

The Outsourcing Group at Skadden supports clients through all stages of an outsourcing project — from preparing the initial RFP and facilitating vendor selection to negotiating all aspects of the definitive agreement and schedules. We work in an efficient and cost-effective manner, tailoring our role to the client’s needs. When appropriate, we can also call on the tremendous range of experience that Skadden possesses, both in the United States and in our numerous offices around the world, allowing us to respond immediately to any issue that may arise in a transaction.

We have handled a wide variety of outsourcing transactions, ranging from the outsourcing of a specific business process to the enterprise-wide outsourcing of all software development and support. Our experience also stretches across a broad range of industries, including financial services, insurance, telecommunications, energy, consulting, travel, media and publishing.

We also have experience representing both vendors and customers in outsourcing transactions. As a result, we understand the perspective that each side brings to the table and can negotiate agreements knowing how the other side is likely to react to specific positions, and the basis for their position. This allows us to provide better advice for our clients and more easily resolve issues as they arise.

The cornerstone of our practice is that we can move easily among the legal, business and technology issues in any outsourcing transaction. We are equally comfortable discussing legal issues with the in-house lawyers, pricing and strategic issues with the business stakeholders and service descriptions with the technology specialists. In all cases, we aim to be creative problem-solvers and never “over-lawyer” a deal.

Skadden also is positioned to handle “offshore” outsourcing transactions. This includes projects where the outsourcer is in a foreign country or where the customer will be receiving services in locations around the world. We regularly rely on our international offices to support these transactions and assist with local law issues.

## **Our Approach**

We mold our approach to each outsourcing deal based on a number of parameters, including the type of service being outsourced, the timeline of the transaction, and the allocation of responsibility among our firm, the client and any external consultants. We describe below the various functions we take on in outsourcing transactions.

## **The RFP Stage and Vendor Selection**

In many cases, our client is evaluating a number of potential outsourcers using an RFP process. We have worked with our clients during the RFP stage by creating legal templates that include proposed contractual terms. Typically, a bidder is required to indicate as part of its proposal whether it will agree to the terms proposed by the customer, and if not, what its position will be. This format provides the client with an early indication of the different bidders’ positions on key legal issues and also provides some insight into how difficult it may be to negotiate with the various bidders. We work with our clients to analyze the responses that are received and to conduct a “yellow-pad” walk-through of these terms with each bidder.

We also help our clients coordinate the RFP process, often working with outside consultants to facilitate an orderly vendor selection. This may include negotiating and drafting confidentiality agreements, overseeing due diligence, and managing the collection and organization of the bids that are received. Our role at this stage varies depending on the resources that the client or an outside consultant brings to the process.

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## Transaction Management

Once our client has selected a vendor, we work with the client to plan a timeline and strategic approach for getting from initial drafting to signing. In some transactions, this means carefully planning the timing of document execution, the closing of the transaction, and the cut-over of the actual services to the vendor. In other cases, this may mean outlining how to coordinate asset sales, employee transition issues and regulatory approvals. We believe that because of our experience in outsourcing transactions, we can be a strong value-add at this preliminary stage.

As part of this process, we also prepare lists of the ancillary documents that need to be created — such as service descriptions, SLAs and pricing schedules — and work with the client to determine the appropriate allocation of responsibility between us, the client and outside consultants to get these documents drafted and negotiated. We also work with the client to identify critical milestones and to prioritize tasks to ensure an efficient and timely process. Again, we are willing to reduce or expand our role depending on the needs and interests of the client.

## Drafting and Negotiation

Undoubtedly, our most significant role in any transaction is the drafting and negotiating of the outsourcing agreement and related exhibits. We are flexible in our approach to drafting and are willing to work with a vendor's form or prepare a first draft for our client. In the latter case, we will customize an agreement using form agreements and provisions from prior transactions in order to prepare a document in the most cost-effective way possible.

Once the negotiations commence, our role varies depending on the resources that the client can bring to a project. In some transactions, we are fully responsible for the negotiations and work directly with the business and technology stakeholders of our clients. In other transactions, we complement in-house counsel who are taking the lead in the negotiations.

One of our greatest strengths during the negotiation process is that we do not limit our contribution to the legal documentation. Rather, we take a critical approach to the business plan, pricing methodologies and technology plan in order to make sure that each of these documents is consistent with the main agreement, accurately reflects the client's intentions and minimizes the client's risks and exposure. Many of our clients have found that such a review is an invaluable contribution to getting the best possible deal.

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## Closing and Post-Closing

Once an outsourcing agreement is ready for signature, we work with our client to coordinate the closing of the transaction. This might include making regulatory filings in foreign jurisdictions, coordinating the assignment or sublicensing of third-party agreements to the vendor, managing employee transition issues, or preparing deal summaries for board approval. In each case, we ensure that the client has addressed all of the potential issues that may arise.

Finally, we do not view our role as being over once the deal is signed. Rather, we often stay in touch with our clients and discuss how implementation of the agreement is being handled and assist in the project's execution and long-term success. In some situations, we are brought in to advise on contract interpretation issues where the client is looking to adopt a new business model or to introduce a new technology that was not contemplated by the original agreement. In other cases, we might assist the client with amendments or modifications to the original agreement. Overall, our clients know that we are an available and ongoing resource on which they can rely.

## Termination and In-Sourcing

Clients also turn to us when they are looking to terminate an outsourcing relationship; either because the agreement is expiring after its stated term or because one of the parties has exercised an early right of termination. In some cases, the client is seeking to transition to a new vendor and in other cases the client is seeking to bring a set of services back in-house.

In all of these situations, we work closely with our clients on the critical transition phase of the outsourcing relationship. At the outset, we help our clients lay the necessary foundation for transi-

tion, either by working with a new vendor to take over the service or to make sure that the client has the necessary corporate and organizational structure to reacquire the outsourced services.

We also help our clients analyze the existing outsourcing contract to assess the other party's obligations and ensure that the client is honoring its own commitments. In the event a transition plan needs to be drafted, we work with our clients to make sure that their business and technology needs are being met. During the transition phase, we counsel our clients on the numerous issues that arise in these contexts, such as employee acquisition (and related employment and benefits issues), tax planning, data transfer, facilities transfer, asset acquisition, and the assignment of third-party vendor contracts. Overall, our goal is to ensure that the transition phase is seamless for our clients.

In those cases where termination or transition results in a dispute between the parties, we are prepared to represent our clients in any litigation or arbitration that may arise. We work closely with the firm's litigation group and arbitration group, each of which has broad experience handling service and technology-related disputes.

Our attorneys frequently lecture and write on current outsourcing topics. One of our partners is the author of an outsourcing treatise titled *Outsourcing: A Practical Guide to Law and Business* (Practising Law Institute, February 2011) that examines different types of outsourcing, the legal issues in drafting an outsourcing agreement, special considerations for outsourcing to India and China, and the life cycle of a typical outsourcing transaction.