



510 Contracting with Software Developers & Outsourcing Service Providers

Leonard A. Ferber

Partner

Katten Muchin Rosenman LLP

Jeffrey R. Stern

Executive Director

Morgan Stanley

Kristi L. Vaiden

Senior Vice President & Deputy General Counsel

The Metropolitan Corporate Counsel

Faculty Biographies

Leonard A. Ferber

Leonard A. Ferber is a partner in, and co-chair of, the Katten Muchin Rosenman LLP technology practice. Mr. Ferber focuses his practice on representing clients in technology transactions. He represents software and other technology-based companies and consulting firms in a variety of transactional matters, including strategic partnering arrangements and joint ventures, sophisticated licensing arrangements, and technology development agreements. As importantly, Mr. Ferber serves as technology counsel to several major corporations in procurement transactions involving hardware, large-scale software licenses, and services ranging from software development, integration, and implementation to maintenance and support, disaster recovery, and training. He also represents clients in disputes arising from complex technology transactions and counsels many clients on their Internet strategies, privacy concerns, and related issues.

Mr. Ferber is on the board of advisors of the Technology Executives Club, the midwest's largest organization focusing exclusively on bringing together senior business and technology executives to discuss trends and the effective use of technology in business. In addition, he has spoken before legal and industry groups on technology-related subjects and his technology and e-business related articles have appeared in the on-line edition of the Chicago Tribune. His article, "Scope of Use and Restrictions; Source Code Access and Escrows" was published in The Computer Law Companion, a publication of the Computer Law Association.

Mr. Ferber received his B.A. with High Distinction and was Phi Beta Kappa from the University of Michigan. He earned his J.D. from the University of Pennsylvania.

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. He presents on a regular basis concerning technology law issues.

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

Kristi L. Vaiden

Kristi L. Vaiden is senior vice president and deputy general counsel for The Metropolitan Corporate Counsel, Inc., in Mountainside, New Jersey. She addresses a wide range of issues related to a legal trade publication.

Previously, she was technology counsel for Cellco Partnership d/b/a Verizon Wireless. She drafted and negotiated contracts and agreements for myriad commercial transactions ranging from web design and hosting agreements to systems development and maintenance contracts to software licenses. She also addressed copyright, trademark, and other intellectual property issues. Her early experience included clerking for the Honorable William L. Hungate in the U.S. District Court, Eastern District of Missouri, and serving as an adjunct professor at the Washington University School of Law.

She has authored a number of articles on contract management, software licensing, document retention, and electronic commerce that have been published in the ACC Docket and the ABA's Business Law Today. She currently is president-elect of ACC's New Jersey Chapter and serves on the executive committee of ACC's Intellectual Property Committee. She received the Robert L. Townsend, Jr., award as ACC's outstanding member of 1996.

She received a B.A. from St. Olaf College and a J.D. from the Washington University School of Law.



510 Contracting with Software Developers & Outsourcing Service Providers

Leonard A. Ferber
Jeffrey R. Stern
Kristi L. Vaiden

ACC's 2005 Annual Meeting: Legal Underdog to Corporate
Superhero—Using Compliance for a Competitive Advantage

October 17-19, Marriott
Wardman Park Hotel



Overview

- Structuring the Negotiations
- Defining the Statement of Work
- Drafting Performance Standards
- Tackling Remedies
- Addressing Price
- Handling Ownership
- Developing Exit Strategy

ACC's 2005 Annual Meeting, October 17-19



Structuring the Negotiations

- Evaluating Current Status
- Establishing Goals and Identifying Risks
- Assessing Commitments
- Using RFPs Effectively

Defining the Statement of Work

- Increasing Likelihood of Success with Effective Structure
- Defining Broad Functional Areas with Detailed Examples
- Being Realistic
- Anticipating Change Orders



Drafting Performance Standards

- Setting the Bar
- Providing Effective Measurement Tools
- Defining Excuses for Non-performance
- Understanding How Vendors “Game” the System
- Reserving Power to Audit

ACC's 2005 Annual Meeting, October 17-19

Tackling Remedies

- Managing the Relationship
- Allocating Risks and Limiting Liability
- Providing for Dispute Resolution
- Structuring Penalties
- Addressing Termination Rights

ACC's 2005 Annual Meeting, October 17-19



Addressing Price

- Linking SOWs, SLAs and Risks
- Anticipating Change Events
- Avoiding Hidden Costs
- Allocating Taxes and Out-of-pocket Expenses

ACC's 2005 Annual Meeting, October 17-19

Handling Ownership Issues

- Understanding Different Types of IP
- Addressing Rights to Work Product
- Identifying IP Related to Manuals, Guidelines and Processes
- Determining Who Owns Updates

ACC's 2005 Annual Meeting, October 17-19



Developing Exit Strategy

- Terminating for Convenience and Cause
- Anticipating Force Majeure Events
- Preserving Knowledge and IP
- Addressing Transition Issues

ACC's 2005 Annual Meeting, October 17-19

LEONARD A. FERBER
Katten Muchin Rosenman LLP

SOFTWARE DEVELOPMENT AGREEMENT SAMPLE PROVISIONS

1. Structuring the Negotiations

a. Getting the most out of your Request for Proposal:

For the purpose of facilitating the contract documentation process and setting expectations for both parties, Client has attached its standard Professional Services Agreement (the "Contract"). Your submission of a Proposal shall constitute your agreement to use the attached Contract as the first draft of the document. Client believes that the Contract is fair to both Client and its vendors, but is willing to consider your comments to the Contract. You are entitled to mark-up the Contract and submit such mark-up with your Proposal. **DO NOT ATTACH YOUR STANDARD CONTRACT OR REFER TO SECTIONS OF YOUR STANDARD CONTRACT. Please note that the extent and nature of any changes made by you will be an important consideration in the evaluation of your Proposal.** By submitting a Proposal, you will thereby be representing to Client that any such mark-up contains substantially all the changes and comments you have to the Contract and that otherwise the Contract is acceptable to you. Client will be relying upon this representation in making its determination on which party to award the Project and incurring costs in the negotiation of the definitive legal documents. Client's attachment of the Contract is not intended to legally bind Client, and Client reserves the right to make such changes in the Contract as it deems necessary and/or appropriate.

b. The role of the Client Project Executive:

Client will designate one or more individuals as its project executive(s) ("**Client Project Executive(s)**"), each of whom shall have authority to appoint one or more designees to fulfill his or her duties, as Client deems appropriate, that, as a group, shall have the authority to: (i) submit material and information requests to Developer and respond to information requests by Developer; (ii) provide access to Client's staff; (iii) provide schedules and plans to Developer for Developer's review and/or approval; (iv) review the Variance Reports; (v) make binding decisions for Client with respect to this Agreement; and (vi) amend this Agreement on behalf of Client in the manner provided herein. Client shall

timely notify Developer of the specific Client Project Executive(s) who has one or more of the foregoing powers or authority and will use reasonable efforts to notify Developer of applicable designees.

2. Defining the Statement of Work

Specificity is the key to having expectations and reality meet:

Client Changes. In the event that Client desires to make changes to any Statement of Work, Client shall so notify Developer in writing (a “**Change Request**”) using a Change Request Form attached to the relevant Statement of Work. Developer will respond, at its cost, by written notice to Client within five (5) Business Days following receipt of the Change Request, outlining in good faith all impacts of the requested change on the Statement of Work, including the impact on specifications, milestones, Deliverables, the Budget and pricing (collectively, the “**Change Request Response**”). Client shall use its reasonable efforts to accept, reject or propose modifications to each such Change Request Response within five (5) Business Days following receipt thereof by Client but, in any event, as soon as reasonably possible. Additional modifications proposed by Client following such response will be handled as set forth above. Upon acceptance by Client of a Change Request Response and its corresponding Change Request, the applicable Statement of Work shall be adjusted as necessary to accommodate the changes so accepted by way of a written, jointly executed, amendment. Developer may not decline to accept any Change Requests that reduce the cost of performance. Developer further may not decline any Change Requests that increase the cost or magnitude of performance, provided that (i) the changes are reasonable in scope, (ii) if the Statement of Work includes a Budget, a commensurate increase in the Budget is reasonably agreed upon by the parties, and (iii) Developer has sufficient resources available to complete, within the time period required by Client, all additional work necessary to implement the Change Request.

Compensation for Replacement Personnel. To compensate Client for the expected lost time due to the replacement, or termination of employment or engagement with Developer, of any member of the Developer Team or any Developer Project Executive, upon any replacement of such person, Developer agrees that Client shall not be charged for the initial eighty (80) hours of services provided to Client by such new Developer Team member or Developer Project Executive.

Work Week. The normal work week for all Developer personnel performing Services shall be (i) forty hours per week, Monday through Thursday inclusive, on Client’s site; or (ii) as otherwise mutually agreed to by both Parties; provided that Developer has representation available at Client’s site Monday through Friday inclusive. Developer Project Team members will give advance verbal

notice of estimated work week overages to Client’s Project Manager. No Developer Personnel shall bill more than forty (40) hours in a single week without the prior verbal approval of the Client Project Manager, which approval shall not be unreasonably withheld.

