



Wednesday, October 22
9:00 am-10:30 am

806 Going Global with Large IT Vendors: Dancing with the Elephant

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James A. Harvey
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Jennifer B. Schlosstein
Senior Corporate Counsel
Expedia, Inc.

Jeffrey Ross Stern
Executive Director
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Faculty Biographies

Robert E. Delaney

Robert E. Delaney is an associate general counsel at Perot Systems Corporation, a worldwide provider of information technology services and business solutions ranked as the second "Most Admired Company in America" in the IT services sector by Fortune magazine in 2006 and 2007. In this capacity, Mr. Delaney is responsible for the legal affairs of the commercial solutions business unit, providing advice and direction with respect to deal pursuits and negotiations, contract issues and compliance, data management (privacy and security) issues, export control compliance, procurement, intellectual property, and other issues. Mr. Delaney negotiates a wide variety of complex global and offshore technology and business process transactions on behalf of Perot Systems (both sole source and consultant-led competitive arrangements) including outsourcing, software licensing, maintenance and support, systems integration and implementation, consulting, application development, ASP, hosting, and joint venture agreements.

He is a graduate of Georgetown University and the Villanova University School of Law.

James A. Harvey

James Harvey is a partner in and co-chair of the Hunton & Williams' global technology, outsourcing and privacy group. Mr. Harvey's practice is composed of board level, complex IT, HR and business process sourcing and offshoring transactions and enterprise wide technology, ecommerce, and data management issues. On the counseling side of his practice, Mr. Harvey is deeply engaged in open source issues on behalf of vendors and users and was an active participant in the Free Software Foundation's efforts to develop version 3.0 of the General Public License. He also routinely provides advice and counseling on privacy, security, information usage, and data transfer issues and their impact on the corporate enterprise, particularly as those issues arise in the transactional context.

Mr. Harvey has been recognized for a number of years as one of America's leading lawyers in business process outsourcing by *Chambers USA*. He also was named as one of America's Leading Lawyers for Information Technology Issues in 2008 and the firm's outsourcing practice was named the #1 Legal Advisor in The Little Black Book of Outsourcing for 2008. Mr. Harvey formerly served as the Chair of the State Bar's Technology Section.

He was received his JD, with honors, from the University of North Carolina at Chapel Hill.

Jennifer B. Schlosstein

Jennifer B. Schlosstein is senior corporate counsel with Expedia, Inc. in Bellevue, Washington in its technology/IP/strategic sourcing legal group. Her responsibilities include structuring and negotiating complex technology, IT, licensing, and intellectual property transactions; large outsourcing transactions (including application development and maintenance outsourcing, IT operations outsourcing, and business process outsourcing); and other strategic sourcing and commercial agreements. Ms. Schlosstein provides legal advice and counsel to Expedia's chief technology officer, worldwide product development group, and real estate and general services group.

Prior to joining Expedia, Ms. Schlosstein was in-house counsel with SumTotal Systems, Inc., a publicly traded Paul Allen software, e-commerce, and technology company. There, she was responsible for sales contracts, commercial agreements, IP and licensing, distribution agreements, and strategic partnership and alliance contracts. Prior to that, Ms. Schlosstein was in-house counsel with Western Wireless Corporation and with Simpson Investment Company. She began her legal career with Bogle & Gates law firm.

Ms. Schlosstein is a member of ACC and is a member of the IT, privacy, and eCommerce committee and the intellectual property committee. She was a presenter at the SMU Dedman School of Law "Symposium on Emerging Intellectual Property Issues" on the following panel: Outsourcing Services, Information and Technology: Present and Future Business Practices and Legal Concerns.

Ms. Schlosstein has a BA from University of Washington and a JD from University of Wisconsin Law School.

Jeffrey Ross Stern

Jeffrey Ross Stern is an executive director at Morgan Stanley, in its technology, intellectual property, and e-commerce law group in New York. Mr. Stern's responsibilities include the negotiation of large IT and business process outsourcings and complex tech transactions, open source software, and other areas relating to tech, IP and e-commerce law such as data, electronic trading, licensing, and copyright.

