411 Outsourcing- Negotiating the Tough Provisions

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Faculty Biographies

Michael J. Cammarota

Michael J. Cammarota is a senior counsel for the Accenture market maker group in Chicago and provides legal advice and counsel to personnel in this IT and BPO outsourcing oriented business unit of Accenture. Responsibilities include antitrust analysis; drafting and negotiating technology licensing, outsourcing and numerous other types of contracts; dealing with issues pertaining to employment law, intellectual property, general corporate, mergers and acquisition, and tax.

Prior to assuming his current position with Accenture, Mr. Cammarota has held various positions in IBM's legal department. His responsibilities have included antitrust analysis, contract drafting and negotiation of all types of customer and supplier contracts, dealing with issues pertaining to employment law, intellectual property, general corporate, mergers and acquisition and tax, and supervising outside counsel on litigation.

Mr. Cammarota received a B.A. from St. John's University and is a graduate of the St. John's University School of Law where he was an editor on the Law Review.

Edward Hansen

Edward Hansen is a partner in the global outsourcing practice at Morgan, Lewis & Bockius LLP in New York City. His practice is devoted solely to representing clients in technology transactions, with an emphasis in representing clients in complex information technology and business process outsourcing transactions. Mr. Hansen frequently works with clients from the very early stages of a transaction, working from the project definition phase and assisting clients on applying a "best practices" approach to the business and legal negotiation process. Mr. Hansen's practice includes negotiating system acquisitions, telecommunications service agreements, outsourcing agreements (including telecommunications, networking, data center, desktop, application development and maintenance, and business process outsourcing), custom software development, software distribution agreements, professional services agreements, and internet-related matters. In the internet arena, Mr. Hansen's practice includes crafting all types of internet distribution arrangements, digital media distribution (including digital music licensing and distribution), application service provider (ASP) arrangements, hosting agreements, collocation agreements, internet service provider (ISP)/remote access agreements, and Web development agreements. Mr. Hansen represents a broad range of clients from start-up software developers to multinational corporations contracting for global systems and services.

A frequent speaker on outsourcing and technology transactions topics, Mr. Hansen has also written articles in the New York Law Journal and Optimize and has been widely quoted in CIO Magazine, InformationWeek, eWeek, ComputerWorld, Baseline and Workforce Management. InformationWeek named Mr. Hansen as one of its eleven key "innovators and influencers" who will drive change in the business technology sector.

He earned a B.A. from New York University and a J.D. from St. John's University School of Law.

Jeffrey R. Stern

Jeffrey R. Stern is an executive director at Morgan Stanley, in its technology, intellectual property, and e-commerce law group in New York. Mr. Stern's practice areas include negotiating IT and business process outsourcing transactions, handling other complex technology negotiations, and providing counsel on a range of tech, IP, and e-commerce related issues.

Prior to Morgan Stanley, Mr. Stern was with Latham & Watkins and Weil, Gotshal & Manges.

Mr. Stern is a founding member of the technology and intellectual property law committee of ACC's Greater New York Chapter. Mr. Stern is co-chair of the Securities Industry Association's working group on free software and is a member of the SIA's subcommittees on outsourcing and on market data. He presents on a regular basis concerning technology law issues.

Mr. Stern is a graduate of Harvard College, magna cum laude, and Virginia Law School, where he was a member of the Virginia Law Review.

Agenda

- Introduction
- Scope of Services
- Service Levels
- Termination
  - Termination Payments
  - Termination Assistance
- Intellectual Property
- Liability and Indemnities

Introduction

The Outsourcing Model

- Outsourcing is the performance of IT or business functions by a third party service provider, and typically involves the provision of

  - Personnel

  - Budgets

  - Assets

  - Direct management control over day-to-day activities

- Outsourcing is a means to achieve many objectives
  - Reduce operating costs
  - Increase flexibility
  - Improve service or productivity; reduce errors

Result

- Customer often is heavily reliant on the service provider
  - Customer often has little or no capability to perform outsourced functions itself

- In a sense, all you (the customer) has is a contract
  - The contract documents the services, the obligations, the means to achieve the customer's objectives
  - Critical to "get it right," especially the key provisions

The Outsourcing Paradox

- A successful outsourcing requires trust, understanding and alignment, yet, the short-term economic interests of the customer and the service provider are not naturally aligned

- A successful outsourcing must strive to be a partnership, yet the nature of the transaction can produce complex agreements, lengthy deal cycles and adversarial negotiations

A Strong Outsourcing Agreement And Negotiation Process Can Help Resolve This

Scope of Services

Services Description

- Heart of the agreement

- Broad contract language

- Specificity in the services schedule

Services Should Include

- Services described in Services Schedule

- Services included in the displaced budget

- Services included in job descriptions displaced by the outsourcing

Scope of Services Ties to Pricing

- This is the bundle of goods bought for the fee

- If it is not included it may cost extra

- Evolution, if it was in the budget

Other Important Concepts

- Implied Services
  - Naturally included
- New Services
  - Services that are additional and different
  - NOT an increase in the volume of the Services
- Change Control
  - Mechanism for change
  - Covers scope, price, SLAs

Service Levels

Selecting SLAs

- Objective is not to cover every possible failure

- Focus on manageable number of SLAs indicative of key business needs

  - Objective

  - Measurable

  - Verifiable

Structuring SLAs

- Maintain flexibility to reweight credit allocations over time

- When negotiating SLAs, understand how vendor prices the services
  - Don't expect performance to surpass SLAs
  - Plan to use for management reporting

- Require Vendor to Monitor and Report on Compliance
  - Failure to report should be a deemed failure of the SLA

Credits

- Establish Credit Pool
  - Percent of monthly revenue "at risk"
    - Percentage
    - Size of pool
- Set credits at a level to promote compliance
  - Each SLA carries a portion of Credit Pool
  - Allocations can add up to greater than 100%
- Limit exceptions/excuses to credits

Use "Acceptance" Model for Project Work

- Point in time threshold test, unlike SLAs measured periodically

- Usually applied to custom deliverables, integration, service transition

  - Deliverable should reasonably meet the purpose
  - Should also comply with specifications
  - Provider will correct any problems with no maintenance fee

    - Post acceptance during warranty period may be a year or less
    - Remember to try to obtain options re ongoing support and maintenance

The Gaps –Addressing What SLA's Don't Cover

- Include a detailed description of services and specifications

- Require that provider resolve each problem regardless of SLA – root cause analysis

- Add an overall customer satisfaction SLA (e.g., 3 out of 5)

- Address service provider personnel turnover, skill sets and training

- Target SLAs on key times (e.g., Monday morning) or sensitive areas (e.g., particular business units)

Termination

General Contract Issues

- Events that Give Rise to Termination

- Termination Payments

- Transition Services

Termination for Cause

- By Client
  - Material breach

- By Service Provider
  - Material breach (or specific types thereof)
  - Beware "Darned If You Do, Darned If You Don't" Contract Structures

Termination for Convenience

- Determines the "stickiness" of the relationship

- Schedule

- What does Service Provider Get?

Other Termination Rights

- Change of Control (Service Provider; Client)
- Changes in Law
- Force Majeure
- Failure to agree on implementing a Benchmarker's recommendation
- Bankruptcy/Precarious Financial Condition

Interests of Parties - Client Interests

- Do I have a way out if Services aren't being done as contracted for?

- What if my business conditions change?

- What do I tell my (CEO, COO, CFO, GC) when they ask about getting out?

Interests of the Parties – Service Provider

- Do I get a chance to fix something that isn't right?

- Will I recover what I need to recover if the client wants to terminate and it isn't my fault?

- Will I screw up the ability to recognize revenue and if so, what do I tell my (CEO, COO, and CFO) and where will I be working next?

Termination Payments

Chargeable Termination

- Termination Before End of Term
  - Convenience
  - Force Majeure
  - Change of control
  - Changes in law
  - Failure to agree on implementing a Benchmarker's recommendation
  - Bankruptcy/Precarious Financial Condition
  - Service Provider's material breach (it's not as crazy as it sounds)

- If fees are calculated, how are they calculated, and of what do they consist?

