

Contract Corner: Termination Provisions—Maximizing Flexibility

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Termination rights are a crucial and frequently negotiated aspect of complex commercial agreements. In addition to providing protection in the event that a vendor defaults, the ability to walk away from negotiations regarding modifications or renewals can also be a powerful tool for creating negotiating leverage. Flexible termination options, termination assistance, and other termination rights can manage the risks of transitioning to a new provider and provide credible alternatives for future negotiations.

Right to Terminate

Alternative termination rights provide essential flexibility when poor performance, changes in technology, or a desire to bring services in-house drive a customer to seek changes to its original deal. Paying an enormous convenience fee to terminate the entire relationship may not be viable, and customers should consider alternative mechanisms and provisions when crafting and negotiating termination rights, including the following:

- **Partial termination.** Partial termination rights are essential to maximizing flexibility. Partial termination for cause is particularly important in the event that a vendor defaults, and customers should consider specifying service-level failures or other metrics that entitle them to terminate the affected services. Partial termination for convenience rights, although more difficult to negotiate, can provide valuable flexibility and reduce the cost of other desired changes.

- **Level of granularity.** Partial termination provisions range from the ability to terminate service schedules, towers, or statements of work to the ability to terminate individual services. Customers should generally push for the lowest level of granularity to maximize the ability to dictate the scope of services terminated.
- **Insourcing and resourcing.** In addition to partial termination rights, customers should consider negotiating the right to insource (bring back in-house) and/or resource (migrate to another service provider) specific services under an agreement where business requirements are likely to require additional flexibility.
- **Timing of termination.** Termination notice periods may range from 30 days to as long as 12 months. Although customers will generally seek to negotiate the shortest possible minimum notice period for flexibility, they should also consider including the ability to extend the effective date of termination to align the termination with their transition plan for insourcing or migrating to a new service provider.

Navigating the Impact of Termination on other Terms

- **Pricing.** If an agreement contains minimum fee commitments or large fixed fees, a partial termination may trigger penalties or require a customer to pay for services that it no longer receives, unless partial terminations are addressed in the pricing provisions. Similarly, reducing services from a partial termination may trigger price renegotiation for resource unit or other pricing mechanisms, unless the effect of partial termination is considered.
- **Confidentiality restrictions.** Without appropriate exceptions, knowledge sharing with third-party resourcing service providers could be prohibited by standard confidentiality and data protection provisions, making transition difficult or creating hold-up problems with the incumbent service provider. Customers should therefore carefully review confidentiality terms to ensure that all necessary sharing of information about the services with the service provider's successor is not restricted.
- **Termination assistance.** The mere right to terminate may not allow for a financially and operationally feasible insourcing or resourcing without the service provider's knowledge and assistance. Customers should therefore include provisions requiring the service provider to cooperate with them and/or their third-party supplier for an orderly transition of the terminated services.

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