

**PREPARING FOR AN OUTSOURCING AGREEMENT RENEGOTIATION –  
A CHECKLIST**

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# PREPARING FOR AN OUTSOURCING AGREEMENT RENEGOTIATION – A CHECKLIST<sup>1</sup>

## I. INTRODUCTION

Many outsourcing agreements end up being restructured or renegotiated, often within the first 18 months after contract signing.<sup>2</sup> The restructuring or renegotiation is not always the result of performance issues or an indication of a bad contract. It may be, simply, a response to unanticipated circumstances such as those that arise when an outsourcing relationship evolves differently than the parties expected. Alternatively, the necessity to restructure an outsourcing relationship may come from changed circumstances such as a change in control of the service provider. During and in the aftermath of the recent economic recession, the need to renegotiate the outsourcing relationship arose in many cases as a reaction to cost pressures facing customers.<sup>3</sup>

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<sup>1</sup> This checklist is for general information purposes only. It represents a distillation of thoughts and observations based on experience renegotiating outsourcing agreements. It is not intended to provide legal advice or opinions of any kind and should not be used for professional or commercial purposes. No person should take any actions or refrain from acting, based upon the information contained in this checklist, without seeking appropriate legal or other professional advice.

I would like to express my appreciation to Al Hurd for this thoughtful comments and insights, both on the idea of preparing a checklist as well as the contents of this document.

<sup>2</sup> It has been suggested that up to three-quarters of all outsourcing deals are renegotiated and that the figure is rising: See Morrison, Paul, “*Avoiding the Nuclear Option - How to redefine your Outsourcing contract through renegotiation*”, Alsbridge plc, April 1, 2007 at <http://www.alsbridge.eu/knowledge/articles.html?id=50>. Logan, Daniel, *Plus Ça Change*, July 30, 2010 at <http://www.slaw.ca/2010/07/30/plus-ca-change-2/> refers to a Gartner Group study indicating that: (1) 55% of enterprises have renegotiated their outsourcing agreement terms within the lifetime of the contract; (2) 15% of such renegotiations occurred within the first 12 months; and (3) nearly 8 in 10 outsourcings will go through renegotiations at some stage.

This level of renegotiation suggests that, in entering into an outsourcing agreement, both the customer and the service provider should:

- (i) recognize the likelihood of renegotiations at the time they enter into their outsourcing contract, and include appropriate provisions in the contract to deal with this eventuality;
- (ii) in administering the outsourcing agreement, take account of the possibility of renegotiations; and
- (iii) if renegotiations happen, enter into the process in the same careful and thoughtful manner as they approached the initial negotiation of the outsourcing agreement.

<sup>3</sup> In 2007, Technology Partners International, Inc. (“TPI”) suggested that the three principal reasons contracts were renegotiated were: (i) the desire of customers to adopt a multi-sourcing or “best-of-breed” approach to outsourcing; (ii) that customers were seeking options for offshore delivery; and (iii) that customers were seeking improved access to service provider creativity, innovation and best practices: see “*Restructuring Outsourcing Agreements: An Indication of Failure, or a Tool to Increase Value*”, Technology Partners International, Inc., January 2007 at [http://www.tpi.net/pdf/researchreports/Restructuring\\_ResearchReport%20Jan\\_24\\_07.pdf](http://www.tpi.net/pdf/researchreports/Restructuring_ResearchReport%20Jan_24_07.pdf) (referred to as the “TPI Report”) Customers also responded to the recession by seeking to renegotiate their outsourcing agreement to achieve cost savings: see Hanson, Vivian and Milner, Gordon, “*Outsourcing Services in the Face of an Economic Downturn*”, Morrison & Foerster LLP, November 2008 at <http://www.mofo.com/news/updates/bulletins/14767.html>. See also “*Recession and Impact on Outsourcing*”, Centre for Outsourcing Research and Education Webinar held June 30, 2009. In *Plus Ça Change*, referred to at note 2, Daniel Logan suggests that one of the principal reasons customers renegotiate their outsourcing

This document has been prepared as a sample checklist of issues for a customer to consider in preparing for the restructuring or renegotiation of an outsourcing agreement.<sup>4</sup> The emphasis throughout is on ***preparing*** for the renegotiation: customers will only be able to negotiate a satisfactory resolution of issues during a renegotiation to the extent they have leverage with their service provider and the best way to identify and capture this leverage is by preparing thoroughly for the renegotiation.<sup>5</sup>

The document is divided into three parts. This Part I focuses on the preliminary issues that the customer will need to consider in connection with any renegotiation such as what the scope of the renegotiation should be and what information should be reviewed as part of the preparation. The second part identifies various issues relating to an outsourcing agreement that, depending on the reasons for renegotiation, may need to be investigated by the customer as part of its preparation. The third part focuses on the renegotiation procedure. It discusses issues that the customer will need to take into account in connection with any renegotiation, e.g. the importance of speaking with legal counsel at an early stage, as well as issues that the customer and the service provider will want to consider as they define the procedures that will govern the renegotiation. The discussion of each topic in the three parts begins with some preliminary notes followed by specific questions around the topic for the customer to consider in its preparation.

Three preliminary points are in order. First, it has been suggested that the first step in any restructuring of an outsourcing arrangement should be a review of the customer's company-wide sourcing strategy (or the creation of such a strategy if it does not exist).<sup>6</sup> This will allow the renegotiation to be guided by the strategy and needs of the customer as a whole, not just by the necessity of responding to or remedying immediate commercial issues or service deficiencies. Moreover, it also recognizes that how the customer addresses issues such as multi-sourcing or off-shoring in the context of the renegotiation will be impacted by and have implications for the organization's overall sourcing or offshoring strategy and business issues such as the customer's geographic expansion strategy. The importance of considering a renegotiation in the context of an organization's overall sourcing strategy is likely to increase as more and more customers adopt sourcing strategies based on a multi-sourcing model<sup>7</sup>. However a more in-depth discussion of sourcing strategies is beyond the purview of this checklist.

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agreements is a lack of flexibility in the outsourcing agreement. For another perspective, see *Reasons for Renegotiating*, November 29, 2010 at <http://www.slw.ca/2010/11/29/reasons-for-renegotiating%20a0/>.

<sup>4</sup> Although the checklist is written from the perspective of the customer, this was as a matter of convenience only. Most of the issues are equally applicable, with only minor changes in perspective and grammar, to service providers who are facing a renegotiation.

<sup>5</sup> TPI noted in the TPI Report referred to at note 3 that one in three companies participating in a recent survey reported they had less leverage in the renegotiations of an outsourcing agreement than during the negotiations of the original outsourcing agreement.

<sup>6</sup> Khakhar, Elesh and Warren, Glen, "Restructuring Outsourcing Contracts: Making Change Work for You", Technology Partners International, Inc., November 2006 at page 7, available at <http://www.tpi.net/pdf/papers/Restructuring%20Outsourcing%20Contracts.pdf>

<sup>7</sup> In the webinar, *What to Expect in 2011 and a Special Report on Outsourcing Governance*, presented by the Centre for Outsourcing Research and Education (CORE) on December 14, 2010, the presenters made note of: (i)

Second, this document has been prepared in the abstract and with a view to identifying as many issues as possible for a customer to consider in preparing for a renegotiation. The specific issues that a customer will need or be willing to review will depend on the circumstances of the renegotiation including the size of the transaction and the dollar value of the issues at stake, the parties' objectives, the scope of the discussions and the timing of the renegotiations. Therefore, in the context of a specific renegotiation, many of the topics and questions set out below will not warrant a review or be relevant to the customer. The purpose of preparing this checklist is to ensure that the fact that an issue is not included or reviewed in a Renegotiation is the result of a conscious decision by the customer, not the result of inadvertence.

Finally, success in renegotiating an outsourcing agreement requires more than preparation. From personal experience, success in renegotiations appears to require the "Five P's":

Perspective:	Understanding the objectives, issues and concerns of both parties to the renegotiation
Preparation:	Identifying and understanding the issues and their importance to each party
Planning:	Determining how to raise and resolve issues
Perseverance:	Allocating the appropriate time and effort to complete the renegotiation process
People:	Dedicating a complete team, usually of senior individuals, to the renegotiation effort, for as long as it takes <sup>8</sup>

Each of these items is a fundamental component of a successful renegotiation strategy although, as with sourcing strategies, a complete discussion of them is beyond the scope of this document.

#### **A. Definitions**

The following defined terms are used in the balance of this document:

"Customer" means the customer whose outsourcing agreement is being restructured or renegotiated;

"Renegotiation" refers to the restructuring or renegotiation of an outsourcing agreement;

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the "[overwhelming] shift by large businesses, away from single vendor sourcing"; and (ii) that "[buyers] for medium sized entities are about evenly split on the question of multi-vendor vs. single vendor".

<sup>8</sup> Just as with the negotiation of the initial outsourcing agreement, the renegotiation of a material outsourcing arrangement requires the dedicated efforts of teams of senior customer and service provider personnel over a number of months. If the necessary personnel are not dedicated to the process, progress will be delayed. Further, replacing personnel in mid-renegotiation may well undermine such progress as has actually been achieved.

“Services Agreement” means the agreement or agreements governing the outsourcing relationship between the Customer and the Service Provider;

“Service Provider” means the other party to the Services Agreement who is providing services to the Customer.

