

Building Relationships Means Better IT Contracts

Good relationships, from on-campus groups to legal counsel and vendors, yield better terms in IT contract negotiations

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The ancient Romans had it right. The underlying relationships between contracting parties were considered so important among Roman citizens that breaking a contract was considered a serious offense: The breaching party forfeited social position and property, and, if necessary, his family was expected to make good on his contractual promises.

In more recent times, contracts have become impersonal, and more often than not the contracting parties never meet or even speak. That's particularly the case in IT and information systems contracting, where shrinkwrap and click-wrap licenses abound. Even in a sluggish economy many educational software vendors have a "take it or leave it" attitude. Too often, it's hard to get prompt assistance from the help desk; first-level support personnel are often not adequately trained and must escalate all but the most basic calls; escalation plans are not well documented and result in mismatched expectations regarding service delivery; and sales per-

sonnel only communicate at renewal time, if then.

In our experiences as a higher education chief information officer and a technology attorney, we've found that by increasing our focus on the relational elements of IT contracts, we get better results. Naturally, you might expect that paying closer attention to vendor relationships could result in better deals, with more institutionally personalized attention, better support after the contract is signed and the fees are paid, and greater cooperation when things do not work out to your satisfaction. That's only part of the story, however. Two other key relationships must be developed as well: internal relationships within the campus—also known as campus constituencies—and external relationships with your legal counsel. Some impressive deals can result when all three relationships are working well and the team is together.

A word of caution: developing effective relationships in these three areas takes significant time and effort. But we believe the results are more than worth the effort.

Don't Mistake Sales Calls for a Relationship

Ask a sales rep his or her objective in selling products and services to your school. Besides the obvious ("my commission"), you'll likely hear stock phrases like, "to work with you to find the best solutions to your needs" or "to form a partnership to help you succeed." Most people hearing those statements roll their eyes and clutch their wallets. They've heard the story before. They know that the sales rep may become scarce even before the ink dries on the contract.

We propose the opposite approach: take the sales rep at his or her word and provide a contracting environment that requires the sales rep, the sales organization, and the entire vendor organization to help you succeed.

Date Every Vendor First

As with any relationship, getting to know your potential partner before committing to something more seri-

ous—like a contract—is a good idea. There are several ways to do this.

Ask Important Questions

Building a vendor relationship doesn't mean you can't ask important or pointed questions. "Why can't you do X?" is a legitimate and often unasked question. Inquire upfront as to whether your vendor uses subcontractors before finding yourself stuck with the local one-person installation service. Don't just ask for referrals from existing customers—ask for a list of customers similar to you who terminated their relationship with the vendor during the past three to five years. Comparing the vendor's explanation of the circumstances to the former customers' can be very revealing.

Deal with the Right People

At a minimum, you should establish contact with the heads of the sales organization and of the vendor technical teams before signing any contract. Call or e-mail them with questions; their responses will be valuable when the time comes to negotiate the contract. Better yet, have the sales representative invite them to the next meeting and make it a requirement of further discussion that the technical and sales heads be involved. When problems arise, it will be important for your account rep to know that you already have well-established lines of communication with his or her senior management.

Make Sure the Vendor Knows Your Role in Higher Education IT

Vendors know that higher education CIOs talk among themselves. Make sure your vendor knows of other forums where your opinion is asked and your praise (or silence) carries weight. That doesn't mean you need to threaten vendors, only that vendors know you'll be truthful if a fellow tech person asks you about your experience with them. As one of our colleagues noted, "The message you want to convey is, 'Help me not to have to say your product/service stinks.'"

Keep Your Options Open

Even after you've settled on a particular vendor, it's wise to establish relation-

ships with their competition—and to let them know that you've done so. "I understand that Vendor X's software does thus and so. How are you planning to enhance your product to perform the same/similar functions?" is always a legitimate question to ask a vendor, as is "Tell me in detail how the key attributes or your product/service compare with Vendor X." You'll likely gain more hard information when the vendor knows you're already somewhat knowledgeable on the subject. In the quest for knowledge, make it part of your job to read the trade magazines, stay up to date with product releases and features, require your vendors to provide product roadmaps (often under nondisclosure agreements), and compare notes with your colleagues.

Keep the Vendors Involved

Vendors who understand your IT infrastructure and operating environment can help you implement the right hardware and software in the short run. Vendors who also understand and think about your campus culture, budget constraints, strategic objectives, and staffing can help you meet your immediate needs without sacrificing your long-term objectives.

One way to keep vendors thinking about your needs is to meet with all the people involved in your account several times a year. We've found it helpful if the meetings focus on the following areas: vendor responsiveness, coordination of vendor efforts, suggested enhancements to products and services, upcoming projects, potential other clients for the vendor (if one of your colleagues has been asking for help), and overall institutional strategic planning for technology.

Another way to retain vendor attention is to encourage them to integrate personnel with your team members and clientele. For example, is the vendor willing to supply experts as guest speakers? Does the vendor have an internship program that could include your students? Is the vendor willing to allow your technical team members to meet their functional counterparts. All these experiences increase the rapport

between the IT department and the vendor.

A final way to keep the vendor involved is to reverse the lines of communication. Be proactive. Instead of waiting for the vendor to initiate contacts—which puts them at a psychological advantage—call your vendor contacts to let them know how their products and services are working out. Let them know not only your complaints but also when you received superior service. Since so few people provide positive feedback, any will be noticed and will set you apart from other customers. When the time comes to complain, you'll likely get a reaction based on a reservoir of good will rather than an "Oh no, not X again!" After all, IT departments typically lament the lack of recognition for good service and the wealth of recognition for poor service. IT vendors live in this world as well and will appreciate good news delivered to the appropriate person.