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

Mr. Stern is vice-chair of ACC's IT, Privacy and e-Commerce Committee. Mr. Stern is also co-chair of the SIFMA Working Group on Free and Open Source Software. Mr. Stern is an active member of the SIFMA subcommittees addressing outsourcing and market data. He is a frequent presenter on topics such as outsourcing and is recognized by *Who's Who in American Law*.

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

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Introduction—discussion topics

1. Pre-negotiation planning
2. The four legged stool approach
3. Structuring competitive negotiations
4. Company negotiation strategies and tactics
5. Vendor strategies and tactics
6. Conclusion

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Early Planning and Readiness

⇒ Early engagement with key groups:

<ul style="list-style-type: none"> • Company/Project Lead* • IT/Operations* • Legal* (domestic/overseas) • Sourcing/Procurement* • HR* • Finance/Accounting* <p>* = Deal Team</p>	<ul style="list-style-type: none"> • Tax • Executive Sponsor/Board • Corporate Communications/PR • Risk/Compliance • Other?
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⇒ Engaging and managing of outside counsel (domestic/overseas)

⇒ Whether to engage more professional support (consultants)

⇒ See accompanying Outsourcing Checklist for further detail

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1. Pre-negotiation planning

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Plan a consistent overall approach

<ul style="list-style-type: none"> • Your Company • Customers • Competitors • Regulators • Investors • Media 	<p>Transaction level</p> <ul style="list-style-type: none"> • Business unit objectives • Risk mitigation/allocation <p>Enterprise level</p> <ul style="list-style-type: none"> • Overall business strategy • Policy/internal clearances <p>Industry/marketplace level</p> <ul style="list-style-type: none"> • Practices in your industry • Regulatory requirements • Global concerns/jurisdictional differences
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Examine current and desired future states

- Identify company's performance baseline and define scope of project
- Establish/prioritize objectives
 1. Reduce operating costs
 2. Increase flexibility
 3. Improve service or productivity; reduce errors
 4. Business continuity
 5. Change/transformation

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Leg 1: Scope, Specifications

- Description of services or specifications (SOWs)
 - Define areas of responsibility (broad)
 - Detailed description of tasks/specifications
 - "Including but not limited to . . ."
 - Services, software and/or equipment needed to accomplish tasks or provide functionality
 - Carefully define any retained/ongoing responsibilities
 - Understand when change orders or purchase orders with additional charges may be required

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2. The four legged approach

(1) Scope,
 (2) Performance levels,
 (3) Legal terms, and
 (4) Pricing.
 All need to be aligned.

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Leg 1: Scope, Specifications (cont'd)

Technology Platform

- Software categories (Vendor, 3rd Party, and Company)
- Shared versus Retained
- IP development, governance and ownership
- Refresh requirements
- Infringement risks
- Third party consents
- Cost impact

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Leg 2: Performance Levels (SLAs)

- Focus on manageable number indicative of key business needs
 - Objective
 - Measurable
 - Verifiable
- Set credits at a level to promote compliance
- Limit exceptions to credits and retained responsibilities
- Understand SLAs represent minimum performance levels
- Use for management reporting
- Reject bonuses unless enhanced service provides a clear benefit

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

- Require that provider try to resolve each problem even if service level not missed or not a material breach
- Consider 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)
- Consider adding a process for an annual technology/business process plan

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Leg 2 (cont'd): Acceptance Criteria

- Carefully define how SLAs are calculated and measured, and how credits are applied
- 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

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Leg 3: Legal—Allocation and Mitigation of Risk

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

- Limits of liability and exceptions, including gross negligence and willful misconduct
- Intra-party and third party (e.g., claims by customers, regulatory actions/fines infringement claims)
- Security/theft/loss of data/viruses/physical & virtual access control
- Confidentiality/privacy
- Disaster Recovery and Business Continuity Planning (DR/BCP)
- IP risk and ownership
- Sarbanes-Oxley and SAS 70 (internal controls of an outsourcing provider)

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Leg 3: Legal Terms and Risks (cont'd)