Deferred "Breakage" Fees

- Gain sharing payments not realized due to premature termination

- Fee or volume discounts given under the assumption the arrangement would run full term

- Retained amounts/bonuses owed until termination

- Profit margins that were foregone in the period up to termination and expected to be recovered in the later period of the contract (e.g., difference between profit margin % to date and expected profit margin % over the life of the contract, multiplied by the contract revenue up to the date of termination)

Stranded Costs

- Unrecouped investments, costs or obligations, or the unrecovered portion of any amortized charges for such investments, costs or obligations, incurred or assumed by Service Provider

- Any amount of accrued and unbilled revenue for Services provided under this Agreement

Demobilization Costs

- Administration of termination process by Service Provider executives

- Delays in re-assigning Service Provider personnel

- Severance costs for redundant employees

- Cost of re-deploying equipment

- Costs of re-assigning or canceling third party agreements, e.g., subcontracts

- Lease termination costs for the buildings used (and recovery of unrecouped leasehold improvements)

Termination Assistance

Helping Client Move at End of Agreement

- Service Provider will nearly always have to provide some level of transition services to facilitate transfer of the services back to the client

- These services will generally include

  - Assistance with Planning and Cooperation
  - Knowledge Transfer
  - Asset Transfer

Employees

- Outsourcing agreements may contain provisions addressing the transfer of employees back to the client

- These provisions may be required in jurisdictions that have adopted the European Acquired Rights Directive or similar law

Mechanics

- Typically, transition assistance services commence on the date that client gives notice of termination

- Can continue, at the client's election, for a period of time (six months is common, but it must be negotiated in light of the deal) after the termination date

- May require Vendor to work with a competitor

  - Common if not moving back in-house

  - Accordingly, the outsourcing agreement should provide for the execution of nondisclosure and other relevant agreements to protect Service Provider's IP and confidential information

Payment

- Service Provider gets paid additional amounts (per the rates agreed) for other services in the contract or at some mutually agreed to rates for the types of services provided that are outside the scope of the agreement and utilize resources not already dedicated to providing the services

- If the client does not pay in a timely fashion --

  - Service Provider will want to be excused from performing termination services
  - Particularly true if the event that gave rise to termination was the client's failure to pay)

Intellectual Property

Two Simple Concepts

- "Your Stuff", "My Stuff", "New Stuff" and "Some Other Guy's Stuff"

- Don't Be A Glutton: Take What You Need and Leave Some for Others

Your Stuff

- Client Preexisting IP

  - It's your stuff, you own it, but then you're responsible for it.
  - Service Provider will need a license to it, at least one that allows Service Provider to perform the services you want performed without interference from you or anyone else

- Modifications to Client Preexisting IP

  - Most clients feel strongly that if they brought something into the engagement, they should own any modifications to it, even if Service Provider does the modifying. This may or may not always be the right answer. Consider
    - Joint ownership,
    - Ownership of all rights but the copyright, or
    - Ownership by the client with some form of license back to the Service Provider
      - License broad enough to allow the Service Provider to use the ideas behind the IP on future engagements
      - License limited only to use during the term

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IP Protection

- Service Provider is going to ask to obtain protections from the client for any preexisting client IP used by Service Provider to deliver its services

- Such protections will likely include
    - A reasonable indemnity,
    - Some form of warranty, and
    - An alleviation of Service Provider's obligations to the extent it is unable to perform due to an issue with client-provided IP

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My Stuff

- Preexisting Service Provider IP
    - It's my stuff, I own it, I'm responsible for it, and please be realistic and don't expect me to give it away to you
    - You'll need a license to it, at least one that allows you to receive the services you want me to perform without interference from anyone else
    - You may also need a license to something after I'm done providing services, but consider
        - "Nice to have" versus "need to have"
        - Terms that go with the license
        - Support you may or not need and the cost for it
        - A license for you for your business, and not a welcome mat to join the wonderful world of IT and BP outsourcing or to share my stuff with those I dislike and/or fear the most
- Modifications to Pre-Existing Service Provider IP -- I'm in the business, please don't be surprised if I want to own modifications to my stuff

IP Protection

- Service Provider will expect to be asked to provide some protection for the client for any Service Provider IP used by Service Provider to deliver its services

- Such protections will likely include

  - A reasonable indemnity, and

  - Some form of warranty

New Stuff

- This is typically where the fun starts
  - Client's Position: "I paid for it, it's mine"
  - Service Provider's Position: "You paid for a service"

- What's the right answer? It depends, so give up the positions start looking for a solution

Weigh the Interests

- Client's Interests
  - Value for fees paid
  - Not having to pay twice for something that's needed after the deal is done
  - Advantages over competition
  - Protection of Client's confidential information
- Service Provider's Interests
  - Ability to grow their business (especially in a shared services environment)
  - Desire to serve other clients in the same sector
  - Avoid undue or unintentional intereference with future business operations

Some Other Guy's Stuff

- Client Provided TP IP Licensed to Service Provider
  - It is typically an obligation of the client to obtain the right for Service Provider to use the third party IP in the manner necessary to perform its services
  - Third parties vary in their willingness to grant such right and will generally insist on owning any modifications made to their software
  - Service Provider will need some reasonable indemnification from its client against any IP infringement resulting from Service Provider's use of a client-provided third party product to perform its obligations under the agreement

Some Other Guy's Stuff

- Third Party IP Licensed by Service Provider to Provide Services.

  - Clients will want the right to use third party IP being brought in by service provider to provide the services

  - They also may need a license to third party software after the termination of the agreement, so either some arrangement will need to be made with the third party vendor or clients will need to understand what's being used to allow for viable alternatives to be implemented after the services are completed

  - Clients will also request an indemnification from Service Provider against IP infringement claims resulting from the third party software. Service Provider will only wish to provide an indemnification that it gets from the third party vendor

Don't Be A Glutton: Take What You Need and Leave Some for Others

- Each side needs to consider thoughtfully their interests and concerns

- Acknowledge the legitimate interests of the other side, and the places where your positions are just that, positions

- Is there a way to "slice and dice" who gets what so that both sides get what they need?

  - Copyright only license, with rights or ownership to other form of IP (patents)

  - Commitment to protect confidential information (so long as confidentiality is not a circular route to exclusivity)

  - Some limited and reasonable restriction on people

  - Meaningful residual rights (the kind that only a frontal lobotomy would effectively eradicate)

Liability/Indemnity

Starting Point

- What are the greatest exposures in connection with the service?

- How will the customer's overall risk profile be affected by the services or deliverable?

- Is one of your goals to reduce risk?

- What is your risk tolerance?

- Who is in a better position to mitigate the risk?

- What is the relation between risk and pricing – e.g. high revenue custom outsourcing versus low cost/margin commodity service?

Legal Risk is Business Risk

- Customer claims

- Regulatory actions/fines

- IP infringement claims

- Employment claims

Specific Examples

- Confidentiality/privacy/loss of data

- Security/theft

- BCP

- Transition risk—inbound and outbound (exit strategy)

- Gross negligence or willful misconduct

- IP risk and ownership

- Risk of change in regulatory requirements

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Other Examples

- Risk of changes in industry pricing or business needs (termination for convenience)

- Property damage

- Employment

- Import/export

- Viruses

- Risk of change of control in vendor or customer

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SAMPLE SERVICES PROVISION
(CUSTOMER PERSPECTIVE WITH COMMENTS FROM VENDOR PERSPECTIVE)

I.   SERVICES

   1.1   **Provision of Services.**

      1.1.1   General. Beginning on the Services Commencement Date, PROVIDER will provide the following services, functions and responsibilities, as they may evolve during the Term and as they may be supplemented, enhanced, modified or replaced (the "Services"):

      (i)   the services, functions and responsibilities described in this Agreement and its Schedules, including, without limitation, the Services Schedule. A summary of the Services is set forth in Section 1.3 below;

      (ii)   the services, functions and responsibilities that CUSTOMER and its Affiliates performed in the ordinary course of business for the twelve (12) months preceding the Services Commencement Date, even if the service, function, or responsibility is not specifically described in this Agreement, where such service, function or responsibility was directly related to the Services and was: **[Comment: always a fun discussion. You really need to focus on what the provider is offering before you can get into this. For example, if the provider is doing a "lift and drop" of the customer's solution and taking responsibility for its people, then provisions like this are more logical. But if the provider is providing an industrialized solution, it may not be providing all the things the customer used to get, with the trade off that what the provider will provide will provide faster, cheaper and better service than what the customer got before]**

         (a)   [The responsibility of, or performed by, any CUSTOMER Legacy Employee or relevant CUSTOMER Contractor Personnel prior to the Services Commencement Date (including, without limitation, all functions that had been performed by employees of CUSTOMER and its Affiliates who are offered employment with PROVIDER or whose positions or responsibilities are displaced as a result of the outsourcing); or]

         (b)   [required to be performed by, or otherwise included in the description of responsibilities for any CUSTOMER Legacy Employee or CUSTOMER Contractor Personnel position which was vacant prior to the applicable Services Commencement Date and displaced or transferred to PROVIDER following the applicable Services Commencement Date]**[Comment: until I know that the work being done by the folks that are leaving is relevant, this does not make sense to agree to]**

      (iii)   any other services, functions and responsibilities not specifically described in this Agreement or its Schedules that are required for the performance and provision of the Services **as specifically described in the Agreement or its Schedules** ("Implied Services"). Implied Services are included within the scope of the Services to the same extent and in the same manner as if specifically described in this Agreement[; and].

