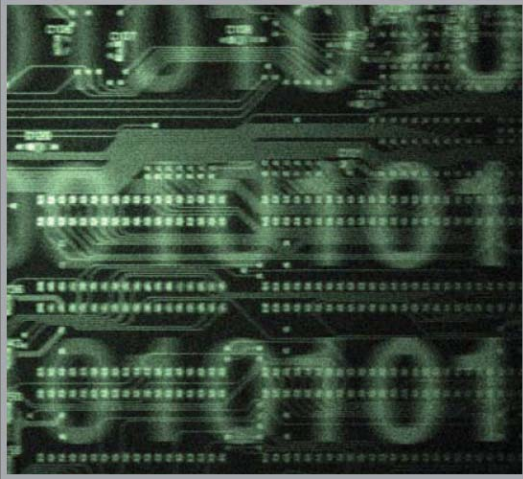


Richard S. Wyde, Esq.



# BEST PRACTICES FOR CONTRACTING WITH SOFTWARE AND SYSTEM VENDORS

- The outlines in this book provide practical guidelines to contracting with software and system vendors and are designed to be used throughout the software and system procurement, negotiation and administration processes.
- The Appendices include tools to help guide your successful software and system procurements.

## Preface

The contract that the purchasing organization makes with the software or system vendor it selects sets the stage for the implementation process soon to follow. This workbook, written by an attorney who specializes in information system contracts, will explain some of the special aspects of software contracting, such as the different methods and techniques for negotiating good contracts, guidelines for the most important contract terms, and how to address the inevitable changes and problems that ensue during the implementation process.

The elements covered in this workbook include:

- The negotiation process
- Key questions to ask vendors when buying their products
- Licensing vs. ownership
- Timelines and payment schedules
- Defining system specifications
- Acceptance testing
- Warranties
- Remedies for non-performance
- Lessons learned from implementing projects and
- How to recognize and deal with troubled projects

Many helpful worksheet and checklist tools have been included in this workbook. The outlines, checklists, and tools are not intended, nor should they be used, as a substitute for specific legal advice or opinions since legal counsel may be given only in response to inquiries regarding particular situations. You should not act upon this information without seeking professional counsel.

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## CHAPTER 1:           **GUIDELINES FOR SOFTWARE LICENSING AND SYSTEM PURCHASES**

### **I.       Introduction**

This outline describes some key guidelines or rules to follow when an organization licenses software or purchases a system. These guidelines are biased towards licensees and suggest ways licensees can avoid project failures and have remedies when problems occur. Although these guidelines do not address all the issues an organization may face, they are consistently followed in this field. And, although there are numerous ways for a technology project to fail, an organization will have a much greater chance of success with its projects if it follows these guidelines.

### **II.      Guidelines**

#### **A.      Everything Starts With the Software.**

- 1.      Types of Software.** Woven into all computer and telecommunications systems is software, the instructions for how computers and telecommunications devices perform their tasks. Software is usually either packaged software for mass markets or standard applications for specific market segments, or custom software developed specially for a buyer's needs.
- 2.      Ownership vs. Licensing.** The first guideline is that a buyer has to understand whether it owns or licenses its software.
  - i.      License Rights.** The license for packaged software describes the rights a buyer has purchased. The license describes the rights the licensee has to the software. Unless the license lists a specific right, the buyer does not have that right. For custom software, the development agreement usually describes the rights to the code. Such rights may include the right to: use; reproduce, modify or prepare derivative works based on the code; distribute; demonstrate; and other types of rights.
  - ii.     Typical Grant of Rights.** In most cases, a licensee is granted the nonexclusive right to use the object code form of the software (i.e., the software code in machine readable form only) for the licensee's internal business purposes. The license is also usually nontransferable and perpetual, subject to termination such as if the licensee breaches the license terms.
  - iii.    Other Possible Rights.** A licensee may also want to have the right to reproduce, modify, and prepare derivative works based on the source code form of the software (i.e., human readable form) if the licensee needs to be able to make changes to the code.

- iv. **Custom Developed Software.** Unless the agreement indicates that the developer has transferred its ownership rights to the purchaser, the developer owns the software and the purchaser only has licensed rights as described in the agreement. If an organization does not own the software, it could lose the rights it has under the license under certain circumstances, such as if it terminates the license agreement.
  
- v. **Ownership of Custom Software.** Buyers usually want to own custom developed software and have licenses to packaged, standard software. It is not unusual, however, for a developer to want ownership of the custom software. If a developer is willing to give the buyer some special benefit, such as a reduced price or a royalty from the developer's licensing of the software to other parties, the developer may keep ownership of the custom software. The organization would be granted an irrevocable (i.e., nonterminable), perpetual, worldwide, royalty-free license to use, reproduce, distribute, demonstrate, modify, and prepare derivative works based on the software for the organization's business purposes. (In this case, a licensor's remedy for a licensee's breach would be to seek money damages.)

**B. Only Pay for Deliverables That Work Right.**

- 1. **Try to Withhold Payment Until the End.** When developing software or providing other services or products, vendors usually want to be paid a large percentage of the contract price when the contract is signed and the rest monthly on a time and materials basis for services or on delivery of the product. However, buyers try to pay only for acceptable deliverables and services, with payments made after the buyer knows the products and services meet requirements.
  
- 2. **Periodic Payment Is Typical.** Parties usually compromise between a vendor's need to have some funds for technology as soon as possible, such as to pay its hardware suppliers, and a buyer's need to pay for actual products and to retain some funds until the technology has been successfully tested. Since many organizations do not pay amounts on contract execution, some amounts are typically paid after delivery and installation of a deliverable; however, a significant percentage should be retained until the successful acceptance of deliverables or services. An additional percentage should be withheld until successful performance of an entire system for 60 or 90 days after its acceptance.

**C. Do Acceptance Tests.**

- 1. **No Technology Works Right All the Time.** Computer and telecommunications technologies often have serious limitations or

fundamental flaws when first installed. Therefore, a buyer has to test technology to confirm that it operates according to all necessary specifications. (See discussion below about specifications.) However, the buyer's right to test technology to confirm that it works correctly is usually omitted from a standard vendor contract. Vendors prefer to just install a system and have the organization accept it without independent testing; then the vendor gets paid after installation is complete or after the vendor has said the system is acceptable.

2. **Perform the Tests Yourself.** An organization should perform its own tests on the system after it is installed to confirm its acceptability. The tests should be independently developed by the organization or its own technical consultant to ensure they are comprehensive and objective. In cases where the vendor of the technology develops the acceptance criteria and tests as separate deliverables in a large development contract, the organization needs to confirm these deliverables will sufficiently test the system's functionality and capabilities.
3. **Set Testing Deadlines.** The acceptance tests should have defined periods of time for testing corrections of failures and retests. For maximum flexibility and accuracy, the testing and correction time periods for each deliverable will be delineated in a comprehensive work plan. (See discussion below regarding work plans.) This plan should also have a "drop dead" date, i.e., a date by which the system must work in accordance with its specifications. If the technology does not work by the drop dead date, the organization should have the option to terminate the contract, in whole or in part, or require the vendor to continue fixing and retesting the technology. If the organization decides to terminate, the vendor must remove the technology and return any amounts paid for the returned technology.

**D. Test the Entire Integrated System, as Well as Certain Parts.**

1. **First Test Discrete Parts.** Discrete subparts of a software system, such as units, modules (combinations of units), or functions (combinations of modules), are tested by a vendor as their development is completed, and then they are ultimately combined into the whole software system. One testing method that reduces risk to some extent is for the organization to test each of the specific functions for the software system. By testing individual functions, an organization can spot problems in one area that may not have been correctly developed. In addition, the problems can be discovered earlier and in more manageable quantities than if the organization waits to test the entire software system in a "big bang" approach.
2. **Then Test It All Together.** After all software functions have been tested individually and together, the organization can then proceed to testing the

entire system. This type of integration testing ensures that all the components work as a whole.

3. **Test the Equipment With the Software.** Vendors often separate acceptance testing of software from equipment. If the equipment works correctly, the organization may have to keep it, even if the software fails its testing. However, an organization usually does not want some parts of the whole if other parts fail, so acceptance tests should be conducted on the integrated system, i.e., the true operating environment. The equipment and its software should operate together during the tests for some period of time, such as between 30 and 120 consecutive days, without failure. If the equipment and software are networked with or interfaced to other systems, all those pieces of the system should work together as a whole. After corrections are made to failures that had occurred in one part of the system, retest the whole system again to confirm it all works correctly. If one part irreparably fails, the equipment and software should be retrieved by the vendor and amounts paid to date should be returned.

**E. The Specifications for Acceptance and Warranty Performance Should Be Objective and Absolute.**

1. **Define Objective Specifications.** Every system has written specifications or standards. The specifications for your system should be defined as thoroughly and clearly as possible because they should serve as objective performance standards for several aspects of the contract. The specifications will set the standards that must be met before acceptance of the technology. Then, during the warranty period, the warranty should be that the technology will operate in accordance with these specifications. (See discussion below about warranties.)
2. **Include All Applicable Documents and Technical Standards.** The specifications should include standard, published user and technical documentation, and all documents and standards upon which the organization relied on when originally making the purchase decision. These additional documents should be requests for proposals, vendor proposals, brochures, and other standards the technology must meet.
3. **Converted Data.** When developing or purchasing new computer systems from vendors, organizations often have the data from their old, legacy systems converted for use on the new system. The converted data should be a separate deliverable if the vendor performs the conversion process. In any case, the specifications should include that the converted data will be processed successfully by the new system.
4. **Client/Server Systems.** Organizations expect their new computer systems to process larger data volumes at faster speeds than was possible with their legacy systems. However, a new system may have more

advanced capabilities, but it may be comprised of a smaller client/server computer system and not able to always process the same data volumes with the same speed as can be achieved with large mainframe systems.

5. **Response Times.** As a result of the trend to using client/server technology and the growing volumes of data to be processed by new systems, organizations need to include detailed response times as part of the specifications. Response times are the time periods the system needs to perform certain tasks, such as online processing of data, retrieving of data from databases, moving from screen to screen, or printing a report. The response times can also include overnight batch processing times for large data volumes. The contract should require that the system will meet each response time, such as that each report will be printed within three seconds after hitting the enter key, 98% of the measurable time period (8:00 a.m. to 5:00 p.m.) when the system is in use. Absolute numbers (e.g., three seconds), not averages, should also be used as the maximum response time standards.
6. **System Availability.** Another performance standard is what is known as system availability or “uptime.” This standard measures the time period that a system is fully operational. Again, the specifications should state that the system availability will be at least 98% during the measurable time period when the system is in use.

**F. Do Not Let the Acceptance or Warranty Standards Include Hedges.**

1. **Substantiality Standards.** Vendors will try to have buyers accept a system if it works “substantially” or “materially” in accordance with the specifications. However, allowing these qualifiers or hedges into an objective standard will severely undercut the buyer’s ability to receive the system it thinks it purchased. Leaving in these hedges will also lead to arguments over how close the system is to what the parties expected when it “substantially” meets the standards. It is smarter and safer to keep the standard objective, without qualifiers.
2. **Compromise if Necessary.** If a compromise is necessary, keep the absolute standard, but allow minor or inconsequential errors. For example, state that the system will perform in accordance with applicable specifications, except for minor or inconsequential errors (in Purchaser’s reasonable judgment).

**G. Warranties Are Promises That the Vendor Must Keep.**

1. **Scope.** A warranty is a promise that a fact is true. For technology purchases, the most important warranty is that the system will operate in accordance with its specifications. The warranty may be limited to a

certain period of time, such as one year from acceptance of the entire system for large purchases.

2. **Standard Remedy for Breach of Warranty.** The standard remedy for a breach of this warranty is for the vendor to repair or replace the system, in whole or in part (not just use reasonable or best efforts to repair) at no additional cost so that the system operates in accordance with the specifications. Although vendors usually do not charge separately for their warranty services, costs for these services are bundled into the overall system cost.
3. **Additional Remedies.** If the vendor cannot satisfy these warranty obligations, another remedy may be that the organization has the right to terminate the agreement and receive a full refund. However, the repair, replace and refund remedies should not be the exclusive remedies for a breach of the warranty because the organization will have incurred more financial harm than can be covered by just the refund of amounts previously paid. As a result, the organization should be entitled to pursue other remedies, such as its actual damages.
4. **Expanded Warranties.**
  - i. **Legal Compliance.** Vendors should warrant that the system being purchased by or developed for the organization will comply with all Federal, State, County and local regulations, statutes, guidelines, and codes.
  - ii. **Date/Time Compliance.** The vendor should also warrant that the system will be Year 2000 and leap year compliant. Date/time compliance will require that the system process data before, during and after the year 2000.
  - iii. **No Bombs or Viruses.** One other important warranty is that the system will contain no viruses, bombs or disabling devices which could be triggered if the organization fails to perform one of its obligations, such as making a payment when due.

**H. Get a Firm (Not Estimated) Schedule for Performance of All Vendor Obligations.**

1. **Project Plans.** Successful projects must have a detailed work or project plan for an entire system, including a subplan for each subsystem if the buyer is installing several subsystems at various sites. This plan should contain firm dates that have been developed in cooperation with and agreed to by the vendor for such important events as delivery, installation, conversion, the beginning of acceptance testing, and the project completion date.

