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Dealing with Vendors and Suppliers: Scope Documents, SOWs, Warranties and Performance Standards, ©2018 Lorman Education Services. All Rights Reserved.

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Dealing with Vendors and Suppliers: Scope Documents, SOWs, Warranties and Performance Standards

Written by Francis X. Taney, Jr.

Scope Documents and Statements of Work

The first area to focus attention in contract drafting is what is often called the “scope document” or “statement of work.” Other terms commonly used include specifications or requirements. Regardless of the nomenclature, these all refer to a written statement that sets forth what the vendor is supposed to do or provide to earn its fee or compensation.

The customer’s goal with respect to that statement is that it should describe the work required of the vendor clearly and without ambiguity. In this context, an ambiguity simply means that one or more reasonable people would or could interpret a writing (i.e., a word, phrase, sentence, paragraph or discussion) in more than one way. Ambiguities often give rise to opportunistic behavior on the vendor’s part, and further, create uncertainty with respect to litigation outcomes.

While every contractual situation is unique, what follows are a number of techniques that if employed will increase the customer’s chances of achieving the necessary clarity. In drafting the statement of work, the customer should draft with the potential ultimate audience in mind. In this case, the potential audience is the “fact

finder:" the judge, jury or arbitrator who may decide the dispute in the event of litigation. This audience will typically not have any familiarity with the parties or the nature of the relationship, and will often lack the expertise to understand the technical issues involved without assistance from the witnesses that the parties offer. Needless to say, the customer must take care to describe the vendor's scope of work in a way that is clear to such an audience.

At a minimum, a scope of work document must describe, in plain English, each aspect or item of work that the vendor should perform. The scope of work should do so in objective, rather than subjective terms. Avoid adjectives and adverbs that are "sales-speak" or that could mean different things to different people. Examples in the technology arena might include "lightweight," "scalable," "customer centric," "easily configurable", "flexible" and the like.

Subjectivity often creeps into contracts where the parties are attempting to describe a division of responsibilities between the parties. Thus, the parties may state that the customer will "support" the vendor's efforts, or "partner", "coordinate" or "facilitate" the vendor's efforts, without specifying where the customer's responsibilities begin and end. A better approach would be to state that the customer's responsibilities in a certain area include the following one, two, or three things or tasks, but that all other efforts remain the vendor's responsibility.

The customer should also avoid using undefined jargon, "undefined" being the key word. While, especially in the context of a highly technical procurement, it is difficult if not impossible to use technical terms in describing a good or service, the customer should take every

effort to define the technical terms in the contract document or by reference to some identifiable external source.

It is sometimes possible to depict the subject matter of the vendor's work in pictures or otherwise graphically. Examples range from construction drawings, equipment diagrams, flow charts, conceptual drawings, and software screen mock-ups. The customer should take the opportunity to do so when it is present. There is the saying that a picture is worth a thousand words; this is true ten-fold in litigation. It is difficult for a vendor to wriggle out of its contractual obligation before a fact finder when the judge or jury can compare a picture of what the product or service was supposed to be or look like with what the vendor actually delivered.

While it is impossible to catalogue all of the best techniques for addressing every conceivable contractual permutation, these techniques are illustrative of the general approach a customer should take. As will be apparent from the discussion in the successive discussions, these techniques have potential application for drafting other portions of the contract.

Warranties and Performance Standards

A closely related issue to clearly defining the vendor's scope of work is clearly defining the performance standards to which the vendor's performance must comply. Contractually, these standards often appear as "warranties," which are the vendor's promises with respect to its performance.

Under the Uniform Commercial Code, which applies to the sale of goods, an express warranty is any affirmation of fact or promise

relating to the goods in question that becomes part of the basis for the bargain. U.C.C. § 2-608. Warranties can also be implied under the U.C.C., as unless the seller expressly disclaims in intent to do so, the seller impliedly warrants that the goods at issue are merchantable, meaning that they are suitable for the purpose to which the goods are typically put. See U.C.C. § 2-314. Where the seller is aware that the buyer intends a particular use for the good, unless the seller specifically disclaims the intent to do so, the seller impliedly warrants that the goods are fit for the particular purpose intended. See U.C.C. § 2-315.

Courts have expressed a variety of views as to whether software provided by vendors by way of development contracts is a service rather than a good, and therefore not covered by the U.C.C. See, e.g., *Arbitron, Inc. v. Tralyn Broadcasting, Inc.*, 400 F.3d 130, (2d Cir. 2005) (holding that it was not clear whether, under New York law, a software license agreement constitutes a contract for the sale of goods, or is otherwise governed by the U.C.C.); *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir.1996) (“[W]e treat [] licenses as ordinary contracts accompanying the sale of products, and therefore as governed by the common law of contracts and the Uniform Commercial Code.”). It is therefore especially important to obtain specific warranties from vendors with respect to software and other services.

As with drafting the scope of work, the customer must strive to express the applicable warranties or performance standards in objective metrics and avoid subject adjectives and adverbs. Often, the business needs giving rise to the procurement provide the material for

the warranties. If, for example, the buyer needed a machine that could produce a certain number of units per time period, then this attribute would be the core of the warranty that the customer would need to include. If the buyer needed a software application that could handle orders from a certain number of concurrent users, then this attribute would be at the core of the required warranty.

In numerous other situations, the vendor itself will provide technical specifications for or descriptions of the vendors' products or services. In these situations, the appropriate warranty, assuming that the specifications or descriptions are sufficiently objective, can come from the vendor itself.

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