EDP engagement: assisting clients in software contract negotiations; Management advisory services practice aids. Technical consulting practice aid, 05

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EDP Engagement: Assisting Clients in Software Contract Negotiations
NOTICE TO READERS

MAS practice aids are designed as educational and reference material for the members of the Institute and others interested in the subject. They do not establish standards or preferred practices. The standards for MAS practice are set forth in the Statements on Standards for Management Advisory Services (SSMASs) issued by the AICPA. However, since the services described in this series of practice aids are management advisory services, the standards in the SSMASs should be applied to them, as appropriate.

Various members of the 1982–83 AICPA Computer Applications Subcommittee were involved in the preparation of this practice aid. The members of the subcommittee are listed below.

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The subcommittee gratefully acknowledges the contribution made to the development of this practice aid by Klaus P. Zech and other former members of the subcommittee.
Preface

This MAS practice aid is one in a series intended to assist practitioners in applying their knowledge of organizational functions and technical disciplines in the course of providing management advisory services. The Summers and Knight study, Management Advisory Services by CPAs, published by the AICPA in 1976, has subdivided such knowledge into seven areas: executive planning, implementation, and control; finance and accounting; electronic data processing; operations (manufacturing and clerical); human resources; marketing; and management science. Although these practice aids will often deal with aspects of those seven areas in the context of an MAS engagement, they are also intended to be useful to practitioners who provide advice on the same subjects in the form of an MAS consultation. MAS engagements and consultations are defined in Statement on Standards for Management Advisory Services 1, issued by the AICPA.

This series of MAS practice aids should be particularly helpful to practitioners who use the technical expertise of others while remaining responsible for the work performed.

MAS technical consulting practice aids do not purport to include everything a practitioner needs to know or do to undertake a specific type of service. Furthermore, engagement circumstances differ, and, therefore, the practitioner’s professional judgment may cause him to conclude that an approach described in a particular practice aid is not appropriate.
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Scope of This Practice Aid

The phrase *EDP engagement* is used in this practice aid to refer to any MAS study or MAS project in which a client is given advice or technical assistance related to the use of EDP equipment in any function.

The use of the computer is so pervasive in business and government today that many engagements—no matter what the objective—will touch on the client's use of EDP in some fashion. For example, an engagement to develop a cost accounting system will probably involve use of the client's computer to process, store, and retrieve data. Consequently, many engagements in which the primary objective is not EDP-oriented become EDP engagements in part.

Common Types of Activities in EDP Engagements

EDP engagements may conveniently be divided into two major categories: (1) those involving assistance to a client in developing an EDP system and (2) those involving advice to a client concerning the acquisition or operations of a computer installation. The following list contains a number of EDP-related activities that fall into each of the major categories:

**EDP Systems Development**

- Long-range systems planning
- General systems planning and design
- Detail systems design
- Program specifications
- Implementation planning
- Programming and testing
- Systems testing
- Conversion and volume testing
- Implementation
- Postimplementation evaluation

**EDP Acquisition or Operations**

- Request for proposals (RFP) development and vendor evaluation and selection
- Vendor contract negotiation
- EDP operations review
- Computer performance evaluation
- Specific systems evaluations
• EDP security review
• Software package evaluation and selection
• Standards for EDP system design and development
• EDP departmental accounting systems development

A practitioner may assist a client in one or several EDP activities. Each EDP engagement can be different in scope.

This practice aid deals with the practitioner's role in assisting a client in software contract negotiations with a third party. It provides the practitioner with information that may be useful in rendering such assistance.

Engagement Considerations

Although no two situations will be completely identical, there are numerous items common to most software contract negotiating sessions. While many of the most common items are discussed in this practice aid, that discussion is by no means exhaustive. Furthermore, consideration should not be limited to only the topics discussed herein. Finally, there may not be any contract negotiations with respect to certain off-the-shelf microcomputer software (for example, electronic spreadsheets and word processing).

The advances in computer technology have given rise to a huge marketplace for software. Businesses are quickly recognizing the economic benefits of contracting for software products, packages, and/or services with a software developer as contrasted to the cost and problems of in-house development. Software may represent a significant investment for the user and will likely become an integral part of his business environment, thus establishing a significant dependency on the continued and proper functioning of the product. To protect the interests of all parties involved, an agreement is normally formalized as a contract. Such an agreement, however, can be a highly involved and technical effort, requiring diverse skills and meticulous attention.