Delivery. Developer will deliver each Deliverable Ready for Approval on or before the end of Client’s normal business hours (5:00 p.m. – Central Time) on the corresponding delivery date for such Deliverable as set forth in the Statement of Work

3. Drafting Performance Standards

a. What to measure against:

“**Documentation**” means, collectively, (i) Client’s Request for Proposal (“RFP”), Developer’s Response to the RFP, and any documents which purport to update or revise either the RFP or Developer’s Response to the RFP, (ii) the results of any Developer “Use Cases Presentation,” “Proof of Concept” or similar type presentations or tests provided by Developer to Client, and (iii) any marketing materials, “White Papers” or similar materials provided by Developer to Client.

b. Not allowing the Developer to “game” the system:

“**Ready for Approval.**” as it relates to a Deliverable, means that the Deliverable has passed Developer’s internal quality assurance testing and Developer reasonably believes such Deliverable substantially meets the criteria for Client’s approval or acceptance of such Deliverable as set forth in the applicable Statement of Work.

c. Stopping the “blame” game:

Notification of Client’s Failure to Perform. If Developer believes that Client has failed to perform as required in this Statement of Work, Developer shall provide Client prompt written notice specifying such alleged nonperformance by Client no later than five (5) days following such alleged nonperformance, and notwithstanding any provision in the Master Agreement or this Statement of Work to the contrary, the failure to provide such notice shall (i) be deemed to be a waiver of such alleged Client nonperformance and (ii) disqualify the alleged Client nonperformance from being deemed a Client Delay hereunder.

d. Measuring tools:

Variance Reports. On a weekly basis, Developer will provide to Client status reports that (i) correspond to Developer’s prior invoice and work-in-process since the last invoice, (ii) for all Services performed, provide detailed descriptions, for

each Statement of Work, of progress to date measured against the then-current timelines, and actual fees to date measured against the applicable Budget, (iii) an explanation of any difference between the progress to date versus the then-current timeline and/or between the actual fees versus the applicable Budget and (iv) such other information as reasonably requested by Client (each, a “**Variance Report**”).

4. Tackling Remedies

a. Interim payment disputes:

Disputed Amounts. As used herein, “**Disputed Amounts**” means amounts that are subject to a bona fide dispute raised by Client in writing. Notwithstanding anything herein to the contrary, failure of Client to pay any Disputed Amounts on a timely basis will not result in the charging of interest, a breach of this Agreement, any suspension of Services or an obligation to pay Developer’s attorneys’ fees; provided (i) Client has notified Developer of such Disputed Amount prior to the due date for such amount, (ii) all undisputed amounts are paid in a timely fashion, (iii) senior level executives of Client make themselves available to resolve the dispute and (iv) all Disputed Amounts that Client subsequently agrees in writing to pay or that are required to be paid pursuant to a proper court order or arbitration award shall be paid within ten (10) days from the date of such agreement or determination.

b. The “nuclear” option:

Substantial Delays. If delays in delivery of Deliverables and/or the length of time it takes Developer to correct one or more Deliverables has resulted in cumulative anticipated delays in milestones or delivery dates for future Deliverables of at least four (4) months, then Client may, at its sole discretion, suspend its performance and/or declare a material breach and terminate this Agreement without providing Developer the cure period otherwise required under this Agreement.

c. Limitation of liability:

1. EXCEPT FOR (i) BREACHES OF CONFIDENTIALITY OBLIGATIONS BY EITHER PARTY, (ii) INFRINGEMENT BY EITHER PARTY OF THE OTHER OR ANY THIRD PARTY’S INTELLECTUAL PROPERTY RIGHTS, AND (iii) EITHER PARTY’S INDEMNITY OBLIGATIONS HEREUNDER, AND EXCEPT AS OTHERWISE PROVIDED IN SECTION 2 BELOW, NEITHER PARTY WILL BE LIABLE TO THE OTHER PARTY FOR ANY INDIRECT, INCIDENTAL, CONSEQUENTIAL, SPECIAL, PUNITIVE OR EXEMPLARY DAMAGES ARISING FROM THE SUBJECT MATTER OF THIS AGREEMENT, REGARDLESS OF THE TYPE OF CLAIM AND EVEN IF THAT PARTY HAS BEEN ADVISED OF THE

POSSIBILITY OF SUCH DAMAGES, SUCH AS, BUT NOT LIMITED TO, LOST PROFITS, LOSS OF REVENUE OR ANTICIPATED PROFITS OR LOST BUSINESS.

2. IN THE EVENT OF A BREACH OF THIS AGREEMENT BY DEVELOPER, OR OTHER “CAUSE,” WHEREBY CLIENT TERMINATES THIS AGREEMENT AND ENGAGES A NEW VENDOR TO PROVIDE SUBSTITUTE SERVICES, THE DAMAGE TO CLIENT IN TERMS OF LOST TIME AND LOST BUSINESS OPPORTUNITY WILL BE DIFFICULT TO MEASURE. IN SUCH CASE, THE PARTIES AGREE THAT, IN ADDITION TO ITS DIRECT DAMAGES, CLIENT SHALL BE ENTITLED TO BE COMPENSATED FOR SUCH LOST TIME AND LOST BUSINESS OPPORTUNITY IN THE LIQUIDATED DAMAGE AMOUNT OF TWO TIMES THE CUMULATIVE AMOUNT THEN PAID BY OR INVOICED TO CLIENT UNDER THIS AGREEMENT (“LIQUIDATED DAMAGES”). THE PARTIES AGREE THAT THE LIQUIDATED DAMAGES ARE A GOOD FAITH ESTIMATE OF THE LIKELY DAMAGES FOR SUCH LOST TIME AND LOST BUSINESS OPPORTUNITY AND ARE NOT A PENALTY. THE MAXIMUM AGGREGATE LIABILITY OF EACH PARTY TO THE OTHER IN CONNECTION WITH THIS AGREEMENT SHALL BE TO RECOVER NO MORE THAN THE CUMULATIVE AMOUNTS THEN PAID BY OR INVOICED TO CLIENT UNDER THIS AGREEMENT MULTIPLIED BY THREE (3). NOTWITHSTANDING THE FOREGOING, NONE OF THE LIMITATIONS IN THIS SECTION WILL APPLY IN THE CASES OF (i) BREACHES OF CONFIDENTIALITY OBLIGATIONS BY EITHER PARTY, (ii) INFRINGEMENT BY EITHER PARTY OF THE OTHER OR ANY THIRD PARTY’S INTELLECTUAL PROPERTY RIGHTS, OR (iii) EITHER PARTY’S INDEMNITY OBLIGATIONS HEREUNDER.

d. Handling delivery delays:

Unless caused by a Client Delay, if delivery of a Deliverable is delayed by more than ten (10) Business Days, Developer agrees to reduce the Payables for such Deliverable by five percent (5%) for each occurrence of a five (5) Business Day delay beginning with the scheduled Delivery Date of the Deliverable.

or

For each Deliverable with respect to which Developer fails to meet the applicable Delivery Date, Developer shall, from the Delivery Date on forward until the Deliverable is actually delivered Ready for Approval and Accepted, reduce the fee rates chargeable to Client for such Deliverable by twenty percent (20%) (the cumulative amount of such reduction, being the “**Fee Reduction Amount**”).

e. Handling broad-based failure to deliver promised functionality:

If (a) at any time during the Term, Developer is in excess of six (6) months behind the Delivery Date for the next unmet Deliverable, or (b) the Final Deliverable has been delivered Ready for Approval but has not been Accepted by a date which is six (6) months from the scheduled Delivery Date for the Final Deliverable, then Client shall be entitled to declare a breach of this Agreement, in which event:

- (i) The Agreement shall terminate for cause, without the necessity of providing a cure period;
- (ii) As Client's sole remedy, Developer shall pay to Client, as liquidated damages, and not as a penalty, an amount equal to fifty percent (50%) of the Payables for all Services paid pursuant to this SOW; and
- (iii) Client shall be entitled to retain all Deliverables previously delivered.

5. Addressing Price

a. Bonus for delivering a deliverable on time and under budget (T&M contract)

For each Deliverable with respect to which (i) the Deliverable is delivered Ready for Approval on or before the applicable Delivery Date, (ii) the actual Payable with respect to such Deliverable is less than the Estimate therefor, as modified by any estimated Payables for any Change Order, and (iii) the Deliverable is Accepted within the First Acceptance Period, beginning upon the actual date the Deliverable is delivered Ready for Approval, Developer shall be entitled to receive twenty percent (20%) of the difference between such Payable and such Estimate.

b. Bonus for completion of a "phase" under budget (T&M contract)

The parties have agreed that for purposes of this Section, there shall be a "Base Value" of \$X, which constitutes an estimate of the Payables for all Phases of this Project. The Base Value is allocated among the Phases of this Project as set forth in Exhibit A hereto (each, a "Phase Base Value"). The Base Value is subject to Change Orders as set forth below. Developer shall be eligible to earn a total aggregate "Base Bonus" of \$Y, which Base Bonus will be allocated among the Phases as set forth in Exhibit A (each, a "Phase Base Bonus"), and shall be earned in accordance with the following:

With respect to each Phase, if:

- (1) (a) the actual Payables for a Phase do not exceed the applicable Phase Base Value and (b) the Final Phase Deliverable shall have been Accepted no later than the end of the Correction Period and all previous Deliverables under the

Phase have been Accepted by such time, then Developer shall earn 100% of the applicable Phase Base Bonus; or

- (2) (a) the actual Payables for a Phase exceed the applicable Phase Base Value (the overage being referred to herein as the "Payable Overage") and (b) the Final Phase Deliverable shall have been Accepted no later than the end of the Correction Period and all previous Deliverables under the Phase have been Accepted by such time, then Developer shall earn a Phase Base Bonus (if any) equal to the maximum Phase Base Bonus amount that could have been earned for the applicable Phase less the applicable Payable Overage.

c. Bonus make-up provisions:

(1) Base Bonus Make-Up. In the event that (a) the Base Value as modified by the estimated Payables for any Change Order(s) has not been exceeded; and (b) the Final Deliverable shall have been Accepted no later than the end of the Correction Period and all previous Deliverables have been Accepted by such time, then Developer shall be entitled to be paid any portion of the Phase Base Bonuses which were not earned pursuant to the terms of [b.(2)] above.

