INFORMATION TECHNOLOGY OUTSOURCING AT COMMUNITY COLLEGES: LEGAL CONSIDERATIONS OF AN EMERGING TRENDS

Presenter:

WILLIAM MULLOWNEY
General Counsel
Valencia Community College
Orlando, Florida

Stetson University College of Law:

20th ANNUAL LAW & HIGHER EDUCATION CONFERENCE
Clearwater Beach, Florida
February 11-13, 1999
Information Technology Outsourcing at Community Colleges
Legal Considerations of an Emerging Trend

Bill Mullowney
General Counsel
Valencia Community College

20th Annual Law & Higher Education Conference
Clearwater Beach, Florida
February 11-13, 1999

I. Introduction

A recent search of the internet revealed many sites discussing various aspects of outsourcing in myriad contexts. What is outsourcing? An outsourcing agreement generally allows the provider company, the outsourcer, to supply a client with services or processes that the customer is supplying internally or is considering supplying. Many commentators predict a tremendous surge in IT outsourcing in the next decade within higher education.

The highly competitive market for skilled technicians and the increasing inability of colleges and universities to recruit and retain quality staff in the information technology (IT) area have contributed to the emerging practice of outsourcing all or part of the IT function. Community colleges find themselves increasingly in the market for these services, the purchase of which requires careful preparation, negotiation and attention. Predictably, the contract is the key to success in outsourcing relationships. Paramount is a clear definition of the scope of services and the inclusion of proper terms and conditions to support the provision of these services.

II. Outsourcing Advantages and Disadvantages

In an article in the January, 1999 NACUBO Business Officer, Good, Bad, and Best Practices of Outsourcing, Bruce J. Howard, vice-president of the Global Peoplesoft Practice, Complete Business Solutions, Inc., discussed the pros and cons of outsourcing. According to Mr. Howard, the advantages of outsourcing include:
- Reduced operational expense
- Reduced internal financial or investment risk
- Reduced administrative burdens
- Enhanced operations vision and experience not found in-house
- Facilitate organizational downsizing or restructuring
- Availability of new, competitive or strategic services
- Reduced collective bargaining power
- Meet the need to recruit and retain skilled staff

The disadvantages of outsourcing or reasons for failure are:
- Cultural differences between the outsourcer and the institution
- Unrealistic expectations of service levels and cost savings
- Less responsive service
- Reduction of elimination of institutional control
- Difficulties in re-establishing internal services
- Union contract and strike issues

III. Choosing An Outsourcer

Institutions that outsource are not just trying to save money; they are looking for help in locating, affording and keeping talented personnel. These colleges seek cutting edge technological know how to significantly enhance computer software, systems, and services available to students, faculty, and staff. They turn to outsourcing as a viable solution to stretch relatively meager IT budgets and produce results.

Outsourcing is a complex and usually long-term contractual relationship. The decision to outsource carries with it serious economic and political ramifications for the institution and should not be made without a thorough review of present institutional operations and expenses, current gaps in service, identification of goals and objectives, and a careful investigation of prospective outsourcers.
In evaluating an outsourcer that has submitted a proposal to your institution, reference checking with other client institutions is important. First, obtain copies of contracts if possible, as entered into between the outsourcer and client. This may prove invaluable during negotiations. Also, conduct extensive institutional interviews, and make sure to contact the client institution’s attorneys, business officers, academic and faculty leadership, and student services leadership, as appropriate. The questions asked of the reference college should include:

A. What other vendors were examined?
B. What other colleges did you contact as references?
   1. What were those findings?
C. What problems did the college encounter regarding:
   1. Contract negotiations?
   2. Staffing?
   3. Operations?
      a. Has college maintained control and knowledge?
   4. Fit with college:
      a. Is outsourcer isolated, inaccessible, or unresponsive?
D. How was decision made to hire outsourcer?
   1. Was faculty or other staff involved?
E. How accurate was outsourcer’s analysis of status quo?
F. How smooth was the transition to outsourcer’s team?
   1. How was the current staff treated?
   2. Was there much turnover?
G. How has outsourcer performed to date?
   1. Did outsourcer meet all deadlines?
   2. Did outsourcer have any conflicts with faculty or other personnel?
Certainly, if the process proceeds to contract negotiations, the outsourcer should be asked about the existence and disposition of pending or prior legal claims, especially in the areas of personnel, intellectual property or other performance areas.

IV. Contract Considerations

The outsourcing contract governs what amounts to a significant commitment between client and outsourcer. Both parties invest a significant amount of time and resources to adjust to the new business environment and build new relationships. Accordingly, the term of the contract is usually long-term, from 3-10 years, and the contract is usually difficult or expensive to terminate prior to the expiration of the term, absent a breach.

A. General Contract Issues

1. Establish Objectives

Establish your institutional objectives before entering contract negotiations. Hire a consultant if necessary, but you must know exactly what you want outsourced and stay focused on what you need as you evaluate proposals and enter negotiations. If your institution does not have a clear grasp of what it needs, it will be susceptible to a flashy pitch from a big outsourcer. Thereafter, the deal is doomed to fail due to ill-defined scope of services provisions and no measurable performance standards. The key to the outsourcing contract is the same as for all business contracts: eliminate ambiguity or opportunity for misunderstanding as to the objectives of the agreement.

A related point is to ensure that the contract clearly defines all key processes that will be outsourced or that will be subject to measurement.

2. Provide for Communication/Reports

Be active and consistent in managing the process outsourced. The contract must provide for, and indeed require, specific means for regular coordination and communication between the parties. An entire section of the contract should
specify reporting requirements, and day-to-day, mid-level and high level communication structures designed to anticipate and solve problems.

