Business & Technology Sourcing Newsletter

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Flexible Contracting: Preserving the Ability to Engage in Multi-Process Outsourcing Transactions

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- Outsourcing additional work to existing or new suppliers;
- Using multiple suppliers;
- Transferring functions or processes back to customers or to different suppliers; and
- Maintaining competitive pressure on incumbent suppliers.

Many such provisions are typically found in outsourcing contracts. However, they assume greater importance within the context of MPO transactions because these provisions provide the flexibility to effect the kinds of structural changes that customers often want to make to their outsourcing relationships in connection with MPO transactions.

Outsourcing Additional Work to Existing or New Suppliers

To preserve flexibility in structuring MPO transactions, customers should include terms and conditions in their outsourcing contracts that not only permit, but also facilitate the ability to obtain new services from their existing suppliers. For example, outsourcing contracts should include provisions obligating suppliers to submit proposals for new services at the customer's request. Customers may also want to consider requiring the supplier to perform any new services for which the customer accepts a proposal from the supplier. Statements of work, pricing, service level methodologies, and other contract provisions (e.g., warranties and indemnities) should also contemplate the introduction of new services by extending to and covering such work.

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Conversely, a single supplier may not offer the best solution for all of a customer's outsourced functions and processes. Customers wanting to preserve the flexibility to engage in MPO transactions should also include terms and conditions in their outsourcing contracts that permit and facilitate the ability to obtain services from new suppliers. Customers should resist agreeing to terms and conditions that create exclusive relationships with their chosen suppliers. For example, if the outsourcing contract contains terms and conditions that make it a "requirements contract" with respect to any or all of the services performed under the contract, the customer must obtain all of its requirements for those services from the supplier. Terms and conditions stating that a supplier is the exclusive provider of any services to the customer have a similar effect. Less obvious but just as restrictive are provisions requiring customers to maintain a "minimum spend" with a supplier, or that grant a supplier rights of "first offer" or of "first refusal" with respect to any services. Provisions such as these can hold customers hostage to a single supplier and that supplier's service capabilities.

To ensure that customers always have access to the best solution mix for their needs, outsourcing contracts should expressly indicate that the contract is not a requirements contract and that the customer shall not be required to obtain its requirements for any of the services performed under the contract from the supplier. Likewise, outsourcing contracts should expressly indicate that the supplier is not the customer's exclusive provider of any of the services performed under the contact and that the customer may obtain any services from different suppliers, including services to supplement, replace, or render unnecessary the services performed under the contract. Finally, provisions requiring customers to maintain a minimum spend with a supplier, or that grant a supplier rights of first offer or of first

Another means to cause suppliers to work together is through the use of multi-supplier operating agreements. Essentially, these agreements require a customer's suppliers to solve problems between or among them first, and apportion fault and liability later. For example, multi-supplier operating agreements should require suppliers to cooperate and collaborate on root cause analyses. This helps to ensure that a customer's operations will not degrade as a result of disputes between two or more suppliers. Multi-supplier operating agreements should also establish a common set of terms under which the customer and its suppliers shall interact. Key terms include those addressing governance and dispute resolution, audit rights, compliance with laws, data formats, data interfaces, general architecture and standards, business continuity and disaster recovery, joinder, choice of law, and venue. Provisions like those outlined in the previous paragraph, together with multi-supplier operating agreements, provide customers with the tools to cause their chosen suppliers to work together in a seamless manner.

Transferring Functions or Processes

Along with the right to source additional functions or processes to suppliers, customers should seek the right to transfer them back to itself or to a different supplier without terminating the outsourcing contract. The right for customers to "in-source," or transfer functions or processes back to themselves for performance by their personnel, and "re-source," or transfer functions or processes from one supplier to another, are generally important rights for accommodating changes in customers' business needs. When structuring MPO transactions, these rights are particularly important because they allow customers further flexibility in obtaining the best solution for each of the functions and processes that are outsourced. In addition, if a function or process that was outsourced in a previous transaction would be better-performed by the customer or a different supplier, the customer can transfer that function or process to itself or its chosen supplier. Accordingly, outsourcing contracts should expressly provide that customers have the right to in-source or re-source any functions or processes performed by their suppliers in order to preserve flexibility in structuring MPO transactions.

