Many of your corporate colleagues take them for granted—the telecommunications services that seamlessly connect your corporate offices, data centers, ecommerce sites, call centers, and cell phones. But you can’t afford to do so. These critical services, typically purchased under multiyear service agreements, represent annual expenditures of millions of dollars for Fortune 1000 companies. And for the largest corporations, annual expenditures can approximate $50 million. Your company’s procurement decisions will have a significant impact.

But as important as these decisions are, they can be daunting when first encountered. The sheer number and variety of services offered, the procurement process, the pricing structure, the complexity of the typical agreement—how can in-house counsel begin to get a grip on the critical issues in this area?

We’re here to help, with this primer on telecommunications service agreements. Of course, your corporate IT or telecom staff will be taking the lead on the business and technology decisions associated with the procurement of these services. But as in-house counsel, your insight into the inherent business and legal risks is essential. This primer describes the telecommunication services typically at issue, the procurement process itself, and the structure of the agreements. We will examine some common problem areas, and we will offer tips for addressing them. Equipped with this review of the basics, you’ll be able to guide your company’s IT and telecom team in some critical steps of the procurement process.

By Jonathan R. Spencer
and C. Douglas Jarrett
Telecommunications services—those things that connect your corporate offices, data centers, ecommerce sites, call centers, and cell phones—are vital to most companies, and with multiyear, multimillion-dollar contracts at stake, in-house counsel can help save company money through informed negotiations with potential providers.

Learn the pricing and cost strategies, standard agreement pitfalls, and remedies to insist on (or avoid) in negotiating your next telecom services agreement.
The Basics

The players

Major carriers. The major telecommunications carriers operate global networks and offer one-stop shopping for domestic and international telecommunications and networking services. But not even the largest carriers have networks that extend to every corporate office or facility. In the United States and other countries, the major service providers rely on local, regional, or national carriers to extend service to their customers’ offices and facilities. The major service providers guarantee service quality to business customers through service level agreements (SLAs). For services to regions lacking adequate infrastructure, the service guarantees may be little more than best efforts. This is especially true for some international services.

Specialized and regional firms. In addition to the major carriers, telecom and network management services are purchased from specialized or regional firms. For example, both in the United States and in other countries, most corporations purchase mobile wireless services from the major wireless carriers. In addition, corporations often contract with systems integrators and other specialized firms to manage the organizations’ routers, firewalls, and switches that are connected to the telecommunications and internet access services.

Another common reason for hiring specialized firms is the need for advanced web hosting. Basic data center services are offered by most telecom providers. These services are offered in secure, environmentally controlled facilities that consist principally of space for servers and related hardware and redundant service connections. But advanced hosting services—such as managed web hosting, application management, and web design—are more akin to specialized IT services. These services tend to require a greater level of interaction on an ongoing basis between the service provider and the customer and, in the case of web design, can involve a high degree of creativity and be more dependent upon the talents, skills, and qualifications of key employees. Many large corporate customers, therefore, often negotiate separate agreements with specialized firms, including major IT outsourcing companies, for advanced hosting services.

Costs

The rates paid for telecom and networking services typically include:

- set-up charges and other nonrecurring costs that relate to establishing the service or extending service to various locations;
- fixed monthly charges that apply to most data services, managed services, and data center services;
- usage-based charges, such as minutes of use, for voice services or bits used/downloaded for data services; and
- taxes and governmental surcharges, which on certain services and technologies can be as much as 20 percent.

Pricing

As a rule, business customers should negotiate fixed prices, rather than agree to fixed discounts of rates specified in providers’ standard price lists. That’s because most service providers reserve and exercise the right to increase the rates in their standard price lists.

Support your own RFP process. Although prices tend to be volume-sensitive, they can and do vary widely among companies having comparable volumes and mixes of services. These variations are mostly due to customers undermining their own Request for Proposal (RFP) processes. Customers can undermine their RFP process by:

• signaling a preference for a particular provider or a reluctance to switch providers, or
• allocating too little time for the vendor selection decisions, contract negotiations, and timely transition of services to a successor service provider (see discussion below).

