

PRELIMINARY CONSIDERATIONS

1. INTRODUCTION

Several agreements may precede actual execution of the *System* procurement agreement. The most common of these—non-disclosure, trial use and beta test agreements—will be considered in this Chapter. Sample agreements are reprinted at the end of the Chapter.¹¹

2. CONFIDENTIALITY

The RFP will include information describing your business operation, your requirements and the objectives expected to be accomplished by the *System*. All of this information is confidential. Likewise, each response to your RFP will include confidential information describing the proposed *System's* functionality, technical design, pricing and contract conditions. Therefore, it is in both parties' interest to respect each other's confidential information as such information is disclosed in the negotiation process and to use this information only for the purposes identified in the RFP.

Prior to delivery of the RFP, the parties should execute a confidentiality agreement. Selected key provisions usually found in these agreements are discussed below. A sample Mutual Confidentiality Agreement is reprinted



¹¹. A disk containing an electronic copy of the agreements reprinted in this book can be ordered by completing the order form at the end of this book.

at the end of this Chapter with certain sections in bold print to identify preferred wording.

- ❑ **PURPOSE:** The use of confidential information by either party should be limited to the specific purpose defined in the agreement. For example, you would not want the vendor to use confidential information relating to the operation of your business to develop application software which could then be made available to your competitors. Paragraph C of the sample agreement defines the “Purpose” and Section 4 limits the use of confidential information solely for that Purpose.
- ❑ **VERBAL DISCLOSURE:** Confidential information should be disclosed in written form. However, during the course of marketing presentations or other meetings, confidential information may be disclosed verbally. When this occurs, the information about to be disclosed should be identified as confidential and promptly documented in writing to the recipient afterwards. The last sentence of Sections 1 and 2 of the sample agreement address this issue.
- ❑ **EXCLUSIONS:** Information is not confidential merely because one party says it is. To be recognized as confidential, appropriate steps should be taken to preserve confidentiality. Even if the test for confidentiality is satisfied at the time of disclosure, information can subsequently lose such standing if it is indiscriminately disclosed. Sections 3(i) through (iii) of the sample agreement identify the prerequisites for confidentiality to exist and endure.
- ❑ **INDEPENDENT DEVELOPMENT:** Evaluation of available application software programs may lead you to conclude that your requirements can only be satisfied by custom software. During the design and specification stage, you will most likely incorporate methodologies used in your day to day business operations, some of which may also be contained in software programs previously evaluated. To avoid a claim of misappropriation, the confidentiality agreement should acknowledge your prior knowledge of such information and recognize your right to use it in the development of new software programs. Sections 3(iv) and 6 of the sample agreement address this contingency.


- ❑ **PROCEDURES:** Confidentiality agreements usually require the receiving party to use “the highest degree of care” to safeguard the confidentiality of information received from the other party. The obligation imposed by such language, as well as the extent of compliance, is difficult to measure. Since it is in each party’s best commercial interest to use effective means to protect their own confidential information, requiring the other party’s information to be protected in a similar manner provides both a more effective and measurable standard. The first sentence of Section 4 and the last sentence of Section 5 of the sample agreement define confidentiality procedures.

3. TRIAL USE

Installation and training associated with *System* implementation usually require a significant investment of management time and attention. However, when you have identified software that appears to best satisfy your requirements, using the *System* on a trial basis is an ideal way to ensure you have made the right choice. Many vendors will agree to free use for a trial period. From the vendor’s viewpoint, if the software can perform as represented during the marketing discussions, trial use will most likely result in a sale.

If the software is performing in a satisfactory manner, it is unlikely that you would return it. Therefore, you should negotiate the license agreement before the trial period begins. If you wait to negotiate the license agreement until after the trial use period has commenced or expired, you will lose negotiating leverage.

The license agreement should contain many of the same terms and conditions as the trial use agreement. Ideally, it should be attached to the trial use agreement as a schedule which becomes effective in the event you decide to license the software.¹² Selected key provisions usually found in a software trial use agreement are discussed below. A sample agreement is reprinted at the end of this Chapter with certain sections in bold print to identify preferred wording.

 12. Chapter Six provides a detailed analysis of the clauses usually contained in procurement agreements.