Negotiating Contracts with Integrated Library System Vendors

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Libraries and consortia are spending a significant percentage of their budgets on the acquisition and maintenance of integrated library systems (ILS). The sales of new multi-user, multi-function systems, upgrades, and vendor support was in excess of $600 million dollars worldwide in 2009—a figure that does not include expenditures on PC-based systems.

Negotiation for PC-based systems is rare, but approximately half of procurements of new multi-user, multi-function integrated library systems priced at more than $100,000 involve contract negotiation. Unfortunately, it is becoming increasingly difficult to negotiate with ILS vendors as the number of major vendors decreases, profit margins shrink, and investors in the companies limit the contractual flexibility of the companies in which they invest. Companies that support open source ILS rarely enter into negotiation; and when they do, negotiation tends to be limited to prices for custom development, migration, and training. Performance guarantees and remedies for poor performance are rare.

The purpose of negotiation is to close the gap between what was asked and what was offered. Increasingly, it is not specific functionality that is negotiated, but contractual issues. When negotiation of functionality is undertaken, it usually involves delivery of functionality claimed to be in development or testing, but not yet in general release. In a few cases, very large libraries and consortia have been able to negotiate custom development of functionality.

While a library or consortium, the prospective “Licensee,” and a “Vendor” may negotiate as many as 50 points, many of them unique to that library or consortium and the Vendor, the following are common to many negotiations for a “turnkey” system, one which includes hardware, software, file migration, installation, training and ongoing support.

While specific wording is recommended, the reader is urged to focus on the substance of the points.
Major Negotiating Points

Components of the Contract

The “Contract” between the Parties shall encompass Vendor’s Software License, Hardware Sales, and Service Agreements.

Licensee’s RFP, Vendor’s Proposal in response thereto, the Summary of Negotiation, and any other written representation which may subsequently be made shall be incorporated into the Contract by specific reference.

Hierarchy of Documents

In case of ambiguity among the documents which constitute the Contract, the hierarchy shall be: the Summary of Negotiation, the body of the Contract with all of its schedules and addenda, any written representations made after Vendor’s Proposal was submitted, the RFP, and Vendor’s Proposal. Ambiguous words or phrases shall be interpreted as an intent to commit; the words "no" and "not" shall mean there is no commitment unless the Parties have specifically agreed to modify such words.

Duration of Contract

The duration or length of the contract shall be seven years, with automatic annual renewal during that period.

OR

The duration of the contract shall be for one year, but with the option of renewal by Licensee each year. The terms set forth in the initial contract shall apply to the renewals for a period of seven years.

Applicable Law

The law of Licensee’s state shall be used to interpret the Contract between the Parties. Any action shall be brought in Licensee’s state. In case of a dispute, the Parties shall first seek mutual agreement to submit to binding arbitration before taking any other action. They shall also discuss good-faith arbitration and mediation as alternatives if they cannot reach agreement on binding arbitration.

Unrestricted Use

All systems and applications software supplied by Vendor shall be available to Licensee for library or archives use on its CPU without restriction except for protection of Vendor’s intellectual property. Licensee shall be able to migrate the software to another machine, regardless of where purchased, using the identical operating system without additional cost except as it seeks to add modules, add libraries, or seeks the assistance of Vendor in the migration. However, the software shall not be run on more than one hardware
platform at a time except for a period of no more than two weeks during a cutover from one platform to another.

**Hardware Sizing**

Vendor commits that the system is sized to support up to ____ concurrent users and shall be field-upgradeable to support up to double the number of concurrent users anytime within five years of installation provided the components are available from the original manufacturer or an after-market manufacturer. If the system cannot be field-upgraded as represented, Vendor shall provide a suitable replacement at its expense.

**User Interface**

Other than the Web-based online patron access catalog, which Licensee will install initially, Licensee may replace the graphical user interface (GUI) for all or part of its staff clients (all modules except patron access catalog) with a Web interface anytime within two years of such interface being made available in general release as Vendor’s primary staff user interface for that application. There shall be no additional charge, provided Licensee has a current software maintenance agreement. Licensee shall remove the GUI interface within three months of installing the Web-based staff interface or shall pay for having two user interfaces for a module. If both interfaces are used, the maintenance rate for the GUI interface shall be half that for the Web interface.

**Price**

The system shall be provided for a purchase price of $_________. The price shall include all hardware, software, migration services, training, and other itemized services from Vendor. There shall be no additional charges unless Licensee adds hardware, software, staff licenses, branches, libraries, or requests additional training.

**Payment Schedule**

Licensee shall pay for 20 percent of the purchase price within 30 days of signing, 35 percent within 30 days of system installation and start-up, 25 percent within 30 days of completion of initial training, and 20 percent within 30 days of satisfactory completion or waiver of acceptance tests.

**Delivery and Installation**

Delivery and installation of all purchased modules and sub-modules shall be between 90 and 120 days from signing or as modified by mutual agreement, subject to the Licensee submitting bibliographic tapes of the records to be loaded at least 45 days before the scheduled installation.