Establish Advisory Boards

Inviting vendors to sit on technical advisory boards can be a useful tool in several respects. First, the advisory board is *your* forum. You control the agenda and the discussion and select the participants. (We recommend a mix of faculty, staff, and students directly involved or soon to be involved with the technology under discussion, augmented on a meeting-by-meeting basis as appropriate.) The advisory board meets on your turf. The fact that the board meets in a group prevents blatant sales talk from any single member. By participating at meetings at your location, key vendor personnel will develop a richer understanding of the context within which their technologies must operate.

Second, advisory boards allow the school to evaluate its IT vision against available and emerging technologies. Tapping into the collective experience and expertise of vendor members is a valuable addition to the IT department's knowledge. One particularly useful technique is a variation on an approach used by the Department of Defense (DoD). Often DoD requests for proposals (RFPs) will include

"hypothetical" problems presumably designed to test the technical expertise of the respondents. The answers are then used to help refine a subsequent RFP for an actual project dealing with the topic of the hypothetical problem. So, play "what if?" with your advisory board. You may be pleasantly surprised by the results.

Third, the forum encourages vendors offering complementary technologies to work together to develop joint opportunities and strategies to meet the institution's IT needs.

Fourth, vendor advisory board members typically are senior members of vendor organizations—the people who can make things happen and who can articulate your needs to both the technical and sales organizations.

Fifth, if properly populated, the advisory board can provide you with useful leverage. For example, an advisory board is not required to consist of only your existing vendors; prospective vendors serving the same technology areas can be included as well. We've found that keeping existing vendors out of the "comfort zone"—assuming our institutions are irrevocably committed to them due to long-standing arrangements—encourages them not to take us for granted and to be more flexible in negotiations when renewal time comes around.

Finally, institutional executives appreciate your willingness to seek outside review. The information from advisory groups can be very helpful in augmenting your "sales pitches" for projects. The ball is in your court, and the advisory groups can help keep it there, with the potential of enhancing the reputations of both the IT and the vendor organizations.

Maintain Discipline in the Relationship

There is an old saying: "Trust everyone, but cut the cards." It applies to IT contracts, too. Even years of past experience with a vendor do not substitute for a written contract. Maintaining vendor relationships in an orderly fashion avoids confusion and extra costs later on.

For example, insisting on master agreements for the entire school can help avoid inconsistent pricing for the same products or services. One large institution we know had facilities located several miles apart. An investigation discovered that each facility had its own purchase agreement for toner cartridges. Though the toner supplied to each facility was identical in make and model and was sold to each by the same vendor, one of the facilities was paying \$60 more per cartridge. The institution canceled the more expensive contract and required the vendor to enter into a master agreement for all its facilities.

Develop the Relationship

Later we will discuss in greater detail how to develop an institutional relationship with your vendors. For now, it is important to note that although vendors may repeatedly deal with the same small group of your employees, the personal relationship between the vendor's representatives and the school's should not impede or overshadow the actual, contractual relationship between the vendor organization and the institution.

That means communications with the vendor should be coordinated and represent a "single voice" regardless of the individuals involved. Vendors have used this technique effectively for years. One major vendor of statistical software so tightly coordinates its personnel that each person knows the negotiating "party line" and adheres to it with only minor deviations. The same can't usually be said about the typical higher education IT department. Which group do you think is more likely to achieve more of its objectives?

Issue Vendor Scorecards

Vendors keep detailed institutional records of their interactions with their clients; you should, too. Besides contact information, it's important to keep a central file of e-mail and hard-copy communications with the vendor, particularly communications in which the vendor makes a promise or asserts its product/service will produce certain results. Keep copies

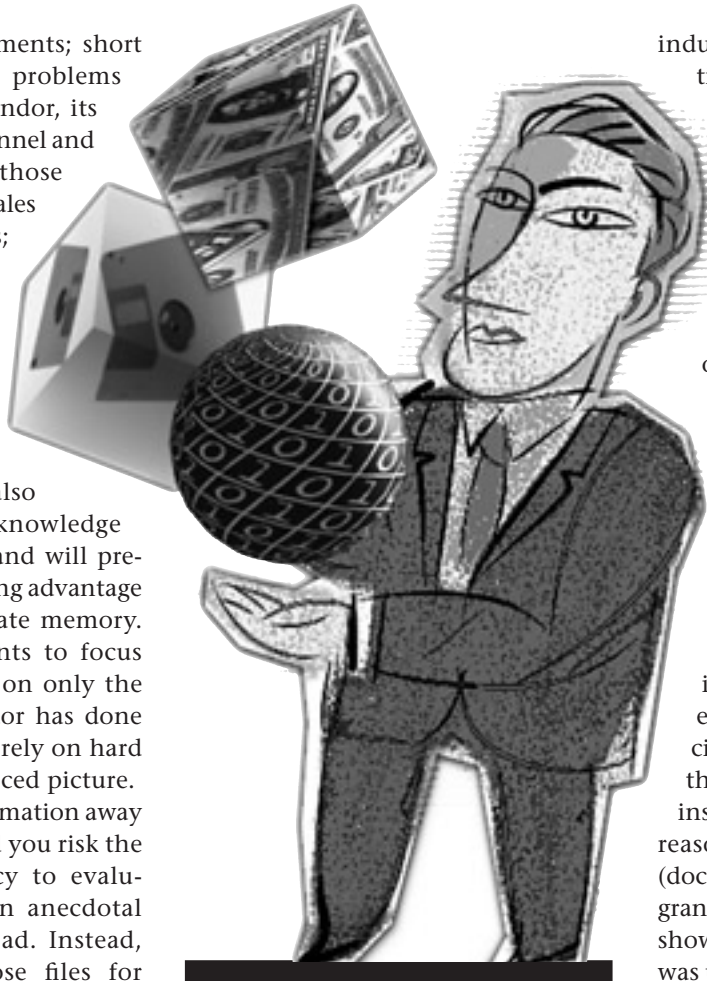
of contracts and amendments; short memoranda describing problems encountered with the vendor, its product/services, or personnel and how and when (or if) those problems were resolved; sales brochures and proposals; white papers; and so on. In short, keep all the information that will provide you and your institution with a clear sense of your experience with the vendor.

