
The logo for infokit, featuring the word "infokit" in a white, lowercase, sans-serif font, oriented vertically within a large orange rounded rectangle.

Contract Negotiation

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Contract Negotiation

Introduction

Selecting the right IT system is only the first step in a successful implementation. It is equally important that you come to a suitable contractual arrangement with the supplier. You need to think about this at an early stage in the selection project. It is tempting to leave contractual matters to the very end and, after a possibly lengthy and tiring selection process, to want to get this stage out of the way as quickly as possible and get on with implementation. Everyone believes at this point that things will go well and the signed contract will go into a drawer never to be looked at again. In the real world this is all too often not the case. Cutting corners at this stage could be your biggest mistake. A well-drawn up contract should protect you (and the supplier) against unforeseen circumstances that throw your project off-track.

The issues involved in negotiating a contract are broadly the scope for any type of IT system and variations with regard to contracts for Virtual Learning Environments (VLEs) and other Management Information Systems (MIS) can be found in a table at the end of the infoKit.

The Freedom of Information Act (FOI) 2000 covers IT contracts. See the section on [FOI and Contracts](#).

You will need to decide at the very start of the selection process what approach you will take to establishing contract terms. The answer to this question may depend on the size of the project and the extent to which you are undertaking any bespoke or developmental work. This does however have an impact on your procurement route especially where procurement is subject to EU regulations. Click on [Procurement related information](#) for more advice. You are advised to involve your Procurement Officer and Legal Adviser at an early stage. The options in relation to contract terms are:

- **Sign up to the company's standard terms.** These are unlikely to be favourable to you.
- **Impose a standard university contract on them.** It is unlikely you will have a standard contract that will cover the circumstances of your implementation without heavy revision.
- **Use a standard GCat contract.** GCat is a catalogue based procurement scheme originally designed to provide public sector organisations with a simplified means of procuring and contracting for a wide range of IT and Telecommunications products and related services. In most cases the standard GCat contract will be tailored to suit the particular project. Use the following link to view information on [standard GCat contract](#). You can also view a standard [GCat contract](#) from the same site.
- **Negotiate a contract.** This is a complex and time-consuming process but it is the best way to come to an arrangement that covers the particular circumstances of your project and ensures give and take between purchaser and supplier. The extent to which you are free to negotiate on terms and conditions is determined to some extent by the procurement route you choose and what you specified in your Invitation to Tender. One of the aims of the JISC infoNet methodology is to put you in a good bargaining position at the end of the evaluation so you are advised to choose a route that allows you to negotiate after you have gained a thorough understanding of the product. Follow the link to view the infoKit on [System Selection](#).

This infoKit attempts to help you chart a course through the minefield of contract negotiations. It is intended as a guide for the novice. If properly used it should be able to save you time and legal costs but it should not be taken as a definitive statement on legal issues. In all cases you are advised to seek professional legal advice at an early stage.

A Stake in the Ground

Both you and the supplier need to be clear, from the point at which they respond to your Invitation to Tender, how you intend to handle the contractual arrangements. If you want to negotiate a suitable contract you can set your stake in the ground in one of two ways:

- Include a sample set of terms and condition with your Invitation to Tender. This need not be anything so elaborate as a sample contract; you could simply list the main headings on which you would expect to negotiate.
- Include a session on contract terms as part of your evaluation event. This will allow you to sum up the different approaches of the interested suppliers as a factor in your final decision.

One point to bear in mind is that many software companies will set their stake in the ground by telling you that their standard contract terms are non-negotiable. The multi-nationals will say this very convincingly but all of them are able to exercise a greater or lesser degree of flexibility in the end when it comes to the difference between winning or losing your business.

An advantage of discussing contract terms as part of your evaluation is that it will give you an indication of what sort of authority your local contacts have in relation to negotiation. Flexibility of approach may help you distinguish between otherwise similar suppliers. A multi-national where the decision-making authority resides in a different country (and possibly a different time zone) may be more frustrating and, ultimately, less flexible to deal with than one where you have direct access to the decision makers.

Single or multiple suppliers?

