Assembling the TEM Puzzle: RFPs, SLAs and Ts & Cs

Justin G. Castillo

jcastillo@lb3law.com

June 2, 2008

About LB3

- Washington, DC-based communications law firm founded in 1993 to represent customers, not carriers
- Represent enterprise customers (including more than half of the Fortune 100) in telecom/IT transactions, regulation and disputes
- TC2 – LB3 affiliate that does pricing and benchmarking
- Full disclosure: TC2 is considering providing TEM services, but does not at this time

Agenda

- Goal: Describe the elements of a successful TEM agreement
- Introduction
- Laying the groundwork
- The RFP
- Ts and Cs
- SLAs
- Questions

Introduction: TEM vs. Telecom

- TEM procurements and telecom agreements differ in many key respects:
  - The players
  - The state of the industry
  - The duration of the procurement cycle
  - The nature and scope of services
  - The nature and content of the RFP
  - The pricing models
  - The contracts
  - The SLAs

Laying the Groundwork

- Review your internal processes: How will they align with a TEM solution?
- TEM can cross multiple organizational boundaries (telecom, procurement, HR, infrastructure, finance, etc.). Early buy-in from management and all affected stakeholders is critical

Laying the Groundwork

- Plan the procurement
  - Who has ownership of the project?
  - Who sets the internal priorities?
  - Who scores RFP responses, selects the vendor and negotiates the contract?
  - Who implements the solution?

Laying the Groundwork

- Successful TEM procurements start with the ***carrier*** contracts
- 4 key provisions for every telecom contract:
  - Confidentiality: ownership of CPNI and other key information
  - Payment intervals: 30 days from *receipt*
  - Billing medium: the need for EDI
  - Carrier cooperation with customer vendors

Laying the Groundwork: Carrier Contracts

- Carriers might try to upend the confidentiality clauses in your existing agreements
- Beware of carrier-drafted NDAs/LOAs/CPNI Addenda
- They are almost surely unnecessary, overbroad and/or dangerous:
  - They could eliminate or erode existing rights
  - They could impair your ability to use consultants/TEM vendors
  - They could cripple your next benchmarking or procurement

Laying the Groundwork: Carrier Contracts

From a carrier-drafted NDA for customers who are considering purchasing services from the carrier but who lack a pre-existing contractual relationship:

Company [the potential customer] agrees to use Confidential Information [disclosed by the carrier] solely in connection with the project. Company will restrict the disclosure and use of Confidential Information to its employees, agents, subcontractors and entities controlled by or controlling it who: a) have a substantive need to know such Confidential Information in connection with the project; (b) have been advised of the confidential and proprietary nature of such Confidential Information; and (c) have agreed with Company in writing to protect such Confidential Information from unauthorized disclosure. ***Notwithstanding the foregoing, Company must first obtain [Carrier's] written permission prior to disclosing any of Carrier's Confidential Information to any third-party telecommunications manager or consultant . . . Company is entitled to receive injunctive relief to remedy or prevent any breach (or threatened breach) of this Agreement.***

The RFP: General Thoughts

- In general, shorter beats longer
- TEM RFPs tend to be more customized and customer-specific than telecom RFPs
- Do ***not*** include a draft contract – it's a waste of time
- ***Do*** list key terms in plain English
  - Your major requirements
  - Terms that you *won't* accept

The RFP: Who Gets It?

- What are you buying – a tool (software) or a solution (outsourcing)?
- Third-party ratings (sometimes)
- Feedback/references from other enterprises
- Scope: Does any single vendor have the ability to provide an integrated solution?
- Beware of overkill: How many RFP responses can you really digest?

RFPs:
General RFP Issues

- TEM history and experience
- Customer references relevant to the services under evaluation
- Other references not provided by the vendor
- Customer retention rate
- Financials (not always easy to get)
- Accounts/spend managed per month
- Asking "who are your competitors?" reveals the vendor's perception of its place in the market

RFPs: Service Quality

- Off-shoring of work
- Responsiveness during the RFP process
- Account team
- Geographical proximity
- Electronic automation and, conversely, ability to process paper invoices
- Relationships with carriers

RFPs: Vendor Capabilities

- Invoice collection and processing
- Audit and recovery
- Provisioning and MACD software
- Optimization and cost savings
- Suitability for baselining and benchmarking
- Chargeback capabilities
- Reporting

RFP: Vendor Capabilities

- Invoice-level approval possible
- Ability to build an inventory
- Searchable by phone number, location and corporate division/entity
- Call detail available (if invoiced electronically to the TEM provider)
- Ability to process/pay bills in foreign currency?
- Ability to read foreign-language invoices?

