Insights: Alerts

Key Takeaways: Nuts and Bolts of Technology Contract Drafting/Negotiation

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Josh Ganz, Partner at Kilpatrick Townsend, focuses his practice on strategic outsourcing, technology licensing and other complex commercial transactions. **Michelle Tyde**, Counsel at Kilpatrick Townsend, focuses her practice on intellectual property/technology transactions, global sourcing transactions, and data privacy and security. Josh and Michelle recently presented **"Nuts and Bolts of Technology Contract Drafting/Negotiation"** to the Charlotte Chapter of the Association of Corporate Counsel.

Key takeaways from the presentation include:

- To effectively negotiate a technology contract, you need to understand the solution/service being procured, how your company will use it, your company's goals, and the unique aspects and risks inherent in technology agreements.
- In creating the relationship with the vendor, capture and balance the business, technology, financial, procurement, and legal requirements of your company.
- Leverage the request for proposal (RFP) process in order to select a compatible vendor and to maximize your leverage in negotiations. You should carefully consider the desired risk profile from the outset and incorporate it into the RFP process, as it drives other provisions such as pricing.
- The "Sourcing Equation" includes the core components of a technology agreement:

  Scope + Quality + Risk = Price.

  - *Scope of the solution/ services being provided*
    - Service Descriptions: One of the most common mistakes is poorly defined requirements or specifications (e.g., scope of services and functional requirements). Thus, carefully review and negotiate the scope of work and/or service description. Be wary of assumptions, customer responsibilities, and services that are specified as out-of-scope.
  - *Level of performance quality to which the customer intends to hold the vendor*
    - Service Level Agreements (SLAs): Ensure that the SLA is a performance level guarantee, rather than an objective, that your vendor stands behind. Include appropriate remedies that motivate the vendor to provide the level of service for which the company contracted and compensate the

company for service failures, (e.g., credits, root cause analysis, yearly comprehensive reviews, and terminations rights for chronic or excessive outages).

- *Level of risk that the customer intends to shift to the vendor*
  - Indemnification: The appropriate scope of the parties' indemnification obligations in technology agreements vary widely and should be evaluated in connection with the risk profile. Carefully draft the indemnification obligations (i.e., indemnify, defend, and/or hold harmless), the scope of the vendor's indemnities, whether the indemnity covers direct claims and/or third party claims, and procedures regarding notice and control of and participation in the defense.
- *Price the customer will pay for the solution/services*
  - Limitations of Liability: Negotiate appropriate caps on direct damages and exclusions from the limitations of liability (e.g., infringement, breach of data security/confidentiality, indemnification obligations). Include a definition of direct damages in the agreement to ensure that certain costs incurred will not be excluded as a consequential damage.

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