If you are purchasing a large or complex system you may also need to decide whether you are prepared to contract with more than one supplier. It is likely you will need to purchase hardware and, possibly, consultancy as well as software. In preparing your Invitation to Tender you will need to say whether you will consider vendors who can only supply part of the package or whether you want the successful supplier to contract with you for the full solution. There are many advantages to the latter approach including time saved on contract negotiation and, more importantly, accountability. If your contract is solely with the software supplier they can't turn round when things go wrong and blame either the hardware or the consultants who implemented the product. If you do contract separately, you need to ensure that the software vendor validates the specification of the hardware you are purchasing and the hardware supplier warrants their equipment will run the software you are buying etc, etc.

Know your Bargaining Power

A key factor in determining what a supplier will concede in the way of contract terms is how much your business means to them. It pays to have a good grasp of the market and to know exactly what your own bargaining power is.

If it is a well-established off-the-shelf system with a strong foothold in the sector they are unlikely to budge too far from their standard terms. If however you are purchasing a new or developing system, or dealing with someone who wants to establish their company in the sector, your position is much stronger.

Just as the supplier needs to sell their company to you, you need to sell yourself as a potential customer. Study the market and know your strengths. A good reference site is a valuable resource to any supplier. Think about why you may be a good catch for them e.g.

- You are a large or prestigious institution
- You are prominent in a niche area
- You may potentially purchase more of their products in future (especially an ERP type solution)
- You have a strong track record in successful implementations
- You will be the first site to go live with this particular product
- You are in a strong position to advise them on the product's development
- You have found an innovative use for the product

Take the opportunity to establish your own credibility in your tender documentation.

Agree a Price

Price is likely to be the first negotiating point since there is no point in getting into other contractual details if your preferred solution isn't within your agreed budget.

To get the best possible deal for your organisation you need to understand where the supplier has the most flexibility to negotiate. Generally this is in the area of licence fees. The price quoted for a piece of software is likely to be composed of:

- software licences
- maintenance and support costs
- implementation consultancy
- and, possibly, hardware if ordered from a single supplier

It may be difficult for a supplier to reduce consultancy costs as they have overheads associated with real people whose salaries must be paid. The cost of producing software is, however, in the development. The cost to the supplier of giving you a software licence for a developed product is little more than the price of the CD on which the application is loaded. Your strongest negotiating position is therefore to ask for a reduction in licence fees or more licences for the price quoted. The supplier may agree to move on maintenance costs or at least to cap them for a fixed period.

A favourite tactic of suppliers who know they are exceeding your budget is to reduce the hardware costs. They do this by reducing the specification of the hardware. This looks good on paper but can lead to huge problems a few months down the line when you realise the hardware is inadequate for your purposes. Not only do you need to meet the added expense of purchasing new hardware but you also face major disruption to services whilst you undertake the upgrade. If a salesman some way into the negotiations suddenly realises 'you don't really need all of that hardware' be very wary and take independent advice on the hardware sizing (this is sound advice in any case). Even if they are more candid and suggest 'you can't afford this now so get the minimum and phase more in out of next year's budget' – you should still be wary. It is very false economy to skimp on hardware just to get the project off the ground.

In agreeing the deal it is important to be absolutely sure that the licences you are purchasing are adequate for the scope of the project you are undertaking. Where possible it is always best to obtain a site licence for the products. A price per named user will inevitably work out most expensive. A price per concurrent user may be better provided you have done the metrics correctly and provided your user activity is spread over time rather than concentrated in intensive processing periods.

Understanding the Jargon

Agreeing an acceptable price is only the first stage of the negotiation – now you get into the detail of negotiating the individual clauses of the contract. The following takes you through some of the main headings you should consider in drafting a contract and attempts to explain the purpose of such a clause. To skip straight to a heading that interests you select the option from the drop down list and click view.

Acceptance Tests

Confirmation that the agreed project deliverables and hence the key milestones in the plan have been achieved, is normally by some form of acceptance test. Don't be fooled by clauses to the effect that the software passes the supplier's standard installation tests – the acceptance testing must be related to the satisfaction of your customer requirements. You will agree with the supplier the form of a test appropriate to determine that the customer requirements have been met and the agreed procedure for carrying out the test. This should be clearly documented and the contract should outline the procedures by which software which does not meet the acceptance tests will be rectified free of charge. The supplier may require you to complete an acceptance certificate on the satisfactory conclusion of a test. To avoid the final acceptance of the software overshooting a defined completion date you may wish to consider incentivising the supplier to meet milestone dates or impose liquidated damages by way of deductions from the purchase price in the event of a delay (see below under Liquidated Damages).