2. **No Estimates.** Vendors will try to have the schedule include estimated dates because they do not necessarily want to be held to firm deadlines. However, an organization should receive firm schedules from vendors if the dates are reasonably negotiated.
3. **Time Is of the Essence.** Once the schedule is set, the contract should indicate that “time is of the essence for the performance of vendor’s obligations” to ensure that the dates are firm and will be strictly met. If the vendor needs some flexibility, such as for minor events that do not affect a key date, set a “best efforts” requirement for those events, but always add a deadline and “time is of the essence” standard for dates the vendor must meet.
4. **Delayed Completion of Work Plan.** If the contract has to be signed before the final dates in the work plan are fully negotiated, put a deadline in the contract for concurrence on the schedule. If the parties cannot agree on the entire work plan by that deadline date, include a provision that allows the organization to terminate the agreement in its discretion, without further liability, and the organization should get a refund of any amounts previously paid.
5. **Integrated Project Plans.** Some projects require the organization to commit as many staff members as the vendor, such as with a large system development effort. In these cases or when the organization is actively involved in numerous project activities, such as design and testing, the project plan should integrate both vendor and organization staff commitments. The same is true if an organization has retained a third party quality control or other consultant to assist on the project. The project plan should also show the interdependencies between the project activities so that the organization understands the impact on the schedule from a party’s failure to perform its tasks.

#### **I. Tightly Manage the Project.**

1. **Unmanaged Projects Fail.** Both the organization and the vendor must carefully manage each of their parts of the project. This means that the organization cannot abdicate full responsibility and give its full trust to the vendor, which may claim to be an expert and able to complete the project as promised in the contract. The organization has to actively fulfill its obligations and make sure that the vendor does the same.
2. **Additional Project Management Requirements.** Requiring the vendor to: stay on the schedule every day or to update the schedule in an acceptable way; attend meetings; provide weekly and monthly reports; fully staff the project; make difficult decisions in a timely manner; stay within the scope of the project; perform change orders as needed; and perform its other obligations, are some of these organization management

tasks. Without constant vigilance and the full support and oversight from the highest level of organization management, the project will flounder and ultimately fail.

**J. Negotiate the Terms of Maintenance Services When Purchasing the Technology.**

1. **Do Not Wait Too Long.** Vendors often wait until after a system is installed and operational before negotiating terms of maintenance and support services. By waiting until after the system is operational and in the warranty period, a user has lost negotiating leverage over determining the terms for maintenance and support.
2. **Maintenance Terms Are as Important as License Terms.** Always negotiate maintenance terms at the time of purchase because an organization will be able to obtain significant support concessions when buying a system, but not a year or more later. Since costs for maintenance agreements are generally 18%-25% of the initial purchase and an organization effectively repurchases the technology after five years of use, maintenance agreements are as important as the purchase agreement.
3. **Scope of Agreements.** Descriptions of maintenance and support should be as detailed as possible and should include: clear definitions of failures that require maintenance service; vendor response times to standard telephone inquiries; caps on price increases; training levels required of technicians providing maintenance support; levels of support in the event of a total crash of the system; credits for failures to respond in a timely manner to maintenance requests; and access to a toll-free repair number that is available 24 hours a day, 365 days a year.
4. **Applicable Standards.** If the vendor is operating the system or the organization's equipment is not changed, the system should remain subject to the same performance standards as during the warranty period. Other warranty standards, such as Year 2000 (date/time compliance) compliance and the lack of disabling devices, should also apply during the entire maintenance period.

**K. Anticipate and Describe Possible Remedies.**

1. **Remedies in General.** It is axiomatic that technology projects do not always proceed as planned. I am involved on behalf of organizations in numerous projects that have failed or appear to be failing. While attempting to resolve differences with vendors in these and other less cataclysmic situations, organizations look for their possible remedies in the applicable contracts. The remedies are designed to compensate the organization for the harm caused by the vendor or provide the organization with solutions for its problems with the vendor. However,

the remedies are not always easy to exercise, and they do not always solve the real problems experienced by the organization.

2. **Typical Remedies.** Typical remedies in large technology agreements may include:

- i. **Liquidated Damages:** these are damages that are enumerated in the agreement for specific failures, such as \$X for each day the vendor fails to achieve system acceptance by the date in the work plan or \$Y for each failure to meet a response time performance standard. Liquidated damages are increasingly required to be compensatory, not punitive, so they should reflect the foreseeable amount of harm the organization will suffer from the harm caused by the vendor's performance failure. Although the fear of suffering liquidated damages theoretically may give vendors incentive to perform as required, liquidated damages are often not available as a practical matter because an organization, or other event outside the vendor's control, causes the vendor to not perform its obligations. Thus, if an organization includes liquidated damages in the contract, the organization has to perform its tasks timely and only impose the damages when appropriate.
- ii. **Performance Bonds:** a performance bond is purchased by a vendor from a bonding company, and the organization is entitled to the bond amount under conditions defined in the bond, such as a vendor's termination or default. However, a vendor may dispute whether it is in default or claim the organization's termination was wrongful, thereby delaying or preventing the organization from receiving the amount of the bond until it has litigated the matter in dispute. Vendors also pay fees to purchase the bond, and the vendors may just pass through those fees to the organization, thereby increasing the cost of the contract.
- iii. **Withholding:** the common sense remedy most buyers exercise is to temporarily withhold payments from a nonperforming vendor until it performs correctly, even to extent of withholding payments for acceptable work. However, unless this withholding remedy is available from the contract, the organization may, itself, be in breach of the contract by not making payments to the vendor for acceptable work. Therefore, this type of withholding should be included as a standard remedy.
- iv. **Setoff:** a setoff is the permanent reduction of payments that would otherwise be made to a vendor. This reduction is based on the buyer's reasonable estimate of the amount it has been harmed by the vendor's breach. Setoff can provide a useful remedy in compensating the organization for harm it has suffered, although a

vendor is almost certain to contest the amount. This remedy has to be exercised only in appropriate circumstances.

- v. **Free Hardware for Performance Failures:** some systems fail to meet response time or system availability standards because the equipment is too small. In this case, a vendor should be required to give the organization more equipment at no additional cost, particularly if the vendor warranted that the software would perform in accordance with specifications with the equipment that now does not process the data fast enough.
- vi. **Termination for Default:** if a vendor is not performing its obligations as required by the contract, the organization should notify the vendor of the its defaults. If the vendor does not then perform within the cure period specified in the contract, the organization should be entitled to terminate the contract and pursue its available remedies, particularly recovering money damages. Although termination is a severe remedy and should only be used when a project has failed, it is sometimes the only practical solution.
- vii. **Termination for Convenience:** there will always be situations where an organization determines it has to terminate a contract and lacks sufficient cause to pursue a termination for default. Some reasons may include unexpected internal policy changes or shifts in organization management. As a result, a contract should include a provision that allows the organization to terminate the contract for the organization's convenience, after giving the vendor a specified number of days notice. In this case, the contract should define a process for paying the vendor appropriate amounts, such as for work accepted by the organization prior to the date of termination. However, the organization should avoid paying the vendor for all work performed at the vendor's hourly rates because the total amount may exceed the contract price.
- viii. **Software Escrow:** the source code for the software is its human readable form, i.e., the instructions are readable in the computer language as written by the programmers. The object code is the source code "translated" into a machine-only readable form, i.e., the binary language of 0s and 1s. Licensed software is usually only provided in object code form. Therefore, organizations often require vendors to place the source code for licensed software into independent, third party escrow arrangements so that the organizations can obtain copies of source code under certain situations, such as if the vendor stops providing support services or enters bankruptcy proceedings. The contract has to delineate these "release" events and the rights the organization has when it gets

the source code, such as to modify and reproduce it for the organization's internal purposes.

- ix. **Guarantee:** if the vendor selling the technology or providing the services is a subsidiary of a larger company, the buyer may want to have the parent company guarantee the performance of the subsidiary.
- x. **Letter of Credit:** the buyer of products or services may want to secure performance by requiring the seller to establish a letter of credit at a reputable bank, instead of having the vendor purchase a performance bond. In the event that the seller fails to perform under the agreement, the buyer can attempt to use the letter of credit to cover its damages.

## L. You Need Appropriate Boilerplate Provisions.

1. **Indemnification.** When one party gives the other an indemnity, it is promising to fully compensate the other party for harms the other party suffers, such as property damage, injury or death. Indemnifications against infringement or misappropriation of intellectual property are increasingly critical in an arrangement with a vendor which is installing sophisticated technology and using licensed software or creating custom software to operate the equipment. In some contracts, organizations receive general indemnifications against harms caused by a vendor's acts or omissions (or at least from its negligence or willful misconduct), from the vendor's disclosure of organization confidential information, and from the system's failure to meet all applicable statutes, regulations, codes and guidelines.
2. **Damages Disclaimers and Limitations Must Be Carefully Crafted.**
  - i. **Definitions.** A damages disclaimer is a provision allowing the organization to disclaim responsibility for consequential and certain other types of damages. Damages limitations can also impose a total cap on amounts due under the contract.
  - ii. **Each Party Can Limit Its Liability.** The organization can usually include these damages limitations and disclaimer provisions for itself. If a vendor has negotiating leverage, it will also try to include damages disclaimers and damages limitations for itself.
  - iii. **Exceptions Are Needed for the Vendor's Limitations and Disclaimers.** If these provisions are included for the vendor, the vendor should still be liable for damages arising from its indemnification obligations, breaches by the vendor of its obligations to protect the organization's confidential information,

and administrative and actual costs resulting from a reprocurement. If the organization makes this compromise, the contract should establish the damages limitations and disclaimers, and then indicate that those provisions are not applicable to the types of damages the organization wants to exclude from the limitations and disclaimers. If the vendor is not kept liable for these types of indemnification and other specific damages, which should be carved out of the disclaimer and limitation, the organization could incur huge amounts of damages caused by the vendor.

**M. Every Contract Needs Special Provisions for Unique Situations.**

- 1. Every Technology Procurement Is Unique.** The vendor developing software may have third-party software embedded in the supposedly “custom-developed” software. The room where the technology will be installed by the vendor may have water pipes or exposed batteries that would cost more to remove than the price of the technology. The system may have a sophisticated network with multiple locations and multiple interfaces. The vendor may be a distributor or dealer for a large manufacturer, and the organization may need special protections from the manufacturer in case the dealer or distributor disappears.
- 2. Do Not Just Sign a Standard Agreement.** All of these and countless other situations require special treatment in the contract. As a result, do not sign the typical vendor agreement, which will lack language addressing the buyer’s unique problems.

**N. Use Your Own Contract and Control Its Editing During Negotiations.**

- 1. Biases Are Intrinsic.** Every model contract has thousands of biases and presumptions that are really impossible to fully balance in negotiations. Instead of starting with a vendor’s model contract and trying to edit it, the organization should always use its own model contract.
- 2. Revisions Are Normal.** The organization should get comments in writing from the vendor about proposed contract revisions, agree to acceptable changes, and negotiate final terms over which there is still disagreement. The language describing agreed upon changes can, like the model contract, have subtle biases, and the organization wants to control the drafting of those provisions, as well.

**III. Conclusion**

Purchasing and implementing new technology will almost always be a long and difficult experience. Before making the commitment to new technology, an organization should obtain all possible protections and describe them clearly and in great detail in the contract. So, be sure that, if your system fails and you rush to the file to grab that contract, you have a document that will provide solutions to your problems.

## **CHAPTER 2: KEY QUESTIONS TO ASK VENDORS WHEN BUYING TECHNOLOGY**

### **I. Introduction**

From a buyer's or software licensee's perspective, vendor agreements for the sale or licensing of technology are fundamentally biased against a buyer. In contrast, vendors will argue their agreements are designed to reflect the types of business arrangements that the vendors are willing to offer (at least initially) at the prices reflected in the agreements.

However, in any transaction where a buyer has some bargaining power, the buyer can revise the vendor's standard agreement to add balance and address some, or perhaps all, of the buyer's concerns. The revision process can take many paths; sometimes the parties just meet for several long and painful days to argue about how to negotiate changes to the vendor's model agreement. In other situations, the buyer proposes revisions to the agreement by editing the document, drafting an amendment or proposing conceptual changes in a memorandum or list. Or, the buyer discards the vendor's agreement and drafts its own agreement which the vendor then has to revise. All of these approaches can take significant amounts of time and generate large legal fees.

An alternative approach that can save time and money involves asking the vendor key questions about how the vendor will address the buyer's concerns in the specific transaction before the parties engage in contract negotiations. These key questions can allow the vendor to compromise in writing before the buyer takes any action in response to the vendor's model and may provide a mechanism for the vendor to explain how this buyer and its transaction differ from all the others that only require the model agreement. They can also avoid contentious negotiations over every provision in the vendor agreement and flushes out the vendor's willingness to compromise on big issues in the relationship before the buyer spends lots of money on legal fees.

The following key questions should be used as a tool for accelerating and improving the contract negotiation process. Note that a buyer should receive a "Yes" answer to each question. If the answer to the question is "No," then the parties know they need to address the response.

The questions are most effective when submitted in advance to a vendor, either as part of an RFP process or after a vendor has been determined by the buyer to ostensibly be the best choice. The vendor should answer the questions in writing so that the buyer can review the answers and meet internally to decide whether it wants to continue to negotiate with the seller or choose another vendor. Then, if the buyer goes forward with the negotiations, the key questions and the vendor's answers can serve as the basis for negotiating resolutions to the most significant points of contention in a technology agreement. A buyer could also use these key questions as a script during a negotiation process to attempt to discuss and resolve significant issues in the transaction.

In every negotiation, there are unique concerns and issues that the parties have to address. Therefore, these key questions will have to be supplemented or tailored to fit your

specific context. However, they can provide a framework for negotiations before pursuing many other paths that can result in unnecessary costs and delays.