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For customers to take advantage of these rights, in-sourcing and re-sourcing events should allow customers access to transition assistance services from the supplier from whom such functions or processes are being in-sourced or re-sourced. These transition assistance services should include, if and to the extent requested by the customer, the original supplier's continued performance of the functions or processes being in-sourced or re-sourced, the original supplier's cooperation with the customer and the customer's designees in the transfer of such functions or processes, and the right to obtain any new services to facilitate the transfer of such functions or processes to the customer or a different supplier. Customers should also include terms and conditions that allow them to acquire or obtain licenses to resources and assume third-party contracts used by the original supplier to perform any in-sourced or re-sourced functions or processes. Finally, customers should reserve the right for themselves and their designees to hire (or re-hire) the supplier personnel performing the in-sourced or re-sourced functions or processes to maintain the customer's operations when such functions or processes are transferred.

see "Flexible Contracting" on page 22

2. **Benefits.** In other outsourcing deals, most customers expect to receive the same or better services while saving on costs. Cost savings are measured by the amount that the customer pays the provider for the services. This is often not the case for indirect procurement outsourcing. While an indirect procurement service provider may in fact save the customer money for procurement services, often the customer is more concerned about reducing third-party spend. In fact, some customers are willing to pay slightly more in provider fees in exchange for the promise of reducing third-party spend. Such a counterintuitive approach to cost savings is critical to keep in mind when planning for indirect procurement outsourcing.

It is important for the customer to educate the provider regarding the customer's own internal cost savings and productivity programs, and to integrate them into the agreement with the provider.

3. **What Counts Toward Cost Savings.** Cost savings based on volume consumption models are relatively easy to track. If you spend $100 to turn 1,000 requisitions into purchase orders, and the procurement service provider can do the same work for $85, you save 15%. Tracking, measuring and reporting cost savings on the customer's overall third party spend can be challenging. The methods to track, measure and report cost savings must be well-negotiated and documented in the agreement. For example, the customer and provider should negotiate the extent to which savings generated from the following areas will count toward the provider's savings commitment: 1) *provider productivity improvements* (e.g., an ability to get to just-in-time procurement); 2) *provider investments* (e.g., better spend management software); 3) *cost avoidance* (e.g., better pricing) and 4) *one-time benefits* (e.g., rebates, refunds). It is important for the customer to educate the provider regarding the customer's own internal cost savings and productivity programs, and to integrate them into the agreement with the provider.

4. **The Promise (and Commitment) of Cost Savings.** Unlike other outsourcing deals, the potential of cost savings on third party spend in indirect procurement outsourcing deals far exceeds the value of the procurement services purchased. Cost savings on third party spend can run in the millions to hundreds of millions of dollars. Since most providers will not guarantee those savings dollar for dollar, it is important to structure the agreement so that the provider has incentives to achieve cost savings. Service levels and credits are one way to do this. Guarantees of a portion of savings are another. Gain sharing — where both parties benefit from reductions in third party spend — is another commonly used method in procurement outsourcing. The rules for calculating and providing gain sharing require careful negotiations and documentation in the agreement.

Compliance with Law in Hedge Fund Outsourcings

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Hedge funds face a complex set of legal and quasi-legal requirements that have significant impact on their operations, despite the conventional wisdom that they operate in a relatively "unregulated" environment. These requirements must be addressed with care in outsourcing contracts in order to properly allocate compliance responsibilities between service providers and the funds. This is true whether the outsourced services involve information technology or business processes.