It is worth making two points with respect to these definitions. First, consistent with the focus of this document, the term “Renegotiation” is defined as renegotiations or restructurings of an outsourcing agreement. It does not include renewals. Although many of the issues identified below will also arise when an outsourcing agreement is being renewed, there is an important difference between renewals and renegotiations. In those renegotiations that are initiated by the Customer, the Customer needs to obtain leverage to motivate the Service Provider to renegotiate the outsourcing agreement or to resolve specific issues in the Customer’s favour. This means the Customer’s preparatory work will be motivated, at least in part, by how to obtain the necessary leverage. In a renewal however, the Customer will not need to worry about inducing the Service Provider to agree to negotiations. Instead, it is the Service Provider who should be seeking to motivate the Customer to agree to renewal discussions on a sole-source basis. The Customer’s focus will be on how to get the best offer from the Service Provider and to evaluate the costs and benefits of that offer in comparison to the other alternatives, e.g. the benefits of not having to re-procure or to undergo a termination transition as compared to any potential increase in costs from proceeding with a sole source renewal.<sup>9</sup>

Second, the definition of “Services Agreement” refers to the contract for the outsourcing relationship. This can encompass much more than the document entitled (say) the “Master Services Agreement”. As Section I.D (Information to be Reviewed) points out, the Services Agreement certainly encompasses the Master Services Agreement as well as any schedules and statements of work. However, the Customer’s rights and obligations may also be found in: (i) documents that are incorporated into the Master Services Agreement by reference such as the Request for Proposal issued by the Customer or the Service Provider’s response and policies or procedures that are referenced in the body of the Agreement; (ii) related standalone agreements such as non-disclosure agreements, service level agreements or guarantees; and (iii) other ancillary documents such as side letters, change orders and amending agreements. Generally, this Checklist uses the term “Services Agreement” to include all of the documents that establish the legal relationship without distinguishing amongst the specific component documents.

## **B. Objectives for the Renegotiation**

### Notes:

The renegotiation of an outsourcing agreement is, first and foremost, a negotiation. At an early state in its preparation for the Renegotiation, the Customer should: (i) define its objectives for the Renegotiation in order of priority<sup>10</sup>; and (ii) seek to understand the Service Provider’s Renegotiation objectives and

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<sup>9</sup> See *Renewing your Outsourcing Agreement - Ensuring the Benefits are Shared*, June 6, 2010 at <http://venturetechnologylaw.blogspot.com/2010/06/renewing-your-outsourcing-agreement.html>.

<sup>10</sup> Outsourcing agreements frequently include preliminary sections that specify the Customer’s or the parties’ objectives in entering into the outsourcing agreement and similar clauses should be part of the agreement

their priority; to the same level of detail as if this were the initial negotiations of the Services Agreement.

The Customer's objectives and their priority and the Customer's understanding of the Service Provider's objectives and priorities will influence the issues that the Customer raises in the Renegotiation and how it negotiates these issues as well as providing the Customer with a principled basis to resolve issues. By way of example, assume the Customer is seeking to renegotiate a Services Agreement with the objective of reducing its costs. The Service Provider may respond to the Customer's request to renegotiate in a manner that seeks to safeguard its revenue stream or, alternatively, that attempts to reduce the Service Provider's delivery costs. The Customer is likely to approach the Renegotiation differently depending on with which of these possible objectives the Service Provider is most concerned: if the most important issue to the Service Provider is protecting its revenue stream, the Customer may try to negotiate price reductions in exchange for extending the term of the Services Agreement. Where the Service Provider is more concerned with reducing its delivery costs however, the Customer may try to achieve price reductions by relaxing services levels or delivery obligations and sharing in any resulting cost savings.

The Customer's possible objectives for the Renegotiation include:

- (i) achieving cost savings;
- (ii) accommodating changes in scope;
- (iii) resolving performance or schedule issues;
- (iv) addressing new, emerging or changed threats or risks, e.g. with respect to security
- (v) responding to technological change, to a legal change such as a change in laws or to a business change such as M and A activity;
- (vi) implementing a new sourcing strategy, e.g. multi-sourcing; or
- (vii) obtaining relief from any direct or indirect failures to perform.

Similarly, the Service Provider's possible objectives for the Renegotiation include:

- (i) safeguarding its revenue stream, by preventing the Customer from repatriating services or adopting a multi-sourcing strategy;
- (ii) reducing the Service Provider's costs of delivering the services;
- (iii) responding to or clarifying its responsibilities with respect to new, emerging or changed threats or risks;
- (iv) achieving more flexibility in the delivery of services, for example the removal of contract provisions that require the services to be performed in a certain manner or from a certain location;
- (v) responding to technological, legal, business or other change; or
- (vi) obtaining relief from any direct or indirect failures to perform.

#### Questions:

1. What objectives does the Customer hope to achieve through the Renegotiation, in order of priority?

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between the Customer and Service Provider that implements the results of the Renegotiation. If the Customer identifies its objectives for the Renegotiation at an early stage, the Customer will have a basis for drafting the corresponding clause of the agreement implementing the results of the Renegotiation when the time comes to do so.

- (i) Do the Customer's objectives and priorities for the Renegotiation differ from the objectives and priorities that the Customer had when originally negotiating the Services Agreement?
  - (ii) Do all of the Customer's stakeholders (other business units, end-users, clients and contractors including other service providers) have the same objectives for the Renegotiation and the same priority amongst these objectives? If not, how will the Customer resolve the conflicts?
2. What objectives does the Service Provider hope to achieve through the Renegotiation, in order of priority?
- (i) Do the Service Provider's objectives and priorities for the Renegotiation differ from the objectives and priorities that the Service Provider had when originally negotiating the Services Agreement?
  - (ii) Do all of the Service Provider's stakeholders (e.g. the Service Provider's subcontractors, suppliers and parent company) have the same objectives for the Renegotiation with the same priority among the objectives?
  - (iii) Does the Service Provider have other customers that will be affected by the Renegotiation? How will the interests of the Service Provider's other customers affect the Service Provider's objectives for the Renegotiation (as well as the Service Provider's approach and flexibility)?

### **C. Renegotiation Issues**

#### Notes:

The Customer and the Service Provider will need to decide whether the Renegotiation will address all of the issues between them or only a specific list of identified issues. As a first step however, the Customer should review the Services Agreement and related documentation (including the documentation referred to in Parts I.D (Information to be Reviewed) and I.E (Information Gathering) below) and perform internal reviews (including discussions with Customer stakeholders and end-users of the services) to identify all potential issues of the Customer and of the Service Provider. The Customer is not doing itself a service if it focuses only on its own issues, because it will be poorly prepared for the inevitable moment when the Service Provider issues do surface.

This is not to suggest that this is an easy task. To get a complete list of issues without drowning in the minutiae requires a thoughtful plan of attack, e.g.:

- (i) identifying the potential categories of issues (transitional, transformational, operational, financial, technical, commercial, legal);
- (ii) determining the documents that need to be reviewed to identify the Customer and Service Provider issues;
- (iii) identifying who should be contacted, about what, in what order and whether individually or as groups to identify the Customer and Service Provider issues;
- (iv) consolidating the results;

- (v) reviewing the list for completeness; and
- (vi) establishing an ongoing process to ensure that any issues arising after the Renegotiation has commences are identified and the Customer becomes aware of them.

Once the complete list of potential issues has been identified, the Customer can review the list against the backdrop of the parties' objectives for the Renegotiation and their priorities to determine: (i) the set of issues the Customer wants or is prepared to discuss in the Renegotiation in order to achieve its objectives; and (ii) the issues that the Customer anticipates the Service Provider will raise.

Where the Renegotiation is narrowly focussed and intended to resolve only a subset of the issues between the Customer and the Services Provider, the Customer should clarify with the Service Provider, before the Renegotiation begins, that other issues between the parties remain outstanding. To the extent the parties agree to execute any form of release of claims at the conclusion of the Renegotiation (see Part III.J (Release) of this Checklist), the release should not extend to issues that were outside the scope of the Renegotiation.

As part of defining the issues for the Renegotiation, the Customer should revisit the initial negotiations of the Service Agreement. This includes reviewing the Customer's original objectives for the outsourcing, the statements and claims made by the Service Provider as part of the selection and negotiation processes and the information exchanged by the Customer and the Service Provider. This review can provide two benefits. First, it will allow the Customer to develop a good understanding of its original expectations for the outsourcing which can be compared against the parties' actual performance under the Services Agreement. Any gaps between the Customer's expectations from the initial negotiations and the services actually delivered after contract signing may indicate issues that need to be addressed through the Renegotiation<sup>11</sup>. Second, in the course of a Renegotiation, a Service Provider will sometimes attribute sub-standard performance to the failure of the Customer to provide complete information during the original negotiations or claim a right to be paid for effort that the Service Provider was not anticipating but which was required as a result of the Customer's alleged failure to make full or accurate disclosure. In reviewing the original negotiations, the Customer can prepare itself to respond to any issues relating to the initial negotiations that may be raised by the Service Provider.

Questions:

1. What is the complete list of potential Customer and Service Provider issues?
  - (i) Transitional;

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<sup>11</sup> The focus here is on identifying issues that the Customer and the Service Provider can address during the Renegotiation and on the information that will inform their negotiation of the issues. This does not mean that, if the Renegotiation is unsuccessful, all of the issues will or are able to be referred to dispute resolution. In such circumstances, the Customer may decide not to refer certain issues to dispute resolution or be unable able to do so because of, for example, provisions of the Service Agreement that preclude the introduction of pre-contract documentation or discussions. That does not mean that the Customer should not look at such issues in the context of the Renegotiation to determine if they should be raised.

- (ii) Transformational;
  - (iii) Operational/Performance;
  - (iv) Financial;
  - (v) Technical;
  - (vi) Commercial;
  - (vii) HR; and
  - (viii) Legal.
2. What issues does the Customer wish to resolve through the Renegotiation?
    - (i) Do any of these issues require the involvement or agreement of third parties if they are to be resolved, e.g. end-users, stakeholders, other service providers or regulatory authorities or other customers or suppliers of the Service Provider?
    - (ii) Are any of these issues contingent?, i.e. to be raised only in response to issues raised by the Service Provider.
  3. What issues will the Service Provider wish to resolve through the Renegotiation? Do any of these issues require the Customer to involve or obtain agreement from third parties if they are to be resolved, e.g. end-users, stakeholders, other Customer service providers or regulatory authorities?
  4. When will the Customer and the Service Provider agree on the list of issues to be addressed in the Renegotiation or an approach to the Renegotiation that determines the issues to be discussed?
  5. Is the list of issues to be addressed in the Renegotiation a complete list of Customer and Service Provider issues?
    - (i) If not, have the parties agreed that other issues remain outstanding and are not affected by the Renegotiation?
    - (ii) What is the process for dealing with the other issues?
  6. Has it been agreed as to whether the parties able to raise other or new issues during the Renegotiation<sup>12</sup>?