## **II. Key Questions**

### **A. Project Management.**

1. Will there be a firm, detailed work schedule that is incorporated into the contract as an exhibit?
2. Will changes to the work schedule be subject to mutual agreement?
3. Will the vendor provide any project management services such as a project manager, regular reports and participation in regular meetings?
4. Will the reports and meetings at least be weekly?
5. Do you get to approve and reject proposed personnel to work on your project (particularly if vendor personnel will work on site at your location)?
6. Have you received full information regarding any hardware, networking or other equipment requirements from the vendor in order to use the deliverables and any environmental conditions that must be provided for the deliverables?
7. Will the vendor produce deliverables, such as designs, software customizations, software or systems, or other products of the services?

### **B. Deliverables and Testing.**

1. Will the deliverables conform to and operate in accordance with applicable specifications, documentation, and laws and regulations (collectively “specifications”) during the acceptance tests?
2. Will you have the right to review, test and accept or reject each deliverable if it fails to meet specifications?
3. If a deliverable is rejected, will you have the right to elect to: (a) have the vendor correct the unacceptable deliverable and represent the deliverable for another review by you; or (b) receive a prompt refund of all amounts that you previously paid for that deliverable?
4. If that deliverable is ultimately rejected, will you also be entitled to return other previously accepted deliverables and receive a refund for those deliverables?

5. If that deliverable is ultimately rejected, will you also have the right to terminate the agreement?

**C. Specifications.**

1. If you issued a request or proposals, will it be included as part of the specifications?
2. If a proposal was submitted by the vendor, will it be included as part of the specifications?
3. Will the agreement also include in the definition of specifications proposals, marketing brochures, correspondence and performance standards (uptimes, system response times, and service response times) that were used as part of the basis of your decision to purchase from this vendor?

**D. Services.**

1. If you are expecting the vendor to provide any installation, implementation, and/or data conversion services, has the vendor provided a detailed description of those services?
2. Will the vendor be providing training for the software?
3. If so, are you receiving the user, administrative and/or technical training that you need?
4. Is additional training available to you if you request it?
5. Will the vendor's maintenance and support service commitments include performance standards for responding to critical inquiries, using sufficient resources to resolve critical issues, and escalating unresolved technical problems quickly enough?

**E. Licensing and Proprietary Rights.**

1. Does the license grant allow you the perpetual right to use the software in the way that you plan and other necessary rights, e.g., the right to distribute, copy or modify; use by your affiliates; and/or a sufficient number of sites or users?
2. Will you own all deliverables and other products of the services?
3. If the vendor will be developing any custom software for you, will you own it?

4. If you will not own it, will you be receiving some other benefit, e.g., reduced license fees or free support, since you are financing development of new product for the vendor?
5. Will the vendor maintain the confidentiality of information and materials that you provide to it or that it becomes aware of through its performance under the agreement, including the deliverables it produces as designs?
6. Will source code for the applications software initially be licensed to you or deposited in an independent escrow arrangement?
7. If the source code is in an escrow arrangement, can you receive it if the vendor fails to provide support services, goes into bankruptcy proceedings and similar events?
8. Will the vendor provide software enhancements and updates to you at no additional cost?

**F. Warranties and Remedies for Breach of the Warranties.**

1. Will the vendor warrant that each deliverable will perform in accordance with the specifications?
2. Will the remedy for breach of this warranty be for the vendor to promptly repair or replace the defective deliverable at no additional cost?
3. If the vendor is unable to repair or replace a defective deliverable within a certain time period, i.e., during a warranty period, can you terminate the agreement and receive a refund of amounts previously paid?
4. Will the deliverables be warranted to comply with particular business concerns or regulatory issues that apply to your business and this project?
5. Will the vendor warrant that the deliverables will not infringe upon or misappropriate any intellectual property rights of any third party?
6. Will the vendor warrant that the deliverables are “Year 2000,” i.e., date/time, compliant?
7. Will the vendor warrant that there are no viruses, bombs or other disabling mechanisms in the deliverables?
8. Will the vendor warrant that the required equipment will be compatible with the software and sufficient for the full use of the software in accordance with specifications, as it is updated, enhanced and customized?
9. Will the vendor warrant that its services will be performed in a professional manner with high quality?

10. Will the remedy for breach of this warranty be for the vendor to reperform the services at no additional cost to you?
11. Will the vendor warrant that time will be of the essence for performance of the services?
12. Will the vendor provide free equipment if the recommended equipment is insufficient to operate the software in accordance with specifications?

**G. Financial Obligations and Remedies.**

1. If the vendor fails to perform its obligations in accordance with mutually agreed upon performance standards, do you receive credits, e.g. a percentage of monthly services fees for each hour the services are not timely performed or other time period the software is unavailable?
2. If there will be an acceptance testing schedule for deliverables, will you have the right to receive liquidated damages to compensate you for each day that the vendor fails to receive acceptance for the deliverable?
3. Will you pay for deliverables on a milestone basis, e.g., after delivery, installation, acceptance, and performance of the deliverables in accordance with their specifications for 30 consecutive days after acceptance?
4. Will at least 20% of payments for deliverables be reserved to acceptance of the deliverable(s)?
5. Will services that are not included as part of a deliverable be paid for after being satisfactorily completed?
6. Will satisfactorily completed services be billed monthly?
7. Will you have the right to withhold payments otherwise due or reduce the amount of payments if the vendor fails to perform its obligations or in the event you have any claims for damages?
8. Will undisputed payments be due within 30 days of your receipt of a correct invoice?
9. If you will reimburse any of the vendor's expenses, is your prior written approval required or a dollar limit imposed on the expenses that will be reimbursed?
10. Are sales and use taxes the only taxes that you will pay?
11. Will the vendor indemnify you for any claim of infringement or misappropriation of intellectual property rights?

12. If there is a claim that the deliverables are infringing, will the vendor obtain the rights to continued use of the software or provide a substitute of functionally equivalent noninfringing deliverable?
13. If vendor is unable to do so within a reasonable time, can you terminate the agreement and receive a refund of all fees paid?
14. Will the vendor indemnify you for damages caused by its negligence or willful misconduct?

**H. Indemnities and Damages.**

1. Will the vendor indemnify, defend and hold you harmless for any claim of personal injury or death or property damage caused by the vendor or persons acting on behalf of the vendor?
2. Will each party limit its liabilities?
3. Will indemnities and damages from breach of confidentiality and intellectual property infringement claims be carved out of the damages limits and disclaimers?
4. Will the vendor have minimum insurance in place to protect against bodily injury and property damage, motor vehicle liability and professional liability, including errors and omissions liability?
5. Do you have the right to assign the agreement to others or at least to any subsidiary, parent, or affiliate corporation or any person or entity that acquires all or substantially all of your assets or stock, or pursuant to a merger?
6. Will the terms of the agreement be governed by and interpreted in accordance with the laws of the State where your/their offices are located?
7. Will you and the vendor attempt in good faith to resolve any contract disputes before pursuing any available legal and equitable remedies?
8. Will the exclusive location of litigation between the parties, i.e., venue, be the city or county where your main offices are located?
9. Do you have the right to audit the vendor's books and records with regard to any deliverables or services provided?
10. Will you be able to terminate the vendor's services at your convenience, subject to payment for services satisfactorily performed prior to the date of termination?

## **CHAPTER 3: GUIDELINES FOR NEGOTIATING WITH VENDORS FOR SYSTEM PROCUREMENTS**

- I. The Contracting Process Clarifies the Business, Legal and Technical Relationship**
  - A. The Process Applies to New Contracts or Changes to an Existing Contract.**
  - B. Thoroughness and Clarity at the Beginning of the Contracting Process Can Help Prevent or Avoid Later Disputes and Litigation.**
  - C. Contentious Negotiations Can Also Damage the Long Term Relationship and Likelihood of Success of the Project.**
  - D. The Negotiating Process Will Reflect Your Later Working Relationship.**
  - E. Get Help From Experts to Prepare for and Conduct Negotiations.**
    - 1. Internal staff.**
    - 2. Consultants.**
    - 3. Lawyers.**
  
- II. In Order to Most Quickly Achieve the Goal of Reaching an Acceptable Agreement, You Need to Understand Both Sides' Goals and Contexts**
  - A. Understand the Vendor's Goals.**
    - 1. The vendor wants to minimize its risks.**
    - 2. The vendor wants to clearly define the scope of the project.**
    - 3. The primary objective of a vendor is to make money, so figure out how the vendor will make its money.**
      - i. Consulting fees.**
      - ii. Development fees.**
      - iii. Profit margin on a fixed price contract.**
      - iv. Hardware sales margins.**
      - v. Leasing margins.**
      - vi. Change orders.**
      - vii. License fees.**

- viii. Maintenance fees.
- ix. Leveraging subcontractors.

- 4. The contract may be written to pay the vendor only for successful deliverables, but the vendor may try to operate as though it is really a time and materials contract.
  - i. No matter how hard you negotiate for a fixed price, the actual implementation and management of the contract may vitiate your efforts.
  - ii. Even though each successive deliverable may be designed to clarify the scope, the vendor may create some ambiguity in certain deliverables that will later lead to more change orders and more compensation.

**B. Understand the Vendor's Context.**

- 1. Nationwide lack of adequate numbers of skilled staff.
- 2. Profitability pressures.
- 3. Sales pressures.
- 4. Most projects fail.
- 5. The vendor is probably involved in a failing project or failing projects somewhere.
- 6. The vendor is also probably involved in some successful projects somewhere.
- 7. The vendor may be as big as or bigger than you are.

**C. Understand Your Goals.**

- 1. You want successful, high quality, and timely products and services for as low a cost as possible.
- 2. You want to allocate as much risk as possible to the vendor in return for paying a premium for the risk transfer.

**D. Understand Your Context.**

- 1. Timing requirements.
- 2. Political pressures.

3. Funding limits.
4. Staffing limits.
5. You have probably published an RFP containing broad and vague definitions of the project scope and requirements that you want the vendor to more clearly define and satisfy with a new system and associated services.

**E. Understand the Competitive Leverage of Each Side.**

1. If there is only one bidder, you may have lost your leverage.
2. Keep the competition open as long as possible during negotiations to maintain your potential leverage.
3. It is common now to only have one real bidder.
4. Do not let the vendor know how much you want it as your vendor for the project.
5. The vendor may desperately want the project in order to increase its market share, to enter a new market, or just to make a profit, and it may have revealed its desires to your team.

**F. Get the Appropriate Level of Help.**

1. The vendor negotiates agreements like yours every day.
2. You rarely negotiate this type of agreement.
3. Consultants advise about business and technical requirements, while lawyers assess legal risks inherent in negotiating an agreement's terms and conditions.
4. Hire an attorney experienced in negotiating technology agreements because attorneys are trained for this purpose.

**III. Establish a Negotiating Philosophy and Goals.**

**A. Determine How Balanced the Final Agreement Should or Must Be.**

**B. Pick an Approach.**

1. Competitive negotiations:
  - i. Trench warfare, yielding nothing until absolutely necessary.
  - ii. Do not give real numbers until required.

- iii. Make the vendor yield to your demands and threaten to end negotiations and go to its competitor unless it capitulates.
- iv. Bluff.
- v. Be intractable.
- vi. Use time deadlines as pressure points.
- vii. Push physical limits.
- viii. Prioritize issues and exaggerate the importance of compromising on small issues in order to win big issues.
- ix. Be grudgingly concede one point at a time, only as needed to avoid killing the deal.

2. Cooperative negotiations:

- i. Seek balance and common solutions that help both parties achieve their goals and satisfy their interests.
- ii. An agreement lacking enough incentive for, and too much burden on, the vendor is more likely to eventually fail.
- iii. If the vendor will be cooperative, get agreement from the vendor to “get to the end at the beginning” of negotiations.
- iv. Make a number of “breathtaking” compromises as quickly as possible.
- v. Get an equal number of initial compromises from the vendor.
- vi. Create a short list of outstanding issues after these compromises.
- vii. Offer a package deal, splitting the issues.
- viii. Expect a counter offer which accepts about 80% of your offer, but changes about 20%.
- ix. Slog through the last few issues, seeking acceptable positions or terminating the negotiations.

**C. If the Vendor Is Competitive and You Want to Be Cooperative, Change to Be Competitive, But Retain the Goal (and Rhetoric) of Trying to Help Both Parties Achieve Their Interests.**

#### **IV. The Mechanics of the Negotiations.**

- A. Avoid the Rhetoric of Establishing a “Partnership” With the Vendor.**
- B. Use Your Own Contract as a Starting Point.**
- C. Control All the Edits on the Document.**
- D. Get Comments or Proposed Changes Back in Writing From the Vendor.**
  - 1. Avoid starting contentious negotiations until necessary.
  - 2. Do not just meet to argue about the contract and what the vendor does not like.
  - 3. Comments on a list are easier to manage and help focus the issues.
  - 4. Changes made in the contract by the vendor can also work instead of a list.
  - 5. But make sure you check the marked version sent by the vendor for accuracy.
  - 6. Expect the vendor to propose 100 - 200 substantive changes on large projects.
  - 7. Get substantive explanations for the proposed changes.
  - 8. Have the vendor quantify the value to each of its changes.
  - 9. Get all the issues or proposed changes on one document before starting the negotiations: technical, business, legal and other.
  - 10. Instead of starting negotiations, initially respond to the vendor with a list of questions.
  - 11. You can send a list of questions to the vendor.
  - 12. Or, you can add your questions to the list provided by the vendor requesting clarification of its changes, thereby keeping a running list of the discussions on a per issue basis.
- E. Minimize Negotiation Time and Maximize Time Spent Understanding the Vendor’s Positions and Negotiating With Your Own Side to Find Compromises That Both Parties Can Accept.**
  - 1. It is less painful to negotiate with your own side than the vendor.
  - 2. You will get to your side’s bottom line faster.

