



VENABLE

Top Ten Tips for Nonprofits When Procuring Technology Solutions

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- **December 5, 2017:** [Performance Management: Getting the Best Out of Your Nonprofit's Workforce](#)
- **January 18, 2018:** The Top Privacy and Data Security Trends and Issues for Nonprofits in 2018 (*details and registration available soon*)
- **February 15, 2018:** Nonprofit Mergers, Alliances, and Joint Ventures: Options, Best Practices, and Practical Tips (*details and registration available soon*)

IT Procurement Scenarios

- M&A transactions
- “Bare” licenses for existing IT products
- License for existing IT, plus services
- IT service arrangements
- Development arrangements
- Outsourcing arrangements
- “Software as a service” and cloud computing
- Some combination of the above





Difference Between Traditional Software Development and License-Based IT Services



Traditional Software Development:

- Software developed primarily for installation and hosting on client hardware
- May involve full or partial transfer of ownership to client
- Escrow

License-Based IT Services:

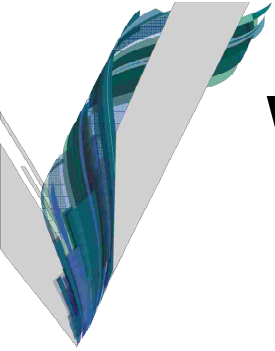
- Ex: “Software as a Service,” cloud-based services
- Externally hosted, accessed by client
- Software exclusively owned by vendor, license to access/use only



Forget the Standard

- No such thing as a true standard contract
- The “industry standard contract” is actually a strongly pro-vendor arrangement
- Vague commitment descriptions, delivery obligations, or product specifications will leave the client with little recourse





What You Should Consider When Entering Into a Transaction to Procure Information Technology Products and Services

Term	Recipient	Service Description	Service Commitments	Assets
Proprietary Rights	Maintenance	Consents	Service Levels	Customer Responsibilities
Service Locations	Human Resources	Acceptance	Management & Control	Reports
Data	Confidentiality	Audits	Pricing	Taxes
Disaster Recovery	Technology	Reps & Warranties	Indemnities	Dispute Resolution
Damages	Insurance	Assignment	Termination	Miscellaneous

**THIS PRESENTATION FOCUSES ON A FEW KEY AREAS
(BUT OTHER ISSUES NOTED ABOVE MAY ALSO BE IMPORTANT)**



Procurement Strategy

- Preparation is key
- Create a multidisciplinary team
- Competition will lead to a faster and better result
- Don't choose a vendor until the contract is fully negotiated
- Best price does not equal best vendor
- Focus on meeting your requirements



Pre-Contract Considerations

- Screen and assess the vendor (e.g., financial stability and experience)
- For any IT engagement, it is essential to determine the scheduling priorities (i.e., mission-critical vs. routine, short-term vs. long-term)
- **Bargaining power may vary, but most vendors are willing to make at least some concessions**
- Work toward maintaining or creating a good customer/vendor relationship
- Use a term sheet only if it will help clarify initial positions



Understanding Electronic Contracts

- Weighing pre-contract considerations
- Forming and executing contracts online
- Managing changes through ancillary documentation
- “Clickwrap” end user agreements vs. fully negotiated contracts





Term and Termination

- Duration of agreement vs. duration of services
- Renewal options, notice requirements, survival
- Will there be a transition period (e.g., moving to a new platform, location)?
 - What needs to be transitioned?
 - Will vendor return your data?
- Long-term contracts are more cost effective, but short-term contracts offer more flexibility and opportunity for future negotiation



Service Description

- Think about what to include in and exclude from definition of “Services”
- Statement of work or order form
- Categories of services
 - Data analysis, storage, security
 - IT services and support
 - Network access and cloud computing
 - Application development and customization
- Schedules, milestones, and timetables
- Review cycles and acceptance criteria
- Fees, expenses, invoicing, payment





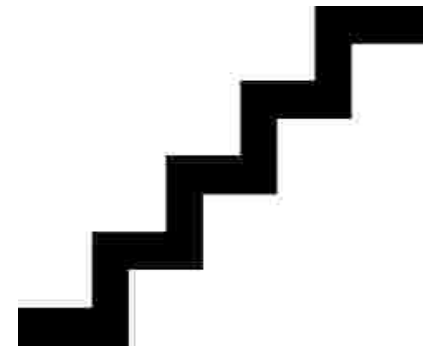
Proprietary Rights

- Pre-existing proprietary software or materials
- License to software vs. license to access vs. assignment
- Ownership of developed software
- Data, usage metrics, financial information
- Trademarks and marketing/publicity
- Confidentiality and non-disclosure
- Third-party materials



Service Levels, Business Continuity, and Disaster Recovery

- How are service levels and availability measured?
 - 99% vs. 99.9999%
 - Monitoring? Reporting? Remedies?
- Is a data recovery plan in place?
 - Redundancy from multiple locations
 - Alternative methods of access
 - Incident reporting systems, access and usage reports
 - Scheduled downtime notices