In this light, each contract should provide for a primary contact for each party, who is vested with the requisite legal and corporate authority to make decisions and solve problems. You need a go-to person who can make a final call on important matters. This saves time, energy, and resources.

Additionally, internal escalation clauses can address resolution of contract disputes at identified and agreed upon organizational levels in efforts to avoid litigation and achieve business objectives.

3. Scope of Services

Perhaps the most important part of the outsourcing agreement, the scope of services is the section that becomes the basis for receiving service, measuring performance and realizing results. In specifying the scope of services, don't imply or assume anything. Determine current capabilities and costs to set a baseline and then develop measurable performance and cost targets in all areas covered by the agreement, with identified deadlines. Generally, if you can't measure it, it may not get done. Some contracts also provide for performance incentives and non-performance penalties, perhaps on the principle (often observed in construction contracts) that service levels/performance benchmarks without penalties are not worth the paper they're written on. These clauses are not universal, especially in the higher education arena.

4. Flexibility

During the effective term of the outsourcing agreement, many things will change, such as the college's strategic plan, technology, and economic and personnel conditions. The circumstances which formed the basis of the carefully drafted scope of services provisions may become so drastically different that the
services may no longer be relevant. The contract should provide for the parties’ ability to modify performance benchmarks, the scope of service, and other aspects of the relationship on a regular basis.

B. Specific Contract Issues

During contract negotiations, specific issues will arise, some owing to the unique nature of higher education, some owing to the complexities associated with technology and intellectual property, and some simply related to the good old fashioned allocation of risk between parties due to the unique features of an outsourcing agreement. Among the issues you should consider are:

- Term
- Cost
- Scope of Services
  - Y2K Issues
  - Cooperation with Internal/External Audits
- Issues Related to Outsourcer’s Presence on Campus
  - Independent Contractor
  - Compliance with Law and Policies
  - Provision of Offices, Equipment, Supplies and Services to Outsourcer
  - Insurance and Indemnification
- Ownership of Hardware, Software, and Intellectual Property
  - Treatment of Grant-Funded Projects
- Non-Solicitation
- Confidentiality, Sunshine Laws, and FERPA
- Liability, Warranties, and Limitations of Liability
- Default and Termination
- Transition and Phase Over
- Miscellaneous Provisions
  - Controlling Law/Venue
  - College/Outsourcer Contact Names
  - Assignment/Successors

Attached is a sample information technology outsourcing contract, annotated from the perspective of a public two-year institution.
AGREEMENT BETWEEN
OUTSOURCER, INC.
AND
DISTRICT BOARD OF TRUSTEES OF PUBLIC COMMUNITY
COLLEGE, A POLITICAL SUBDIVISION OF THE STATE

THIS AGREEMENT between OUTSOURCER, INC. ("OUTSOURCER") and District Board of Trustees of Public Community College, a political subdivision of the State ("CLIENT") is made this _____ day of __________________, 19__. 

WHEREAS, the CLIENT desires to purchase certain data processing services in support of the management and operation of its computer center; and 

WHEREAS, OUTSOURCER wishes to provide the services described herein in accordance with the terms and conditions hereof; 

NOW THEREFORE, in consideration of the payments herein agreed to be made and the covenants and agreement herein contained, the parties hereto, intending to be legally bound, hereby agree to the following:

1. SERVICES

Starting on the Effective Date (as defined in Section 3.1), OUTSOURCER shall perform the services described in this Agreement and Exhibit A, attached hereto and made a part hereof ("Scope of Services").  

Include in Scope of Services a requirement that Out sourcer shall cooperate with all internal and external audits and shall effectively respond to audit findings and recommendations, including corrective actions.

2. COST FOR SERVICES

The costs for services to be provided by OUTSOURCER are set forth in Exhibit B attached hereto and made a part hereof. Such costs shall be subject to a cost of living adjustment, as more fully set forth in Exhibit B.

3. TERMS AND CONDITIONS

3.1 Term:

This Agreement shall commence on __________________, 19__ (the "Effective Date"), and terminate on __________________, 19__.
3.2 Invoices and Payment Terms:

3.2.1 OUTSOURCER shall submit monthly invoices to the CLIENT. Invoices shall be issued before services are rendered by OUTSOURCER and shall be submitted by OUTSOURCER at least 30 business days before payment is due by the CLIENT.

Throughout the contract, be cognizant that business days for the outsourcer are often not business days for the college.

3.2.2 Exhibit C indicates the monthly amounts to be paid by the CLIENT for OUTSOURCER staff services and expenses. The CLIENT shall pay according to this schedule. Payment not received within [five (5)] days of the due date will be subject to an interest charge. All interest charges will be computed at the current prime rate as designed by The Wall Street Journal plus two percent (2%), but in no event to exceed the provisions of STATE law.

Be sure to cap any interest charges as set forth in state law.

3.3 Data Processing Equipment and Supplies:

Subject to Section 3.9(c) below, as between the parties, the CLIENT reserves and retains the right, title and interest in any and all computing equipment, software, systems, data, output and other materials or property except that which is furnished by OUTSOURCER and is not developed pursuant to this Agreement, which retains such rights itself. Upon expiration or earlier termination of this Agreement, OUTSOURCER shall relinquish to CLIENT the use of equipment provided by CLIENT in as good condition as when turned over to OUTSOURCER, reasonable wear and tear excepted.