Assignment

Mergers and takeovers are common in the IT industry and you do not want to find yourself in a position where a new supplier takes over and will not support the product you have purchased or requires you pay to upgrade to a new version of the product. It is therefore advisable to ensure that the contract terms will survive any such acquisition of the supplier by a third party.

Change

See Variation.

Conduct of Supplier's Staff on your Premises

You may wish to insert a clause that supplier's staff comply with your own policies and procedures whilst on your premises. You would generally expect professional conduct from all such staff but issues can arise. These are often small matters but can impact on the morale of your project team. Examples could be discontent caused by supplier's staff taking smoking breaks when your own staff

are not permitted to do so or using your phones for personal calls etc.

Customer Responsibilities

The supplier will generally wish to specify certain facilities and resources that the customer is expected to provide to the project. It is in your interest to have these clearly laid out at the start as you do not want to be hit by any unexpected resource requirements such as having to install new phone lines at short notice.

Data Protection and Security

Data Protection is a major issue and you should take all possible steps to ensure that you do not fall foul of Data Protection legislation as a result of the supplier's actions. It is reasonable to expect the supplier to warrant that they will comply with the requirements and the principles of the Data Protection Act 1998. You may also wish them to warrant that they will comply with a recognised code of practice on information security management such as BS 7799 or an equivalent.

Areas of potential difficulty may occur when a supplier wishes to access your data for the purposes of installation, testing, maintenance or support, especially if they do this from outside the European Economic Area. The contract should specify that access is only for these purposes and that the supplier will process personal data to which it has access only on your instructions. It has also been known for lazy/unscrupulous suppliers to use copies of actual customer data for demonstration purposes. Needless to say use of your data for any marketing or other commercial purpose should be expressly forbidden as should any transfer of data to a third party without your prior consent. You also should seek an indemnity from the supplier against any liabilities you incur as a result of the supplier (or its employees or sub-contractors) breaching your instructions or data protection legislation.

Definitions

You will need to include a set of definitions of the terms used in the contract such as 'hardware', 'software', 'system' etc in order to avoid any ambiguity.

Delay

You should specify what will happen in the event of a delay in delivering the goods/services in line with the agreed implementation plan.

Should the delay be the responsibility of the supplier, it is reasonable to expect them to notify you of the expected delay, agree a contingency plan with you and meet any direct costs arising as a result of workarounds needed to implement the contingency.

Should the delay be a direct consequence of your own actions and prevent you achieving a milestone in your implementation plan, you cannot expect to withhold payment from the supplier for work to date (see payment plan).

Escalation Procedure

It is normal practice to identify key staff to whom issues will be escalated in the event that a dispute cannot be easily resolved. You will generally identify staff at corresponding levels in both organisations in the form of an escalation hierarchy.

Escrow

Escrow is not an acronym – it is a term describing a legal arrangement whereby a supplier deposits the source code for their product with a third party. In the event of the supplier going out of business, customers who have taken out an Escrow agreement will be able to obtain a copy of the source code. This offers the customer some protection in that, although you may be left with an unsupported product, you would be able to undertake essential maintenance and development provided you have the resources to do so.

The supplier will pass on to you the administrative cost imposed by the Escrow agent. Fees are of the order of £300 per annum at the time of writing (2002) although complex systems may require more than one agreement e.g. where the application, the underlying database and reporting tools are separate products.

Your Escrow agreement should specify which versions of the source code and documentation are to be held (it is important to have access to previous versions if you are not on the latest release) and the circumstances in which and conditions on which it will be released. The National Computing Centre (NCC) is a recognised Escrow agent. Click [here](#) to find out more about NCC.

Intellectual Property Rights

Your licence agreement should include an unambiguous definition of the number of users permitted and their level of access to the software. The supplier should fully indemnify you against any legal action/costs arising from any actual or alleged infringement of Intellectual Property Rights (IPR) as a result of your legitimate use of the system. In other words, even though the supplier may have infringed someone else's copyright in developing the system, you, as a legitimate user, should not suffer any of the consequences. The supplier may of course have to replace the offending element of the system with functionality of an equivalent standard.

The question of Intellectual Property Rights becomes more complex when the supplier undertakes bespoke development on your behalf. Generally they will want to retain IPR even though much of the analytical and design work may have been done by your own staff. Unless you are getting the development at a knock-down price you may wish to argue for a share of future sales.

