

Software Contracts and Liability

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Introduction

- A contract is simply an agreement between two or more persons that can be enforced in a court of law.
- The parties involved may be legal persons or natural persons.
- There is no specific form for a contract in particular

Fixed Price Contracts for Bespoke Systems

- The first type of contract we shall consider is the type that is used when an organization is buying a system configured specifically to meet its needs.
- Such systems are known as tailor-made or bespoke systems.

- A bespoke system may consist of a single PC equipped with a word processor, a spread sheet, and a set of macros adapted to the customer's needs or it may consist of several thousand PCs spread across 50 offices in different parts of the world, connected by a wide-area network, with large database servers and a million lines of specially written software.

- Typically, the contract for the supply of a bespoke system consists of three parts:
 - A short agreement, which is signed by the parties to the contract: This states who the parties are and very importantly says that anything that may have been said or written before does not form part of the contract.
 - The standards terms and conditions, which are normally those under which the supplier does business; and
 - A set of schedules or annexes, which specify the particular requirements of this contract, including what is to be supplied, when it is to be supplied, what payments are to be made and when and so on.

What is to be produced

- It is clearly necessary that contract states what is to be produced.
- There are usually two levels of reference here: the standard terms and conditions refer to an annex and the annex then refers to a separate document that constitutes the requirements specification. It is important that the reference to the requirements specification identifies that document uniquely; normally this will mean quoting a date and issue number

What is to delivered

- Producing software for a client is not, usually, a matter of simply handing over the text of the program which does what is required
- The following is a non-exhaustive list of possibilities:
 - Source code
 - Command files for building the executable code from the source and for installing it;
 - Documentation of the design and of the code

- Reference manuals, training manuals and operations manuals:
- Software tools to help maintain the code;
- User training
- Training for the client's maintenance staff;
- Test data and test results

Ownership of Rights

- It is important that the contract should also state just what legal rights are being passed by the software house to the client under the contract
- Ownership in physical items such as books, documents or disks will usually pass from the software house to the client, but other intangible rights, known as intellectual property rights, present more problems.

Confidentiality

- It is almost inevitable that, when the major bespoke software system is being developed, the two parties will acquire confidential information about each other. The commissioning client may well have to pass confidential information about its business operation to the software house.

Payments Terms

- The standard terms and conditions will specify the payment conditions, that is something along the lines of :
Payment shall become due within thirty days of the date of issue of an invoice. If payment is delayed more than thirty days from the due date, the company shall have the right, at its discretion, to terminate the contract, or to apply surcharge at an interest rate of 2% above the bank base lending rate.

- It would be unusual, in a project of any significant length , for all payment to be delayed until the work is complete and accepted. An annex will usually specify a pattern of payments such as the following:
 - An initial payment of say, 15% of the contract value becomes due on signature of the contract;
 - Further stage payments become due at various points during the development, bringing the total up to say, 65%
 - A further 25% becomes due on acceptance of the software
 - The final 10% becomes due at the end of the warranty period

Calculating payments or delays and changes

- It happened not frequently that progress on the development of a piece of software is delayed by the failure of the client to meet obligations on time.
- The contract must specify the process by which these extra payments are to be calculated. Typically, an annex will include daily charging rates for each grade of staff employed on the contract and the amount of extra effort to be paid for will be agreed at progress meeting

Penalty clauses

- The previous subsection dealt with compensation for delays caused by the client; delays caused by the supplier are handled differently
- The normal mechanism used is to include a penalty clause that provides that the sum payable to the supplier is reduced by a specified amount for each week that acceptance of the product is delayed, up to certain maximum.

Obligation of the client

- In almost all cases where work is being carried out for a specific client, the client will have to fulfill certain obligations if the contract is to be completed successfully. The following is a list of possibilities:
 - Provide documentation on aspects of the client's activities or the environment in which the system will run;
 - Provide access to appropriate members of staff
 - Provide machine facilities for development and testing
 - Provide data communications facilities to the site

Standards and methods of working

- The supplier is likely to have company standards, methods of working, quality assurance procedures, and so on, and will normally prefer to use these

Progress meeting

- Regular progress meetings are essential to the successful completion of the fixed price contract and it is advisable that standards terms and conditions require them to be held .
- The minutes of the progress meetings, duly approved and signed, should have contractual significance in that they constitute evidence that milestones have been reached and that delay payments have been agreed.