Overriding question throughout: who owns what? Be very careful with wording here...the words in bold above were added to prevent a contradiction which might have resulted in loss of college property rights. Keep it simple and as between the parties.

3.3.2 All costs relating to data processing equipment and supplies for the CLIENT's computer functions shall be the responsibility of the CLIENT.

3.3.3 All costs relating to OUTSOURCER's employees, including without limitation costs related to compliance with state and federal laws and regulations shall be the sole responsibility of OUTSOURCER.

This makes clear that Outsourcer pays for costs associated with worker's compensation, ADA accommodations, drug-free workplace, etc. This can be a thorny issue.
3.3.4 The CLIENT shall also provide to OUTSOURCER, at no charge to OUTSOURCER subject to Section 3.17 CLIENT Policy and Procedures, the following in order to allow OUTSOURCER to perform under this Agreement.

This makes clear that all performance under the agreement, including the use of facilities and equipment and interactions with College personnel, are to be in accord with College policy. Important. See Sec. 3.17.

(a) All utilities, including any special power and air conditioning needed, as determined solely by CLIENT, to operate the CLIENT's data processing equipment and storage of computer supplies;

The words in bold protect the institution from expensive and perhaps unnecessary demands of Outsourcer.

(b) Storage, in an area removed from the data processing site, for historical data and backup material that may be needed to reconstruct data files in the event working files are destroyed by natural disasters, fire, riots or other causes;

(c) Computing supplies such as paper, forms, ribbons, tapes, disk packs and microfilm; and

(d) Security, fire control equipment and janitorial support for the CLIENT's data processing facilities.

3.4 Work Space:

At no charge to OUTSOURCER, subject to Section 3.17 CLIENT Policy and Procedures, the CLIENT shall provide OUTSOURCER, with an appropriately furnished, conveniently located office or other suitable work space for use by the OUTSOURCER staff in performing work under this Agreement. Also at no charge to OUTSOURCER, the CLIENT shall provide office supplies, telephone service and reproduction, telecommunications and office equipment reasonable and necessary to support OUTSOURCER's staff and performance of this Agreement.

Long distance charges could be an issue here.

3.5 Use of Data Processing Equipment:

At no charge to OUTSOURCER, subject to Section 3.17 CLIENT Policy and Procedures, the CLIENT shall provide OUTSOURCER access to all equipment, equipment
services, programs and supplies necessary to support the computing needs of the CLIENT. The CLIENT shall provide OUTSOURCER’s staff access to all such equipment so that OUTSOURCER may perform its obligations under this Agreement including, but not limited to, operating all such equipment. If pursuant to a third party agreement CLIENT incurs additional costs as the result of providing such access to OUTSOURCER, the OUTSOURCER shall be responsible for paying such additional costs.

The bolded language addresses a substantial concern, because many existing computer maintenance agreements or software license agreements prohibit disclosure to or access by a third party (which the Outsourcer, of course, is) and may actually assess a charge if these actions take place. Protect the College!

3.6 Use of Software and Access to Personnel:

For purposes of performance under this Agreement, OUTSOURCER shall have complete access to, shall operate and shall, subject to CLIENT’s approval and obligations of CLIENT under third party agreements, have the right to modify or alter all CLIENT software programs and related material, pursuant to the Scope of Services. OUTSOURCER shall also have reasonable access to the CLIENT’s management, professional and operating personnel necessary for performance under this Agreement, as well as to all materials, records, discs, tapes or other information necessary to perform the services contemplated hereby. OUTSOURCER and CLIENT each realize that time is of the essence in order to accomplish the objectives of this Agreement, including the Scope of Services. OUTSOURCER agrees to provide requests for support from CLIENT in a timely and reasonable manner. CLIENT agrees to handle OUTSOURCER’s requests for support, to the best of its ability, in a timely and reasonable manner.

3.7 Status Reporting:

OUTSOURCER management staff shall conduct regular meetings with the CLIENT Contract Administrator (as defined in Section 4.4 hereof) and such other persons as may be designated by the CLIENT to formally review OUTSOURCER performance under the terms of this Agreement. These meetings shall be conducted at a time and location mutually agreed upon. OUTSOURCER shall also prepare, on a monthly and quarterly basis, as applicable, a written status report which documents past activities and outlines planned activities for the forthcoming month or year.

Regular communication is critical.

3.8 Non-Solicitation:

3.8.1 Beginning on the Effective Date and continuing for a period of one year from the expiration or termination of this Agreement, the CLIENT shall
not, without OUTSOURCER's prior written consent (which consent may be withheld at OUTSOURCER's sole discretion), enter into any contract (including, but not limited to, an employment contract, facilities management contract or consulting contract) with (i) any employee or former employee of OUTSOURCER who performed work under this Agreement within two years of such contract (a "OUTSOURCER Employee") or (ii) any person, firm, corporation or enterprise by which the OUTSOURCER Employee is employed or with which such OUTSOURCER Employee is affiliated (including, but not limited to, as a consultant, shareholder, partner, officer or director) ("OUTSOURCER Employee's New Firm"), whereby the OUTSOURCER Employee or OUTSOURCER Employee's New Firm would provide to the CLIENT all or part of the services provided by OUTSOURCER to the CLIENT under this Agreement.

3.8.2 Beginning on the Effective Date and continuing for a period of one year from the expiration or termination of this Agreement, OUTSOURCER shall not, without CLIENT's prior written consent (which consent may be withheld at CLIENT's sole discretion), enter into any contract (including, but not limited to, an employment contract, facilities management contract, or consulting contract) with (i) CLIENT employee(s), or (ii) any person, firm, corporation or enterprise by which the CLIENT Employee is employed or with which such CLIENT Employee is affiliated (including, but not limited to, as a consultant, shareholder, partner, officer or director) ("CLIENT Employee's New Firm").