      (iv)   [any incidental services (e.g., new product demonstrations, lab access, etc.) which PROVIDER or any PROVIDER Affiliate has historically provided to CUSTOMER or its Affiliates.]**[Comment: given that providers may have multiple things going on with a customer at any one time, this provision really isn't appropriate nor fair.]**

   1.1.2   Facilities. Except as otherwise expressly provided in this Agreement, PROVIDER will provide the facilities, personnel and other resources required to provide the Services. **[Comment: The provider then needs to ensure that the Customer's facilities, personnel and other resources are laid out somewhere in the agreement.]**

   1.1.3   Management of Ongoing Projects.

      (i)   As part of the Services, PROVIDER will manage those of CUSTOMER's and its Affiliates' ongoing projects listed in Schedule X.

      (ii)   A list of material ongoing projects as of the Effective Date is attached hereto as Schedule X.

      (iii)   [Any projects not specified in Schedule X (such as . . ..) will be addressed through the Change Control Procedure, [provided that PROVIDER will not require CUSTOMER to pay additional Charges with respect to additional projects.]]] **[Comment: this approach really can't work for the provider, since he would end up doing projects for free. A**

potential solution is to lay out the possibility of doing these projects using the available resources already committed, but with the understanding that (1) other projects and/or contractual obligations (e.g. service levels) will have to be adjusted and (2) they may very well be projects where the customer will have to pay additional charges for]

1.1.4 Availability of Services. Except as otherwise specified herein (including the Services Schedule) PROVIDER will provide the Services on a twenty-four (24) hour a day, seven (7) days per week basis. **[Comment: once again, the provider needs to confirm this really is the case]**

1.1.5 Services and Agreement Global in Scope. Except as otherwise specified herein, PROVIDER will provide the Services on a worldwide basis, and all terms and conditions of this Agreement, including, without limitation, Charges and Performance Standards, will apply globally. **[Comment: Several issues flow from this. First, does the customer really want services in Turkey billed for in the US and paid in US dollars? Probably not, given potential tax considerations. What about currency risk (i.e. who will bear it). Certainly the customer and the provider want to have a single contract infrastructure to draw on, but it may make more sense to have the master agreement and implement it in countries through companion agreements. In the companion agreements, you can then sort out what variances you may need for contract terms (for example, to accommodate country legal requirements.]**

1.1.6 Recipients of Services.

(i) At CUSTOMER's election, PROVIDER will provide the Services to CUSTOMER, to CUSTOMER's Affiliates, to CUSTOMER's Former Affiliates as well as to third parties with whom CUSTOMER or its Affiliates have *bona fide* business relationships ("Business Partners"). CUSTOMER, CUSTOMER's Affiliates and such Business Partners are collectively the "Service Recipients". Except where the context requires otherwise, Business Partners will be deemed to be included in the definition of "Affiliates" as such term is used in the Agreement. **[Comment: not clear that an unaffiliated third party should get all of the rights afforded to a true majority-owned or parent company-owned Affiliated]**

(ii) Except as otherwise described in this Agreement or unless agreed otherwise through the Change Control Procedure,

PROVIDER will invoice CUSTOMER for all Service Recipients' use of Services in accordance with Section X.

(iii) Services to be provided by PROVIDER hereunder may only be ordered by the CUSTOMER Contract Executive or his/her designee(s) as identified in the Procedures Manual or otherwise by written notice from the CUSTOMER Contract Executive to the PROVIDER Program Director. The CUSTOMER Contract Executive will, from time to time, provide PROVIDER with a list of designees authorized to order Services and the scope of Services such designees are authorized to order.

1.2 **Phases of Services.**

PROVIDER will perform the Services in phases in accordance with the following:

1.2.1 Legacy Services.

(i) Beginning on the Services Commencement Date and ending on the applicable Migration Date PROVIDER will assume responsibility for and perform the Legacy Services **as agreed in the Services Schedules**.

(ii) In performing the Legacy Services, PROVIDER will comply with the Legacy Performance Standards more fully described in, and subject to the terms of, the Service Level Agreement. **[Comment: will need to see the Service Level Agreement]**

1.2.2 Migration Services.

(i) PROVIDER will commence performing the Migration Services as agreed in the Migration Plan.

(ii) Migrations and the Migration Services are more specifically described in Article X below. **[Comment: will need to see Article X]**

1.2.3 Ongoing Services.

(i) Beginning on the Migration Date PROVIDER will provide the Ongoing Services **as agreed in the Services Schedules**.

(ii) Beginning on the Migration Date PROVIDER will comply with the Ongoing Performance Standards as more fully described in, and subject to the terms of, the Service Level Agreement.

1.3   Functional Scope of Services.

PROVIDER will perform, as part of the Legacy and/or Ongoing Services, as applicable, the services, functions and responsibilities described generally below [(]**as provided** and more fully described in the Services Schedule)[. In the event of conflict between this Section and the Services Schedule, the Services Schedule will control].

[[List of services with general description]]

1.4   Services Variable in Scope and Volume.

PROVIDER will be responsible for adjusting the resources used to provide the Services to accommodate changes in the scope and volume of the Services so as to comply with all Performance Standards. **[Comment: a great deal more discussion is needed around this clause. Resources can't simply be adjusted upward or downward and there may very well be impacts to performance standards].**

1.5   Availability of Services; Additional Resources.

PROVIDER will make available all resources necessary to provide [all additional services requested or required by CUSTOMER, its Affiliates and their business activities]**the Services** subject to and in accordance with the Change Control Procedure (as applicable).

1.6   Standard of Performance.

PROVIDER will perform the Services with promptness and diligence in a workmanlike manner, in accordance with generally-accepted practices and professional standards used in well-managed operations performing services **substantially** similar to the Services**, subject to the Change Control Procedure**.

From the Change Control Section:

1.6.1   General.

(i)   "New Services" means services that are [materially]different from, and in addition to, the Services being provided by PROVIDER under this Agreement as well as functionality that is not Included Functionality.

(ii)   "Replacement Services" means additional functions or services that would reduce or eliminate certain Services.

(iii)   [New Services and Replacement Services will be subject to the Change Control Procedure.]

SAMPLE SERVICE LEVEL PROVISIONS

(CUSTOMER PERSPECTIVE WITH COMMENTS FROM VENDOR PERSPECTIVE AND "DRAFTING NOTES" IN RESPONSE TO VENDOR COMMENTS)
[GENERIC PORTION OF MODEL SERVICE LEVEL]

1.   General.   The service levels described below ("Service Levels") are [non-]inclusive **[Drafting note: marked comments to the text are mock revisions from a vendor perspective]** measures of whether the Services meet the requisite levels and standards under the Agreement. The Service Levels are key indicators of performance[but do not cover all aspects of the Services and are only a few of many indicators relevant to whether the requisite levels and standards under the Agreement are met]. Consultant will meet or exceed the Service Levels. A Service Level Default will occur when Consultant fails to meet a Service Level. The provision of Service Level Credits is [without prejudice to other rights and remedies that Customer may have under the Agreement or at law or in equity.]**an exclusive remedy. [Drafting note to suggested vendor changes in this paragraph: a potential compromise on the issues raised by this paragraph is that credits will be Customer's exclusive remedy except that Customer can pay credits back to Vendor in order to seek other remedies within a specified time period, e.g. one year after receiving the credits. SLA's should not be the exclusive measure of vendor performance – the vendor should be obligated to meet a specified general standard of performance and to perform the tasks required under the statement of work]**

