

Negotiating a Computer Contract

• Michael Saunders

This article is the first in a three part series dealing with computer contracts. The first part examines the solicitor's role in negotiating a computer contract. The second part will examine the drafting considerations for computer systems contracts and the third part will examine the main areas of risk in computer contracts.

Many people including lawyers wonder why it is necessary to talk about computer contracts at all. After all isn't a contract for the acquisition of a computer system just like a contract for the acquisition of a engineering plant or a motor car? If properly instructed can't any competent lawyer draft an appropriate computer contract?

The "problem" with computer contracts is really a function of two things:

1. The complexity of computer technology; and
2. The relative ignorance of people generally, including lawyers, of computer technology.

Problems with computer contracts often have their beginning with the arrival of a computer salesman. Computer salesman are very friendly people who approach the prospective customer with smiles and order forms and offers to put the customer on a production schedule without obligation. It is explained to the customer that there is a waiting list for the production schedule for computer systems. This will be a welcome

suggestion because the six to twelve month delivery time could be running while the contract details are sorted out later. In fact the contract details take quite a long time to sort out.

Management, in anticipation of the arrival of a new computer system, alters its business arrangements in accordance with an expected delivery date and before long the customer is in a very practical sense committed to buying the computer system on the prospective delivery date. Then the salesman asks for a signature upon the standard contract. Without the signature he explains the customer goes to the end of the production schedule. In one blow the customer has lost the little bargaining position he had and a standard contract is signed. A real risk arises that before long the customer will threaten to litigate on the basis of collateral warranties and misrepresentations. This will be met by the salesman with a comprehensive exclusion of liability clause.

One of my clients assured me that 80% of its customers sign its standard contract containing amongst other provisions a clause that payment in full shall be made when the computer equipment is installed. At the end of the this standard contract, is a clause that the computer equipment is installed when the supplier gives the customer notice saying that it is installed. Fortunately however, customers are fast becoming aware of the need to test the computer system before paying for it i.e. acceptance testing.

Team Approach

Customers buy solutions and suppliers sell equipment. It is therefore important for the customer to find a supplier who commits himself to selling a solution instead of selling problems. To this end,

the customer needs a team approach when it comes to negotiating the contract. The team should include:

1. the customer and his accountant with knowledge of his business and financial affairs;
2. a computer consultant (who could be an accountant with the requisite knowledge) with knowledge of computers; and
3. a lawyer, preferably expert in or familiar with computer contracts.

When the Computer Contract Problems Lead to Litigation

Generally, if the client knows what he wants, gets that, and pays for it, litigation will not result. The most common cause of litigation in relation to computer contracts arises when the product does not live up to the customer's expectations usually for one or two reasons:

1. because the client's expectations are unrealistic or undefined; and/or
2. the salesman has misrepresented the product and in particular sold a computer with inadequate memory in order to obtain a price advantage.

The objectives of a computer contract are to:

- Protect against and provide for consequences of potential disasters;
- Clearly document the agreement between the supplier and the purchaser;
- Define each party's responsibilities;

- Give clear legal and technical descriptions of contractual events;
- Provide quantitative and objective measures of performance;
- Alert the parties to implementation problems; and
- Ultimately provide a means of recourse if difficulties arise.

The Selection Process

The following steps should be taken before considering a computer contract for the acquisition of a computer system:

Feasibility Analysis

Examine your business to determine if the proposed information technology change is economically feasible and technically practical. Define your requirements, including volumes of data to be processed now and in the foreseeable future.

Request for Proposal

Follow the steps listed below:

1. Prepare a request for proposal (RFP) showing full details of your requirements to enable a proper proposal to be prepared by suppliers;
2. List and weight in order of importance the criteria to be used in selecting the computer system, e.g. operating performance, cost, capacity, software quality and quantity, expansibility, modularity, quality and facility of maintenance services, supplier reputation, willingness to negotiate a contract etc;

3. Give the RFP to a least three suppliers;
4. Have a conference with each to clarify the answers contained in their proposals;
5. Evaluate each proposal on the basis of your criteria;
6. Draw your contract specifications;
7. Select and rank suppliers;
8. Decide on the best method to acquire the system, (purchase, lease etc); and
9. Negotiate the contract.

Contract Specification

As soon as the proposals are received make it clear to the suppliers what sort of contract is required by preparing a contract specification. The purpose of the contract specification is to:

- Place the customer at an advantage;
- Show the intent of the parties; and
- Show what type of contract would be ideal for the customer.

The contract specification can be a draft contract or it can be a collection of important and minor clauses. It should include any matters which the supplier has agreed to in his proposal.

It is important that the first contract be prepared by the purchaser not the supplier, as the person who prepares the first draft has the advantage.

In acquisitions of very large systems you can list all of the desirable clauses, weighting them in order of importance

and completing an exposure analysis i.e. listing them as key, significant, minor, unimportant and giving them a risk category rating of anything from 1 to 6 each showing the amount which could be lost as a result of breach in each risk category. This forms the basis for a schedule of clauses to be forwarded by letter to the suppliers.

Part two in the next issue of this newsletter looks at specific agreements for the purchase and maintenance of hardware, and the licensing and development of software.

• *Partner, Westgarth Middletons*

Optical Disk Storage Technology: An Explanation

• *Heather Campbell*

Current Technology – Magnetic Media

Most microcomputers utilize magnetic hard disk drives, often referred to as "Winchester" drives, for the electronic storage of information or data. Information, stored magnetically, is retrieved by means of a read/write head which skims across the surface of the spinning hard disk, locating and retrieving to screen the requested information, data, application or instruction.

These magnetic drives are capable of storing large amounts of information, have extremely fast data access times (generally 18 to 80 milliseconds or less), and are relatively inexpensive.