

# Negotiating Effective Service Level Agreements

*Diana J.P. McKenzie and Benjamin D. Kern*

Many healthcare providers treat contracting for technology in much the same way as they would treat any other contract, by spending considerable time negotiating pricing, contract duration, and the scope or amount of the service or product purchased, but very little time discussing the level of service that the vendor must provide. In fact, many vendors' form contracts omit service level agreements (SLAs) entirely, or provide only minimal standards.

A customer can greatly improve the level of accountability that applies to the services a vendor provides by carefully constructing an SLA that meets the customer's needs. In the current technology market, vendors often are willing to make major concessions to accommodate customers' service level needs as a means of securing new business.

Even if a vendor's form agreement contains few commitments about service levels, or altogether omits the SLA, a customer can create real incentives for a vendor to provide a high level of service by focusing on a few critical SLA components and on the wording of these commitments. To create an effective SLA, the customer first must understand its technical and business requirements. All commitments in the SLA should be designed to ensure that the vendor will meet these minimum requirements, and they should be drafted in a way that sufficiently obligates the vendor to perform the commitments.

A customer should ensure that the language obligating the vendor to provide service is phrased as an absolute commitment (the vendor "shall" or "will" do X), or commits the vendor to using a specified level of efforts ("best efforts" or "commercially reasonable efforts") rather than phrased as a "target" or a "goal."

Although SLAs tend to vary tremendously from deal to deal, what follows are a few of the SLAs a customer should consider.

## **Support Response Time Commitments**

A common cause of dissatisfaction among consumers of technology services is the speed with which issues or problems are resolved. A customer should carefully consider the effects that a failing application, a serious software bug, or a defective

within the specified time, the parties may agree that the problem be escalated to more senior management levels, and that regular updates be provided until resolution is achieved.

Response-time commitments often take the form of a matrix, with different response and resolution times for different severity levels of problems. The vendor must analyze the problem and quickly propose a severity level, typically based on the number of users impacted and the severity of the impairment the problem causes to the IT environment.

While timing commitments will differ depending on the nature of the affected application and on specific environmental factors, response time commitments will, on average, fall into the same general range. For a critical error, in which an IT function or application is unavailable, a vendor should respond to a complaint within no more than 30 minutes, and should use best efforts to fix a problem in no more than a few hours. For a less serious error that still has a substantive impact on functionality, response should be within a few hours, and the vendor should use best efforts to fix the problem within less than a business day. For errors that cause inconvenience, but do not substantively impact business functions, the initial response should be within a business day, and a fix should be delivered within a week. These commitments may be less stringent if services are not provided on a 24/7 basis, or if the customer has contracted for a lower level of service on evenings and weekends.

## **Application Response Time Commitments**

The phrase "response time" is also sometimes used to refer to the amount of time that a software

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software configuration would have on its business operations. One way to address the risk of technology bugs and failure is to obtain a commitment from the service provider as to the maximum time in which the service provider must begin to respond to a problem, notify the customer of its continuing process, and ultimately resolve the problem.

Although it is generally impossible for a vendor to commit that a problem will be fixed within a given period of time, the vendor can commit to using its best efforts, including diverting resources from other projects, until the problem has been resolved. If, despite such efforts, the problem has not been resolved

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application takes to return a response to a user. In situations where a complicated application must respond quickly to be considered successful, and particularly in situations where an application is offered on an application service provider (ASP) basis, it may be appropriate to require that a vendor's application return a result to a user within a certain number of seconds, or a fraction of a second, from the last keystroke entered by a user.

Although there are many factors beyond the vendor's control that may lengthen application response time, in the case of either applications that run locally or applications offered on an ASP basis, the parties can agree on conditions for the application response time commitments that remove the influence of these external factors. In the case of applications that run locally on the customer's equipment, the response time commitment can be conditioned on the customer's using equipment that meets certain minimum specifications. In the case of ASP applications, response time should be measured by the vendor, from the time that a request reaches the vendor's router, to the time that response data is returned to the router; in this way, Internet transmission times can be excluded from the calculation.

### Availability

Particularly in cases in which a vendor hosts some part of a customer's infrastructure, or where a vendor provides on-site support, a customer should obtain commitments as to the percentage of time during which the hosted application or service will be available for use (not including downtime for routine maintenance that is scheduled in advance).

Availability commitments for website hosting and bandwidth provision are frequently 98 or 99 percent, and sometimes reach as high as 99.999 percent (referred to as "five nines"). As important as the level of availability that is promised is the level of fee reductions that apply if the availability

commitments are not met. In contracts for telecom services, it is common for a vendor's form to promise a very high level of availability, but to specify exclusive remedies for any failure to meet these commitments that are only a small fraction of the monthly fees. A customer should ensure that the fee reductions adequately reflect the cost to the customer of the loss of availability.

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### Benchmarking

As the last few years have shown, prices for IT services and the levels of service that vendors are willing to guarantee can fluctuate dramatically. To mitigate the risk of entering a long-term service contract, customers may negotiate an ongoing right to benchmark the prices and service levels provided by a vendor against the prices and service levels offered by industry leaders. It is common to have this benchmarking function provided by an independent third party who has the ability to broadly survey market rates, terms, and conditions, with the cost of such third party's benchmarking shared by both parties. In the event that the benchmarking reveals decreasing market prices or increasing service levels, the vendor should be required to match these terms.

### No Sunset

Shrinking IT budgets have considerably slowed the rate at which customers purchase new software. In response, some vendors have adopted novel strategies for bringing in new revenues. One strategy is to

discontinue support for an existing product and introduce a "new" product, which is simply a revamped version of the discontinued product. After support has been discontinued for the customer's existing product, the customer may have no choice but to license the "new" product.

A customer may be able to prevent a vendor from forcing the purchase of a new product by requiring the vendor to commit to a certain period of continuing support for a product. These prohibitions on "sunsetting" a product vary greatly in length, depending on the expected useful life of a product. Restrictions on sunsetting typically last a minimum of 18 months, but can sometimes reach seven years or more. It is common for the time frame for the prohibition on sunsetting service for a product to start again with each new release and new version of a product.

### Conclusion

With attention to a few critical provisions in an SLA, a customer can provide strong incentives for a healthcare technology vendor to meet the customer's service level needs. With the proper internal preparation and careful drafting, a customer can construct an SLA that contains firm commitments, appropriately encourages timely performance, ensures that the pricing and terms for services remain competitive, and ensures that support will continue to be provided throughout the life of a product. In a buyer's market for technology, vendors often are willing to provide these important non-monetary commitments to win or maintain customer relationships.

### About the Authors

Diana J. P. McKenzie is senior partner and chair of healthcare technology law at Gordon & Glickson LLC, a Chicago law firm focused on providing legal services related to the technology markets.

Benjamin D. Kern is an associate and a member of the healthcare technology group at Gordon & Glickson LLC.