2.   Service Level Credit Methodology.   Service Level Credits will be calculated based upon Consultant's performance relative to the Service Levels described in this Exhibit B. Service Level Credits will be determined on the following basis: (a) each month, [[fifteen]**seven** percent ([15%)]**7%)] [Drafting note: number usually ends up somewhere in these ranges**] of all fees and billables accrued or charged to Customer, excluding permitted out-of-pocket expenses but not excluding Service Level Credits credited (the "Monthly Charges") will constitute a pool of "Revenue at Risk" available as Service Level Credits; (b) the percentage of the Revenue at Risk available to be applied as a Service Level Credit with respect to each Service Level ("Service Level Credit Allocations") is set forth in Section __ below; and (c) Customer shall be entitled, based upon the Service Level Credit Allocations, to Service Level Credits if Service Level Defaults occur in any calendar month. **[VENDOR COMMENT: NEED TO BREAK DOWN REVENUE AT RISK TO APPLY ON A SERVICE AREA BY SERVICE AREA BASIS AND REVISE THIS SCHEDULE ACCORDINGLY, E.G. IF THERE ARE 10 SERVICE AREAS THEN EACH AREA HAS ITS OWN SEPARATE SERVICE LEVELS WITH REVENUE AT RISK BASED UPON SPEND IN THAT AREA; BUT THE CUMULATIVE TOTAL OF SERVICE CREDITS TO BE PAID WILL STILL BE CAPPED AS A PERCENTAGE OF MONTHLY FEES IN THE RANGES DISCUSSED ABOVE] [Drafting note: breaking down revenue at risk by service areas or towers dramatically reduces Customer's remedy and does not reflect Customer's overall spend and commitment to vendor. Customer should prevail on this issue when Customer has a coordinated/global relationship with vendor]** Service Levels shall be measured on a monthly basis unless otherwise indicated.

3. <u>Application of Service Level Credits</u>. Consultant shall track its performance and calculate any amount that Customer is entitled to as Service Level Credits. Within [ten]**thirty** ([10]**30**) days after the last day of each month, Consultant will provide to Customer monthly performance reports (in both hard and soft copy) which specify any performance failures, the remedial measures taken, and application of Service Level Credits. Consultant shall credit all Service Level Credits towards the next invoice.

4. <u>Remedial Measures</u>. [Regardless of whether Service Level Credits apply, if Consultant fails to meet a Service Level in a particular instance, it will take prompt corrective action and, as requested by Customer, report on the progress of such actions to Customer.]**[VENDOR COMMENT: NOT RESPONSIBLE FOR SPECIFIC FAILURES TO SOLVE SERVICE ISSUES IF MEET AGGREGATE LEVELS] [Drafting note: Vendor should not be off hook for addressing any specific performance failure due to a SLA – this will hurt the relationship]** On request, **to be made no more than once per calendar quarter,** Consultant will provide a report detailing its past performance and planned measures to improve future performance with respect to any or all Service Levels or other aspects of the Services.

5. [Automatic]Continuous Improvement. On each anniversary date of the Agreement,** the parties will meet to discuss whether there should be changes to** the Service Levels [will be automatically improved to the median of all measurements in the prior year to the extent greater than the original Service Level]**as part of Consultant's effort to continuously improve its quality of service. [Drafting note: agreements to discuss periodically continuous improvements often do not have effective results from a customer perspective. One compromise is to negotiate fixed increases in SLA's over time, e.g. one percentage point per year, for service levels where such increases make sense (e.g. if the service level is already 99%, you're probably not going to get buy in for any percentage increases)]**.

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6. <u>Service Levels</u>. The Services performed by Consultant shall be subject to the following Service Levels, as further described in Section 7: (a) Time to Acknowledge, (b) Time to Respond, (c) Time to Resolve, and (d) Customer Satisfaction Survey.

7. <u>Service Level Definitions</u>.

   (a)"Time to Acknowledge" shall be measured as the number of Tickets that Consultant responds to within the Time to Acknowledge during a month, divided by the total number of such Tickets opened during the month, with the result expressed as a percentage. Time to Acknowledge begins when the caller calls Consultant **as recorded by Consultant's call tracking system** and ends at the time that Consultant [both]contacts the end user to acknowledge receipt of the call[and coordinates the necessary measures to resolve the problem raised].

   (b) "Time to Respond" shall be measured as the number of Tickets that Consultant responds to within the Time to Respond during a month, divided by the total number of such Tickets opened during the month, with the result expressed as a percentage. Time to Respond begins when the caller calls Consultant and ends at the time that Consultant [initiates problem resolution]**contacts the caller in response to the call**.

   (c) "Time to Resolve" shall be measured as the number of Tickets that Consultant actually resolved within the Time to Resolve during a month, divided by the total number of such Tickets opened during the month, with the result expressed as a percentage. Time to Resolve begins when a Ticket is opened and ends when the problem has been resolved [to Customer's reasonable satisfaction]**according to Consultant's call tracking system (Customer may challenge any results recorded in Consultant's call tracking system which Customer believes are incorrect)**.

   (d) "Customer Satisfaction Surveys" shall be provided to Customer on a quarterly basis, in a manner and form approved by Customer[, unless Customer otherwise requests. Customer may have such] **and Consultant. Such** surveys **will be** completed by [such]**representative** personnel as Customer [may]**and Consultant** deem appropriate. This Service Level shall be measured as indicated in Section 8 below.

8. <u>Service Level Metrics</u>. The following metrics shall apply to the Service Levels:

Service Level Description	Permitted Time	Service Level
Time to Acknowledge	15 minutes	[98]**95** percent []**[VENDOR COMMENT: 98% WILL COST MORE]**
Time to Respond		

| Priority Tickets | [30]60 minutes | [98]95 percent aggregate |
| Other Tickets | 4 hours | |

Time to Resolve
| Priority Tickets | [4]5 hours | [98]95 percent aggregate |
| Other Tickets | [8 hours]1 business day | |

| Customer Satisfaction SurveyN/A | | Average score of [4]3 out of 5 score [and at least 50% response rate] |

Each month Customer may designate up to [25]20 percent of Tickets as Priority Tickets. A "Ticket" means the primary electronic record opened to record and track a **discrete** problem. Only one Ticket may be opened with respect to a [problem. FORGIVEN]**discrete problem. [Drafting note: it is often worthwhile to ask vendors to price different levels of performance to maximize value]**

[VENDOR COMMENT: THESE SERVICE LEVELS ARE TOO PUNITIVE. VENDOR NEEDS 1. FAIR OPPORTUNITY TO CURE (E.G. AFTER A PARTICULAR SLA FAILURE, A FAILURE IN THE NEXT MONTH IS FORGIVEN AS PROVIDER INVESTIGATES PROBLEM AND TRIES TO CORRECT), 2. EARNBACK (E.G. AFTER A FAILURE, CONSULTANT EARNS BACK CREDIT IF IT MEETS PERFORMANCE LEVEL FOR NEXT TWO MONTHS), AND 3. BANK (IN RETURN FOR A STRING OF THREE MONTHS GOOD PERFORMANCE, VENDOR GETS FUTURE RELIEF FROM NEXT SLA PENALTY)] [Drafting note: Vendor usually only gets one of these three]

[VENDOR COMMENT: VENDOR NEEDS COMMENSURATE REWARDS AS AN INDUCEMENT FOR EXCEPTIONAL PERFORMANCE BEYOND WHAT IS ANTICIPATED, E.G. SERVICE LEVELS OF 99% OR ABOVE] [Drafting note: Vendor should obtain rewards for exceptional performance only where the Customer sees a commensurate, clear value in such exceptional performance.]

