



REAL WORLD OR VIRTUAL WORLD?

Choosing An Appropriate Service Level Contract

A business that buys services needs to be sure that the contract chosen protects the business and ensures that it gets what it pays for. But services contracts are not “one size fits all.” The checklist below is designed to highlight some of the major issues that should be considered in contracts for physical services (“real world” services, such as cleaning or janitorial services) as compared to contracts for software services (“virtual services”, such as access to an Internet service). **If you are using a “real world” contract for virtual services, you may be missing out on valuable protections for your business.**

Issue	Real World	Virtual World
Quality of Services	A contract for physical services should specify that services will be provided diligently, in a workmanlike manner, and with at least reasonable skill and care. The buyer should have the right to inspect the quality of the work.	For software services, concepts such as “diligence” and “reasonable care” have limited usefulness, because what the buyer really wants is to know that the software service will provide the functions advertised by the vendor. The contract should specify that the software service will meet its published specifications or user documentation.
Place of Service Delivery	A physical service contract may need to specify where services will be performed. Are these “on premise” services that need to be performed at your site (such as janitorial services) or “off premise” services, such as accounting services that you expect your accountant to perform in his own office?	Software services can be provided from almost anywhere, and so location of the services is probably irrelevant (unless regulatory issues restrict data storage to a particular jurisdiction). What matters most to the buyer is access to the vendor’s service, through the Internet or other technical means.
Time for Service Delivery	A contract for physical services may need to specify when services are delivered, such as only inside or outside usual business hours. Timing issues may be relevant principally to delivery of specific deliverables within a fixed deadline.	Software services are often required to be constantly available, and buyers should request a “service level agreement” that will give them assurance of satisfactory uptime for the services (with reasonable downtime for scheduled maintenance) and responsiveness for support services.
Site Issues	The buyer may wish to require that vendor employees working at the buyer site comply with buyer workplace policies.	Buyer workplace policies may not be relevant, as the vendor’s workers are offsite and should be subject to the vendor’s own policies.
Employment-Related Issues	If vendor employees will work at the buyer site, there may be a risk of the employees being characterized as the buyer’s own employees. The contract should ensure that the vendor takes responsibility for all employment-related responsibilities, including salaries, wages, social security and benefits.	As the vendor’s employees are remote from the buyer and are generally engaged in services that the buyer would not provide itself, employment issues probably do not need to be addressed.
Confidentiality, Data Ownership and Security	Many contracts designed for “real world” services will omit data provisions entirely. The contract may include a confidentiality provision, in case the vendor will come into contact with confidential information, but in a “real world” contract this will usually be narrower in scope than the equivalent provision in a software services contract.	Data is the lifeblood of a software service, and the service contract should address data ownership and usage rights of both parties. More importantly, as the vendor will have copies of the buyer’s data, the contract should cover the vendor’s data security and disaster recovery obligations. Confidentiality protections should be more robust in a software services contract.
Data Recovery	Not relevant to real world services contracts, so often not covered.	The buyer should ensure that the contract covers how the buyer will obtain copies of its data when the contract ends.

Risk and Indemnities

A contract for physical services should deal with the primary risks arising from physical service performance, including:

- Liability for non-performance of services
- Bodily injury, death and physical property damage, and related liabilities
- Theft
- Automobile injuries

Risks relevant to software services contracts are quite different to physical services, although liability for non-performance of services remains an issue. The vendor's workers are not on the buyer's premises, so many of the usual risks probably don't apply. Confidentiality and data risks are primary, as discussed above. In addition, the buyer should ensure it receives protection from intellectual property infringement claims arising from use of the vendor's service. This is an issue that may not be covered in a physical services contract.

Insurance

The insurance requirements in a contract should vary according to the risks involved. In a "real world" contract, insurance should probably include workers compensation insurance, automobile insurance (if automobiles are involved in provision of services) and commercial general liability protection (which should provide coverage for liability arising from physical injuries and damage caused by the vendor).

Insurance covering death, bodily injury and physical property damage is unlikely to be particularly relevant. The buyer should consider the nature of the data stored by the vendor. Does commercial general liability insurance cover the risks, or should cyber liability insurance be purchased?

DISCLAIMER

The above table is designed to highlight major issues for consideration and to contrast physical and virtual services, and does not purport to be a comprehensive guide to all issues that might arise or should be considered in a contract for physical services or software services. Attorney advertising. Prior results do not guarantee a similar outcome.

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