RFPs: Pricing

- Provide a demand set for the vendor to populate (and consider multiple scenarios)
- Request data on all pricing types
  - One-time fees (*e.g.*, implementation)
  - Recurring fees
  - Initial look-back
  - Audits/billing disputes
  - Professional services
  - Wireless
  - Early termination
- Rate stability (or caps on rate hikes)

RFPs: Service Levels/Performance

- Implementation time frames
- Average time to process invoices and pay
- Annual recoveries (measured by percentage of claims and percentage of spend)
- Average recovery time for audits
- ROI
- Account team support

RFPs:
Key Terms and Conditions

- Draft contract is not necessary
- Choose 10 to 20 key Terms and Conditions: Will the vendor comply with them or not?
  - Risk allocation
  - Setting defaults
  - Enterprise-specific clauses
- Save final language for contract negotiations

RFPs:
Narrowing the Field

- Score the RFP responses
- Organize pricing elements to make it possible to compare them across vendors on an “apples-to-apples” basis
- Choose 3 to 4 finalists and obtain additional references – ideally from someone other than the finalists themselves

RFPs: Narrowing the Field

- Meet with finalists and get their BAFO
- Get your internal billing experts to perform a thorough “test drive” of the TEM tool (with live data if possible)
- Select two finalists and visit their operations centers

The Contract: Thinking Ahead

- Whose paper?
  - If you start with the vendor's form, look beyond what is in the agreement to what is missing
- Contract Structure: An MSA with attached SOWs offers flexibility
  - But look past the issues arising in the immediate SOW
- Change management

The Contract: Planning Ahead

- Renewal rights
- Transition support
- Significant business changes
  - If the customer merges, or acquires or divests
  - If the TEM vendor merges or divests
- Pricing stability over the term
- Significant changes in your demand set

The Contract: When Things Go Bad

- Billing disputes
- Objective dispute resolution
- Vendor financial distress (pitfalls) – Look who’s got your CPNI!!
- Problems with the telecom carrier
- Indemnification/Limitation of Liability
- Termination rights
  - Breach
  - Convenience
  - Cure periods

The Contract: Miscellaneous

- Confidentiality
- Software: scope of license, infringement
- Account team support/meetings
- Training
- Subcontractors
- Publicity/marks
- Choice of law/venue

The Contract: The Scope of Work

- If it’s not in-scope it’s out-of-scope
- To avoid delays, confusion and acrimony, drafting of the SOW should start with the RFP
- SPOCs and escalation procedures
- Document what the vendor will do and how the vendor will do it
- Describe any customer duties clearly and precisely
- “Don’t worry; we don’t need to put that in the contract”
- If are any definite project milestones, put them in the SOW

The Contract: SLAs

- There are probably 40 to 50 possible TEM SLAs
- Several basic SLA types
  - Negative SLAs (flog the horse)
  - Positive SLAs (maximize the value of the service)
  - Vendor SLAs
  - Internal SLAs
  - “Soft” SLAs

The Contract: SLAs

- SLA components:
  - Objectives
  - Remedies
  - Measurement periods
  - Exceptions/exclusions/caps
- Pitfalls:
  - The inverse relationship between SLAs and remedies
  - Complex formulae
  - Losing sight of the purpose of SLAs
  - Cumbersome processes for obtaining credits

The Contract: SLAs

- Five key TEM-related SLA issues:
  - Implementation
  - Time to process, present and pay
  - System availability (including downtime/maintenance windows)
  - Bill loading accuracy
  - Reporting

The Contract: SLAs

- Remedies:
  - Credits and the strings attached
  - Termination rights
  - Other
- Other SLAs:
  - Training for new releases/features
  - Responsiveness to changes (new circuit types or vendor billing changes)
  - Escalation
  - Periodic revision of SLAs

Silly Vendor Tricks

- “The pricing in this SOW includes the processing of up to five million dollars ($5,000,000.00) (net) in annual telecommunications expenses representing approximately 150 paper invoices and 500 electronic invoices annually. If the volume of invoices or annual spend exceeds these estimates, [Vendor] reserves the right to modify its fees, but only after good faith discussions with Customer.”
- “As part of the initial set-up and implementation of the TEM solution, Customer agrees to ensure that the appropriate personnel are assigned to assist [Vendor] with the implementation.
- “[Vendor] does not accept any liability for Customer’s implementation of any recommendations or conclusions contained in any report under SOW.”

Silly Vendor Tricks (continued)

- "In no event shall the total SLA credits earned during any one month exceed five percent (5%) of the affected service fees."
- "During business hours, [Vendor's] system will be available for Customer's access at least 99% of the time. In the event that the system fails to meet this objective, Customer is not entitled to credits but may request a meeting with Vendor."
- If [Vendor's] solution experiences a protracted outage, Customer shall receive a credit equal to ten percent (10%) of the applicable monthly service charge. [Vendor] and Customer will agree on whether an availability SLA has not been met in a specific month."

Questions?