CONSULTING SERVICE PROJECTS

Volume 3: Professional Service

Most commercial consulting projects start with a software application package that the customer believes will address most of their operational needs. They then carefully consider various consulting entities that have a demonstrated competency with that application package and set about the process of defining who they would like to implement that software to address their specific requirements. They typically construct an outline of the tasks they would like to achieve that vary from one project and one customer to another. Typically, a consulting project starts out with some sort of fact finding process that may include discussions with the customers team members, this is intended to assess the customer's requirements (due diligence). Often this fact finding is followed by the Consultant reviewing with the Customer the various functional options available within the packaged software applications. This review stage may include consideration of certain modifications required to meet the customer's functional requirements. Once the customer makes all of their design decisions, then the work is generally organized by the Consultant into a logical sequence of software deliverables and those deliverables together with a projected timeline for their delivery (or at least the sequence of that delivery) is reflected in both the Statement of Work as well as the associated Project Plan. At the start of any Consulting Project it is extremely important to develop and agree upon a clear definition of the respective parties' duties and obligations. Often Customers make the mistake of thinking that the preferred contract positions (like those found in many corporate authored MSAs) are the object of the project negotiation, perhaps shifting duties and responsibilities to the other party, or adding provisions for late fees etc., the reality is your goal whether customer or consultant should be to construct a fair agreement with reasonable detail and detailed process specified within that agreement that helps to avoid unpleasant surprises. More often than not in a consulting Project pushing for "more-than-fair" is counterproductive to the success of the project.

With a fair Consulting Agreement as our stated goal, let's look at some of the elements that we expect to see in that agreement, and make a brief mention of a few other provisions that may also be included to help ensure that result.

Assumptions include items clarifying the requirement of items like: proper software licenses, appropriate configurations, access to personnel and any other resources that may be required; these are the things each party expects from the other. For instance the Consultant might expect that the Customer has proper licenses to certain software featured in the project that the Consultant is being asked to modify, install or integrate with. In addition the Consultant might further expect that those software packages are subject to a software maintenance agreement from the manufacturer 1) to support that software and 2) to keep the software current with later releases (i.e. that updating is not a duty that the Consultant assumes simply because he is doing other Project work). The Consultant might also clarify that the Customer's computer platform is properly configured and remains, subject to maintenance etc. The

parties may agree to schedule maintenance after hours or on weekends, etc. Both parties must assume that each party has a duty to have all necessary pre-defined resources, equipment, records and people ready in accordance with the stated assumptions so that the project work can proceed in a timely and efficient manner. The failure of either party to meet their obligations as agreed upon in the Assumptions section of the SOW becomes the basis for a change order. Assumptions may also incorporate the facility's workplace rules; security policies, etc.

SCOPE of the Service delivery obligation must be an adequately defined deliverable; specifically, if you need to explain what you have documented, then your documentation is insufficient. The Consultant will help discuss alternatives, however even well run customer environments will inevitably learn much more about their requirements as well as the software's capabilities over the course of the Project's delivery, they will come to appreciate more completely the trade-offs in design alternatives, and the delivery obligations will evolve, shift and grow; this phenomena is commonly referred to as ***Scope Creep***.

It is essential to the success of a consulting project that the parties agree upon a set of rules that they can rely upon to ensure the project stays on track, both the Consultant and the Customer have a formal centralized process for keeping each other informed and holding each other accountable. This set of consulting service delivery rules is commonly referred to as ***Project Methodology*** and the rules might include (Status Reporting, Change Control Process, Issue Resolution; and Acceptance Testing etc.) Sometimes the rules may have slightly different names, some professionals might have slightly different lists, however they are functionally identical and the essential requirement is that they are clearly understood and carefully followed during the Project service delivery process.

