610 Step by Step Success: Achieving Best Results When Advising a Large Technology Procurement

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Faculty Biographies

Karen L. Boudreau

Karen L. Boudreau was most recently director, commercial legal affairs for Iomega Corporation in San Diego, California and is presently in transition.

She has been in-house counsel for a variety of companies including IBM, Oracle, The GAP, Sony Electronics, Gateway, and Marshalls.

Ms. Boudreau is chair of ACC's Information Technology Law and eCommerce Committee.

Ms. Boudreau received her J.D. from George Washington University's National Law Center with honors.

Hemant Pathak

Hemant Pathak is senior attorney in the law and corporate affairs group at Microsoft Corporation. Mr. Pathak is located in Microsoft's Washington, DC offices where he provides legal support to Microsoft's U.S. public sector sales organization.
Prior to joining Microsoft, Mr. Pathak served as a corporate attorney in the legal department at Oracle.

Mr. Pathak is a member of ACC's eCommerce Committee.

He recieved his B.S. from Washington & Jefferson College and his JD from The Widener University School of Law.

John E. Thomas

John E. Thomas is technology counsel at Thomson West in Eagan, Minnesota.
A seasoned corporate generalist, he has accumulated a wealth of in-house experience as a staff attorney at Ford Motor Company, senior vice president-general counsel and secretary of ITT Financial Corporation and vice president-assistant general counsel of Wells Fargo (at the time, Norwest). Mr. Thomas assumed his present position at Thomson West following 10 years of practicing in-house on a contract basis with four more industry leaders 3M, BellSouth, Imation, and Andersen Windows.

Mr. Thomas has previously served as membership chair, treasurer, and president of ACC's Minnesota Chapter. He has been on the faculty and/or planning board of numerous CLE programs and has often moderated panel presentations on the effective delivery of corporate legal services using a mix of inside and outside resources.

He received his B.A. from Lawrence University and J.D. from the University of Wisconsin.

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Hemant Pathak -- Microsoft Corporation
John E. Thomas -- Thomson-West
Karen L. Boudreau – Chair, ACC IT&E Committee

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Agenda

- Introductions
- Phase I: Issuing the RFP
- Phase 2: Negotiation
- Phase 3: Project Management
- Summary/Questions

Know Your Current Situation

- What Is the Current State
  - Hardware
    - Inventory
  - Software
    - License Agreements
    - Number of Licenses or Users
  - Personnel
    - Employees
    - Consultants
  - Processes
    - Process Flow Diagrams
    - Meet with Present Participants

Define The Goals of the Project

- Specifically what does your organization want to accomplish
- Is your organization willing to change
- Do you want to use technology to support your present processes
- What are the major drivers
  - Cost savings
  - Efficiency
  - Customer Service/Increase Sales

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Who Should be on the Team

- A Committed Executive Sponsor
- Representatives of the affected business organizations
- Legal
- Finance
- Information Technology
- Procurement

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Team Member Requirements

- Committed to the project/process
- Knowledgeable in their area
- Have time to devote to the project
- Flexible
- Open minded
- Team Players

Initial Preparation Items

- Summary of Your Company
- Description of the Project
- Outline of the Process (RFI or RFP)
- Contact Information
- Summary of Current State
- List of Potential Vendors

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Request for Information

- List of Questions about your project
- Send to Possible Vendors
- Written Specific Answers not Sales Pitch
- Consider Vendor Presentation to the Team
- Helps to Develop RFP
- Always ask if there is anything else you should ask or know
- Ask for their lessons learned from similar projects

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Elements of RFP

I. Summary of your Company

II. General description of the project

III. Description of the RFP process

  A. Schedule

  B. Process

  C. Selection criteria

  D. Procedural Rules for the RFP Process

  E. Contact Person

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Elements of an RFP

IV. Detailed description of the project's requirements
V. The agreement or legal terms you want to use
VI. Description of the vendor's company and qualifications
VII. References for similar projects
   A. Completed in the last X number of months
   B. At least one reference from an abandoned project
VIII. Give the vendors an opportunity to add additional information which might be helpful to your company in making a decision

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RFP Process

1. Issue Request for Proposal
2. Allow Vendors to Ask Written Questions
   1. Restrict contact to one person
   2. Send all questions and answers to all bidders
3. Have a Bidder's Conference
4. Receive the Proposals
5. Score the Proposals
6. Presentation/Interview the top 2 or 3 Vendors
7. Negotiate with the Top 2 or 3 Vendors

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Contract Negotiation

- One or more vendors
  - Bandwidth vs leverage
- What to expect from RFP Responses
  - Proposed solution
  - Cost estimates
  - Exceptions to proposed Terms and Conditions
    - Existing terms and conditions between vendor and customer
    - Standard Boilerplate
    - “Make or Break” terms

Business Terms & Project Parameters

- Recitals
- Definitions
- Personnel
- Scope of Work
- Change to Scope
- Schedule/Delivery
- Acceptance
- Payment

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Use of Software and Developments

- Commercial Off The Shelf (“COTS”)
- Custom Developments
  - Pre-Existing Work
- Restrictions on Use
  - What is purpose
    - Internal use
    - Distribution
    - Data Process/Service Bureau
    - Hosting

The “Hot Buttons”

- Limitation of Liability
- IP Ownership
  - Custom Developments
- Termination
  - “Bat & Ball” Provision
    - Transition Plans
- Escrow/Direct Release
  - Depends on Product and Vendor
- Indemnity

"Hot Buttons" (cont.)