9. Service Level Credit Allocations. The initial Service Level Credit Allocations shall be as follows:

Time to Acknowledge	25 percent
Time to Respond	25 percent
Time to Resolve	25 percent
Customer Satisfaction Survey	25 percent

The foregoing Service Level Credit Allocations may be revised by Customer in its sole discretion **once per year** upon notice to Consultant at least 10 days in advance of the next reporting period. **[Drafting note: usually this ends up in the once per quarter time frame]**

10. Example. The following example indicates how the Service Level Credit model works: In a month, Consultant breaches two Service Levels which each have a Service Level Credit Allocation of 25 percent. The Monthly Fee is $100,000. The Revenue at Risk equals 15% of the Monthly Fee, or $15,000. The total amount of Service Level Credits incurred by Consultant and to credited towards the invoice for the next month is calculated as follows:

50% (25% X 2) X $15,000 (15% [OF]of $100,000) = $7,500

TERMINATION

(vendor form with custom comments – aggressive/first round)

17 .1 *Termination for Cause***.**

(a) Client may [after (i) complying with [Section on Dispute Resolution], and (ii) giving at least 30]**terminate this Agreement immediately upon written notice of a material breach of the Agreement by Service Provider which cannot be cured or upon thirty** days prior written notice [identifying specifically the basis for such notice and referring to this Clause 17.1 (a), terminate this Agreement, in whole but not in part, for Service Provider's material breach of its material service obligations under this Agreement unless Service Provider has within such 30-day period either (x) cured such breach (if such breach is curable) or (y) made substantial progress to cure such breach (if such breach is curable) and implemented a plan that results in a cure of such breach within 60 days]**of a material breach which remains uncured during such thirty day period**. Such notice will specify the effective date of such termination. **For the avoidance of doubt, no Termination Charge will apply to a termination under this Section 17.1(a) except as provided under Section 17.6 [note: dispute resolution section should operate within the 30 day cure period]**

(b) Service Provider may after [(i) complying with [Section on Dispute Resolution], and (ii)]giving at least **90 days prior written notice with an additional written warning two weeks before scheduled termination (or, in the event Service Provider reasonably believes that Client may become insolvent, file for bankruptcy or otherwise be unable to pay,** 30 days prior written notice **specifying such concern)** identifying specifically the basis for such notice and referring to this Clause 17.1(b), terminate this Agreement, in whole but not in part, for: (x) the failure by Client to pay undisputed charges owed to Service Provider when due under this Agreement totaling at least [*one*] month's charges; (y) the failure by Client to comply with Client's obligation to place disputed amounts in escrow pursuant to Clause [•], unless Client has within such 30-day period cured such breach; or (z) Client's material **uncured or substantially mitigated** breach of its obligations under [Confidentiality Section Reference] and [IP Section Reference]. Such notice will specify the effective date of such termination. **This Section 17.1(b) contains Service Provider's sole right to terminate this Agreement in whole or in part.**

(c) Notwithstanding any provision of this Agreement to the contrary, although Service Provider has undertaken the contractual obligation to meet the Service Levels set out in Schedule [•], neither Service Provider's failure to comply with any particular Service Level nor any Service Level Default will necessarily be deemed to constitute a material breach of this Agreement **unless [specify numbers/types of SLA breaches within a certain time frame that automatically constitute a terminable, material breach]**.

17 .2 *Termination for Convenience***.**

(a) On or after the [•] year anniversary of the [Base Services Commencement/Effective Date], Client may terminate this Agreement, in whole but not in part, for convenience (*i.e.*, for any reason or for no reason) upon at least [•] months' prior written notice to Service Provider and payment of the Termination Amount**, if any,** set out in Schedule [ᵈ]. **[note that it is Client's position that the Termination Amounts should constitute the entire amount payable for termination for convenience except for hourly rates for transition assistance, and should reflect only Service Provider's upfront costs amortized over a reasonable time frame]**

(b) On and after the [•] year anniversary of the [Base Services Commencement/Effective Date,] Client may terminate this Agreement in part for convenience (a "Service Discontinuance") as follows:

(i) To effect a Service Discontinuance, Client will deliver a written request (a "Discontinuance Notice") to the Service Provider Account Representative, specifying in reasonable detail (i) the [proposed]Service Discontinuance and (ii) the [requested]date of such discontinuance. In no event will the requested date for a Service Discontinuance be less than [•] [months]**weeks** from the date of the Discontinuance Request. The Parties will cooperate with each other in good faith in discussing the scope and nature of the Discontinuance Request, including the time period in which such Service Discontinuance will be implemented. [Upon]**Within thirty days after the completion of** a Service Discontinuance, Client will pay to Service Provider the amount of any [proportional]**applicable** Termination Fee[including Demobilization Costs and Stranded Costs, as set out in Schedule [ᵈ], resulting from such Service Discontinuance].

(ii) [As soon as practicable thereafter (but in no event more than 30 days after receipt of the Discontinuance Notice) and to the extent applicable, Service Provider will prepare and deliver to the Client Account Representative‡][a written statement (the "Discontinuance Response") describing any changes in products, services, assignment of personnel and other resources that Service Provider believes would be required to implement the Service Discontinuance. In addition, such Discontinuance Response will include, as applicable (i) an estimation of the increase or decrease in the Service Provider Service Charges that would be required, including appropriate back-up documentation to justify such estimates, (ii) an estimation of the Demobilization Costs and Stranded Costs that would result from such

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[‡ Defined as "a senior level individual who: (i) will be the primary contact for Service Provider in dealing with Client under this Agreement; (ii) will have overall responsibility for managing and coordinating the receipt of the Services; (iii) will meet regularly with the Service Provider Account Representative; and (iv) will have the authority to make decisions with respect to actions to be taken by Client in the ordinary course of day-to-day management of this Agreement (the "Client Account Representative")"]

~~Service Discontinuance, (iii) a description of how the proposed Service Discontinuance would be implemented, (iv) a description of the effect, if any, such Service Discontinuance would have on this Agreement, including without limitation, the Service Levels, (v) a description of any transition or termination services that will be provided in respect of such Service Discontinuance and (vi) such other information as may be relevant to the proposed Service Discontinuance~~**Service Provider may bill Client on an hourly basis at an amount no greater than its standard rates for services performed to assist with the transition process which are outside the scope of Services**. Each Party will take commercially reasonable measures to mitigate expenses incurred in order to effect such Service Discontinuance. The Service Provider Account Representative and the Client Account Representative will meet to discuss the Discontinuance Response[~~and to determine the appropriate schedule for such Service Discontinuance~~].

17.3   Termination for Existence of Benchmarking Condition. If [~~the Parties do not timely~~]**Service Provider does not** effect any Benchmarking Adjustment pursuant to Clause [•][2]**1 in accordance with the ordered time frame**, then Client may terminate this Agreement, in whole but not in part, upon at least [~~90~~]**30** days prior written notice to Service Provider [~~and payment of~~]**without the need to pay any** Termination Amount[~~set out in~~ ~~Schedule [d]~~].

17.4   Termination for Insolvency. In addition to all other rights or remedies provided for in this Agreement or by law, either Party may terminate this Agreement in whole, but not in part, in the event that: (a) the other Party makes a general assignment for the benefit of creditors; (b) the other Party becomes or is unable to pay debts as they fall due; (c) a trustee, custodian or receiver is appointed by any court with respect to the other Party or any substantial part of such Party's assets; (d) an action is taken by or against the other Party under any bankruptcy or insolvency laws or laws relating to the relief of debtors, including the United States Bankruptcy Code and such action is not dismissed within sixty (60) days of commencement of the action; or (e) the other Party is the subject of a winding-up petition which is not dismissed within five business days, or a resolution is passed for its winding-up. [~~If Service Provider terminates pursuant to this Clause 17.4, Client shall pay the Termination Amount set out in~~ ~~Schedule [d]~~ **[note: under US law this clause is probably not enforceable]**]

17.5   Extension of Termination Effective Date. Upon at least 60 days prior written notice to Service Provider, Client may extend, from time to time, the effective date of expiration or termination of this Agreement [~~(except in the case of a termination by Service Provider pursuant to Clause 0)~~]until the [•]-month anniversary of the original effective date of the expiration or termination of this Agreement. Charges for such periods of extension will be as provided in Schedule [ℓ].

17.6   Termination Amounts.

(a)   Upon any termination or expiration of this Agreement, the provisions of Schedule [d] will apply. **[note sure what such schedule says or why it is necessary]**

(b)   If Client purportedly terminates this Agreement pursuant to Clause 17.1 but Service Provider disputes Client's right to so terminate this Agreement and it is ultimately determined that Client did not have the right to terminate this Agreement pursuant to Clause [~~17.1.~~]**17.1 and did so in bad faith,** then for purposes of determining the amounts payable to Service Provider pursuant to Schedule [d], such termination will be deemed to have been a termination for convenience effected pursuant to Clause 17.2.

17.7   Termination Assistance Services. Commencing at the later of (i) six months prior to the scheduled expiration date of this Agreement, or (ii) the delivery of any notice of termination or non-renewal of this Agreement (or such other date as mutually agreed by the Parties), and continuing until the effective date of the expiration or termination (the "Termination Assistance Period"), Service Provider will provide to Client, or at Client's request to Client's designee, such reasonable cooperation, assistance and services as specified in Schedule [‡] (the "Termination Assistance Services") **at the lesser of the hourly rates specified therein or Service Provider's then-current standard hourly rates**. Upon at least 30 days prior written notice to Service Provider, Client may extend, from time to time, the Termination Assistance Period until the [•]-month anniversary of the effective date of the expiration or termination of this Agreement.