A complete file will also help you avoid losing knowledge when personnel depart and will prevent the vendor from taking advantage of lapses in your corporate memory. When the sales rep wants to focus your renewal discussion on only the positive things the vendor has done for you, you'll be able to rely on hard evidence of a more balanced picture.

Don't just file that information away and forget it. Do that and you risk the natural human tendency to evaluate the vendor based on anecdotal information—good or bad. Instead, periodically review those files for problems and successes to bring up at your quarterly vendor meetings and to issue a vendor scorecard that sums up your dealings with the vendor. That way, issues don't get lost in the frenzy of everyday activities. By using a standard scorecard, you can better compare competing vendors on the more subjective aspects of your relationship, such as quality and timeliness of service, responsiveness, quality of problem resolution, and the like.

A number of commercial applications deal with the issue of "scorecarding" vendors. The majority of these focus on particular software applications such as business intelligence¹ and rate them according to categories including "business view of the data" and "multiple data sources." *The Balanced Scorecard* software report evaluates balanced scorecard vendors such as Open Ratings, EFM Software, and The Vision Web.²

Various research groups have produced vendor scorecards. One model



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includes both product and company assessment in categories such as stability, viability, geographic research, customer perception, pricing, and deployment.³ Another model uses market standards that define the basis for success. These include criteria for consistency across markets with subcriteria tailored to each market. The scores for these criteria are then combined with "what-if" analysis. Criteria include vision/strategy, channels/partners, awareness/reputation, investment,

industry focus, and so forth.⁴ Additional balanced scorecard products and services can be located on the balancedscorecard.org Web site.⁵

Franklin W. Olin College of Engineering created its own scorecard to rate vendors. The Olin-devised Standard Score Card focuses on three portions of the sales experience: pre-sales, sales cycle, and post-sales (see Figure 1). For most small to midsize technology decisions, such as those under \$100,000 total investment, this layout will provide a basic understanding of the decision-making process. This type of approach is also beneficial in discussing decisions with senior executives, particularly chief financial officers. The weights assigned to the categories will likely vary from institution to institution for various reasons, including institution type (doctoral granting or associate degree granting, for example). In the scorecard shown in Figure 1, a scale of 0 to 10 was used to indicate weight (Wt.). The example represents an Olin College scorecard used to make a decision on a particular hardware investment. Note that the IT staff member(s) responsible for presenting the recommendation completed the scorecard.

Olin is a relatively new institution, continually evolving, so flexibility is a key issue before, during, and after the sale. Because Olin is a small institution with a small IT staff, vendor responsiveness is always a critical component. Technical support becomes more important during product implementation. Sales support is important, but not as critical as other factors. Engineering support is most important during the sales and decision-making process. In this case (a hardware purchase), training was most important after the sale but of only medium importance to the process given the hardware in question. Payment terms were of medium importance during and after the sales process. Future proofing and roadmaps were most important during

Figure 1

Sample Vendor Scorecard

Category	Example	Pre-Sale Wt.	Sale Cycle Wt.	Post-Sale Wt.
Flexibility	Buy/lease	10	10	9
Responsiveness	Call back, scheduled appointment	10	10	10
Understanding of customer environment	Business cycles, other customers	10	9	8
Technical support	Skill set, levels	8	8	10
Sales support	Senior-level support, executive sponsor	7	8	8
Engineering support	Levels, service level agreements	7	9	8
Training	Quality, quantity	2	3	6
Delivery	Payment terms	0	5	5
Future proofing	Future projects, product roadmaps	8	10	8
Financial status	Dunn and Bradstreet	7	7	7
Colleague experiential information	Implementation experience	8	4	4
Other vendor activities	Partnership	9	9	9
Resources	Number of staff hours of support	8	9	9
Meetings	Timing number	4	4	5

and after the sale. Financial status was of high—but not critical—importance in this case. Colleague information was most important during the pre-sales process. Partnership is of high importance to Olin at all times. Resources are important throughout the process, and the meetings are of additional value after the sale.

Figure 2 shows an example of an Olin College scorecard for a major network infrastructure investment. Note that in some cases the same categories are mission critical, as in the smaller hardware investment, while others differ significantly. In addition, one other column was added to the scorecard: Warranty Period.

Note that flexibility, responsiveness, partnership, and technical support remain the most critical factors (as in the smaller hardware scorecard above). At the same time future proofing, financial status, resources, and engineering support have become more important, while training, colleague experience,

delivery, and sales support are less important in this decision.

In spite of the effort required to maintain vendor scorecards, it is work that will ultimately benefit an institution, large or small. In decentralized institutions, having a central repository for vendors' scorecards can assist in communication among departments and schools to better understand the vendors' relationship with the institution, not just with a particular department or person. This provides leverage in negotiation, and smaller departments or schools can "piggyback" on larger departments or schools to provide monetary savings. In addition, the work relies on a template that is easy to use and adaptable to particular requirements. In a centralized institution, good record keeping enhances interdepartmental relationships and assists in the internal communications processes that make the negotiation process as effective as possible for the institution.

Using Institutional Policies to Enhance Relationships

Coordinated internal institutional relationships should play a significant role in the relationship of the vendor to the institution as a whole. Unfortunately, most central IT activities center around purchasing, maintenance, licensing, and infrastructure support, not on institution-wide coordination and information sharing. We believe this is a mistake, not only because it permits the vendor to "divide and conquer" as it sells to multiple isolated buyers, but also because it adds administrative nightmares with respect to contract administration and prevents the institution from leveraging its "institutional-ness" for better pricing and support.