This may be matter of contention. If you must have a non-solicitation clause, make it mutual and for a reasonable amount of time. Remember, if this is a five-year agreement, and you agree not to solicit employment of an Outsourcer employee for two years after the termination of the agreement, you have inadvertently created a six year non-solicit period for the Outsourcer employee who leaves during Year 1.

3.9 Confidentiality and Ownership of Material:

3.9.1 Subject to paragraph (c) below, ownership of all data, material and documentation originated and prepared for the CLIENT pursuant to this Agreement shall belong exclusively to the CLIENT. Upon termination of the Agreement, all such data, material and documentation shall be returned by OUTSOURCER to the CLIENT.

3.9.2 CLIENT and OUTSOURCER shall treat the other's "Confidential Information" (as defined below) as proprietary. Each of CLIENT and OUTSOURCER shall (i) exercise due care to keep in confidence and not disclose Confidential Information to any individual other than its own employees who have a "need to know" in order to perform the obligations of CLIENT or OUTSOURCER, as applicable, under this Agreement; (ii) not duplicate or publish any Confidential Information; and (iii) use Confidential Information only for the purposes authorized herein. The foregoing obligations shall not apply to Confidential Information if, and only to the extent that, it:
(a) is or becomes public knowledge through no fault of either of the parties hereto;

(b) was previously known by the recipient;

(c) is lawfully provided to the recipient without restriction by an independent third party; or

(d) must be disclosed pursuant to applicable law or regulation;

provided, however, that with respect to exception (a), the disclosing party (i.e., the party who is disclosing to a third party information which is confidential to the other party to this Agreement) shall first establish that the full particulars of the Confidential Information are, in the combination disclosed to the disclosing party, well known or generally used within the industry, not merely that the individual features are in the public domain or available in isolated segments in two or more readily-available public sources; and provided, further, that the burden shall be on the disclosing party to prove the applicability of any of exceptions (a), (b), and (c).

Don’t violate your state’s sunshine laws. Also, define the disclosing party and avoid the burden of proof on exception (d).

3.9.3 For purposes hereof, “Confidential Information” shall mean manufacturing, engineering, software, business, customer, marketing, financial and other non-public information, reports or trade secrets relating to the business of OUTSOURCER or the CLIENT, as applicable, and created or learned by the CLIENT or OUTSOURCER, as applicable, in connection with the performance of this Agreement.

3.9.4 In accordance with FERPA, 20 U.S.C. 1232g et seq., 34 C.F.R. Part 99 and Section 000.000, State Statute, OUTSOURCER and its employees acting in the course of their employment under this Agreement are deemed to have a legitimate educational interest in accessing student educational records, and OUTSOURCER and its employees shall comply with the non-disclosure and other requirements of all applicable laws and regulations.

Key provision—avoids potential liability under state and federal student records privacy acts. In the IT area, these disclosures are routine. This protect both parties.

3.9.5.1 All worldwide right, title and interest in Intellectual Property Rights (as defined below) relating to inseverable improvements in software and documentation not owned by or licensed to OUTSOURCER, which improvements are made, conceived or developed by OUTSOURCER in the performance of its duties under this
Agreement shall vest exclusively in CLIENT. Inseverable improvements shall mean those improvements that are not applicable to other software.

3.9.5.2 All worldwide right, title and interest in Intellectual Property Rights in, to, or relating to new software, including without limitation, modules, sub-routines and stand-alone programs, and related documentation made, conceived or developed by OUTSOURCER in the performance of its duties under this Agreement shall vest exclusively with CLIENT.

3.9.5.3 All worldwide right, title and interest in Intellectual Property Rights in, to, or relating to severable improvements and modifications made, created, conceived or developed by OUTSOURCER in the performance of its duties under this Agreement, to software and related documentation not owned by or licensed to OUTSOURCER, shall vest exclusively in CLIENT. Severable improvements shall mean those improvements having application in and to other software.

3.9.6 “Intellectual Property Rights” shall mean all patents, trade secrets, and copyrights in, covering, and relating to software and documentation made, created, conceived, developed, improved or modified by OUTSOURCER in the performance of its duties under this Agreement.

You may go to the mat on intellectual property ownership issues. Remember that outsourcer is an independent contractor arguably creating works-made-for-hire. If the college is successful in retaining ownership, outsourcer may insist on perpetual, royalty-free, non-exclusive worldwide licenses to allow them the benefit of institutional knowledge across their operations.

3.9.7 Notwithstanding the foregoing to the contrary, Software developed under grants where OUTSOURCER is responsible for all aspects of development shall be done under a specific change of scope, and the ownership of the software so developed shall be governed by the grant provisions, and if there are no ownership requirements under the grant provisions, then the provisions of subparagraph (d) shall apply.

3.9.8 Notwithstanding the foregoing to the contrary, Software developed under grants where OUTSOURCER provides management and coordination services only shall not require a specific change of scope, and the ownership of the software so developed shall be governed by the grant provisions, and if there are no ownership requirements under the grant provisions, then the provisions of subparagraph 3.9.5 shall apply.