17.8   Survival of Provisions. Upon the expiration or termination of this Agreement for any reason, the provisions of Articles [•] and Clauses [•] will survive indefinitely.

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[2]**1** Clause contemplates that Client exercises right to benchmark, benchmarker has recommended some change, and the Parties have not mutually agreed to implement such change.

Article 6
PROPRIETARY RIGHTS

(vendor form with customer comments – aggressive/first round)

6.1   *Client-Owned Software.*

(a)   [~~ny~~]**"Client-Owned Software" means any** software, tools, databases, data [~~and~~]**or** methodologies owned by Client **or licensed to Client by third parties** (together with related documentation) [~~to which Service Provider needs access for purposes of this Agreement, including~~]**as well as modifications, enhancements and improvements to, or derivative works of, the same. Without limiting and in addition to the foregoing Client-Owned Software includes** the Client-owned software identified in Schedule [•] [~~are collectively referred to herein as the "Client-Owned Software."~~]**and, except as otherwise agreed by Client under Section 6.6 hereunder, any software, tools, databases, data or methodologies developed by Client or on its behalf by third parties. [Note: also need a separate section for Client-Owned IP which includes all IP other than software and is analogous to Service Provider's Proprietary Items in Section 6.7 – see below for a definition of such Intellectual Property. While the need for software licenses is somewhat apparent, we would like to discuss why software is broken out separately for ownership purposes (e.g. Section 6.3 below) as in many outsourcing agreements – from a customer perspective it seems to add confusion. The definition of Proprietary Items in Section 6.7 below seems to be sufficient to cover software/IP therein as well as other IP.]**

(b)   As between the Parties, Client will be the sole and exclusive owner of the Client-Owned Software.[~~Client hereby grants to Service Provider (and applicable Service Provider subcontractors) a nonexclusive, nontransferable, royalty-free license to access, use, copy, modify and enhance such Client-Owned Software, all to the extent necessary for Service Provider's performance under this Agreement. Such license will terminate upon the expiration or termination of this Agreement.~~] **[note: license is in 6.1(d)]**

(c)[~~Client will be financially and administratively responsible for (i) obtaining any Consents[3]~~][~~required for Client's grant of such license and (ii) maintenance of the Client-Owned Software, including upgrades necessary to correct defects.~~]   **Except as specified hereunder or where the operation, maintenance or support of Client-Owned Software is part of the Service, Client will be financially and administratively responsible for (i) obtaining any Consents[2]**

required for Client's grant of such license and (ii) maintenance of the Client-Owned Software, including upgrades necessary to correct defects.

(d)   Service Provider and its applicable **pre-approved** subcontractors will access, use, copy, modify and enhance such Client-Owned Software (i) solely for purposes of this Agreement, (ii) solely during the [~~Agreement~~]**applicable Task Order** Term and (iii) in compliance with any applicable use restrictions that are identified in writing to, and acknowledged **(such acknowledgment not to be unreasonably withheld)** by, Service Provider[~~. Service Provider will establish an access control procedure to limit Service Provider's access and use accordingly.~~] **including without limitation those in Exhibit ____ (which Service Provider hereby acknowledges). The license in the preceding sentence will terminate upon the expiration or termination of the applicable Task Order, at which time Service Provider will stop all use immediately unless Client otherwise agrees. Service Provider will establish an access control procedure acceptable to Client to limit Service Provider's access and use only as necessary for such purposes. Notwithstanding any agreements or click-wrap or shrink wrap licenses to the contrary, the license under this Section 6.1(d) supersedes that in any software which Service Provider provides to Client unless Client otherwise agrees in a writing which specifically references this Section 6.1(d).**

6.2   *Service Provider Software.*

(a)   Any software, tools, databases, data or methodologies that are (i) owned by Service Provider or Service Provider Affiliates before the Effective Date or acquired **independently of this Agreement and the Services hereunder** by Service Provider after the Effective Date, (ii) developed by Service Provider or Service Provider Affiliates other than [~~pursuant to~~]**in connection with** this Agreement or any other agreement with Client **or any Services hereunder**, or (iii) licensed by Service Provider or Service Provider Affiliates from [~~a third party (other than third-party software that is the subject of licenses included in the Transferred Assets)~~]**an unaffiliated third party and identified in a Task Order or otherwise agreed by Client**, including any such items used by Service Provider or Service Provider Affiliates to provide the Services to Client, are collectively referred to herein as the "Service Provider Software." As between the Parties, Service Provider will be the sole and exclusive owner of the Service Provider Software. **Unless it first obtains Client's prior written consent [defined throughout as given through the pen and ink signature of an authorized representative of a party], Service Provider will not grant any access to Service Provider Software or deploy any Service Provider Software on or in connection with Client's networks, computers or systems, except for the Service Provider Software listed in Schedule ___ in the manner described in such Schedule. [NOTE: other portions of the Agreement must make clear how at the end of the term an exit transition from using any Service Provider Software will occur by, for example, Service Provider providing all data in standard formats etc.]**

[~~[3 "Consents" means consents, waivers, permits, clearances, approvals, rights and other authorizations.]~~

[2] "Consents" means consents, waivers, permits, clearances, approvals, rights and other authorizations.

(b)   Service Provider will be financially and administratively responsible for (i) obtaining any Consents required to provide the Services using the Service Provider Software, and (ii) maintenance of the Service Provider Software, including upgrades necessary to correct defects.

(c)   With respect to Client's access and use of any Service Provider Software, Client will comply with any **reasonable** applicable use restrictions **consistent with this Agreement** that are identified in writing to, and acknowledged by, Client.[Client will establish an access control procedure to limit]   Client's access and use [accordingly.]**of Service Provider Software will be in accordance with Client's standard practices concerning access and use of third party commercial software.**

(d)   Unless otherwise stated in a Task Order or Client otherwise agrees, Service Provider hereby grants Client and its affiliates, agents and contractors a non-transferable, perpetual, irrevocable, worldwide, non-exclusive license to access, use, publicly disclose, distribute, copy, maintain, modify and enhance any Service Provider Software, Embedded Service Provider Software (as defined below) and Proprietary Items (as defined below) which are provided to Client in connection with this Agreement or any Services hereunder. Unless otherwise stated in a Task Order or agreed, the scope of the foregoing license is limited to a license to access, use, publicly disclose, distribute, copy, maintain, modify and enhance in connection with Client's use of Work Product.

6.3   *Ownership of Client-Owned Software*. As between the Parties, Client will be the sole and exclusive owner of the Client-Owned Software. Any derivatives, modifications, enhancements or improvements to the Client-Owned Software (or its related documentation) developed by Service Provider [will be considered Work Product[4]][and subject to Clause 6.5.]**are also considered Client-Owned Software under Section 6.1(a) unless otherwise agreed in advance by Client..**

6.4   *Ownership of Service Provider-Owned Software*. As between the Parties, Service Provider will be the sole and exclusive owner of the Service Provider-Owned Software. Any derivative works, modifications, enhancements or improvements to the Service Provider-Owned Software (or its related documentation) developed by Service Provider will not be considered Work Product and will be owned exclusively by Service Provider. **[NOTE: this is okay for commodity services, but to the extent that Client funds the development of Service Provider Software for a custom solution, Client has paid for and should own such software without any license back to Service Provider unless Service Provider funds some of the development costs/shares the gains it will obtain by using such Client-funded software for its other customers]**

[4 "Work Product" means the specifications, design documents, flow charts, software programs, documentation, reports and other similar work product that Service Provider develops specifically for Client pursuant to this Agreement; provided, however, that Work Product will not include any Service Provider Software]

6.5   *Ownership of Work Product*

[(a)   ]Upon [final payment]**its creation**, Client [will own]**owns** all Work Product, subject to[(1) Clause 6.4 and Clause 6.6 and (2)] any restrictions of any third-party materials embodied in the Work Product and disclosed to Client **which are specifically agreed to in a Task Order or otherwise agreed by Client [define "agreed" globally to mean only in a writing signed in pen and ink by an authorized officer of Client]**. Service Provider will have a [perpetual, non-transferable, non-exclusive paid-up right and license to use, copy, modify and prepare derivative works of the Work Product. To the extent any Work Product contains Confidential Information of a Party, such Confidential Information will be subject to [Confidentiality Section Reference].]**license with respect to the Work Product as follows: [fill in same scope as the license in 6.1(b)]. [See note to 6.4 about co-funded development] [note: we are not going to be held up by confidentiality restrictions in our use of work product unless we specifically agree in a particular instance]**

