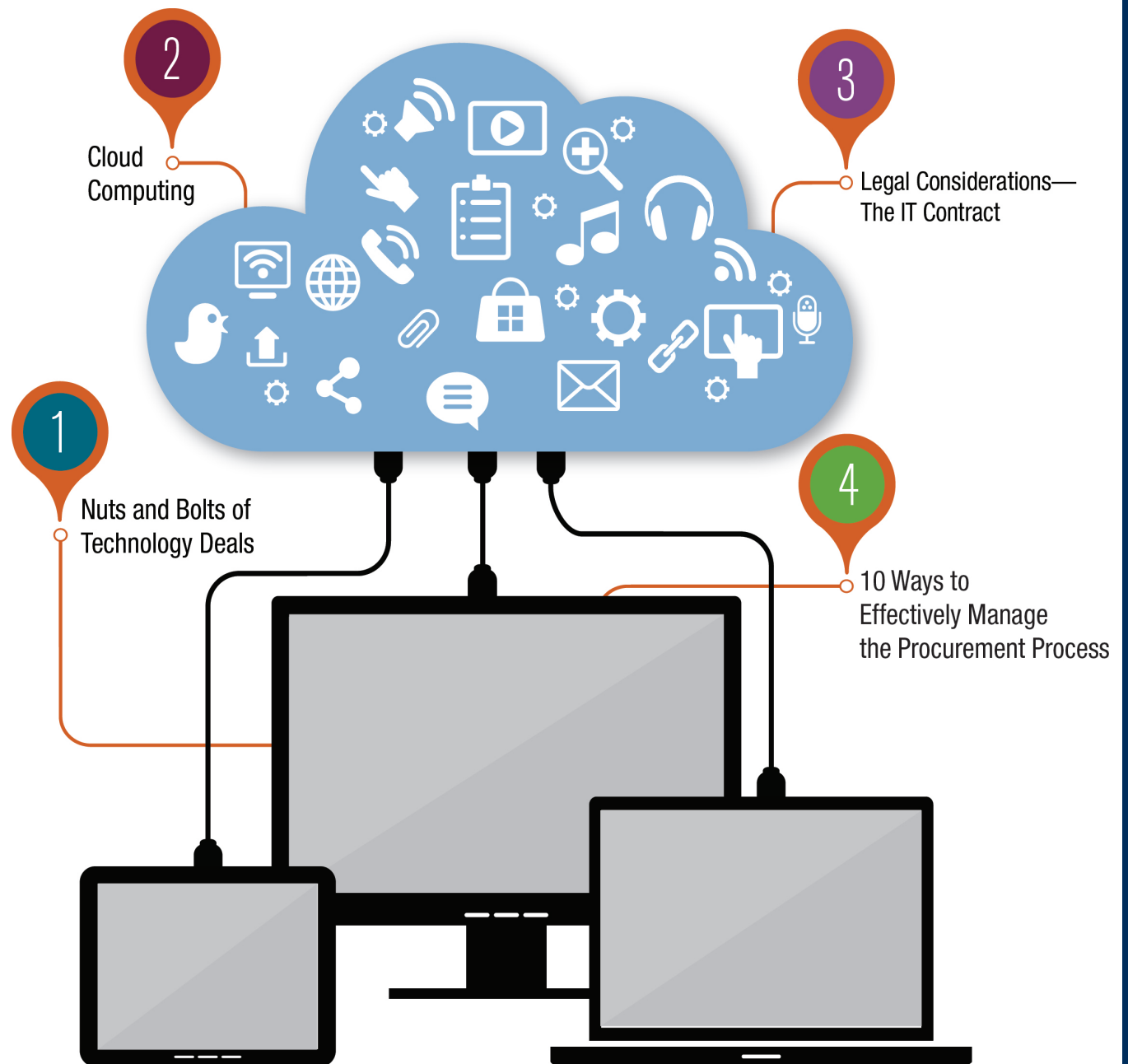


Managing the Technology Procurement Process



The Nuts and Bolts of Technology Deals



Organizations rely on technology to help them operate more effectively and efficiently, and the steps they take when procuring that technology are vital to meeting that goal. Benesch's IP attorneys are focused on completing technology-oriented transactions that support our clients' overall business objectives. We draft contracts that clearly define the rights and obligations of both parties, and we identify and help companies' business and legal teams consider and evaluate the risks associated with deals so they can make informed decisions.