Insolvency and Bankruptcy

The contract will provide for termination in the event of insolvency or bankruptcy. You should also consider the notes under Assignment and Escrow to protect you in the event of the supplier going out of business.

Law

It is normal practice to define that the Agreement is subject to and constructed and interpreted in accordance with the laws of England and Wales (or Scotland). This may be important where you are contracting with a non UK company.

Liability and Insurance

The supplier should indemnify you against any loss or damage resulting from an act or omission of the company and its employees or sub contractors. A supplier will normally be expected to show evidence of:

- Employer's liability insurance
- Professional indemnity insurance
- Public liability insurance

You should take advice from your own insurers as to the required levels of cover.

Suppliers will usually attempt to limit their liability for breaches of warranty to the amount paid for the software and/or services (sometimes plus a percentage). You may wish to reserve the right to require them to repair or replace the software rather than go straight to a refund and termination situation.

Limitation of Liability

The supplier should be obliged to repair or replace any software which does not function in accordance with the specification free of charge during the warranty period.

Any clause that attempts to exclude or limit the supplier's liability for personal injury or death caused by its negligence will be ineffective pursuant to the Unfair Contract Terms Act 1977 ("UCTA"). Any other damage caused to or loss sustained by the purchaser should be limited only to the level of insurance that it is reasonable to expect the supplier to obtain.

There have been a number of recent cases concerning the exclusion by a supplier of liability for consequential or indirect losses and whether or not this is reasonable. As a result, it appears to be a matter of fact in any particular case whether it is reasonable to include an exclusion or limitation clause. The specific provisions of UCTA and these cases demonstrate that it is important to consider the following in deciding whether or not a liability limit imposed by a supplier is reasonable (and therefore enforceable):–

- What are the resources and insurance available to each party should a loss arise? For example, is business interruption insurance available to the customer? Could the supplier realistically obtain insurance against all consequential loss?
- What are the bargaining positions of the parties?
- Has the contract been negotiated in any way?
- Has the price factored in the allocation of risks?

Liquidated Damages

The contract will generally include some form of incentive to encourage the supplier to deliver as per the agreement. The use of price retentions and the imposition of liquidated damages are examples of such "incentives". For example should you purchase a payroll system which doesn't work and you are unable to pay your employees, you would be asking the supplier to be responsible for all related costs e.g. meeting employee overdraft charges which arise as a result of the non payment of salary. Similarly with a student or finance system, if you were unable to collect student fees, you would incur substantial losses as a result of the supplier's breach. Needless to say most suppliers will strongly resist the introduction of such a clause and they can be difficult to enforce in law unless the liquidated damages payment can be demonstrated to represent a genuine estimate of the loss that will be incurred as a result of the breach. A liquidated damages payment such as a fixed percentage of the contract price deducted for each week of delay also is more likely to be agreed.

Maintenance

Where maintenance is to be provided, the contract should assign priority levels to faults and define service levels in accordance with which reported faults should be responded to and fixed. The provisions should also cover how future increases in maintenance costs will be limited.

Non Disclosure

There will generally be a clause that neither party will disclose information identified as confidential to any third party.

Parent Company Bond or Guarantee

Where you are dealing with a company which is a subsidiary of a larger parent you may require some form of bond or guarantee stating that the parent company will meet the supplier's obligations in the event of the smaller company folding. You should take advice from your Treasurer's/Finance Department at an early stage about what financial information they need to see at the tender stage and they will advise on whether such a clause is necessary. Even very large companies can be subdivided in such a way as to make this an essential precaution.

Price Movement

It may be appropriate to insert a clause relating to future price increases in relation to your maintenance agreement. This is likely to be capped at no more than the maximum increase in the Average IT Earnings Index plus an agreed percentage.

Relationship between the Parties

The agreement is likely to clarify the relationship between the parties by stating that this is contractual and does not represent a partnership or joint venture etc. There may be additional clauses stating that each party must pay its own sub contractors and not order goods or services in the other's name.

Resolution of Disputes

This section clarifies how you will proceed should you be unable to settle a dispute arising from the contract through the specified Escalation procedure. The settlement of a dispute by mediation in accordance with the Centre for Disputes Resolution Model Mediation Procedure is a common precursor to (and often avoids) litigation or the appointment of an arbitrator is a common practice that may help to reduce the costs involved in going straight to litigation. You may wish to nominate an authority, such as the President of the British Computing Society, who will appoint an arbitrator should the two parties involved be unable to agree on one.