In assisting a client in negotiating with a third-party vendor, the practitioner provides his client with a technical resource that can result in an advantageous contract that avoids many of the pitfalls common to software acquisition situations. However, the practitioner is not a party to the contract, and care may be required to maintain the practitioner's role as a consultant in the eyes of the client and the vendor. Since final decisions concerning the contractual terms and the acceptance of the contract as a whole are to be the client's, the practitioner needs to explain all potential decisions and their consequences to the client in terms the client can grasp. Once the client's decisions are made, the practitioner can provide further assistance by reviewing the final document for conformity with those decisions before it is signed. The client's attorney would, of course, also review the final contract.
The practitioner's role is that of a technical consultant and not that of an attorney. However, the practitioner's technical knowledge and knowledge gained through assisting other clients and their attorneys in software contract negotiations can be a valuable resource not only for the client, but for the client's attorney as well.

**Why Negotiate a Contract?**

The acquisition of computer software can be a major transaction for the client, especially if all the ramifications of the transaction are considered. In some cases the cost of the software may be a substantial portion of the total cost of the project. Considerable cost may be involved in training personnel and converting to the new system. There may also be enhancements and modifications to the system as well as continuing support costs. More important, the client's business may become dependent on the software, and any failure or interruptions of service could have a severe impact on the functioning of the business. The client is risking far more than the vendor is. Therefore, it is imperative that the client's interests and concerns be provided for in the contract. Vendors should be willing to accommodate reasonable requests by their prospective customers in order to make a profitable sale.

Prior to the acquisition of a software package or services, most clients will be asked by vendors to sign a contract. Clients tend to view these contracts as "boiler plate" because the vendors represent that all licensees are signing the same agreement. However, vendor-supplied contracts are usually designed to protect the vendor's interests.

The client is often eager to acquire and begin using the selected software as soon as study and analysis have determined that it meets the specified requirements. At this time the client may be vulnerable because he tends to place great trust in the vendor's product and has developed a high regard and respect for the vendor's technical competence. Often, unwritten assurances may have been provided, and these can create a false sense of security. The client's eagerness, coupled with trust in the vendor, might cause significant oversights if pertinent matters are not carefully addressed in the contract negotiating process.

It is expressly because of the above that it is appropriate for the practitioner to help the client carefully evaluate requirements, enumerate concerns, address them with the vendor, and have them formalized as part of the contract. One should not misconstrue the term *negotiating* to mean a haggling session; rather, it is an opportunity for constructive discussion and resolution of any open items.

A vendor-supplied contract will typically address all the vendor's areas of concern regarding use of the software and protection of his...
proprietary rights. In these engagements the role of the practitioner is generally to assist the client in enumerating any user concerns regarding both the product and anticipated future dealings with the vendor. The practitioner could also caution his client to be aware of any warranties expressed or implied by the vendor, as well as any and all restrictions and limitations on the product or services. In addition, the practitioner might brief the client on steps that could be taken if contract provisions are not fulfilled due to nonperformance of either the product or service.

The objectives the client wants to achieve through the acquisition of the product or services need to be stated in clear and unambiguous terms. In this way all parties will be in full agreement about the anticipated end product, thus helping to avoid any possible misunderstandings. It is important that all anticipated deliverables (packaged programs, modifications, custom programming documentation, file layouts, training, and so on) be determined and itemized. All financial arrangements, whether fixed payments or progress payments, need to be clearly spelled out, and the appropriate timetable for such payments needs to be clearly established. If payment schedules are to be made in accordance with user acceptance, then the acceptance criteria need to be agreed on in advance. Many contracts will include provisions for an ongoing relationship with the vendor, either through renewal terms, product maintenance, or subsequent services. These terms also need to be enumerated in detail.

If the necessary effort is expended during the contract negotiating session, both parties should have a well-defined understanding of their expectations. This will lead to a more harmonious relationship between client and vendor. Although a practitioner can productively contribute to the process, no negotiating session can guarantee the elimination of all potential problems. However, the absence of such an effort could lead to a disastrous relationship and a potentially significant financial loss, as evidenced by numerous instances that have resulted in litigation.

The practitioner’s aim is to assist the client in negotiating a contract that is as favorable as possible to the client’s needs, but at the same time, the contract should not exceed the vendor’s technical and financial capabilities to deliver the specified product.