Some legal requirements apply to any outsourcing, irrespective of the services being outsourced or the customer's industry. These requirements include laws generally applicable to the services themselves as well as laws specifically applicable to the service provider. With regard to laws applicable to the outsourced services themselves, information technology outsourcings have historically operated in a relatively light regulatory environment. Business process outsourcings services, on the other hand (such as those involving finance and accounting or human resources services), often involve more significant legal and regulatory considerations and heightened regulatory scrutiny. With regard to laws applicable to the service provider, compliance requirements range from licensing and authority-to-do-business issues to those directly impacting service performance, such as health and safety and environmental regulations and data safeguarding requirements.

Beyond those legal requirements generally applicable to any outsourcing, many outsourcing customers face legal obligations resulting from their particular industry and their own unique characteristics. Hedge funds (despite their noted "unregulated" nature) certainly face direct legal obligations. Further, and even more significantly, hedge funds must deal with many compliance requirements that are applicable to other parties that are part of the fund's operating environment. An example of such indirectly applicable requirements is the compliance obligations faced by the fund's investment advisor, its broker-dealers, and its clearing banks. These parties face distinct, and often significant, legal and regulatory requirements that necessarily impact the fund's operations. In addition, the demands of fund investors, as well as other business environment realities, result in a variety of self-imposed operational requirements that function effectively as (and in some cases may actually become — through fraud claims, for example) legal requirements.

These legal issues place significant demands on the outsourcing contract. The contract must provide mechanisms to allow the hedge fund operator to monitor and confirm compliance, and to address instances of compliance failure.

Contract provisions governing compliance with law matters must balance the requirements of the customer and the capabilities of the service provider. These provisions carry financial and business ramifications extending far beyond price and scope of the outsourced services. The potential risk to the customer of failed compliance is tremendous, and may include significant liability, as well as disruption of services essential to the customer's business. These contract provisions must address the parties' respective duties and responsibilities, while affording the customer the necessary assurances, visibility, and control to allow it to undertake the outsourcing engagement.

- Data protection and privacy laws;
- Gramm-Leach-Bliley Act (and its implementing regulations);
- Anti-money laundering requirements under the Patriot Act; and
- Foreign Corrupt Practices Act.

Finally, the definition of laws should reference appropriate quasi- or extra-legal authorities or practices, including those of self-regulatory organizations, that should be treated equivalently to laws for purposes of the service provider's contractual performance. Examples of these may include:

- The Rules of the National Futures Association;
- Generally accepted accounting principles (GAAP), as such principles and standards may be modified during the contract term by the Public Company Accounting Oversight Board or other applicable authorities; and
- Elected performance measurements, such as the Global Investment Performance Standards.

Service Provider's Obligation to Comply With Applicable Laws

In the case of a hedge fund outsourcing, it is particularly important that the contract clearly define applicable laws to include those of indirect applicability to the fund.

Fundamentally, the service provider's obligation to comply with all applicable laws must be clearly and unequivocally expressed in the contract. Often, outsourcing contracts position this obligation by simple reference to "applicable laws." In the case of a hedge fund outsourcing, it is particularly important that the contract clearly define applicable laws to include those of indirect applicability to the fund.

Failure of the service provider to comply with applicable laws may carry the risk of penalties, fines, or even interruption of business services. Further, in the case of an indirectly applicable law, the service provider's failure can adversely impact the fund's supporting organizations. In view of the fundamental significance of these risks, the outsourcing customer is often reluctant to leave this obligation subject to broader contractual defenses and so this commitment by the service provider is typically expressed to include a "warranty" commitment.

Two clarifications or qualifications to this service provider warranty are sometimes raised. First, the service provider may insist that its compliance warranty be subject to some level of duty on the customer's part to identify the particular laws applicable to the customer's business or industry. This is especially relevant with hedge fund customers because of the complex tangle of regulatory considerations involved in that business. Second, in the event of an actual dispute between the parties respecting interpretation of a legal requirement, the service provider may seek relief from its warranty if the service provider disputes a customer-required interpretation that is ultimately determined to be wrong.