**D. Information to be Reviewed**

Notes:

This section is concerned with identifying and assembling information in the possession of the Customer or Service Provider relevant to the Renegotiation. The next section focuses on obtaining additional information through the use of benchmarking or audit clauses and from third parties such as Everest Group or Technology Partners International, Inc.

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<sup>12</sup> Normally, this is less a question for the Renegotiation team that a reminder to them to get agreement with the Service Provider that the parties are able to raise new issues during the Renegotiation. It is difficult to prevent a party from raising new issues and attempts to do so often serve only to engender ill will which is counter-productive to the progress of the Renegotiations.

The Customer should identify all information that is related to the outsourcing transaction and that may need to be reviewed in preparing for the Renegotiation.<sup>13</sup> In so doing, the Customer should take an expansive approach to identifying the information and without regard to: (i) whether the information was prepared by the Customer, the Service Provider, a third party or electronically say as a result of automated monitoring or reporting tools; and (ii) whether the information relates to the pre-contract period, the outsourcing contract itself or performance of the contract. The information to be identified includes prior drafts of documents as the manner in which a document has evolved can often provide insight into the parties' intentions, act as evidence of the parties' expectations or provide guidance about the meaning of contract terms.

Once all information related to the outsourcing transaction has been identified, the Customer: (i) will need to determine whether there are any confidentiality, non-disclosure or other restrictions that limit the manner in which such information may be used in the Renegotiation; and (ii) should review the list to determine the information to be reviewed in preparing for the Renegotiation. See Part III.F (Documentation) of this Checklist for a discussion about collecting and retaining documentation in the course of a Renegotiation.

Questions:

1. Has all information relating to the pre-contract period been identified:
  - (i) non-disclosure agreements;
  - (ii) RFPs, amendments, questions and answers and related documents;
  - (iii) RFP responses and amendments, supplements and resubmissions;
  - (iv) Information included in any data rooms made available to bidders or provided to the Service Provider as part of any due diligence;
  - (v) cost and pricing models;
  - (vi) Customer and Service Provider presentations;
  - (vii) meeting minutes;
  - (viii) draft documents and term sheets; and
  - (ix) notes, transition and other memos and emails.
  
2. What documents make up the "Services Agreement" for the outsourcing transaction?
  - (i) the Master Services Agreement including schedules and amending agreements;
  - (ii) Statements of Work;
  - (iii) assignment agreements, asset purchase agreements, transition agreements or transformation agreements;
  - (iv) service level agreements;

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<sup>13</sup> Assembling the information can be problematic for the Customer, especially where individuals who were involved with (say) evaluation of RFP responses or negotiation of the Services Agreement are no longer part of the Customer's delivery team and when electronic or other files were not copied prior to their departure.

It will be important to have, in any renegotiation, information concerning the initial negotiations of the outsourcing agreement. That fact, combined with the high percentage of outsourcing agreements that are renegotiated, suggest that customers should establish, as part of their Record Retention and Destruction Policies, a policy around collecting and archiving such information immediately after execution of an outsourcing agreement (and perhaps as part of the handoff from the negotiations team to the delivery team).

- (v) guarantees;
  - (vi) licenses, supply agreements and subcontracts;
  - (vii) side letters;
  - (viii) change orders; and
  - (ix) any documents incorporated by reference into the foregoing, e.g. Customer or Service Provider policies or procedures including operating manuals.
3. What information can be identified that relates to performance of the Services Agreement?
- (i) service level or other reports;
  - (ii) open and closed trouble tickets, root cause analyses, incident reports and other output from any problem and incident management processes implemented under the Services Agreement;
  - (iii) governance or other committee meeting minutes;
  - (iv) customer satisfaction and other surveys;
  - (v) annual, quarterly or other planning documents;
  - (vi) draft and final deliverables; and
  - (vii) invoices, notices and emails.
4. Is the Customer required to provide the Service Provider with copies of any information that the Service Provider does not possess?
5. Is there information relevant to the Renegotiation in the possession of the Service Provider that the Customer does not have? Is the Customer entitled to obtain copies of this information from the Service Provider or a third party?
6. Does the Services Agreement include any terms and conditions related to Record Keeping that require the Service Provider to retain records on behalf of the Customer? If yes, are any of such records likely to be relevant to issues that are the subject of the Renegotiation?
7. Are there any confidentiality, proprietary or other restrictions relating to such information that limit the manner in which the information can be used in the Renegotiation?
8. Based on the Customer's objectives for the Renegotiation and the issues to be discussed, what information from the list identified by the Customer should be reviewed to prepare for the Renegotiation?

**E. Information Gathering**

Notes:

Depending on the issues in the Renegotiation, the Customer may need to assemble as much information as possible with respect to the services that are being provided, whether such services are in compliance with the terms of the Services Agreement and how such services compare to similar services available in the market. Information about the services being performed should be available from the Service Provider as part of the regular reporting provided for in the Services Agreement or in response to specific requests. Information about the services available in the market place can be obtained through government agencies, from third party firms such as Gartner, Inc. or IDC or from third party outsourcing consultants such as Everest Group or Technology Partners International, Inc.

The Customer may also be able, in theory at least, to utilize benchmarking, audit and similar provisions in the Services Agreement to gather valuable information for the Renegotiation, e.g. how the prices for the Service Provider's services compare to market rates or how the Customer's service levels compare to industry standards. In practical terms, the Customer may find that it is not possible to complete a benchmarking or audit in the time available for the Renegotiation. Even in such circumstances, the Customer's threat to exercise its benchmarking or audit rights may be of sufficient concern to the Service Provider that it will accept a substitute source for the information or agree to resolve an issue with less than the complete information that a benchmark or audit would have provided.

In a similar vein, the Customer should also consider any testing or similar rights it may have with respect to the specific services provided under the Services Agreement and the information such testing activities can provide. For example, if disaster recovery planning is an issue in the Renegotiations, the Customer should review the Services Agreement to determine what rights it has to test the Service Provider's disaster recovery planning activities.

The Customer should not ignore publically available information. There are annual reports, press releases and media reports, industry analyses, court decisions, information about regulatory proceedings and many other sources of information about the Service Provider or its services available through the web including on the Service Provider's website. In this digital age, comprehensive web-based searches about the other party are an essential part of preparation for any negotiations and should certainly be considered in connection with the Renegotiation.

There are also, for many service providers, copies of contracts entered into by the service provider or others available on government websites or by way of access to information requests under applicable freedom of information laws that can provide valuable information about the service provider's contracting practices or practices in the industry in general.<sup>14</sup>

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<sup>14</sup> By way of example, in connection with the B.C. Government's Alternative Service Delivery Program, the Province of British Columbia has made available on Government websites many of the agreements it entered into with private sector service providers. These agreements can be a valuable source of information about service providers' contracting practices.

Questions:

1. What sort of information about the service levels, prices, quality, currency or other aspects of the services does the Customer require in connection with the Renegotiation?
2. Can the Customer obtain the information it requires from the Service Provider pursuant to the terms of the Services Agreement or as a result of any agreements between the Customer and the Service Provider relating to the Renegotiation?
3. Can the Customer obtain the information it requires from third parties, e.g. from Gartner, IDC, Everest Group or TPI? At what cost?
4. Does the Services Agreement include provisions entitling the Customer to conduct benchmarks in respect of the services provided under the agreement?, e.g. in respect of the services or service levels provided under the Services Agreement or in respect of the Service Provider's charges?
  - (i) What aspects of the services can be benchmarked?
  - (ii) Can the Customer benchmark only a part of the services? Or is it necessary to benchmark all of the services provided by the Service Provider?
  - (iii) Is the agreement or cooperation of the Service Provider required? Is the Service Provider required to cooperate by the terms of the Services Agreement?
  - (iv) How long will it take to complete a benchmarking?
  - (v) What are the consequences of a benchmarking? Do provisions of the Services Agreement adjust automatically or is agreement of the parties required? What happens if the parties do not agree with the results of the benchmarking?
  - (vi) How much will a benchmarking cost and who is responsible for the costs?
5. Does the Services Agreement include provisions entitling the Customer to audit or investigate the services provided under the agreement?
  - (i) Are there restrictions on the Customer's right to conduct audits or investigations that limit the circumstances in which such audits or investigations can be carried out?
  - (ii) What aspects of the services can be audited?
  - (iii) How long will it take to perform the audit?
  - (iv) Who is responsible for the auditor's fees? Is the customer responsible for any costs incurred by the Service Provider?
  - (v) What are the consequences of performing an audit? What remedies are available to the Customer with respect to any deficiencies identified in the performance of the audit?
6. Does the Customer have the right to conduct testing or reviews of the Service Provider's performance of any services that are at issue in the Renegotiation?
7. What other provisions of the Services Agreement entitle the Customer to receive information about the Services that will be useful in the Renegotiation?, e.g. is the Customer entitled to receive copies of all or part of internal or external audits carried out by or in respect of the Service Provider?
8. What information about the Service Provider would be helpful to the Customer in connection with the Renegotiation and is this information likely to be publically available?

9. Has the Customer undertaken comprehensive web-based searches relating to Renegotiation issues?

## II. SERVICE AGREEMENT REVIEW

This part of the Checklist identifies various issues relating to the Services Agreement that, depending on the reasons for Renegotiation, may need to be investigated by the Customer as part of its preparation.