**Types of Contracts**

The uniqueness of each client environment and client expectations will necessitate variations in contract terms. However, most contracts tend to focus on either the acquisition of a software package, software development services, or a combination of the two. Turnkey systems may involve a total package, which includes hardware as well as software. This practice aid could be applicable to the software in such a package.
Contract for Preprogrammed, Ready-to-Use Software

When negotiating for the acquisition of a software product, the client should be clear about the intended use of the product, its expected performance, and the anticipated benefits. Any restrictions or limitations on use and any special considerations need to be identified. For example, if the client requires the product to be used at multiple computer sites, to interface with other systems, or to perform unusual functions, such requirements, or others, should be specifically provided for in the contract.

Contract for the Software Product and for Development

If there is an interdependency between the product to be acquired and software development (services), consideration should be given to having all requirements formulated as part of a single agreement. Obviously, as the number of deliverables and the project’s time span increase, the entire project becomes more complex. In such situations it is even more critical to define expectations and establish time frames and performance criteria.

The contract for the acquisition of the software can be in the form of a purchase, a license to use, or a lease. The practitioner would seek to provide for the client’s protection in the contract by considering quantitative and qualitative factors and by making recommendations accordingly. These considerations often include the degree of risk involved and the previous experience with the vendor. The reputation and integrity of the vendor can often be a deciding factor.

Preparation for Negotiations

Prior to the signing of a software contract, there is generally a formal meeting between the vendor and the client. In this meeting areas of concern are addressed and, hopefully, resolved. However, the client should not enter such a session without being adequately prepared.

The client needs to establish a negotiating team to participate in such a negotiating session. This team would likely consist of, but not necessarily be limited to, the practitioner1 as well as some or all of the following:

- An attorney, to address the client’s legal concerns and to draft and approve the final written expression of the agreement
- An accountant, to address matters such as audit and tax ramifications of the contract

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1. The practitioner may be able to fulfill one or both of the accounting and data processing functions described in the list.
• A data processing representative, to address data processing matters
• The intended user of the product or service, to provide guidance on objectives or performance expectations
• The ultimate decision maker, who may or may not be one of the above

Once the negotiating team has been established, specific issues need to be addressed. A checklist of all the items to be considered would be developed, with special emphasis on the problem areas in the installation and continued operation of the software. Each item would be analyzed and a position established. It would be helpful to draft desired contract provisions in advance of the negotiating session so that the client’s wishes could be precisely communicated to the vendor.

The client should recognize that the negotiating session may reveal divergent philosophies between himself and the vendor. Because of this, it is preferable to have formulated alternative approaches. Therefore, the practitioner would assist the client in identifying, in advance, items that are non-negotiable as contrasted to those where alternatives can be considered.

Objectives

Major Objectives

In contract negotiations it is important not to lose sight of the major objectives of both parties to the transaction. Some possible objectives are listed below.

Client’s Major Objectives

• Delivery and installation will be timely.
• Software will perform in accordance with the client’s requirements.
• Software will be used as needed without burdensome restrictions.
• Costs will be within the anticipated range.
• Continuing support of the software will be available as needed.
• The client will be indemnified if anything goes wrong.

Vendor’s Major Objectives

• The client will require the vendor’s software.
• The client will pay as agreed.
• The client will not make unreasonable demands for support services and so on.

2. The Appendix may be helpful in developing a specific checklist.
The client will protect proprietary and trade-secret rights and will not redistribute the product.

Potential liability for the transaction will be limited.

Specific Issues

The following paragraphs provide a guide to some of the specific contract provisions to be considered in negotiating technical issues. The attorney representing the client will draft the actual contract provisions and be involved in the other legal considerations.

Standard Contract vs. Customized Agreement

Many factors determine whether a contract will be the standard contract proposed by the vendor or a customized agreement. As previously mentioned, vendor contracts are normally weighted heavily in a vendor's favor. Initially it was industry practice for vendors to insist on the execution of their standard contracts; however, this practice has changed considerably over the years, and now many negotiated and custom agreements drafted by attorneys are used.

Certain vendors, largely because of a dominant market position, will even today insist on using their standard contracts. Few contract modifications, if any, may be extracted from these vendors, but such modifications can be significant and should therefore be sought.

