

Insights: Alerts

A Software Services Agreement Checklist For Companies

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Technology constantly changes. Firms are periodically put to the choice about whether to upgrade their technology or build a new platform. An expert software vendor/installer can greatly assist firms in making and implementing these decisions, increasing productivity and efficiency, and thereby helping a firm grow its business. Vendors are often selected after a thorough evaluation process involving the submission of requests for proposals and the evaluation of multiple proposals, culminating in the negotiation and execution of a complicated services agreement and associated statement of work. Once the agreement is executed and the firm's IT department takes over, however, the details of the agreement and SOW can be overlooked, creating litigation risk in the event a dispute develops between the vendor and the firm.

There are numerous reasons such a relationship can become contentious. The technology and the parties' contractual framework is oftentimes complicated. Disputes can arise out of implementation delays, product defects, service inadequacies, disputes over payments, personnel changes, shifts in technology, and even personality conflicts. A one-sided agreement can force a customer to absorb long delays, continue the use of a dissatisfactory or otherwise outdated platform, or pay exorbitant fees to terminate the services agreement. As a result, understanding and adhering to the terms of these complicated contracts in the event of a dispute is oftentimes critical.

To assist customers in minimizing litigation risk after a services agreement is executed, below is a checklist identifying the typical yet critical provisions in a services agreement. Careful attention to these provisions will greatly assist companies in identifying issues and minimizing litigation risk after a service agreement is signed.

1. **Payment Schedule:** The payment schedule will dictate whether and how much payment is owed.

- First Payment Due
 - At contract execution?
 - Delivery?
 - Installation?
 - Completion of training?
 - Acceptance?
 - When software/services "go live"?
 - When vendor/customer fulfills certain responsibilities?

- Date certain?
- Separate term for maintenance/support?
- Form of Payment
 - Fixed lump sum?
 - Fixed periodic?
 - Variable?
 - Based on certain milestones?
- Notice of Disputes: If software/services are inadequate, does contract require notice of defect/performance issues in response to each specific invoice?

2. Project Plan/Schedule/Milestones: Getting from contract execution to “go live” is often a long, expensive and complicated process. Clear timelines and the delineation of duties and responsibilities are crucial when a dispute arises. These are often found in the SOW.

- Does the contract/SOW set out a concrete project plan, schedule and/or milestone payments?
- How specific is the project plan? Are there clear deadlines?
- What is the remedy in the event of delay or performance issues (30 days or “as soon as practicable”)?
- What are the customer’s responsibilities?
- What are the vendor’s responsibilities?
- What are the remedies if the schedule is not met?
 - Monetary damages?
 - Payment for delay?
- Is the customer required to provide notice of any changes?
- Does the vendor have an opportunity to cure?
- What is the procedure for amending the schedule? Is it the responsibility of the customer or vendor? Is a change order required?
- Does failure to provide notice of delay constitute waiver?

3. Term and Renewal: The term of the agreement — and the starting date of the term — can dictate how much a customer has to pay to get out of an agreement or how long the parties’ contractual relationship will last.

- When does term begin?
 - Execution?
 - Go live?
- Set term?
- Perpetual license?
- Renewal?
 - Does the contract automatically renew?
 - Is notice of non-renewal required?
 - How long is the renewal period?
 - Do the terms of the agreement change after renewal?

4. Warranties: Warranty provisions can provide concrete performance requirements; a warranty can be a basis for terminating the contract.

- Duration of the warranty?
- Does the contract warrant quality of software performance?
 - Free of material defect?
 - Capacity of software?
 - Reliability of software?
 - Frequency of crashes?
 - Compatibility?
 - Integration?
 - Essential purpose?
 - Industry standards?
- Does the contract warrant quality of services?
 - Requirements to meet contractually set deadlines and milestones?
 - Specific response time for support?
 - Availability of support?
 - Qualified personnel?
- What notices are required and what are the remedies for breach of warranty?
 - Time for notification?
 - Opportunity to cure?
 - Termination?
 - Monetary damages?

5. **Termination:** The termination provision is often the most crucial term in the event of a dispute. Complying with any such a provision is critical to managing litigation risk.

- Termination for convenience?
 - When?
 - With what notice?
- Termination for cause?
 - When?
 - Under what circumstances?
 - With what notice?
- Termination only after notice provided with opportunity to cure
 - How soon after discovery of defect?
 - How long is cure period?
 - Written notice?
 - To whom?
 - In what form?
- Force majeure?
- Bankruptcy?
- Same obligations for both parties?

6. **Remedies and Damages:** The contractual remedies are crucial to understanding the pros and cons of termination (or attempted termination).

- Limitation of liability?
- Allocation of risks?
- Does contract only allow “direct damages”?
- Does contract prohibit “consequential damages”?
- Are liquidated damages available?
- Maximum amount available?
- Is specific performance contractually authorized?
- Fee-shifting/attorneys’ fees to prevailing party?
- Who pays “transition” expenses?
- Are remedies same for both parties?

7. **Dispute Resolution:** Any dispute resolution procedures are obviously a major consideration in any dispute and must be carefully followed.

- Negotiation of disputes (and “escalation” of dispute to executive team) required/suggested as first step?
- Mediation required?
- Arbitration?
 - Of what disputes? (“arising under contract,” “related to contract,” “any dispute between the parties”)
 - In what location?
 - How many arbitrators?
 - Under what rules? (AAA, JAMS, etc.)
 - Who chooses arbitrator?
 - Specific requirements of expediency? (i.e., decision six months from commencement)
 - Who bears costs?

8. **Applicable Law/Forum:** The forum and governing law is often critical to the cost and even the outcome of the dispute.

- Choice of law
 - What state law governs contract?
 - Scope of choice of law (“arising under contract,” “related to contract,” “any dispute between the parties”)
- Forum selection clause
 - Specific state?
 - Specific county/city?
 - Specific court (federal, state)?

Related People



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