Chapter 4

The Vendor Selection Process

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§ 4:1 Overview

A successful outsourcing relationship depends in large part on the selection of the appropriate service provider. The optimal service provider will not only meet or exceed the required service levels, lower the customer’s costs, and improve productivity, but will also form a cooperative relationship with the customer. Indeed, in the best-case scenario, once the parties have signed the master services agreement (“MSA”), it is placed in a drawer and, other than to check for renewal dates, is never again consulted. This is the type of working relationship in which disputes are minimized and the disputes that do arise are easily resolved. In contrast, in the worst-case scenario, the customer is forced to manage its outsourcing...
relationship with the MSA “on the desk.” In these situations, the parties constantly consult the MSA to determine their respective rights each time a dispute arises and to determine whether the other party is acting in contravention of its contractual rights and obligations. In this kind of relationship, the customer may find that it can only force the service provider to act when the customer can cite to a specific provision of the MSA requiring such action.

Given the critical importance of selecting the right service provider, it is surprising how many customers fail to devote sufficient time and resources to the vendor selection stage of the outsourcing process. All too often outsourcing customers select service providers based on existing relationships, prior engagements, word of mouth, or a quick and rudimentary analysis of the available options. While there may be legitimate business reasons for adopting one of these “quick-pick” approaches, most outsourcing customers are better served in the long run by undertaking a careful, methodical, and in some cases time-consuming selection process. Such a process will help ensure that the optimal service provider is selected for the project at hand, and (as discussed below) may facilitate an easier negotiation process once the service provider is selected. A more formal process will also help ensure that the vendor selection phase proceeds smoothly and efficiently, and minimize the chances that the process will get sidetracked or delayed.

Adopting a more formal process also increases the likelihood that the views of all stakeholders have been taken into account when selecting the service provider. Companies that outsource for the first time are often surprised to learn how many “interest groups” within the organization have critical input or a different perspective that needs to be considered before a selection is made. By establishing a vendor selection process, the outsourcing team can also manage the expectations of senior management regarding how long it may take before a service provider is finally selected and one-on-one negotiations can commence.

Finally, the task of choosing the right service provider has become even more difficult in recent years, so a well-organized process is critical. In almost every category of outsourcing, companies are finding a far larger group of potential service providers to choose from than they did only a few years ago. In addition, the range in the quality of these providers is much wider than it once was. Today’s outsourcing customer can choose from top-tier, best-of-breed industry leaders, mid-tier providers, and smaller, new entrants who might offer greater cost savings, but whose experience is not on par with the larger, more established providers. Likewise, companies looking to offshore are no longer limited to India, and can today choose vendors from a number of different countries with robust outsourcing sectors. The maxim that offshoring translates into outsourcing to India no longer applies.
§ 4:2 Selecting the Right Provider

Unfortunately for outsourcing customers, there is no one-size-fits-all approach to selecting the appropriate service provider for an outsourcing engagement. This decision, as with many procurement decisions, depends a great deal on the customer’s risk tolerance, corporate culture, and business requirements.

§ 4:2.1 Initial Assessments

For many types of outsourcing services, the list of potential providers can be dauntingly large, so customers are well served by developing a profile of the types of organizations they are willing to consider. For example, customers might want to assess the importance of the following factors when selecting a service provider:

- **The strategic goal.** When selecting a pool of potential service providers, the customer should ask itself what it hopes to achieve from outsourcing. The simplistic answer of “better service at lower cost” is not always reality. Some customers will be singularly focused on cost reduction, while others will want to find best-of-breed services, even if the cost savings are not as significant. Determining the company’s strategic goal at the outset will help streamline the vendor selection process.

- **Level of service provider experience.** Selecting an experienced service provider has a number of distinct benefits. These providers can usually transition the services and begin operations more quickly; have already problem-solved many issues that may arise; and, can generally allocate its costs over a wider customer base. However, the level of the provider’s experience may be less significant for certain types of outsourcing transaction. For example, where the service provider is basically just providing supplemental manpower resources for routine tasks, extensive experience may be less important.

- **Industry experience.** A service provider with experience in an industry vertical will be more familiar with, and adept at addressing, potential regulatory issues; can better anticipate service and technology needs of that industry; and, will have a better over-all sense of how to manage current services and address future developments.