Use consultants in pricing reviews. The industry practice is for the service agreements to include provisions calling for periodic competitive pricing. However, as a rule, these multiparagraph contract provisions, which generally describe comparable agreements or customers for benchmarking purposes, favor the carrier. Because for virtually all services, customer-specific pricing is no longer in the public domain, customers should negotiate the right to use qualified consultants to assist in pricing reviews. (See “Do You Need a Consultant?” on p. 41.)

Consider savings on local services. Local exchange services remain the least price-competitive segment of the telecommunications market; these services are still subject to tariff regulation. A multiyear commitment to purchase a minimum level of local services generally provides a modest discount. Migrating voice traffic to VoIP services can result in substantial savings, but VoIP services often require an investment in new switches and phones.
The standard forms

Service provider agreements are typically composed of multiple documents, including a master agreement, service-specific schedules or attachments, and a variety of online tariff replacement documents (variously referred to as services guides, guides, schedules, or guidebooks). The online documents often include standard price lists, service descriptions, SLAs, and restrictions on use of services (such as a policy on “authorized use” that governs the use of internet access services).

Manage the agreement. The numerous online documents, which are often poorly indexed, pose a major challenge in determining all of the terms applicable to a particular procurement. One approach is to require:

- that the service provider deliver either a hard copy or a disk with all applicable documents that clearly identify all applicable online documents (including all URLs);
- that the “Entire Agreement” or Integration Clause of your agreement
  - exclude any online documents not specifically

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**Term Sheet: An explanation of telecom services shorthand**

There is a wide range of telecommunications and network services:

- **Wireline Voice Services.** These are the well-known, local exchange and domestic and international interexchange services, including 800/888 toll-free services. For important operational benefits, such as integrated voice and electronic mail, companies are now migrating their voice traffic to Voice over Internet Protocol (VoIP) services. (An exchange covers a local calling area. Interexchange services, generally referred to as “long distance services,” originate calls in one exchange and terminate them in another. These distinctions are less relevant for VoIP services.)

- **Mobile Wireless Services.** Wireless services that support cell phones and Blackberry devices are available globally. Many corporations now purchase these services for their employees on a national or regional basis.

- **Wireless Broadband Services.** Wireless broadband services that enable broadband connections between employees remote from corporate offices and the internet are increasingly being used by corporations, particularly by companies with mobile sales and marketing. Individuals with laptops or notebooks can connect to their corporate data networks or the World Wide Web wherever they can secure wireless broadband connections, such as at WiFi hotspots. The major wireless carriers and new wireless broadband providers offer these services.

- **Interexchange Data Services.** Each of your company’s offices typically has a local area network (LAN) that connects all the office’s computers (desktops and servers). In turn, the LAN at each company facility often is connected to the LANs at other company facilities and corporate data centers, utilizing the high-speed data services offered by the major service providers.

- **Virtual Private Networks.** In the alternative, your company may deploy a virtual private network to enable secure data communications over both the carrier’s network and the public internet. These networks—sometimes referred to as IP-VPNs—combine internet access services and sophisticated customer premises equipment (CPE) so as to enable the transmission of data communications in a secure (encrypted) manner over the internet and to provide secure access to the World Wide Web by providing firewalls and antivirus protection.

- **Special Access Services.** These high-capacity digital services connect your company’s facilities to the nearest nodes of your company’s service providers. These high-capacity services are used at company offices having substantial volumes of voice, data, and internet access traffic. Major corporations often have several hundred or more locations that require these services.

- **Network Management Services.** These services generally consist of (1) monitoring the routers, firewalls, or other software-based CPE at a customer’s locations, and the services connected to the CPE; (2) notifying the customer of troubles and outages in either the services or the CPE; (3) remotely diagnosing and restoring the CPE and data services; and (4) dispatching technicians as needed to fix problems with the CPE or telecommunications services facilities. Providers of these services typically subcontract with CPE providers for CPE maintenance.