The more sophisticated software suppliers have several versions of "standard contracts" to apply under different circumstances and in different industries. Although the use of several versions may appear to introduce some customization, this is not the case. The various versions are all written with the supplier interests being paramount. If the vendor cannot be persuaded to modify the standard contract, the practitioner might recommend the use of the vendor's standard federal government contract, which grants more concessions to the client than the version normally proposed to nongovernment users.

Negotiations can be made easier by pretesting the software. Due to the growing competition among vendors and a greater sophistication among their customers, there is a trend toward offering free trials or training and use of the system before buying. By trying out the product and thereby resolving some uncertainties, the client can reduce some risks in negotiating the contract and acquiring the software.

Making changes in standard vendor contracts requires careful planning by the client. In order to present meaningful contract modifications to the vendor, the client needs to precisely define, specify, and draft software contract requirements in advance of negotiations. The practitioner would assist in this process. If a client-prepared draft can be used as the basis for negotiations, the vendor will have to argue for each
change from this proposed agreement, thus placing the client in a much better bargaining position.

Modification of software agreements—either the vendor's or the client's—also requires competent legal assistance. The client should endeavor to engage counsel with experience in data processing contracts.

Finally, all provisions negotiated and decided on should be incorporated in writing in the final version of the agreement. The client will then be able to enforce the promises made by the vendor should problems subsequently arise.

Rights and Limitations

Package content (software, documentation, training). In negotiations with the vendor, the client should consider stating, in detail, and incorporating in the resulting agreement his expectations of the total software "package" he wishes to acquire. Such a package could include software and documentation.

The software would consist of the source and object code of the program being acquired, both on electronic media, that is, disk or tape (whatever the client specifies), and on hardcopy, that is, a printout.

The documentation would address the needs of both the operations personnel and the end users by covering systems, programming, operations, and production. The client would, at least in the case of large software acquisitions, insist that the documentation meet his standards. The vendor should either provide the client with sufficient copies of the documentation for internal use and backup or allow the client to reproduce documentation as required.

Any error corrections and enhancements should be communicated by the vendor quickly and in a form permitting easy incorporation into the existing documentation manuals.

Ownership. The current environment favors ownership of the software by the vendor-programmer. Vendors most commonly grant licenses to clients to use the software, and ownership remains with the vendor. Clients should therefore clarify their rights to the software.

In addition to determining the ownership of the original software package, the ownership rights of subsequent changes and enhancements can present special problems. On the one hand, the vendor may make changes to an existing package and include the cost of making these changes in the price proposed to the client. This is usually a fairly clear-cut example under which no ownership rights are transferred. On the other hand, the vendor may, before or after delivering the software, make changes to it according to the client's specifications and at additional cost to the client. This introduces some uncertainty regarding ownership.

Ownership of software customized for the client by the vendor needs to be spelled out very carefully in the related software agreement. Where
the client has participated in the development or testing of a software package, the vendor may agree to a price reduction or a royalty on subsequent sales by the vendor. Where software contains proprietary or trade-secret information relating to the client's business, it is appropriate to prohibit the vendor from reselling the software without the client's permission. If permission for distribution is granted, then sharing of fees and limitations on liability for the client should be carefully defined and agreed on.

The client's prime objective is usually not ownership, but the right to continuously use the software without interference. Such use would extend to affiliates and successors (in the event of a sale of the business). If appropriate, the client may want the right to transfer the software to others.

Acceptance. Among the most important matters to be resolved are defining the acceptance criteria and determining the tests to be used in evaluating the product or services prior to payment to the vendor. The client should attempt to identify any potential problem areas and address them as part of the contract negotiations. For example, if a given throughput rate is expected, then it should be defined.

Restrictions on use, duplication, and alteration. The negotiations with the vendor should ferret out any copyright limitations and define the rights that will be conferred on the client by the vendor.

Restrictions on use, such as confining the software to a single location or limiting the equipment in the system, should be carefully spelled out. If use at more than one location is permitted, the handling and possible payment of any additional fees and expenses should be defined by the vendor.

The right to make copies of the software and of documentation for backup and use at another site in the event of an emergency is important. In addition, the right to disclose the material to employees, software and hardware support vendors, consultants, auditors, and other specified parties is needed.

Clients may want to modify software after installation. The right to do so and the ownership of such modifications and their effect on vendor warranties and support are additional matters to be considered.

