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Four Considerations in Procurement Contracts: Proper Preparation Can Save the Business Considerable Time and Money

August 9, 2011

Procurement deals require an important marriage of the business and legal teams (if not others as well). Questions such as the following are important to consider:

- Is this a short-term engagement that has many possible vendors or a more strategic or long-term relationship important to the company's business?
- What is the possible effect on the company if the vendor does not perform, and can the vendor be easily replaced?
- What price protections or costs can be leveraged?

Answers to these questions will often be related to the following four issues:

1. A *prenuptial agreement*, usually in the form of a termination provision, is an important aspect of a procurement contract. Termination for convenience may be appropriate for simple services or products, but probably not in more significant or long-term contracts. For example, in a large-scale IT outsourcing deal, the parties will be so intertwined that a requirement to provide termination assistance should be included. Termination assistance post termination (e.g., six months) exists to provide business continuity and to help move the company to another vendor or take the service internally. As a practical matter, a company may have a problem keeping the attention of a vendor losing the contract, much less when the vendor is transferring services to a competitor.
2. This brings us to the *service-level agreement* (SLAs) both during and post termination. SLAs are usually metrics that define how a vendor will maintain the services and respond to problems. These can range from categorizing low-, medium- and high-level service problems affecting a business and response times for fixing problems, to availability of a help desk. Service levels have little impact, however, unless there is a financial penalty associated with failure to meet them. Also, most vendors have "form" SLAs with metrics that may not meet the company's needs. Always review SLAs carefully and run business scenarios to determine whether they actually provide anticipated value.
3. *Limitations of liability* can impact behavior for both termination assistance and service levels. With respect to termination assistance, increasing liability to the vendor should be considered. Vendors often review their potential liability when providing termination assistance. If limited, some vendors may simply discontinue such services, claim an "efficient breach" and pay what is owed (sometimes). With respect to service levels, many vendors will try to limit damages to "credits" against the next invoices as the sole and exclusive remedy of the contract. This means that a breach of the service levels can never trigger the limitation of liability damages.
4. Finally, while it may seem innocuous, *auto-renewals* can be very costly. Many contracts include auto-renewal provisions that require upwards of 120 days notice of the intent to terminate. Courts often strictly enforce these provisions even when the services are not used during the renewal period. If you cannot negotiate this provision, make sure the company has adequate internal notices to help avoid this problem.