- **Geographic location.** Some customers have definitive views on whether the service provider needs to be onshore or offshore and/or the specific country or countries they will consider as outsourcing destinations.
• **Relative size of the customer base.** Some customers prefer to be one of the largest clients of a provider, ensuring [at least in theory] that they will get maximum attention from the service provider. Other customers take greater comfort, and perhaps lower their risk profile, by selecting a provider for which they will be one of only many similar-sized clients.

• **Industry reputation.** While a customer will always want to retain a service provider with a favorable reputation, a good reputation in the customer’s industry can be essential in situations where the customer faces internal opposition to outsourcing. In such cases, looking at service providers with a particularly strong reputation may help convince others that the outsourcing transaction will be successful. Reputation is also important in cases where the success of the outsourcing engagement depends on certain of the customer’s employees accepting employment offers from the service provider, since they will be more likely to accept employment from a tier-one provider.

• **Financial viability.** A financially strong service provider will more likely be able to weather slowdowns in the marketplace and will have the financial capability to implement necessary technology and service innovations. While no customer will select a service provider that is not financially viable, the customer should consider the relative importance of a strong financial record.

• **Overall culture of the service provider.** For some organizations, a strong cultural fit with a service provider is essential. These customers want to feel that the service provider has the same risk tolerance and management approach as the customer in order to minimize potential disputes. Other customers feel that as long as the service provider can perform the services at an optimal level, a good culture fit is relatively unimportant.¹

**§ 4:2.2 Establishing Expectations**

Customers should keep in mind that, in every case, the selection of an outsourcing vendor involves trade-offs. There is almost no chance that a customer will find a service provider that meets or exceeds all of its expectations. Indeed, customers who believe they have found such a provider likely have not done sufficient due diligence or have

1. For a discussion on the issue of service provider culture, see section 4:5.4[D][8].
not established a robust set of criteria for evaluating all outsourcing candidates. The key for the customer is to establish its expectations, determine and weigh its selection criteria, and then assess each provider in order to find the best alternative from the options presented. Customers must be willing to accept that the selection process might reveal that electing not to outsource is the most logical alternative. Indeed, in some cases, the RFP process itself will unlock a value proposition that the customer can achieve on its own without outsourcing.

§ 4:2.3 External Advisers

As noted above, given the growth of the outsourcing industry, companies today can choose from an increasingly large group of vendors from a wide range of countries. As a result, selecting the right outsourcing provider has never been more important, or more challenging. For this reason, customers may consider using an external advisor to aid with the selection process. The number of consultants offering “vendor selection” advisory services (both for customers and for service providers) is on the rise. While some consultants provide this expertise as part of their general consulting services for outsourcing projects, others now specialize in the request for proposal (“RFP”) process itself, often focusing on an industry vertical such as healthcare or financial services. Consultants can help the customer frame its objectives, draft the RFP, compile a list of potential bidders, advise on due diligence, and help the customer manage the selection process. The value proposition that consultants bring to the table includes familiarity with the strengths and weaknesses of many service providers and how to evaluate them.

§ 4:3 The RFP Process

§ 4:3.1 Overview

The most effective approach for selecting an outsourcing service provider is for the customer to engage in a competitive bid process. This is typically accomplished through a request for proposal (“RFP”) process.\(^2\)

From the customer’s perspective, a competitive RFP process yields valuable insight into the terms that are generally available in the marketplace, and typically results in more favorable terms and conditions than the customer would have enjoyed if it had merely picked

\(^2\) This process is sometimes referred to as Request for Quotes (“RFQ”).
one service provider without an RFP process. The RFP process also yields tangible benefits for the service providers, even though they surely would prefer to forego a competitive process and simply be awarded the engagement. Specifically, the RFP process generally forces the customer to define more succinctly the services it is seeking, as well as its key objectives. This ultimately allows the service provider to tailor its offering to the customer’s requirements, resulting in a better working relationship for both parties.

The RFP involves four key phases that are closely intertwined:

1. **Internal assessment and analysis of the customer’s needs and requirements, and drafting a document that specifies those requirements (the RFP).** This is a critical phase of the process and one that often is not given sufficient attention by outsourcing customers. The RFP might solicit responses through a series of questions to which the bidder must respond and/or may include proposed forms of agreements or schedules that the bidder must mark up.