- F. Your Business People Can Then Meet With the Vendor, With or Without Lawyers, in Order to Gain a Better “Understanding” of Its Changes But Not Negotiate Any Terms.**
- G. After Gaining This “Understanding,” Incorporate Changes Into the Agreement That You Find Acceptable.**
- H. Send the Vendor the Changed Agreement, Marked to Show Changes, or Send the Vendor a List of Your Responses to Its Issues.**
- I. Meet With the Vendor to Start Resolving the Issues.**
  - 1.** Get the right people at the table for both sides.
    - i.** Vendor’s senior or experienced enough and English-speaking attorney(s).
    - ii.** Your attorney(s).
    - iii.** Your technical expert(s).
    - iv.** Your future project manager.
  - 2.** Experts can stay behind the scenes or participate in the negotiations, as appropriate.
  - 3.** Prioritize the issues and start negotiations with the most important issues.
  - 4.** Or, work through the issues in a linear fashion in the agreement, line by line, word by word.
  - 5.** Ultimately, you will need to slog through issues, item by item.
  - 6.** Agree on how to resolve as many issues as possible and leave open those that seem unreasonable at that stage.
  - 7.** After agreeing on some issues, create a chart of the remaining open issues, the vendor’s position on each, and your position, or create a short list of the open issues.
  - 8.** The chart will grow in the number of columns as issues are discussed and the number of rows in the chart will shrink as the issues are resolved.
  - 9.** Or, the list will shorten as issues are resolved.
  - 10.** At some point, you will have to make a final packaged offer that the vendor will accept, reject or counter.
  - 11.** Then, make a final decision on the deal.

- J. Incorporate the Mutually Agreed Upon Issues Into the “Final” Version of the Agreement.**
  - K. Send the Revised Version (in Marked and Unmarked Formats).**
  - L. Additional Changes Will Be Needed After the Vendor Reviews Your Edits.**
  - M. Complete the Final Version of the Agreement.**
  - N. Get Titles, Dates, Printed Names, and Signatures on the Signature Page.**
- V. Get Help If You Don’t Have Negotiating Expertise.**
- VI. Reminders About the Process.**
- A. The Vendor May Try to Wear You Down, Physically and Mentally.**
  - B. Treat Yourself Humanely During the Negotiations.**
    - 1. Meet in a location with sunlight, good airflow, and access to appropriate resources.
    - 2. Take breaks regularly.
    - 3. Take a lunch break.
    - 4. Caucus with your own team to discuss key issues.
  - C. Stop After No More Than Seven or Eight Hours Total of Negotiations Each Day.**
    - 1. You will need lots of physical, emotional and intellectual stamina to negotiate successfully.
  - D. Ask Obvious Questions During Negotiations.**
    - 1. Do the people negotiating the agreement have authority for the negotiations and compromises they are making?
    - 2. Do they have authority for themselves and their subcontractors?
  - E. Expect the Unexpected During the Negotiations.**
    - 1. New issues may be raised by the vendor during the negotiations, even after you thought you had all the issues on the table.
    - 2. The vendor may switch attorneys in the process, resulting in new issues being raised during the negotiating process.

3. The vendor may be a screamer and try to intimidate you.
    - i. Suggest yelling is counterproductive.
    - ii. Take a timeout until things calm down.
  4. The vendor may suddenly become intractable without any good reason, which should cause you to suspect an ulterior motive.
  5. The vendor may carefully script, practice and orchestrate its response to many issues.
  6. Some vendors may tell you untruths, intentionally or unintentionally.
- F. Even Though You Tell the Vendor You Have Given Your Final Terms and Numbers, the Vendor May Not Believe You Because of How It Negotiates, I.e., Says It Is Giving Final Terms But Is Not.**
- G. Expect Bluffing.**
- H. You Always Have to Be Ready to Kill the Deal.**
- I. You May Have to Walk Away to Show the Vendor You Are Serious.**
- J. Do Not Fall for Cheap Tricks, Such as Last Minute Efforts to Tell You the Contract Is Unfair, Even Though It Was Fully Negotiated.**
- K. No Deal Is Better Than a Bad Deal.**
- L. Keep Your Existing System in Place Until the New Contract Is Signed.**
- M. Keep Negotiations Moving Briskly or End Them.**
- N. On Big Transactions Where You Lack Leverage, the Final Deal Will Make You Uncomfortable to Some Extent and Require That You Make Unpleasant and Risky Compromises.**
- O. In the End, You Will Buy Back More Risk Than You Want But Less Than Will Kill the Deal, or You Will Kill the Deal and Decide What to Do Next.**

## **CHAPTER 4: KEY NEGOTIATION TOPICS AND OPTIONAL POSITIONS OF VENDORS AND BUYERS**

Every business relationship between a computer system vendor and a buyer has numerous elements to it. In any such relationship, the most important aspects are fairly common—the nature of the software being licensed, the scope of the work to be performed in connection with the software, the money to be paid for the license and the vendor's work, the rights each party has if there are problems in the relationship, how to end a bad relationship, and how much money each party could owe if the relationship is terminated.

For every such element, there are numerous potential approaches and options as to how to address that part of the relationship in the contract, depending on the allocations of risks, benefits and costs. Negotiations help the parties determine how to agree on each aspect of the relationship. The attached chart is designed to compare different practical options parties have during the negotiation process and to help both sides successfully reach an agreement that satisfies their needs.

**KEY NEGOTIATION TOPICS AND OPTIONAL POSITIONS OF THE PARTIES**

Topic	Buyer Position	Vendor Position	Negotiations/Possible Compromises	
			Pro-Buyer	Pro-Vendor
1. Payment Terms for Deliverables and Services	<p>A Vendor has the right to issue invoices in the amounts noted in a work plan following Acceptance of each Deliverable, subject to a holdback which would be paid as described below. Buyer will pay undisputed amounts on such invoices that are issued in accordance with the terms of the Agreement within 30 days of receipt of such invoices.</p> <p>Holdback: The Buyer would retain a holdback of 15% of the purchase prices for each deliverable which has received acceptance. The Buyer will pay the Vendor the holdback 30 days following receipt by the Buyer of an invoice which is issued in accordance with the terms of the Agreement following 30 consecutive days of operation without deficiency after final acceptance of the system.</p>	Vendors should have license fees and implementation and support services fees 100% paid up front.	<p>Parties often agree on a larger number of smaller, more discrete deliverables so that the Vendor satisfies its cash flow needs by receiving acceptance and then payment for the deliverables regularly through the project.</p> <p>The holdback amount may be reduced to 5% or 10% and paid on final acceptance.</p> <p>Pay for implementation on a fixed fee basis, recognizing the Vendor might add 20%-40% extra fees as padding for unknowns.</p> <p>Annual support would be paid quarterly in arrears.</p>	<p>License fees and purchase prices would be paid on discrete events, such as 20%-50% up front, then 20% on delivery and installation of software. Some small percentage of the license fee would be paid on acceptance, perhaps 5%-10%.</p> <p>Implementation services would be paid on a time and materials basis.</p> <p>Annual support fees are paid up front each year.</p>
2. Acceptance Testing	The Buyer reviews and performs acceptance tests on all deliverables according to specific schedules in the work plan, the Vendor has to correct failures of the deliverables to	Acceptance occurs when the Vendor delivers the software components and other deliverables; no refunds.	Acceptance occurs if the deliverables meet the specifications except for inconsequential and cosmetic deficiencies; the Buyer would move some of the deliverables	Acceptance is on installation; or acceptance occurs if the software substantially meets the acceptance criteria; or, acceptance occurs if the software meets acceptance

**KEY NEGOTIATION TOPICS AND OPTIONAL  
POSITIONS OF THE PARTIES**

Topic	Buyer Position	Vendor Position	Negotiations/Possible Compromises	
			Pro-Buyer	Pro-Vendor
	meet their specifications, and the Buyer has the right to terminate the agreement and receive a full refund if all deliverables are not accepted in accordance with specifications and the timing in the work plan		payments to correction of all such deficiencies that existed when the deliverable was accepted	criteria, except for minor or immaterial deficiencies; the software is deemed accepted if no timely notice of rejection; a refund is the exclusive remedy if it is allowed to be included in the agreement.
3. Work Plan Schedule	The Vendor has to develop and keep current an integrated work plan with tasks and timing for all parties; the work plan is a deliverable, subject to the Buyer's acceptance; no changes can occur in the work plan without written acceptance by the Buyer; all Vendor performance will be subject to a "time is of the essence" standard.	Dates will be estimated and the work plan only applies to the Vendor; updates will be infrequent and can be unilaterally made by the Vendor to keep the work plan accurate.	The parties will mutually develop and update the work plan.  A few key dates will be subject to a "time is of the essence" standard for the Vendor.	Both parties will be held to a "time is of the essence" standard for a few key events or neither will; otherwise, performance shall be reasonably timely.
4. Performance Standards	Performance standards for the system (response times and uptimes) and the services to be performed by the Vendor (responding to inquiries, starting to fix bugs, and bug fix times) should be included in the agreement.	No obligations to perform by specific time periods or for the system to meet uptime or response time standards	The Vendor has to meet performance standards; negotiations will result in changes to the number and stringency of the standards, although almost all of the standards should be included at close to the measures in the Agreement (e.g., 99% uptime, certain response times of two seconds, 95% of the time, etc.	Response time and uptime "goals" could be included, but not firm standards; or, low standards might be included, but without the Vendor being in breach if they are not met.

**KEY NEGOTIATION TOPICS AND OPTIONAL POSITIONS OF THE PARTIES**

Topic	Buyer Position	Vendor Position	Negotiations/Possible Compromises	
			Pro-Buyer	Pro-Vendor
5. Liquidated Damages	Liquidated damages will be paid by the Vendor if it fails to meet the performance standards, e.g., \$500 for each hour of downtime or failure to meet a response time, or \$1,000 a day for a failure to receive acceptance of a deliverable as scheduled.	No liquidated damages for failures to perform by dates established in a work plan or for failures to meet system or service performance standards.  Vendor's damages caused by the Buyer's delays also result in liquidated damages to be paid by the Buyer.	Liquidated damages will only apply to a limited number of key deliverables and to failures to meet selected performance standards; the amounts of liquidated damages will be reduced during negotiations.	Maybe liquidated damages apply to 1-5 key events if the failure was solely caused by the Vendor; maybe agree to small liquidated damages for performance standards; but liquidated damages only apply if they are the sole and exclusive remedy and are capped per month and in total; the Vendor could also get a bonus if it is early or exceeds the standards.
6. Letter of Credit	The Vendor has to establish a letter of credit that will be available to the Buyer if the Vendor breaches the Agreement	No letter of credit; maybe a performance bond with the premiums paid for by the Buyer.	If the Vendor proposes a performance bond, a better compromise is to have a letter of credit for an amount both parties can agree upon, perhaps equal to the amount that the bond premiums would fund.	No letter of credit because it ties up valuable capital; maybe a performance bond with most of the premiums paid for by the Buyer.
7. Right to Withhold Amounts Due	The Buyer has the right to withhold any amounts due, even for accepted work, if the Vendor is in breach	No rights by the Buyer to withhold any amounts	The Buyer retains the right to withhold any amounts due up to the amount in dispute.	The only amounts that can be withheld are those due to a failed performance obligation; undisputed invoices and accepted work have to be paid for.
8. Ownership and License to Software	The Vendor will own its standard application software.  The Buyer will own custom software developed for the	The Vendor owns everything, including newly developed software and deliverables.  The Buyer has a perpetual,	The Vendor can own newly developed software and deliverables, but the custom software has to be blended into and supported as part of the	The Vendor will blend the custom software into the standard product and support it, but the license is not irrevocable; maybe a free year

**KEY NEGOTIATION TOPICS AND OPTIONAL POSITIONS OF THE PARTIES**

Topic	Buyer Position	Vendor Position	Negotiations/Possible Compromises	
			Pro-Buyer	Pro-Vendor
	<p>Buyer and other deliverables, including designs and techniques developed on the project.</p> <p>License Example: Vendor hereby grants to Buyer a nonexclusive, perpetual, <u>nonterminable</u>, and <u>irrevocable</u> license to use, demonstrate, modify, prepare derivative works based on, and reproduce the Vendor Technology, which Vendor provides to Buyer or makes available to Buyer on Vendor's Equipment in Source Code format, and the Specifications for Buyer's internal purposes and for processing data for other Buyer affiliates.</p>	<p>nontransferable, nonexclusive license to use the software and deliverables.</p>	<p>standard product, and the Buyer gets an <u>irrevocable</u> license to the custom software and all deliverables, and maintenance is free for five years.</p>	<p>of support, but probably not.</p>
<p>9. Warranties for Deliverables and Remedies</p>	<p>Agreement Text: Vendor represents and warrants that each Deliverable, including without limitation the System, shall meet its Specifications as provided in the Agreement following its Acceptance and during the term. Vendor shall immediately repair or replace each of the Deliverables that does not meet its Specifications as provided</p>	<p>If any warranty is offered, the Vendor may offer to warrant its standard application software to perform substantially as described in its standard documentation. All other warranties are disclaimed. As the Buyer's sole and exclusive remedy, the Vendor will attempt to repair or replace standard application software that does not perform substantially as described in its</p>	<p>Vendor represents and warrants that each Deliverable, including without limitation the System, shall meet its Specifications as provided herein following its Acceptance and during the term, except for cosmetic or inconsequential deficiencies. Vendor shall promptly repair or replace each of the Deliverables that does not meet its Specifications as</p>	<p>The Vendor may warrant that the standard software, as customized by the Vendor, meets the Specifications except for immaterial errors.</p> <p>The <u>sole and exclusive</u> remedy is for the Vendor, at its option, to repair or replace the software in breach of the warranty or to take back the software and terminate. If the software is returned, refund</p>

