Negotiating Software License Agreements in a Recession

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Introduction

- Economic cycles
- Important terms
- Practical tips
Economic Cycles

- Contracting is dynamic, not static
- Example → Technology
  - Early 1990s = mild recession = CONCESSIONS
  - Late 1990s (1999!) = FEW CONCESSIONS
  - 2001–2002 = recession = BIG CONCESSIONS
  - 2005 = LESS CONCESSIONS
  - Today = moving back toward 2001–2002
    - Example: 2 vendors signed without revisions
An Example – Warranties

- 1990 → 8
- 1999 → 2
- 2001 → 28
- 2005 → 10 to 12
- Today → 16 (more?)
A Few Important Terms

- Payment terms and fees
- Scope
- Board of Directors Presentation
- Implementation
- Testing
- Training
- Customer Satisfaction Survey
- Warranties
- Disclosure of all software components
Payment Terms and Fees

- Include rate protections
- Pass through third party maintenance and support fee increases at actual cost
- Clearly define time-and-materials service charges
- Tie payment to completion of milestones
- Lower interest on late payments
- All fees clause
Scope

- Know up front what the price includes
- Who is the licensee?
- Flexibility and scalability
- Exclusive license for custom modules
Board of Directors Presentation

- Presented by CIO to get approval
  - Describes the benefits of the project
  - Often written by the vendors
- Problem: contract doesn’t reflect the benefits
- Trend: include stated goals from the presentation in the contract.
Implementation

- Incorporate a detailed project plan and resource plans into the contract before it is signed
- Payment contingent on adherence to delivery schedule
- Limit payment for poorly performed services
- Right to reject or remove vendor personnel
Testing

- Testing period longer than 1 billing cycle
  - Extension if defects are detected

- Well-defined, quantifiable testing standards
  - Complies and functions in accordance with warranties
  - Require vendor to correct defects and retest
  - Right to terminate if defects persist
  - Acceptance occurs only after completion of post-live acceptance testing
  - Terminology of “Acceptance”
Training

- Detailed training schedule in the contract
- Specify who pays (including travel costs)
- Hold back some payment until training responsibilities are complete
Customer Satisfaction Surveys

- CIO compensation increasingly based on results of internal satisfaction surveys
- CIOs are passing this on to software vendors
  - Usually structured as an incentive: greater customer satisfaction \( \rightarrow \) higher license fees
- Issue: vendor designs the survey and analyzes results
  - Allows the vendor to game the survey process to its advantage
  - Better for the parties to agree to survey content prior to signing the contract
Warranties

- Software performance
- Software and data integrity
- Compatibility
- Adequacy of documentation
- IP Warranty
- No sunset
- Cure after breach of warranty
Disclosure of All Software Components

- **Provision:** Vendor represents that it has disclosed all relevant software components that it offers in the contract
  - List must include all modules, add-ons, etc. to the licensed software
  - If list is not complete, vendor must give the missing item to customer at no extra charge

- **Alternative:** List all of the features or components that have been presented to the customer during vendor site visits or product demonstrations.

- **Problem:** During implementation, customer sometimes finds out that additional modules or add-ons are needed for software to function as demonstrated.
Practical Tips in a Recession

- **Vendors:**
  - Offer more low-cost options
    - Pooling is particularly popular
  - Offer discounts for long-term or consolidated contracts
  - Spread out payment terms
    - Long-term benefit: locks in the customer

- **Customers:**
  - Conduct an enterprise review of what you have, what you need and what you will need in the future
  - Take time to negotiate agreements tailored to your needs
Questions

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