Installation shall include testing of the server with the existing network. Licensee shall be responsible for loading and configuring client software after appropriate training by Vendor.
Acceptance Tests

Licensee shall have the option of undertaking acceptance tests. If undertaken, the acceptance tests shall consist of full function, reliability, and response times tests at the Licensee’s discretion. Licensee shall begin the tests within 60 days of installation, database load, and completion of initial training. Reliability shall be measured over a period of 30 days. The other tests shall be undertaken during the same 30 days. Written notification of test results shall be submitted by Licensee within 15 days of completion of the tests. If a test is failed, it shall be repeated up to two times.

The functionality of each module shall be determined by ascertaining the presence or absence of each feature committed in Vendor's Proposal and product literature except the test shall not include features for which Vendor has quoted a delivery date later than the scheduled test completion date. The Licensee may use Vendor's own full-function test, but does not waive the right to look for anything else committed by Vendor.

Licensee may use Vendor’s reliability and response times tests, but reserves the right to test for all uptime and response time requirements as per the table of coefficients and response times in the RFP.

Should the system not pass the reliability or response times test, the test shall be repeated. If the system again fails to pass, a third 30-day test shall be undertaken. If the system does not meet the reliability or response times requirements by the end of the third acceptance test, Vendor shall provide a hardware upgrade at its expense to bring system performance up to the agreed upon level.

Licensee shall decide at the end of the acceptance tests whether the system meets all of the functional requirements the Vendor agreed to meet. If the system does not, the Licensee may (a) waive the requirement, (b) require removal of the system with a full refund of all monies paid if Vendor has not remedied the deficiencies within 90 days, or (c) enter into negotiation.

Acceptance tests may be repeated as new modules are implemented, except functionality previously successfully tested shall not be retested unless there is evidence that the loading of new software has adversely affected the functionality of previously loaded software.

Maintenance

Annual software maintenance, which shall begin twelve months from installation and system start-up, shall not exceed $______________ in year two. Increases after year two shall not exceed five percent per year in years three through seven. The escalator clause shall apply to software added during the term of the Contract.

The database server and other hardware components that are under manufacturer warranty shall not be subject to maintenance charges until after the warranty periods have expired. Hardware maintenance charges shall not exceed the amount set by the manufacturer each year.
Remote Diagnostics

As long as the system is under maintenance, Vendor shall provide remote diagnostics not only for the integrated library system, but also for the network to the extent its diagnostic tools permit provided the system is covered by a current maintenance agreement.

System Performance

The standard of reliability for future ongoing system performance for seven years following initial installation shall be 98 percent using the table of coefficients in the RFP as long as the system is kept under maintenance. “Scheduled downtime” for upgrades and other mutually agreed upon activities that make the system unavailable for normal use shall not be counted in the reliability calculation. Maintenance payments shall be reduced by five percent for each one percent reliability falls below 98 percent.

Response times shall remain within the maxima set forth in the RFP for seven years after initial installation as long as the transaction levels remain within those set forth in the RFP and Licensee keeps the system under maintenance. If Licensee perceives deterioration in response times, Vendor shall resolve the problem within 60 days of notification of perceived deterioration by providing appropriately qualified personnel at its expense. If responses times are six seconds or more for circulation charge and discharge, the condition shall be deemed an “emergency” and resolution shall be within five days of notification that charge/discharge requires six seconds or more.

Licensee may reduce the monthly maintenance payment by five percent for each one-second average response times (the average of all of them) exceeds eight seconds.

Source Code

Vendor shall provide a copy of its source code escrow agreement within two weeks of negotiation completion. Licensee shall pay the annual premium at such time as it elects to subscribe to the agreement.

Licensee may use the source code to maintain and enhance the software, including working cooperatively with other Licensees that also have a currently paid source code escrow agreement. No commercial entity shall be provided access to the source code.

Assignment

Vendor may not assign its rights and obligations under the Contract except upon receiving written permission from Licensee, which shall not be unreasonably withheld. Further, Vendor shall not sell its library automation product to another organization under a contract that relieves that organization of liability to perform under this Contract.

Conclusion
Every major vendor in the industry has agreed to each of the foregoing points in contract negotiation, but not necessarily all of them in a single negotiation. The outcome depends on the importance of the account to the vendor and the priorities of the library or consortium.

It is common for the library or consortium to submit the negotiation points that it has prepared to the vendor at least one week prior to the negotiation. The vendor can then respond as to which points it is prepared to accept without negotiation—sometimes as many as one-third. Most negotiations are now undertaken in one or more conference telephone calls, each no more than two hours in duration.

The most difficult points are almost always the ones that deal with price, followed by the ones that deal with performance guarantees and remedies. The dollar figures and percentages are, therefore, subject to reduction from the negotiation position with which the library or consortium begins.