Software developed under grant agreements with separate ownership provisions must be considered. Avoid creating conflicts in intellectual property rights and obligations.
3.10 Liability and Warranties:

3.10.1 Subject to its record retention policies, the CLIENT shall maintain Adequate Supporting Material to enable OUTSOURCER to update or regenerate, as necessary, data files, printer outputs and other data. In the event of loss, damage, destruction of any data, service, system or program due to the negligence of OUTSOURCER, OUTSOURCER’s liability therefore shall be limited to either the replacement, repair, reconstruction, redevelopment or regeneration, at OUTSOURCER’s option, of the lost, damaged, destroyed or inoperable data, service, system or program from the CLIENT’s supporting material or otherwise as appropriate in the method deemed, most suitable, by OUTSOURCER for such action. In the event the CLIENT has failed to maintain Adequate Supporting Material, OUTSOURCER’s liability shall be strictly limited to the same costs of replacement, repair, reconstruction, redevelopment or regeneration as if the CLIENT had so maintained adequate supporting material. Adequate Supporting Material is defined for the purposes of this Section as the original source material or data input documents initially provided to OUTSOURCER or replacement source material or data input documents provided to OUTSOURCER from time to time from which OUTSOURCER has obtained and input data in performance of its services hereunder. OUTSOURCER shall not be liable for any damages resulting or arising from CLIENT’s failure to perform its obligations hereunder, provided that OUTSOURCER is not responsible for such failure to perform.

This whole section will generate tremendous debate. Be cognizant of all potential liabilities and Outsourcer avoidance attempts. Here, reference record retention policies, define "adequate material," and condition Outsourcer’s liability limitation.

3.10.2 To the extent permitted by Federal and State Law, OUTSOURCER shall not be liable, whether contractually or in tort, for any consequential, special or indirect damages arising out of or in connection with this Agreement. To the extent they are beyond the reasonable control of OUTSOURCER, OUTSOURCER shall not be responsible for schedule delays, inaccuracies or other consequences resulting from incorrect CLIENT data, lateness in delivery by of CLIENT’s data or the failure of CLIENT’s equipment or personnel.

Condition Outsourcer’s liability limitation with bolded language.

3.10.3 The parties recognize and acknowledge that CLIENT is a political subdivision of the State. As a political subdivision of the State, CLIENT’s liability shall be limited by the provisions of sovereign immunity, as set forth in Section 000.00, State Statutes. Nothing in this Agreement shall be construed as a waiver by CLIENT of such sovereign immunity. CLIENT shall be liable for its own wrongful acts or negligence pursuant to the statutory limits of Section 000.00, State Statutes. Within the limits of the laws and constitution of the State, and as a political subdivision of the State, CLIENT agrees
to indemnify and hold OUTSOURCER harmless from and against liabilities, claims, losses and expenses, including attorneys’ fees, which arise out of and/or result solely from CLIENT’s negligence.

3.10.4 OUTSOURCER agrees to be liable for, defend and indemnify CLIENT against all claims, suits, judgments or damages, including the cost of administrative hearings, court costs and attorneys fees, arising out of the negligent or intentional acts or omissions, or violations of state or federal laws or regulations, of or on the part of OUTSOURCER or its agents, officers, subcontractors or employees, in the course of the operation of this Agreement.

3.10.5 Warranties:

OUTSOURCER SHALL PERFORM THE SERVICES UNDER THIS AGREEMENT IN ACCORDANCE WITH STANDARDS OF CARE, SKILL AND DILIGENCE CONSISTENT WITH RECOGNIZED AND PRUDENT INFORMATION TECHNOLOGY PRACTICES, ALL APPLICABLE LAWS AND REGULATIONS, THE SCOPE OF SERVICES, EXHIBITS, DOCUMENTS AND PROCEDURES APPLICABLE TO THE SERVICES, AND THE DEGREE OF KNOWLEDGE, SKILL AND JUDGEMENT NORMALLY EXERCISED BY PROFESSIONALS WITH RESPECT TO SERVICES OF THE SAME OR SIMILAR NATURE. THIS IS THE ONLY WARRANTY MADE BY OUTSOURCER WITH RESPECT TO ITS SERVICES UNDER THIS AGREEMENT AND TO THE EXTENT PERMITTED BY FEDERAL AND STATE LAWS IS IN LIEU OF ALL OTHER UNDERSTANDINGS AND ALL WARRANTIES, EXPRESSED, IMPLIED OR STATUTORY, AS TO THE SERVICES TO BE PROVIDED BY OUTSOURCER, INCLUDING BUT NOT LIMITED TO ANY WARRANTY OF MERCHANTABILITY OR FITNESS FOR USE FOR A PARTICULAR PURPOSE.

3.10.4 Insurance:

(a) Throughout the term of this Agreement, OUTSOURCER shall maintain in full force and effect comprehensive general liability insurance with limits in an amount of not less than $2,000,000 per occurrence and $5,000,000 in the aggregate. Throughout the term of this Agreement, OUTSOURCER shall
maintain in full force and effect a policy of Worker’s Compensation Insurance covering all of its employees assigned to render services under this Agreement.

Potential problem: if Outsourcer employee is injured on campus, College is not protected by worker’s comp as it would be for College employees, but Outsourcer is. Could require indemnification of College here by Outsourcer.

(b) OUTSOURCER shall provide the CLIENT a certificate of insurance certifying that coverage as required by this Agreement has been obtained and shall remain in force as specified by the Agreement.

