

# Looking for the Nuance in Software Vendor Agreements

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Posted By: Mark F. Foley

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In a previous column, I discussed why licensees of major software packages or purchasers of major IT systems should not conduct contract negotiations based on the vendor's standard contract, and discussed a few terms that purchasers will generally want to include in their acquisition and license agreements. Although it remains true that each license or acquisition situation is different and must be analyzed to determine what terms and conditions the purchaser needs, here are some additional terms to consider in your own proposed agreements or the vendor's standard language.

## **Interfaces and Implementation Costs**

Many software developers promote their products as interfacing seamlessly with various well-known applications already commonly installed by their target customers. However, vendor agreements often ignore the development time and costs that may be incurred in sewing up this "seamless" interface. Leaving the interface process to the typical, catchall "time and materials" clause can create unhappy financial surprises.

Ask your vendor to identify other users who have implemented such an interface and then check the references. Make sure that all fees for interface services are clearly understood and negotiated before executing the agreement. Make sure that you have the version, service-pack release, and other requirements for the existing software to interface with the new package, and check to make sure that your existing license permits you to make any code changes that are necessary to interface with the new software.

## **Installation and Acceptance Testing**

Standard vendor contracts generally provide that software or systems are automatically "deemed accepted" after some arbitrary period of time, often as short as 30 or 60 days after delivery or installation. Payment of the full license fee or acquisition price often is tied to this date of deemed acceptance. The customer should not agree to such terms for any important system, especially a complex one requiring integration with other software or systems.

A customer should not accept and make payment for software or systems unless and until the customer is satisfied that they are performing in accordance with agreed specifications and business objectives. This can be judged properly only after completion of acceptance tests. The agreement should set forth a detailed but fair test methodology. The client must make sure that the acceptance criteria and test scripts are clearly developed. To retain sufficient leverage, all of this must occur before the contract is executed.

### **Withhold Remedies**

Customers should seek to include a withhold remedy applicable to all aspects of the agreement. A withhold remedy allows the customer to withhold payments otherwise due to the licensor or seller in the event of a failure to perform. Such a provision enables the customer to maintain negotiation leverage and prevents the customer from being forced to make payments for defective or incomplete products or services. For example a good practice is to hold 20 to 25 percent of the implementation and license fees until after final acceptance.

### **Subsequent Rights**

The licensee of important software needs to know that it will receive and continue to have a current application. Accordingly, for major acquisitions, the customer should negotiate the right to receive new releases and versions of the software at no additional charge during the first few years of the agreement. Without such rights, the customer may find itself using outmoded, unsupported, or simply unsatisfactory software after more robust versions are available. The temptation will be to spend and spend again to keep current.

Equally important, and often overlooked, however, is the need to protect against a vendor who replaces a licensed application for the purpose of charging an additional license fee, or acquires a similar product from a competitor or new developer and then stops supporting and maintaining its original product. If the software or system is important and expensive, include language in the acquisition agreement that permits you to upgrade to new versions and releases, or even to switch to a replacement product at reasonable or no cost.

### **Proprietary Rights and Indemnity**

Most well-established vendors will offer some limited agreement to indemnify the customer against court costs and other damages in litigation over intellectual property infringement or misuse claims. Vendor provisions of this kind generally provide that the licensor will have the option either to procure for the customer continued rights to use the licensed software, or to refund a depreciated amount of the license fees paid by the licensee.

However, these provisions generally do not go far enough, especially if the issue arises after the selection process, installation, implementation, and employee training have been completed.

A better agreement provides that the customer will give the licensor the opportunity to do the following:

- Obtain the right for the customer to continue using the software.
- Modify the software while retaining all-important functionality, or
- Replace the software with other code of comparable functionality and quality.

If the licensor fails to take such steps within a reasonable defined time, the customer is authorized to take all actions necessary to protect itself, at the licensor's expense. This type of agreement not only provides better protection, but it also encourages the licensor to get the infringement issues out of the way quickly.

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