



Should Your ASP Contract Include a Key Personnel Clause?

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Author: Minda Zetlin

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It's your worst nightmare.

You depend on an ASP to keep your business running, and suddenly things aren't working right. Data isn't going through correctly. You can't process orders anymore. So you call. The ASP help desk tries to fix the problem. They keep trying for several hours. Meanwhile, you know you're losing customers to your competitors. So you call your guru. You know who we mean. The can-do person at your ASP. The one who knows the system inside out, and understands how to solve every problem. The one who has enough clout within the ASP hierarchy to get your problem taken care of right away. You know your guru will save the day. If only you could locate your guru. He or she is not in the office, not answering a cell phone or beeper, and you don't have a home phone number. You leave message after message into the night.

In the morning, your guru calls back and politely explains that he or she is not your guru anymore. Your company's business has been reassigned to someone else, someone who recently joined the company. Someone you've never spoken with before.

Scenarios like this are the reason some clients have begun adding special clauses to their contracts that specify--by name--who will be responsible for the ASP's work on their account and how they can get in touch with that person at any time of the day or night. Traditionally, key personnel clauses are more common in outsourcing arrangements involving a customized relationship. But a growing number of ASP customers are insisting on them too, according to Bradley Gross, senior attorney at Fort Lauderdale-based Becker & Poliakoff, and a member of CompTIA's best practices committee.

"It's increasing at a dramatic rate because people have been burned," he says. "Customers are no longer just going by the services offered, or the reputation of the ASP."

Would it make sense to specify key personnel in your next ASP contract? If so, here are some factors to consider:

Key personnel or designated personnel? Many ASPs are will gladly designate one employee who will be your contact whenever you have questions or concerns. While this can be helpful, Gross says, "the problem is that person might be negotiating the same service with another customer--or negotiating for a job with another employer."

A key person, on the other hand, has the knowledge and authority to actually solve whatever problem might arise with your data or your ASP relationship.

What makes someone key? You'll know the answer to this question better than your lawyer, Gross points out, and should work with him or her to determine which elements of training or experience make someone at your ASP indispensable to your company. You might also include that person's title in the criteria, though titles can be deceiving. Gross likes to include the key person's resume, as an addendum to the contract (because it's relatively easy to change an addendum without affecting the contract as a whole). In cases where you're really dependent on someone to keep your business going, he even recommends taking out a life insurance policy on that person.

What if the key person leaves? This is one good reason to include the resume in the contract addenda: It's a starting place for defining the qualifications for his or her replacement. You may also wish to have final approval over who's hired, and even take part in the final round of interviews.

Who do you reach in an emergency? Some legal experts believe a key personnel clause is overkill in most ASP arrangements. But you may want the contract to specify which executives at the ASP will be available when things go awry. "The help desk should have its own escalation procedures, taking it to the next level after an outage of, say, four hours," says Ted Stockbridge, partner at Vinson & Elkins. "That might go through two or three steps, but at some point the CIO at the customer will get involved and want to deal with someone of equal stature at the ASP." Stockbridge sometimes includes phone numbers, mobile numbers and beeper numbers for key personnel in the contract.

Do you really need it? Not all experts agree that key personnel clauses are appropriate in typical ASP relationships. "If it's an applications outsourcing deal--hosting and managing a third-party application in a dedicated environment--a key personnel clause makes sense," says Christopher Ambrose, research director at Gartner. "If you have an ASP deal where the application, and its underlying infrastructure and support is shared amongst many customers, I think a key personnel clause would be difficult to apply."

In that case, the contract should specify the ASP's responsibilities, he notes, but not who will fulfill those responsibilities. "You're buying a service, and they're providing a service level commitment. You shouldn't necessarily be in a position to tell them how to fulfill it."

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info@ASPstreet.com +1 650 837-9980