- **Data Center Services.** Data centers host the websites of many corporations and online service companies. Data centers typically have extensive physical and electronic security, operate with redundant power supplies and sophisticated fire-suppression systems, and offer high-capacity telecommunications access arrangements. Data center services include customer-specified security capabilities, such as firewalls and intrusion detection, to prevent or detect persons attempting to hack into websites.
identified, and
- contain a strict order of precedence to deal with conflicts between your negotiated deal and these other documents;

- that your technical people have reviewed these additional documents.

Don’t be afraid to negotiate. As in many industries, the service providers’ standard agreements are drafted by and for the benefit of the service providers. The remedies granted to customers are usually quite limited, and issues of concern to customers, such as billing disputes and service provisioning commitments, typically are not addressed. Substantial revisions are often warranted, as we discuss further below.

Request for Proposals
As a practical matter, negotiations begin as your company issues its comprehensive RFP. The company’s IT or telecom staff have primary responsibility for preparation of the RFP—specifying the services, traffic levels, bandwidth requirements, customer locations, and other variables that constitute the company’s overall demand set. The RFP should also address the main business issues, such as minimum commitment levels and the term of the agreement, and should include the preferred legal terms and conditions.

Issue the RFP well in advance. The RFP should be issued six months to a year before the current service agreement expires (or your company must send a notice of nonrenewal). Your company will require substantial lead time to plan and implement service conversions at all of its locations. Substantial lead time is also necessary to avoid the substantial economic penalty embedded in most service agreements: When an agreement or agreed-upon transition period ends, the rates revert to standard price-list rates that can easily exceed 100 percent of the prices in the expiring agreement. If potential bidders conclude that your company doesn’t have time to make a timely transition, they typically will not expend the resources to prepare and submit comprehensive, competitive bids.

Review sample invoices. As part of the RFP process, your company should ask each bidder to submit a sample invoice with a sample calculation of taxes and surcharges. Requiring this calculation is important; service providers are subject to regulatory surcharges that they routinely seek to recoup directly from their customers. Sample invoices or schedules showing taxes and surcharges assessed on the respective services may disclose significant total cost differences between otherwise similarly priced proposals.

Crucial Bargaining Points

Minimum purchase commitment
Service providers require a minimum purchase commit-

Do You Need A Consultant?

Many companies rely on consultants for help with their telecommunications and networking services procure-
ments. These consultants are not the familiar technology or management consultants, but rather specialists with experience in these procurements. Competent consultants provide substantial value because they are familiar with the structure and economics of service agreements, know the carriers’ pricing strategies and current pricing trends, and understand providers’ interests and priorities.

Experienced consultants are particularly important for companies whose current staff have not conducted a tele-
communications or networking services procurement in the last five years or otherwise do not have resources to devote to the procurement process. These consultants
- help prepare RFPs,
- assist in negotiations with service providers,
- provide assistance in connection with competitive pricing reviews, and
- audit bills from telecom and network providers.

Many consultants bill on an hourly basis. Others base their fees on a percentage of savings (as measured by the rate reductions achieved in the new agreement, or the savings realized from identifying and correcting billing errors). For procurements, an hourly or daily fee arrangement most closely aligns the consultant’s interests with the customer’s. For bill audit services, a percentage of savings approach makes more sense.
**Negotiate a low minimum commitment.** There are two principal reasons to negotiate a low minimum purchase commitment. First, a relatively high minimum commitment increases the risk that your company will pay for services it doesn’t use if it experiences a substantial business downturn, divestiture, or downsizing. Service providers typically agree to negotiate with customers if adverse business developments slash the customer’s service expenditures, but at that point customers are in a relatively weak bargaining position. Second, to the extent a customer has the flexibility to move substantial volumes of business to other providers, the service provider will be motivated to earn the customer’s business every day.

**Timetable for the switch**

Switching your company’s telecom service providers is a time-consuming, resource-intensive process for a company’s IT or telecom staff. A timely, predictable transition is essential for minimizing both disruptions to your company’s communications and the period during which your company is paying for both the existing and new providers’ services.

