Aavenir

CHECKLIST

SERVICES VENDOR CONTRACT

REVIEW & NEGOTIATION CHECKLIST



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Executive **Summary**

From a regulatory perspective, organizations must have a formal contract with vendors that provide products or services. The contract must clearly address the duties and responsibilities of all parties involved. In the past, some organizations may have had informal expectations for vendors that were not committed to writing or not adequately reviewed and, therefore, it created issues with enforceability, vendor risk management and overall business risk management. So, it's a regulatory requirement and best practice to have a contract in place with all of your vendors.

This document provides a review checklist for a services vendor contract to enforce a standard contract language. The items listed in the checklist should be considered while internal review and negotiating service vendor contracts. However, where the negotiation ends up on each item will differ based upon the relative size and sophistication of both parties and the business needs. Regulators also needs to know that the vendors understands the various options and that it has weighed against the business, legal and reputation risks that may flow out of the choices that have been made concerning the final agreement.



Contract Structure

Contract structure defines the fundamental requirements for entering into an enforceable agreement - the names of the parties, titles, abbreviations, and exhibits.

Title of Contract	The contract should have a specific “name” and make sure that internal references within the contract are consistent.	☑
Vendor Name	Make sure that the Vendor’s full legal name is complete. Keep the Vendor’s name similar to the details mentioned in the Bank.	☑
Financial Institution Name	Make sure that the Bank’s full legal name is complete. Some Vendors may not understand the legal difference between a bank and its holding company and may try and use the bank holding company as the party instead of the bank.	☑
Signatures	Confirm that the parties signing the Contract have the actual authority to bind the respective entities and that the titles and names are accurate.	☑
Addresses	Make sure that the mailing address, internet addresses, fax numbers and phone numbers are correct for the sending and receipt of notices	☑
Definitions	Vendors will sometimes use acronyms to describe various products and services. Make sure all acronyms are defined in the contract, either where they are first used or in a separate definitions section. Defined terms should be reviewed carefully to insure that the given meaning is what the Bank expects it to be.	☑
Exhibits	Make sure that all exhibits and schedules are numbered properly and are physically attached.	☑
Recitals Consistency	Recitals are the introductory statements in a written agreement or deed, generally appearing at the beginning, and similar to the preamble. Make sure Recitals should accurately reflect the transaction, as, if there is any ambiguity or uncertainty arising from the operative or main conditions of the agreement the courts may look at the recitals in order to establish the intentions of the parties to the agreement.	☑
Facts	Makes sure that all statements and assertions about the history of the transaction and the relationship of the parties are correct.	☑
Contract Artifacts	Review the recitals and the contract generally to validate that there are no misplaced references to other financial institutions left over from previous versions of the contract.	☑

Vendor Services

Ensure that the contract specifies the nature and scope of the services in the arrangement.

Description of the Services	The parties should be as comprehensive regarding describing the scope of the services.	☑
Internal Review	It is important that the appropriate people within the businss team are consulted and signed off on the terms of the contract.	☑
Incorporation of Brochures	References to proposals or other materials that read like marketing brochures are generally good enough for a contractual description of the services.	☑
Contingencies	Incorporating contingencies in the Contract should be avoided wherever possible	☑
Agreements to Agree	An agreement to agree to specific terms after signing the Contract can be problematic.	☑
Responsibilities Grid or Matrix	Precisely Answer the question of who is going to provide all of the services under the contract. For reference- Responsibility assignment matrix RACI matrix (R – who is responsible; A – who is accountable if things do not go as planned; C – who are the parties with the financial institution that need to be consulted and I – who needs to be kept informed about the progress?).	☑
Subcontractors	The contract should restrict vendor's use of subcontractors to only those that have been approved by bank for the approved function. Any change in the approved subcontractors should require the Bank's consent	☑
Third-party Vendor Services	Specify which activities the third party is to conduct, whether on or off the Vendor ownership, and describe the terms governing the third-party ownership, facilities, personnel, systems, and equipment, as well as access to and use of the information.	☑
Service Locations	The contract should list the locations from where the Vendor and third-party (if exists) will be performing the services. Any change in the listed location should require the consent.	☑
Offshore Outsourcing	If the Vendor outsources work overseas will the vendor have control over what information is sent overseas or not?	☑
Access to Company Premises	Does the Vendor need access to the premises of the financial institution? During normal working hours or in the evening?	☑