Think of it this way: Will a vendor react as quickly to a call from your chemistry department as it will to a call from the university? Will you get the same pricing when the math department licenses a dozen copies

of modeling software as if the college decides to license the same software enterprise-wide? Would the vendor care as much if one of your engineering professors criticized its software as it would if your CIO did?

Multiple Faces, Single Message

Bringing the CIO, corporate relations director, external relations director, and institutional advancement director into the vendor relationship allows the institution to present more than one face to the vendor. This internal linking and involvement provides additional levels of bidirectional information sharing between the institution and the vendor, for example, marketing information, focus groups, student contact, and so forth. As the vendor becomes more vested in the relationship with the institution rather than with a single person, the vendor becomes more interested in the suc-

cess of the relationship as opposed to simply a successful sale.

At the same time, linking the decision makers also enables them to develop and coordinate a single message when speaking with vendors and to avoid “side deals” that undermine a cohesive and coordinated institutional IT plan. In our negotiations with vendors, we found that concessions were most difficult to obtain where the vendor organization spoke with one message and vendor representatives—regardless of their position in the company—articulated that message and did not deviate significantly from it. The same technique works for the other side of the negotiating table, too.

While establishing multiple institutional relationships with the vendor is important, it is critical to ensure that only one—that with the CIO—is the point relationship. The point relation-

ship provides leverage and eliminates end-run potential. For example, if the vendor tries to “sell” to the president rather than the CIO, the president will redirect the issue to the CIO. Through this vendor-CIO relationship, mechanisms can be put into place to handle any problems that arise after the contract is signed.

A well-oiled relationship might look something like Figure 3, which depicts an approach to coordinating internal communications and focusing external communications with IT vendors. The CIO occupies the center of the relationship wheel and is directly connected to the vendor as the point person. All other institutional constituencies have a link to the vendor through the CIO relationship.

Note that the CIO position connects to external relations, which then connects to the vendor. In some institutions, the external relations role

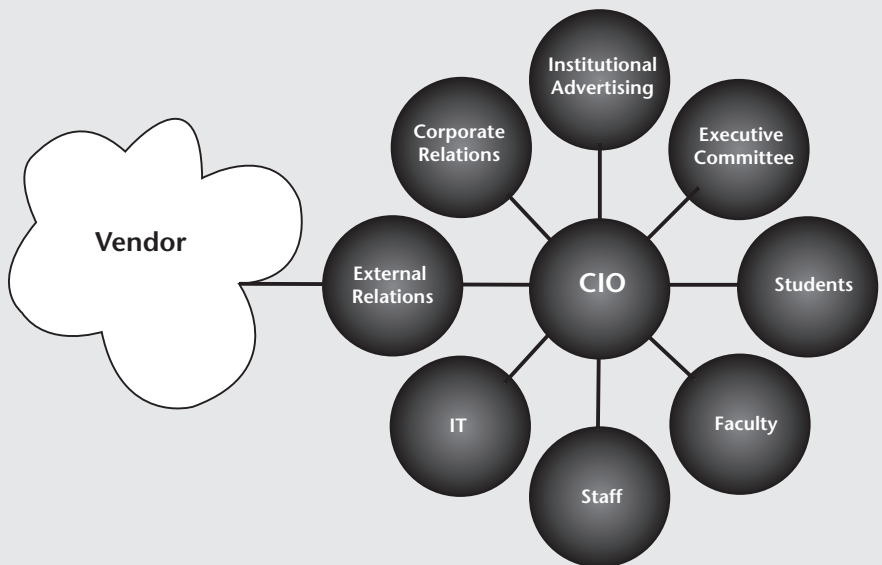
Figure 2

Olin College Sample Scorecard

Category	Example	Pre-Sale Wt.	Sale Cycle Wt.	Post-Sale Wt.	Warranty Period Wt.
Flexibility	Buy/lease	10	10	9	8
Responsiveness	Call back, scheduled appointment	10	10	10	10
Understanding of customer environment	Business cycles, other customers	10	9	8	8
Technical support	Skill set, levels	8	8	10	10
Sales support	Senior-level support, executive sponsor	7	8	8	7
Engineering support	Levels, service level agreements	7	9	8	8
Training	Quality, quantity	2	3	6	0
Delivery	Payment terms	0	5	5	0
Future proofing	Future projects, product roadmaps	8	10	8	9
Financial status	Dunn and Bradstreet	7	7	7	8
Colleague experiential information	Implementation experience	8	4	4	0
Other vendor activities	Partnership	9	9	9	10
Resources	Number of staff hours of support	8	9	9	9
Meetings	Timing number	4	4	5	6

Figure 3

Relationship Wheel



provides the formal contact point with the vendor, with the CIO as the internal information collection point and implementer of the relationship. In these institutions, the external relations office acts as the informational repository to ensure that all relationships are pursued to the maximum benefit of the institution.

The diagram in Figure 3 represents a full institutional relationship that leverages a point person (the CIO) while investing the vendor in an institutional relationship. Certainly, other effective models exist at different institutions of higher education.

Everyone Knows Their Roles

Understanding and playing a role is not just for senior staff. All IT employees need to think like "mini CIOs." Successful projects depend on all staff understanding and crafting the mission of their departments in the context of the larger institutional mission. To do otherwise prejudices the IT deployment process with personal opinions and experiences. When this happens, the institution's best interests might be sacrificed in favor of personal expediency.