Service providers, however, are reluctant to commit to installation deadlines for new data services for all or most of a customer’s locations, even though substantially complete installation is required for a company to migrate traffic to and use the new carrier’s services for corporate data traffic. The service providers stress that local carriers are responsible for installing the special access services and generally do not offer installation commitments, and that as a result their provisioning is often unpredictable.

**Set installation milestones.** Contract provisions should be negotiated that obligate the service provider to meet service installation milestones that specify service to be installed at a specific number of enterprise locations per month, or at specific locations by fixed dates. If the timetables are not met, the provider should be required to pay either liquidated damages or the monthly charges for the services being provided by the current service provider.

**Service troubles**

When service troubles and outages occur, not only will your company want the service restored, but responsible staff at your company will want to know the scope and duration of the outage, the projected time for service restoration, the actual time of restoration, and the cause of the problem.

**Detail trouble resolution procedures.** Your service provider should therefore detail its trouble resolution and reporting procedures, as well as its online tools for reporting and tracking any troubles. All of these procedures should be specified in the provider’s contract with your company, and maintaining these processes should be a material obligation of the provider. The contract may provide the service provider with substantial flexibility to upgrade, modify, and enhance trouble reporting and resolution capabilities.

**Network and data security**

If your company is buying managed services, the service provider will be in charge of managing access to your local area networks and, ultimately, your corporate data. This provider may also be responsible for firewall management and other elements of network security.

**Meet security standards.** The agreement should therefore require the provider to meet your company’s usual security standards (or the best security practices for your industry). The contract should also give your company the right to review and modify these security requirements. In addition, the provider should be obligated to advise your company when network security is breached, potentially affecting the integrity of your data or the quality of your telecom service.

**Migrating to new services**

Although the standard three-year procurement cycle is in part intended to provide companies with the opportunity to migrate to new services or technologies, customers often want to be able to migrate to different services during a multiyear agreement, particularly if they might otherwise want to extend the term of the agreement. For example, your company might want to shift voice traffic to VoIP service or move data communications to an IP-VPN environment. Thus, it is fairly common for an RFP to elicit rates, terms, and conditions for the most probable replacement services or for higher capacity offerings of the services initially installed.

But the negotiations will be more difficult if the replacement services you’re considering are not priced in the original agreement. Attempting to negotiate a “competitive rate” for a service that may be in place for less than the full term can be problematic. It can be even more difficult to negotiate the option to migrate to a service or technology that has just come onto the market, regardless of whether it is offered by the service provider. The difficulty of negotiating these forward-looking provisions is tied to the service providers’ projected revenues and profit margins. Service providers build these projections into the pricing for the services specified in the original agreement, and the replacement services are often less costly than the current service.

**Keep the commitment low.** Your best bet to preserve your leverage to migrate to a different service or technology is therefore a low minimum purchase commitment, with its minimal impact on the service provider’s revenue expectations. Sometimes service providers will agree upfront to reduce the minimum purchase commitments to accommodate service transitions or to extend the term of the agreement.
Billing disputes

Although service providers’ billing systems have improved significantly in recent years, billing mistakes remain a major concern for customers. Substantial and recurring billing mistakes may not only prevent a customer from realizing the projected economic benefits of the services, but can also consume substantial staff time or consulting fees to identify and correct any billing mistakes.²

*Have a dispute process.* Billing disputes typically are resolved informally by meetings between the customer’s staff and the account team. However, the agreement should include a billing-dispute process that would provide that if a dispute is not resolved informally within a defined period (generally 50 days), the matter should be escalated to the formal dispute resolution process. The formal process may involve

- escalation to senior management,
- mandatory arbitration, or
- judicial proceedings.

One caution on arbitration provisions: Some service providers’ standard agreements specify the use of particular rules and arbitration services other than the American Arbitration Association standard rules.

*Escrow disputed charges.* Service providers often insist that uncontested amounts be paid promptly, and, if the dispute is not resolved within a defined period, that the disputed charges be paid under protest. A more equitable approach is to pay disputed charges into an escrow fund, pending resolution of the dispute.