- Residuals
  - Independent Development
- Assignment
  - M&A
- Dispute Resolution
  - Governing Law
  - Jurisdiction/Judicial Resolution
  - Escalation
  - Mediation/Arbitration

Negotiation Tips & Strategies

- Initial Coordination
  - Know the Vendor –Understand relationship with your Company
  - Understand client and vendor's perspective on the business issues
  - Know your business point person and for vendor
  - Get complete list of vendor issues
  - Identify minor issues are there that can be easily resolved
  - Identify issues that (if conceded) will require senior management approval

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The Negotiation Stage

- Negotiating Tips – Getting Started
  - What's your negotiation style?
    - "Adversarial" or "Consensus Building"
  - Have a negotiation strategy and share it with your business clients
  - Help business clients identify and resolve business issues
  - Ensure ALL issues are identified prior to a conference call or meeting with the vendor
  - Consider practice before negotiating

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The Negotiation Stage

- Negotiating Tips – Getting Started
  - Know what's important to your business client
    - What will they concede easily?
    - What will they not concede at all?
    - Hold on to some 'giveaways'
  - Negotiate everything at one time
  - Make sure you understand all the other side's issue before you make concessions
  - Try to get down to as few issues as possible

The Negotiation

- Making Concessions
  - Manage making concessions
    - Creates the perception they are not important
    - Worsens your bargaining position later
  - Explain that certain concessions require "executive approval"
  - Don't make or trade concessions (or express willingness to do so) before confirming the person making the proposal has "approval"

The Diplomatic "no"– Getting to "yes"

- Knowledge is power
- "Tell me what you need"
- "I know you said you want that, but what if we did this…"
- "Let me repeat that back to you to make sure I've got it right."
- "I'm not able to make that change, but let me tell you why…"
- Relationship can be key
- Use of No should be strategic

Now the REAL Work Begins

Transaction Documents

- License
- Support / Maintenance
- Professional Services / SW Development
- Source Code Escrow

Project Management

- Before the Ink is Dry
- Getting it Done
- Making it Work

Before the Ink is Dry

- License: Contract Management System; A/P; Plain language overview (contract summary); etc.
- Services: Any open items? Individual NDAs; Ban on competitive activities; etc.
- Support & Maintenance: CMS entry.
- Source Code Escrow: Agreement; Deposit, Verification protocol; etc.

Getting it Done - License

- Acceptance: Test protocol; Correction steps; Avoid acceptance by default; Production environment; etc.
- Warranty: Performance criteria; "Substantial" vs. "Material" conformity; End date; Claims; Remedies; Relationship with Support/Maintenance; etc.
- Use: Compliance safeguards;
- Copies: Disaster recovery, archive, back-up, test & development
- Publicity: case studies, press releases, references, use of customer's Trade Marks

Getting it Done – Services

- Model: Master Services Agreement / Section of License; SOWs; Purchase orders, etc.
- Details: Services; Deliverables; Milestones; Conditions precedent (Assumptions); Payment; etc.
- "Work Product:" Ownership; Protection; Enforcement
- Legal participation is ESSENTIAL

Getting it Done – Escrow

- Direct Release
- Initial Deposit: Base Source Code + Documentation
- Verification: Magnitude; Cost; Correction process.
- Monitoring: Tracking mechanism
- "What If:" Determine Required Resources

Getting it Done – S&M

- Time Limits: Response vs resolution
- Priority Levels: Definitions; Who assigns; etc.
- Escalation
- Notification Requirements: Internal support desk; authorized individuals; Problem details; etc.
- Consequences

Making it Work - License

- Compliance Audits: Periodic Internal vs. Vendor-instigated
- "Comparable Products"
- Infringement
- Bankruptcy

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Making it Work – S&M

- Pricing Model: Flat fee; Percentage; Time & Materials; Per incident; etc.
- Percentage: List; Net; Cost of custom code; etc.
- Price Increases: Then-current vs. Cap; Fixed percent; Indexed; Index + %; Usage; Additional licenses; etc.
- Events: Reduced service level; Prior versions; Continuing availability; etc.

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Making it Work - Services

- Additional SOWs
- Fee Increases
- Insist on Use of Agreed Template
- Completion Certificates

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SUMMARY

- Define what the Solution must accomplish
- Establish the Team and Define the Scope
- Complete RFP Process & Select Vendor
- Outline Strategy & List "Must-Haves"
- Negotiate & Sign the Legal Documents
- Finalize Any Follow-up Agreements
- Complete all Required Tasks per Plan
- Schedule Performance Reviews

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