- Transition risk—inbound and outbound (Develop Transition Plan)
- Subcontracting
- Compliance with laws including changes in laws
- Insurance
- Term and Termination (and insourcing/resourcing rights)
- Risk of changes in industry pricing, currency fluctuation, or business needs
- Risk of change of control in vendor or customer
- Indemnity obligations (including IP infringement indemnity)
- Regulator access/record keeping
- Affiliate participation in contract
- "Related person" transaction analysis (if public company)

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Leg 4: Pricing

- Pricing ties together scope, performance, risk allocation
- Talk through pricing in detail with vendor and check document carefully
 - 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
- Payment terms and triggers

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Leg 3: Legal Terms and Risks (cont'd)

For Overseas Outsourcing

- Relocation rights (if overseas)
- Technology platform
- HR considerations (international laws)
- Asset transfer and transition planning
- Regulatory overlay
- Jurisdictional considerations
- Export control
- Dispute mechanisms
- Currency risks/Exchange controls

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Leg 4: Pricing (cont'd)

Lawyers ignore pricing terms at own peril

- Termination charges and transition assistance services
- 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.)
- Company's business people may not be experienced in large IT transactions (as opposed to vendor business people who will have done many)

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3. Structuring competitive negotiations

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4. Company negotiation strategies and tactics

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Structuring Competitive Negotiations

- Use competitive procurement for large transactions
 - Allow sufficient time for an effective process and identify deadlines
 - Provide as much information (requirements, platforms, standards, architectures) as possible – see accompanying sample RFP terms
 - Provide clear instructions and timeframes
 - Provide proposed reasonable contract terms, SOW and SLA and pricing instructions for "apples to apples" comparisons
 - Be scrupulously fair and reasonable – provide equal opportunity for due diligence and negotiation, and be mindful of vendor's expenditure of resources and risk/reward profile
- Anticipate consequences of each possible outcome before starting the process
- Review existing relationships/agreements (including with affiliates and subsidiaries, globally)

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Company 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

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Company 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, 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

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Company Strategies and Tactics (cont'd)

- If vendor claims its policy is not to negotiate, don't stop there. Ask for most favored customer terms, or a letter stating vendor's policy is never to negotiate some or all terms, as applicable
- For small licensing, software or data transactions, consider use of short addenda focusing on major risk areas

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Company 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 or sweat excessively
- Sell yourself as the good customer you are!

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5. Vendor negotiation strategies and tactics

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Vendor Negotiation Strategies and Tactics

- *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

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Vendor Strategies and Tactics (cont'd)

- Develop relationships across the company
- Develop negotiated terms that can be leveraged for future transactions
- Build trust

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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
 - Innovation
 - Process improvement
- Develop relationships across the company
- Build trust

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Vendor Strategies and Tactics (cont'd)

The good, the bad, and the high-pressure time-limited offer to close/end competition, often at quarter end



CONCLUSIONS

- Early and comprehensive global planning
- Negotiation strategies and tactics that employ competition work best
- Integrate negotiation of business and legal terms
- Additional Q&A

**MASTER CONFIRMATION OF TERMS
REGARDING AN INTENT TO PARTICIPATE TO RFPs OF [ENTER COMPANY]**

This Agreement is entered into as of _____, 2008, is by and between [Enter Company Name] ("Company") and _____ ("Consultant").

Company or its affiliates may invite Consultant to participate in requests for quote, requests for information, requests for proposal or similar processes (the "Request"). Consultant may elect to participate therein by (a) notifying Company in writing (including via email), (b) otherwise notifying Company electronically such as by clicking the appropriate button in Company's automated system or (c) responding to or participating in the Request. Any such affirmation will be legally binding and the terms and conditions set forth herein including Exhibit A and A-1 shall apply to Consultant and any of its employees, officers, directors, agents, and affiliates which participate in responding to the Request.

A Request may specify alternative terms and conditions apply by expressly referencing that the terms and conditions of the Request will supersede any other terms in place to the extent they are inconsistent, in which event the foregoing affirmation will constitute Consultant's agreement that the terms and conditions set forth herein as modified by the Request will apply.