The driving forces underlying most Information Technology (IT) deals are economics, scale, flexibility, personnel, efficiency, competitive advantage and timing. We have experience drafting many different types of IT contracts, including:

- Licenses
- Development agreements
- Master services agreements
- Outsourcing agreements
- Systems implementation agreements
- Professional services and consulting agreements
- Support and maintenance agreements
- Cloud computing agreements
- Internet and eCommerce agreements
- Combinations of the above

Cloud Computing



Cloud computing refers to on-demand availability of Internet-based computing resources including both hardware and software. Software as a Service (SaaS), Platform as a Service (PaaS) and Infrastructure as a Service (IaaS) are three distinct cloud computing delivery methodologies that provide companies with access to software applications, programming platforms and hardware infrastructure through the Internet. Cloud computing methodologies are transformative because they have the potential to dramatically change a company's cost structure by reducing up-front costs and permitting more efficient use of computing resources. However, cloud computing is not without risk.

Use of cloud computing resources involves many of the same risks associated with the use of more traditional computing resources, but the risk emphasis can be very different. Risks associated with data privacy and security, data preservation and destruction, litigation and discovery, ownership of data, limitations on liability, and service levels generally play a much larger role in the evaluation and implementation of cloud computing agreements.

Legal Considerations— The IT Contract



Every provision of an IT agreement has a business impact because it can affect rights granted or the property acquired or licensed, risks inherent in the deal, and economics of the deal. There is no such thing as a “boilerplate” contract. Even very simple-looking provisions can alter the basic nature of the deal or have the potential to infuse or mitigate risk. These provisions are negotiated most extensively because they impact the key business drivers of the deal or represent its key inflection points.

General provisions to key contracts define the general nature of the deal, the services and deliverables to be provided, and the rights granted. General provisions include:

- Statements of work
- Technical specifications/user guides
- License grant
- Subscription grant
- Development
 - Delivery, acceptance and rejection
 - Ownership
 - Work-made-for-hire
 - Assignment
 - Protection
 - Background technology
- Payment
 - Fixed vs. variable
 - Milestone based vs. non-milestone based
 - Disputed vs. undisputed
 - In advance vs. in arrears
 - Caps on increases upon renewal

Obligatory provisions define the vendor’s obligations.

Obligatory provisions include:

- Updates and upgrades
- Service level agreements
- Nondisclosure and confidentiality
- Data management and security
- Warranty

Risk provisions shift or help to mitigate risk in the deal. Risk provisions include:

- Representations and warranties
- Indemnification
- Limitation of liability
- Disclaimers of damages and liability
- Audits
- Insurance
- Alternative Dispute Resolution (ADR)
- Termination
- Open source restrictions

Supporting provisions support the relationship between the parties. Supporting provisions include:

- Source code escrow
- Dispute resolution
- Assignment

10 Ways to Effectively Manage the Procurement Process

10. Clearly articulate expectations up front so that your advisors/counsel have an understanding of your desires and can exercise good judgment in accordance with your wishes.
9. Be accessible. Accessibility of key decision makers and participants in the procurement process is vital to the completion of complex transactions.
8. Coordinate your approach to the key decisions, actions and schedules for the timing of required actions. Make sure internal stakeholders are all on the same page.
7. Implement and effectively manage a consistent approach to deal negotiation among internal business clients, recognizing the real bargaining power of the organization.
6. Trust the judgment of outside counsel. Benesch's IP attorneys have negotiated hundreds of these deals. We understand what "market" is. We understand the issues that are important to your vendors. We understand the key inflection points, strategic decisions and timing concerns of your vendors. We can use this understanding to your benefit.
5. Focus on the big picture. How will the deal affect your overall business? How important is the timing of the deal to your business (as opposed to the vendor's business)? Where does it fit in the big picture?
4. Remember that your attorneys are your representatives. We are all on the same side of the deal and all working diligently in the best interests of the business. The details of the deal should never be sacrificed just to "get it done."
3. Recognize that efficiency, value and cost-effectiveness are absolute necessities, but competent, effective, valuable work and work product require that unrealistic demands and constraints be minimized.
2. Provide your counsel full information regarding the deal. The more information we have about your needs and expectations, the better we can serve your interests.
1. Display strength of conviction in the face of pressure from vendors to take a particular approach or meet an unreasonable timeline. Remember: You are the buyer. You are the one spending money. You have a business to run effectively and profitably.