Company Resources	The contract should set forth on an exclusive basis the equipment, facilities, office space, and office services/technology that Bank is required to make available for the Vendor's use.	☑
Security Policies	The company should have defined security policies governing access to the company's systems, data (including customer data), facilities, and equipment. The Vendor should be obligated to comply with the company's Security Policies when accessing such resources.	☑
Data Ownership	The contract should provide that bank's data remains the property of bank and that vendor is prohibited from using such data for any purposes other than providing the services under the contract. Address the ability of the third party to resell, assign, or permit access to the Bank's data and systems to other entities.	☑
Change Control	The contract should have a defined change control process that requires company's approval for changes to the services and contemplates how changes to Policies or other compliance issues will be implemented and who will bear the costs of such changes.	☑

Service Levels Agreements

Specify performance measures that define the expectations and responsibilities for both parties including conformance with regulatory standards or rules.

Service Level Methodology	Define the processes for measuring the Vendor's performance	☑
Service Level Support	Service levels should support the company's business goals and compliance obligations.	☑
Service Level Definition and Target	The contract should be specific about the processes and tools used to measure and collect data for the service level measurements.	☑
Consideration	Consideration should be given to the fact that as the company grows or changes the nature of business the service levels may need to change.	☑
Industry Standard	Industry standards may provide a reference point but the company may have peculiar benchmarks of all SLAs which should be taken into account.	☑

Non-Performance	The contract should spell out remedies to which vendor is entitled in the event Vendor fails to cure any reported defects or measure/report on the service levels.	☑
Analysis	Vendor's obligations to perform a root cause analysis for incidents and Service Level failures and to remediate those deficiencies that are uncovered by the root cause analysis.	☑

Reporting

Ensure that the contract requires the third party to provide and retain timely, accurate, and comprehensive information such as records and reports that allow company management to monitor performance, service levels, and risks. Stipulate the frequency and type of reports required.

Internal Controls Reporting	The contract should define the types and frequency of internal control reporting. The reports should cover all Vendor locations from which Bank receives services.	☑
Performance Reports	Performance reports should not only address performance Service levels but also what steps the Vendor has taken to provide required services.	☑
Reporting	The contract should define the reports that the Vendor is required to provide to the Bank, including the required contents of the reports, the frequency of the reports, the Bank resources that will receive the reports, and any other information that Bank requires from the reports in order to comply with its regulatory reporting requirements.	☑
Data Retention Requirements	The contract should include an obligation for Vendor to record and retain records for the period required by law or by company's Policies, but no less than a defined period of time following the termination or expiration of the contract.	☑

Breach and termination

Address the responsibilities and methods to address failures to adhere to the agreement including the ability of both parties to the agreement to exit the relationship.

Termination for Convenience	The contract should include the right for company to terminate the contract for convenience.	☑
Automatic Termination	The contract should define certain events such as a breach of confidentiality provisions, bankruptcy and regulatory directives that may trigger an automatic termination.	☑
Vendor Termination Rights	If Vendor is performing services that are required for company's ability to operate, Vendor's termination rights should be limited to breaches of company's payment obligations	☑
Termination/ Expiration Assistance	The contract should define the Vendor's obligations to facilitate the orderly, uninterrupted transfer and transition of the services back to company or to another service Vendor, including the continued provision of the services for a reasonable period of time to allow the transition to occur.	☑
Dispute Resolution Process	A formal dispute resolution process can be helpful in preventing service issues and ambiguities from escalating to contract termination. A typical dispute resolution process requires each party to designate a relationship manager who must first meet to try and resolve disputes before a matter is moved to senior management. Resort to formal mediation or arbitration should only follow once the parties are unable to resolve the matter by themselves.	☑
Remediation of Security Breaches	The contract should require vendor to investigate, remediate, and mitigate the effects of the breach. The vendor should be required to develop a plan for implementing the remedial actions for bank approval.	☑
Incident Management	The contract should define the joint obligations and responsibilities of the parties with respect to incidents involving intrusions or other security breaches	☑
Business Continuity/ Disaster Recovery	The contract should define the Vendor's business continuity and disaster recovery capabilities and obligations to enable Vendor to continue delivery of the Services in the event of a disaster or other service interruption affecting a location from where the services are provided.	☑
Force Majeure Events	All possible Force majeure events should be described so vendoe shall not excuse from performing the business continuity/disaster recovery services.	☑