Software License Terms

The supplier should include a clear and unambiguous statement of their licence terms covering the number of users, levels of access and number of copies you may make for back-up purposes. They will probably include clauses to the effect that you cannot provide bureau services or training to third parties without their consent and they may wish to audit your use of the system.

Specification

The supplier should be prepared to warrant the software's compliance with an agreed functional specification for an agreed minimum period from the final acceptance date of the software. You may also want them to warrant compliance with specific versions of your existing software although it would be unreasonable to expect them to give an open-ended warranty in this area.

Staff Skills and Expertise

The supplier should warrant that their staff employed on the project possess the necessary skills and experience to undertake the work. Don't underestimate the importance of this clause or you may find yourself training their consultants and paying for the privilege of doing so. You should reserve the right to interview the staff they assign to the project and reject unsuitable candidates.

The supplier should also warrant that, having appointed suitable staff to your project, they will not seek to remove them without your permission (allowing for unavoidable situations such as illness or resignation). There are numerous examples of suppliers sending in a high flyer to win the business then replacing them with someone of considerably less experience when another project comes up.

Sub Contractors

It is advisable to insert a clause to the effect that the supplier will not sub contract any of the work without your prior permission otherwise you may be paying for the name and reputation of one company but find you are actually working with another.

Where you have agreed to sub contracting you need to be absolutely clear about your relationship with both parties. We strongly recommend that you contract with a single supplier who takes responsibility for the whole project and undertakes to pay for and manage the work of sub contractors. You may otherwise find yourself caught in a blame loop as soon as something goes wrong in the project. Examples of such situations may include hardware/software issues such as incompatibility between the software and the operating system or inadequate specification of hardware and/or software/implementation issues where one supplier's consultants implement another supplier's software.

System Compatibility

If you have explicitly stated that the system must interface with a specific version of another product or work within a specific environment it may be worth asking the supplier to warrant this as part of the contract.

Term and Termination

The agreement may be for a fixed term or open ended, either way it should indicate a period for either party to serve notice of termination on the other. Where you are undertaking a lengthy implementation project it may be advisable to include the duration of the implementation plan as a minimum term as you do not want the supplier to pull out before the work is complete.

The contract should indicate the circumstances under which a purchaser has the right to terminate. Such circumstances might include the supplier's insolvency, breach of a material obligation or change of control of the supplier's business.

There will normally be a clause stating that either party has the right to terminate as a result of breach of contract.

You may wish to add a clause that in the event of termination the supplier will, for reasonable reimbursement of expenses, take all reasonable steps to ensure that you can continue to support and maintain the system until a suitable alternative is implemented.

Should your contract include a perpetual software licence then it should specify that termination of the agreement does not imply termination of the licence provided you have not breached any of the licence conditions.

Variations

You should outline the procedure by which the contractual agreement may be varied. Normally this will be by prior written agreement. Should you request additional work from the supplier, you should specify the basis on which you will agree the increased cost. Don't forget to include words to the

effect that if you reduce the requirements, the cost should show a corresponding decrease.

Waiver

Most contracts will contain a clause similar to the following:

'Failure by either you or us at any time to require the performance of any provision of the Agreement shall not affect the right of such party to require full performance of it at any time thereafter nor shall it constitute a waiver of any subsequent breach of any such provision or in any way prejudice such party's rights under this Agreement.'

This means basically that, should you choose to overlook a breach of contract terms for whatever reason, you are not affecting your future right to redress. There may however be a time limit within which you must bring an action.

Warranty Period

The supplier will generally warrant the goods for a specific period. A common bone of contention is that the customer is expected to pay support and maintenance costs even during the warranty period and that bug fixes will be in accordance with the standard support agreement. There isn't generally any way round this so this particular warranty isn't worth a lot.

Schedules and Related Documents

Your contract will include a set of appendices or schedules that provide supporting detail referenced by clauses in the contract. The following are likely to be needed for most systems purchases.

Customer Requirements

A list of the customer requirements that the supplier is undertaking to meet. This may be taken from your ITT but it is likely to require some amendment if there are areas where the supplier is unable to meet the requirements as originally stated. It is particularly important to include the specific agreements about areas where the supplier has promised to meet a requirement with a future release of the product.