(2) Fee Reduction Make-Up. With respect to each Phase, if (a) the Delivery Date for Final Phase Deliverable has been met; (b) the Estimates, as modified by the estimates for any Change Order, for the entire Phase have not been exceeded; and (c) the Final Phase Deliverable shall have been Accepted no later than the end of the Correction Period and all previous Deliverables under the Phase have been Accepted by such time, then Developer shall be entitled to be paid the Fee Reduction Amounts, if any, applicable to the other Deliverables in that Phase.

6. Handling Ownership Issues

a. "**Developer Tools**" means the materials, information, trade secrets, generic programming codes and segments, algorithms, methodologies, processes, tools, data, documents, notes, programming techniques, reusable objects, routines, formulae and templates that are specifically identified in Exhibit A or that (i) are developed prior to, or in connection with, the Services and utilized by Developer in connection with the Services, (ii) are designed to perform generalized functions not specific to the particular requirements of Client or the Services, (iii) do not contain any Client Confidential Information or other information or items provided by Client and (iv) cannot reasonably be expected to provide Client an advantage over its competitors. As to items developed in connection with the Services, Developer and Client must agree in the applicable Statement of Work, that said items will be considered "Developer Tools."

b. Work Made for Hire. Developer and Client agree that all results of and work product from the Services under this Agreement (including without limitation all

Deliverables, work-in-progress, notes, technical documentation and other written materials, such as source code and written materials reasonably necessary for an effective understanding of such source code, developed or created by Developer and any inventions and designs embodied in the work or developed in the course of creation thereof), in all stages of completion and whether or not developed by Developer alone or jointly with Client or with any third party (but excluding the Developer Tools and third party materials expressly approved by Client in writing) (collectively, the “**Materials**”) have been specially ordered or commissioned by Client and shall be considered “works made for hire” (as such term is defined under U.S. copyright law) with Client being the author thereof and owner of all rights thereto.

c. Assignment. To the extent any Materials do not qualify as a “work made for hire” under applicable law, Developer hereby irrevocably and unconditionally assigns to Client all rights (including without limitation, all Intellectual Property Rights), title, and interest in and to all such Materials when and as created. Accordingly, without limiting the generality of the foregoing, Client shall be deemed to own, without any restrictions or limitations whatsoever, the sole and exclusive rights to prepare derivative works based on the Materials and to reproduce, adapt, distribute, publicly perform and display, sublicense and otherwise exploit the Materials and such derivative works, by any and all means and in any and all media now or hereafter known, throughout the world and in perpetuity.

d. Non-Assignable Rights; Waiver. To the extent any of Developer’s rights in the Materials, including without limitation any moral rights, are not capable of assignment under applicable law, Developer hereby irrevocably and unconditionally waives all enforcement of such rights to the maximum extent permitted under applicable law.

e. Additional Instruments. Developer shall execute and deliver to Client such additional instruments, and take such other actions, as Client may reasonably request to confirm, evidence or carry out the grants of rights contemplated by this Section. Developer’s obligations under this subsection will apply both during and indefinitely after the term of Developer’s engagement under this Agreement. Developer hereby appoints Client (and its duly authorized officers and agents) as Developer’s agent and attorney-in-fact, to act in Developer’s stead to execute and deliver any such additional instrument and take such other actions, with the same legal force and effect as if done by Developer, should Developer for any reason whatsoever fail to promptly execute or deliver any such instrument or take such other actions as described in the first sentence of this subsection; Developer acknowledges and agrees that this appointment constitutes a right coupled with an interest and is irrevocable.

f. License to Developer Tools. Developer hereby grants to Client, under all Developer Intellectual Property Rights, the worldwide, non-exclusive, perpetual,

irrevocable, fully paid-up, royalty-free right and license to the Developer Tools, in both source code and object code formats, to (i) use the Developer Tools for Client’s business and administrative purposes, (ii) copy, incorporate, imbed, modify and create derivative works of the Developer Tools, (iii) compile and link the source code for the Developer Tools, both as modified and unmodified, to create object code and to use, copy, incorporate, imbed, modify, create derivative works of any such object code so created, (iv) publicly perform and display, import, broadcast, transmit, distribute, license, offer to sell, sell, rent, lease and lend (collectively “**Distribute**”) copies of the Developer Tools (and derivative works thereof); and (v) sublicense to third parties the foregoing rights, including the right to sublicense to further third parties (collectively, the “**Purpose**”). Notwithstanding the immediately foregoing sentence, Client may not (A) Distribute the Developer Tools (or derivative works thereof) to third parties on a standalone basis (i.e., Client may only Distribute the Developer Tools or derivative works thereof as embodied within a Deliverable, as such Deliverable may be modified from time to time), or (B) remove any copyright notices, trademarks or other identifying marks from Developer Tools, and shall reproduce all such marks on each copy of an Developer Tool.

7. Developing Exit Strategy

Transition of Services. At any time during the Term, upon Client’s written request, and again no later than ten (10) Business Days from the date of termination or expiration of this Agreement, Developer shall deliver to Client all completed or in-process Deliverables, including all Materials and Developer Tools embodied therein or developed or utilized in connection therewith, including all data derived from Services performed under this Agreement, along with a copy of all documentation being used for such Services, and will make its staff available to assist with the transition of the Services (or a portion thereof, as requested by Client) to Client or its designees. Developer will be compensated based on mutually agreeable hourly rates, but in no event any higher rates than its then-current standard hourly rates for these transition services. Notwithstanding the preceding sentence, Developer will, upon Client’s request and at no additional charge to Client, assist Client in contacting the appropriate third party vendor(s) to obtain licenses to any third party software tools which may be required for the continued utilization of any Materials and/or Developer Tools.

Doc #:CHI02 (201300-31974) 60396712v2;08/04/2005/Time:10:52

SAMPLE PROVISIONS**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, inure 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 are wholly independent of performance of the Services ("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 use, duplicate modify, sublicense, distribute, display and otherwise engage 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.

2. REPRESENTATIONS, WARRANTIES COVENANTS AND LIMITATION OF LIABILITY

(2.1) **Performance.** (a) Consultant represents, warrants and covenants that all Services: (i) will be performed in accordance with Customer's reasonable written instructions; (ii) will be performed to the best of Consultant's ability and in an effective, timely, professional and workmanlike manner in accordance with the highest applicable industry standards and practices; (iii) will be performed in accordance with any specifications and documentation set forth in the relevant Task Order; (iv) will be performed by persons who have employment authorization to perform the Services under this Agreement in accordance with the immigration laws of the United States; (v) will be fully compatible with Customer's computer environment existing at the time of installation (as may be defined in the relevant Schedule), or such other environment as agreed to by the parties in the relevant Task Order; (vi) will comply, including the utilization thereof as

contemplated hereunder, with all applicable laws, rules, regulations, orders of any governmental (including any regulatory or quasi-regulatory) agency, including financial, disclosure, import, export and encryption laws, as well as all applicable securities laws and compliance regulations and procedures of Customer, and will not violate or contravene the terms of any contracts between Consultant and third parties.

(b) Consultant also represents, warrants and covenants that its entering into this Agreement and provision of the Services does not violate any other obligations it may have.

(2.2) **Noninfringement.** Consultant represents, warrants and covenants that: (i) it has and will have all rights, titles, licenses, intellectual property, permissions and approvals necessary in connection with its performance under this Agreement and to grant Customer the rights granted hereunder; and (ii) none of the Services nor the provision or utilization thereof as contemplated under this Agreement, do or will infringe, violate, trespass or in any manner contravene or breach or constitute the unauthorized use or misappropriation of any Intellectual Property of any third party.

(2.3) **Viruses.** Consultant represents warrants and covenants that any software or firmware provided in the course of the Services do not and will not contain, and Consultant will not insert, any computer code (i) designed to disrupt, disable, harm, or otherwise impede the operation of such software or firmware or any computer or network (referred to as "viruses" or "worms"); (ii) that would disable the software or firmware or any computer or network or impair in any way their operation based on the elapsing of a period of time, the exceeding of an authorized number of copies, or the advancement to a particular date or other numeral (referred to as "time bombs", "time locks", or "drop dead" devices); (iii) that would permit Consultant or any third party to access the software or firmware or any computer or network system (referred to as "traps", "access codes" or "trap door" devices); or (iv) that would permit Consultant or any third party to track, monitor or otherwise report the operation and use of the software or firmware or any computer or network system by Customer or any of its customers or clients.