This Agreement shall be governed by, and construed in accordance with, the internal laws of the State of New York, without regard to its choice of laws principles. The parties hereby consent to the exclusive jurisdiction of, and venue in, any federal or state court of competent jurisdiction located in the Borough of Manhattan, New York City for the purposes of adjudicating any matter arising from or in connection with this Agreement. **THE PARTIES UNCONDITIONALLY WAIVE THEIR RESPECTIVE RIGHTS TO A JURY TRIAL FOR ANY CLAIM OR CAUSE OF ACTION BASED UPON OR ARISING OUT OF, DIRECTLY OR INDIRECTLY, THIS AGREEMENT (INCLUDING ANY SUCH CLAIM OR ACTION INVOLVING A PARTY'S CONFIDENTIAL INFORMATION).** This Agreement constitutes the entire agreement of the parties hereto with respect to its subject matter. Affiliates of Company are third party beneficiaries of this Agreement entitled to enforce it as if they are a party hereto. This Agreement may be executed in counterparts.

IN WITNESS WHEREOF, Company and Consultant execute this Agreement by their duly authorized representatives.

CONSULTANT:	COMPANY:
By: _____	By: _____
Name: _____	Name: _____
Title: _____	Title: _____
Date: _____	Date: _____

Exhibit A**1. The Proposal**

Your proposal ("Proposal") in response to the Request must be timely submitted in accordance with the due dates provided by Company. You will provide the Proposal a manner that constitutes an offer ready for Company's consideration and potential acceptance and it will be construed as such. The documents/attachments provided to Company 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).

2. Communications

All written and oral communications should be sent in electronic format to the contacts identified by Company ("Primary Contacts").

Any questions related to the Request must be submitted in the manner directed by the Primary Contacts, such as through the Q&A Board found in the eSourcing tool.

Unless otherwise expressly permitted by the Primary Contacts in writing or email, you may not negotiate with anyone at Company other than the Primary Contacts. You may not otherwise communicate with anyone else at Company for purposes of due diligence concerning the subject matter hereof except as otherwise authorized by the Primary Contacts. 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.

3. Timetable

Company will provide a calendar to be followed (the "Calendar"). To avoid wasting Company'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. You agree to exercise your best efforts to submit your Proposal, including answers to questions and related materials, on schedule, and generally to act in good faith in participating in Requests. Company 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 Contacts know immediately. Company will make exceptions to the Calendar only under extremely rare circumstances in its sole discretion.

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

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

4. Due Diligence

You may perform due diligence in accordance with the Calendar and Section 2 above. Any information you receive will be treated as confidential hereunder. Any and all due diligence you conduct, whether at

your or Company'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. The agreement will not contain provisions for post-signing due diligence or any related pricing adjustments.

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 Company, and for providing any additional information required by Company to facilitate the evaluation process. You also assume all costs you incur during the process of contract development and negotiations.

6. Proposal Validity

Your Proposal, including pricing, will remain valid for 180 days from the response due date. Company, at its option, may incorporate all or any portion of your Proposal into the final contract.

7. Vendor Partners or Consortia

Unless otherwise stated in a Request, Company 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's best interests, and how management of multiple vendors would affect Company's retained costs and staffing.

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 for each partner or subcontractor that will provide significant services for Company under the agreement. You will have direct responsibility to Company for the agreed upon services and functions, whether or not they are delivered by partners or subcontractors. Company 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 on the details of the governance arrangement among the partners and/or subcontractors.

8. General Terms and Conditions

This is not an offer to enter into a contract. It is a description of Company'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 specifically reserves the right to accept or reject any Proposals, 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'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's issuance of a Request, your preparation and submission of a Proposal and our subsequent receipt and evaluation of your Proposal do not commit Company to award a contract to you or anyone, even if all requirements are met. Only a written contract, signed by an authorized officer of the company, will obligate Company in accordance with its terms and conditions.

Any information or data provided to or accessible by you in connection with the subject matter hereof will be deemed Company confidential information and you will strictly comply with the terms of Exhibit A-1 with respect to such information. The terms and conditions of this Agreement will be binding on your affiliates to the extent they participate in responding to the Request or perform services or provide goods that are within the scope of the Request.