Consider, for example, a network

engineer who has a relationship with the vendor of a particular product, such as a firewall appliance. Assume this vendor is not already involved with the institution and in fact competes with another of the institution's vendors, which also sponsors internships, speakers for lectures, and so on. The vendor dealing with the network engineer expects that person to persuade the other decision makers to go along with his or her opinion, despite possible damage to other vendor-institution relationships. After all, the proposed deal is only worth \$15,000 to \$20,000.

Turning the Stockholm Syndrome to the Institution's Advantage

One of the curious things about vendor-customer relationships is how easily customers can become subject to a variation of the "Stockholm Syndrome," which was first identified several decades ago following a hostage-taking crisis in Stockholm, Sweden. During a prolonged stand-off between the hostage-takers and the police, the hostages began to identify more with their captors than with their liberators, developing a certain degree of loyalty

to them. Some hostages even testified on their captors' behalf at trial.

In the IT world, it is not unusual for staff to identify more with the vendors than with their own organizations, sharing critical information with them about IT planning, resources, and needs or actively advocating for a particular vendor during internal meetings. It is not unusual to encounter vendor representatives who know as much (and sometimes more) about an institution's IT operations, priorities, problems, and goals as the highest ranking members of the IT organization themselves.

How does this happen? Simply put, effective vendor representatives treat everyone one they meet at an institution as a potential source of information, from staff members to decision makers. They pay attention to IT problems and sympathize with frustrations in working through institutional bureaucracies and dealing with the technologically deficient. They share tidbits of information that make their contacts feel "in the loop." By focusing on the contact's needs when the contact's own organization, the vendor engenders loyalty in that person. This loyalty manifests itself in tangible ways. Vendors receive the benefit of the doubt in close calls for vendor selection, for example. Negotiations perhaps are not as "hard nosed" or detailed because "they have always treated us well," and insights and information concerning the IT organization's problems and objectives are more readily shared.

A good practice in any acquisition or negotiation is to ensure that all team members understand they are on the IT team, not the vendor team. Certain responsibilities are required of them. Team members should feel like a critical part of the team, comfortable expressing their agreement or dissent during team-only meetings or conversations. Agreeing to share only information that is absolutely necessary, not expressing dissatisfaction with the current IT situation or staff, and mentioning other vendors and competitors as opposed to stating "when you get the order" will go a long way toward minimizing symptoms of the Stockholm Syndrome.

To turn the Stockholm Syndrome to the institution's advantage, it is important to understand that vendors also have needs. By focusing on those needs, the institution can create the same feeling of loyalty among vendors. In our experience, vendors' key needs are the opportunity to have high visibility with existing and potential customers, access to decision makers, and to be viewed as part of a solution rather than a cause of problems. By attending to these vendor needs, institutions can build long-term relationships with vendors that will make it more difficult for the vendor to treat the institution merely as another revenue source.

Advisory board membership, for example, provides a sales representative with the desired higher visibility, cachet, and a reason to work the deal higher up into the vendor organization. Advisory boards also provide the opportunity for groups of vendors to come together and "compete" in front of the customer to provide clever, cost-effective solutions to the institution's IT needs. Since advisory board membership is often the first time vendors have met and/or interacted with each other on a formal basis, the interaction can lead to far more creative ideas through cross-company collaboration and partnership than any single vendor could provide.

Actively involving vendors with the institution's internship programs—and linking participation in such programs to the institution's willingness to do business with the vendor—provides another reason for the sales representative to encourage senior management to view the institution as a partner to be treated with respect. The same can result from inviting vendor engineering and other technical staff to interact with students through on-campus talks and joint projects.

Maslow's Hierarchy and Vendor Relationships

Abraham Maslow established the theory of a hierarchy of needs.⁶ He wrote that human beings are motivated by unsatisfied needs and that lower-level needs require satisfaction before higher

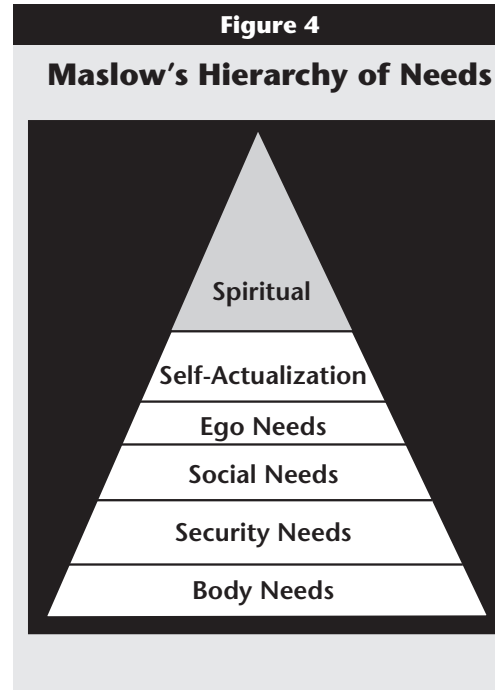
needs can be satisfied (see Figure 4).⁷ According to Maslow, general types of needs (physiological, safety, and love) are defined as deficiency needs; these must be satisfied before higher levels of needs such as esteem and self-actualization can occur. Once the lower levels of need are met, then higher needs emerge and begin to dominate a person's behavior.

Maslow's hierarchy lends a unique perspective to vendor and client relationships, supporting the give-and-take relationship as defined throughout this article. For example, you could argue that a typical sale would meet the sales rep's security needs. An enhanced sale or one producing the expectation of further sales might meet security and social needs. A transaction that added interaction with vendor senior management to achieve a level of partnership could meet ego needs. A full partnership transaction involving reference visits, student and other community focus groups, and so forth would likely meet self-actualization needs. If the vendor's self-actualization need is met, the vendor feels more vested in the relationship and increasingly willing to work on creative and innovative scenarios that lead to more self-actualization. When vendors get a closer match to what they need, then institutions come closer to accurately estimating the value and optimizing the benefits of the relationship.