**KEY NEGOTIATION TOPICS AND OPTIONAL POSITIONS OF THE PARTIES**

Topic	Buyer Position	Vendor Position	Negotiations/Possible Compromises	
			Pro-Buyer	Pro-Vendor
	herein.	standard documentation.	provided herein. If the Vendor cannot repair or replace a deliverable, the Buyer should get a full refund for it.	the undepreciated license fee based on a five-year schedule.
10. Termination	<p>The Buyer can terminate the Vendor due to the Vendor’s material breach of the Agreement, Vendor’s failure to provide deliverables per the work plan and for the Buyer’s convenience.</p> <p>The Vendor can only terminate the Agreement if Buyer fails to pay Vendor undisputed, material Purchase Prices and Services Charges within 90 days of receipt of Notice from Vendor of the failure to make such payments when due.</p>	<p>Either party can terminate the agreement if the other party materially breaches the agreement and fails to cure such breaches within 30 days of receipt of a notice describing such breaches, although there is no cure period for breach of obligations to protect the Vendor’s intellectual property. Also, failure to pay timely is a material breach that has to be cured in 15 days, and the Vendor can also terminate for its convenience.</p>	<p>The Buyer wants more time, such as 60-90 days, to cure its breaches. The Vendor cannot terminate for its convenience.</p>	<p>Either party can terminate if the other party materially breaches and fails to cure in 30 days. If the Buyer is allowed to terminate for convenience, the Vendor is paid amounts owed for work done, “wind down” costs, and some profit.</p>
11. Intellectual Property Indemnity	<p>Agreement Text: Vendor shall, at its expense, defend, indemnify, and hold harmless Buyer and its employees, officers, directors, contractors, and agents from and against any third-party claim or action against Buyer which is based on a claim that any Deliverable or any part thereof under this Agreement infringes a patent, copyright, utility</p>	<p>Agreement Text: Vendor will defend Buyer against any third party action against Buyer that is based on a claim that any Services and products infringe a United States registered patent or copyright as of the Effective Date and shall pay any costs or damages that may be finally awarded by a court of competent jurisdiction against Buyer resulting from</p>	<p>Narrow the scope of the indemnity to all IP enforceable in the United States.</p> <p>Narrow the exceptions proposed by the Vendor to when the indemnity does not apply.</p> <p>Accept the indemnity as the sole and exclusive remedy for</p>	<p>Agree to give an indemnity, narrow the scope of the IP to registered patents and copyrights enforceable in the United States as of the date of acceptance of a detailed design.</p> <p>Maintain the exceptions.</p> <p>This remedy is the sole and exclusive remedy for all IP</p>

**KEY NEGOTIATION TOPICS AND OPTIONAL POSITIONS OF THE PARTIES**

Topic	Buyer Position	Vendor Position	Negotiations/Possible Compromises	
			Pro-Buyer	Pro-Vendor
	<p>model, industrial design, mask work, trademark, or other proprietary right or misappropriates a trade secret, and Vendor shall pay all losses, liabilities, damages, penalties, costs, fees (including reasonable attorneys' fees) and expenses caused by or arising from such claim. Buyer shall promptly give Vendor notice of any such claim.</p> <p>In case the Deliverables, or any one or part thereof, are in such action held to constitute an infringement or misappropriation, or the exercise of Buyer's rights thereto is enjoined or restricted, Vendor shall, at its own expense and in the following order of priorities: (i) procure for Buyer the right to continue using the Deliverables; (ii) modify the Deliverables to comply with the Specifications and to not violate any intellectual property rights; (iii) or retrieve any or all Deliverables upon receipt of notice from Buyer and refund the Purchase Price of each Deliverable, as</p>	<p>such action, subject to Buyer promptly notifying Vendor in writing of any such action. Vendor will not defend Buyer, however, if the claim of infringement is caused by: (1) Buyer's misuse or modification of the Services and products; (2) Buyer's failure to use corrections or enhancements made available by Vendor; (3) Buyer's use of the Services and products in combination with any product or information not owned or developed by Vendor; (4) Buyer's distribution, marketing or use for the benefit of third parties of the Services and products or (5) information, direction, specification or materials provided by Buyer or any third party. If any Services and products are, or in Vendor's opinion are likely to be, held to be, infringing, Vendor shall at its expense and option either (a) procure the right for Buyer to continue using them, (b) replace them with a noninfringing equivalent, (c) modify them to be noninfringing or (d) direct the return of the Services and</p>	<p>IP claims.</p> <p>If the IP is returned, get a full refund.</p>	<p>claims.</p> <p>If the IP is returned, refund the undepreciated license fee based on a five-year schedule.</p>

**KEY NEGOTIATION TOPICS AND OPTIONAL POSITIONS OF THE PARTIES**

Topic	Buyer Position	Vendor Position	Negotiations/Possible Compromises	
			Pro-Buyer	Pro-Vendor
	<p>applicable.</p> <p>However, Vendor shall not be liable to the extent claims of misappropriation of infringement arise from Vendor's compliance with any designs, Specifications or written instructions of Buyer and Vendor could not have avoided such claims through alternative products.</p>	<p>products and have the right to terminate the Agreement. The foregoing remedies constitute Buyer's sole and exclusive remedies and Vendor's entire liability with respect to intellectual property claims and actions.</p>		
12. Damages Disclaimer for Vendor	<p>No consequential and other non-direct damages disclaimers for Vendor; instead: Vendor will not be liable to Buyer to the extent of any loss, damage, or liabilities:</p> <p>(a) Caused by the failure of Buyer, another Buyer affiliate, or a Buyer Vendor to perform in connection with this Agreement and such nonperformance prevented Vendor from performing in accordance with this Agreement; or</p> <p>(b) Resulting from Vendor acting prudently in accordance with instructions given by authorized representatives of</p>	<p>No consequential, indirect, special, incidental, exemplary or punitive damages for Vendor.</p> <p>The Uniform Commercial Code (UCC) does not apply and this damages disclaimer will apply even if the remedies fail of their essential purpose or if there is a material and fundamental failure; the parties agree on the risk allocation.</p>	<p>No consequential, indirect, special or incidental damages for Vendor, except that these damages disclaimers do not apply for damages arising from a breach of confidentiality obligations and for indemnification obligations</p>	<p>Same as Buyer's last offer, but with the carve-outs subject to Vendor's insurance limits or a dollar cap (such as 2x direct damages).</p>

**KEY NEGOTIATION TOPICS AND OPTIONAL POSITIONS OF THE PARTIES**

Topic	Buyer Position	Vendor Position	Negotiations/Possible Compromises	
			Pro-Buyer	Pro-Vendor
	Buyer.			
13. Damages Cap for Vendor	No direct damages cap for Vendor.	<p>Direct damages cap for Vendor of amounts <u>paid</u> by the Buyer to the Vendor.</p> <p>The UCC does not apply and the damages cap will apply even if the remedies fail of their essential purpose or if there is a material and fundamental failure; the parties agree on the risk allocation.</p>	Allow a direct damages cap for the Vendor of the Agreement maximum amount (amount paid and to be paid), except there is no cap on direct damages arising from a breach of confidentiality obligations and for indemnification obligations.	Same as Buyer's last offer, but with the carve-outs subject to Vendor's insurance limits or a dollar cap (such as 2x direct damages).
14. Damages Disclaimer for Buyer	No consequential, indirect, special or incidental damages for Buyer.	No damages disclaimers for Buyer.	No consequential, indirect, special or incidental damages for Buyer, except that these damages disclaimers do not apply for damages arising from a breach of confidentiality obligations and license restrictions and same limits as Vendor has on its disclaimer.	Same as proposed by Buyer but no limit on carve-outs for Buyer.
15. Damages Cap for Buyer	Direct damages cap for Buyer of the agreement maximum amount.	No damages cap for Buyer.	Direct damages cap for Buyer of the agreement maximum amount, except there is a carve-out on damages arising from a breach of confidentiality obligations and license restrictions, subject to the same limits or dollar cap	Same as proposed by Buyer but no limit on carve-outs for Buyer.

**KEY NEGOTIATION TOPICS AND OPTIONAL  
POSITIONS OF THE PARTIES**

Topic	Buyer Position	Vendor Position	Negotiations/Possible Compromises	
			Pro-Buyer	Pro-Vendor
			Vendor has.	
16. Confidentiality	Strict obligation on Vendor to protect all Buyer information; indemnity for breach of HIPAA obligations.	Mutual obligation to protect the other party's proprietary and confidential information.	Each party will protect each other's confidential information and mutual indemnities for breaches of these obligations.	Each party will protect each other's confidential information and mutual indemnities for breaches of these obligations.

## CHAPTER 5: LESSONS LEARNED FROM IMPLEMENTING IT PROJECTS

### I. Introduction

The guidelines in this outline are intended to provide objective, practical advice to executive and project management about how to approach the implementation of large scale information technology projects. Each guideline below is based on a bad experience or problem typically encountered in similar projects. Most of these guidelines are often ignored, discounted, or overlooked during the actual implementation of a project for a number of reasons, such as stress, timing, lack of resources, the “Stockholm syndrome,” the inexperience of most people with failed projects, or other reasons. Notwithstanding the buyer’s expectation that the vendor or the buyer’s quality assurance consultant will perform many of the project management and administration tasks, the buyer and its project director ultimately remain responsible for the project’s success, which is far from assured. In fact, statistics clearly indicate that, the larger the project, the more likely it is to fail. For the largest projects, there is a 65% likelihood that it will fail and such a failure is likely to be caused by failing to follow many of these guidelines, which on a smaller project would not have such a large impact.

### II. Project Management

#### A. General/Operations.

1. **Act in Good Faith.** A buyer may view as reasonable, necessary and decisive actions after a long period of trying to fix a failed project. However, a judge or jury might view these same actions as being taken in bad faith. Even if a buyer tries to work through the contractor’s deficiencies, it must document those efforts with notices required by the agreement or other correspondence at the time the problems occurred to build a record of providing formal requests to the contractor. Buyers also often think they can make a project work by informally giving the contractor more time to fix problems, but failure to follow procedures can lead to the impression (in the judge’s mind) that the buyer is not acting in good faith when it finally does act in accordance with applicable procedures. Good faith can be hard to define, but it always involves acting fairly, giving fair notice and not waiting to act until you are angry and frustrated.
2. **Closely Coordinate and Manage Vendor and Buyer Activities.** Project managers for each side often do not coordinate their activities in a structured and efficient way. One side can stop communicating with the other, and the buyer can fail to remember that it has to constantly manage the vendor in conjunction with managing its own people. These communications could be as simple as casual, unscheduled discussions each day or e-mails about the status of daily events on the project.

3. **Strictly Adhere to the Project Plan.** Projects will always fail if they do not adhere to the project plan. Projects that implement changes without structure and careful recordation become chaotic and almost always deteriorate because both sides lose sight of their obligations and the timing of performance.
4. **Meet Buyer Required Deadlines, E.g., Timely Attending Design Sessions and Reviewing Deliverables.** Buyers often fail to strictly perform their own obligations, perhaps due to lack of their internal resources or resources outside their control, e.g., the failure of another department to attend a meeting or do its job. Such a failure is a buyer's breach because you are responsible, vis-à-vis the vendor, for all other agencies or departments working on the project on your behalf.
5. **Review and Either Approve or Reject Project Plan Revisions.** It is absolutely critical to carefully analyze changes proposed by the vendor to the project plan. On one failed project, the buyer allowed the vendor to repeatedly (six times) change the project plan in a significant way, each time slipping completion a few months or so, and once fundamentally restructuring the order of activities. If the plan is correct with revisions, accept it. If not, promptly reject it. In both cases, the action must be in writing. If a project fails, the vendor will claim the buyer demanded and required too many changes in the project plan. Therefore, buyers should only use this approach when needed. Number each version of the project plan consecutively, get each one signed by both parties, and keep them clear and specific about both parties' tasks.
6. **Manage the Change Order Process Efficiently and Accurately.** Many projects spin out of control when they fail to carefully document change orders. A change order should only be used for new work, not repairs to the system or changes to the schedule, both of which actions should utilize different procedures or forms. If a project fails, the vendor immediately says the buyer demanded and required too many change orders. Therefore, buyers should minimize this administrative mechanism and only use it when needed. Number each change order consecutively, get each one signed by both parties, and keep them clear and specific about both parties' obligations.
7. **Do Not Pay for Work Described in a Change Order Unless There Is an Executed Change Order Delineating the Hours and Price, and Verification That the Work Has Been Completed.** Even though some organizations cannot, or say they will not, pay for work which is not documented in an amendment or change order and which may not even be completed, it happens all too frequently. One legal theory is that, if these change orders are not recorded and approved properly, there is personal liability for a government official and/or employee for unauthorized expenditure of taxpayer funds.