Project managers

- Each party needs to know who, of the other party's staff, has day-to-day responsibility for the work and what the limits of that person's authority are.
- The standard terms and conditions should therefore require each party to nominate , in writing, a project manager.

Acceptance procedure

- Acceptance procedures are a critical part of any fixed price contract for they provide the criteria by which successful completion of the contract is judged.
- The essence of the acceptance procedure is that the client should provide a fixed set of acceptance tests and expected results and that successful performance of these tests shall continue acceptance of the system.

Warranty and maintenance

- Once the product has been accepted, it is common practice to offer a warranty period of , typically, 90 days.
- Any errors found in the software and reported with in this period will be corrected free of charge.

Inflation

- In lengthy projects or projects where there is a commitment to long-term maintenance, the supplier will wish to ensure protection against the effect of unpredictable inflation.
- To handle this problem, it is customary to include a clause which allows charges to be increased in accordance with the rise in costs.

Indemnity

- It could happen that, as a result of the client's instructions, the supplier is led unwittingly to infringe the intellectual property rights of a third party or that, through carelessness or dishonesty, the supplier provides a system which infringes such rights-perhaps through using proprietary software as a component of the system delivered.

Termination of the contract

- There are many reasons why it may become necessary to terminate a contract before it has been completed.
- It is not uncommon, for example, for the client to be taken over by another company that already has a system of the type being developed, or for a change in policy on the part of the client to mean that the system is no longer relevant to its needs.

Arbitration

- Litigation is always expensive and the people who benefit most from it are usually lawyers.
- Contracts often therefore contain a clause saying that, in the event of the dispute that they cannot solve themselves, the parties agree to accept the decision of an independent arbitrator.

Applicable Law

- Where the supplier and the client have their registered offices in different legal jurisdictions or performance of the contract involves more than one jurisdiction, it is necessary to state under which laws the contract is to be interpreted.

Consultancy and Contract Hire

- Contract hire is an arrangement in which the supplier agrees to supply the customer with the services of a certain number of staff at agreed daily or hourly charge rate.
- Either party can terminate the arrangement at fairly short notice

- Consultancy is essentially an up-market version of contract hire.
- Consultants are experts who are called in by an organization to assess some aspect of its operations or its strategy and to make proposals for improvements .
- There are four important aspects of a consultancy contract
 - Confidentiality
 - Terms of reference
 - Liability
 - Who has control over the final version of the report

Time and Materials

- Time and material contract is somewhere between a contract hire agreement and a fixed price contract.
- The supplier agrees to undertake the development of the software in much the same way as in a fixed price contract, but payment is made on the basis of the costs incurred, with labour charged in the same way as for contract hire.

Outsourcing

- Outsourcing, sometimes known as facilities management, is the commercial arrangement under which a company or organization hands over the planning, management and operation of certain functions to another organization .
- IT outsourcing contracts are inherently complex and depend very much on individual circumstances.

- It is not appropriate to go into detail here about such contracts but the following is a list of just some of the points that need to be addressed;
 - How is performance to be monitored and managed;
 - What happens if performance is unsatisfactory;
 - Which assets are being transferred;
 - Staff transfers;
 - Audit rights;
 - Contingency planning and disaster recovery;
 - Intellectual property rights in software developed during the contract;
 - Duration of the agreement and termination provisions

License Agreements

- When customers buy some software, they are buying a copy of the software together with the right to use it in certain ways.
- There are many different types of restrictions that a license agreement may place on the extent to which a customer can use the software

- Here are some examples:
 - A licence may allow the licensee to use one copy of the software on his computer. This is the type of licence commonly granted when software such as a computer game is purchased from a retail outlet.
 - A licence allow the licensee to run as many copies of the software as he wishes on computers at specified premises . This known as the site licence

Liability for Defective Software

- Suppliers of software and hardware are very reluctant to give a contractual commitment that it is fit for any purposes whatsoever.
- Standard terms and conditions will invariably contain a clause that tries to limit the supplier's liability if it turns out that the software or hardware is defective.

Health and safety

- The Health and Safety at work act completely changed the approach to safety in Britain.
- European thinking was also affected by the Act and there has been fruitful exchange of ideas.