One example of this type of scenario—meeting the self actualization needs of both the vendor and the institution—is the manner in which Olin College's IT department creates and distributes RFPs. A critical portion of the RFP includes "partnership." Partnership is defined as involving Olin students in the business of the vendor or partner. This can be done in any number of ways: internships, co-development projects, student focus group feedback, and vendor or partner employees speaking to student groups.

Designing a Process

Given all this information, how do you design a process to achieve



your institution's goals? Step one is to organize the institution. This involves building internal relationships and collaborations. Relationships are built by setting appropriate expectations, communicating, and achieving shared objectives. Internal relationships and collaborations are not one-time events or conversations. Relationships imply ongoing communication, feedback, and assessment. Start early and nurture often.

Many methods for nurturing exist. These include regularly scheduled meetings; round-robin e-mails (but be careful who gets copied); informal brown-bag lunches to discuss topics and issues; working groups on the various topics; and timely reports to the institutional community and leadership. It is important to make sure that these relationships will remain in place once a third party is introduced into the process.

Step two can be categorized as organizing the third party. This is a critical step, as one successful end run around the CIO sets the precedent for many others. Fitting the third party or vendor into the process can be a natural event provided that all the internal parties involved understand what the institution needs and the goal of the relationship.

Another step in organizing the third

party is to understand what they require from the relationship (as detailed above regarding Maslow's hierarchy). Therefore, creating a structure that optimizes and accommodates the needs of all parties is likely to be the most successful. Tips for creating this structure include the following:

- Look beyond the immediate deal to consider further vendor involvement, for example,
 - Internships for students or staff
 - Advisory board membership
 - Talks to campus constituencies
 - Projects in collaboration with students or staff
- Consider introductions to other vendors and possible inter-company partnerships
- Define the institution's role as it relates to
 - Other, similar types of institutions
 - Other, dissimilar educational institutions
 - Professional organizations
 - Corporate partners
- Define the role of institutional personnel by
 - Building and maintaining relationships
 - Sticking to the game plan
- Use higher education-specific leverage, such as
 - The institution's ability to influence/impact decisions in other spheres, like professional organizations
 - The fact that CIOs in higher education tend to get jobs as CIOs at other higher education institutions when they change positions
 - Higher education is a small world, and the people in it talk to each other frequently

You have lots of choices, so select the ones that will accomplish short- and long-term goals to keep internal and external relationships vital. For instance, say you have a set budget that allows for procurement of a product that meets a current need but doesn't provide for growth. You could let the vendor know you need to spend less than \$X this year but will be seeking additional funding to meet projected growth the following budget year. Therefore, the potential deal is not just

about this year but about this year plus next year or more.

Once the process is designed, you can focus on the next step—building better relationships with your vendor through your legal counsel or contract negotiator, not in spite of them.

Building Effective IT Deals Through Your Legal Counsel

Using key points and some best-practices examples, you have designed a process for your institution to build relationships with vendors. Now what?

The characterization of lawyers as hindrances to completing a client's IT transaction are not 100 percent accurate—but close enough. Most CIOs can point to a deal that was delayed, altered, or derailed because legal counsel was not in sync with what the IT team wanted to accomplish. Most grit their teeth and endure their dealings with the lawyers, as opposed to creating a partnership. They usually wait until the last possible minute to get the lawyers involved and swear after every painful deal that they'll wait even longer the next time.

We recommend the opposite: Building a sound working relationship with your legal counsel and involving counsel early in the IT deal will not only remove roadblocks in getting the deal done efficiently but will also yield qualitatively better deals.

Defining Your Attorney's Roles

To many clients, the lawyer comes last, the person who has to "bless" an agreement before it can be signed. To be effective, however, your attorney must perform several roles as a member of your team, the least of which is final approval of the contract.

Servant. Many attorneys have reputations as arrogant know-it-all who always have to be right, tell you what you can't do, and nit-pick everything. In contrast, effective attorneys recognize that theirs is primarily a service function. Their job is not to win the argument but to win *your* argument, to help you accomplish

(within legal, institutional policy, and ethical bounds) the objectives set out for your IT deal.

The "Scooper." Your attorney might have previously negotiated against a particular vendor and can assist your team in identifying elements that might make the vendor balk or that will require concessions. At the same time, your attorney should be able to identify areas where concessions can be obtained from the vendor. An experienced attorney's knowledge of similar deals should be mined early and often as your deal moves toward completion.

Strategist. Negotiations are most attorneys' stock in trade. A relatively experienced attorney has seen the tricks and encountered the bluffs and can provide insights into how to respond to the vendor's negotiating tactics. At the same time, you will know the vendor and the vendor representative much better than will your attorney. Sharing your respective information builds a strong framework from which to negotiate the IT contract with the vendor.

Negotiating Team Member. Note that we mention the attorney as a member of the team, but not necessarily the leader. The attorney's job is to help achieve your business objectives in a sound, legal manner. The attorney's negotiating approach should at all times be consistent with the institution's business objectives and policies.

Drafter. Part of the attorney's job is to ensure that the language of the contract reflects the institution's business objectives in a manner that will stand up to the scrutiny of a judge, jury, or arbitrator if the need arises.

Educator. The attorney should take the time to explain the why's of the negotiations—why a seemingly unimportant provision might be vital; why a change requested by the vendor could expose your institution

to significant liabilities; and why conceding on a particular point is not as harmful as it might appear. The attorney should translate the agreement's legalese into concepts that are useful to you and your institution and should clearly explain the legal implications as you contemplate proposed changes to the deal. In the final analysis, your organization will be on the front line in implementing the contract, so you need to understand the ins and outs of the agreement.

