



Exploring Complexities of Contract Negotiations – Southern Style

By John Yates, Special To LTW

Editor's note: John Yates, head of the technology practice of Morris, Manning & Martin, LLP, is a regular contributor to Local Tech Wire.

ATLANTA - Negotiating a computer contract has always been challenging, but in 2003, the obstacles have increased. Especially for entrepreneurial tech companies in the Southeast, your negotiating leverage may be limited. Therefore, you'll need to know some of the recent trends in negotiating computer agreements as a way to satisfy your sales team, Board of Directors and senior management.

Here are also a few practical pointers for the negotiating process:

Set Expectations and the Timetable: As sales cycles have elongated, so has the amount of time required for negotiating, drafting and signing a computer deal.

Whether you're working on a software/hardware procurement, license agreement or professional services arrangement, customers are generally slowing down the time to complete a deal. As a result, the lead sales manager and the legal counsel must determine a realistic timeline for deal completion -- and this timeline must be communicated to the members of your company to avoid missed expectations.

If you are selling or licensing products or services, get the customer to openly agree to a timetable (even if it is not the best one for you). At least you know when to deploy your resources and can gauge when to complete draft documents.

Avoid the Quarterly Crunch: Today, most customers are savvy buyers and understand the quarterly financial goals of technology companies. Unfortunately, most customers have little concern for these vendor goals, leaving you in a predicament when you have pressure applied from the top to close a deal before quarter end.

This pressure has resulted in serious problems in the software market. Most notably, major software companies have been sued and investigated by the government for fraudulently recognizing revenues too early -- usually as a result of quarterly pressure to meet forecasted numbers.

Upfront in the sales process, make sure to let your negotiating team know if the deal must be closed in the quarter. Importantly, you may need to separate the deal into pieces in order to be able to recognize revenue from at least a portion of the transaction.

Engage the Accountants Early: Now more than ever, tech companies must involve their accountants in the contract negotiating process. This involvement adds additional time and cost to the process -- two factors that must be added into your analysis of whether or not to proceed with the deal.

Revenue recognition is the key issue of concern in the contracting process, and the accountants are critical to understanding it. The language in your agreements will impact the ability to recognize revenue quickly and could cause a delay in recognizing revenue or a deferral to a later period. Each major draft of your contract should be forwarded to your accountants in order to ensure that your agreement is consistent with your accounting policies.

Standardize Your Agreements: In this current environment with corporate scandals, many companies are working to standardize their agreements, policies and systems. Consider developing standard agreements that have been pre-approved by legal counsel, accountants and senior management. Procedures can then be imposed that require management approval before material changes can be made to the documents. Additionally, side letter agreements and “special” deals may also be prohibited – with the penalty being termination if the employee fails to adhere to these restrictions.

Create a Revenue Recognition Policy: A revenue recognition statement is one of the policies to be considered by a tech company. A policy statement is often approved by your Board of Directors and sets forth the specific method by which the company will recognize revenue in its financial statements. Then, the contracts are conformed with this policy statement.

The accounting authorities are constantly revising and interpreting revenue recognition guidelines set forth in the accounting literature. Therefore, your revenue recognition policy will need to be updated on a frequent basis. In addition, the Audit Committees of many Boards will be carefully reviewing these statements and questioning the company auditors as to the conformity of these statements with current accounting developments.

Educate the Sales Force: In order to have a strong contract negotiating process, the players in the process must be educated as to the major legal and accounting issues. This requires training of the sales force, contract administrator, key members of the management team and legal counsel.

Consider an educational session on a quarterly basis with your management and sales team. In these sessions you can review recent case law impacting computer contracts, discuss accounting and revenue recognition developments and streamline the negotiating process in your company. Often, the company auditors or outside counsel may be willing to attend these meetings at no charge in order to update your sales team on recent developments.

In summary, the contract negotiating process has become more complex. With the increase of lawsuits and government regulation in the corporate area, tech companies of all sizes are required to develop more rigorous procedures for ensuring that computer contracts conform with legal, accounting and company policies.

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