### A. Scope of Services

#### Notes:

The Customer should compare the scope of services that the Service Provider is required to provide under the Services Agreement with the services actually being provided. (The focus in this Part II.A is on the scope of the services, not the manner in which the services are provided.) In considering the scope of services the Service Provider is required to provide, the Customer should look at how the services are described in the Services Agreement as well as the Services Agreement provisions that supplement these specific services description, e.g. any “sweeps” clauses, quality assurance provisions, technology refresh obligations and continuous improvement obligations included in the Services Agreement.

The Customer should also think about what amendments to the scope of services will support of the Customer’s or the Service Provider’s objectives for the Renegotiation. For example, if the Customer is seeking to reduce the price of the services, the Customer may be able to obtain lower prices by committing to higher volumes of services or to different services.

#### Questions:

1. How does the scope of services that are being provided correspond to the requirements of the Services Agreement?
  - (i) Are there services the Service Provider is required to provide under the Services Agreement (including as a result of any “sweeps” clauses or similar provisions) that are not being provided? What remedies are available to the Customer if the Service Provider has not been performing the services in accordance with the Services Agreement?
  - (ii) Are there services that the Service Provider is performing that the Service Provider is not required to provide under the Services Agreement? Can the Service Provider cease to provide these services? Can the Service Provider invoice the Customer for these additional services that have already been provided? What is the impact to the Customer if the Service Provider ceases to provide these services?
2. Can the services be adjusted in a manner that will support the Renegotiation objectives of the Customer?
  - (i) Does the Customer have the flexibility to adjust the services without additional approvals? Or will any adjustment to the services require the approval of third parties?

who would be impacted by the adjustment such as the approval of clients, customers or other service providers of the Customer?

- (ii) Can the Customer or another third party perform some of the services that are being provided by the Service Provider, at a lower aggregate cost to the Customer?
- (iii) Are there additional services that can be outsourced to the Service Provider with lower aggregate costs to the Customer?

**B. Service Descriptions**

Notes:

The Customer should compare the provisions of the Services Agreement specifying when and how the services are to be provided with the time at which and manner in which the services are actually being provided. Is the Service Provider in compliance with the provisions of the Services Agreement? Can any of the provisions of the Services Agreement be relaxed?

Questions:

1. Is the Service Provider performing the services in accordance with the schedule for the performance of services set out in the Services Agreement?, e.g. have the transition and transformation services, the disaster recovery planning services and the termination transition planning services been provided in accordance with the schedule therefor in the Services Agreement? Are there certain services that the Service Provider is habitually late in performing?
  - (i) What do delays in the performance of the services indicate about the parties' approach to the Services Agreement? Does it suggest a failure to perform other responsibilities such as with respect to management of the services?
  - (ii) If the Service Provider is late in performing the services, who (the Customer or the Service Provider) is responsible for the delays in performance?
  - (iii) What are the Customer's rights or liabilities in respect of the late performance?
2. Are the services being provided in accordance with the applicable provisions of the Services Agreement?, e.g. any restrictions on off-shoring, limitations on the use of subcontractors or requirements to use dedicated facilities or personnel that are contained in the Services Agreement?
  - (i) What do failures to perform the services in accordance with the provisions of the Services Agreement indicate about the parties' approach to the Services Agreement? Does it suggest a failure to perform other responsibilities such as with respect to management of the services?
  - (ii) If the services are not being performed in accordance with the applicable provisions of the Services Agreement, who (the Customer or the Service Provider) is responsible for the failure to perform?
  - (iii) What are the Customer's rights or liabilities in respect of such non-performance?
3. What are the implications to the Customer of any failures to perform the services in accordance with the schedule and provisions of the Services Agreement? Is this a matter of fundamental concern that must be addressed? Or can the schedule or other requirements be relaxed to the benefit of both the Customer and the Services Provider?

### **C. Service Levels**

#### Notes:

The Customer should compare the service level targets contemplated in the Services Agreement with the levels of service actually being delivered. Is the Service Provider performing the services at the service level targets contemplated in the Services Agreement? Can any of the service level targets be relaxed? Do the service level targets need to be increased to address Customer business issues?

#### Questions:

1. Has the Service Provider been performing the services at the service level targets set out in the Services Agreement, having regard to any continuous improvement provisions of the Services Agreement?
2. If the Service Provider has not been performing the services at the service level targets set out in the Services Agreement:
  - (i) Is this the fault of the Customer? If yes, does the Customer have any liability to the Service Provider as a result of such Customer fault?
  - (ii) Is this the fault of the Service Provider? Has the Customer received any credits to which it is entitled as a result of such Service Provider fault? What other remedies are available to the Customer?
3. Does the Customer have the right, pursuant to the terms of the Services Agreement, to adjust the service levels, service level targets or service level weightings (including by changing a service level from a key service level to a critical service level) in a manner that supports the Customer's Renegotiation objectives?
4. Are all of the service levels providing meaningful, output based information about the services to the Customer?
  - (i) Or do some of the service levels provide intermediate / interim information that is subsumed in other service levels or information about aspects of the services that are not important to the Customer?
  - (ii) Are there aspects of the services that are important to the Customer but that are not currently being measured? Should the Customer be requesting new service levels to measure these items?
5. Are the service levels and service level targets set out in the Services Agreement "industry standard"?
6. Does the Customer have the right under the Services Agreement to perform service level benchmarks? If the Customer has the right, but has not already done so, should the Customer cause a benchmark to be performed?
7. Does the Customer require the level of performance dictated by the service levels specified under the Services Agreement? Can the Customer make do with lower service levels? Does the Customer require higher levels of performance?

8. If the Service Provider is subject to continuous improvement obligations in connection with the service levels, are these provisions cost effective? (If, for example, the service level agreement automatically increases the service level target on an annual basis to 50% of the difference between the prior year's service level target and any level of improved performance, what is the cost to the Customer of this automatic adjustment?)
9. Are the service level reports being reviewed by the Customer on a regular basis and in an effective and meaningful manner? If not:
  - (i) does the Customer require this level of service level reporting?
  - (ii) should the Customer increase its level of review of the service level reports?
  - (iii) should the level, type and quantity of reporting be adjusted?, e.g. rather than receiving monthly service level reports, can the Customer request that service level data be made available in a data warehouse or on a dashboard?

**D. Employees and Subcontractors**

Notes:

The Customer should review the provisions of the Services Agreement that impact the employees and subcontractors the Service Provider may use in performing the services. Is the Service Provider in compliance with the provisions of the Services Agreement? Based on the experience that the Customer has had with the Service Provider since the Services Agreement was signed, is Customer able to relax any of the restrictive provisions of the Services Agreement?

If, in implementing the Services Agreement, Customer employees transitioned to the Service Provider, the Customer should also consider the ongoing impact of any Services Agreement provisions relating to the transitioning employees.

Questions:

1. Is the Service Provider in compliance with the Services Agreement in respect of its employees who are providing the services?, e.g. provisions of the Services Agreement requiring that:
  - (i) Service Provider personnel be dedicated to providing services to the Customer?
  - (ii) Service Provider personnel be located at specific facilities or located on-shore?
  - (iii) Service Provider personnel have specific training, experience or skill (including as a result of any representations and warranties provided by the Service Provider in the Services Agreement)?
  - (iv) a specific number of personnel to be used?
  - (v) Customer consent be obtained before the Service Provider replaces its personnel?
  - (vi) Service Provider restrict its use of independent contractors?
2. What are the Customer's remedies if the Service Provider is not in compliance with the Services Agreement in respect of its employees who are providing the services?
3. Did any Customer employees transition to the Service Provider in connection with the implementation of the Services Agreement? If yes:

- (i) Does the Customer have any ongoing responsibilities or liabilities in respect of such employees?
  - (ii) What information do the transitioned Customer employees have about the issues in the Renegotiation?
4. Are the restrictions on Service Provider employees that are contained in the Services Agreement (including any restrictions related to Customer employees who transitioned to the Service Provider) still required by the Customer? Or is the Customer able to relax, amend or delete any such provisions?
5. Is the Service Provider in compliance with the Services Agreement in respect of its use of subcontractors to provide the services?, e.g. provisions of the Services Agreement requiring that:
  - (i) specific subcontractors be used to deliver the services?
  - (ii) subcontractor certifications be delivered to the Customer?
  - (iii) subcontractors have specific training, experience or skill (including as a result of any representations and warranties provided by the Service Provider in the Services Agreement)?
  - (iv) Customer consent to the use of subcontractors be obtained?
  - (v) the Customer approve the wording of subcontracts?
6. What are the Customer's remedies if the Service Provider is not in compliance with the Services Agreement in respect of its use of subcontractors to provide the services?
7. Were any subcontracts assigned by the Customer to the Service Provider in implementing the Services Agreement? Are any of the Renegotiation issues affected by any such assigned subcontracts?
8. Are the restrictions on the Service Provider's use of subcontractors that are contained in the Services Agreement still required by the Customer? Or is the Customer able to amend or delete any such provisions?

**E. Other Parties**

Notes:

The issues referred to below are touched on elsewhere in this Checklist. However, because of the importance of the issues, especially in a multi-sourcing context, they are repeated here as a separate part. The issues are all directed toward understanding how the performance of third parties for which the Customer or the Services Provider is responsible has impacted the performance of other the other party to the Services Agreement.

Questions:

1. Does the performance of any of the Customer's other service providers affect the performance of the Service Provider? If yes:
  - (i) are the other service providers in compliance with their obligations under their services agreements?

- (ii) vis-à-vis the Service Provider, is the Customer responsible for the performance (and non-performance) of the other services providers?
  - (iii) what information is the Customer entitled or obligated to provide to the Service Provider about the performance of such other service providers?
2. Does the performance of the Service Provider impact the performance of any of the Customer's other service providers?. If yes:
- (i) is the Service Provider in compliance with its obligations under the Services Agreement that impact the other service providers?
  - (ii) what information is the Customer entitled or obligated to provide to the other service providers about the performance of the Service Provider?
3. With respect to the performance of the Service Provider's subcontractors:
- (i) is the Service Provider in compliance with the provisions of the Services Agreement (to the extent such performance is based on the performance of the subcontractors)?
  - (ii) does the Customer have the right to require the Service Provider to replace any defaulting subcontractors or subcontractors whose performance is not satisfactory?