2. **Distribution of the RFP to a group of potential bidders along with a set of instructions regarding how to respond and outlining the bid process.**

3. **Determination by bidders as to whether they wish to bid on the project and, if so, submission of responses based on the RFP instructions.**

4. **Evaluation of bids by the customer.** As part of this phase, a customer may request additional or clarifying information, conduct due diligence of the bidders, or even offer bidders the opportunity to ask questions of the customer in order to refine their responses. In some cases, the customer will select two (and perhaps even three) bidders as finalists and engage in simultaneous negotiations with each bidder, ultimately selecting a winning bidder at a later date.³

Some customers add a preliminary step to this process by soliciting initial background information from each bidder using a “request for information” (“RFI”) document. In the past, RFIs provided the marginal benefit of providing the customer with some preliminary, albeit cursory, information about the bidders. However, in recent years, with the wealth of publicly available information that is accessible through online resources and external advisors, RFIs are proving to be far less valuable. While some customers still circulate RFIs to test the waters

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³. For a discussion of dual-track negotiations, see section 4:8.
and see which bidders might be interested in the engagement, most view the RFI as an extra step that merely delays the bidder selection process without providing any tangible value.

Customers should assume that the RFP process for a large outsourcing project can take six months or more from the initial stages of developing the RFP until the final vendor is selected. This includes a few weeks for the development of a well-documented RFP that takes into account the views of the different stakeholders at the customer, creation of an initial vendor list, distribution of the RFP and responses from bidders, a due diligence phase, and a selection phase. While customers can shave off a few days or even weeks, it is difficult to short-circuit the entire process without making significant sacrifices in the quality of the selection process.

§ 4:3.2 Outsourcing Distinguished from Procurement Contracts

When considering the best approach for selecting an outsourcing provider, customers all too often rely on a procurement model. However, there are significant differences between procuring outsourcing services and procuring the types of goods and services with which the company might be more familiar. In most procurement contexts, when a company uses an RFP, the number of variables that it needs to evaluate are limited. Companies generally describe the goods or services they require and how they want those goods or services to be delivered. Armed with this information, the bidders generally compete on price and timetable for delivery, with some small variation in how they might approach the task. The customer, in most cases, selects the provider that comes in with the lowest-cost proposal. Moreover, the customer is generally paying for a single delivery of a single product or service (or perhaps a small series of products or services), and when delivery is completed, the relationship ends.

Such procurement transactions stand in sharp contrast to outsourcing relationships, which involve a very different vendor selection process. In outsourcing, the customer knows the result it wants to achieve, but is less committed to a specific implementation to achieve that result. As a result, an outsourcing RFP provides bidders with far more leeway to propose their own solutions than does a standard procurement contract. Bids may differ markedly in terms of strategy, functional approach, technology solution, or value proposition. The customer will have to make a decision that is based not only on price and delivery, but also on a host of other factors.

In addition, an outsourcing relationship more closely resembles a strategic alliance, with an ongoing provision of services over an
extended period of time. As a result, criteria such as the culture of the service provider, governance structure, and the long-term financial viability of the service provider will enter into the equation. Such criteria are more-time consuming and more challenging to evaluate.

§ 4:3.3 Benefits of Using the RFP Process

In some cases, the decision as to whether an RFP is the appropriate selection process has already been made at the corporate level. An increasing number of companies are requiring a competitive bidding process for any contracts over a certain dollar threshold or that are of strategic importance to the organization. However, even in cases where an RFP is not required by the corporation, this selection process is a “best practice” in the outsourcing context.4

Nevertheless, some outsourcing customers may question whether an RFP is even necessary. These customers may believe that they already know the service provider they plan to use or that simply meeting informally with two or three potential bidders will quickly provide them with all of the information they require in order to select a vendor. Customers who do not normally use an RFP process in order to select vendors in other contexts might question why this somewhat cumbersome process is necessary for an outsourcing transaction. The answer is that, while the RFP process might indeed consume time and resources, it has a number of distinct advantages over other less formal selection processes.

[A] Reducing Requirements to Writing

The RFP process forces the customer to capture its needs and requirements in a written document. Once an entity must reduce its requirements to writing, it will find that it must articulate the specifics of those requirements with far greater attention to detail than it would in any informal process. The RFP thus helps the customer close loopholes and eliminate ambiguities, and forces the customer to be explicit about its requirements. This benefits the customer since bidders will have a more detailed and nuanced view of the customer’s requirements.