Disaster Recovery Plan	The contract should include the Vendor's disaster recovery plan defining the processes followed by Vendor during a disaster including backup schedules and processes.	☑
Disaster Testing	The contract should require that the disaster recovery procedures should be tested periodically and include obligations for Vendor to correct any failures identified during testing within a defined timeframe and retest as necessary to ensure such failures have been corrected.	☑

Choice of Law

The contract should specify that it is governed by preferably the law of a state where the company is located.

Governing Law	Local vendors will generally agree to use the law of the state where the company is located but large national vendors will oftentimes pick the state where they are located.	☑
Jurisdiction for Resolving Disputes – US Based Entities	There are limits to the legal authority of each court to hear and decide a case. For a court to be able to decide a case, it has to have jurisdiction. The jurisdiction for resolving matters in court should if possible be the state where the company is located.	☑
Jurisdiction for Resolving Disputes – Foreign Entities	Foreign courts and laws may differ substantially from U.S. courts and laws in the application and enforcement of choice-of-law covenants, requirements on company, protection of privacy of customer information, and the types of information that the third party or foreign governmental entities will provide upon request. Include in contracts with foreign-based third parties choice-of-law covenants and jurisdictional covenants that provide for adjudication of all disputes between the parties under the laws of a single, specific jurisdiction.	☑

Notice Requirements

Address the prompt notification of financial difficulty, catastrophic events, and significant incidents such as information breaches, data loss, service or system interruptions, compliance lapses, enforcement actions, or other regulatory actions.

Notice	Company should set out strategic business or operational changes which may affect the vendor's ability to provide the services and define any required notice and/or other requirements if such an event occurs.	☑
Business Continuity / Force Majeure	Make sure that the Vendor's full legal name is complete. Keep the Vendor's name similar to the details mentioned in the Bank.	☑
Information Breaches and Compliance Lapses	The compliance and information security requirements of the contract should include obligations to promptly notify the company in the event vendor becomes aware of or reasonably suspects an information or data breach or compliance issue has occurred.	☑
Data Privacy Notification	The contract should define when a security breach is deemed to occur and when Vendor is obligated to provide notification to company and perform remediation procedures.	☑
Company Policies	Depending on the type of contract being negotiated, the company can include the policies as part of the agreement, and the vendor need to comply with any thresholds and/or processes defined in the company policies.	☑
Security Breaches	The contract should require vendor to promptly notify bank if vendor becomes aware (or reasonably suspects) that a security breach has occurred. Security breach should be defined to include unauthorized access, disclosure, or misuse of Bank data or information that can be used to access Bank data.	☑

Compensation and Fees

Fully describe compensation, fees, and calculations for base services, as well as any fees based on volume of activity and for special requests.

Fees	The contract should define all charging methodologies and charging units in detail. The fees for the services should be limited to the specific fees and charges set forth in the contract. Any fees or payments for audit and examination fees to be paid by company would need to be defined in the contract.	☑
Variable Fees	Any volume based fees should be defined in the contract.	☑
Pass-Through Expenses	The contract should identify the passthrough/out-of-pocket expenses for which company is responsible.	☑
Taxes, Tariffs and Duties	The contract should identify the types of taxes that will be borne by company and whether those taxes are included in the fees or charged on pass-through basis. The contract should also identify which party is responsible for any tariffs, duties, and import/export fees imposed on the services.	☑
Implementation Fees	Any implementation fees or incentives to implement the services in a timely manner should not cause cash flow or similar issues to the Vendor that would encourage Vendor to take undue risks for payment.	☑
Financial Responsibility Matrix	Define the vendor financial responsibility for procurement, maintenance, growth, refresh, operational expenses, and any other cost applicable to the resources needed to provide the services, including equipment, facilities, software, and personnel.	☑
Services/ New Services	Only “new services” that are outside the defined scope of services that company has agreed to via an amendment should result in increases or additions to the fees that are outside the defined fees and charges.	☑

Confidentiality and Use of Trademarks, Copyrights, Patents

State whether the third party and its subcontractors has the right to use the Company's information, technology, and intellectual property, such as the Company's name, logo, trademark, and copyrighted material.