#### **F. Security**

##### Notes:

The security that is provided to a Customer's information and data under an outsourcing agreement results from more than those services that are specifically described in the agreement as "security services". It also results from infrastructure that the Service Provider operates for the Customer, the Service Provider's normal operating procedures, and the measures that the Service Provider implements to comply with its obligations and liabilities under the Services Agreement, regardless of whether these items are specifically called out as "security services". It also encompasses any measures and safeguards that the Customer implements on its own behalf.

The Customer should compare the scope of the security services that the Service Provider is required to provide under the Services Agreement with the services actually being provided. In considering the scope of the Service Provider's obligations, the Customer should look at the services described as "security services" in the Services Agreement, the parties' obligations with respect to confidentiality and personal information, technology refresh or continuous improvement obligations and any other provisions of the Services Agreement that supplement the specific descriptions of the services.

The security services provided by the Service Provider are (or ought to be) critical components of any outsourcing agreement. However this is also an extraordinarily complicated area and one in which the Customer may wish to consider retaining consultants with the requisite specialized expertise.

##### Questions:

1. What is the Service Provider's obligation with respect to security services?
- (i) Is it to provide specific and detailed security services, as described in the Services Agreement?

- (ii) Is the Service Provider required to provide a level of security that changes over time, e.g. to provide reasonable security services or to provide security services in accordance with industry standards or applicable laws?
  - (iii) Does the Service Provider have any technology refresh or continuous improvement obligations in respect of the security services being provided by it?
  - (iv) Does the Service Provider have any obligations to keep the Customer apprised of emerging security risks or technologies?
2. Are the security services being provided to the Customer dedicated to the Customer or are the services leveraged across multiple customers?
  3. Has the Service Provider been performing the security services in accordance with the provisions set out in the Services Agreement? What remedies are available to the Customer if the Service Provider has not been performing the services at the agreed-to service levels?
  4. Does the Customer require the level of security prescribed in the Services Agreement? Does the Customer now require a higher level of security? Can the Customer make do with lower level of security?
  5. What is the Service Provider's liability with respect to security breaches? Is the Service Provider's liability strict? Does the Customer now require a higher standard of liability or a higher cap on damages? Can the Customer accept a lower standard of liability or a lower cap on liability?

**G. Pricing and Invoicing**

Notes:

The pricing and invoicing provisions of an outsourcing arrangement are often one of the most heavily negotiated aspects of the agreement. The Customer will have specific requirements related to pricing and invoicing that it is expecting the Service Provider to satisfy. Conversely, the Service Provider will frequently have standard corporate systems that are applied to calculate the amounts owing by customers and to prepare the invoices that it does not want to customise to take account of the peccadillos of just one customer. In their negotiations around the Services Agreement, the Customer and the Service Provider will need to agree on the tweaks to the Service Provider's standard corporate systems that are necessary to accommodate the Customer's specific requirements.

The compromises worked out by the Customer and Service Provider in the course of negotiations that are reflected in the Services Agreement do not always get properly implemented in practice. There is the potential therefore, for the Customer to be able to recover from the Service Provider amounts that may have been improperly paid although it is equally possible for the Customer to discover that additional amounts are owing because of incorrect invoices. This is especially the case for those Service Agreements where the Service Provider's compensation is calculated in innovative ways.

The Customer should review the pricing and invoicing provisions of the Services Agreement against the invoices the Services Provider has delivered for its services to verify that the correctness of the invoices. The Customer should also review its payment history to confirm that invoices are being paid at the proper time or early payment discounts are being received.

The Customer may also wish to consider what amendments to the payment and invoicing provisions it is able to make in support of the Customer's or the Service Provider's objectives for the Renegotiation. For example, if the Customer is seeking to reduce the price of the services, the Customer may be able to obtain lower prices by committing to more rapid payment of invoices.

Questions:

1. Are the charges for the "base" services provided by the Service Provider under the Services Agreement calculated properly? With respect to services provided on a unit price basis, has the Customer verified: (i) the quantity of resources provided; and (ii) that the resources are being invoiced in the proper categories or classifications, e.g. that Service Provider personnel satisfy the criteria (knowledge, skill, training, experience) for the job classification at which they are invoiced to the Customer?
2. If the Customer is being charged for services in addition to the base services, is the Service Provider entitled to do so and are the charges properly calculated?
  - (i) Do any of the charges relate to services that should be provided by the Service Provider at no additional charge pursuant to any "sweeps" clauses?
  - (ii) Are the charges under any change orders calculated properly?
3. Has the Customer exercised any benchmarking rights it has under the Services Agreement?
4. Have any price adjustment provisions been correctly applied?, e.g. if the prices under the Services Agreement are subject to cost of living increases, have the increases been correctly calculated?
5. Is the Service Provider required to provide any certifications with respect to its prices or charges, e.g. annual certificates supporting any most favoured nation pricing provisions in the Services Agreement?
6. Are pass-through amounts invoiced properly?
  - (i) Is the Service Provider entitled to charge the Customer for the types of expenditures that are being passed through to the Customer?
  - (ii) Do the amounts passed through to the Customer comply with the applicable provisions of the Services Agreement? For example, are the Service Provider travel and living expenses that are being paid by the Customer in compliance with any travel and living policies provided for in the Services Agreement? Are the software license and renewal fees and maintenance charges for which the Customer is being charged on a pass through basis accurately calculated?
  - (iii) Has the Service Provider supplied the backup documentation to support its pass-through expenses that is required by the Services Agreement?
7. Do the invoices reflect any credits to which the Customer is entitled?, e.g. credits in respect of the Service Provider's failure to achieve service levels?
8. Are the taxes being properly assessed?

9. Is the Service Provider delivering invoices at the time contemplated in the Services Agreement? Are the invoices consistently being delivered early or late?
10. Is the Customer paying invoices in accordance with the Services Agreement? For example, if the Services Agreement provides the Customer with thirty days from receipt of the invoice to pay, are the invoices being paid on the thirtieth day after receipt?
  - (i) If the Customer is paying invoices before they are due, is the Customer receiving any early payment discounts to which it is entitled under the Services Agreement?
  - (ii) If the Customer is late in paying invoices, are interest charges being calculated in accordance with the provisions of the Services Agreement?
11. Are the invoices in the proper form and are they accompanied by the supporting documentation required under the Services Agreement?
12. Does the Services Agreement include any provisions requiring that the Service Provider invoice the Customer for services within a specified period of time after the services have been performed? Is the Service Provider still entitled to charge the Customer for services that are only invoiced after the expiry of such period?
13. Has the Customer reviewed any charges related to the services that the Customer is paying directly? Is the Customer required to pay these amounts?
14. Does the Service Provider have any obligations to pay amounts to the Customer, e.g. gainsharing or royalty payments or in respect of Customer equipment sold by the Service Provider on the Customer's behalf? Is the Service Provider performing its obligations in respect of such payments and are the payments properly calculated?

#### **H. Termination of the Agreement**

##### Notes:

In connection with any Renegotiation, the Customer needs to understand what rights, if any, it has to terminate the Services Agreement in whole or in part as well as its ability to do so from a practical perspective. This requires: (i) an understanding of the provisions of the Services Agreement; (ii) an analysis of any defaults that may have occurred and of any other termination rights in the Services Agreement; and (iii) an assessment of the time, organizational effort and costs required to re-establish the services, whether through repatriation of the services or transition to a new service provider. It will be helpful for the Customer, in assessing its ability to terminate the Services Agreement, to compare the estimates it used, in entering into the Services Agreement, of the time, effort and costs to transition the services to the Service Provider against what actually occurred.

With respect to termination for default, the Customer should review the history of any Service Provider failures to perform, assess whether such non-performances give it the right to terminate the Services Agreement, estimate its damages and think about how any dispute is likely to proceed. This analysis should be performed in conjunction with legal counsel. It should also take into account that the resolution of disputes under the agreement dispute resolution procedures is normally a long, complicated, time-consuming and expensive process.

Questions:

Default

1. Does the Services Agreement provide the Customer with the right to terminate the Services Agreement in whole or in part for Service Provider default?
2. Are there any failures to perform by the Service Provider that have the potential to rise to the level of a default entitling the Customer to terminate the Services Agreement in whole or in part?
3. With respect to any such failures to perform, what are the pre-conditions to the Customer's right to terminate? Notice? Expiry of a cure period? Have the pre-conditions been satisfied?
4. Is the Service Provider required to co-operate in any such termination for default, notwithstanding that the Service Provider disagrees about the Customer's right to terminate?
5. What is the Customer's exposure if it is subsequently determined that the Customer was not entitled to terminate for default?

Other Customer Termination

6. Does the Services Agreement provide the Customer with the right to terminate the Services Agreement in whole or in part for any other reason that is applicable in the circumstances?, e.g. for convenience, change of control of the Customer or Service Provider or the occurrence of an Event of Force Majeure that is not cured within prescribed time limits.
7. What are the pre-conditions to such Customer rights of termination?, e.g. notice.
8. What termination fees must be paid by the Customer in connection with such termination?

Service Provider Termination

9. Does the Services Agreement provide the Service Provider with the right to terminate the Services Agreement in whole or in part for Customer default?
10. Are there any failures to perform by the Customer that have the potential to rise to the level of default entitling the Service Provider to terminate the Services Agreement in whole or in part?
11. With respect to any such failures to perform, what are the pre-conditions to the Service Provider's right to terminate? Notice? Expiry of a cure period? Have the pre-conditions been satisfied?
12. Does the Service Provider have any other rights to terminate the Services Agreement?