Customer's Commitment to Comply With Applicable Laws

The service provider sometimes requests a reciprocal compliance with law commitment from the customer. Although not actually a reciprocal issue in this context, the customer often is willing to negotiate such an assurance as it is a trade carrying relatively limited risk.

of law, but opportunity clearly remains for the service provider to bring practical day-to-day value to the customer in this area. Ultimately, this is an area of important collaboration and close cooperation between the customer and service provider. The success of this collaboration and cooperation may well be the determining factor in the overall success of the compliance effort.

Scope of the Service Provider's Responsibility for Fines and Penalties

The outsourcing contract should specifically address the possibility of fines, penalties, sanctions, and other claims resulting from the service provider's failure to meet its compliance obligations. Often, the customer will require some level of indemnification from the service provider with respect to such a failure, with the indemnity excluded from general liability limitation, or else subject to a specifically defined liability scope that adequately accounts for the risks and exposures. Additionally, the customer may seek an express acknowledgement in the contract that such claims constitute direct damages and are therefore not excluded by any indirect damages exclusion. In each case, the service provider's liability is defined within the context of the parties' respective obligations and responsibilities related to compliance with law.

The outsourcing contract should specifically address the possibility of fines, penalties, sanctions, and other claims resulting from the service provider's failure to meet its compliance obligations.

Additional Compliance with Law Considerations

In addition to the foregoing issues, the outsourcing contract should address a number of related considerations, including:

- service provider support for the customer's general legal compliance efforts, such as regulatory filings, audits, and even investigations;
- specific compliance descriptions (as services or activities) addressing specifically applicable laws (for example, known privacy and data protection law requirements, export control requirements, labor laws, tax laws, and laws applicable to offshore outsourcings); and
- participation of service provider personnel in appropriate customer provided or facilitated compliance training programs.

Finally, the contract must provide the customer with flexible rights and effective mechanisms to manage the service provider's support in meeting the requirements of current and future laws, as, and in the manner that, the customer deems appropriate and necessary. These rights and mechanisms should be reflected throughout the contract, from the service level methodology, to the ability to reprioritize the services and activities of the service provider, to the availability and viability of new services and ultimately to the ability to terminate the contract if and to the extent deemed appropriate.

Conclusion

Issues related to compliance with law are serious and challenging and must be effectively addressed in any hedge fund outsourcing arrangement. Through careful analysis and negotiation, customers and service providers can resolve these issues in a balanced and responsible manner. Such resolution is critical to a successful outsourcing relationship.

The Rules

SYSC 8.1 sets out binding rules that a firm must observe in relation to outsourcing of critical or important functions. This is a change from the existing position under which there is simply guidance to be followed by a firm proposing to enter outsourcing arrangements. In many respects the rules are no different from the current guidance and are consistent with good practice in any sizeable outsourcing arrangement.

The firm will have to be satisfied that it has chosen a supplier with the ability, capacity, and requisite authorizations to carry out the outsourced services–a due diligence obligation. A firm will also be required to have reporting and supervision mechanisms in place through good governance, reporting obligations, and service-level commitments. Other obvious areas such as disaster recovery and continued ability to provide the services in the event of termination for poor service or otherwise are covered by specific rules.

In many respects the rules are no different from the current guidance and are consistent with good practice in any sizeable outsourcing arrangement.

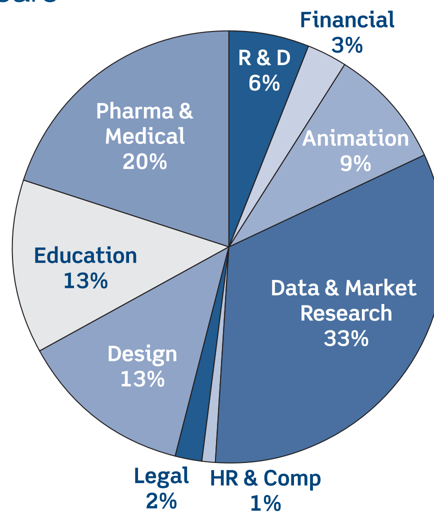
A new rule requires the firm to retain the necessary expertise to supervise the outsourced functions effectively and manage the risks associated with the outsourcing. A firm will need to consider carefully just how much resource is required to manage and supervise the outsourced functions and, in fact, to manage the risk. This risk will cover not just the way in which the service provider provides the service, but will also involve an assessment of the risks arising from the way in which the firm itself interfaces with the service provider. A light will be shone on a particularly dark area for the management of outsourcing relationships. This is a reflection of the shift in emphasis in the new rules towards a regime that looks at risk to the activities of the firm and its customers rather than control of particular situations as in the "material contracts" approach to supervision.

