

## **Basic Checklist for Outsourcing Relationships** \*

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### A. Before the First Bid

#### 1. Create a Team

- a. Operations.
- b. Information Systems.
- c. Human Resources.
- d. Legal.
- e. Financial.
- f. Sales/Customer Relations.
- g. Insurance/Risk Management.

#### 2. Define Your Goals and Objectives for Outsourcing

- a. Specifically, what services/support/processes are needed? Why are you doing this? (cost?/capacity?)
- b. Where will outsourcing occur?
  - At company's plant?
  - Off site?

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\* Not intended as legal advice. All contracts and business relationships are unique and require individual consideration.

- Off shore?
- c. Clearly defined RFP
  - Time.
  - Place.
  - Manner.
  - Reports.
  - Equipment.
  - Personnel (qualification).
  - Ability to meet clearly defined goals, objectives.
- d. How will you manage internally/externally?

3. Early Risk Management Task - Confidentiality

- a. Identify data subject to privacy concerns.
  - Customer or employee names
  - Addresses
  - Billing information
  - Date of birth
  - Social security numbers
  - Minors
  - Medical records or history
  - Customer account information
  - Pin numbers
  - Phone numbers

- b. Identify data subject to intellectual property theft.
- Customer lists
  - Billing history
  - Research
  - Forms
  - Products
  - Suppliers
  - Processes
  - Software
  - Protocols
  - Pricing
  - Handbooks

c. Establish protocol/requirements for data management (confidentiality point person).

4. Software/Hardware Issues

- a. What systems are needed to be fully compatible with company's system?
- b. What licenses are needed?
- c. What existing licenses are affected?

5. Human Resources

- a. Will outsourcing reduce company's staffing? If so, plan for notice(s) required.

- b. Management of information internally.
- c. Language issues.
  - What languages?
  - How staffed?
  - Who pays for translator?

6. Financial

- a. Market cycle concern.
- b. Cost of raw materials.
- c. Currency fluctuations.
- d. Timing of key contract expirations.

B. Investigate Bidders

- 1. Google® Search
- 2. Criminal Background Search
  - a. Does bidder do these?
  - b. How often?
  - c. Mechanism to share information (employee release).
- 3. Review Bidders' Web Page/Press Releases
  - a. Rapid expansion? Can they handle growth?
  - b. Technical qualification of personnel.

- c. Are competitors of your company using the same service?
- d. Is the outsourced company likely to be a future competitor?

4. Credit Check

5. Physical Plant Inspection

- a. Plant size appropriate?
- b. Outward signs of concern for safety and security.
- c. Equipment in place and operational.
- d. Permits in hand (if required).
- e. Lease length (to avoid disruptive moves).

6. References

- a. Current customers.
- b. Former customers.

C. Drafting the Contract

1. Parties

- a. Small subsidiary performing the contract? (Parent guarantee needed?)
- b. What is the precise legal name?

2. Term and Termination

- a. Can you adjust term for market fluctuations?

- b. Can you arrange early termination with sufficient notice? (Will penalties apply?)
- c. Will a “ramp up” period be required?
- d. How will renewals be handled?
- e. Define termination for cause.
- f. Notice in writing.
  - Identify who gets notice (by position)
  - Notice by certified mail or overnight mail
  - Change of address responsibility
- g. Opportunity for cure.
  - What breaches are subject to cure?

3. Service Level Agreements (SLA's) and Quality Control Issues

- a. What are benchmarks for appropriate levels of service?
- b. Quality control procedures (need written overview).
  - outsourcing vendor
  - company
- c. Service level variance reports (What triggers? What frequency?)
- d. Notice/Opportunity to Cure.
- e. What constitutes critical failure of service?

- Percentage down time?
  - Number of complaints?
  - Specific Episode?
- f. Audit rights (who pays? How often?)

4. Pricing

- a. What currency? (U.S. dollars?)
- b. Purchase orders.
- Written
  - Form
  - Signature required or is email sufficient?
  - Identification authorizing personnel (by job title)
- c. Billing cycle.
- d. Deadlines to dispute bills/charges.
- e. Pricing fluctuations.
- How are prices set?
  - What factors can influence prices? (time, currency, cost of goods, cost of service, new regulations or taxes).
  - Floor/ceiling provisions required?
- f. Penalties
- noncompliance with SLA (credits or fines?)

- late fees
  - regulatory concerns
  - termination
- g. Other issues - - who pays for:
- Taxes
  - Regulatory fees/penalties/compliance
  - Licenses
  - Permits
  - Shipping
  - Warnings
  - Packaging
  - Warehouse fees
  - Training
  - Import/export fees
  - End of term transition costs

5. Inventory

- a. Guaranteed inventory?
- b. Inventory located in the U.S.?
- c. Where will inventory be staged?
- d. Inventory tracking procedures?
- e. Dedicated inventory?
- f. Inventory shrinkage?
- g. Spare parts? (To exceed end of contract?)

- h. Insurance?
- i. Taxes?
- j. Uninsured inventory?

6. Personnel

- a. Criminal background checks (frequency)?
- b. Financial background checks (frequency)?
- c. Method of restricting/tracking, who has access to confidential/proprietary data?
- d. Physical location.
- e. Requirement to sign acknowledgement of confidentiality forms.
- f. Language concerns (do you need bilingual?)
- g. Literacy concerns?
- h. Technical training certification?
- i. Access to key support personnel after contract end.