(2.4) **Other Code.** Consultant represents, warrants and covenants that any software or firmware provided in the course of the Services do not and will not contain, and Consultant will not insert, any computer code (i) that would disable the software or firmware or any computer or network or impair in any way their operation based on the elapsing of a period of time, the exceeding of an authorized number of copies, or the advancement to a particular date or other numeral (referred to as "time bombs", "time locks", or "drop dead" devices); (ii) that would permit Consultant or any third party to access the software or firmware or any computer or network system (referred to as "traps", "access codes" or "trap door" devices); or (iii) that would permit Consultant or any third party to track, monitor or otherwise report the operation and use of the software or firmware or any computer or network system by Customer or any of its customers or clients.

(2.5) **Disclaimer.** EXCEPT AS EXPRESSLY SET FORTH IN THIS AGREEMENT, NEITHER PARTY MAKES ANY OTHER WARRANTY, EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION ANY IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE.

(2.6) **Limitation of Liability.** NOTWITHSTANDING ANYTHING TO THE CONTRARY IN THIS AGREEMENT OR ANY TASK ORDER, IN NO EVENT WILL CONSULTANT OR CUSTOMER OR ITS AFFILIATES BE LIABLE FOR ANY INDIRECT, INCIDENTAL, CONSEQUENTIAL, SPECIAL OR PUNITIVE DAMAGES (INCLUDING WITHOUT LIMITATION LOST PROFITS) 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"), __ ("OWNERSHIP"), SECTION __ ("WAIVER AND IDEMNIFICATION") AND ARTICLE __ ("INDEMNIFICATION") OF THIS AGREEMENT, OR ITS WILLFUL MISCONDUCT OR GROSS NEGLIGENCE, OR ANY CLAIMS FOR PERSONAL INJURY OR 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.

3. INDEMNIFICATION

(3.1) 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 by Consultant or third parties) 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 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.

(3.2) 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 (10) 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.

(3.3) 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: (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.

Model Service Levels

[GENERIC PORTION OF MODEL SERVICE LEVEL]

1. General. The service levels described below ("Service Levels") are non-inclusive 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.
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 percent (15%)] 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. Service Levels shall be measured on a monthly basis unless otherwise indicated.
3. Application of Service Level Credits. Consultant shall track its performance and calculate any amount that Customer is entitled to as Service Level Credits. Within ten (10) 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. Remedial Measures. 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. On request, 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 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.

[SAMPLE SERVICE LEVELS SPECIFIC TO MAINTENANCE]

6. Service Levels. 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. Service Level Definitions.

(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 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.

(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.

(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 surveys completed by such personnel as Customer may deem appropriate. This Service Level shall be measured as indicated in Section 8 below.

8. Service Level Metrics. The following metrics shall apply to the Service Levels:

| <u>Service Level Description</u> | <u>Permitted Time</u> | <u>Service Level</u> |
|----------------------------------|-----------------------|--|
| Time to Acknowledge | 15 minutes | 98 percent |
| Time to Respond | | |
| Priority Tickets | 30 minutes | 98 percent aggregate |
| Other Tickets | 4 hours | |
| Time to Resolve | | |
| Priority Tickets | 4 hours | 98 percent aggregate |
| Other Tickets | 8 hours | |
| Customer Satisfaction Survey | N/A | Average score of 4 out of 5 score and at least 50% response rate |

Each month Customer may designate up to 25 percent of Tickets as Priority Tickets. A "Ticket" means the primary electronic record opened to record and track a problem. Only one Ticket may be opened with respect to a problem.

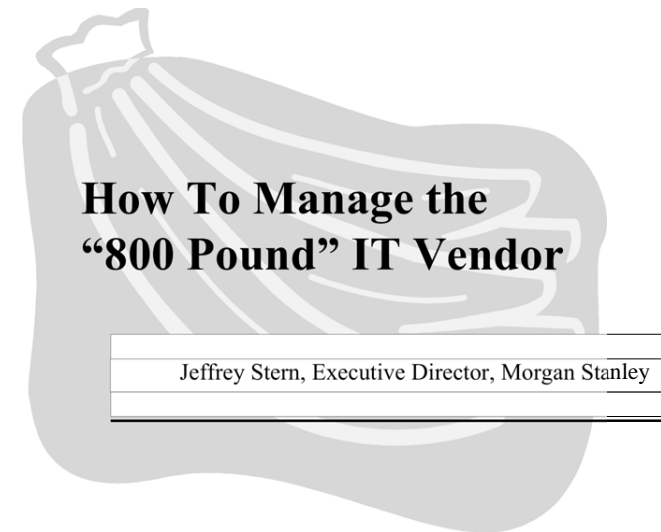
9. Service Level Credit Allocations. The initial Service Level Credit Allocations shall be as follows:

| | |
|------------------------------|------------|
| 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 upon notice to Consultant at least 10 days in advance of the next reporting period.

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:

$$50\% (25\% \times 2) \times \$15,000 (15\% \text{ of } \$100,000) = \$7,500$$



This presentation reflects the personal views of Jeff Stern and not necessarily those of Morgan Stanley

Negotiating With Large IT
Vendors

Introduction—discussion topics

1. Pre-negotiation planning
2. A four legged approach to large IT negotiations
3. Structuring competitive negotiations
4. Customer negotiation strategies and tactics
5. Vendor strategies and tactics
6. Conclusion

Negotiating With Large IT
Vendors

1. Pre-negotiation planning

Negotiating With Large IT Vendors

Firm
Customers
Competitors
Regulators
Investors
Media

Plan a consistent overall approach

Industry/marketplace level

- Practices in your industry
- Global concerns/jurisdictional differences

Firm level

- Firm business strategy
- Regulatory requirements
- Policy/internal clearances

Transaction level

- Business unit objectives
- Risk mitigation/allocation

Negotiating With Large IT Vendors

Examine current and desired future states

- Define point person/team
- Identify baseline and define scope of services
- Establish/prioritize objectives
 - 1.Reduce operating costs
 - 2.Increase flexibility
 - 3.Improve service or productivity; reduce errors

Negotiating With Large IT
Vendors

2. The four legged approach

Negotiating With Large IT
Vendors

Leg 1: scope, specifications

Description of services or specifications

- Broad areas of responsibility or descriptions of functionality
- Detailed description of tasks or specifications
 - “Including but not limited to . . .”
- Services needed to accomplish tasks or equipment needed to provide functionality should be accounted for and not “new”
- Understand when change orders or purchase orders with additional charges will be required

Negotiating With Large IT
Vendors

Leg 2: performance levels

Focus on manageable number indicative of key business needs

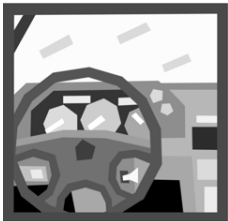
- Objective
- Measurable
- Verifiable

Set credits at a level to promote compliance

Limit exceptions to credits

Don't expect performance to surpass SLAs

Use for management reporting



Negotiating With Large IT
Vendors

Leg 2 (cont'd): acceptance criteria

Threshold test, unlike ongoing SLAs

Usually applied to custom deliverables, service transition

- Deliverable should reasonably meet the purpose
- Should also meet specification requirements
- Provider will correct any problems with no maintenance fee
 - Post acceptance warranty period may be a year or less

Remember to try to obtain options to renew maintenance and support with caps on fee increases

Negotiating With Large IT Vendors

Leg 2 (cont'd): filling gaps in SLAs, acceptance

Include detailed obligations in description of services or specifications

Require that provider try to resolve each problem even if service level not missed or not a material breach

Include overall customer satisfaction SLA (e.g., 3 out of 5)

Address service provider personnel skill sets and training

Require low personnel turnover

Add SLAs that address specific times (e.g., Monday morning) or sensitive areas (e.g., particular business units)

Negotiating With Large IT Vendors

Will the customer's overall risk profile be affected positively or negatively by the services or deliverable?

Leg 3: Legal—allocation and mitigation of risk

Overall liability

- Intra-party and third party (e.g., claims by customers, regulatory actions/fines infringement claims)

Security/theft/loss of data/viruses

Confidentiality/privacy

BCP

Transition risk—inbound and outbound (exit strategy)

Gross negligence or willful misconduct

Negotiating With Large IT
Vendors

Leg 3: legal terms and risks (cont'd)

IP risk and ownership

Risk of change in regulatory requirements

Property damage

Insurance

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

Risk of change of control in vendor or customer

Scope of indemnity obligations

Negotiating With Large IT
Vendors

Leg 4: pricing

Pricing ties together scope, performance, risk allocation

- Talk through pricing in detail with vendor
 - Understand how vendor is pricing re scope, SLAs, risk
 - Explore price effect of changes on scope and SLAs
 - Avoid “assumptions” or other hidden opportunities for change orders or extra charges
 - All due diligence should be completed prior to execution

May be most likely source of dispute, especially if not given proper focus in drafting and documenting

Negotiating With Large IT Vendors

Leg 4: pricing (cont'd)

Focus on termination rights

- Obtain termination for convenience right
 - May be a charge reflecting provider's fixed costs amortized over length of term

Be suspicious of complex pricing models

- Suggest use of simple models when possible
- $1 + 1 = 2$ is preferable to $E=MC^2$ (easier to manage, audit, benchmark, calculate TCO etc.)