Status Reporting defines the parties' joint obligation and duty to participate in regularly scheduled (weekly or bi-weekly) formal status meetings to review of the progress of the project delivery to date; review and respond on the appropriateness of the service deliverables. Remember, the Customer will always know their environment better than any 3rd party and therefore the Consultant is relying upon the Customer feedback. If the Customer is late or inattentive the Consultant will presume the information provided thus far is accurate and complete. If the software requires a feature or function that is not in the SOW, or if the Customer's operation dictates that some process flow work differently from the software package the Customer has the duty to speak up promptly. There is no adequate substitute for the voice of the Customer.

Change Control addresses the fact that the Customers' needs will change over time, often the business will undergo new challenges, and these will drive the need to change the consulting service deliverable. Even with the very best definition of the delivery environment some change is inevitable, often the change could come as a result of a more detailed and accurate understating of the Customer's environment and business requirements as the project delivery proceeds. Frequently, early Project assumptions regarding the number of records, or the quality of the Customer's data is severely mistaken. Changes should be mutually agreed upon; and not all changes effect the Project's price or the Project's estimated delivery date for the Service Deliverables. However all change, even zero dollar changes, should be formally reported in the Status Meetings and documented in order to gain a clear picture of the overall cumulative project delivery process. A Change Request should require mutual written consent before it alters the delivery obligation. All open Change Requests should be tracked and reported upon during the Project's weekly Status Meetings.

Acceptance sounds simple enough, but you should establish a default period for acceptance and where a particular Service Deliverable (or milestone) warrants you may override and extend the acceptance period for a longer period, you would generally stipulate that extension in the Statement Of Work ("SOW") where you define that Service Deliverable (Milestone). The acceptance criteria should also be clearly defined within the SOW, this defines what functionality will be tested. Customers often resist the need to define the acceptance criteria inside the SOW, but frankly this is the best way for any Customer to ensure the Service Deliverable (Milestone) functions in accordance with their expectations. Candidly, it is the effort of going through the process of defining meaningful acceptance criteria that forces a deep and thorough Customer understanding of the required functionality. Every customer thinks they understand what they require, but that never truly happens unless they are forced to define the functionality in the SOW acceptance test criteria for the Consultant. Many of the better acceptance tests define the sample data and a test script that will be used to rigorously test the Service Deliverable; again it's the process of defining that test script that is so valuable. That process inherently forces the detailed planning and careful communication very early in the process when the SOW is being developed, that clarity of purpose is invaluable to the success of the consulting service delivery process. Remember, an acceptance test should not be viewed as a trial drive, it is intended to be much more rigorous than a few days meandering through unplanned user testing; but it's like exercise, if you put no effort into it, the value of the acceptance test dramatically diminishes. The Acceptance Test provision should address a cure period and re-testing in the event the Service Deliverable/Milestone fails to function in accordance with the SOW. The length of the cure period, whether a 2nd cure period is provided in the event of another failed delivery, and what other remedies might be appropriate is dependent upon many project specific details.

Warranty - once your acceptance test is successful does your project include a warranty, if so how long does that warranty last, does it extend to 3rd party products, etc..

IP Ownership – who owns what? Can the Consultant use pre-existing work, how about open source?

Dispute Resolution – alternate dispute resolution does it make sense, and is your management willing?

SOWs – what items are best addressed in the Agreement and what at the transaction level?

Contract Remedies –what remedies put the parties in the best position to succeed?

Flow-Thru Obligations (background checks, security policies, and privacy laws) – what duties should be flowed thru to the Consultant?

Background checks, Network security policies, Privacy Laws, Key Man Consultant provisions are some of the other topics you might want to consider as you construct your Consulting Agreement.

Service delivery agreements are fundamentally different from most other agreements in one very simple but profound way.....*in a Service Delivery Agreement; regardless of what remedies are provided in the contract, if the project fails both parties fail*. In most cases the Customer is just left starting over the project very late, fresh on the heels of a bad experience and making it even more difficult for the next Consultant to successfully complete the project. Now think about a failing project from the Consultant's perspective, if the Customer doesn't know what

they want (no clearly defined deliverables) or at least has not bothered to define what they want and keeps changing their direction, how can the consultant avoid failure?. The Consultant, no matter however qualified, cannot make up for the tasks that the Customer has not done, or refuses to do, on their own behalf. Successful projects are well planned and carefully monitored joint efforts, in this way that potential problem issues are spotted and resolved quickly before they become big issues.