8. **Minimize, Control and Record Changes in the Substance and Process of the Project as Much as Possible, E.g., Statutory and Regulatory Changes, New Features, Etc.** Projects that are frantically trying to catch up or rectify problems tend to stop documenting changes in obligations to be performed by each party. Or, if the relationship between the buyer and vendor becomes too trusting or “friendly”, the procedures become casual, thereby creating an opportunity later for a vendor to claim it was not responsible to perform certain obligations and/or to blame the buyer team. In many projects, the project managers decide not to bother with the type of documentation needed to clarify which party is responsible for what task or to document changes they made in the project, thereby leading to confusion, divisiveness and a troubled project.
9. **Review and Either Approve or Reject Change Orders.** Most well-written contracts have procedures about the timing to review and either approve or reject change orders. Failing to follow the procedures will put the buyer in a vulnerable position and potentially in breach.
10. **Hire and Listen to Competent, Experienced Consultants.** On many projects that fail, the buyers totally disregard the advice of their consultants who advise the buyers to either terminate the vendor or to require the vendor to fix a troubled situation. In one litigation matter we pursued, the failure to follow the consultant’s advice undercut the buyer’s credibility. Do not hire a consultant if you do not plan to follow its advice, and make sure your contract with the consultant holds it accountable for its advice.
11. **Do Not Manage a Project to an Artificial Deadline, E.g., One Established Arbitrarily by the Federal Government.** Many organizations become overly focused on meeting an artificial deadline that has been set by a parent company or the federal government and lose touch with the reality of their situations, i.e., that the date could not be met without divine intervention. The deadline will be missed and the project will fail if you do not recognize and admit limitations of resources and timing realities. Such failures are common in projects, especially when penalties are imposed after a certain date. Project management sometimes forgets that the contract between the buyer and vendor defines that relationship.
12. **Make Sure the Weekly Meetings and Resulting Reports Are Meaningful and Accurate.** Regular reporting requirements can deteriorate into a meaningless exercise. Formal meetings each week with the vendor should be meaningful and used as opportunities to resolve problems or air differences, and the reports should document the discussions at the meetings and the ways the parties will fix problems. These reports are always the first way consultants and lawyers spot problems in projects.

13. **Control and Track Internal Communications to Avoid Later Claims of Bad Faith or Interference With the Contractor's Ability to Perform Its Obligations.** People should only document in a writing or an e-mail a statement they would be willing to see in the next day's newspaper. Too often, well-meaning buyer staff have made frank statements, usually now in e-mails, that are later used out of context to bolster a contractor's claim that the buyer was acting in bad faith or failed to perform its obligations due to prejudice or anger against the vendor. The project director has to meticulously manage the staff members' communications, including those of every individual involved in the project, to prevent inadvertent and potentially damaging e-mails or other documents from being produced and possibly being available someday for use in litigation against the buyer.

**B. Project Managers and Staff.**

1. **The Buyer Manager Should Be as Skilled and Experienced as or More Skilled and Experienced Than the Vendor Project Manager.** On too many projects, the government buyer hires someone to be the project director who lacks technology and project management experience. Without experience and the appropriate level of skills, a project director for the buyer will be overwhelmed and exploited by a vendor. This problem has occurred in numerous projects, often due to salary constraints and the lack of buyer candidates. However, without equivalent talent in this position, the buyer is likely to have problems managing the vendor and will see increased costs, delays, and unresolved problems throughout the life of the project.
2. **Maintain Consistency in the Project Manager Position and Avoid Turnover.** A successful project avoids unnecessary turnover in the project management position.
3. **When Problems Occur, Meet With Internal Staff and Then the Vendor's Project Manager.** The project director cannot be a hero and think he or she can solve all problems alone. Successful projects of this nature and size require teams, usually big teams, of talented and dedicated individuals.
4. **Keep Upper Level Management Updated on the Status of and Problems With the Project, and Seek Their Guidance.** Too often project directors are afraid to apprise upper level managers of problems on the project, usually due to a fear that they will be perceived as unable to solve problems. This view is mistaken because upper level management prefers to know when problems arise so that they can help resolve them before the project enters a troubled and potentially failing phase. The project director has to be instructed by upper level management that they must be apprised of problems that cannot be or are not being resolved at the project management level in order to quickly escalate the unresolved

problems to upper level management which has responsibility to shareholders or elected officials for making the project successful. It can sometimes be helpful to have both the buyer and vendor project managers advise upper level management of unresolved matters.

5. **Take Decisive Actions in a Timely Manner and Resolve Problems Quickly Instead of Accumulating Lists of Open Issues.** On so many projects, a relationship between the project leaders disintegrates and problems stop being resolved. Or, the project director for the buyer becomes afraid of making potentially controversial decisions and does not escalate decisions to upper level management for fear of being perceived as a failure. In either case, the open issues list grows and grows. One common result from a failure to make timely decisions is that the project grinds to a halt or certain key parts of the project just do not come to closure. Confusion and tension grow, and the project starts to fail. The best solution to this problem is for the project director and upper level management to take decisive actions as quickly as possible, instead of stalling on facing difficult problems.

### C. **Technical.**

1. **Phase in Different Parts of the System Instead of All of the System at Once.** “Big bang” projects tend to have a higher likelihood of surprises and failures. This project will be phased in, so it is more likely to avoid big bang problems. Nonetheless, even the phases should each be segmented into as many bite sized pieces as possible so that problems can be isolated more readily than if the parts of the project that are tested by the buyer are bigger than necessary.
2. **Do Not Accept Deficient Deliverables, E.g., Design Documents.** So many buyer projects accept deficient “paper” deliverables on the promise from the vendor that the system will be okay, even though the design is not, with the concomitant promise that the design will later be fixed to match the system. There may also be political pressures to proceed with the project, even though it has problems. This process is backwards. A deficiency is something that is broken or not working correctly. Building a system based on deficient design deliverables will result in a deficient system. Accepting a deficient system will result in your workers not being able to provide the services you are now providing, with the likelihood of problems, which could be avoided with strong decision-making at critical junctures of the project. This principle applies at any time during the project, even in the beginning when issues may seem small and the buyer may seem overly critical for raising them, or when the parties are trying very hard to create a cooperative, amicable project process. Implementing a strong standard at the beginning, on the first deliverables, actually sets the stage for bigger deliverables and what the vendor will expect from the

buyer, and it avoids allowing small problems to compound into larger and more difficult to resolve differences, later in the process.

3. **Avoid Design Ambiguities in Documentation and Deliverables.** Many projects run into problems because of ambiguities in the designs which are used to build, configure or implement a system. It is unlikely that a buyer will be able to include a provision in the agreement to require that design ambiguities will be resolved as determined by the buyer in its reasonable judgment. Instead, it is more likely that the latest deliverable will be used to determine the criteria for acceptance. Following is some contract text for this purpose:

In the event of a contradiction, conflict, ambiguity or inconsistency in or between Deliverables and other documents comprising this Agreement, including without limitation, a Deliverable that has already received Acceptance, the RFP and the Response, any such contradiction, conflict, ambiguity or inconsistency shall be resolved in favor of the latest Buyer-approved Deliverable, except in the case where a previous documented requirement is inadvertently omitted or not addressed directly in a subsequent Deliverable.

4. **Do Not Leave Specifications and Requirements Out of the Designs and Other Deliverables.** While attempting to build a design for a new system, both parties can omit important or even fundamental requirements from the design. These types of omissions are common and later can lead to expensive and divisive arguments. Buyers should place the responsibility for and risks associated with meeting this responsibility on the vendor. Following is text buyers can insert into their agreements to address this risk:

No requirements can be omitted from the Specifications without the written consent of the Buyer Project Manager.

5. **Do Not Allow Coding to Start Until Agreement on Designs.** When a project gets behind its schedule, a vendor may try to proceed with coding before the design deliverable is accepted. This process is backwards. If the designs are finally completed and the previous coding has to be redone, this process will lead to increased costs and, more importantly, significant delays in completing the project.
6. **Do Not Go to Pilots Until Full, Successful Acceptance Testing Is Completed.** Projects can fail when the buyer allows the vendor to implement a system that has not been fully tested and fixed,

notwithstanding promises that bugs will be fixed in the field. The fundamental flaw consistently experienced with this approach is that huge numbers of bugs are only found once implementation occurs, so all the bugs that you knew existed when implementation started are only compounded once you proceed, and those bugs you were aware of are less likely to get fixed as new, more crippling bugs arise.

7. **Do Not Implement a System in Field Conditions Until the Full Acceptance Test Has Been Successfully Completed and Any Pilot Tests Are Successful.** Same comments as above.
8. **Apply Contract Standards When Determining Whether Performance Obligations Are Satisfied.** There is a reason a buyer pays to have an experienced lawyer draft and negotiate the best contract with the best standards possible under the circumstance. Since most larger IT projects will fail, following the contract standards decreases the likelihood of failures. The vendor, which agreed to these standards, should be held accountable to meet them.

#### **D. Financial.**

1. **Impose Detailed Cost Accounting Standards Throughout the Project.**
2. **Follow Fiscal Management Requirements, E.g., Regarding When to Pay and Only Pay for Accepted Deliverables.** On many projects, the accounting and payables staffs are not apprised of the contract requirements for payment and, as a result, they pay prematurely and in contravention of the terms of the contract, such as on delivery instead of acceptance of hardware.
3. **Track When Payments Are Made and the Amount of Each Payment.** Some projects do not carefully track their payments and confusion arises as to how much is owed to the vendor, particularly after the vendor is terminated.

#### **E. Legal and Contractual.**

1. **Strictly Adhere to Contract Terms.** In addition to payment terms that should be strictly followed, the other terms of the contract are there for a reason – they define your obligations in addition to those of the vendor. Failing to adhere to the terms allows the vendor to force you to make concessions you may not want to make. Also, buyer staff often develop close relationships with vendor staff, especially when they are often intermingled in a common space or spend a lot of time together. The buyer has to avoid being talked out of holding the vendor accountable, even when there are close personal relationships between the parties. This principle applies to both the development and implementation vendor, as

well as the quality assurance/IV&V vendor which usually has an even closer relationship with the buyer.

2. **Send Notices of Breaches to the Vendor.** As painful as it may be, the project director has to apprise the vendor when the vendor has breached the contract. Otherwise, you may be waiving the breach and your ability to pursue a remedy that is available to fix the breach. You may also be setting yourself up for a bad faith claim if you acquiesce, do not hold the vendor accountable when the breach occurs, and then later try to pursue the available remedies in the contract, such as after there is a complete failure resulting in part from the breach. Any such notice should be reviewed by legal counsel before being sent or prepared by legal counsel with assistance from project staff.
3. **Follow Contract Requirements, E.g., Regarding Breaches and Cure Opportunities.** Again, reviewing the contract to discern appropriate procedural requirements and then following those requirements should not be perceived as being harsh or dogmatic. The vendor knows it has agreed to these requirements and has to accept them as part of the relationship.
4. **Track Vendor Performance Against Contract Requirements.** This task is part of the standard project management activities and should be performed continually. Without meticulous attention to this mundane task, the buyer could lose the ability to hold the vendor accountable if some very serious breach occurs and the buyer decides to require the vendor to fix the breach.
5. **Do Not Allow the Vendor to Do Work Not Documented in a Change Order, Contract or Amendment.** Even though some organizations, such as government agencies, are legally allowed to only pay for work approved in writing by the agencies, the vendor may be allowed to charge for work performed without documentation, based on an estoppel theory, i.e., the vendor performed work in reliance on the buyer's representations that the vendor would be paid for the work.
6. **Follow Contract Procedures, E.g., Performing Acceptance Testing in Accordance With the Procedures.** Procedures may be annoying, but they provide structure and tend to keep a project moving successfully toward completion. Also, failing to follow procedures may put the buyer in breach or allow the vendor to argue the buyer waived rights it may have had if it had followed the procedures.
7. **Terminate the Contract Instead of Allowing Continual Delays in Reviewing and Accepting Deliverables, E.g., GSD or DSD.** The buyer has to act in good faith, but failing to take decisive action, such as pursuing termination as a remedy, if the vendor is clearly in material breach and failing to perform critical obligations in a timely manner, such

as providing acceptable design deliverables, will only prolong a bad and painful situation.

- 8. Use Formal Amendments to Document Changes to the Agreement.** All changes to the relationship must be documented. Depending on the nature of the change, a formal amendment may need to be drafted and approved by a board of directors or other upper level management group.

### **III. Project Administration**

- A. Introduction.** Without adherence to careful administrative procedures, the buyer will fail to manage the project and preserve its legal rights related to the project. The buyer must assume that the vendor is maintaining meticulous records that will support its views and positions on any issues that arise during or after the project, so the buyer needs to have comparable records to support its positions. Vendors are also well aware of the statistical failure rates of these projects and may be building a record to support arguments that the buyer is to blame for the failure.
- B. Operate a Separate E-mail System From the Vendor's E-mail System.** In addition to having the need to avoid sending potentially damaging e-mails to the vendor too easily due to a shared system, the buyer staff must also feel comfortable that they can communicate with their other members and within their own organization without interference from or fear of having their e-mails read by the vendor. E-mails can go across a network or the Internet to the vendor, but the vendor should not be able to read the buyer's e-mails each day or to have backup tapes with those e-mails in case problems do arise in the project. This type of electronic separation also helps remind the staff that they are part of a different organization than that of the vendor, even though they may share common physical space and a common goal.
- C. Establish a Document Management System.**
  - 1. An Independent System Is Best.** The buyer needs its own system, independent of the vendor, for tracking its documents. This server should have adequate security mechanisms, such as password protections, firewalls, and the like. The system must also have protections against security violations.
  - 2. Numbering Documents.** On particularly efficient projects, the buyers number each document, thereby making it very easy to find documents, e.g., memos, forms, etc., when problems arise in the project. Creating a database that organizes and more carefully tracks each document according to various criteria, e.g., document number, author, recipient, date, subject, etc., would be even more helpful.
  - 3. Establish and Adhere To an E-mail Retention Policy.** E-mail can be the Trojan horse for any project. When disputes arise, old e-mails often

create large problems. The buyer should establish an e-mail retention policy, which addresses time for retaining old e-mails, overwriting of backup tapes, and similar procedures.