IP Rights in Bank Materials	The contract should define the license rights that vendor has in the company's intellectual property.	☑
General IP Rights	The contract should include intellectual property provisions that clearly define each party's intellectual property rights for their pre-existing materials and materials developed as part of the contract	☑
Escrow Agreements	The company may require that the vendor place certain source code in escrow so that if the Vendor goes defunct the source code is released to the company.	☑
Confidentiality Provisions	The contract should include appropriate confidentiality provisions that define Vendor's obligations to protect the Bank's information and prohibit unauthorized disclosures to third parties.	☑
Data Protection Requirements	The contract should include obligations for Vendor to comply with applicable domestic and international laws and regulations pertaining to data privacy, personal data, transfer of information across international borders, data flow, and data protection and to implement practices and procedures sufficient to enable such compliance.	☑
Information Security Management System	Vendor should be required to maintain an information security management system that is consistent with industry practices and sufficient to comply with the data protection requirements of the contract.	☑
General Audit Requirements	The contract should address Vendor's obligations to maintain an audit trail of all financial and non-financial activities resulting from the services. The contract should identify which party will perform the audits.	☑

Vendor Indemnities

The contract should include obligations for Vendor to defend, indemnify, and hold harmless the Bank, its affiliates, and its and their officers, directors, and employees from the following types of third party claims:

Damages	Claims resulting from bodily injury, death, or damage to personal or real property caused by Vendor	☑
Violation of Law	Claims resulting from Vendor's violation of laws, rules, regulations, or orders applicable to Vendor	☑
Failure to comply	Claims resulting from Vendor's failure to comply with the Bank's Policies	☑
Breach of contract	Claims related to Vendor's breach of Bank's third party contracts for software or services used by Vendor	☑
Fraud & Malpractice	Claims resulting from Vendor's fraud, criminal acts, or intentional misconduct	☑
Tax Obligation	Claims for Vendor's tax obligations arising from the provision of the services under the contract	☑
Consent	Claims resulting from Vendor's failure to obtain any necessary consents needed to perform under the contract	☑
Refusal	Claims resulting from Vendor's intentional refusal to perform any portion of the services	☑
Intellectual Property & Data Privacy	Claims resulting from Vendor's breach of the intellectual property, confidentiality, or data privacy provisions	☑
Insurance	Claims that would have been covered by insurance but for Vendor's breach of its obligations to maintain insurance.	☑
Company Indemnities	Depending on the nature of the services under the contract, it may be appropriate for Company to indemnify Vendor for similar types of third party claims.	☑
Indemnification Limits / Limitation of Liabilities	The company should consider whether damages arising from certain acts or omissions should be excluded from the limitations of liability.	☑

Insurance

Stipulate that the third party is required to maintain adequate insurance, notify the bank of material changes to coverage, and provide evidence of coverage where appropriate. Types of insurance coverage may include fidelity bond coverage, liability coverage, hazard insurance, and intellectual property insurance.

Coverage	The contract should obligate Vendor to maintain appropriate insurance coverage for the benefit of Bank.	☑

Default

Ensure that the contract stipulates what constitutes default, identifies remedies and allows opportunities to cure defaults, and stipulates the circumstances and responsibilities for termination

Warranties	The contract should include warranties and covenants with respect to the performance of the service.	☑
Operational Defaults and Service Level Termination Events	The contract should require that the disaster recovery procedures should be tested periodically and include obligations for Vendor to correct any failures identified during testing within a defined timeframe and retest as necessary to ensure such failures have been corrected.	☑

About **Aavenir**

Aavenir offers next-gen Source-to-Pay solutions including RFPflow, Contractflow, and Invoiceflow that revolutionizes age-old procurement processes. Led by domain experts in procure-to-pay enterprise tech, Aavenir's intelligent procure-to-pay solutions are designed to reinvent vendor selection, contracts lifecycle management, and accounts payable processes using disruptive AI, ML and NLP technologies. For more details, visit www.aavenir.com