The new rules will generally remove the need for prior notification to the FSA before outsourcing. Where portfolio management for retail clients is being outsourced to a service provider located outside the EEA which is not regulated in its home country and/or there is no cooperation agreement between the FSA and the home regulator of the service provider, prior notification will still be required. Under the new rules, when notified, the FSA will have a reasonable time–interpreted as meaning one month–in which to make observations on the proposed arrangements.

see "Impact of MiFID" on page 21

has a large reservoir of English-speaking, knowledge-based professionals[3] who are available at extremely competitive salaries, and a rapidly evolving legal and regulatory environment that is based on a western model and is increasingly friendly to foreign investment.

KPO India – Next 5 Years



Unlike ITO and BPO, which are almost exclusively cost-based and benefit from a virtually unlimited, relatively quickly trainable labor pool in developing countries such as India and China, KPO depends on a more limited, albeit currently vast, resource of highly-skilled, educated workers.

Unlike ITO and BPO, which are almost exclusively cost-based and benefit from a virtually unlimited, relatively quickly trainable labor pool in developing countries such as India and China, KPO depends on a more limited, albeit currently vast, resource of highly-skilled, educated workers. These workers, over time, will certainly demand more economically rewarding compensation packages as competition for their skills increases.[4] Successful KPO participants, accordingly, should not only leverage existing resources but should also consider investing, and visibly participating, in education and training systems in an effort to assure a predictable future supply of highly-skilled workers[5] and to develop first-mover branding of the company in Indian society, as many companies (Microsoft, GE, and American Express, to name a few) already are doing. Because of this market timing consideration inherent in tapping into India's increasingly developing worker base, first mover considerations are therefore not insignificant with respect to KPO strategy.

The future prospects for KPO in India are immense because KPO is applicable to multiple industry sectors in which India's highly-skilled workers and technically educated professionals have developed particularized expertise. These sectors include finance, pharmaceuticals, healthcare, biotechnology, insurance, electronics, software, aerospace, automotive, textiles, industrial machinery, entertainment, media and publishing, education, law, and engineering. A number of U.S. businesses have already made successful forays into the KPO domain in India to leverage India's "knowledge class," including GE, IBM, Microsoft, HP, Intel, Oracle, Cisco, Texas Instruments, Sun Microsystems, Philips, Motorola, JP Morgan, Citigroup, McKinsey, Goldman Sachs, Reuters, Morgan Stanley, United Airlines, Ford, General Motors, and Caterpiller. Not only will many of these businesses likely expand their KPO operations in India, but a host of new entrants will assuredly also seek to leverage India's growing KPO sector.

vendors, or what can be called "Third Party KPO," and (iii) partnering with local entities to share control of local operations used for delivery of KPO services, or "Joint Venture KPO." Each model has its own advantages and risks, and should be evaluated carefully so as to identify and assess the relative pros and cons for a particular KPO strategy. Businesses should adopt different delivery models for different situations, taking into account variables such as the nature and scope of the activities to be offshored, previous offshoring experience, concerns about security and control of intellectual property (IP), risk tolerance, tax considerations, and budgetary constraints.