Counselor. One of the most crucial roles your attorney should play is counselor, providing legal advice concerning the deal. In many cases the deal will involve trade-offs between the legal risks you and your institution are willing to assume in exchange for better business terms. These legal risks are not risks of the illegal or criminal sort (no attorney should ever advise you to break the law), but instead involve the "private law" between you and the vendor that will be memorialized in the contract. For example, should you pay the entire amount for license fees prior to the completion of acceptance testing and run the risk that you'll have to extract it from the vendor's pocket through litigation if the software fails to perform as advertised? Or, should you retain a portion of the fees until after acceptance testing is successfully completed? Should you be willing to have California law apply to the contract, with the venue for litigation in Silicon Valley? Or, should your home state's law apply? Should the software warranty period be 30 days, 60 days, 90 days, or longer? What cap is reasonable on the vendor's liability if the software damages valuable databases or otherwise disrupts normal operations?

Early Involvement Is Key

One good way to build rapport with your attorney is to get him or her involved early. Attorneys are trained to ask lots of questions as soon as they start work on a new contract. Your attorney will ask them regardless of how far along your deal actually is; better to answer

them early on when they won't delay the deal too much (if at all) than to have them spring up the day before you want or need to sign the contract.

Many of the questions asked are fundamental to your attorney's understanding of the deal. Often, some key questions that should be addressed in the business planning leading to the deal are overlooked until the attorney raises them. For example, if software is going to be licensed,

- What is your intended (current and future) use of the software?
- Is a master agreement in place with this vendor?
- Does the license cover a certain number of seats or users? Enterprise-wide use? Certain CPUs? Named users?
- If a user has the software on her desktop and on her laptop, are those counted as two licenses or one? If you have a service whereby images are maintained of a user's laptop in case it needs to be replicated if the laptop is lost, stolen, or destroyed, does that image constitute a license?
- Are there territorial restrictions on the use of the software, for example, only in North America?
- Are your consultants and third-party vendors permitted to use the software when performing services for you?
- What software upgrades are free (or provided as part of maintenance fees) and which require new license fees?

Similar questions apply to hardware acquisitions, vendor services, and every other aspect of IT deals. Armed with the answers to these questions, your attorney can better match negotiating and contract drafting strategies to the business objectives you and your institution have set.

One approach we have found to be effective is simply to create a questionnaire of all the questions that attorneys typically want to ask about any IT deal. The questionnaire is filled out at the beginning of the acquisition or other process and shared with the attorneys early on. In a number of instances the questionnaire has helped refine the deal early on; at the least it provides

your entire team with the same starting point prior to the start of negotiations. (Full copies of the questionnaire are available from Donald Ballman at dballman@brownraysman.com.)

Share "Incidental" Information with Your Attorney

Your IT negotiation starts long before you and the vendor sit down at the bargaining table. It actually begins when the vendor first provides information that you rely on to determine whether to do business with that vendor. The information might be a vendor white paper or a sales representative's presentation. It might be the vendor's response to your RFP. It could be the sales rep's e-mail reply to a technical question or technical information posted on the vendor's Web site. Any and all information the vendor provides that substantively asserts the functionality, reliability, efficiency, or accuracy of the vendor's product should be shared with your attorney so that it can be addressed in the contract. (And, be wary when the vendor balks at such an inclusion—it usually signals that the vendor overstated the product's quality.)

Inside Versus Outside Counsel

Many institutions have one or more in-house legal advisors whose job is to oversee all legal negotiations and agreements for the institution, address litigation issues, ensure that the institution complies with state and federal regulations, and generally oversee all the legal aspects of the institution's operation. It's also not unusual that they are stretched thin, juggling issues as diverse as food service agreements, technology licensing, intellectual property protections, employment agreements and grievances, student disciplinary actions, and formal regulatory filings. It's small wonder that, even with tools such as the questionnaire that we mentioned previously, your in-house counsel may need to employ the services of attorneys from outside law firms.

Since it is more likely that you will have input on the selection and retention of outside counsel than in-house counsel, we suggest you use the follow-

ing criteria in assessing whether a specific outside counsel will be an effective member of your team:

- Is the attorney enthusiastic about your deal and its success?
- Is the attorney knowledgeable and experienced in similar types of transaction?
- Has the attorney negotiated against or with the vendor?
- Does the attorney appear willing to serve in the above-mentioned roles, particularly that of counselor (de facto partner)?

One caution: Remember that the lawyer is not your personal attorney—his or her client is your institution. As a result, it is not unusual to hear from “your” attorney that the deal may require revision or restructuring because it creates legal risk for the institution or it violates the institution’s policies. A good attorney will not simply tell you why your deal can’t be done the way you wish, however, but will work with you to determine whether alternatives exist that can achieve your objectives while applying legal best practices.

Planning the Negotiations

Effective negotiations don’t just happen. A good working relationship with the vendor can fly out the window once the contract is on the table and hardball negotiations begin, with counterproposals, hard-line positions, and concessions. Given the complexity of IT negotiations, with issues of licensing, ownership, support, and warranties often intertwined, it is critical to have a game plan in place before sitting down at the bargaining table. The game plan you and your attorney decide on should address the following elements at minimum.

Available Intelligence

What intelligence do you have on the vendor (and vice versa) that directly affects the negotiations? For example, who in your IT organization has spoken to the sales reps? What information has been shared formally and informally with the vendor? What information could the vendor use to its advantage during the negotiations?

If the vendor knows that you have not identified possible alternate vendors, for example, or that the software you want to license must be installed no later than a specific date, the vendor could stall the negotiations and extract additional concessions—or not offer many concessions. Similarly, your attorney might have negotiated against the vendor before and be able to identify areas of the agreement that might become sticking points or areas where the vendor made concessions on other agreements.