## Other

13. Does a plan exist for the Customer to repatriate the services in whole or in part or to transition the services in whole or in part to another service provider (the “**Termination Transition**”)?
14. Does the Service Agreement provide the Customer with the rights it requires to effect a smooth Termination Transition?, e.g.:
  - (i) Assistance from the Service Provider to develop any documents required to re-procure the services?
  - (ii) Assistance with the transition of services?
  - (iii) Rights to Service Provider and third party software?
  - (iv) Options to purchase dedicated hardware?
  - (v) Permission to make offers of employment to dedicated personnel?
15. What period of time will the Customer require to complete the Termination Transition?
16. What are the consequences to the Customer’s business of performing the Termination Transition at this time? For example, will the Customer obtain, as a result of the Termination Transition, a refreshed technology infrastructure? Will the Termination Transition prevent the Customer from focussing on other critical business issues that require its attention
17. What costs will the Customer incur to complete the Termination Transition?
18. Are there any costs that will be incurred by the Service Provider for which the Customer will be liable?

### **I. Term of the Agreement**

#### Notes:

Just as the Customer should analyze its ability to terminate the Services Agreement, the Customer should also consider its ability to renew or to extend the term of the Services Agreement. The Customer can obtain significant leverage in the Renegotiations if it is willing to renew or extend an outsourcing agreement that is or can be profitable to the Service Provider. More is involved however than simply adding one, two or three years (say) to the term of the Services Agreement or exercising a right to renew. As part of its assessment of what the term extension or renewal is worth to the Service Provider, the customer will need to consider its authority to extend the term of the Services Agreement and what provisions, if any, will need to be adjusted in connection with the extension.

#### Questions:

1. Does the Customer have the legal authority and any necessary approvals to extend or renew the term of the Services Agreement?
2. How can the Customer establish, for the purposes of Customer internal control or governance procedures, that the Customer is doing at least as well in extending or renewing the Services Agreement with the Service Provider as the Customer would be able to do if the Customer were to “go to market”, i.e. issue an RFP?

3. How important will an extension of the term of the Services Agreement be to the Services Provider?
4. What adjustments will be required to the terms and conditions of the Services Agreement in connection with the extension?
  - (i) How will the parties adjust the terms and conditions of the Services Agreement relating to price, termination fees, continuous improvement, technology currency and technology refresh?
  - (ii) Will these adjustments be effective from the conclusion of the Renegotiation or will they apply only in respect of the extension?

**J. Other Terms and Conditions**

Notes:

The Customer should also make an assessment of the terms and conditions of the Services Agreement in light of how the Services Agreement has unfolded since contract signing. There are three reasons for doing so. First, the Customer may discover that it has rights or remedies under contract provisions that have been ignored since the Services Agreement was signed. For example, ongoing representations and warranties contained in the Services Agreement may entitle the Customer to improvements in the services of which the Customer was not aware. Second, the Customer may discover that issues that were originally critical to the Customer, when the Services Agreement was new, are no longer so and the Customer is more able to compromise on the issues. For example, the Customer may no longer require the same restrictions or data storage, levels of liability or insurance and be able to utilize this flexibility to achieve cost savings or to negotiate other more flexible terms. Third, the Customer may determine that provisions included in the Services Agreement to respond to its specific concerns are not adequately addressing those concerns and that an adjustment to the provisions should be made, e.g. The Customer may have required, at the time the Services Agreement was entered into, that the Service Provider commit to providing specific and detailed reporting that does not in fact address the Customer's operational requirements and which should be amended.

Questions:

Representations and Warranties:

1. Are the representations and warranties included in the Services Agreement ongoing representations and warranties?, i.e. representations and warranties that continue throughout the term of the Services Agreement?
  - (i) What services (if any) do such ongoing representations and warranties entitle the Customer to obtain at no additional charge?
  - (ii) Do such representations and warranties in fact continue to be true?
  - (iii) What are the Customer's remedies if the ongoing representations and warranties are not true?

Applicable Laws:

2. Does the Service Provider commit to perform the services in accordance with applicable laws?

- (i) What is the scope of “applicable laws”? Does it also include, for example, policies of regulators?
- (ii) Have there been any changes in laws that impact the services?
- (iii) Does the Customer anticipate any changes in laws that will impact the services?, e.g. in respect of environmental matters?

Governance:

- 3. Are the Customer and the Service Provider managing the Services Agreement in compliance with the governance procedures set out in the Services Agreement?
  - (i) Are the governance processes dealing with the right issues in the proper time frame?
  - (ii) Do the Customer and Service Provider have the right people involved in the management of the Agreement?
  - (iii) How many people are involved in the Customer’s governance of the Services Agreement? Can this number be reduced?
  - (iv) Can the governance procedures be simplified?

Indemnification and Liability:

- 4. With respect to the indemnification and liability provisions of the Services Agreement:
  - (i) Does the Customer continue to require the same indemnification and liability provisions? Or based on the Customer’s experience with the Service Provider since the Services Agreement was signed, is the Customer prepared to adjust the indemnification or liability provisions?
  - (ii) Is there any benefit to the parties from adjusting the indemnification or liability provisions that can be captured?

Reporting:

- 5. Is the Service Provider providing the Customer with the information relating to the performance of services that it is required to provide under the Services Agreement?
  - (i) Is the Customer using all of the information being provided by the Service Provider?
  - (ii) Does the Customer require information with respect to the services that is not being provided?
  - (iii) Is there another way to provide the Customer with the information or data it requires, e.g. through a data warehouse accessible to the Customer?

Confidentiality and Privacy:

- 6. What are the terms and conditions of the Services Agreement relating to confidentiality and privacy?
  - (i) What information is included within the definition of “Confidential Information”? Does it include the terms and conditions of the Services Agreement?
  - (ii) Is the Customer entitled, under the confidentiality and privacy provisions of the Services Agreement, to collect, store, use and disclose Confidential Information in connection with the Renegotiation as it intends to do?
  - (iii) Is the Service Provider entitled, under the confidentiality and privacy provisions of the Services Agreement, to collect, store, use and disclose Confidential Information in

connection with the Renegotiation as the Customer anticipates the Service Provider intends to do?

### III. THE RENEGOTIATIONS PROCESS

The first two parts of this checklist provided an introduction to Renegotiations and suggested specific questions to investigate in preparing to negotiate specific Renegotiation issues. This part discusses issues around renegotiations that the Customer should take into account, e.g. the importance of speaking with legal counsel and identifying required notices and approvals, as well as issues that the Customer will want to consider as it defines, in conjunction with the Service Provider, the procedures that will govern the renegotiation.

#### A. Consult with Counsel

##### Notes:

It is important that the Customer consult with legal counsel at an early stage in connection with any Renegotiation. Counsel can:

- (i) review with the Customer the legal environment in which the Renegotiation is being conducted, i.e. the laws, regulations and regulatory policies and guidelines that apply to or are impacted by the Renegotiation<sup>15</sup>;
- (ii) ensure that the Customer does not unintentionally waive rights or that it does not assume obligations that it was not intending to assume, e.g. allowing applicable limitation periods to

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<sup>15</sup> For example, in the government context, counsel can provide advice about the applicability of Freedom of Information laws to the Renegotiations process. In Ontario, the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, paragraph 18(1) provides that “[a] head may refuse to disclose a record that contains ... (e) positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution or the Government of Ontario”.

See also Section 5.1 (FRE Board of Directors Responsibilities) of Guideline B-10, *Outsourcing of Business Activities, Functions and Processes*, issued by the Office of the Superintendent of Financial Institutions of Canada on March 11, 2009 (available at [http://www.osfi-bsif.gc.ca/app/DocRepository/1/eng/guidelines/sound/guidelines/b10\\_e.pdf](http://www.osfi-bsif.gc.ca/app/DocRepository/1/eng/guidelines/sound/guidelines/b10_e.pdf)) . This section requires federally regulated entities (FREs) to have appropriate risk management policies and practices in place (and that these be regularly reviewed by the board of directors of the FRE or by a committee of the board). Section 5.2 (*FRE Management Responsibilities*) further requires that management of the FRE communicate information pertaining to significant outsourcing risks to the board in a timely manner. In connection with any Renegotiation of a material outsourcing agreement entered into by an FRE, counsel will be able to review with the FRE what actions, if any, are necessary under the risk management policies established by the board and whether the risks associated with the Renegotiations are significant enough to require that notice of the Renegotiation be given to the board.

expire or having a willingness to discuss issues interpreted as a binding commitment to renegotiate;

- (iii) guide the Customer as to how to conduct itself during the Renegotiation, bearing in mind that issues not resolved through the renegotiation process may end up as disputes subject to litigation and in respect of which the Customer will have a separate set of obligations;
- (iv) determine how to position the Renegotiation in light of the provisions of the Services Agreement relating to changes, dispute resolution and governance; and
- (v) direct and instruct participants and, in so doing, protect through solicitor-client privilege communications in respect of which legal advice is sought<sup>16</sup>.

No checklist can substitute for thoughtful legal advice, provided by experienced counsel familiar with the outsourcing agreement, which will guide the Customer through the Renegotiation.