Personnel recruitment policy. Both the vendor and the client may wish to agree to refrain from hiring each other's personnel during a predetermined period of time.

Publicity and endorsements. The vendor might be asked to consent to not use the client's name in advertising or other publicity unless the client gives permission.
Safeguards

Entire-agreement clause, disclaimers, and side agreements. Most contracts will have a provision similar to the following: “This agreement is the complete, exclusive, and entire agreement between the parties and supersedes all proposals, oral or written, and all other communications between the parties relating to the subject matter of this agreement.” Vendors may attempt to include numerous disclaimers and warranty limits in their contracts and prefer to give oral assurances regarding performance. Such oral assurances are very difficult, if not impossible, to enforce should subsequent problems arise. The client should also avoid promises and concessions made in so-called side agreements or side letters, which provide very little assurance and may be difficult to enforce.

To be able to rely on the various representations made by the vendor, it is important to retain all communications between the vendor and the client. Where relevant, these materials would be attached or referred to in the agreement. Included in these materials are sales proposals, technical manuals, samples of documentation, specifications, results of tests and demonstrations, minutes of meetings between the vendor and the client, testimonials, policy statements, and other information used in deciding to acquire the software.

Contract modifications. The agreement should be clear on how subsequent modifications to contract terms will be made.

Warranties and penalties. Warranties are commonly of two types—express and implied. They should, at a minimum, cover ownership, merchantability, fitness for a particular purpose, and timing of installation. These points should be defined so that performance can subsequently be clearly measured and monitored.

The agreement might also spell out penalties for nonperformance by the vendor. The primary goal here is not necessarily to collect monetary damages, but rather to obtain the performance specified and agreed on. Remedies for nonperformance may be monetary, including liquidated or other damages, or they may be nonmonetary, encompassing, at a minimum, provisions that the software be corrected or replaced.

To facilitate a speedy and orderly settlement for any dispute that may arise under the agreement, the use of arbitration could be specified. Any such arbitration clauses would contain the source of a competent arbitrator and the location where arbitration would occur.

Nondisclosure. The client may wish to include in the agreement certain clauses that prohibit the vendor from disclosing to others information gathered during the proposal or testing stages. The agreement could be specific; for example, it could stipulate that sensitive data supplied to the
vendor for testing purposes will be returned or destroyed once the need for this data has been satisfied and testing is complete. Coupled with this clause could be restrictions on the reproduction of such data.

**Infringement.** It may be alleged by a third party that the software acquired by the client infringes on the patent, copyright, proprietary right, or trade-secret right of that party. A suit or proceedings could be brought against the client to prevent continued use of the software or to seek payment or damages for its use.

The vendor should agree to defend such suits at his own expense and pay all damages and costs awarded to the third party. In the event the client is enjoined from further use of the software, the vendor should be required either to procure new rights for the client to use the software or to replace the software with noninfringing software. If the software cannot be replaced by the vendor, the client should have the right to terminate the agreement and recover all costs.

**Vendor default.** The agreement should anticipate how the client will continue to operate in the event the vendor fails to provide what was agreed on or goes out of business. The software industry has a serious "revolving door" problem as new vendors enter the marketplace and others leave it. Causes for vendor disappearance are most often undercapitalization, bankruptcy, mergers, acquisitions, or, in rare cases, a natural disaster or catastrophe. While there exists no foolproof approach to judging the vendor's strength, some factors to be evaluated are financial stability, size, history, and user references.

Rapid vendor turnover poses a significant risk to the client. To be at least partially protected against default, the client should obtain a copy of the program source code and documentation or have them placed in escrow with an independent third party at the time the contract is signed. The source code can then generally be retrieved and used by the client even if the vendor goes out of business or for any other agreed-on condition. The escrow provisions should provide for testing the source code to verify that it corresponds with the object programs delivered to the client and that subsequent enhancements and updates to the system will be placed in escrow.

**Multiple vendors.** In many cases a client deals with multiple vendors, usually separate software and hardware vendors. The client may wish to insert a "single vendor" clause in the software contract, if acceptable to the software vendor, for assigning that vendor prime responsibility for installation and performance of the system.

**Termination procedures.** Termination for cause could be permitted under the agreement if the vendor misses important, preestablished deadlines.
or if the software does not pass agreed-on acceptance tests. The amount, timing, and type of compensation for termination by the client or vendor could be agreed on and incorporated in the contract. Timely notice and use of arbitration in termination could be similarly covered.

