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Critical Strategies for Successful Outsourcing

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**Association of Corporate Counsel
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Phil is the head of the Outsourcing Practice at Hogan & Hartson LLP, a law firm of over 1,000 attorneys with 23 offices in the US, Europe, Asia and Latin America. Phil is listed in *Who's Who in American Law*, *Chambers USA: America's Leading Lawyers for Business* and the Legal Elite, published by *Virginia Business Magazine*.

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Robin has considerable experience structuring, drafting and negotiating outsourcing and technology-related agreements including IT, BPO, HR, manufacturing and telecommunications outsourcing agreements. She spoke about privacy and data security issues at the 2006 Outsourcing World Summit.

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Part 1
Look Before
You Leap

Do Due Diligence

- **Identify services to be outsourced and designate those that are mission-critical**
- **Identify current performance standards**
- **Understand outsourcing objectives**
- **Obtain “buy-in” from stakeholders**
- **Calculate current cost**
- **Identify all relevant third-party providers (services, software, data, equipment, etc.)**
- **Identify assets and jobs that will be transferred or eliminated**

Identification of Services to be Outsourced

- **Document the services**
- **The bidders will calculate proposed prices based on services as described**
- **Additional services will increase the price**
- **Sweep Clauses**
 - ✓ **Tasks previously performed by displaced employees**
 - ✓ **Inherent in performance of the services**

Identification of Services to be Outsourced

- Establish service/performance levels
- Current performance often establishes baseline
- What you have; What you want
 - ✓ Measure the right objective
 - ✓ Define and measure the same way
- Transformation vs. Transition
 - Status quo?
 - Or fix services?
 - Upgrade the services?
 - Bring them into legal compliance?

Identification of Assets and Third Party Resources

- Economics of asset disposal or purchase by the service provider must be explored
- “Refresh” responsibility
- Identify third-party resources – software, leased equipment
- Determine if service provider will have adequate rights to third-party resources
- Operating Level Agreement (OLA) – customer responsibilities

Identify Job Transfers

- **When services are outsourced, jobs are eliminated**
- **Domestic and foreign regulations applicable to job elimination or transfer must be identified, and compliance planned for**
 - ✓ **WARN Act issues at home**
 - ✓ **Acquired Rights Directive issues in Europe**
- **Sensitivity to outsourcing – local jobs lost**

Identify Job Transfers

- **Employers must also plan for:**
 - ✓ **Possible departure of employees before outsourcing services begin**
 - ✓ **Strategies to encourage the service provider to hire the strong employees**
 - ✓ **Offers of appropriate employee benefits to former customer employees**
 - ✓ **Possible legal actions by employees whose jobs are eliminated**

Governance

Focus on governance to tilt the probability of success in your favor

- **Communication management**
- **Performance management**
- **Change management**
- **Dispute management**

Communication Management

- **Identify stakeholders**
- **Create internal escalation procedures for issues that are not resolved at the operations level**
- **Institutionalize regular provider-customer meetings to address issues that have been escalated**

Performance Management

- **Joint responsibility**
- **Brand protection**
- **Periodic performance meetings**
- **Acceptance/Product Review**
- **Reporting SLA**
- **Get monthly performance reports**
- **Key Performance Indicators (KPI)**
- **Customer satisfaction survey**
- **Executive satisfaction survey**

Performance Management

- **Remedies for Service Deficiencies**
 - ✓ **Service Credits**
 - ✓ **Escalation with Service Provider Management**
 - ✓ **Self Help**
 - ✓ **Termination**
 - ✓ **Damages**
- **Rewards for Service Excellence**
 - ✓ **Performance Bonus**
 - ✓ **Gainsharing**
 - ✓ **Earnback (get-well incentive)**

Change Management

- **The relationship will work best if the parties avoid scope creep and demand creation**
- **Service provider flexibility in “how” services are performed**
- **The service provider should prepare an impact analysis for each proposed change**
 - ✓ **Price change**
 - ✓ **Time to implement**
 - ✓ **Effect on service levels**
 - ✓ **Effect on termination**
 - ✓ **Additional customer costs/savings**

Dispute Management

- **Regular open communication can avoid disputes**
- **Establish procedures that encourage the parties to acknowledge and address disputes as they arise**
- **Establish internal resolution and escalation procedures**

Part 2

Key Offshoring Issues

Privacy and Data Security

- **The US federal trade commission requires reasonable data security measures**
- **Over 33 U.S. state laws require notification of security breaches**
- **Certain US laws (e.g., GLB and HIPAA) restrict disclosure of personally identifiable information**
- **Restrictions on export of personally identifiable information from Europe**
- **Notifications or applications to process data required in many European countries**
- **Credit card data processing**
- **Restrictions on government classified data**

Intellectual Property Ownership and Protection

- **Different laws**
- **Different enforcement reliability**
- **Restrictions on use of third-party resources**
 - ✓ **Stated restrictions**
 - ✓ **Geographic-patent concerns**

Other Offshoring Issues

- **COLA**
 - ✓ **Determine appropriate index**
 - ✓ **Sensitivity factor**
 - ✓ **On-shore/Off-shore**
 - ✓ **Sharing risk**
- **Foreign Exchange Rate Fluctuations**
- **Changes in Law**
- **Sarbanes-Oxley – SAS 70**
- **Language/Cultural Differences**

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