Customer business people may not be experienced in large IT transactions (as opposed to vendor business people who will have done many)

Lawyers ignore pricing terms at own peril—business people may not think through all the “lawyer” contingencies or document their agreement clearly.

Negotiating With Large IT Vendors

3. Structuring competitive negotiations

Negotiating With Large IT
Vendors

Structuring competitive negotiations

Use competitive procurement for large transactions

- Provide clear instructions and timeframes
- Provide proposed reasonable contract terms, SOW and SLA and pricing instructions for “apples to apples” comparisons
- Be scrupulously fair – provide equal due diligence and negotiation opportunities to each vendor

Anticipate consequences of each possible outcome before starting the process

- Review existing relationships/agreements

Negotiating With Large IT
Vendors

4. Customer negotiation strategies and tactics

Negotiating With Large IT
Vendors

Customer negotiation strategies and tactics

Competition, competition, competition

- Bidding for business
- Finding possible alternative solutions
- Ability to terminate/renegotiate
- Ability to compete for new business
- Non-exclusivity of services
- Flexibility to ramp up and down
- Benchmarking

Negotiating With Large IT
Vendors

Customer strategies and tactics (cont'd)

- Focus on key areas consistent with transaction objectives
- Consider the vendor's point of view and concerns/objectives
 - Conduct due diligence
 - If the transaction is significant, have BU find your vendor “advocate,” e.g. the sales person who gets a commission
 - ask for account executive if one not assigned
 - use advocate to help vendor better understand and address your concerns
 - learn information about vendor motivations

Negotiating With Large IT
Vendors

Customer strategies and tactics (cont'd)

- No leverage? Appeal to fairness, reasonableness, logic
 - Don't overreach
 - Consider requesting business concessions which are non-monetary (more use rights, more support etc.)
- Persistence
- Firm policy/standards
- Be credible and never appear desperate
- Sell yourself as a good customer

Negotiating With Large IT
Vendors

Customer strategies and tactics (cont'd)

- If vendor claims its policy is not to negotiate, ask for MFC, or a letter stating vendor's policy is never to negotiate some or all terms, as applicable
- For small transactions, consider use of short addenda focusing on major risk areas

Negotiating With Large IT
Vendors

5. Vendor negotiation strategies and tactics

Negotiating With Large IT
Vendors

Vendor negotiation strategies and tactics

1. Providing value (only strategy that works in long run)
2. *Avoiding* competition
 - Refusal to enter bidding process; “Take it or leave it”
 - Vendor believes you have no other option
 - Transaction is too small for vendor to negotiate
 - Contract lock-in/long-term commitment
 - Exclusivity
 - Sole service provider
 - De facto exclusivity – ARC/RRCs

Negotiating With Large IT
Vendors

Vendor strategies and tactics (cont'd)

- Providing valuable unique services/products not offered by competitors (the good strategy that helps customers)
 - Serving a niche market
 - Unique IP
 - High quality



Negotiating With Large IT
Vendors

Vendor strategies and tactics (cont'd)

High-pressure time-limited offer to close/end competition, often at quarter end (the bad used car salesman approach)

Negotiating With Large IT
Vendors

Conclusion

- Negotiation strategies and tactics that employ competition work best

- Integrate negotiation of business and legal terms

- Q&A

Stern, Jeffrey (TECH-IPLAW)

From: jared.flinn@viasat.com
Sent: Thursday, October 20, 2005 2:32 PM
To: Stern, Jeffrey (TECH-IPLAW)
Subject: Request for additional information

This inquiry is the result of a search of the Lawyer Locator on martindale.com.

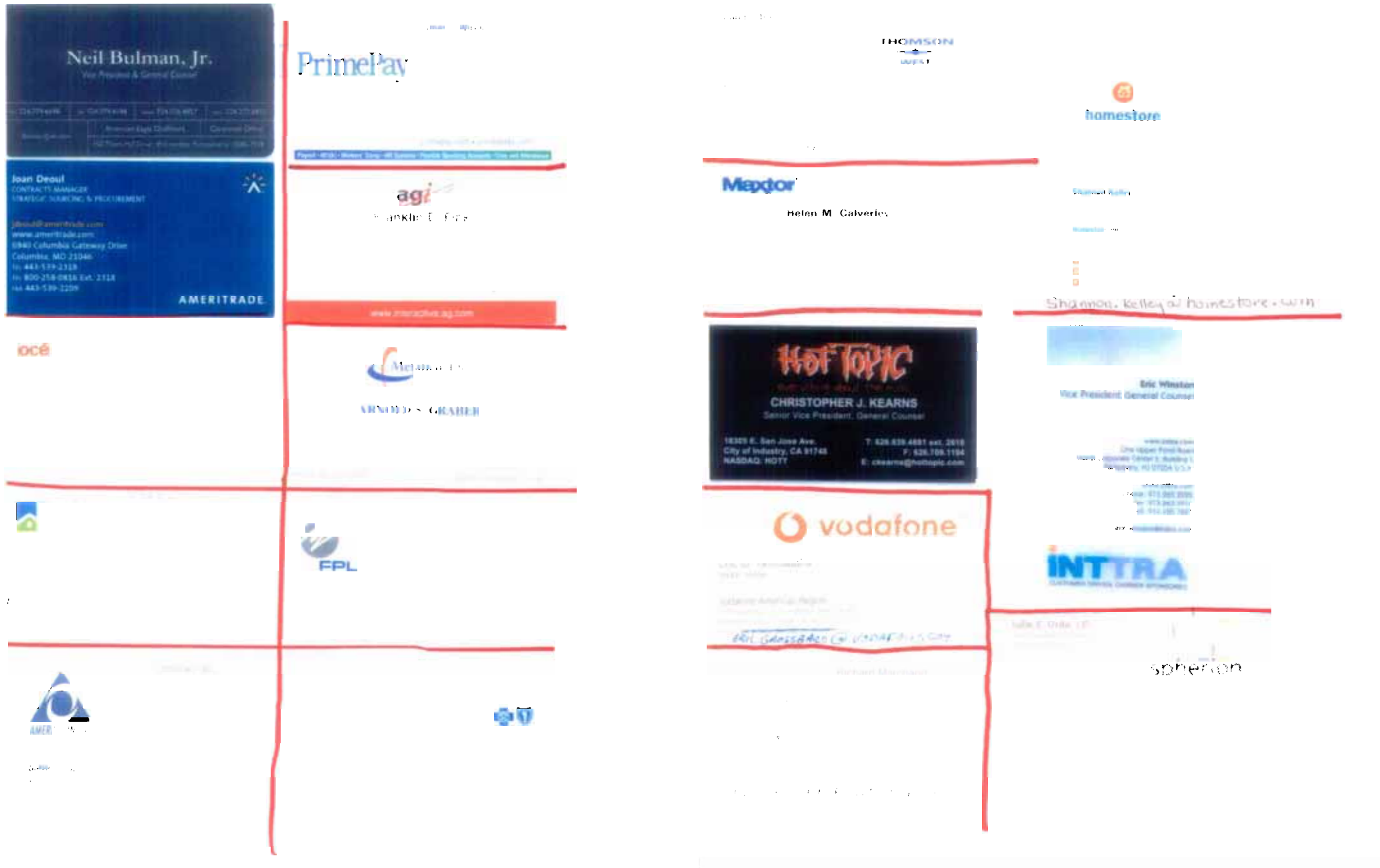
Sent By:
Name: Jared Flinn
City: Carlsbad
State: California
Email Address: jared.flinn@viasat.com

Comments:
Jeffrey:

At this week's ACC meeting, I attended your excellent presentation concerning Contracting with Software Developers & Outsourcing Service Providers. You mentioned that you could provide the attendees with a document containing a form RFP, along with vendor comments. Would you mind emailing me a copy of that document?

Thanks,

Jared Flinn
Associate General Counsel
ViaSat, Inc.



