Legal Briefs: Top Outsourcing Lawyers Give Advice to Buyers

RFP alternatives, mistakes to avoid, improving relationships with vendors, and more.

What is the most significant development facing outsourcers?

***Scott Hobby*, Sourcing & Systems Integration Practice Group Leader & *Randy Parks, Sourcing & Systems Integration Practice Group Partner, Hunton & Williams LLP*:** The recent reaction against the classic RFP model. A number of industry process experts are concluding the time and effort expended in the usual RFP process does not result in improved outcomes. They are advising clients to abandon RFPs and enter into intensive collaborative efforts with two vendors on a competitive basis. Champions of the process believe it allows the buyer to leverage the vendors' expertise, fosters creativity by eliminating the rigid RFP process, and short-cuts the time to a customized solution and "go live" date. Relationship management, transition and service delivery should also be improved.

***Allen Mass, Attorney Lynch Rowin LLP*:** Some buyers are experimenting with a new bidding dynamic that is intended to reduce the time and cost of negotiation. In this process, the buyer presents to selected vendors a reasonably balanced outsourcing agreement. Each vendor is invited to red-line the agreement and has the opportunity to discuss the proposed changes individually with the buyer's legal team. Following these individual sessions, the buyer revises the agreement in an effort to take into account the vendors' principal concerns with the first draft. With the exception of a few issues unique to each vendor, the revised agreement is the one that the vendors must accept if they wish to submit proposals. Of course, this process will work properly for the buyer only if the revised Master Agreement properly synthesizes the interests of the buyer and the most desirable vendors.

***Chris Ford, Partner, Alston & Bird, LLP*:** In the aftermath of the fall of Enron, regulatory scrutiny of corporate behavior has been heightened. In the context of outsourcing transactions, corporate executives, particularly CFOs, have begun to pay more attention to how well their outsourcing agreements protect the company and them from risks related to non-compliance with laws and regulations. Outsourcing lawyers and advisers must find creative solutions that address customers' compliance needs without causing one of the parties to incur undue cost or risk.

***Gregg Kirchhoefer, Partner Kirkland & Ellis LLP*:** In addition to offshoring and

Continued on page 16


Scott Hobby
Hunton & Williams LLP


Randy Parks
Hunton & Williams LLP


Allen Mass
Lynch Rowin LLP


Chris Ford
Alston & Bird LLP


Gregg Kirchhoefer
Kirkland & Ellis LLP

Continued from page 11

the movement up the value chain of functions outsourced, there is a greater focus on laws and regulations - both outsourcing-specific legislation and generally applicable laws and regulations such as Sarbanes-Oxley and data protection laws. Service providers are concerned about increased costs of doing business as a result of changes in laws and regulations and buyers are concerned about service providers' compliance with laws and the effect of changes in law on taxes, restrictions on the ability to secure government contracts, and disclosure requirements.

What is the most important advice you can give to buyers?

***Hobby* & *Parks*:** Align financial interests. Structure your BPO transactions to align the vendor's economic interests with your critical success and financial metrics. Link pricing and service levels to the key intersections where the vendors' performance will influence your success and increase the vendor's revenue and possibly margin. The vendor should succeed only when the business succeeds and should feel pain when it doesn't.

Typical IT-based service levels achieve this at a basic level using the “stick” approach. However, in complex, multi-function BPO transactions, buyers should think strategically. Implementing a pricing model that over time forces the vendor to shift work flows to the most efficient business processes will create better outcomes over longer periods than simply asking the vendor to execute existing processes better and more cheaply without a benefit to the vendor for better performance that actually has a demonstrated value to the customer.

***Mass*:** Standardize. When consistent with its business objectives, the buyer should optimize the use of the vendor's best practices and its standardized process, procedures and tools. This is the best way to reduce the buyer's costs and enhance the vendor's service. Unnecessary customization also complicates the all-important transition phase of the relationship.

***Ford*:** Do not be fooled into believing that one size fits all. In some instances a standard outsourcing solution can meet the needs of the vast majority of buyers. But in most cases, customers require solutions that are tailored to their specific needs. A one-size-fits-all solution does not take into account how one organization differs from another, and those differences may give that organization an edge over its competitors. Many buyers choose a standard solution to save on the near term transaction cost. However those short-term savings can have a negative impact in the long-term if the buyer's specific needs are not met.

***Kirchhoefer*:** Think clearly through the objectives - “need-to-haves” and “nice-to-haves” in outsourcing; the risk factors, and in light of potential backlash, the message to convey to various constituencies (employees, customers, investors, and government).

Sometimes, in the hot blush of romance and the desire to start reaping the benefits of outsourcing, a buyer will hastily tie the knot with a service provider without clearly considering what it wants out of the relationship. Outsourcing requires both a fair amount of premarital counseling and an often-elaborate prenuptial agreement to ensure the buyer is meeting its objectives and can live with its partner once the thrill is gone.

What is the biggest mistake buyers make when outsourcing?

***Hobby* & *Parks*:** Failure to develop a well-considered, strategic business case and tactical set of performance requirements, risk allocation parameters and relationship management and flexibility requirements for the outsourcing initiative. If the buyer team doesn't fully understand the organization's strategic goals and how outsourcing supports them the chances of completing the negotiation and documentation of the arrangement and a long-running success are substantially diminished. Simply achieving the same level of service at a lower price may be enough to claim immediate success, but that success will erode as the business requirements change and the 'banged together' solution from the vender becomes inadequate.

***Mass*:** Negotiations should be collaborative rather than adversarial. By demanding one-sided terms, the buyer prolongs negotiation time, increases attorneys' fees and the costs of consultants, and may drive the most desirable vendors away. A collaborative relationship is also the best way to assure the long-term success for both parties.

***Ford*:** Customers err when they become overly-focused on cost savings. Then, they often lose sight of the very essence of the outsourcing arrangement - the relationship. Unlike most other types of transactions, the outsourcing arrangement is one that requires the parties to work together for extended periods of time. As a result, customers should place a premium on the aspects of the transaction that will lead to a long-term relationship of value - account governance, service performance and change management.

***Kirchhoefer*:** Buyers may become so focused on winning the "battle" in a contract that they sometimes end up with a Pyrrhic victory and a lost "war" as the engagement progresses. If there are onerous burdens imposed in the contract, a service provider may have to look for ways to cut corners, resulting in the buyer not achieving the objectives that outsourcing was intended to bring. Be careful what you ask for - you just may get it - along with a slew of unintended consequences.