Termination without cause can be a desirable provision for the client to attempt to negotiate.

Servicing and Maintenance

Support. Sound vendor support is a key ingredient in the successful implementation of any software program. Such support would span the preinstallation, installation, and postinstallation phases of the implementation.

A significant aspect of preinstallation support is the development of an installation plan. Such a plan could include (1) a fairly precise timetable, (2) personnel requirements—the client's and the vendor's—for installation, (3) progress reports, (4) meetings, and, finally, (5) an agreement on (a) criteria for the acceptance of the software and (b) the definition of what constitutes exceptions that call for corrections or invoke some default clauses in the agreement.

Installation support principally involves acceptance testing of the software. The software is normally tested on the actual hardware system the client expects to use on a regular basis. To avoid misunderstandings and subsequent disagreements, acceptance tests could be a joint endeavor by the vendor and the client. Any errors or discrepancies discovered as a result of these tests should be corrected by the vendor free of charge and on a timely basis. Conversion assistance, if any, including the roles of the client and vendor in this process, is another consideration.

Postinstallation support includes the correction of any errors discovered in actual operations conducted within a previously agreed-on time period. Whether or not the vendor may charge the client for these corrections depends on what discrepancies were included in the categories to be fixed free of charge. Such categories would have been established during the preinstallation support phase. Ongoing technical support, maintenance, and possible replacement of software would also be part of postinstallation considerations. Vendors usually offer annual maintenance agreements to provide these services at a fixed price.

Training. To successfully run the software program after installation, client personnel need to be trained in its use. The vendor could provide such training not only for operators, but also for executives and others who use the system and its output. The availability, cost, and location of current and future training would be agreed on in advance and then documented in the agreement.
Capacity to upgrade. As the client’s business grows and its activities increase, so may the need for data processing services. This often necessitates a change or upgrade in hardware. If appropriate software is acquired, it could provide for ease of handling of such upgrades and changes. The agreement could also provide for obtaining the upgrades based on a prearranged cost or formula.

Financial Arrangements

Price. Price is, of course, an important consideration in software contract negotiations. Some vendors will not deviate from their published prices; others will negotiate. In order to get a reduced price, it may be necessary to concede other issues.

Schedule of payments. Payment schedules should be closely tied to the progress of the implementation process. Implementation may stretch over a fairly long period of time when significant development efforts are involved, or it can be of short duration when it entails solely the installation of packaged software. Implementation progress could be measured by acceptance testing. The criteria for such testing should be defined, agreed on, and spelled out in the agreement.

Limitations on renewal increases. Contract renewal provisions could be negotiated at the time the original agreement is drafted. Such provisions would state the nature and amount of chargeable costs and would specifically address the costs of any future enhancements to the purchased software. A good approach to establishing renewal increases is to use a formula that may provide for inflation but that may also set a maximum renewal price when the original agreement is implemented.

Conclusion

Negotiating a contract is often an important step in the process of acquiring and implementing computer software. It is the final step in the software evaluation and selection process and precedes implementation. In assisting a client in negotiating a software contract with a third-party vendor, the practitioner provides the client with a technical resource. The result may be an advantageous contract that avoids many of the pitfalls common to software acquisition situations.
Negotiations take place between the negotiating team and the vendor to develop an agreement on the anticipated end product and the procedures that will govern its acquisition and use. The practitioner would serve on the team as a technical consultant on matters of content. The client's attorney would be responsible for legal phrasing of the agreed-upon terms. The ultimate decision regarding the terms and acceptance of the contract remains the responsibility of the client.
APPENDIX

Software Contract Negotiations Checklist

The checklist that follows includes matters that the practitioner may wish to advise a client about when assisting in software contract negotiations. It might also be useful in determining areas where the client's attorney could benefit from the practitioner's technical assistance.

Since each engagement is unique, this list does not include all matters that could be considered, nor will all that are listed apply to every engagement. A practitioner may wish to prepare a checklist tailored to a specific engagement as an early step in the negotiating process.

In every engagement it is important to retain any documents containing information that may be included in the contract, such as—

- Vendor correspondence.
- Vendor literature and advertising.
- Notes of meetings between vendor and client.
- Materials from vendor demonstrations, such as output reports.
- Systems specifications.
- Other vendor representations.