On a related thought, as long as the Consultant is working towards a reasonable resolution of the Customers issues it is generally better for both parties to work toward that resolution: 1.) it's much harder for another party to get introduced to a failing project, pick up where things stand and successfully complete a project someone else started; 2.) it's generally much quicker for the 1st Consultant to fix the issues; and 3.) the lost time and wasted resources expended by both parties in trying to prove the other party is as fault is simply counterproductive. Customers sometimes are tempted to focus on ensuring that the Consultant's failures are proven and acknowledged; just as Consultants are tempted to demonstrate how missing or inaccurate data, along with lax customer participation (reviews and such), combined with a series of changes from the initial SOW helped cause the project delivery problem. In almost every failed project there are generally plenty of things each party could have done much better to help prevent that failure. Neither party wins when they engage in a finger-pointing process; that process alienates the other party and just defers and meaningful efforts to actually resolve the problem. If you agree with this requirement for a "win-win" project philosophy *Contract Remedies* can represent an excellent vehicle to accelerate the cure process and by-passing fault assignment and litigation sink holes. However, this approach requires more work by both parties to: 1) contemplate meaning contract remedies as you construct the project delivery plan; and 2) more work in careful monitoring of the project delivery process so you can initiate the cure before the deliver gets too far off track, (for this the parties must rely upon following the *Project Methodology*).

With a wide range of powerful applications for so many business information requirements there is a greater need than ever for appropriate professional services to help you implement and leverage those applications within your operations. However, ever professional service project is unique, your needs, your staff's qualifications, the Consultant's capabilities all facto into the appropriate project SOW and project Plan and they must be considered as you develop your SOW, your Project Plan and your Consulting Service Agreement.

Customer:

1) Have you reasonable assurance that your project will be delivered on-time?

   a. What sort of contract remedies should you include to help support that result?

   b. What rights should you have regarding personnel assigned, and how can you help ensure they remain dedicated to your project through completion?

2) How do you help ensure that your projects function properly?

3) How do you ensure that the project remains within the project's budget?

4) How do you ensure that you are in compliance with your regulatory obligations, privacy laws and?

5)   What rights and assurances should secure to ensure your ability to support and evolve?

Consultant:

1)   How do you help ensure you get the feedback you need to successfully deliver the project?

2)   How do you ensure that acceptance is not delayed or withheld?

3)   How do you ensure you have the necessary rights to perform future works?

4)   How do you complete the project and get paid for extra work?

5)   How do you protect yourself from liability for issues under the Customer's control?

I would be pleased to help review your requirements and discuss your specific requirements. I have helped consultants and hi-tech customers successfully implement projects of all sizes. Please contact me for a free 30 minute consultation to help determine if my legal support services are right for your business.

30-minute FREE CONSULTATION
Call (732) 219-6641 or email Johnpobrienesq@verizon.net

About John O'Brien

John O'Brien is an Attorney at Law with 30+ years of legal technology experience. John helps companies of all sizes develop, negotiate and modify consulting contracts, licenses, SOWs HR agreements and other business related financial transactions. John specializes in software subscription models, financial based cloud offerings, and capacity on demand offerings all built around a client's IT consumption patterns and budgetary constraints. He has helped software developers transition their business from the on-premise end user license model to a hosted SaaS environment; and represented clients in many inbound SaaS negotiations. Please contact John for a free consultation if you or the organization you work for is tired of trying to develop, negotiate and/or modify contracts and agreements of any type. John can be reached at (732) 219-6641 or email Johnpobrienesq@verizon.net.