- D. Create a Project Library and Use a Librarian to Manage It.** One person should be responsible for managing originals or copies of all of project documents. These documents should be maintained in an organized fashion, in files and bookshelves. Projects that have problems incur enormous costs after problems arise when experts are brought in to figure out what went wrong and try to find documents and organize them. It is much less expensive and more efficient to start out with a process than to recreate one later.
- E. Create and Use Forms That Fit the Activities.** All projects use relatively standard forms for most standard activities. Change orders, acceptance documents, and the like should be developed to cover all relevant activities. One example is worthy of mention. On one project, the change order form developed by the vendor included a blank block to indicate how much the vendor would be paid for preparing the change order. When the buyer had problems with the vendor and carefully reviewed its forms, it revised this form to remove the block which seemed to create a presumption some amount would be paid for this activity.
- F. Create a Change Order Management System.** Every change order should be numbered and organized, from beginning (submission of request) to end (final executed form). On one large project, there were approximately 300 possible change orders in the client's files, some of which were signed, some of which were not. During litigation, the parties fought over which ones were valid and which were not. This aspect of the litigation could have easily been avoided had the parties properly managed the change orders.
- G. Create a Form and Process for Tracking Performance by the Vendor and Its Subcontractors Against the Project Plan.** Different software products such as Microsoft Project offer numerous reports for tracking performance, and the buyer should establish standard forms or even one basic form it can use regularly for this basic management purpose.
- H. Establish Administrative Procedures and Follow Them.** Although this guideline sounds axiomatic, it is often ignored. Even after procedures are established, parties perform without following the procedures due to the time required or inconvenience. Failing to follow formal procedures will increase the likelihood that the vendor will be able to avoid responsibilities it might otherwise be held to under the procedures.
- I. Create a List of Defects and Track Corrections Against the List Each Day.** Daily management of defects will increase the likelihood of success for the project. Without daily management, small problems and defects are more likely

to impact on other parts of the project in unforeseen ways, having a ripple effect and causing greater problems.

**IV. Coordinate With Others in Your Political Environment**

**A. Other Agencies.**

**B. Other Affiliates.**

**C. Upper Level Management.**

**V. Government Agencies and Private Sector Buyers Should Not Use Arbitration**

Most arbitrators or arbitration panels are comprised of business or litigation attorneys or business people. In contrast, judges are often former attorneys trained to or experienced in weighing evidence and in making decisions based on evidence. My experience with arbitration has generally been negative, with costs and time to resolve disputes not being less than litigation. Also, the procedures are often less clear. Nonbinding mediation can be effective if the parties want to settle the dispute and are willing to make compromises to avoid paying higher legal fees from arbitration or litigation and taking risks of third parties deciding how to resolve the dispute.



## **CHAPTER 6: RECOGNIZING AND SURVIVING FAILING INFORMATION TECHNOLOGY PROJECTS**

### **I. What Is a Failing Technology Project?**

- A. A Project Not Going to Be Completed.**
- B. It Will Be Completed, But It Will Be Dramatically Reduced From Original Requirements and Will Not Meet the Purchaser's Needs, It Is Way Overbudget and Over Two Years Late.**

### **II. Lots of Projects Fail**

- A. Certain Types of Projects Are Prone to Fail: Software Design and Development, System Integration, and Large Outsourcing Projects.**
- B. Statistics Reflect the Likelihood of System Failures:**
  - 1. Between 48% - 65% of large computer system implementations are cancelled.
  - 2. Only between 13.67% - 28.17% of larger system projects are completed early or on time.
  - 3. Between 21.33% - 23.83% are delayed.

### **III. What Causes the Failures?**

- A. Failure to Discuss and Resolve Differences Between the Parties in a Well Written Contract.**
- B. Failure to Create and Keep to an Accurate Schedule and Integrated Project Plan.**
  - 1. The plan may have been produced too late, after the project had already begun.
  - 2. The plan lacked enough details about tasks and deliverables.
  - 3. For software development projects, the schedule for development is often at least six months to a year behind.
  - 4. The schedule for project completion (however defined) is often one to two years behind the original plan.
  - 5. The schedule may originally have been unrealistic or "aggressive."

- C. Lack of Enough Talented Staff and Management on Both Sides.**
1. Technical skills.
  2. Management skills.
  3. Numbers of people.
- D. Lack of Commitment at the Highest Management Levels to Making the Project Succeed.**
1. Regular briefings are needed.
  2. Helping resolve difficult disputes or make difficult decisions.
- E. Miscommunications and Unclear or Ill Defined Expectations.**
1. Purchaser to vendor.
  2. Internal to purchaser.
  3. Internal to vendor.
- F. Inadequate Process for Resolving Disputes.**
1. Project managers bury or don't disclose their problems and disputes quickly or often enough to their managers.
  2. Lists of unresolved large issues are accumulating, such as whether a development piece is within or outside the scope of the project.
  3. The project managers have stopped working as a team and are using their lawyers to communicate.
  4. Disputed matters are not getting resolved effectively under the contract's dispute resolution process.
  5. Lack of escalation procedures to higher levels of management on both sides.
- G. Inadequate Procedures for Ensuring the Products.**
1. Are designed correctly.
  2. Work correctly.
  3. Can be maintained and updated.

**H. Moving Targets.**

1. Scope creep versus fixes (the vendor is claiming that the purchaser is increasing the scope of the project with requested change orders, but the purchaser's staff feels the change orders are for fixes to the system).
2. Excessive change order requests.
3. Changing regulations.
4. Changing technology.
5. Changing specifications.
6. Changing managements.

**I. Problems With the Analysis and Design.**

1. Project requirements were poorly defined.
2. The vendor took much longer than planned to complete its first requirements and design deliverables drafts.
3. The purchaser may not have been involved enough in or provided enough resources for designing the system.
4. Designer deliverable drafts were very poor quality.
5. The purchaser rejected numerous drafts and finally accepted a less-than-optimal, ambiguous or incomplete design.
6. There are continual and intense arguments interpreting the design.
7. The vendor wants to be paid for work it says is outside the design but the purchaser stridently believes is in the design scope.
8. The design is over-complex.

**J. Lack of a Contingency Plan.**

**K. Bad Quality Product.**

1. Types of failures.
  - i. Failure to follow standardized procedures for writing code.
  - ii. Inability to fix code due to lack of controls and standards.
  - iii. Failure to test code properly.

- iv. Large numbers of technical problems.
    - v. Omission from the design.
  - 2. Time period when it occurs.
    - i. Development phase.
    - ii. Testing.
    - iii. Pilot.
    - iv. Implementation.
  - 3. Bad data conversion.

**L. Poor Testing Procedures.**

- 1. Lack of or compressed time.
- 2. No set criteria, scripts, or procedures.
- 3. Lack of remedies for failures to address testing procedures and technical requirements.

**M. Failure of the Purchaser to Participate as Promised.**

- 1. Design.
- 2. Removing weak contractor staff.
- 3. Resolving disputes.
- 4. Providing substantive knowledge, e.g., regarding policies and business rules.
- 5. Acceptance process.

**N. Fundamentally Different and Often Diametrically Opposed Objectives Between Buyers and Sellers.**

- 1. Purchasers want to build systems that meet a public or private business need.
- 2. Contractors would like for projects to succeed, but their primary objective is to earn profits.
- 3. Each side may have a different focus - time and materials work versus a fixed price, deliverables-based project.

**O. People Problems.**

1. In the technology business, the technical people are often more akin to artists, making thousands of subtle design and crafting decisions each day.
2. These projects always need more, talented people.

**P. Misused Technology.**

1. Lots of technology hasn't been fully tested.
2. Client/server or web-based systems increasingly patch together third-party products with custom developed products and standard applications.
3. Vendors may bid to use the latest technology, which may not have been fully understood when proposed.

**Q. Underbudgeted/Underbid Project.**

**R. The Vendor Wants More Money, Often Significantly More Money, for Work It Already Agreed to Do for a Fixed Price.**

**S. The Project Was Oversold From the Beginning.**

**T. Inadequate Training.**

**U. The Relationship Between the Vendor and Purchaser Has Deteriorated as the Problems Worsen.**

1. The vendor may refuse to let the purchaser staff participate in all design, development, testing, and all other appropriate project phases.
2. The vendor may refuse to promptly share information the purchaser has requested, e.g., testing results.
3. If there is a deadline for federal funding, the deadline is impending, and the vendor is not close to making it, the pressure has increased and people stop acting rationally and cooperatively.
4. Correspondence to build a record about fault has occurred between the parties.
5. Notices of breach may have been sent.
6. Notices of termination or an intent to terminate may have been sent to the vendor or should have been sent.

**V. An Accumulation of Numerous Problems, Reflecting a Pattern of Poor Project Management.**

#### **IV. What Do You Do When You Spot a Failing Project?**

##### **A. Think Before You Act; Good Design Leads to Good Decisions.**

1. Once you recognize the project as failing, implement a process to make sound decisions.
2. Moving too quickly or without good and full information will compound the problems.

##### **B. Gather Together the Right Team of People to Make Decisions.**

1. Highest level of management must be in support.
2. Project team.
3. In-house legal.
4. Financial.
5. Auditors.
6. External experts.
  - i. Legal.
  - ii. Technical consultants.

##### **C. Implement a Process to Analyze the Situation.**

1. Move quickly once the process is in place.
  - i. This approach will help project staff morale, no matter what the outcome is.
  - ii. If you start then grind to a halt, the project staff morale will plummet.
2. Do as objective as possible an analysis of the facts.
  - i. Have the in-house attorney, the attorney general's office, or the auditor assess the facts with technical staff from another agency or your own staff if needed.
  - ii. Hire one or more third parties to assess the facts.
    - (1) Third parties can be expensive, but they can also provide an independent reality check on your internal perspective.

(2) Lawyers and/or auditors.

3. Review key documents.

- i. The request for proposals.
- ii. The vendor's proposal, to the extent practical (it's usually voluminous but very useful regarding representations about the vendor's commitments).
- iii. The contract.
- iv. Contract amendments.
- v. Key correspondence (internal and external) related to.
- vi. The project.
- vii. The dispute.
- viii. Don't forget email messages between the two staffs.
- ix. Payments made to the vendor to date.
- x. Amounts withheld due to alleged breaches.
- xi. Technical failure lists.
- xii. Quality assurance vendors' reports.
- xiii. Weekly and monthly project reports.
- xiv. Audits.
- xv. Advance planning documents.
- xvi. Acceptance signoffs.
- xvii. Timelines/schedules.
- xviii. Key problems document.
- xix. Other project documents.

4. Meet with key individuals.

- i. Current project manager.

- ii. Second level project leadership, preferably without the project manager.
  - iii. Responsible internal attorneys.
  - iv. Upper level management.
  - v. Former project manager(s).
    - (1) It helps if they still work for the agency.
    - (2) In either case, assess their strengths and weaknesses as witnesses.
  - vi. Quality assurance consultants.
5. Preserve the attorney-client privilege.
- i. You want candor from staff.
  - ii. These notes may otherwise be discoverable.
6. Conduct necessary legal research.
- i. Define materiality standard for breaches.
  - ii. Define fraud and misrepresentation standards.
  - iii. Assess risks of waiver and estoppel claims.
  - iv. Clarify whether a cure period is required if you notify the vendor it is in breach and, if so, how long it must be.
  - v. Determine whether the Uniform Commercial Code applies.
    - (1) If so, you may have additional remedies.
    - (2) For example, in the Ninth Circuit, there are ways (albeit difficult) to remove the damages limitations in the contract.
  - vi. Determine whether there are setoff rights or other remedies.
7. After analyzing the key documents, doing the legal research and interviewing the key people.
- i. Create a key dates list.
  - ii. Create a key problems list.



10. Based on your analysis and the staff's chart, determine:
  - i. Whether or not the vendor is in material breach under your state law and the contract.
  - ii. Whether you are more at fault or have waived your rights related the vendor's breaches.

**D. Assess Your Technical Situation in the Context of the Political Environment.**

1. Is it still possible to salvage the project to achieve your objectives.
  - i. Getting what you contracted for in the first place is ideal.
  - ii. More practically, can you achieve baseline necessary results, i.e., try to get what you absolutely need and then figure out a way to get the rest later.
2. If it is possible, do you want to attempt to salvage the project.
3. Prepare different technical options for replacing the vendor in whole or in part.
  - i. Analyze associated costs for each option.
4. Do you believe you want or need to terminate the project (before assessing the facts and determining fault).
  - i. The project is no longer viable.
    - (1) Technically.
    - (2) Politically.
  - ii. For example:
    - (1) The system appears to be a technical failure.
    - (2) The vendor is so uncooperative, the project is grinding to a halt.
  - iii. The vendor is demanding "too" much additional money.
  - iv. The schedule is so far behind, the vendor has lost its credibility.

5. Determine what roles and relationships are key; do you need to:
  - i. Keep the current vendor.
    - (1) Same role.
    - (2) Different role.
  - ii. Remove the vendor.
6. Even if termination is warranted, what would the political effects be of terminating a large project.
7. Will a termination or lawsuit help or hurt the organization.
8. Would the buyer upper level management or parent organization have the commitment to pursuing a lawsuit initiated by the buyer or the vendor.

