



## “Soft” Sell

Protect properties and data with well-crafted, no-nonsense software agreements

by Pamela V. Rothenberg

**W**hen contemplating a change in software applications, it is essential to analyze all potential business and operational challenges and develop a clear understanding of needs and expectations about the software, as well as a precise company-wide deployment plan.

To avoid surprises, be sure to include certain provisions in the software license or purchase agreement. Some protections to consider:

- Confirm software specifications clearly identify its ability to integrate other critical applications, as well as the required hardware and communications systems.
- Include a deployment schedule for installation and implementation.
- Require specific provisions relating to access rights to mission-critical data. The company must be afforded 24-7-365 access rights, subject only to vendor-required downtimes.
- Clarify how the vendor will protect data with back-up systems and redundant networks. The company should also try to obtain its own right to back up data on separate servers and computers.
- Insist on strict confidentiality protections for the company’s data. Prohibit the vendor from using, changing, tampering with, sharing or otherwise disclosing data without prior written approval.

- Require the vendor to identify specific measures to protect the security and integrity of data and operations. Try to shift all security risks to the vendor to assure it will address issues with the highest level of attention.

It is better to have a costly safety valve than no way out.

- Define specific and comprehensive vendor service-level assurances, including technical and training support.
- Insist on detailed vendor warranties, including those relating to the ability to integrate other applications. Verbal assurances must appear in the agreement.
- Include favorable termination rights permitting the company to “exit” if at any point the vendor, software or process is not meeting expectations. The company should be afforded a lengthy due diligence period to fully evaluate the software and vendor and the right to terminate the contract without penalty if this is not completed.
- Enumerate detailed vendor defaults for circumstances when software is not meeting specifications or timely deployment. If separate

agreements are required for each building using the software, insist on a “master” cross default right to concurrently terminate all contracts upon any vendor default.

- Eliminate limitations of liability that favor the vendor and require broad vendor indemnifications in the company’s favor for losses suffered because of vendor acts, omissions or breach of contract.
  - Minimize exposure by obtaining “non-recourse carve-outs” that limit the company’s liabilities to specific properties and not its assets as a whole.
  - Consider a “buy-out” right allowing the company to terminate its relationship by paying a fee. It is better to have an expensive safety valve than no way out.
  - Include transition protections obligating software and operations support for a reasonable period upon termination of the contract for any reason.
- By incorporating meaningful provisions, a manager can prevent contract issues from adversely affecting the integrity of business processes and be better positioned to focus on the operational challenges a software change will trigger. □

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