the solution is vague and the buyer believes a particular service or functionality is covered by the fees and the supplier believes the service or function at issue is out of scope and will only be provided for an additional fee.

There are several reasons the scope of work is not accurately defined, including the following: the parties may focus too much on closing the deal quickly, minimizing the transaction costs and reaping expected benefits of the deal; the parties may wrongly assume that form documents from another transaction can be recycled for the current deal and fail to take into account that the scope may be substantially different from the current deal; the parties may be conflict avoidant and simply avoid conversations that would reveal gaps in their understanding of the deal; and finally, in international transactions, language or cultural differences may prevent the parties from identifying the gaps in their understanding.

This article describes a process to reduce this risk and identifies practice points for more thoroughly documenting the services in a technology contract.

Clearly Define the Solution

Buyers should be prepared to spend significant time and energy to create a clear, accurate and complete scope of work.

The first step is to understand their primary goals and objectives for the solution. Then the team—internal subject matter experts, consultants, lawyers, the ultimate end-users and members of the supplier team—can begin to define the services.

Ultimately, this should be a collaborative effort between the buyer and supplier.

In terms of drafting the statement of work, there are a number of helpful rules to keep in mind. First, the focus should be on the desired results or outcome (what, when and how often). The parties should not focus on how the supplier will perform the services, since that will likely evolve over time. Second, the parties should use simple sentences. The sentences should be direct and in the active tense; buzz words should be avoided. Remember, in the event of a dispute, a lay person will be interpreting the agreement.

Sweeps Clause

In addition to these drafting tips, there are additional clauses than can be included in the contract to fill in the gaps.

The inclusion of a dragnet or "sweeps" clause is the best way to mitigate the risk that the description of the services is insufficient.

There are several variations of the sweeps clause, and each example below can come in a variety of forms, but the purpose of each is to fill in the gaps that likely exist in the statement of work.

• Version 1: "Supplier will perform all underlying tasks or functions, although not expressly enumerated, that are inherent, necessary or customary to provide the services and products described in Exhibit A." This is the narrowest of the sweeps clauses because it does not significantly expand the scope of work beyond what is expressly stated in the contract.

• Version 2: "Supplier will perform all tasks and services performed by the transitioned employees or contractors during the 12 month period prior to migration to supplier." This is a broad version of the sweeps clause and at least ensures that the scope of services is not less than the current scope of services. If the buyer can demonstrate that Employee A previously performed the disputed service, then it is within the scope of work.

• Version 3: "Supplier will provide all those products, services, functions and responsibilities included in the base case." A base case is a financial model covering the buyer's cost of self-performing the services before transition to the supplier. This example still requires a certain level of detail in the base case or else the parties are left with the same ambiguity they are trying to avoid. The less detailed the base case, the less helpful it will be.

A technology contract will often include all three of these clauses to ensure the buyer's expectations are met for the scope of services.

Define Product Functionality

When defining product functionality, the RFP is frequently the best place to start because the buyer likely spent considerable time outlining their specifications in the RFP.

Frequently, however, when we get involved in projects, the parties ignore the specifications in the RFP, and instead rely on the supplier's documentation to describe the product. We refer to this as the "leap of faith" because the buyers often have not received the documentation, and it is likely not as thorough as the RFP.

Where the buyer has the leverage in the negotiation, it should avoid relying on supplier documentation and go back to the product specifications set forth in the RFP and amend them as needed. If you must rely on the supplier's product documentation, then review the documentation carefully. If it is inadequate, supplement it by including specific representations and warranties in the agreement regarding your critical functionality requirements.

Transition Services

Technology transactions typically involve a transition phase, which requires the parties to negotiate a special set of services to cover migration. The transition stage is often the most difficult phase of a transaction and describing what is required is just as difficult as describing the steady-state services.

A well-crafted description of the transition services will describe the activities required for the transition, all deliverables the supplier must complete prior to transition, critical transition milestones, performance standards and any transition activities the buyer will be required to perform.

Similar to the impact of the sweeps clause, the buyer should include in the contract a provision obligating the supplier to perform all activities necessary to accomplish the transition, except for any specifically enumerated items that are reserved to the buyer in the transition plan.

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