This is sometimes termed a functional specification or a Statement of Requirements. A more in-depth look at this area is available in the [System Selection](#) infoKit.

List of Goods Supplied

Many of the larger systems can be composed of a bewildering array of products e.g. database, operating system, various application modules, reporting tools, workflow tools etc. You need a clear listing of what products (and what versions of those products) you are purchasing. We refer to single or multiple supplier situations above – it may be that during the pre-sales demonstrations you were shown third party products, such as reporting tools, that integrate well with the supplier's product. Now is the time to do a final check that the purchase list includes all the items you expected.

Plan

An outline plan that highlights the key implementation milestones. The plan is bound to be subject to change but you should start with an agreed baseline and adopt formal change control procedures to handle deviation from the plan. If you are unable to develop the plan before you sign the contract, you should at least refer in this schedule to a plan to be agreed and specify a time limit for reaching agreement.

Payment Schedule

A payment schedule that references the milestones in the plan. A piece of software is of no use to you unless it can be delivered as a working solution in your environment. Where you are partnering with a supplier on implementation, it is reasonable to pay against delivery of agreed objectives rather than simply pay up front. This is particularly important in relation to implementation consultancy which can eat up a large proportion of any implementation budget. Staged payments give you some leverage in the event that the consultancy does not deliver the expected results or overruns the agreed budget. Follow this link to read our article on managing consultancy input to projects.

Support

Details of your support agreement with the supplier. This should include a clear set of service standards in relation to:

- Hours of service
- Response times for issues of differing severity
- Method for agreeing problem severity
- Transparent tracking mechanisms
- Escalation procedure

Sign The Contract

Only when you are fully satisfied that you have acceptable solutions to all of the points above should you sign the contract. You need to check your own organisation's procedures and regulations to identify who in your organisation is authorised to sign the contract. The checklist below may help to recap the main points.

| Contract Point | MIS | VLE | Notes and Variations |
|---|-----|-----|--|
| Agreement Period | Yes | Yes | Variable or fixed term. If fixed term, check CHEST site for agreements |
| Post-termination of Agreement period – possibility for outright purchase? | Yes | Yes | Possibility of continuation of use by prior arrangement and usually payment of a reduced annual fee. This could include support and new releases |
| Type of licence: e.g | | | |
| Full site? | Yes | Yes | Dependent on size of institution measured in FTEs / per server, with limit of student seats per server / Dependent upon registered users |
| Number of users based on FTE (Full time equivalent) count? | Yes | Yes | |
| Number of users based on concurrency? | Yes | Yes | Licence may not be available on this basis. Variations may include number of servers (with limit of 1,500 per |

| | | | |
|--|-----|-----|---|
| | | | server) / Number of student seats |
| Rights issues: e.g. | | | |
| To whom does the data and content belong if institution stops using the service? | Yes | Yes | Usually the Institution. In some instances the ownership of the content depends upon the license. |
| Hosted services: e.g. | | | |
| Is there a disaster recovery plan for off-site hosting? If so, what is it? | Yes | Yes | If required, provided at extra cost |
| Requirements: e.g. | | | |
| Integration with other systems | Yes | Yes | Variable, need to check which systems have been tested. Requirements should be agreed as part of the contract. May not be possible with pilot or basic system. |
| Product Support: e.g. | | | |
| Included in cost? | Yes | Yes | If yes, but variable as to exactly what is included. e.g. Standard phone and email support only. Premium support is extra and priced on application. May not be included but charged on an annual basis |
| Any limits on support calls? e.g. Mon-Fri 09:00-17:00; maximum number of calls?; limited number of contacts at site? | Yes | Yes | This varies from vendor to vendor. The type of support required should be clearly stated and agreed in the contract. There is usually no limit on the number of calls, but there may be on the time of day. It is useful to have a named contact for support. |
| Previous versions supported? | Yes | Yes | This may be for an agreed period or for a fixed period after the new version of the software has been made available. |
| Perpetual use? | Yes | Yes | A possibility with some vendors. |
| Authentication and Security: | | | |
| Whose responsibility is systems security? | Yes | Yes | Usually, security is customer responsibility. For hosted services, vendor assumes all responsibility |
| Integration with authentication systems | Yes | Yes | Some vendors offer integration with authentication systems and routines such as Kerberos (network authentication protocol) and LDAP (lightweight directory access protocol). |
| Franchise Agreements | | | |
| Specific mention may be required to cover franchise agreements (home and overseas) | | Yes | A distinction is usually made between registered and enrolled students. Agreement may be possible to distinguish between students enrolled on a franchise programme and the FTE of their institution. |
| Cost of Training: | | | |
| Timescales and rates must be included. Are the rates daily, weekly? What is included and what are additional costs? | Yes | Yes | Basic training is frequently provided as part of the agreement, with additional days costed per day. Need to check if such items as consultants' travel and accommodation are included; also if training is on-site or remote. |
| Other staff: Who should do the training? Different levels of training? | Yes | Yes | Some vendors offer specific training for different groups of staff e.g. IT Admin, Academic staff. Requirements must be clearly stated and agreed. |
| Cost of Maintenance and Support – On site hosting: | | | |
| All Aspects | Yes | Yes | May be available but for negotiation |
| Other Support Services: | | | |