7. Privacy/Security Concerns

- a. Identification of confidential, proprietary or commercially sensitive material or data.
  - Who does this?
  - How?
  - When?
  - Later identification?

- b. How will data be physically protected?
  - Physical access
  - Key control
  - Security
- c. How will data be electronically protected?
  - Encryption?
  - Fire walls?
  - Password changes?
- d. Policies
  - Remote access restrictions?
  - Ban on lap top use?
  - Ban on wireless use?
  - Ban on zip drives?
- e. Non-solicitation Agreements
  - Customers
  - Employees
- f. Nondisclosure Agreements
  - What is covered?
  - Extend for what period (beyond contract term)?
- g. Exclusivity Concerns
  - Work for competitors?
  - Capacity issues?

- h. Data Storage
- i. End of Term
  - Equipment
  - Return/destruction of confidential and sensitive data
- j. Mandatory Reporting Requirements for Security Breach or Suspected Security Breach
  - To company
  - To regulators
  - To customers / end-users
  - Method of notice
  - Who pays for notice?
  - Notice to insurance carriers?
- k. Duty to cooperate with investigation (company's/regulators).
  - Access.
  - Repairing.
  - Vendor bears costs.

## 8. Intellectual Property

- a. Create lists of patents, trademarks, copyrights, licenses (are these up to date and registered?)  
(Note: carefully consider need to register intellectual property outside of United States)

- b. Agreement/warranty not to infringe (your intellectual property; intellectual property of third parties).
- c. Agreement/warranty not to use your name without prior notice and permission.
- d. If vendor has updates/upgrades in technology or services, define cost to upgrade (if any); requirement to make available.
- e. Deadline for technology review/upgrades.

9. Remedies for Breach

- a. Damages to include:
  - attorneys fees.
  - consequential damages.
  - liquidated damages (early termination).
  - indemnification for third party claims (including but not limited to attorneys fees for investigation and defense costs).
  - punitive damages for willful misconduct or gross negligence.
  - attorney fees (actual/reasonable).
  - regulatory instructive/administrative penalties.
  - interest.

- b. Injunctive relief to protect propriety information, trade secrets, other confidential data, intellectual property rights.

10. Litigation Concerns

- a. Consider agreement for arbitration in company's home state/county except for intellectual property issues – or – agreement for nonjury (bench trial) in company's home state/county [note: bench trial agreement not binding in all states].
- b. Waiver of personal jurisdiction defenses and agreement to litigation or arbitration in company's home state.
- c. Choice of laws: company's home state, Delaware, New York.
- d. Notice requirement for subpoena or court order to disclose.
- e. Duty to maintain information in response to subpoena (new electronic discovery rules).
- f. Duty to cooperate with subpoena or order directed to your company (address who pays for cost of response).
- g. Ability to select/approve defense counsel.

h. Ability to approve settlement.

11. Representations and Warranties

- a. Performance under SLA
- b. Non-infringement of intellectual property rights (yours, third parties).
- c. Follow all laws (including but not limited to...)
- d. Non-disclosure agreement.
- e. Non-solicitation agreement.
- f. Exclusivity (if applicable).
- g. Insurance (to be purchased and maintained).

12. Assignment/Transfer/Sub Agreements

- a. Written approval required.
- b. Not unreasonably withheld.

13. End of Term

- a. Migration of customers/end users.
- b. Timing.
- c. Costs.
- d. Best efforts to avoid disruption in customer service or service to company.
- e. Preservation of confidences.
- f. Destruction/out of service equipment with sensitive data.
- g. Employees of vendor needed for transition.

- h. Equipment purchase/lease.
- i. Training.
- j. Availability of software updates/upgrades.
- k. Availability of spare parts.

14. Force Majeure

a. Define

- Riot.
- Terror.
- Pandemic (home or abroad).
- Weather.
- Natural disaster/Act of God.
- War.

b. Duties Arising Even If Force Majeure

- Best efforts to restore service.
- Best efforts to reduce customer/end-user disruptions.

c. Ability to terminate if disruption too lengthy.

15. Disaster Management

- a. How to access in emergency.
- b. Contacts (where/how maintained).
- c. Submission of business continuity disaster planning protocols.
- d. Security of Data, Intellectual Property.

## D. Insurance Required

### 1. Types

- a. Commercial General Liability.
  - Products.
  - Personal Injury (note, not the same as bodily injury)
  - Advertising injury?
- b. Automobile Liability
  - Property.
  - Bodily injury.
  - Any Auto? – Scheduled autos?
- c. Excess Liability
- d. Workers' Compensation/Employers' Liability
- e. Business Income.
- f. Environmental/Pollution Coverages.
  - Limits
  - Claims made
  - Occurrence
- g. Directors and Officers.
- h. Errors and Omissions.
- i. Technology Errors and Omissions.
- j. Cyber-Risk Liability.

- k. Property Coverages (real and intangible).
- l. Intellectual Property.
2. Limits
  - a. Per occurrence.
  - b. Aggregate.
3. Claims Made/Occurrence.
4. Named Additional Insured – Certificate of Liability Insurance.
5. Ability to Select/Approve Insurance Carrier.
6. Agreement Not to Cancel.
7. Notice of Changes.