Staffing and Subcontracting

- Assignment of project manager or other business rep for both customer and vendor
- Staff continuity – restrictions on reassignment, right to remove
- Non-compete or non-solicitation
- U.S./local vs. off-shore personnel
- Subcontractors
 - Vendor's right to subcontract – prior approval or notice
 - Which services may be subcontracted?
 - Right to restrict or remove subcontractors
 - Liability for subcontractor performance, breach



Confidentiality

- Defining “confidential information”
 - Marking requirements vs. context of disclosure
 - Exceptions
- License to use confidential information
- Permitted disclosures – personnel, government order
- Return of confidential information upon termination/request
- Injunctive relief
- Survival
- Entity-specific confidentiality issues – health insurance, education, sovereign immunity
- Overlap with data provisions and proprietary rights



Data and Data Security

- Consider the role that data plays in the agreement
 - Data services, i.e., marketing analytics, cloud storage – data as the product
 - Data *about* the services, i.e., usage metrics, anonymized statistics – data as a by-product
- Data hosting, storage, maintenance, access, and processing
- Storage location – know where your data is stored and where it travels, and make sure you are notified if it changes
- Vendor's security procedures (especially important in cloud computing)
- Proprietary rights and license to use
- Rights and access post-termination
- Hosting or processing by subcontractors



Privacy and Data Breach

- Include language in contract that vendor will comply with data/privacy laws, rules, and regulations
- Personally Identifiable Information has special rules and higher stakes – particularly in Europe
- The laws on this vary widely by jurisdiction, and are constantly changing
- Reporting obligations and remedies in event of security breach
- Have a plan for how a security breach will be handled
- Security breach vs. breach of contract and indemnification
- Consider cyber liability insurance



Insurance

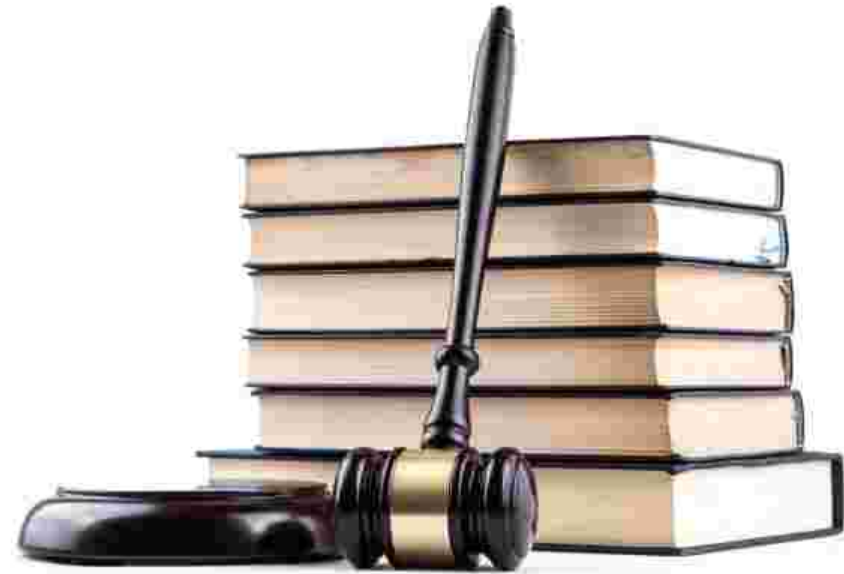
- Nature of exposure and category of insurance
- Worker's compensation
- Employer's liability
- General commercial liability
- Professional liability or E&O
- Umbrella
- Cyber liability insurance
 - Protection from costs arising from data security breaches
 - Third-party claims, costs of remediation, breach notification, regulatory investigation, and damage to data
- Documentation and named additional insureds
- Practically relevant to indemnification and breach — \$\$\$
- Coordinate with risk management department, broker, or insurance consultant





Dispute Resolution

- Informal dispute resolution
 - Alleged breach
 - Withholding of payment
- Arbitration
 - Rules
 - Arbitrator selection
 - Enforcement
- Litigation
 - Class actions
 - Jury trial waiver
- Governing law and venue
- Issues with off-shore vendors





Remedies and Limitation of Liability

- Liquidated damages
- Injunctive relief
- Direct damages limitation
 - Fees paid/payable or multiplier
 - Fixed amount
- Special, indirect, consequential, punitive damages
- Claim limitations
- Exclusions to limitation
 - Confidentiality or security breach
 - Indemnification
 - IP infringement
 - Violation of law



Additional Provisions

Provisions for Counsel to Negotiate:

- Indemnification
- Representations and Warranties
- Audit Rights

Legal Boilerplate:

- Notices
- Assignment
- Counterparts
- Relationship of the Parties
- Severability
- Waivers
- Entire Agreement
- Survival
- Governing Law/Venue
- Headings





Questions?

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