

DO-IT-YOURSELF LEGAL REVIEW PART 1: A GUIDE FOR HELPING BUSINESSES EVALUATE TERMS

Your vendor just sent you a quote to let you obtain the software that you need, and it contains a link to the vendor's standard terms and conditions. If it's a seven-figure or eight-figure deal, one can assume that the vendor had the good sense to send you an editable version of the contract and that you're working with an attorney as a rule. But when it's not obvious whether negotiation of terms is worth it, or you're wondering whether it makes sense to engage an attorney to evaluate or negotiate the agreement, it may help to have a better idea of how attorneys think about these terms.

This is the first post in a multi-part series to do just that. The series should help buyers better understand the terms of software contracts and work more efficiently with the attorneys who help negotiate them. We'll start with something very basic that can be easily overlooked: the parties to the deal.

Modern enterprises are often collections of corporations and limited liability companies that are related to each other through common ownership. Is the particular entity that you have authority to bind listed as the customer? Imagine you're doing a one-off deal with some vendor who doesn't know your organization. When the salesperson enters your organization's information into the vendor's quote-generation system, is the information entered exactly what you told the salesperson, or did you not tell them the intended party? Unless you educate the vendor on the intended purchaser, how will the salesperson know that you're buying something for ACME Americas, LLC rather than ACME Global, Inc.?

The problem of using the wrong party can cut the other way as well. You may have been told that ACME Global, Inc. has a master agreement in place with the vendor, so you don't have to worry about anything but the price. But is the master agreement binding on ACME Americas, LLC? Is it binding on the particular vendor entity that is selling you this product? Customer entities are not the only ones that can have complex organization structures. In the event of a dispute, you may find that the vendor says something like *that master agreement is with Vendor, Inc., but we're Vendor Affiliate LLC, a completely different entity that is not bound by that master agreement*. That is effectively what happened to a tax preparation business in its breach of contract claim involving software that it had licensed, resulting in its claim being dismissed after much litigation. See *DWOC, LLC v. TRX All., Inc.*, 156 So. 3d 978, 983 (Ala. Civ. App. 2014).

PRACTICAL TAKEAWAYS

All of this commentary applies to any commercial contract – it's important to get the parties right. But in the software context, you have to think about how the software will be used within the customer organization. Do the customer's rights extend to ACME and all of its affiliates, or would use by the affiliates be a breach of the agreement? Does the vendor intend to charge additional fees as affiliates are brought into the deal? Party identification and enterprise structure are related issues that can change the economics of a deal if the terms do not match your expectations, so they should be kept in mind in evaluating applicable terms.

For more information on this topic, please contact your regular Hall Render attorney.

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