Customer remedies

It is standard for service providers’ agreements to restrict their customers’ remedies. The SLAs for most services typically specify service quality and availability standards for

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**Technology Procurements**

- **Committee:** Information Technology Law & eCommerce Committee; contact info available at www.acca.com/networks/eCommerce.php, or contact Staff Attorney and Committees Manager Jacqueline Windley at 202.293.4103, ext. 314, or windley@acca.com.
- **InfoPAKs:** Technology Primer, an ACC InfoPAK (2004). www.acca.com/infopaks/tech.html
- **Annual Meeting Course Materials:** Karen L. Boudreau, Hemant Pathak, John E. Thomas, “Step by Step Success: Achieving Best Results When Advising a Large Technology Procurement,” program material from course 610 at ACC’s 2005 Annual Meeting. www.acca.com/am/05/cm/610.pdf
- **Dedicated Internet Access Service Level Agreement** www.acca.com/protected/forms/ecommerce/internetservice.pdf
- **Hosting Exhibit Service Level Agreement** www.acca.com/protected/forms/ecommerce/hostingexhibit.pdf
- **Service Level Agreement—Data Feed** www.acca.com/protected/forms/ecommerce/sl_datafeed.pdf
- **Outsourcing Your Company’s Technology Operations,** program material from course 310 at ACC’s 2004 Annual Meeting. www.acca.com/am/04/cm/310.pdf
- **Virtual Library℠ Sample Forms and Policies:** Find these and others in the Virtual Library at www.acca.com/vl/ and searching for the material type “Sample Form and Policy.”
  - Service Level Agreement www.acca.com/protected/forms/ecommerce/hostingexhibit.pdf
  - Service Level Agreement—Data Feed www.acca.com/protected/forms/ecommerce/sl_datafeed.pdf
services. If the SLA is not satisfied, the customer is entitled to credits or discontinuance of the affected service to a specific customer location. Damages for breaches of the agreement are limited to the affected services. Customers are usually given the right to terminate the agreement only if the provider materially breaches the agreement, which is often difficult to prove due to the complexity of the services and of the agreement itself. On the other hand, if the customer is in breach, the service provider can routinely terminate the agreement and collect early termination fees that are quite hefty, typically a fixed percentage of the remaining minimum purchase commitment, plus damages.

Define the consequences. It is possible to negotiate more balanced remedies clauses that include mutual limits on damages. But in any case, the most beneficial approach, from the customer’s point of view, is generally to focus on defining the consequences (customer rights and remedies) of significant service problems, including problematic customer support. Service providers are typically more willing to craft remedies that address specific, well-defined business issues. You may well be able to negotiate a series of escalating remedies for any chronic problems that beset all or a defined subset of your company’s locations. These remedies can include progressively larger credits and move on to re-provisioning of services, an analysis of the problem’s causes (signed by an

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**ACC International Resources**

**Technology**

For more on how the international legal community addresses this topic, see:
executive of the service provider), and ultimately the right to terminate the service to the customer location, the service provided to all customer locations, or the entire agreement.

Understand what service problems are critical. Thus in order to negotiate more meaningful remedies and better balance the risks in the agreement, you must understand—through discussions with your company’s IT or telecom staff—what service problems would undermine the overall utility of the services to your entire company, specific business units, and critical business locations. You should make the same analysis for individual services, such as internet access service, and you can expand this approach to provisioning, billing, and trouble notification and resolution. This typically results in a matrix of service problems and remedies, even if the remedy is only the right to terminate without liability.

Retain flexibility for cases of service termination. If you discontinue any service for cause (but do not terminate the entire agreement), the agreement should permit your company to proportionately reduce its minimum purchase commitment. And if your company terminates some or all of the services because of the provider’s breach, the service provider should remain obligated to provide the terminated services for a reasonable period of time at the rates specified in the agreement, so that your company has time to procure and put into place replacement services at competitive rates. The contract should specify what time period will be considered reasonable.