3.10.5 Year 2000 Compliance of CLIENT’s hardware and software is specifically provided for in the Scope of Services, and upon CLIENT’s receipt of OUTSOURCER’s recommendations for changes to the CLIENT’s hardware or software to resolve Year 2000 Compliance issues, CLIENT shall have the right to review and approve such recommendations, or have the recommendations approved by third parties. CLIENT and OUTSOURCER shall mutually agree in writing upon funding requirements and implementation plans related to such recommendations. If such recommendations are not funded and implemented as mutually agreed upon, unless the failure to implement is attributable to OUTSOURCER, OUTSOURCER shall have no responsibility for Year 2000 Compliance, or liability for non-compliance. Year 2000 Compliance for the purposes of this paragraph, mean, with respect to information technology (hardware and software), that the information technology accurately processes date/time data (including, but not limited to, calculating, comparing, and sequencing) from, into and between the twentieth and twenty-first centuries, and the years 1999 and 2000 leap year calculations, to the extent that other information technology, used in combination with the information technology being acquired, properly exchanges date/time data with it.

The Y2K provision is another area where Outsourcer will attempt to avoid or shift liability and responsibility. The bolded language above gives the College the right to review and approve, and engage consultant to assess the plan of Outsourcer. This may prevent submission of unattainable plans with impossible budgets. Also, this promotes reasonableness, cooperation and coordination. If Outsourcer is the source of the problem relating to Y2K non-compliance or failure, the contract imposes liability.

Details of Y2K services are usually found in the scope of services section, which if appropriate should contain a compliance warranty clause - a general compliance warranty provision used with most procurement documents or contracts for information technology hardware, software, or services. The State of Florida uses the following:

"The contractor warrants that each item of hardware, software, and/or firmware delivered, developed or modified under this contract shall be able to accurately process date data (including, but not limited to, calculating, comparing, and sequencing) from, into, and between the twentieth and twenty-"
first centuries, including leap year calculations, when used in accordance with the item documentation provided by the contractor, provided that all items (e.g. hardware, software, firmware) used in combination with other designated items properly exchange date data with it. The duration of this warranty and the remedies available to the State for breach of this warranty shall be as defined in, and subject to, the terms and limitations of any general warranty provisions of this contract, provided that notwithstanding any provision to the contrary in such warranty provision(s), or in the absence of any such warranty provision(s), the remedies available to the State under this warranty shall include repair or replacement of any item whose non-compliance is discovered and made known to the contractor in writing within ninety (90) days after acceptance. Nothing in this warranty shall be construed to limit any rights or remedies the State may otherwise have under this contract with respect to defects other than Year 2000 performance."

Consider the provisions of the Year 2000 Information and Readiness Disclosure Act, signed into law (Pub. L. 105-271, 112 Stat. 2386) on October 19, 1998. While a detailed discussion of this is beyond the scope of this presentation, according to the Information Technology Association of America (ITAA) in its guide found at www.lawsight.com/X2K.htm, this law will:

- allow a provider of Year 2000 remediation services or products to receive protection under the law if it provides a special statement "in the course of a solicitation or offer to sell" to customers regarding the possible limitation of rights in the event of a later dispute.

- Establish a high, but fair and consistent standard of proof for a claimant to use an entity's Year 2000 Statement as the basis for a legal action.

- Prevent a claimant from entering into evidence a Year 2000 Readiness Disclosure to prove the truth or accuracy of this type of Year 2000 Statement. Exceptions exist here.

The guide states that the law will not:

- Lessen the liability of companies if there is a Y2K product or service failure or defect.

- Lessen the ability of wronged parties to take action against entities, with whom they are in a contractual relationship, for failures, fraud or breaches of contract.

- Create new legal obligations or duties, or change or reduce any underlying duty or standard of care.

- Affect current lawsuits, existing contracts, tariffs, or intellectual property rights.
3.11 Taxes:

This Agreement does not include charges for any taxes, which now or in the future may be deemed by a taxing authority to be applicable to the services to be provided by OUTSOURCER. In the event a taxing authority determines now or in the future that such services are subject to tax, OUTSOURCER shall invoice such taxes to the CLIENT and the CLIENT shall pay same simultaneously with the payment to which taxes relate. CLIENT hereby represents that it is not currently subject to any such taxes and will notify OUTSOURCER in a timely manner if CLIENT becomes subject to any such tax. At the time of execution of this Agreement taxes on services provided by OUTSOURCER to CLIENT hereunder are not required to be paid, but if in the future are required, then CLIENT shall pay such taxes.

3.12 Force Majeure:

If either OUTSOURCER or the CLIENT is prevented from performing any task hereunder, in whole or in part, as a result of a cause beyond its reasonable control, which may include an Act of God, war, civil disturbance or organized labor dispute, such failure to perform shall not be grounds for termination of this Agreement.

*This term could come into play to the benefit or detriment of either party.*

3.13 Termination:

3.13.1 This Agreement may be terminated by a party (the “Terminating Party”) prior to the expiration of its stated term upon the occurrence of an “Event of Default” affecting the other party (the “Terminated Party”).

3.13.2 An “Event of Default” shall mean:

(a) failure by a party to timely perform any obligation under this Agreement, including without limitation CLIENT’s failure to pay or cause to be paid any sums due in the manner provided in this Agreement within fifteen (15) business days of the date such payments were due; or OUTSOURCER not performing any of its obligations in accordance with this Agreement and all Exhibits thereto; or

*Avoid using the term “material obligation” here as it may lead to more disputes than necessary. Emphasize relationship and unproductive nature of de minimus enforcement.*

(b) any representation or warranty made by either party herein or in any document executed simultaneously and in connection herewith, or in any
Upon the occurrence of an Event of Default the Terminating Party may give notice of termination to the Terminated Party, identifying in reasonable detail the nature of the Event of Default. Thereupon, the Terminated party shall have 30 days to correct in all material respects the Event of Default (15 business days if the Event of Default consists in CLIENT’s failure to pay outstanding sums within 15 business days of the date the payment was due). If the Terminated party so cures the Event of Default, then the notice of termination shall be ineffective. If the Terminated party does not so cure the Event of Default within the aforementioned period, then this Agreement shall be terminated upon the expiration of such period (the “Termination Date”).