XEROX
 Johanna V. Bartlett
 Director of Compliance
 Xerox Corporation
 333 Central Expressway
 Stamford, CT 06904
 Phone: 203.333.4444
 Fax: 203.333.4444
 Email: johanna.v.bartlett@xerox.com

Equity Office
 Sara E. DeBian
 Director of Compliance
 Equity Office
 1000 North Dearborn Street
 Chicago, IL 60610
 Phone: 312.467.4000
 Fax: 312.467.4000
 Email: sdebian@equityoffice.com

open tv
 Mark Sturiant
 Director of Compliance
 Open TV
 1000 North Dearborn Street
 Chicago, IL 60610
 Phone: 312.467.4000
 Fax: 312.467.4000
 Email: msturiant@opentv.com

Henkel
 Glenn W. Young
 Director of Compliance
 Henkel
 1000 North Dearborn Street
 Chicago, IL 60610
 Phone: 312.467.4000
 Fax: 312.467.4000
 Email: gyoung@henkel.com

FINAPLEX
 Karyn Smith
 Director of Compliance
 Finaplex
 1000 North Dearborn Street
 Chicago, IL 60610
 Phone: 312.467.4000
 Fax: 312.467.4000
 Email: ksmith@finaplex.com

Portrait
 Michael P. McGroarty
 Director of Compliance
 Portrait
 1000 North Dearborn Street
 Chicago, IL 60610
 Phone: 312.467.4000
 Fax: 312.467.4000
 Email: mcgroarty@portrait.com

Portrait Software
 1000 North Dearborn Street
 Chicago, IL 60610
 Phone: 312.467.4000
 Fax: 312.467.4000
 Email: portrait@portrait.com

ACE
 Betsy A. Friedlander
 Attorney
 ACE
 1000 North Dearborn Street
 Chicago, IL 60610
 Phone: 312.467.4000
 Fax: 312.467.4000
 Email: bfriedlander@ace.com

Instill
 Keramer@instill.com
 Instill
 1000 North Dearborn Street
 Chicago, IL 60610
 Phone: 312.467.4000
 Fax: 312.467.4000
 Email: keramer@instill.com

INGRAM MICRO
 1000 North Dearborn Street
 Chicago, IL 60610
 Phone: 312.467.4000
 Fax: 312.467.4000
 Email: ingram@ingram.com

Johnson Data Software - Com

ACC

Abtix

Metropolitan St. Louis Sewer District
 "Your Clean Water People"
 Linda J. Grady
 Attorney at Law
 2250 Market Street
 St. Louis, MO 63103
 Phone: 314.768.6279
 Fax: 314.768.6279
 E-mail: lgrady@stlsd.com
 Website: www.stlsd.com



Stephen B. Combs
Corporate Counsel

State Support Center
Building C-20
2455 Peach Ferry Road, N.W.
Atlanta, Georgia 30339

(770)294-2034
Mobile (404)296-1951
Fax (770)294-2728
Pager (404)946-3376 TDD # 337635
s-comb@comcast.net
www.comcast.net

COMPANY NAME Request for Proposal – **Insert Name of RFP**

Instructions for use of the Template RFP Materials

- ❖ Confidentiality Requirements need to be signed and returned before any confidential information is shared and before delivering the full RFP.
- ❖ The highlighted areas of the form indicate information that needs to be inserted by the business unit before sending this RFP to participating entities.
- ❖ Work with the [INSERT INTERNAL LEGAL OR PROCUREMENT GROUP NAME THAT MANAGES THESE TYPES OF TRANSACTIONS] on how to pursue a multi-vendor negotiation, if deemed appropriate.
- ❖ Work with the [INSERT INTERNAL GROUP NAME] regarding the information that should be inserted in Section 1.1(D) of the Vendor Instructions

NOTE: This Instruction page is for internal use only and should not be included when the Confidentiality Requirements and full RFP are sent to the participating entities.

COMPANY NAME Confidential

COMPANY NAME Request for Proposal – **insert Name of RFP**

COMPANY NAME Request for Proposal – **insert Name of RFP**

[INSERT YOUR COMPANY NAME]

**Request for Proposal
for**

_____, 2005

CONFIRMATION OF INTENTION TO PARTICIPATE

If your Company elects to respond to the Request for Proposal, please have this confirmation signed by an officer of your Company and returned to [INSERT YOUR COMPANY NAME] ("COMPANY NAME"). A signature will confirm that your Company will comply with the terms and conditions of the following confidentiality requirement.

Please check one of the following:

CONFIDENTIALITY REQUIREMENTS

This Request for Proposal contains material which is highly sensitive and is confidential to COMPANY NAME. The terms "you", "respondent," "vendor" and other similar terms include the person signing below and his or her organization, including all its affiliates, personnel and representatives. You agree to abide the terms of this RFP as follows:

1. You hereby acknowledge that you or your employees and/or agents, in the course of responding to and participating in this RFP, may be exposed to information which is proprietary or confidential to COMPANY NAME, and its affiliated companies or third parties to whom COMPANY NAME has a duty of confidentiality. All information contained in the RFP and which you or your employees and/or agents obtain from COMPANY NAME, including without limitation, non-public information of any form is COMPANY NAME confidential and proprietary information ("Confidential Information"). You will permit Confidential Information to be disclosed only to those of your employees and/or agents who have a need to know such information for purposes of responding to this RFP and you will inform all persons who receive Confidential Information of the confidentiality of such information and cause them to be bound by confidentiality obligations at least as stringent as those in this paragraph. You will not disclose such information to any third parties or use such information for any purpose whatsoever other than to respond to this RFP. This provision shall survive this RFP.
2. In no event shall this document, or any subsequent documents that may be available in connection with this RFP, be copied, transcribed, or distributed in whole or in part without the specific authorization of COMPANY NAME.
3. COMPANY NAME Confidential Information will not include information that: (a) is not personal information and that is or becomes publicly available through no breach of this provision; (b) becomes known by you from a third party and is not subject to any obligation of confidentiality; or (c) is independently developed by you without use of or reference to the Confidential Information. If you are requested to disclose any of the Confidential Information under a subpoena or other legal requirement, you will immediately notify and cooperate with COMPANY NAME. If COMPANY NAME is not successful in obtaining a protective order or other appropriate remedy, you may disclose such Confidential Information solely to the extent necessary in the reasonable opinion of its counsel to comply with a legally required disclosure.
4. You will deliver promptly to COMPANY NAME or destroy all records, data, information, and copies of or related to the Confidential Information then in your possession or control, and delete all electronic copies thereof, if for any reason at any time you (i) elect not to participate in the RFP process, (ii) discontinue participation in the RFP process, or (iii) are asked by COMPANY NAME to discontinue the RFP process. COMPANY NAME

COMPANY NAME Confidential

COMPANY NAME Confidential

COMPANY NAME Request for Proposal – **insert Name of RFP**

reserves the right to require the return or destruction of all documents including extracts, summaries and related notes at any time.

5. You agree not to disclose the identity of COMPANY NAME as a solicitor of bids or the nature of the relationship contemplated by a response to this RFP without the prior written consent of COMPANY NAME. Furthermore, you agree to refrain from using, in any way, the name and logo of COMPANY NAME or any affiliate in any press release or other publicity or marketing material, including without limitation, internally prepared brochures and other promotional literature, without COMPANY NAME's prior written consent, in each instance. Notwithstanding the foregoing, you may share information in connection with this RFP to present joint proposals with third parties only with the prior written consent of the Primary Contact.
6. All access to COMPANY NAME sites shall be subject to COMPANY NAME security procedures, Code of Conduct, confidentiality provisions and health and safety rules. COMPANY NAME reserves the right at its absolute discretion to exclude and or refuse access to any of its sites to any personnel including but not limited to your staff and or agents.
7. Notwithstanding the terms contained in any other documentation or agreement between the parties, COMPANY NAME makes and undertakes no obligation, including but not limited to any obligation of non-disclosure, to you in connection with the information you may provide to COMPANY NAME in relation to this RFP, its subject matter or any information transmitted by you or your representatives in connection therewith.

_____ We hereby **confirm** our intent to respond to your Request for Information and we agree that we will be bound by these Confidentiality Requirements . Please send an RFP to the address below.

_____ We hereby **decline** the offer of your Request for Information.

Company: _____
 Signature: _____
 Name (please print): _____
 Address: _____

COMPANY NAME Confidential

COMPANY NAME Request for Proposal – **insert Name of RFP**

REQUEST FOR PROPOSAL

Standard Vendor Instructions and Terms and Conditions

COMPANY NAME is pleased to invite you to participate as a bidder in this RFP process. To be in a competitive position, you will need to follow these instructions closely and in good faith in submitting a competitive bid. Please review them carefully. You should contact the COMPANY NAME Primary Contact. if you have any questions concerning these instructions.

COMPANY NAME strategically engages best-in-class, competitively priced vendors to further its business objectives. COMPANY NAME is a global financial services firm and a market leader in securities, investment management and credit services. With more than 600 offices in 28 countries, COMPANY NAME connects people, ideas and capital to help clients achieve their financial aspirations.

We welcome you and thank you in advance for your participation and hard work throughout this RFP process.

1 VENDOR INSTRUCTIONS

1.1 The Proposal

In accordance with these instructions and the dates in the attached Calendar, your Proposal should include:

- A. A copy of these instructions signed on the signature line below. **Due** _____ .
- B. An Executive Summary of your proposal that summarizes at a high level: the technical solution, the financial proposal, your capabilities and key members of the account management team, and any unique features of the proposal to meet COMPANY NAME's vision for the future. **Due** _____ .
- C. The Vendor Qualifications and other similar information requested by these instructions. **Due** _____ .
- D. Your comments to the following documents: **(To be provided on _____ to vendors that have signed this document.) (1 week after the RFP is sent out)**
 - 1. Agreement**
 - 2. Schedule A (Description of products, services or other need for which COMPANY NAME is seeking proposals)**
 - 3. Schedule B (Service Levels)**
 - 4. Schedule C (Charges)**

You should provide a full set of the above documents that constitutes an offer ready for COMPANY NAME's consideration and potential acceptance. All comments must be clearly marked using revision tracking. COMPANY NAME will not consider any comments or requested changes except those received pursuant to these instructions.