Company and its affiliates do not make any express or implied covenants, warranties, representations or guarantees concerning the subject matter hereof or which entity ultimately may be awarded a contract. Company makes and undertakes no obligation to you in connection with this subject matter or any information transmitted in connection therewith. IN NO EVENT WILL COMPANY, 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 REQUEST OR TO AWARDED (OR NOT AWARDED) ANY CONTRACT TO ANY ENTITY, EVEN IF ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.

Company reserves the right to discontinue a Request at any time, and makes no commitments, implied or otherwise, that a Request will result in a business transaction with one or more third parties. Nothing herein 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 hereof or materials submitted.

9. **No Publicity**

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

[Enter any additional terms that may be appropriate for Company's RFPs or vendor relationships]

Exhibit A-1

CONFIDENTIALITY REQUIREMENTS

The Requests contain material which is highly sensitive and is confidential to Company. You agree to abide by the following terms:

1. You hereby acknowledge that you or your employees and/or agents may, in the course of responding to or participating in a Request, be exposed to information which is proprietary or confidential to Company, and its affiliated companies or third parties to whom Company has a duty of confidentiality. "Company Confidential Information" shall include all information of Company or any of its affiliates to which you have had or will have access, whether in oral, written, graphic or machine-readable form, including without limitation, specifications, operations or systems manuals, decision processes, profiles, system and management architectures, diagrams, graphs, models, sketches, technical data, research, business or financial information, plans, strategies, forecasts, forecast assumptions, business practices, marketing information and material, customer names, proprietary ideas, concepts, know-how, methodologies and all other information related to Company's business or the business of any of its affiliates. Company Confidential Information shall be kept confidential by you. You will permit Company Confidential Information to be disclosed only to those of your employees or agents who have a need to know such information for purposes of responding to a Request and you will inform all persons who receive Company 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 a Request. This provision shall survive the Agreement.
2. In no event shall this document, or any subsequent documents that may be available in connection with a Request, be copied, transcribed, or distributed in whole or in part without the specific authorization of Company.
3. Company 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 Company Confidential Information. If you are requested to disclose any of the Company Confidential Information under a subpoena or other legal requirement, you will immediately notify and cooperate with Company. If Company is not successful in obtaining a protective order or other appropriate remedy, you may disclose such Company 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 or destroy all records, data, information, and copies of or related to the Company 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 a Request, (ii) discontinue participation in a Request, or (iii) are asked by Company to discontinue participating in a Request. Company 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 as a requestor of information or solicitor of

bids or the nature of the relationship contemplated by a response to a Request without the prior written consent of Company. Furthermore, you agree to refrain from using, in any way, the name and logo of Company 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's prior written consent, in each instance.

6. All access to Company sites shall be subject to Company security procedures, Code of Conduct, confidentiality provisions and health and safety rules. Company 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. Company shall keep confidential any pricing and corporate financial information that you disclose in your response to a Request. Notwithstanding the terms contained in any other documentation or agreement between the parties, Company makes and undertakes no other obligation, including but not limited to any obligation of non-disclosure, to you in connection with the information you may provide to Company in relation to a Request, its subject matter or any information transmitted by you or your representatives in connection therewith.

**Informal Outsourcing Checklist
for In-house Counsel**

(nonexclusive)

(October 2008)

Early Planning & Communication

1. Early discussions with your company's business owners and stakeholders about the outsourcing deal (domestic and/or overseas) and strategies for success.
 - Business owner's goals and challenges.
 - Early engagement with your company's key departments (i.e., HR, Tax, IT, Sourcing/Procurement, Finance/Accounting, PR/Marketing, Legal, Operations, Corporate Communications, Technology, Compliance, Risk...)
 - Discuss whether your company should hire a consultant (for benchmarking and/or development of statements of work)
 - Set expectations about timelines, legal challenges, and the contract negotiation and development process.
2. Set expectations early with business owners about outsourcing timelines (from RFI step through contract signing).
3. Encourage business owner to hold regular internal outsourcing team meetings (large and/or small group).