(a)   Client shall have exclusive title and ownership rights, including all Intellectual Property rights, throughout the world in all Work Product. To the extent that exclusive title and/or ownership rights may not originally vest in Client as contemplated herein, Service Provider hereby irrevocably assigns all right title and interest, including Intellectual Property and ownership rights, in the Work Product to Client, and will cause its Representatives to irrevocably assign to Client all such rights in the Work Product. ["Intellectual Property" is defined to include all (i) patents, patent applications, patent disclosures and inventions (whether patentable or not), (ii) trademarks, service marks, trade dress, trade names, logos, corporate names, Internet domain names, and registrations and applications for the registration thereof together with all of the goodwill associated therewith, (iii) copyrights and copyrightable works (including computer programs and mask works) and registrations and applications thereof, (iv) trade secrets, know-how and other confidential information, (v) waivable or assignable rights of publicity, waivable or assignable moral rights and (vi) unregistered and registered design rights and any applications for registration thereof; and (vii) database rights and all other forms of intellectual property]

(b)   All uses of any trademarks, service marks and trade names in the Work Product or in the performance of the Services, and the goodwill associated therewith, whether by Service Provider or third parties, inures and will inure to the benefit of Client.

(c)   Service Provider agrees to disclose promptly in writing to Client any and all Intellectual Property (i) consisting of or associated with Work Product and (ii) made, conceived, developed, acquired or reduced to practice by the Service Provider, alone or jointly with others, including any Representatives, during or in connection with the performance of the Services.

(d)   Each Party agrees to execute any appropriate documents and take any other appropriate actions reasonably requested by the other Party to give effect to the provisions of this <u>Clause 6.5</u>.

(e)   Notwithstanding anything to the contrary, all specifications, design documents, flow charts, software programs, documentation, reports, materials, software, and any other tangible or intangible work product delivered by Service Provider or its affiliates or approved subcontractors to Client are Work Product under this Section 6.5 unless Service Provider otherwise clearly identifies them when delivered as Service Provider Software or Proprietary Items. [Client needs to be informed of and agree to all materials which are not Work Product so it can treat them appropriately]

6.6   *Embedded Service Provider Software.*   Service Provider will [~~use commercially reasonable efforts to avoid incorporating or embedding~~]**not incorporate or embed** any Service Provider Software into any Work Product without the prior written consent of Client; *provided, however,* that if Service Provider does incorporate or embed Service Provider Software into any Work Product **with such consent**, then **unless otherwise agreed** the following provisions will apply:

(a)   If Service Provider incorporates or embeds any Service Provider Software into any Work Product ("Embedded Service Provider Software"), Service Provider will not be deemed to have transferred or assigned any rights therein to Client. Service Provider will grant to Client [~~a nonexclusive, nontransferable, worldwide, royalty-free, perpetual license to use, maintain, modify, enhance and create derivative works of such Embedded Service Provider Software (i) to the extent necessary to use or maintain such Work Product for Client's normal business purposes and (ii) solely as used in such Work Product and not as a "stand-alone" product or separately from such Work Product in which it is embedded~~]**the license described above in Section 6.2(d)**.

(b)   Notwithstanding such license, Service Provider will be the sole and exclusive owner of any modifications, enhancements and improvements to, or derivative works of, any Embedded Service Provider Software made by [~~Client~~]**Service Provider** or its contractors pursuant to the above license (the "Service Provider Software Enhancements"). All Service Provider Software Enhancements **made by Service Provider** will be considered "works made for hire" and will be owned by Service Provider (subject to the above license to Client). [~~If any Service Provider Software Enhancements may not be considered a "work made for hire" under applicable law, Client hereby assigns to Service Provider without further consideration Client's copyright and ownership rights in and to such Service Provider Software Enhancements~~]. All **such** Service Provider Software Enhancements will be deemed part of the license granted to Client pursuant to Clause 6.6(a). **[Client note: we are not going to develop your IP for you unless there is particular reason or it is contained in an effective "sandbox" in which we do not need or expect to own any IP]**

(c)   Client agrees to execute any appropriate documents and take any other appropriate actions reasonably requested by Service Provider to effectuate the purposes of this <u>Clause 6.6.</u>

(d)   Client will not have any interest in or claim to any Service Provider Software **or Service Provider Software Enhancements made by Service Provider**, other than the above license to the Embedded Service Provider Software.

6.7   *Proprietary Items.* In the course of performing its obligations under this Agreement, Service Provider may use **pre-existing or independently developed** products, materials, tools and methodologies that are proprietary to Service Provider or to third parties (collectively, "Proprietary Items") **only as they are specifically identified in advance in a Task Order or otherwise agreed by Client**. As between Client and Service Provider, **when designated in a Task Order or otherwise agreed,** Proprietary Items will be deemed Confidential Information of Service Provider for purposes of [Confidentiality Section Reference][~~.~~] **except where Client has an independent right to use or access such Proprietary Items. Except where Client independently obtains such rights from a third party,** Client will neither have nor obtain rights in such Proprietary Items (or in any modifications or enhancements thereto) other than[~~: (i) to use them as authorized by Service Provider in writing from time to time solely for purposes of performing its responsibilities under this Agreement; (ii) to the extent the Proprietary Items constitute Embedded Service Provider Software under Clause 6.6 to use them as part thereof as provided in Clause 6.6. or (iii) pursuant to Service Provider's standard license for such Proprietary Items or, in the case of Proprietary Items owned by third parties, pursuant to terms acceptable to the applicable third party. If Proprietary Items are made available to Client under (i) or (ii) above, they will be made available on an "as is" basis and, to the extent permitted by applicable law, without express or implied warranties of any kind. Proprietary Items made available under (iii) above will be subject to the terms of the applicable license.~~] **pursuant to the license in Section 6.2(d).**.

6.8   *Knowledge Capital.* Nothing in this Agreement will preclude [~~Service Provider~~]**Client** from acquiring, marketing, developing, distributing, licensing or using for itself or others, services, products or technology that are the same as or similar to those provided [~~to Client~~]by Service Provider pursuant to this Agreement. Furthermore, [~~Service Provider~~]**Client** will continue to be free to use the general knowledge, skills and experience and any ideas, concepts, know-how and techniques that are acquired or used in the course of providing the Services. This <u>Clause 6.8</u> will not diminish [~~Service Provider~~]**Client**'s obligations regarding Confidential Information under [Confidentiality Section Reference]. **[Note: confidentiality section needs to include residuals clause for Client]**

SAMPLE IP OWNERSHIP AND LICENSING PROVISIONS

(CUSTOMER PERSPECTIVE)

1.   OWNERSHIP

(1.1)   Intellectual Property.   "Intellectual Property" means all (i) patents, patent applications, patent disclosures and inventions (whether patentable or not), (ii) trademarks, service marks, trade dress, trade names, logos, corporate names, Internet domain names, and registrations and applications for the registration thereof together with all of the goodwill associated therewith, (iii) copyrights and copyrightable works (including computer programs and mask works) and registrations and applications thereof, (iv) trade secrets, know-how and other confidential information, (v) waivable or assignable rights of publicity, waivable or assignable moral rights and (vi) unregistered and registered design rights and any applications for registration thereof; and (vii) database rights and all other forms of intellectual property, such as data.

(1.2)   Disclosure. Consultant agrees to disclose promptly in writing to Customer any and all Intellectual Property made, conceived, developed, acquired or reduced to practice by the Consultant, alone or jointly with others, including any Representatives, during or in connection with the performance of the Services.

(1.3)   Ownership of Work Product.   (a) All works materials, software, documentation, methods, apparatus, systems and the like prepared, developed, conceived, or delivered as part of or in connection with the Services, and all tangible embodiments thereof, shall be considered Work Product.

(b) Customer shall have exclusive title and ownership rights, including all Intellectual Property rights, throughout the world in all Work Product. To the extent that exclusive title and/or ownership rights may not originally vest in Customer as contemplated herein, Consultant hereby irrevocably assigns all right title and interest, including Intellectual Property and ownership rights, in the Work Product to Customer, and will cause its Representatives to irrevocably assign to Customer all such rights in the Work Product.