3.13.3 CLIENT shall pay OUTSOURCER in full, within 15 business days of receipt of a final invoice from OUTSOURCER, for all services rendered up to and including the Termination Date.

3.14 Phase Over:

The transition and phase-over is one of the most important parts of the agreement, especially if the scope of services is extensive. Essentially, the operation has to be handed back over to the College or to another Outsourcer, at best due to the expiration of the agreement, and at worst when relations are bad due to a breach. Better to resolve the procedures and obligations at contract negotiation time than down the road following a breach or a losing bid by the Outsourcer to renew the agreement. College should never be forced to retain services of Outsourcer beyond term of agreement, but should be assured of receiving proper performance. Transition services are a contractual obligation, whether this provision occurs in the main contract or in the scope of services addendum. A breach by Outsourcer here may subject it to liabilities even if a College breach caused transition. Key considerations are cause of termination and cause of transition failure.

3.14.1 Prior to the expiration pursuant to its term of this Agreement, OUTSOURCER shall develop a plan for the orderly transition of all services provided by OUTSOURCER under this Agreement (the “Transition Plan”). Such Transition Plan shall be developed by OUTSOURCER in conjunction with OUTSOURCER’s employees on site, the CLIENT’s executives and administrators and such other persons as shall be designated by the CLIENT. The CLIENT shall fully cooperate with OUTSOURCER in order to develop the Transition Plan. The Transition Plan shall be completed no later than 90 days prior to expiration of this Agreement. It shall cover, inter alia, the training of CLIENT’s personnel in the operation and maintenance of the systems used and operated by OUTSOURCER during the term of the Agreement. CLIENT shall notify OUTSOURCER of its acceptance of the Transition Plan within 14 days of receipt from OUTSOURCER.
3.14.2 OUTSOURCER shall complete all transition activities associated with the orderly termination of this Agreement on or before the date the notice of termination becomes effective. OUTSOURCER shall effect the transition to the CLIENT.

3.14.3 If due to OUTSOURCER’s actions or omissions (i) the Transition Plan is not completed within the aforementioned period and the notice of termination becomes effective, or (ii) if the Transition Plan is completed and the notice of termination becomes effective but an orderly transition is not effected prior to the Termination Date, then OUTSOURCER shall continue to perform such services as may be required by the CLIENT, at no additional cost to CLIENT, in order to operate the CLIENT’s computing system until such time as an orderly transition may be effected, but no later than 90 days after the Termination Date.

3.14.4 In the event of termination of this Agreement following the occurrence of an Event of Default on the part of OUTSOURCER, OUTSOURCER shall immediately upon the issuance of the notice of termination develop a Transition plan in accordance with the procedures set forth in paragraph (a) above except, however, that the Transition Plan shall be completed no later than 30 days after the date of the notice of termination. CLIENT shall notify OUTSOURCER of its acceptance of the Transition Plan within 14 days of receipt from OUTSOURCER. OUTSOURCER shall complete all Transition activities associated with the termination by reason of its default no later than 60 days following OUTSOURCER’s receipt of CLIENT’s acceptance of the Transition Plan.

3.14.5 In the event of termination of this Agreement following the occurrence of an Event of Default on the part of CLIENT, then OUTSOURCER may, at the sole option of CLIENT, continue to perform such services as may be required by the CLIENT, at its rates then in effect, in order to operate the CLIENT’s computing system until such time as an orderly transition may be effected, but no later than 90 days after the Termination Date; provided, however, that if the Event of Default consists in CLIENT’s failure to pay any sums due OUTSOURCER, then OUTSOURCER shall continue to perform such services as may be required by the CLIENT after the Termination Date, at OUTSOURCER’s rates then in effect, only if the CLIENT pays for such services in advance.

3.15 Funding:

This provides some relief for publicly-funded colleges in light of legislative uncertainties.

3.15.1 CLIENT hereby represents to OUTSOURCER that (i) the services to be performed by OUTSOURCER hereunder are necessary to CLIENT’s efficient operation of its business and (ii) to the best of its knowledge, after investigation, it believes
that sufficient funds may be obtained by it or appropriated for it in order to make all payments contemplated hereby.

3.15.2 CLIENT shall make its best efforts to obtain, or cause to be appropriated as part of CLIENT's annual budget, sufficient funds to pay the sums due from time to time hereunder.

3.15.3 In the event that for any fiscal year (the "Underfunded Fiscal Year") for CLIENT other than the fiscal year in which this Agreement becomes effective (the "Initial Fiscal Year"), CLIENT's total budget is reduced in an aggregate amount less than the amount of the Preceding Year, then CLIENT shall be entitled to reduce the amount payable to OUTSORCER under this Agreement in the Underfunded Fiscal Year prorata by calculating the percentage reduction in the total budget and applying that percentage to the amount for the Services provided in Exhibit "B" of this Agreement. In such event, OUTSORCER shall be entitled to reduce the Services for the Underfunded Fiscal Year to a level commensurate with the amount which will be payable to OUTSORCER for that Underfunded Fiscal Year. CLIENT and OUTSORCER shall mutually agree on the (i) types of Services to be provided by OUTSORCER as a result of such reduction, and (ii) any schedule changes that result from the change in the types of Services.

