

PETER S. VOGEL

Direct Phone: 214-999-4422

Direct Fax: 214-999-3422

Email: pvogel@gardere.com

Blog: www.VogelITLawBlog.com

10 Commandments of Information Technology Contracts

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INTRODUCTION

Over the years I have drafted, negotiated, and litigated hundreds of Information Technology (IT) Contracts. As a result, I have a great deal of experience helping customers and vendors negotiate successful IT contracts and avoid major disputes. In summary, I have concluded there are at least 10 Commandments that affect virtually every single IT contract:

1st Commandment – No Computer Project is ever completed on time

This is a Commandment and an absolute rule of computer technology projects primarily because software developers often underestimate the complexity of problems and overestimate their abilities to solve problems. Following the 1st Commandment is pretty simple; always expect IP projects to take longer than planned, build in more time, and be realistic about timing. Some customers want to penalize vendors for missing deadlines, or get rewarded for completing tasks before deadlines. Neither of these solutions usually work well, since a penalized vendor usually has a bad attitude and a vendor may overestimate each deadline solely to get rewarded for early completion.

2nd Commandment – No Computer Project is ever complete

It is the inherent nature of computer software that there will be bugs, or problems, that may be cured in future versions of software. Most programmers have to stop writing programs and/or testing because of some deadline, and so when software is actually delivered it has some problems. As long as you understand that all software has this characteristic then you will not be surprised. That does not excuse a vendor, particularly if the feature that you need does not work. So make sure that the critical portions of the software work before committing to final payments.

3rd Commandment – If you cannot see the software, it does not exist

Most computer vendors promote features in future versions of software, but until that software is actually operational you cannot be sure how it works. To solve this problem, if you are buying a

software license for new software, make sure that you actually see it in operation and that it really has the specific features that you think important. Do not buy vaporware

4th Commandment – New versions of operating systems never work

Whether you buy the newest version of Windows or unix (or related variant like AIX or Linux), it is unlikely that it will work properly on the day it is announced. The underlying reasons are described in the 1st and 2nd Commandments. You would be well advised to wait until the newer versions of operating systems have corrections. Usually, the manufacturers release these corrections soon after the initial wave of deliveries. Because operating systems are essential to the operation of any computers, this is particularly important.

5th Commandment – There are no Industry Standards

Of course there are standards, just not standards adopted by everyone. IBM wants everyone to adopt its standards, as does Hewlett Packard, and Dell. The 5th Commandment is important because when a vendor warranty that its technology complies with industry standards is a very weak warranty. Your contract warranties should be specific as to features and functions, and not a vague standard that would be difficult to establish in court.

6th Commandment – Do not buy brand new hardware

Inevitably computer hardware goes to market before the engineers work out all the bugs and problems. Not unlike the 4th Commandment about operating systems, you can assume that the same is true for hardware in the 6th Commandment. When some new line of computers is built around a brand new chip or innovative technology, there is a very high probability that there will be problems. Accordingly, you would be well advised to wait until the manufacture offers fixes to the new technology.

7th Commandment – Do not buy brand new software

Similar to operating systems and hardware, new computer applications often do not work properly when initially delivered. For instance when the newest and latest version of Microsoft Internet Explorer (IE) came out, it had serious security issues for which now Microsoft has offered patches. If you buy a new computer software package when it initially introduced, do not be surprised if you have problems, and watch for the vendor to offer some fixes.

8th Commandment – Sales people have answers to every question

Individuals who sell computer technology generally will have answers, whether the answers are right or wrong. One way to avoid relying too much on sales people is to insist that technical support people be present to answer technical questions. Another way to overcome the problems associated with the 8th Commandment is to call or see other customers who use the same products. You can ask them how accurately the sales representations were. Also, you can

determine other important information, like how long the project actually took, the amount of training, and if there are one or two key individuals that you should require to be part of the project team.

9th Commandment – Sales people know absolutely nothing

This is a bit of an exaggeration, but really a variant to the 8th Commandment. Sales people know more about their products than you, but their knowledge may be very superficial. Yet another reason to speak to other customers.

10th Commandment – Individuals who negotiate contracts are never around later

Unfortunately there is high mobility in the IT industry and so you should assume that a year after you negotiate an IT contract, the people you negotiated with are long gone. All important items negotiated and relied upon by you when you committed to your purchase should be included in the IT contract.

OTHER IMPORTANT IT CONTRACT TERMS

Obviously the 10 Commandments are broad topics to try to protect IT customers, but clearly there are important IT contract terms that should be negotiated to protect every customer. In addition to the business and technical terms needed in an IT contract, some of those other important terms include: IT acceptance procedures, software license terms, performance bonds, source code escrow, express warranties, limitations of liabilities and warranties, jurisdiction and venue for lawsuits, and termination rights.

CONCLUSIONS

There are dozens of important IT contract terms that should be negotiated to ensure a successful purchase, whether you are purchasing an entire new system for your organization, adding important new software systems, or upgrading your hardware. It is essential that customers use lawyers who understand the technology, and the important contract terms to negotiate and consulting with experienced IT professionals during the negotiation process to be sure you are getting what you need.

Peter S. Vogel is a trial partner at Gardere Wynne Sewell where he is Chair of the Electronic Discovery Team and co-Chair of the Technology Industry Team. Before practicing law he was a computer programmer, received a Masters in Computer Science, and taught graduate courses in information systems. His law practice has always been exclusively limited to representing buyers and sellers of computer technology and Internet services, had trials throughout the US, and so he has been involved with electronic evidence for more than 30 years. Since 1997, Peter has served as the founding chair of the Texas Supreme Court on Judicial Committee on Information Technology, which is responsible for helping automate the Texas court system and putting Internet on the desktops of all 3,200 judges. He has taught courses on the Law of eCommerce at the SMU Dedman School of Law since 2000.