Your comments may suggest including clauses from other agreements that you have negotiated with COMPANY NAME to replace clauses in the above documents. You need to identify the agreement from which the suggested clause is copied by title and date and identify the section

COMPANY NAME Confidential

COMPANY NAME Request for Proposal – **insert Name of RFP**

number from that agreement, provide full text of the original clause and use revision tracking to show any suggested revisions to the clause.

If comments or requested changes to contract language are not marked or a clause from another contract is proposed in a modified form and the modifications are not clearly identified using revision tracking, COMPANY NAME will consider the omission to be intentional and the proposal to have been made in bad faith and you may be disqualified from this RFP process in COMPANY NAME's sole discretion.

The documents provided to COMPANY NAME must not be password protected or be in any way electronically restricted (e.g., they will not be "protected" using the "Protect Document" feature in Word).

1.2 Communications

All written and oral communications concerning this RFP or its subject matter should be sent in electronic format to:

Primary Contact:

Copies of written and e-mail communications should be sent to

Legal Contact:

Legal Contact: [Outside counsel name, title, email, phone, fax, address]

You also should deliver four hard copies of your Proposal via messenger or overnight mail to the Primary Contact and one hard copy to each of the Legal Contacts.

All your negotiation in connection with this RFP must be conducted only with the Primary Contact and Legal Contacts. Unless otherwise indicated by COMPANY NAME, you may not negotiate this RFP with anyone at COMPANY NAME other than the Primary Contact and Legal Contacts. You may not otherwise communicate with anyone else at COMPANY NAME concerning the subject matter of this RFP except as expressly permitted by this proposal or informed otherwise in writing by the Primary Contact. Any communications other than with the above persons in connection with due diligence will be limited to the information you need to complete your bid and will not involve negotiation of business or legal terms or conditions.

1.3 Timetable

Activities and dates are set forth in the attached Calendar. To avoid wasting COMPANY NAME's and your valuable time and resources and in the interest of fair treatment to all bidders, it is extremely important that you adhere strictly to the Calendar, including scheduled dates and times. COMPANY NAME will not permit additional or "makeup" time if you miss any scheduled event or are unable to complete scheduled activities within the allotted times. If you fail to show up or run over because you are unable to negotiate in a timely manner as scheduled, your Proposal will be considered "as is" and you may be seriously disadvantaged relative to your competitors. If at any time you believe or learn that you will be unable to adhere to the Calendar you must let the Primary Contact know immediately. COMPANY NAME will make exceptions to the Calendar only under extremely rare circumstances in its sole discretion.

COMPANY NAME Confidential

COMPANY NAME Request for Proposal – **insert Name of RFP**

You should not withhold your most favorable solutions, pricing, terms and conditions that you are prepared to offer in response to this RFP until late in the process. COMPANY NAME will view with disfavor any dramatic "eleventh hour" bid improvements, particularly after the time scheduled for your BAFO. COMPANY NAME reserves the right to make a selection of a vendor at any point in the negotiation process, including before BAFO's are due. If a vendor elects to withhold bid improvements until late in the process, it runs the risk that COMPANY NAME will make an award earlier than planned and before the vendor makes its bid improvements.

COMPANY NAME may change the Calendar in its sole discretion at any time. COMPANY NAME will notify you of any such changes that affect you.

1.4 Due Diligence

You may perform due diligence in accordance with the attached Calendar. Any information or data provided to you will be deemed COMPANY NAME Confidential Information as defined below and will be treated as such in accordance with the confidentiality undertaking you have already signed. Any and all due diligence you conduct, whether at your or COMPANY NAME's request, is entirely at your expense. You must complete and will be deemed to have completed your due diligence prior to entering into an agreement with COMPANY NAME. The agreement will not contain provisions for post-signing due diligence or any related pricing adjustments.

1.5 Proposal Preparation Costs

In addition to any costs associated with your due diligence, you assume all responsibilities and costs incurred in providing responses to this RFP, and for providing any additional information required by COMPANY NAME to facilitate the evaluation process. You also assume all costs you incur during the process of contract development and negotiations.

1.6 Proposal Validity

Your Proposal, including pricing, will remain valid for 180 days from the RFP Response due date. COMPANY NAME, at its option, may incorporate all or any portion of the RFP and your proposal into the final contract.

2 VENDOR QUALIFICATIONS

Because the response to this Section is likely to involve the use of pre-existing documentation, you should provide your response to this Section as an appendix. The appendix content should include the following as a minimum.

2.1 Vendor Partners or Consortia

If, in order to meet COMPANY NAME's goal of receiving the best service within each class of service covered by this RFP, you conclude that your solution should include a consortium of service providers, then you should respond to the requirements of this Section 2 for each provider.

COMPANY NAME plans to execute a contract with one lead Vendor responsible and accountable for all services awarded. This is a strongly held presumption that would require significant persuasion to overcome. If you propose another arrangement, explain in detail why this would be in COMPANY NAME's best interests, and how management of multiple vendors would affect COMPANY NAME's retained costs and staffing. It should be noted that reducing the number of vendors with whom COMPANY NAME will work is an objective of this RFP.

COMPANY NAME Confidential

COMPANY NAME Request for Proposal – **insert Name of RFP**

If you propose the use of partners and/or subcontractors under your direction and lead, you must demonstrate your capability to exercise full control over the other members of the team, and to manage the services. You will also provide company background information, as required in Section 2.2 below, for each partner or subcontractor that will provide significant services for COMPANY NAME under the agreement. You will have direct responsibility to COMPANY NAME for the agreed upon services and functions, whether or not they are delivered by partners or subcontractors. COMPANY NAME has experience with consortia of service providers in other outsourcing service arrangements, and is well aware of the extent to which a customer can be adversely affected by disputes and dissension among service providers, including internal pricing disputes among the vendors, competition among the team members for new customer business and projects, disputed accountability for service level credits and performance lapses, lead vendor attempts to involve the customer in mediating team differences, and the staff of team vendors lobbying customer business leaders on the economic disadvantages of the consortium and the needless cost of the lead manager's valueless management oversight. Your demonstration of full control therefore must include providing insight to COMPANY NAME on the details of the governance arrangement among the partners and/or subcontractors.

2.2 Vendor Company Background

You should provide information describing your background, services, experience and qualifications, including at a minimum the following:

- Your most recent annual financial reports including, parent and subsidiaries.
- Organization chart and senior management profiles.
- Resumes of key personnel who would manage and staff this engagement.
- Experience with, long-term strategy and commitment to, the processes and technology described in this RFP and your response.
- Revenue profile by customer industry-segment base (i.e., financial services, pharmaceutical, commercial banking, etc.).
- Your revenue and staffing profile by division.
- Geographic profile of your business, with a focus on the parts of your business that will support the contemplated engagement.
- Relative size of this engagement in comparison to your current total and similar customer bases.
- A listing of strategic partners with whom you have successfully worked in serving financial services clients, if applicable.
- A listing of COMPANY NAME business units with whom you have worked in the past 5 years, including the revenue to you for each workstream.
- Relative investment in research and development.
- Strategies used in the past 5 years that have resulted in substantial savings for customers.

2.3 Transition Experience

COMPANY NAME recognizes the unique challenges of transitioning services from one source to another, and that those challenges differ significantly from the transition from an in-house operation. Therefore, it is important that you describe in detail any experience you have with

COMPANY NAME Confidential

COMPANY NAME Request for Proposal – **insert Name of RFP**

the planning, management and execution of such a transition elsewhere including in particular any financial services firms. Describe, in particular, the risks encountered and the mitigation steps that you undertook to minimize those risks.

2.4 Customer Base

Please provide a list of your financial services customer base, and in the case of three such customers, provide contact names, addresses, telephone numbers, and a brief description of the services provided. In addition, please provide a list of financial services customers with whom you have ceased providing sourcing services in the last three years. COMPANY NAME will, at its discretion, contact any or all of these references.

2.5 Minority and Women Business Enterprises

COMPANY NAME is committed to providing Minority and Women Business Enterprises (M/WBE's) with the maximum opportunity in the performance of COMPANY NAME contracts and subcontracts. We strive to foster the economic growth of M/WBE's by developing First and Second Tier purchasing opportunities. We encourage vendors to make a good faith effort to ensure that M/WBE's have a significant opportunity to participate as Second Tier subcontractors and/or suppliers to your company. A statement of Minority Involvement is required as part of your submission.

2.6 Additional Questions

You will provide complete written answers to the following additional questions:

3 Legal Terms For RFP Process

3.1 General Terms and Conditions

This RFP is not an offer to enter into a contract. It is a description of COMPANY NAME's specific needs and requirements that will allow us to evaluate the responses we receive and make an informed decision in the best interests of the company. COMPANY NAME specifically reserves the right to accept or reject any Proposals submitted in response to this RFP, to sole source or enter into multiple contracts, and to enter into discussions and/or negotiations with any one or more bidders at the same time and/or at any time in COMPANY NAME's discretion, (the terms "bidder", "you", "respondent" and other similar terms include the person signing below and his or her organization, including all its affiliates, personnel and representatives). COMPANY NAME's issuance of an RFP, your preparation and submission of a Proposal and our subsequent receipt and evaluation of your Proposal do not commit COMPANY NAME to award a contract to you or anyone, even if all the requirements in the RFP are met. Only a written contract, signed by an authorized officer of the company, will obligate COMPANY NAME in accordance with its terms and conditions.