**Checklist**

*Terms of Agreement*

- Initial terms
- Renewals

*Deliverables*

- Programs
- Modifications
- Custom programming
- Documentation
- Training
- Enhancements and updates
- Continuing support

*Delivery*

- Timetable
- Delays (They will be considered to constitute default.)
- Price reduction or penalty for delays
- Trial period

*Acceptance Criteria*

- Thorough test data
- Performance tests
• Reliability tests
• Throughput
• Run time
• Computer resources required
• Efficiency
• Standards of continuing performance
• Acceptance period

Use and Ownership of Software
• Unlimited use
• Upgrades and portability of software for client's future use
• Ownership of software customized to client's specifications
• Ownership of modifications
• Effect of refusal of future modifications if unacceptable

Source Programs
• Access by client to source programs
• Source program documentation in escrow

Training
• All appropriate education required by client to successfully implement and operate system
• Period of time that training will be available
• Location
• Costs
• Curriculum

Warranties of Vendor
• Suitability of software for client's requirements
• Capacity to handle stated volume of transactions
• Capacity of system to accommodate growth
• Ownership of software
• Vendor's right to license software
• Assurances regarding infringement
• Period of time vendor will keep software operational
• Correction of malfunctions
• Equipment configuration required for software
• Vendor's commitment to software maintenance
• Guarantee of support availability

Client's (Acquirer's) Rights and Safeguards
• Right to reproduce documentation
• Right to disclose software to others
• Right to rescind agreement at any time prior to acceptance of the system
• Right to transfer software with sale of computer
• Right to modify software
• Right to merge software into other program material
• Right of assignment
• Product liability insurance
• Performance bond

Confidentiality
• Client data
• Client's business methods and trade secrets

Infringement Provisions
• Vendor defends any suit brought against client
• Vendor pays costs and damages
• Vendor replaces infringing software
• Vendor indemnifies client for loss

Events Constituting Default
• Failure to deliver
• Failure of software to perform according to specifications
• Unreliability of software
• Failure of vendor to correct malfunctions within an agreed-on time period
• Failure of vendor to provide support services
• Bankruptcy of vendor

Default and Malfunction Remedies
• Termination of agreement
• Recovery of damages for costs incurred
• Liquidation of damages
• Refund of money paid and costs incurred
• Replacement of software by vendor
• Repair of software by vendor
• Payment by vendor for cost of repairing or replacing software by others
• Downtime credits
• Backup facility in the event of malfunction
• Time to correct malfunctions, which extends the warranty period

Price
• Fixed cost
• Time and material costs
• Renewal cost
• Other charges
• Quantity discounts for multiple installations
• Price protection for future enhancements and support
- Pass through of future price reductions
- Lease payments applied to purchase

**Payments**
- Fixed dates
- Progress payments based on defined acceptance criteria
- Credit for delays
- Refund of money if agreed-on situation occurs
- Holdback
- Periodic payments and royalties
- Maintenance fees

**Taxes**
- Liability for taxes
- Tax credits

**Client-Vendor Relationship**
- Vendor's status (independent contractor, not employee of client)
- Prohibition against assignment by vendor
- Prohibition against subcontracting by vendor without client's consent
- Continuity during dispute
- Personnel recruitment policy (each other's employees)
- Use of client's resources by vendor

**Other Considerations**
- Free trials or demonstrations
- Compensation for assisting vendor in developing or testing software
- Publicity and endorsements
- Arbitration
- Termination procedures
- Inclusion of all side agreements in contract
Bibliography

Books

Periodicals
MAS PRACTICE AIDS

MAS Small Business Consulting Practice Aids Series
No. 1 Assisting Small Business Clients in Obtaining Funds
No. 2 Identifying Client Problems: A Diagnostic Review Technique
No. 3 Assisting Clients in Maximizing Profits: A Diagnostic Approach

MAS Technical Consulting Practice Aids Series
No. 1 EDP Engagement: Systems Planning and General Design
No. 2 Financial Model Preparation
No. 3 Financial Ratio Analysis
No. 4 EDP Engagement: Software Package Evaluation and Selection
No. 5 EDP Engagement: Assisting Clients in Software Contract Negotiations

MAS Practice Administration Aids Series
No. 1 Developing an MAS Engagement Control Program