**E. Develop One Type of Action Plan Based on Your Overall Analysis if You Decide to Hold the Vendor at Fault and Responsible.**

1. Try to resolve the dispute by meeting with the vendor's authorized representatives.
  - i. Pursue administrative remedies if they are required by law or in the contract.
  - ii. Dispute resolution procedures are usually in the contract.
  - iii. You may need to pursue these procedures before you can send out any notice of breach.
  - iv. However, depending on the contract, you may be able to pursue dispute resolution and send a material breach notice simultaneously so that there is not a delay in pursuing a cure of the breach or termination if the breach is not cured.
2. Do not necessarily use binding arbitration.
  - i. Arbitration is not necessarily cheaper or faster than litigation.
  - ii. Procedures can be less complete than those used in litigation.
3. Stay within the boundaries of the contract.
  - i. If there are not formal procedures in the contract, make sure the right people are talking to the right people, with appropriate expertise to help at these meetings.



- v. Only ask the vendor to cure the breaches.
  - vi. Do not require performance beyond the obligations in the contract.
  - vii. Clearly state in the letter that you are not waiving any rights to pursue damages or other remedies from past, current, or future breaches and that you are reserving all rights to pursue such damages and other remedies.
6. If the UCC applies, an alternative is to seek adequate assurances of due performance from the vendor.
- i. This alternative arises if a buyer is insecure about the vendor's ability to perform its obligations.
    - (1) If the vendor is unable to remove your insecurity, you may be entitled to terminate the agreement and pursue UCC remedies, such as rescinding the agreement.
    - (2) Your request must be reasonable; if it isn't, you risk being in breach and acting in bad faith.
    - (3) Your response to the vendor's response must be reasonable; if it isn't, you risk being in breach and acting in bad faith.
7. You must be ready to terminate and pursue litigation if you plan to send these types of notices.
8. If you are not ready to litigate and the vendor calls your bluff, you will lose credibility and the vendor will be in even more control of the situation.
9. Send the notice to the vendor in accordance with the notice provisions in the contract to make it effective.
- i. Registered or certified mail usually.
  - ii. Find the right vendor person to receive the notice.
10. Cure periods usually apply before you can terminate.
11. Do a press release if it will be helpful in managing your process.
12. Brief and garner the support of your financiers, administration and constituents.
13. Mediation may be helpful if both parties want it to be productive.

**F. Expect a Negative Reaction to the Letter.**

1. You will receive a long refutation in response from the vendor.
2. The vendor may try to go around or over you to upper level management to achieve its results or to pressure you.
3. The vendor parent company or upper level management may be totally surprised due to lack of communication within its own ranks.

**G. Nevertheless, This Type of Notice Will Motivate the Vendor to Negotiate.**

**H. Meet Again With Authorized Representatives of the Vendor to Discuss the Problems and Ways to Achieve Your Objectives.**

1. Compromise will be necessary from both sides if you want to keep the vendor and avoid litigation.
  - i. Money.
  - ii. Time.
  - iii. Deliverables.
2. Compromises are often distasteful in part, but necessary to avoid worse alternatives.
3. If you do not want to keep the vendor, stand firm on termination and apprise the vendor of its potential liability.
4. There is likely to be a final argument over money and liability.
5. Be aware of whether each party is bringing litigators or business attorneys to the meetings.

**I. If You and the Vendor Can Agree on How to Resolve All Outstanding Issues, Draft an Amendment (if You Go Forward With the Project) or a Settlement Agreement (if the Project Will End). For a Settlement Agreement:**

1. Have mutual releases from liability.
2. However, you may want to reserve your rights against the vendor for future third-party claims from:
  - i. Injuries to persons or property.
  - ii. Intellectual property claims.

- iii. Special types of liability, e.g., lost federal funding by a state agency due to the vendor's breaches or criminal actions.

**J. If You and the Vendor Cannot Agree on How to Settle, Terminate the Vendor.**

**K. Try to Salvage the Project by Yourself if That Is a Viable Alternative.**

- 1. Hire new project management.
- 2. Hire consultants to assess whether any of the project is salvageable.

**L. Be Prepared for Litigation.**

- 1. Retain outside counsel or use in-house litigation counsel.
- 2. Follow the termination procedures in the contract.
- 3. Draft and send the termination notice.
- 4. Decide whether:
  - i. To take the initiative and prepare a complaint.
  - ii. Proceed ahead and wait to see if the vendor files a complaint.
  - iii. If the vendor sues you, prepare counterclaims.

**M. On Large Projects (Millions), Expect the Litigation to Be:**

- 1. Very expensive: \$1-\$15 million in litigation fees and costs.
- 2. Time consuming.
  - i. Document production.
  - ii. Document review.
  - iii. Depositions and interrogatories.
  - iv. Trial preparation.
  - v. Long trial.
- 3. Damaging or debilitating to the project.
- 4. Very risky due to possible biases in a third party decision-maker.

## ATTACHMENT 1: SOFTWARE LICENSING CHECKLIST

1. **Grants**
  - Exclusive? Transferable? Irrevocable? Perpetual? Worldwide?
  - Scope of use (modifications, derivative works, reproduce, distribute, demonstrate, sublicense)
  - Who can use, Where, When, How Many users/computers?
  - Limitations/Exclusions (backup copy, reverse engineer, decompile, etc.)
2. **Definitions**
3. **Description of Software**
4. **Documentation**
5. **Other Services**
  - Software development/customization
  - Delivery
  - Installation
  - Training
  - Support (days of the week/time of day)
  - Maintenance (bug fixes, patches, workarounds)
  - Upgrades
  - Enhancements
6. **Equipment** (consider an integrated “System” concept)
7. **Project Plan? Statements of Work? Schedule? Milestones?**
8. **Deliverables based?**
9. **Fees**
  - If Licensee: Subject to Vendor/Licensor/Contractor performing its obligations...
  - If Licensee: Due on receipt of correct and undisputed invoices
  - If Licensor: Interest if late
  - Payment terms (flat fee; X% on execution, Y% on delivery/installation, Z% on Acceptance; royalties based; value pricing (based on number of transactions or amount of info processed); etc.)
  - If Licensee: Cap on increases in fees
  - If Licensee: most favored company provision
10. **Term**
11. **Termination**
  - For convenience (if Licensee, do not allow this for Licensor)
  - For default upon material breach, notice, cure period
  - Suspension of services
12. **Staffing commitments** (right to approve/disapprove?)
13. **Ownership** (if software development, customization, derivative works, who owns? copyright/work for hire issues)
14. **Specifications**
  - All documentation, including without limitation published specifications, technical documentation and manuals, RFPs, proposals, and brochures
  - Response times, uptime
15. **Confidential Information**
16. **Acceptance Testing** (test for conformance with specifications)
  - Test discrete parts
  - Test integrated system (including with hardware)
17. **Warranties if Licensee**
  - Warranty period
  - Standard to apply: commercially reasonable efforts, best efforts, etc.
  - Y2K and leap year
  - Conform to specifications (if Licensor: “substantially conform”; if Licensee: “conform to specs, except for minor or inconsequential errors”)
  - Uptime guarantee
- Infringement and misappropriation
- Performance (high quality, professional manner, time of the essence)
- Viruses or bombs
- How long maintenance will remain available
- Compliance with applicable laws and regulations
- Ownership (Licensor has the right, title and interest in the Software)
18. **Remedies for Warranty Breach if Licensee**
  - Repair
  - Replace
  - Terminate
  - Refund
  - Extend warranty period
  - If Licensee: remedies are not exclusive
19. **Warranty Disclaimers if Licensor**
  - No other express or implied warranties
  - Including but not limited to implied warranties of merchantability, fitness, noninfringement
20. **Indemnification**
  - Confidentiality breaches (for both parties)
  - Infringement and misappropriation (if Licensee)
  - Negligence, willful acts or omissions, strict liability
21. **Insurance** (workers’ comp, liability, property damage, etc.)
22. **Audit Rights if Licensor**
23. **Limitation of Liability/Damages Limitation**
  - No consequential, exemplary special, incidental, indirect, or punitive damages
  - Exception for confidentiality, infringement and misappropriation indemnities
24. **Additional Rights & Remedies for Licensee**
  - Liquidated damages
  - Performance bond
  - Withhold payments
  - Setoff--reduction in payments
  - Suspend performance
  - Cover
  - Free equipment for performance failures
25. **Escrow Agreement**
26. **Independent Contractor Relationship**
27. **Miscellaneous**
  - Applicable law/venue
  - Assignment
  - Attorney Fees
  - Entire Agreement
  - Force Majeure (not to apply to payments due)
  - Headings
  - Modifications/Amendments
  - Nonwaiver
  - Notices
  - Remedies not exclusive (if representing licensee/buyer)
  - Severability
  - Survival
  - Taxes
  - Waiver



**ATTACHMENT 2: MODEL TABLES FOR RESOLVING ISSUES IN VENDOR NEGOTIATIONS**

**1. COMPREHENSIVE AGREEMENT ISSUES LIST**

<b>Issue #</b>	<b>Issue/Subject Matter</b>	<b>Agreement Section</b>	<b>Vendor Position in Proposal</b>	<b>Buyer Response</b>
1				
2				
3				
4				
5				
6				
7				
8				
9				
10				

**2. CHANGES PROPOSED BY VENDOR AND BUYER RESPONSE (IN PRIORITIZED ORDER)**

Issue #	Issue/ Subject Matter	Agreement Section	Vendor Position in Proposal	Buyer Response	Dialogue
	Payment Terms				

**3. OPEN REMAINING ISSUES AND TABLE TO USE WHEN PREPARING COMPREHENSIVE COMPROMISE OFFER**

<b>Agreement Section</b>	<b>Issue/Subject Matter</b>	<b>Buyer</b>	<b>Vendor</b>

**4. COMPROMISE POSITIONS AND FURTHER NEGOTIATIONS**

<b>Agreement Section</b>	<b>Issue/Subject Matter</b>	<b>Buyer</b>	<b>Vendor</b>	<b>Agreement Edits</b>

## ATTACHMENT 3: CHECKLIST FOR ADMINISTERING IT PROJECTS

- 1. Administer the Project to Succeed**
  - (a) If all available resources are not dedicated to its success, the project will fail.
  - (b) If it fails, the project could result in litigation.
- 2. Contracts Do Not Cover All Aspects of a Project**
  - (a) Expect gaps.
  - (b) Expect ambiguities to be found in the contract.
  - (c) Manage the gaps and ambiguity.
- 3. Create an Organized and Complete Project Team**
  - (a) Hire and train a skilled project manager.
  - (b) Include your departments.
  - (c) Include other departments.
  - (d) Hire consultants if necessary.
- 4. Create a Work Plan**
  - (a) Manage tightly to the schedule.
  - (b) Track activities each week against the plan.
  - (c) Keep it accurate.
  - (d) Do not agree to changes without understanding the implications.
  - (e) If you agree to changes, reserve rights to impose liquidated damages or to get paid for claims caused by the vendor's delays.
- 5. Expect Lots of Changes During the Project**
  - (a) Technology changes.
  - (b) People change.
  - (c) Exigencies occur.
  - (d) Use the change order process.
- 6. Organize and Manage All the Project Documents**
  - (a) Set up a system.
  - (b) Have a document administrator.
  - (c) Copy everyone appropriate on each document.
  - (d) Use the system from beginning to end of the project.
  - (e) Address hard copies and electronic documents, e.g., e-mails and documents on hard drives.
  - (f) Establish a project library, if appropriate.
- 7. Follow the Terms and Procedures in the Contract**
  - (a) Do not pay prematurely.
  - (b) Prepare the site.
  - (c) Make deadlines.
  - (d) Fulfill other obligations.
  - (e) Impose liquidated damages if appropriate.
  - (f) Impose requirements to produce reports.
  - (g) Do testing.
  - (h) If testing shows failures, require all failures be fixed.
  - (i) Or, allow minor errors that will be fixed according to a schedule and condition subsequent payments on the success of the corrections.
- 8. Send Notices to Interested Parties**
  - (a) Bonding companies need to know about change orders.
  - (b) Banks that provide letters of credit may need to know about change orders.
- 9. Document All Project-Oriented "Agreements" or Decisions Made in Managing the Project**
  - (a) Less than contract amendments.
  - (b) E.g., procedures, forms.
  - (c) Set up a system, e.g., number each letter or memorandum.
- 10. Document Contract Amendments: Written and Mutually Agreed Upon**
  - (a) Create a standard form
  - (b) Beware estoppel and oral agreements.
- 11. Avoid Waivers**
- 12. Document Waivers if They Occur**
- 13. Breaches Will Occur**
  - (a) Keep two files with all breaches:
    - MATERIAL.
    - IMMATERIAL.
  - (b) Notify the other side of its breaches.
- 14. Manage the Project Tightly**
  - (a) Vendor.
  - (b) Your staff.
  - (c) Be reasonable and fair in administering the contract.
  - (d) Establish a cost control and management system for tracking payments.
- 15. Have Regular Meetings That Are Meaningful**
- 16. Produce Accurate, Meaningful Reports**
- 17. Hire Consultants to Help You Administer the Project**
  - (a) Quality Assurance (QA).
  - (b) Independent Verification and Validation (IV&V).
  - (c) Testing.
  - (d) Get monthly or more frequent reports from each.
  - (e) Their reports will be used to judge your performance and as evidence in litigation if the project fails.
  - (f) Follow their advice.
- 18. Resolve Disputes as They Occur**
  - (a) Do not create long lists of open issues.
  - (b) Handle issues if possible at the project level.
  - (c) Escalate issues quickly to upper levels of management.
  - (d) Use the dispute resolution process in the contract.
- 19. Send Breach Letters if Appropriate**
  - (a) Immaterial breaches.
  - (b) Material breaches.
  - (c) Termination letter if necessary.
  - (d) Use the notice and other procedures (e.g., cure opportunity) in the contract.