Account service
A service provider will typically designate a specific account executive or team to manage the business relationship and oversee all administrative and support functions related to the services provided to your company, such as ordering services for new locations, addressing provisioning issues, and handling billing questions. A nonresponsive account executive or team can seriously undermine your company’s relations with your service provider.

Address account team performance. Thus, the agreement should obligate the service provider, upon reasonable request, to address any issues concerning the performance of its account team. The provider should also agree to carefully consider your requests to replace members of the account team. Service providers generally agree to this commitment in order to maintain a positive working relationship and maximize the potential for new business.

Capturing the entire agreement
Consider integration issues carefully. Integration and precedence clauses are particularly important because a single telecom agreement will almost certainly include a large number of attachments, exhibits, and online service guides. The precedence clause should ensure that all negotiated rates, terms, and conditions take precedence over conflicting provisions in the service guides. A precedence clause may not be sufficient, however, because service providers reserve the right to amend these online documents at their discretion. Additional—but not necessarily conflicting—provisions may be added to the agreement, such as new indemnities or security obligations. Thus you should also consider identifying specific provisions of the agreement that cannot be modified, supplemented, or superseded.

General terms and conditions
Consider ADR. Service providers, like customers, have divergent views on whether alternative dispute resolution (ADR) is preferable to litigation. Some providers object to
ADRs, while others insist upon it. ADR may be advantageous for customers, because the cost and time for ADR are often noticeably less than for commercial litigation. Considering that telecom service agreements are rarely “bet the company” litigation matters, customers should give due consideration to ADR for disputes that may arise under these agreements.

In indemnities, beware of modification provisions. Telecom agreements generally contain mutual property and personal injury indemnities. They also typically contain an intellectual property indemnity provided by the provider to the customer. A service provider may reserve the right to extensively modify its services in order to avoid intellectual property infringement actions. You should carefully review the extent to which a provider is allowed to modify its service or the extent to which the customer remains obligated to pay for the modified service, lest your company wind up paying for a revised service that no longer fits its needs.

Watch out for assignment clauses. In a number of instances, the partial assignment of providers’ service obligations has resulted in trouble for customers. You will thus want to prevent service responsibilities from being assigned in part to other providers.

The provider should satisfy your work rules. The service provider’s employees, agents, and subcontractors will often be working on your company’s premises. Thus, you should ensure that the contract with the provider satisfies your company’s requirements for insurance, vendor compliance with your company’s workplace rules, and policies on the consumption of alcohol and drugs.

Some choice of law is better than others. Your firm should carefully evaluate the choice of law provisions in the provider’s agreement. The laws in states other than New York (and in countries other than the United States) may be far more favorable to customers, particularly with regard to limitations of liability.

Essential Takeaways

Although the cost of many telecommunications services has declined in recent years, corporate expenditures in this area have increased, for the simple reason that more of these services are being used. And acquiring these services is likely to become even more challenging in the future, as major telecommunications service providers in the United States consolidate and offer an increasingly broad array of the services discussed in this article.

Simply reviewing the legal terms and conditions after the IT or procurement staff has negotiated the business points is likely to prove neither timely nor sufficient to address your company’s interests and objectives. It’s therefore critical that you understand telecommunication services, their procurement life cycle, and the basic dynamics of negotiating service agreements. With that understanding, you will be able to represent your company with regard to the business and legal risks associated with these agreements—agreements that are key for acquiring essential services and reducing your company’s costs.

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Notes

1. Service providers are responsible for restoring outages and fixing service troubles not caused by the customer or its CPE, even when the carrier is not providing managed services under the agreement.
2. Counsel should not overlook the value of obtaining electronic invoice data, which can speed up the process of identifying billing errors, especially if the business’ internal telecommunications equipment can generate an independent record for comparison.
3. The performance standard may be 99.99 percent availability of the service as measured at various customer locations. More stringent standards are secured by purchasing redundant services, purchasing redundant services over diverse paths to customer locations, installing stand-by CPE, or purchasing managed services or quality of service offerings from the service provider. However, obtaining nonstandard metrics or standards are the exception, rather than the rule.