Questions:

1. What laws, regulations and regulatory policies and guidelines apply to the Renegotiation? How will the Customer's rights and obligations in respect of the Renegotiation be impacted by these laws, regulations, policies and guidelines?
2. Are there any limitation periods, whether under the Services Agreement or applicable law, that impact the issues to be renegotiated or the timing thereof? If yes, do such limitation periods require the Customer to take specific action with respect to any issues, e.g. making a formal claim against the Service Provider?
3. What instructions should counsel provide to the Customer's team: (i) to avoid actions or failures to act being misinterpreted?; and (ii) about how to conduct itself during the Renegotiation?
4. Do any existing provisions of the Services Agreement, e.g. terms and conditions relating to change management, dispute resolution or governance, apply to and govern renegotiations and restructurings of the Services Agreement? If yes, is the impact of these terms and conditions on the Renegotiation consistent with the parties' expectations? For example:
  - (i) Is the Renegotiation to be carried out in accordance with the dispute resolution or other provisions of the Services Agreement?
  - (ii) If yes, do the dispute resolution procedures, as documented in the Service Agreement, apply to and determine the issues (legal, business, operational and procedural) to be addressed in the Renegotiation? Will the Customer and Service Provider enter into a separate agreement to deal with any issues that are not covered by the defined dispute resolution procedures?
  - (iii) Even if the Renegotiation is not intended to be carried out in accordance with the dispute resolution process in the Services Agreement, is the Renegotiation intended to satisfy any of the steps of the dispute resolution process that are documented in the Services Agreement,

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<sup>16</sup> By way of example, the Ontario *Freedom of Information and Protection of Privacy Act*, referred to at note 14, provides in section 19 that "[A] head may refuse to disclose a record (a) that is subject to solicitor-client privilege;"

e.g. preliminary steps that require escalating business discussions between the parties or mediation? Does this need to be documented? Or, is it the case that, if the Renegotiation is unsuccessful, the parties will follow the dispute resolution process documented in the Services Agreement including any preliminary steps requiring the parties to discuss or mediate the issues in dispute?

5. What aspects of the Renegotiation:
  - (i) should be carried out under the direction and control of counsel and be subject to solicitor-client privilege?
  - (ii) are carried out on a “without prejudice” basis?, i.e. if the Renegotiation is not successful, then any conversations and concessions and any interim agreements made for the purpose of a settlement may not be introduced as evidence in formal dispute resolution proceedings<sup>17</sup>.
6. Do the issues to be renegotiated or the fact of the Renegotiation give rise to any obligations on the Customer, whether under the Services Agreement, applicable law, other agreements of the Customer or otherwise? For example, do any of the issues to be renegotiated constitute disputes in respect of which litigation may be anticipated, so that, even as the Renegotiation proceeds, the Customer should be considering its obligations to retain documents in anticipation of litigation?
7. If the issues to be addressed in the Renegotiation include performance issues, what impact will the Renegotiation have on the liability and default provisions of the Services Agreement?, e.g.:
  - (i) Should the Customer deliver a notice of default under the Services Agreement notwithstanding the Renegotiation?
  - (ii) Will notices sent in connection with the Renegotiation constitute notices of default under the Services Agreement?
  - (iii) Will any cure periods be suspended during the Renegotiation?
  - (iv) Will damages continue to accumulate during the Renegotiation?
8. Will the Renegotiation impact any rights or obligations of the Customer under any agreements entered into in connection with the Services Agreement?, e.g. if the parent of the Service

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<sup>17</sup> See *Phillips v. Rodgers*, 1988 CanLII 3518 (AB Q.B.):

“[7] The law with respect to “without prejudice” correspondence is clearly outlined in *Pirie v. Wyld* (1886), 11 O.R. 422 at 427-428 (C.A.) where the court found:

The authorities seem, though not very numerous, to be clear upon the first point, that letters written or communications made without prejudice, or offers made for the sake of buying peace, or to effect a compromise, are inadmissible in evidence. It seemingly being considered against public policy as having a tendency to promote litigation, and to prevent amicable settlements.

The language in the cases is sufficiently wide to cover all communications made under the words “without prejudice”. The cases in which the rejection of such letters or communications has taken place have generally contained some offer of settlement.”

Provider has provided the Customer with a guarantee of the Service Provider's obligations under the Services Agreement:

- (i) is it a requirement to notify the guarantor or involve the guarantor in any Renegotiation discussions?; and
- (ii) will the Renegotiation or any amendment to the Services Agreement made in consequence of the Renegotiation require a corresponding amendment to the guarantee if it is to continue to bind the guarantor?

## **B. Approvals and Notices**

### Notes:

The Customer should consider what notices it should provide and what approvals it requires or should obtain: (i) in connection with the Renegotiation; and (ii) to preserve its rights under the Services Agreement and otherwise.

There are legal and practical dimensions to these questions. On the one hand, the Customer may have specific legal obligations to provide notice of the Renegotiation, for example, under the laws applicable to it<sup>18</sup>. However the Renegotiation may also impact the ability of the Customer to perform its obligations under other agreements to which it is a party, e.g. in a multi-sourcing situation, performance under one services agreement frequently impacts performance under other services agreements to which the Customer is a party. Therefore, in a multi-sourcing environment, the Customer will want to determine whether the issues subject to Renegotiation affect performance under other service agreements and, if so, whether the Customer should provide notice of the Renegotiation to its other service providers, assuming it has the right to do so.<sup>19</sup>

Similarly, as a preliminary matter, the Customer should consider what notices it should provide and approvals it requires to conclude and implement any agreement it may reach with the Service Provider. Although the parties to a renegotiation will frequently state that any agreements they reach are subject to internal corporate approvals, the Customer should know the internal corporate approvals that will be required early on in the process.

### Questions:

1. Having regard to: (a) the issues that are or may be involved in the Renegotiation; and (b) the fact of the Renegotiation itself; what notices are required or should be provided by the Customer under or pursuant to:

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<sup>18</sup> See, for example, the obligations of a management of an FRI to provide information pertaining to significant outsourcing risks to the board in a timely manner under section 5.2 (*FRI Management Responsibilities*) of Guideline B-10, *Outsourcing of Business Activities, Functions and Processes*, issued by the Office of the Superintendent of Financial Institutions of Canada discussed at note 14 above.

<sup>19</sup> The Customer's right to provide notices to third parties may be constrained by the confidentiality or public disclosure provisions of the Services Agreement.

- (i) laws or regulations applicable to the Customer including any policies or guidelines of any regulatory bodies having jurisdiction over the Customer;
  - (ii) the Services Agreement;
  - (iii) any related agreements, e.g. if the parent of the Service Provider has provided the Customer with a guarantee of the Service Provider's obligations under the Services Agreement, does the guarantee require that the Customer provide the parent company with notice of the Renegotiation?;
  - (iv) the service agreements, supply agreements, subcontracts and other agreements to which the Customer is a party; and
  - (v) insurance policies.
2. Are there any confidentiality obligations, public disclosure provisions or other constraints that impact the ability of the Customer to provide such notices?
  3. Does the Customer's ability to commence the Renegotiation depend upon it having provided such notices?
  4. What approvals does the Customer require:
    - (i) to make concessions on specific issues in the context of the Renegotiation?; and
    - (ii) to execute the agreements implementing the results of the Renegotiation?

### **C. Communications**

#### Notes:

The renegotiation of an outsourcing agreement is almost always accompanied by rumours that "the deal is in trouble" or that termination of the agreement is imminent and will be followed by litigation. The negative impact of these impressions can last long after the Renegotiation is completed. Such rumours are not just internal in the Customer: often, they run rampant outside the Customer, perhaps spurred on by competitors of the Customer or the Service Provider anxious to reap the benefits of any negative impacts or publicity<sup>20</sup>.

Faced with the likelihood of rumours about the Renegotiation, the Customer should develop a communication plan to respond to deal with any communications issues that may arise.

#### Questions:

1. Are there any restrictions affecting the Customer's ability to make public statements about the Renegotiation?
  - (i) Under the Services Agreement including under any "Public Notices" or "Public Disclosures" provisions included in the Services Agreement
  - (ii) Under the laws applicable to the Customer?

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<sup>20</sup> This is the Five Rs: "Regardless, Renegotiation rumours run rampant."

2. What are the key messages the Customer wishes to communicate in respect of the Renegotiation?
3. What is the Customer's communication plan:
  - (i) For internal stakeholders and audiences?
  - (ii) For external stakeholders and audiences?
4. Has the Customer appointed a designated spokesperson to deal with all questions concerning the Renegotiation?
5. Should the communication plan be a joint communication plan (in whole or in part)? Have the Customer and the Service Provider agreed as to what statements they will make concerning the Renegotiation and who will make them?
6. Does the Service Provider require the Customer's consent under the Services Agreement to any statements concerning the Renegotiation?
7. Has the Customer advised its employees of how to respond to questions about the Renegotiation?

**D. Ongoing Operations**

Notes:

The rights and obligations of the Customer and the Service Provider and the processes established under the Services Agreement will continue during the Renegotiation, except to the extent that the parties otherwise agree. The Customer should consider whether any of these rights, obligations or processes should be adjusted or suspended pending the outcome of the Renegotiations.

Questions:

1. Should the rights and obligations of Customer and the Service Provider under the Services Agreement be adjusted or suspended during the Renegotiation:
  - (i) in respect of issues that are the subject of the Renegotiation; and
  - (iii) in respect of the parties' other performance responsibilities?
2. Will the operational processes documented in the Services Agreement continue to apply without variation during the Renegotiation? Or will these processes be suspended or adjusted in any manner?, e.g. will the parties adjust any of the following processes documented in the Services Agreement:
  - (i) contract management;
  - (ii) change order processes;
  - (iii) problem management;
  - (iv) risk management;
  - (v) financial management including annual planning processes, invoicing and payment procedures;
  - (vi) customer references concerning Service Provider performance; and

- (vii) governance procedures

## **E. Use of a Facilitator**

### Notes:

There are many factors that make it difficult for a Customer to prepare effectively for Renegotiations including: (i) complex technical, business or operational issues; (ii) a perceived lack of industry knowledge; (iii) divergent stakeholder interests; (iv) absence of objective processes or methodologies that enable the Customer to address inter-related issues and develop positions and approaches to the issues for the Renegotiation; and (v) uncertainty about what constitutes an appropriate solution including concern about ex post facto criticism of any agreements reached. All of these issues can similarly inhibit the ability of the Customer and the Service Provider to reach a negotiated resolution to the issues confronting them.