Partnering with the Business

4. Partner with your company's business owners on formation of your "outsourcing team" for the deal and key negotiators.
5. Partner with your company's business owners early to understand and provide input into basic legal parameters of outsourcing deal (i.e., termination rights, publicity, pricing and price triggers, payment and invoicing terms, taxes, non-solicitation, transitioning the services, use of customer data, and other areas identified below)
6. Provide direction to the business regarding the due diligence it needs to conduct.

Company Policies

6. Review relevant company policies with your company's outsourcing team (i.e., Business Code of Conduct, Insider Trading Policy, other vendor policies)
7. Ensure no actual or perceived conflicts of interest between your deal team and potential suppliers throughout vendor selection and contract process.

- 8. Review your company's vendor policies with your outsourcing team, including those relating to information security, access to data, use of personal information, etc.
- 9. Consider having your business team members sign a reminder that they have read and are in compliance with the above policies.

Securities Laws

- 10. Ensure compliance with securities laws and your Insider Trading Policy, as your business/outsourcing team structures the outsourcing deal and sets up business entities. (Employees may not trade stock in your company or the outsourcing company based on inside information.)

HR Planning

- 11. Work with Human Resources on an employee communications plan that takes into account any legal notice requirements. Assume that affected employees will hear about any potential outsourcing before executive management does. Ensure that business people identify key employees and consider retention plans and determine requirements for affected employee compensation and benefit packages.

Existing Contracts

- 12. Before reaching out to potential vendors, review existing contracts with vendors and outsourcers (i.e., termination clauses, exclusivity clauses, non-solicitation clauses, etc.)

Hiring and Management of Outside Counsel

- 13. Select outsourcing counsel that specialize in domestic and/or overseas outsourcing and employment counsel (U.S. and local country) and conduct interviews where appropriate.
- 14. Establish legal budget with outside counsel and obtain regular status reports on legal fees and expenses from outside counsel.

Software Review

- 15. Business people should prepare a list of internal software and third-party software to be provided to vendor to perform the services. Work with business people to:
 - Ensure third-party software licenses are reviewed and independent contractors and/or outsourcers may use the software (consents, notices).
 - Obtain permission from third-party software companies for such use, as needed
 - Include list of software to be used by the vendor in attachment to the contract or in relevant statements of work.

Form Contract Development

- 16. Develop "baseline" form Master Outsourcing Services Agreement for inclusion in RFP or to provide to vendors (or selected finalists).

Communication During Vendor Selection Process

- 17. Ensure all communications with vendors go through defined channels with your company during the selection process.
- 18. Remind others at your company and outsourcing team members of the defined communication policy and that information received from vendors should all be passed along to the point person.
- 19. Participate in Request for Information (RFI) and/or Request for Proposal (RFP) process and in vendor selection process (as needed). Work with business people to structure the RFP in an efficient manner. Consider how to maximize use of competition to negotiate legal terms in addition to business terms.
- 20. Highlight the sensitivity of your company's confidential information with all potential vendors (especially in replacement-vendor scenarios); sign NDAs, RFP terms.

CONTRACT Drafting/Development

- 21. Early discussion with team about legal terms, and early discussions with local country counsel (for overseas outsourcing deals) (see #32 and #33 below).
- 22. Draft master outsourcing service agreement, obtaining input from business stakeholders and key departments on draft.
- 23. Review draft statements of work (SOWs) throughout process where any legal terms may be involved.
- 24. Regular review of pricing attachment, as it's developed.
- 25. Obtain input from local country-specific counsel (for overseas outsourcing).
- 26. Obtain comments and legal input from vendors on your company's "baseline" form contract during RFP process, when appropriate for the project.