| | | | |
|-------------------------------|-----|-----|--|
| Content advisory service? | | Yes | Some vendors offer content development – process on application |
| Other support tools/services? | Yes | Yes | 24/7 and other premium services may be available at an additional cost |

Having got your signed contract let's hope you put it away and never need to look at it again!

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Contract Checklist

What is included, or not included, in the contract varies from supplier to supplier. The table above is an attempt to show areas that are subject to the agreed contract.

A full grid for Virtual learning Environments, which includes named products and vendors, may be viewed at www.chest.ac.uk. This site also contains model licenses. Other relevant information may be available from www.jisc.ac.uk.

Freedom of Information and Contracts

Record keeping for the tendering and contract process in the public sector in the UK is governed by one statute, three Statutory Instruments, and VAT and Tax regulations. These are:–

The Limitation Act 1980 c. 58

SI 1991/2839 The Public Works Contracts Regulations

SI 1993/3228 The Public Service Contracts Regulations

SI 1995/201 The Public Supply Contracts Regulations

HMCE Notice 700/21 Keeping VAT records and Accounts

The records which have to be maintained to document tendering and contract processes, and the length of time they have to be kept are not changed by either the Freedom of Information Act 2000, or the Freedom of Information Scotland Act 2002.

For briefing notes on the Freedom of Information Acts see:

<http://www.jisclegal.ac.uk/freedomofinformation/freedomofinformationPub.htm>

It is in every institution's interest to ensure:

- that the appropriate records are created.
- that records are retained for the statutory retention periods which apply.
- that obsolete records are destroyed as part of a controlled and auditable business process.

The retention periods suggested for contract records may be found at Section F of the JISC Study of the Records Lifecycle

http://www.jisc.ac.uk/whatwedo/programmes/programme_preservation/project_lifecycle_revision.aspx

The full impact of the Freedom of Information Acts on contractual relationships is as yet unknown. However the Acts do appear to reduce the force of **commercial confidentiality clauses**, which are normally written into contracts with third parties. This limitation operates not only with contracts completed from January 2005, but is retroactive and applies to contracts already in place. The problem arises because the FOI Acts place great emphasis on **Public Interest**, which in many instances may override commercial confidentiality, and require the public authority to release information to an enquirer that it would have withheld pre-2005. The boundaries between these potentially conflicting interests will only be resolved as the FOI Commissioners provide judgements, or case law develops post 2005.

At this stage the only advice, which can be given is based on common sense:

- Do not accept standard blanket confidentiality clauses in contracts with commercial third parties. They are unlikely to be enforceable.
- Anything which can be defined as a trade secret can be included in a confidentiality clause.
- Information in contracts is exempt information if its disclosure would, or would be likely to, prejudice the commercial interests of any person (this includes the public authority).
- Always look for internal legal advice unless using standard contracts previously approved by the institution's solicitors.
- Make the other party aware that you may be required to make elements of the contract documentation publicly available under the Freedom of Information Acts.
- Reach agreement with the other party during the contract negotiations which elements of the documentation you will agree to make public on request, and which elements you will look to exempt from the legislation.
- Be aware that commercial confidentiality may be time dependent and exemptions successfully applied at the time of signing a contract may well cease to apply at a later stage in the relationship.

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