For example, Third Party KPO can be more quickly implemented and often can offer greater flexibility in access to talent, scalability and cost structure. But it also yields to the third party more control over day-to-day operations and the handling of sensitive data and IP, and creates more reliance on the foreign host country's legal regime and the timely enforcement of contracts. In comparison, a Captive KPO model usually requires more time to implement and provides less flexibility to ramp up or down quickly, but it ensures substantially more control over the management of the offshore operations and the company's sensitive data and IP, and less dependence on foreign enforcement of contract rights. A KPO customer should consider adopting the Captive KPO strategy if the scope of KPO involves a substantial transfer to India of the customer's critical proprietary technology, IP, or data, and the enterprise cost of possibly losing control over some meaningful component of any of those assets is high.

In India, KPO initially took hold in captive centers through the establishment of local subsidiaries and reportedly over 50 percent of offshore business in India is currently Captive KPO. But as the Indian KPO market matures and the business, legal and regulatory environment there continues to advance and stabilize, businesses can be expected to increasingly leverage the Third Party KPO model in light of the advantages that model offers in terms of flexibility, scalability, and range of expertise.

Regardless of the delivery model, KPO invariably requires the customer to disclose and share knowledge-intensive processes with the offshore provider, which knowledge may be in the form of proprietary technology, software, chemical entities, specifications, product designs, business processes, methodologies, drug formulations, or other sensitive data. Accordingly, the substantial benefits that KPO in India offers must be seen as "hand in hand" with the unique and heightened risks inherent in the transfer of customer-owned knowledge to India. These risks must be carefully considered upfront and mitigated to realize the full benefit of KPO to India.

Conclusion

KPO to India cannot only yield enormous cost savings and increased efficiencies but can also leverage India's vast knowledge class to perform "high end" skill- and judgment-based services and functions. The potential KPO customer must be aware, however, that KPO presents a number of risks, particularly with regard to controlling intellectual property and protecting sensitive data, that must be considered and addressed. These risks can be managed, however, through appropriate due diligence, planning, and a well-crafted KPO contract that properly identifies and addresses the risks and provides real and practical protections and enforcement mechanisms.

Endnotes

1 Study conducted by Evalueserve in 2004.

2 *Knowledge Process Outsourcing (KPO) — An Emerging Opportunity*, Kelly Services White Paper, July 2006.

3 India produces 441,000 technical graduates, nearly 2.3 million other graduates and more than 300,000 postgraduates every year. A Survey of Business in India in *The Economist*, June 3, 2006.

4 A Deutsche Bank research report published in October 2005 reports that wages for skilled workers in India are rising on an average by 12-15% per year.

5 The National Association of Software and Service Companies (NASSCOM) predicts that the Indian IT sector faces a shortfall of 500,000 professionals by 2010 that threatens India's dominance of global offshore IT services. *Financial Times*, July 20, 2006.

6 The Patents (Amendment) Act, 2005.

7 A Survey of Business in India, *The Economist*, June 3, 2006.

This danger was particularly demonstrated in 2003, when a medical transcriber in Pakistan threatened to post patients' private records online unless the University of California San Francisco Medical Center (UCSM) paid wages owed to her by the U.S.-based company that had sent the work to Pakistan. UCSM had outsourced the processing of the medical transcripts to a U.S.-based company that had, in turn, outsourced records to yet another domestic company. The second outsourcing company then sent the work to Pakistan for processing. It was the Pakistani company's employee who threatened UCSM. In a similar case, an Ohio-based company, Heartland Information Services, received emails from its own employees in India (this type of arrangement is commonly called "offshoring" because while the task is being performed elsewhere, the same company is in charge of the process) attempting to extort cash from the company by threatening to publicly disclose confidential information.

The UCSM case illustrates the need for developing appropriate vendor monitoring policies. Several steps are essential. First is identifying all vendors that receive sensitive information. Second is developing contractual protections that hold the vendors liable for secondary outsourcing. And third is continuous monitoring and updating of these procedures. The Heartland case, while not involving outsourcing to a vendor, similarly stresses the need for oversight of outsourced processes.

