Managing Provider Performance in Software and Hardware Transactions
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Daily Report

April 6, 2015

In any contract for the purchase or license of hardware, software or software as a service solution (SaaS), one of the buyer's critical concerns is that the vendor provide products which live up to the quality promised.

To this end, contracts for technology products should include a variety of provisions to guarantee performance, including clear product specifications, acceptance testing, product warranties and maintenance and support services. The specific structure will vary based on the hardware, software or solution purchased, but in each case it should be focused on the performance promised (usually the output).

The buyer should strive to describe clearly the products being purchased and ensure that the description is incorporated into the contract. Generally, the request for proposal (RFP) contains the most robust description of the product; however, too often parties fail to utilize the product description built into the RFP and instead rely on the supplier's documentation. If you are forced to rely on the supplier's documentation, you should take care to review it and confirm that it contains the level of detail necessary in the event of a dispute.

The buyer's first step in confirming the product meets its requirements is acceptance testing, which allows the buyer to utilize the product in its own environment to verify that it meets certain criteria, which should, at a minimum, include satisfaction of the functional requirements, compatibility with buyer's IT environment and stress testing for anticipated volumes.

Satisfaction of acceptance testing may be on a subjective basis (i.e., am I satisfied), but suppliers will generally insist on an objective basis since they usually have a significant investment dependent on acceptance.

Suppliers also generally want both a short testing period and a concept known as "deemed acceptance," which occurs when the buyer fails to provide notice of acceptance within a certain number of days or months. Therefore, a buyer should negotiate for adequate time to test the product to avoid a product being "deemed accepted."

If the product does not conform to the acceptance criteria, in addition to withholding payment, the buyer can rely on the specific remedies negotiated in the contract, which may include the buyer's right to:

- Give the supplier additional time to remedy the nonconformity,
- Accept the nonconforming product but reduce the fees to reflect the reduced value of the product,
- Correct the nonconformity at supplier's expense, or

- Reject the nonconforming product, terminate the contract and receive a full refund of any fees paid.

If the buyer rejects a nonconforming product, the buyer should also have the right to reject other products or deliverables that are functionally dependent on the nonconforming product or, if the nonconforming product is part of an integrated solution, reject the entire solution.

Acceptance testing may not reveal all of a product's flaws. Therefore, after the product has been accepted, a buyer will rely on the product warranties to guarantee its performance and functionality.

It is a good practice for the buyer to include a statement in the contract that its acceptance does not negate any of the product warranties. When a buyer is reviewing and drafting the content of the warranties, it should expect a warranty that the product will comply with the agreed specifications. Often, however, the supplier offers a warranty that the product substantially complies with its documentation.

This is problematic for a number of reasons. First, it provides a margin by which the product can deviate from the product specifications, and second, the documentation most likely is not consistent with or as detailed as the product specifications in the RFP. A buyer's remedies for a nonconforming product that arises during the warranty period should include the same remedies that accompany a failure to meet the acceptance criteria listed above, including the right to terminate the contract for such product.

A warranty period typically lasts anywhere from 90 days to 24 months and should begin to run upon buyer's acceptance of the product. Often however, supplier forms provide for the warranty period to begin upon the execution of the contract rather than upon acceptance of the product. This overlap with the acceptance period reduces the value of the warranty.

Additionally, a buyer should make sure the warranty period extends beyond the customization and implementation of the product so that the warranty is still available when the product is first used in a commercial situation. A buyer must also be aware of exclusions to the product warranty, which may include a buyer's modification, combination or use of the product which is prohibited by the product documentation, or a buyer's failure to implement corrections or updates to the product after a certain period of time.

A buyer may choose to purchase support and maintenance services from the supplier. These services are often included in a separate support agreement and function, in part, as an extended warranty. After the warranties expire, the support services are frequently the only promise from the supplier regarding performance of the product. This can present a number of problems.

First, many suppliers will not promise to fix the product, but only try to fix it. This means the buyer's substantial upfront investment may not be realized. Further, even if you have a promise from the supplier to fix the product, you may not have an adequate remedy because the limit of liability in the support agreement is tied to the fees paid for the support services, which do not cover the previous investment in the product (i.e., license, customization and implementation fees).

Instead, you should negotiate a limit of liability in the support agreement that is tied to the fees paid for the support services, as well as the license and implementation fees, so that you are fully covered if the product fails and the supplier is unable or refuses to fix it.

When negotiating support obligations, there are a number of other considerations, including how critical the product is to the buyer's business operations, how long the buyer will require support, and whether the buyer expects the support services to cover enhancements to the product or just repair of bugs. The contract should cover which product versions and upgrades will be supported and how long the buyer has to upgrade before the old version will no longer be supported.

A buyer should keep in mind that upgrades are time-consuming and costly, and its customizations are often lost in the transition.

The contract should include a commitment from the supplier to provide support services for a certain number of years without cancellation so that the buyer is not stranded with an unsupported product. If support services are purchased, the contract should include service levels to measure the supplier's performance of the support services, such as the supplier's time to respond to and resolve issues that arise with the product.

Finally, the buyer should also negotiate a price cap on the supplier's ability to increase support service fees during the term of the contract.

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