In such circumstances, either the Customer alone or the Customer and Service Provider jointly may choose to retain a facilitator<sup>21</sup> to assist with the negotiations and to help find a solution. The use of a facilitator can expedite the Renegotiation and increases the chances of a successful outcome. A good facilitator, especially one with experience in outsourcing and ideally with the Customer's line of business, can create an environment that keeps the parties focussed on issues, encourages creativity in identifying solutions, controls group dynamics and enhances the acceptability of the solution.

Where the Customer and the Service Provider determine to retain the facilitator jointly, both parties need to be committed to the use of the facilitator. The facilitator will be ineffective if one of the parties is only going through the motions or agreeing to retain the facilitator only so that it can put a check in the box.

### Questions:

1. Will the Customer alone or the Customer and the Service Provider jointly retain a facilitator to assist with the Renegotiation?

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<sup>21</sup> The facilitators being referred to are neither third party outsourcing advisors such as Everest Group or Technology Partners International, Inc. nor mediators.

Third party outsourcing advisors, also referred to as outsourcing advisors or intermediaries, provide consulting services regarding sourcing strategies and decisions whereas facilitators are concerned with creating an environment that enables negotiations and allows the parties to work together to find solutions.

Mediation is a problem solving process that focuses on helping parties with strong differences reach an agreement that will resolve their conflict. Facilitation while similar to mediation, is a less formal process that applies where the disagreements or dispute are not as clearly defined.

2. If a facilitator will be retained, has a Facilitation Agreement been prepared? In the circumstances where the Customer and the Service Provider agree to retain the facilitator jointly, does the Facilitation Agreement establish:
  - (i) the extent of the facilitator's authority;
  - (ii) the information to be provided to the facilitator;
  - (iii) the facilitator's rights and responsibilities;
  - (iv) the parties' responsibility for the facilitator's fees?
  - (v) that the facilitator may not be called as a witness in any subsequent dispute resolution proceedings if the Renegotiation is not successful?

#### **F. Documentation**

##### Notes:

Part I.D (*Information to be Reviewed*) above discussed identifying and assembling information in the possession of the Customer or Service Provider that is relevant to the Renegotiation. It did not address the more practical questions that are the subject of this Part such as where the information will be stored, who will have access to the information, whether any guidelines exist about creation of documents and whether the information should be archived at the conclusion of the Renegotiation.

The Customer should ensure its consults with counsel with respect to collection, storage and disclosure of documents to ensure that the Customer complies with its legal obligations and that it does unintentionally waive any privilege attached to documents.

##### Questions:

1. Will the information assembled by the Customer in preparation for the Renegotiation be stored in a central location, e.g. a SharePoint?
  - (i) who will manage the SharePoint?
  - (ii) who will have access to the SharePoint? Is confidentiality protected?
  - (iii) are appropriate controls in place to preserve the integrity of documents?
  - (iv) where is the SharePoint located, i.e. in what country? Considering that the SharePoint may contain confidential, personal or sensitive information, is this location in compliance with the provisions of the Services Agreement?
2. Has the Customer established guidelines with respect to documents created during the Renegotiation? All are members of the Renegotiation team who are creating documents required to store such documents or at least certain types of documents in a central repository?
3. How will the Customer document the history of the Renegotiation? Has a person been designated to track the progress of the Renegotiations, attendance at meetings, action items, etc.?
4. At the conclusion of the Renegotiation, will all information related to the Renegotiation (documents, emails, meeting minutes, notes, drafts, etc.) be collected and archived?<sup>22</sup>

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<sup>22</sup> This matter may already be addressed in the Customer's record retention and destruction policies.

## G. Schedule

### Notes:

Scheduling involves both administrative and substantive issues. At the administrative level, the Customer should think about issues such as how long it will take to resolve issues, how to define the Renegotiation schedule, the inclusion of appropriate interim milestones and how often to review progress against the schedule and to update it if required.

The substantive schedule issues stem from the fact that it is likely many of the matters that will need to be resolved in the Renegotiation will be time sensitive: the importance of an issue to the Customer or Service Provider and the party's interest in it will change over time. For example, in the weeks just before its year end, the Service Provider may be very focussed on resolving issues with revenue recognition impacts and be willing to make significant compromises in order to do so. After its year end however, when any revenue recognition impacts have crystallized on the Service Provider's balance sheet, the Service Provider may no longer have the same interest in or motivation to resolve the issue. It will be beneficial to the Customer to understand the time sensitive issues in the Renegotiation, the parties' interests in resolving these issues and how the interests fluctuate over time.

### Questions:

1. Are any of the issues involved in the Renegotiation time sensitive, either to the Customer or the Service Provider? What are the parties' interests in these issues and do they fluctuate over time?
2. By when do the parties wish to complete the Renegotiation?
3. Has a schedule been prepared for the Renegotiation?
  - (i) Does it include dates by which specific milestones related to the Renegotiation must be accomplished?
  - (ii) Has time been included in the schedule for the parties to obtain required approvals?
  - (iii) Have all parties who will be involved in the Renegotiation been consulted with respect to the schedule?
  - (iv) Has the schedule been prepared taking account of vacations?
4. What is motivating the parties to keep to the schedule? Do the Customer and Service Provider have the same understanding of the factors are driving the schedule?
5. What happens if the schedule is not met?
6. How frequently will the parties review progress against the schedule?

## H. Meetings

### Notes:

The Customer should consider, at an early stage, how the actual Renegotiation meetings with the Service Provider will be conducted, as the manner in which the meetings will be conducted may influence how the Customer prepares and who the Customer uses to prepare for the Renegotiation.

### Questions:

1. When and where will the parties meet?
  - (i) Will all meetings take place in person? Can meetings occur by video conference or conference call?
  - (ii) Are breakout rooms available?
  - (iii) Will the parties have after-hours access to the premises?
  - (iv) How will the parties deal with the expenses of the meetings?, e.g. room rental costs and the costs of meals?
  - (v) Will this allow the Customer sufficient opportunity, after one Renegotiation meeting ends, to prepare for the next?
  
2. Who will represent the parties at the meetings?
  - (i) Are the right people at the meetings to enable decisions to be made?
  - (ii) Does the Customer's Renegotiation team understand the extent of its authority to negotiate?
  - (iii) Are the parties allowed to include their respective stakeholders at the meetings?, e.g. in the case of the Service Provider, is the Service Provider allowed to include its subcontractors in the Renegotiation meeting? In the case of the Customer, is the Customer entitled to bring other service providers to the meetings?
  - (iv) Can a party bring someone to the meetings whose sole function is to take minutes of the meetings?
  - (v) What are the rules with respect to the attendance of counsel at the Renegotiation meetings? Can the Renegotiation meetings proceed in the absence of counsel representing one party or the other?
  
3. Has the Customer established guidelines to be applied by its team for the conduct of meetings?, e.g.
  - (i) Who speaks for the Customer?
  - (ii) What are the rules with respect to calling of caucuses?
  
4. Will joint minutes of any Renegotiation meetings be prepared?
  - (i) Will the parties document discussions on the issues?
  - (ii) Will the meetings be recorded?
  - (iii) Is one party unilaterally entitled to record meetings?

## **I. Agreement on Issues**

### Notes:

Any Renegotiation will proceed in stages, with the parties resolving issues over time. The Customer and the Service Provider should agree, prior to the start of the Renegotiation meetings, on: (i) what effect, if any, is to be given to interim agreements on specific issue; (ii) how they will document their interim agreements; and (iii) the next steps once agreement on all of the issues is reached.

### Questions:

1. What is the effect of agreement on individual issues in the course of the Renegotiation? Can agreements reached on issues be revisited at any time?
2. When agreement has been reached on an issue in the course of the Renegotiation, how will the parties: (i) document that agreement; and (ii) jointly approve how the agreement is documented? In a table of issues? On a whiteboard? In meeting minutes? Via email? In an amended and restated agreement?
3. What form will the final agreement take and how will it be prepared?
  - (i) Is it a Term Sheet or a Restated and Amended Services Agreement?
  - (ii) Will the final agreement be drafted and negotiated as the Renegotiation proceeds? Or will the final agreement be prepared after all issues have been negotiated?
  - (iii) Once agreement has been reached between the Customer and the Services, will the Customer require any acknowledgements, confirmations or agreements from third parties, e.g. subcontractors of the Service Provider or from any third party guarantors?
- (i) Is the final agreement subject to internal or external approvals? Are the Customer and the Service Provider aware of each other's approval requirements and how long it will likely take to obtain such approvals?

## **J. Release**

### Notes:

If the Renegotiation is successful in resolving the issues between the Customer and the Service Provider, it will also deal with any claims the parties may have against each other. In order to give effect to the resolution agreed to by the Customer and the Service Provider therefore, the parties will likely enter into or incorporate in their final agreement a Release of claims against each other.

The thorny issue in many Renegotiations is the scope of this Release. On the one hand, by the time the Renegotiation is concluded, the parties will have spent a significant amount of time in negotiations: their natural reluctance to start the process again with new items or to have their compromises undermined by new issues argues in favour of a comprehensive Release.. On the other hand however, both the Customer and the Service Provider may be cautious about relinquishing claims of which they are not aware or the impact of which they do not appreciate, suggesting that the scope of the Release should be more restricted. .

The scope of the release to be provided may impact how the Customer or the Service Provider prepares itself for or conducts the Renegotiation, e.g. the amount of effort expended to identify potential issues. For this reason, the parties should clarify the scope of the Release at an early stage in the Renegotiating process.

Questions:

1. Will the Customer and Service Provider sign Releases in connection with the final agreement?
2. If the parties will sign a Release in connection with the final agreement, what is the scope of claims that will be released by each party?
  - (i) All claims between the parties related to matters covered by the final agreement?
  - (ii) All claims between the parties prior to a specific date?
  - (iii) All claims of a party known or that should have been known to the party?
  - (iv) Third party claims?
3. Does the scope of the Release impact how the Customer conducts the Renegotiation?
4. Will the Release bind affiliates and subcontractors?
5. Does any Release encompass an indemnity against third party claims?

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