In an effort to gain the trust of business communities worldwide, the recipients of outsourcing work are improving internal safeguards in order to better avoid security breaches. Recently, the National Association of Software and Services Companies (NASSCOM), the organization representing India's information and technology services industry, announced its intention to create a "self regulatory organization" to oversee best practices in India's $20 billion "back office" services sector. The United States is the largest source of those revenues, and the proposed measures are aimed at addressing concerns in the United States about the risks associated with breaches of security. Of course, regulation has its limits in countries where outsourced work is performed by many small companies that can easily escape the nascent regulatory process, assuming one is implemented. Enforcement, including prosecution of individual employees who engage in illegal conduct, is also unlikely to be on par with what many businesses from the developed countries are familiar with. One proposed solution by NASSCOM is to launch a registry to help employers track the employment history and education qualifications, among other information, of workers.

Recently, the National Association of Software and Services Companies (NASSCOM), the organization representing India's information and technology services industry, announced its intention to create a "self regulatory organization" to oversee best practices in India's $20 billion "back office" services sector.

"Flexible Contracting" continued from page 4

Absent the right to receive transition assistance services, acquire or obtain licenses to such resources and assume such third party contracts, and hire or re-hire supplier personnel, customers run the risk that in-sourcing and re-sourcing events could leave them scrambling in order to continue to obtain their requirements for any in-sourced or re-sourced functions or processes without degradation or interruption.

Maintaining Competitive Pressure on an Incumbent Supplier

Customers should also include provisions in their outsourcing contracts that allow them to maintain competitive pressure on their incumbent suppliers. Two of the primary benefits these provisions afford customers are the comfort of knowing that their outsourced solutions remain competitive with other offerings available in the marketplace, and the ability to avoid transferring functions and processes to different suppliers, with the attendant hassles and switching costs that result from such transfers. Considered within the context of MPO transactions, these provisions increase flexibility by encouraging a customer's incumbent suppliers to remain viable alternatives to transferring functions and processes back to the customer, or to different suppliers, and procuring new services from different suppliers.

One of the primary provisions for maintaining competitive pressure are those allowing (but not requiring) customers to obtain new services from their incumbent suppliers. It goes without saying that suppliers want new business from their customers. If a customer is not required to obtain its requirements for new services from its existing suppliers (see discussion above), then, to win new business, suppliers are motivated to perform their current scope of services at or above the requirements for such services and to provide competitive proposals for new services. Another set of terms and conditions that maintain competitive pressure are benchmarking provisions that permit customers to measure the performance of their incumbent suppliers, including the cost, quality and availability of the services they provide. If a supplier's services are found to be lacking in any of these respects, then the outsourcing contract should provide that any relevant terms and conditions will be equitably adjusted at the customer's option in order to remain competitive with prevailing terms offered in the industry. Similarly, customers may want to seek the right to terminate an existing outsourcing contract if the existing supplier does not agree to provide the services it is then providing under that contract on the terms and conditions being offered by a different supplier. Rights to renegotiate pricing due to extraordinary events (e.g., mergers and acquisitions) affecting the customer's business provide a further tool to maintain competitive pressure on incumbent suppliers. These types of provisions all allow customers to maintain leverage over incumbent suppliers, and enhance the flexibility to structure MPO transactions by encouraging incumbent suppliers to keep their service offerings competitive over the life of the outsourcing contract.

Conclusion

MPO transactions are gaining traction in the marketplace, and call for a new approach to contacting, operating, and governing outsourcing relationships. One of the keys to preserving flexibility in structuring MPO transactions is to include terms and conditions in existing outsourcing contracts that maintain flexibility. Provisions that give customers the flexibility to re-structure their outsourcing relationships enable them to accommodate the changes that accompany MPO transactions, and can be invaluable for ensuring the success of these transactions. Customers that do not preserve flexibility in their outsourcing contracts may not be able to obtain access to the best practices and cost efficiencies that MPO transactions can offer.

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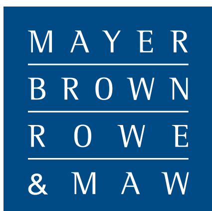

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