COMPANY NAME and its affiliates do not make any express or implied covenants, warranties, representations or guarantees concerning the subject matter of this RFP or which entity ultimately may be awarded a contract. COMPANY NAME makes and undertakes no obligation, including but not limited to any obligation of non-disclosure, to you in connection with this RFP, its subject matter or any information transmitted in connection therewith. IN NO EVENT WILL COMPANY NAME, ITS AFFILIATES OR ANY THIRD PARTY HAVE ANY LIABILITY FOR ANY DIRECT, INDIRECT, SPECIAL, PUNITIVE, CONSEQUENTIAL OR ANY OTHER DAMAGES (INCLUDING LOST PROFITS) RELATING TO THE SUBJECT MATTER OF THIS RFP OR TO AWARDING (OR NOT AWARDING) ANY CONTRACT TO ANY ENTITY. By signing these instructions, you agree that you will indemnify and hold COMPANY NAME and its affiliates,

COMPANY NAME Confidential

COMPANY NAME Request for Proposal – **Insert Name of RFP**

officers, directors, employees, agents and third-party contractors harmless from and against any charges, claims, damages, costs, judgments, decrees, losses, expenses (including reasonable attorney's fees), penalties and liabilities of any kind or nature arising out of your breach of these terms.

COMPANY NAME reserves the right to discontinue the RFP process at any time, and makes no commitments, implied or otherwise, that this process will result in a business transaction with one or more third parties. These terms and conditions are governed by the internal laws of the State of New York, without regard to its conflict of laws principles. Nothing in this these RFP terms and conditions will be construed to constitute or appoint either party as the agent, partner, joint venturer, or representative of the other party for any purpose, or to grant to either party any right or authority to assume or create any obligation or responsibility, express or implied, for or on behalf of or in the name of the other, or to bind the other in any way or manner. These terms and conditions constitute the entire agreement of the parties hereto with respect to their subject matter and supersede any other agreements that may otherwise apply to the subject matter of the RFP or materials submitted. THE PARTIES TO THIS RFP UNCONDITIONALLY WAIVE THEIR RESPECTIVE RIGHTS TO A JURY TRIAL FOR ANY CLAIM OR CAUSE OF ACTION ARISING OUT OF OR RELATING TO, DIRECTLY OR INDIRECTLY, THIS AGREEMENT, ANY OF THE RELATED DOCUMENTS, OR ANY DEALINGS BETWEEN THEM ARISING OUT OF OR RELATING TO THE SUBJECT MATTER OF THIS TRANSACTION OR ANY RELATED TRANSACTIONS.

3.2 No Publicity

Vendor, and its partners or consortia if any, will not disclose to third parties the existence of this RFP or the services, data or the project to which it relates without prior written approval from COMPANY NAME. No results of the RFP process are to be released by you.

3.3 Right to hire

As a condition to and in consideration of your ability to participate in this RFP, COMPANY NAME and its third party service providers may solicit, hire and engage any of Vendor's personnel, subcontractors or employees currently performing services for COMPANY NAME that are within the scope of the RFP without any penalty, fee or other restriction, notwithstanding any provision to the contrary in any agreement, including but not limited to any agreement between Vendor or any of its affiliates or subcontractors, on the one hand, and COMPANY NAME or any Vendor employee or subcontractor or any other third party on the other hand.

3.4 Right to Terminate

As a condition to and in consideration of your ability to participate in this RFP, Vendor agrees that COMPANY NAME may terminate, effective as of [redacted] or any date thereafter as determined by COMPANY NAME, any agreements and any statements of work, schedule and orders that COMPANY NAME currently has with Vendor or any of Vendor's affiliates or subcontractors that are within the scope of this RFP, at COMPANY NAME's sole discretion and without any penalty, fee or other restriction, notwithstanding any provision to the contrary in any such agreement, statement of work, schedule or order.

COMPANY NAME Request for Proposal – **Insert Name of RFP**

As a condition to your participating in this RFP, an authorized signatory must indicate your and your affiliates' agreement to fully comply with the above instructions and terms and conditions therein by signing on the signature lines listed in this paragraph below, and submitting the signed copy to the COMPANY NAME Primary Contact:

On behalf of: _____
 Title: _____
 Printed Name: _____
 Signature: _____
 Date: _____

COMPANY NAME Confidential

COMPANY NAME Confidential

COMPANY NAME Request for Proposal – insert Name of RFP

**Attachment 1
Calendar**

| Event | Scheduled date |
|--|----------------|
| RFP document issued | |
| Signed RFPs due from vendors | |
| RFP schedules issued (sent only to vendors who have returned a signed RFP) | |
| Conference call for Vendor questions | |
| Proposals Due | |
| Proposals Evaluated | |
| Preferred Vendors Contacted | |
| Terms & Conditions Negotiated with Preferred Vendors | |
| Vendor Selected and Contracts Signed | |
| Project Implemented | |

Service Levels With Mock Vendor Comments/Markup And Drafting Notes

[GENERIC PORTION OF MODEL SERVICE LEVEL]

- General.** The service levels described below ("Service Levels") are 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. 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 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]
- 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, seven percent (7%) [Drafting note: number usually ends up somewhere in the middle] 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] [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.
- Application of Service Level Credits.** Consultant shall track its performance and calculate any amount that Customer is entitled to as Service Level Credits. Within thirty (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.
- Remedial Measures.** [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.
- Continuous Improvement.** On each anniversary date of the Agreement, the parties will meet to discuss whether there should be changes to the Service Levels 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].

[SAMPLE SERVICE LEVELS SPECIFIC TO COM ROOM MAINTENANCE]

- sternje 12/29/03 11:01 AM
Deleted: non-inclusive
- sternje 12/29/03 11:02 AM
Deleted: 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
- sternje 12/29/03 11:02 AM
Deleted: without prejudice to other rights and remedies that Customer may have under the Agreement or at law or in equity
- sternje 12/29/03 11:03 AM
Deleted: fifteen percent (15%)
- sternje 12/29/03 11:58 AM
Formatted: Font:10 pt
- sternje 12/29/03 11:58 AM
Formatted: Font:10 pt
- sternje 7/18/05 3:57 PM
Formatted: No widow/orphan control
- sternje 12/29/03 11:36 AM
Deleted: ten (10)
- sternje 7/18/05 3:57 PM
Formatted: No widow/orphan control, Don't keep with next
- sternje 12/29/03 11:37 AM
Deleted: 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.
- sternje 12/29/03 11:38 AM
Deleted: Automatic
- sternje 12/29/03 11:38 AM
Deleted: 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
- Erica Pina 10/25/05 11:27 AM
Deleted: 1

6-24-03 version

6. **Service Levels.** 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. **Service Level Definitions.**

(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 contacts the end user to acknowledge receipt of the call.

(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 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 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 and Consultant, unless Customer otherwise requests. Such surveys will be completed by representative personnel as Customer and Consultant deem appropriate. This Service Level shall be measured as indicated in Section 8 below.

8. **Service Level Metrics.** The following metrics shall apply to the Service Levels:

| Service Level Description | Permitted Time | Service Level |
|------------------------------|---|-----------------------------------|
| Time to Acknowledge | 15 minutes <i>COMMENT: 98% WILL COST MORE!</i> | 95 percent <i>(VENDOR</i> |
| Time to Respond | | |
| Priority Tickets | 60 minutes | 95 percent aggregate |
| Other Tickets | 4 hours | |
| Time to Resolve | | |
| Priority Tickets | 5 hours | 95 percent aggregate |
| Other Tickets | 1 business day | |
| Customer Satisfaction Survey | N/A | Average score of 3 out of 5 score |

Each month Customer may designate up to 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 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

sternje 12/29/03 11:44 AM
Deleted: both

sternje 12/29/03 11:45 AM
Deleted: and coordinates the necessary measures to resolve the problem raised

sternje 12/29/03 11:46 AM
Deleted: initiates problem resolution

sternje 12/29/03 11:46 AM
Deleted: to Customer's reasonable satisfaction

sternje 12/29/03 11:48 AM
Deleted: Customer may have su

sternje 12/29/03 11:48 AM
Deleted: such

sternje 12/29/03 11:48 AM
Deleted: may

sternje 12/29/03 11:48 AM
Deleted: 98

sternje 12/29/03 11:48 AM
Deleted: 30

sternje 12/29/03 11:49 AM
Deleted: 98

sternje 12/29/03 11:49 AM
Deleted: 4

sternje 12/29/03 11:49 AM
Deleted: 98

sternje 12/29/03 11:49 AM
Deleted: 8 hours

sternje 12/29/03 11:49 AM
Deleted: 4

sternje 12/29/03 11:49 AM
Deleted: and at least 50% response rate

sternje 12/29/03 11:49 AM
Deleted: 25

Erica Pina 10/25/05 11:27 AM
Deleted: 1

(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:

$$50\% (25\% \times 2) \times \$15,000 (15\% \text{ of } \$100,000) = \$7,500$$

sternje 12/29/03 11:51 AM
Formatted: Normal, Left, Indent, First

Erica Pina 10/25/05 11:27 AM
Deleted: 1