CONTRACT – Privacy Terms

- 27. Discuss key privacy terms with your company – (1) obligation to protect information is not delegable and (2) laws differ and include in contract vendor's specific data privacy compliance obligations, how investigations will be handled between the parties, and enforcement of the data privacy terms.
- 28. Consult with US privacy counsel and local country privacy counsel (if overseas outsourcing on privacy laws and regulatory requirements).
 - Database breach notification acts in California and about 20 other states require notification of unauthorized use or access to database
- 29. U.S. Framework:
 - GLB: Graham Leach Bliley – Financial Modernization Services Act
 - HIPAA: Health Insurance Portability and Accountability Act

- Regulatory guidance
- Applicable state laws and regulations

CONTRACT – Service Level Agreements (SLAs)

30. Legal review and assistance in developing SLAs (as needed) for inclusion in contract or statements of work (including service level credits if vendor fails to meet critical service levels, caps on service level credits, and ability to earn back service level credits for performance above service levels).

CONTRACT – Intellectual Property

31. Include clear and comprehensive terms on intellectual property rights and concerns

CONTRACT – Additional Legal Review

32. Assess and evaluate local country laws and potential additional costs to your company resulting from the analysis completed at #32 below.

33. Conduct legal analysis of your outsourcing deal (with domestic counsel and/or local country counsel, if overseas outsourcing) of the following laws that may apply to your deal:

- employment/labor laws
- intellectual property laws
- data privacy laws
- export laws
- tax laws
- other industry specific laws, e.g. financial services

CONTRACT – Export Laws

34. Ensure both parties commit in the contract to comply with U.S. export regulations.

CONTRACT – Transition Planning & Transfer of Personnel

35. Transition planning – develop comprehensive requirement that vendor provide transition assistance to your company; attach to contract an outline of minimum terms to include in a Transition Plan to be developed by the parties within a set period after signing the contract; price your company will pay for additional transition assistance services.

CONTRACT – Affiliate/Subsidiary Participation

36. Consider whether your company wants/needs its affiliates and subsidiaries to receive the services.

37. Consider affiliate and subsidiary participation in your outsourcing contract via a separate contracting vehicle or broad inclusion of all affiliates and subsidiaries.

38. Public companies – ensure securities lawyer conducts “related person transaction” analysis where applicable.

CONTRACT – Employment Law

39. Discuss employment and personnel aspects of your deal with U.S. employment counsel and local country employment counsel for overseas outsourcing deals (i.e., termination, compensation, non-solicitation clauses, non-competition clauses, co-employment risks, IP concerns)

CONTRACT – Other

40. Subcontractors. Address whether vendor may use subcontractors to provide the services.

41. Company Facilities. Address whether vendor may use company facilities, duration, and whether upgrades or modifications to such facilities are needed to provide the services. Discuss migration from company facilities

42. Equipment, Software, and Third Party Service Contracts. Allocate responsibilities with respect to equipment, third party software, and third party service contracts, including legal, financial, and operational support.

43. Technology Licensing. Address licensing your company's technology, software, and processes to vendor in connection with the services provided by vendor and/or licensing the vendor's technology, software, and processes.

44. Customer Data. Address how vendor will treat, access, and/or use your company's customer data.

45. Pricing, Invoicing, Payment, Taxes. Include clear terms in the contract.

46. Also address in detail: data security, business continuity planning (BCP), audit rights, governance, termination, and other areas identified above.

Regulatory Compliance

47. Ensure your company has obtained all necessary governmental licenses and permits and ensure that you have considered all industry specific requirements, including audit rights for regulators as appropriate.

48. Detailed planning of transition the services and work from your company to vendor – include minimum details in contract (attached draft transition plan).

Contract Summary

49. Prepare contract summary for your team for easy and quick reference later.

50. Distribute copies of signed contracts (and SOWs) to your business stakeholders who will manage and implement the contract and have the relationship with the vendor.

Moving Forward with the New Vendor

51. Ensure your company's business owner(s) conduct ongoing monitoring and governance on a regular basis and that they consult with legal on:
- (i) legal review of new SOWs as appropriate,
 - (ii) contract amendments needed, and
 - (iii) documentation and communication to vendor of breaches of SLA's and contract terms.

NOTE: This checklist is not intended to be a comprehensive list of all legal terms and conditions that should be in an outsourcing services agreement. It is a guide and management tool.

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