

Negotiating a Statement of Work: Key Terms in a Statement of Work

By Stephen Pinson

Often, after signing a Master Service Agreement (“MSA”), a service provider and its client will memorialize the details of the project by crafting a Statement of Work (“SOW”). The importance of the terms in a SOW is sometimes overlooked by both business and legal teams because an SOW is commonly considered a business document rather than a legal document. There are many risks and potential issues that can arise in SOW. But, what exactly should be included and negotiated in an SOW?

- **The Who - Who will be providing the services?**

It’s important for the parties to document who will be providing the services. Sometimes, software developers, cloud providers, and IT service providers, will subcontract their responsibilities to third-parties. It is important to know if the work will subcontracted or not to determine who will be ultimately responsible for the work and its acceptance. For businesses receiving the services, it is always important to include in the SOW a provision which states that the service provider will ultimately be responsible for any subcontracted work.

Additionally, it’s vital for both parties to appoint a project manager. The purpose is to have a key point of communication, as well as to have a person who has the authority to accept the work and services they are being provided throughout the SOW.

- **The What - What are the services being provided?**

This section of the SOW contains the scope of work being provided. Generally, it should contain the specific work to be provided under the project. Although, this section may be drafted by the technical staff, it must be reviewed by the business and legal teams to be sure the services and responsibilities of the parties are adequately defined.

Sometimes, in SOWs there will be a section that outlines key assumptions about the project. Usually, this section will articulate that any changes in assumptions will allow for an increase in the price of the overall project.

As for each party’s responsibilities, it is crucial for both sides to memorialize what exactly they are responsible for and for any safeguards such as who will be responsible if something fails, there are inaccuracies, or delays in the project. For instance, for software development SOWs, it’s important to include who will be responsible for certain configurations and inputs into the software. For cloud offerings, it is important to determine who will be responsible for the information being supplied, and or the security and accuracy of the system. For IT services (usually to configure or run a system or network), it is important to determine who will accept the configurations or system maintenance or performance at each stage in the process.

- **The When - When will the services start and be completed?**

It is essential for an SOW to contain a start date and timeline for the work (a beginning date and end date). It is best practice to have a provision that pegs certain phases of the project to payment. This will increase the likelihood that the service provider will try to maintain the proposed schedule, so it can be paid. For projects, that are time and materials based, it's best practice to have projects estimated with a number of total hours, so as not to exceed those hours. For projects that are on a fixed fee, it's best practice to keep projects on a phase or milestone timeline where the price is fixed to a certain time horizon, and if the phase or milestone is not met then there will be a discount in the overall price. Additionally, if several phases or milestones are not met by the service provider, it's always a good idea to include a clause that will allow the business to terminate the relationship.

- **The Where - Where will the services take place?**

Sometimes the services are going to be delivered in various locations. When dealing with this issue, the business should determine what necessary precautions it needs to have built into the SOW. For instance, if the work is going to be performed in the jurisdiction of the business location, it's a good idea for the service provider to agree to comply with local laws. If the work is going to be performed in a foreign jurisdiction, it is important to include a provision requiring the service provider to abide by the governing laws of the jurisdiction of the parties to the contract, and the governing laws in the foreign country.

- **The Why - Why is the service being performed?**

The parties should include a section containing the "Scope of Work to be Performed" and the exact "Deliverables". These sections should outline the extent of the work, and the particular items to be delivered to the business when the work is completed. Detailing this information in the SOW will help keep the project in view. Additionally, it should give a checklist for the project manager to sign off on at each stage of the project to accept the work.

- **The How - How will the service ultimately be performed/delivered and paid?**

The most important part of the SOW is how the work will be performed/delivered and how it is tied to payment. Typically, SOWs follow two methods of performance tied to payment: (1) time and materials, which is hourly, and (2) fixed price, which is a set price paid, typically in installments. The parties should outline the pricing based on the actual deliverables. With each deliverable that is completed, or a set of deliverables completed, the service provider should be paid, whether in installments or as work is completed. Ideally, best practice for time and materials projects, is to have the hourly payment based on increments of payment, such as monthly, or as a certain type of work is completed. It is crucial to keep the total amount of hours in view of the project's goal, and if those hours are reaching the total estimated hours, then the business should have a safeguard provision drafted into the SOW stating that any work beyond that point will be at the service provider's expense. On the other hand, best practice for fixed price projects, is to have the actual deliverables tied to a milestone or phases. When that milestone or phase is completed, and accepted, only then is the service provider paid.

Lastly, if there are changes in how the service will ultimately be performed, the SOW should contain a procedure to change the scope or timing of the work. Sometimes, if there is only a minor change, the parties can agree to a change process that entails e-mail correspondence rather than executing another document. For major changes, it is best to include a change order procedure to execute a separate document to memorialize a major change. Sometimes for the unwary, a major change can be used by the service provider to increase the overall project price. The business should always protect itself and include a provision in the SOW to prevent this type of outcome.

Remember, SOWs should be detailed enough to tell a good story. They should contain at least the “Five Ws” and the “How”, so the parties will know exactly what they are getting and how they will perform under the SOW. It is always important to seek advice from experienced legal counsel in order to understand all the risks involved when negotiating one.



About the author Stephen Pinson:

Stephen represents clients involved with intellectual property and technology disputes. Specifically, he defends clients in software licensing and copyright infringement matters. Prior to joining the firm, Stephen practiced in high-stakes securities litigation, regulation, and enforcement actions. He spent the majority of his time prosecuting and defending large corporate clients, institutional investors, and Wall Street firms.

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