

'SWEEP' CLAUSES

PREVENTING SCOPE CREEP AND MARGIN EROSION

Most customer-oriented form contracts contain 'sweep,' 'dragnet' or 'catch-all' clauses that obligate suppliers to perform unmentioned services formerly performed and 'lesser-included' services related to or inherent in those described by statements of work. Sweep clauses can enlarge scope and erode margins unless appropriately qualified and limited to incidental, implicit or inherent details that might have been captured by more detailed scope documents.

Sweep clauses first appeared decades ago in data center transactions. Customers transferred whole 'glass houses,' including equipment and personnel, to outside suppliers and expected services to continue essentially unchanged. Whatever had been done would continue.

The logic is less compelling for (i) selective sourcing strategies that entrust parts of operations to various suppliers; (ii) standard, branded, or 'package' solutions; (iii) novel solutions that use new methods and technologies; and (iv) second-generation transfers from one supplier to another, when neither the customer nor the new supplier have detailed knowledge of the incumbent's solution or operations. In these situations, sweep clauses have limited relevance or none.

Sweep clauses may remain appropriate when whole functions are outsourced – such as maintenance of whole portfolios of applications or such financial processes as accounts receivable and payable. Customers fairly expect related, inherent, implicit activities to be performed, rather than just the strict letter of the scope documents. However, sweep clauses should not introduce wholly-new, unanticipated scope, conflict with the solution proposed and purchased, override statements of work or transfer retained responsibilities to an incoming supplier.

How, then, to achieve these objectives without excessive redlines?

- Limit commitments to services 'reasonably related' to outsourced functions described by scope documents. Unrelated work formerly performed by displaced personnel for historic reasons or convenience should not be swept inadvertently into the supplier's scope.
- Limit commitments concerning services formerly performed to those regularly performed during a reasonable period (often, one year) and not discontinued.
- Subject sweep clauses to qualifications, limitations and exclusions in scope documents. General provisions should not override specifics or draw into scope anything expressly excluded.
- Exclude functions retained by the customer or entrusted to other contractors. Suggest (in the contract or scope documents) that the customer's responsibilities include inherent, related activities.

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COMMENTARY | 'SWEEP' CLAUSES

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- Exclude loose references to whatever may be usual in the customer's industry. Suppliers rarely know this, and in any event, internal methods and operations vary considerably within any industry.
- If possible, limit application of 'sweep' clauses to functions and activities identified by the customer within a reasonable 'sunset' or 'cutoff' period after signing or commencement of steady state operations.

The supplier's best possible protection against scope creep and margin erosion – and both parties' best protection against future misunderstandings – is, of course, a well-crafted, comprehensive statement of work that describes in-scope activities in reasonable detail, contains those commitments within agreed limits, specifies customer obligations and dependencies and enumerates appropriate qualifications, limitations and exclusions from the supplier's scope. In so doing, good statements of work align the parties' expectations.