



Host With the Most

Protect your company and your data with a solid ASP agreement

by Pamela V. Rothenberg

Property managers are increasingly relying on application service providers (ASPs) to deliver the core business systems to operate their assets on a daily basis. One overriding goal is to let the ASP (and not the manager) worry about everything needed to make various applications available and functional. However, a significant loss of control over many key operations presents a risk as managers rely on ASPs to ensure data security and application reliability.

Before outsourcing any functions, managers must carefully analyze the associated business and operational challenges. Consider whether the ASP's data center has adequate bandwidth, redundancy and stability, as well as whether it is secure. Specifically, how will the ASP maintain the confidentiality of mission-critical data and protect against hacking? What types of training and other customer support will be provided? Are the applications to be hosted by the ASP scalable (i.e., can they accommodate more users, growing databases and new applications)?

Property managers should also attempt to incorporate the following key legal protections into any binding agreements they may sign with an ASP:

- **Include precise specifications for the software, detailed service level covenants** and comprehensive vendor software warranties, including

those relating to the ASP's ability to integrate other applications. The goal is to have complete clarity about the software's performance, its exact functionality and services.

- **Secure favorable termination rights—this is essential.** Managers must retain the right to exit from the agreement if the ASP, the software or the process is not meeting expectations. The agreement should include a lengthy due diligence period to evaluate the soft-

How will the ASP maintain the confidentiality of mission-critical data and protect against hacking?

ware and the ASP, and the right of the manager to terminate the agreement without penalty.

- **Spell out the ASP's obligations in sufficient detail.** ASP defaults should include circumstances in which the software is not meeting the stated specifications or is not being deployed in conformity with an agreed upon schedule. The agreement should also include transition protections requiring the ASP to support the software and the company's operations for a rea-

sonable period upon termination of the agreement for any reason.

- **Include specific provisions relating to the rights of the manager to access and protect mission-critical data.** Access should be available 24-7, subject only to ASP-required downtimes specified in the agreement.
- **State how the ASP intends to protect the company's data.** Managers should also obtain an independent right to back up data on separate company servers and computers.
- **Include strict confidentiality protections with respect to data.** The manager should retain all ownership and associated intellectual property rights and the ASP must be expressly prohibited from using, changing, tampering with, sharing or otherwise disclosing data to any party in any form, whether "sanitized" or not, without prior written approval.
- **Eliminate any limitations of liability in favor of the ASP,** but require broad ASP indemnifications for losses the manager may suffer because of the ASP's acts, omissions or breach of contract.

By incorporating provisions into their ASP agreements, managers can better protect the integrity of the business processes the ASP will deliver. □

Pamela V. Rothenberg (prothenberg@wcsr.com) is a member of the Real Estate Development and Real Estate Technology Groups at Womble Carlyle Sandridge & Rice, PLLC.

SCHUMANN: place
Member-Get-A-Member
ad from page 19 of
Mar/April 2004 issue here