3.15.4 In the event during an Underfunded Fiscal Year, the CLIENT's budget for that Underfunded Fiscal Year receives additional state funds appropriated by the STATE Legislature, then the IT Budget shall be increased by the greater of the (i) increase in the line item for the IT Budget or (ii) the prorata amount calculated as set forth in the first paragraph in this subsection (d). Once set for a Fiscal Year as provided in this subsection (c) the amount payable to OUTSORCER shall not be further reduced due to reduction in CLIENT's budget.

3.15.5 In the event the IT Budget is reduced as provided for in this subsection (c), then in such event CLIENT shall not, directly or indirectly, use any funds to purchase or in any way obtain services from another vendor that OUTSORCER would have provided under this Agreement but for the reduction in the Services due to budget reductions, excluding those uses of funds committed or subject to an agreement in effect before or at the time the IT Budget is reduced. If at any time CLIENT violates this provision then, in addition to all other remedies available to OUTSORCER hereunder or in law or equity, CLIENT shall be immediately liable to OUTSORCER for the full amount paid to such other vendor.

3.16 Independent Contractor Status:

OUTSORCER and CLIENT acknowledge and agree that OUTSORCER is and shall be an independent contractor; that neither OUTSORCER nor any of its employees, representatives or agents is, or shall be deemed to be, an employee, partner or joint venturer of the CLIENT; and that neither OUTSORCER nor any of its
employees, representatives or agents shall be entitled to any employee benefits under any employee benefit plan, including medical, insurance and other similar plans, of the CLIENT. OUTSOURCER further acknowledges that the CLIENT will not withhold any amounts in respect to federal, state or local taxes from amounts payable by the CLIENT hereunder and it shall be the exclusive responsibility of OUTSOURCER to pay all amounts due in respect of applicable federal, state and local taxes on such amounts.

This is a key provision of the agreement that specifically defines the role of the Outsourcer and which helps the College avoid certain liabilities.

3.17 Client Policy and Procedures:

OUTSOURCER agrees to comply with all applicable CLIENT policies and procedures, including but not limited to those regarding conditions of work, access to and use of CLIENT's offices, facilities, work space, support services, supplies, Data Processing Equipment and software and access.

This is a key section of the agreement and helps the college avoid certain liabilities. Also, assures College that Outsourcer employees will not engage in prohibited conduct and subject the College to audits, claims or other undesired outcomes. Make all Outsourcer conduct and use of College resources and facilities subject to this provision.

4. MISCELLANEOUS PROVISIONS

4.1 Severability:

Each provision of this Agreement shall be a separate and distinct covenant and, if declared illegal, unenforceable or in conflict with any governing law, shall not affect the validity of the remaining portion of this Agreement.

4.2 Controlling Law:

This Agreement shall be governed by the laws of the State, with reference to rules of conflict of laws. Any action to enforce the terms of this Agreement shall be brought in LOCAL COUNTY.

4.3 Nondiscrimination:

Neither the CLIENT nor OUTSOURCER shall, in the performance of this Agreement, engage in any unlawful discrimination against any person because of race, color, religion, national origin, sex, handicap or age.
The CLIENT represents that it is not in violation of any federal, state or local law relating to the employment of its computing center staff. The computing center staff is not covered by any collective bargaining agreement except as disclosed on Exhibit ___.

4.4.1 Client’s Contract Administrator:

The CLIENT shall appoint as Contract Administrator ________________, who will be delegated the duty and responsibility of maintaining liaison with OUTSOURCER and to oversee performance of this Agreement.

4.4.2 OUTSOURCER’s Contract Administrator:

The Outsourcer shall appoint as Contract Administrator ________________, who will be delegated the duty and responsibility of maintaining liaison with CLIENT and to oversee performance of this Agreement.

4.5 Notice:

Any notice required or permitted to be given to either party under this Agreement shall be effective upon deposit in the United States mail, postage prepaid, addressed as follows:

CLIENT:

OUTSOURCER:

4.6 Successors:

This Agreement and all future amendments shall be binding on parties and their heirs, successors and assigns. The CLIENT agrees that OUTSOURCER may pledge or assign the net sums of money due and to become due to it hereunder to any bank, lending agency or institution as collateral security.

4.7 Extension:

Upon written agreement of both parties entered into at least ninety (90) days prior to the expiration date, this Agreement may be extended for successive one year periods on the terms and conditions then in effect subject however, to such modifications as may be set forth in the extension agreement.
4.8 Entire Agreement-Amendments:

(a) This Agreement, together with the Exhibits hereto, embodies the entire agreement and understanding between the parties hereto and supersedes all prior understandings and agreements, whether written or oral, between the parties hereto relating to the matter hereof.

(b) This Agreement (including the Exhibits hereto) may not be amended or modified except in writing signed by the parties hereto.

4.9 Assignment

This Agreement may not be assigned by either party without the prior written consent of the other party. For the avoidance of doubt, a change of control of OUTSOURCER shall not constitute an assignment for purposes hereof.

Be wary of attempts by Outsourcers to provide for much looser assignment provisions. The bolded language represents one approach to satisfy corporate needs, but even this could result in undesirable outcomes for the College.

4.10 Attorneys Fees

In the event that suit is brought to enforce the provisions of this Agreement, the prevailing party, as determined by the judge, or arbitrator in the event of arbitration, shall be entitled to an award of reasonable attorneys fees, paralegals' fees and court costs, whether incurred before trial, at trial, during appeals, or in any mediation or arbitration required by a court.