(c) All uses of any trademarks, service marks and trade names in the Work Product or in the performance of the Services, and the goodwill associated therewith, whether by Consultant or third parties, inures and will inure to the benefit of Customer.

(1.4)   Further Assurances. Consultant will, and will cause its Representatives to, give Customer or Customer's designee all reasonable assistance and execute all documents necessary to assist with enabling Customer to prosecute, perfect, register or record its rights in any Work Product.

(1.5)   Pre-Existing Materials. This Agreement does not restrict or deprive Consultant of any of its rights or proprietary interests in any materials that existed prior to or which are developed wholly independent of performance of the Services and Customer Confidential Information ("Pre-Existing Materials"). If Pre-Existing Materials are delivered in connection with or as part of the Work Product, Consultant grants Customer, its Affiliates and their contractors an irrevocable, unrestricted, non-exclusive, paid-up, perpetual, worldwide license to duplicate, disclose, modify, sublicense, distribute, display and otherwise use such Pre-Existing Materials to enable the full use and/or benefit of the Work Product. Consultant shall identify such Pre-Existing Materials in the relevant Task Order.

<div align="center">SAMPLE LIABILITY/INDEMNITY PROVISIONS

(CUSTOMER PERSPECTIVE WITH COMMENTS FROM VENDOR PERSPECTIVE)</div>

1.   LIMITATION OF LIABILITY

(1.1)   Limitation of Liability. NOTWITHSTANDING ANYTHING TO THE CONTRARY IN THIS AGREEMENT OR ANY TASK ORDER, IN NO EVENT WILL **(I) THE AGGREGATE LIABILITY OF** CONSULTANT OR CUSTOMER OR [~~ITS~~]**THEIR AFFILIATES ARISING OUT OF THIS AGREEMENT OR THE SERVICES PROVIDED HEREUNDER EXCEED   [ENTER AMOUNT – USUALLY BASED ON FEES PAID OVER A PERIOD OF TIME SUCH AS 12 MONTHS. THIS IS USUALLY THE MOST CONTESTED PART OF THE LIMIT OF LIABILITY CLAUSES AND THE AMOUNT WILL VARY DEPENDING ON SUCH FACTORS AS NEGOTIATING LEVERAGE, E.G. IS THERE A COMPETITIVE BIDDING PROCESS WHICH INCORPORATES NEGOTIATION OF RISK/LEGAL CONTRACT TERMS?, THE SIZE OF THE ENGAGEMENT, THE NATURE OF THE SERVICES, WHETHER THE LIABILITY IS AGGREGATED ACROSS TASK ORDERS OR BROKEN DOWN ON AN ENGAGEMENT BASIS] OR (II) CONSULTANT OR CUSTOMER OR THEIR** AFFILIATES BE LIABLE FOR ANY OF THE FOLLOWING: LOST PROFITS, LOST REVENUES, INDIRECT, INCIDENTAL, CONSEQUENTIAL, SPECIAL**, EXEMPLARY** OR PUNITIVE DAMAGES EVEN IF IT HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. NOTWITHSTANDING THE FOREGOING, NO LIMITATION OR EXCLUSION OF CONSULTANT'S LIABILITY WILL APPLY WITH RESPECT TO ANY CLAIMS ARISING OUT OF OR RELATING TO ARTICLES __ ("NON-DISCLOSURE") **[VENDOR COMMENT – WANT TO DISCUSS ALL THESE REQUESTED CARVE OUTS, AS THE MAJORITY SHOULD BE DEALT WITH UNDER THE STANDARD CAP OR PERHAPS WITH SEPARATE HIGHER LIMIT] [DRAFTING NOTE: OFTEN IT IS POSSIBLE TO ACHIEVE UNLIMITED LIABILITY FOR MANY OF THESE "CARVE OUTS"]**, ARTICLE __ ("OWNERSHIP"), ARTICLE __ ("INDEMNIFICATION"), ARTICLE __ ("BUSINESS CONTINUITY"), ARTICLE __ (CO-EMPLOYMENT), AND ARTICLE __ ("TRANSITION ASSISTANCE") OF THIS AGREEMENT, OR ITS WILLFUL MISCONDUCT[~~OR GROSS NEGLIGENCE~~], OR ANY CLAIMS FOR PERSONAL INJURY OR **DAMAGE TO REAL OR TANGIBLE PERSONAL** PROPERTY[~~DAMAGE (INCLUDING WITHOUT LIMITATION ALL COSTS ASSOCIATED WITH THE RECOVERY OR REPLACEMENT OF LOST OR DAMAGED DATA)~~]. For the avoidance of doubt, any fines or penalties assessed on a party under applicable law arising out of the other party's breach of this Agreement are direct damages.

2.   INDEMNIFICATION

(2.1)   Indemnification. Consultant, at its expense, will indemnify, defend and hold harmless Customer and its Affiliates and any of their officers, directors, employees, agents, consultants and other representatives (collectively, the "Indemnified Parties") from all liabilities, costs, losses, damages and expenses (including reasonable attorneys' and experts' fees and expenses [~~as well as interparty damages caused~~]**except to the extent Customer participates at its own expense in an action defended** by Consultant [~~or third parties~~]**as provided in Section 2.2 below**) and will reimburse such fees and expenses as they are incurred, including in connection with any claim or action threatened or brought against the Indemnified Parties, arising out of or relating to any **third party** claim that the provision or utilization of any Services or any portion thereof constitutes an infringement, violation, trespass, contravention or breach of any patent, copyright, trademark, license or other property or proprietary right of any third party, or constitutes the unauthorized use or misappropriation of any trade secret of any third party. Customer will promptly notify Consultant of any such claim or action and will reasonably cooperate with Consultant in the defense of such claim or action, at Consultant's expense. **[VENDOR COMMENT: WANT TO MAKE MUTUAL SECTIONS 2.1 AND 2.2 AND ADD CUSTOMER INDEMNITY FOR IP PROVIDED BY CUSTOMER] [DRAFTING NOTE: ALSO SOMETIMES INDEMNITIES INCLUDE BREACH OF REPS AND WARRANTIES, PERSONAL INJURY OR PROPERTY DAMAGE, GROSS NEGLIGENCE OR OTHERS. INDEMNITIES IN FAVOR OF VENDOR IN CERTAIN CASES MAY BE BROADER]**

(2.2)   Customer's Right to Participate. Consultant will have the right to conduct the defense of any such claim or action and all negotiations for its settlement or compromise except that Customer may in its sole discretion participate in the defense of any such claim or action at Customer's expense. Without limiting the foregoing, Consultant may not, without Customer's prior written consent, settle, compromise or consent to the entry of any judgment in any such commenced or threatened claim or action, unless such settlement, compromise or consent: (i) includes an unconditional release of the relevant Indemnified Parties from all liability arising out of such commenced or threatened claim or action; and (ii) is solely monetary in nature and does not include a statement as to, or an admission of fault, culpability or failure to act by or on behalf of, any Indemnified Party or otherwise adversely affect any Indemnified Party. If Consultant fails to appoint an attorney within [~~ten~~]**thirty** ([~~10~~]**30**) days after Customer has notified Consultant of any such claim or action, or after Consultant becomes aware of such claim or action, whichever is earlier, Customer will have the right to select and appoint an alternative attorney and the reasonable cost and expense thereof will be paid by Consultant.

Election of Remedy. If any Services or Work Product or any portion thereof becomes, or in Consultant's or Customer's reasonable opinion is likely to become, the subject of any such claim or action, then [~~Customer may terminate the relevant Task Order with respect to such Services or require ~~]Consultant [~~to~~]**will** : (i) procure for Customer the right to continue utilizing the Services or the ownership rights to the Work Product or such portion thereof, as contemplated hereunder;

(ii) modify the Services or Work Product or such portion thereof, to render same non-infringing (provided such modification does not adversely affect the utilization of such Services or Work Product or such portion thereof, as reasonably determined by Customer); or (iii) replace same with an equally suitable, functionally equivalent, compatible, non-infringing Services or Work Product as reasonably determined by Customer. If none of the foregoing is possible and if such Services or Work Product or such portion thereof, is found to infringe by a court of competent jurisdiction, Consultant or Customer will have the right to terminate the relevant Task Order with respect to such Services or Work Product in which case Consultant will refund to Customer [all amounts paid by Customer for such Services. Any termination of any Task Orders by Customer under this Section ___ will be without prejudice to any other rights and remedies which Customer may have under this Agreement or at law or in equity.]**[to be discussed].**

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