Who Negotiates?

Who will do the talking? Will your attorney speak both to business issues and legal issues or to legal issues only? Effective negotiating teams speak with one voice, with every team member knowing his or her responsibilities and which issues belong to other team members. A common negotiating tactic is to try to separate the other team’s members while holding fast to one’s own position. Even a small “defection” from one’s position can cause problems.

Priorities

What are your (and your institution’s) “must have” contractual conditions, that is, the conditions that will be deal-breakers if you don’t get them? What are the “nice-to-have” points? What do you consider “trading points”—contract provisions useful to you but tradable for other provisions? What are your priorities for each category?

Attorney Roles

What role(s) will your attorney play? “Bad” cop to your “good” cop? Facilitator of the discussion? Or primary negotiator?

Side Discussions

How will you deal with “side” discussions? This is often a tricky issue, as sales reps often approach the IT team outside the negotiations to discuss specific points of contention. Although it is usually helpful to listen to what the vendor might have to say, we recommend strongly that all such discus-

sions be brought back to the formal negotiations for resolution. Side deals not only tend to confuse the formal negotiations but, because they often focus on resolving a single issue, can preclude obtaining valuable concessions available when several (possibly diverse) issues are linked.

Time Outs

How will you deal with time outs? It’s not unusual for a new idea to pop up during negotiations, whether a new alternative offered by the other side or a sudden inspiration by a member of your team. The negotiation should be structured to permit your team to consider and discuss new ideas. When the whole negotiating team is in the same location, this is relatively easy to do—just move the team to the hallway or some other secluded area. It is increasingly common, however, for negotiations to occur via teleconference, telephone, or other remote-access methods. We have found it useful to have instant messaging, wireless, or e-mail access available to distant negotiating team members on such occasions. This allows us to communicate privately during the discussions without having to drop off the negotiation call to confer.

Choosing a Basis for Negotiation

Whose “paper” will you negotiate from? Most negotiations revolve around the vendor’s standard form contract, which gives the vendor an advantage in negotiations. The vendor knows exactly what it is retaining and what it is giving up as the negotiations progress. Vendor negotiators can also legitimately argue that the form has already been approved and that substantive changes cannot be accepted without time-consuming senior management approval. More importantly, by working from a contract with which it is very familiar, the vendor team has a clear idea of how the contract will hold together (including loopholes).

What works for the vendor can also work for you. One valuable role your attorney can play is to develop form agreements for your team. Typically, these are quick to produce, with the

main body of the form relatively fixed from deal to deal. Schedules (attachments) detail unique aspects of each contract, such as the names of the hardware or software to be acquired and special maintenance and support provisions.

As with the vendor agreements, deviation from your institution's forms will require senior management approval. In our experience, vendors request relatively few changes to another party's form agreements, preferring to book the business and avoid time-consuming management approval processes. This is especially true at quarter- and year-end periods and when sales bonuses are on the line.

Of course, it is also important that the institution seldom agree to substantive changes to its agreements. If changes occur easily, your form agreement will lose much of its effectiveness. Moreover, since all of your institution's negotiating teams are "reading from the same script," you will find that your negotiations become similarly effective, regardless of who is on the negotiating team, if the base form is effective.

We know of at least one large software vendor that has used this approach to great effect. Even senior members of their negotiating team have limited authority to change the agreements without permission from the CEO.

After the Deal Closes

Not all deals go well. Keep your attorney apprised of any problems you encounter so that she or he can maintain a record. Not only will this provide your attorney with detailed ammunition in the event litigation occurs, it can also serve as an early warning of problems. Often a well-worded letter from your lawyer will encourage a sloppy vendor to be more responsive. In addition, your attorney's vendor dossier can help focus future negotiations with that vendor.

Even if the deal goes well, make sure your attorney knows of any deviations from the contract. For example, you might agree that the new servers can be delivered on November 1 instead of the contract date of October 15. Or, you

Not all deals go well. Keep your attorney apprised of any problems you encounter so that she or he can maintain a record.

might be willing to accept buggy software because its main functions work well. Let your attorney know about these decisions so that those incidental deviations don't inadvertently amend the agreement as a whole. For example, if you consistently allow the vendor to miss milestone deadlines without appropriate documentation, it will be more difficult to later try to terminate the agreement on the grounds that the vendor was always late.

Summary


The toolkit provided in this article can help you create, manage, and nurture better relationships with your IT vendors. The vendor scorecards offer the flexibility to customize your institution's priorities in an easily maintained and assessed format. Advisory boards give IT management access to third-party resources, support, and validation while providing a forum for out-of-the-box thinking and creative solutions.

Aligning institutional personnel, actors, and roles takes a lot of work—putting together good teams, sharing information, and meeting the needs of institutional and vendor team members. The list of tips for designing a structure to accommodate all of this will smooth your path.

Working out roles and strategies with your attorney or contract negotiator can also be tricky. Reach an understanding on whether or not all information is pertinent and reliable information and who will play good cop or bad cop on a given day.

Reading and understanding con-

tracts is only one step in a relationship, usually one that occurs after you have begun the relationship nurturing process. Contracts and their negotiation have the ability to cement and further develop those relationships if approached in the appropriate manner, as we have suggested.

In the end, each vendor relationship is unique due to factors such as institutional requirements and priorities, budget, fit of the vendor and the institutional mission, and the needs of the parties negotiating the deal. The tools in this article are flexible enough to work in many situations. If you use the information and tools in this article to further your relationships, please send us your feedback on their effectiveness by e-mail (Joanne.Kossuth@olin.edu and dballman@brownraysman.com). 

Endnotes

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7. For a discussion of Maslow's hierarchy, see G. Norwood, <<http://www.deepermind.com/20maslow.htm>> (accessed September 8, 2004).

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