Before it can be distributed, a written RFP document might also need to go through multiple layers of review and approval, thereby broadening the number of stakeholders that can provide input into the project. While this might add time to the RFP process in the short term, it will reduce the number of stakeholders who, in the future

4. For a discussion on the issue of service provider culture, see section 4:5.4[D][8].
(and possibly at more sensitive times in the negotiations), might otherwise have slowed down the process by arguing that they were not given sufficient opportunity to provide input.

Finally, the RFP process will leave the customer with a robust document that it can use during other phases of the negotiation process. For example, the description of services, service levels, and statement of fees set forth in the RFP might serve as the foundation blocks—if not the actual text—that can be used in the final MSA. The RFP might also include certain policies and procedures (such as disaster recovery plan) that the customer will ultimately need to attach as schedules or exhibits to the MSA.

[B] Gaining Insight into Other Potential Service Providers

Customers often enter the RFP process with a strong sense of which service provider they will ultimately select, or at least the group that will make the final cut. The front-runner might be a current or former service provider with whom the customer has had a favorable experience in another engagement, a market leader in the service area that the customer wishes to outsource, or the service provider that is being used by others in the customer’s industry vertical. Through the RFP process, the customer can gain valuable insight into other service providers that it might not otherwise have considered and that might actually prove to be a better fit for the outsourcing project. Indeed, by analyzing the strengths of certain bidders, the customer may uncover new factors that it now realizes are important to its selection process.

The RFP process can also yield critical information about the front-runner that changes the customer’s perception of that service provider. For example, the customer may learn that the industry leader has a poor track record with newer clients or has recently been experiencing high turnover. A customer may learn that its former service provider is now in a weakened financial condition, rendering it a poor choice for a long-term outsourcing project.

[C] Obtaining Detailed and Consistent Information from Bidders

There is probably no better process for obtaining detailed information about a bidder and its capabilities than through an RFP. Through a series of direct questions and diligence exercises, the customer will gain a detailed understanding of each bidder’s capabilities and shortcomings. This information will be difficult to garner through face-to-face discussions or other informal contacts.
The RFP process will also ensure that the customer receives the same categories of information from each bidder, allowing the customer to make comparisons based on comparable sets of data—an essential element of any best practices selection methodology. In contrast, when customers use informal methods or speak to one bidder at a time, they often find that they are left with slightly different sets of information regarding each bidder. This requires the customer to either make inexact comparisons or circle back with each bidder until it has a consistent set of information—a time-consuming and often frustrating exercise.

[D] Increasing Opportunities for Leverage

The RFP process provides the customer with important points of leverage when negotiating with each bidder. Specifically, since the customer will likely have a variety of proposals on each business or legal point, it can tell each bidder how it needs to improve its bid in order to match what has been offered by others. In doing so, the customer needs to be careful not to cherry-pick the most favorable part of each bid, lest it create a package that no bidder is willing to accept. For example, Bidder A’s proposed fees may have lower fees than Bidder B’s but with more limitations on its liability exposure. The customer should not assume that the best strategy is to extract Bidder A’s lower fees coupled with Bidder B’s more favorable proposal on liability.

Even if the customer is reluctant to play one bidder off of another, the reality is that an RFP process will likely yield more attractive bids. Because potential service providers know that they are engaged in a competitive process, they likely will not hold off on their best proposal, hoping to compromise later, but rather will put forward their best bid earlier in the process.

[E] Obtaining Information for Future Negotiations

The RFP process can provide the customer with an important reality check about what the “market” is for various business and legal points, as well as what service providers are generally willing to offer. The customer may learn through the RFP process that it needs to adjust its expectations on various points and possibly compromise on certain aspects of the deal. While this reality would have come to light at some point during the negotiations, the RFP provides an early window into the marketplace, allowing a business to manage the expectations of senior management and perhaps rethink its outsourcing model.

This marketplace insight can also benefit the customer during negotiations. Once the winning bidder has been selected and full negotiations have commenced, the customer can negate arguments
from the service provider that “no one in the industry would agree to such terms,” if the customer knows that this is not, in fact, the case.

[F] Creating an Audit Trail

Even if there is no corporate requirement to use an RFP when selecting a vendor, it might make business sense to adopt this process in the outsourcing context. In the event that there is a problem with the service provider’s performance in the future, it will be useful to be able to tell investors, auditors, regulators, and even senior management that the service provider was selected pursuant to a competitive and documented RFP process.

[G] Building Consensus

In certain cases, the customer may not have total consensus within its organization regarding the outsourcing project. Business leaders or managers might disagree on the scope of the project, the primary justifications for outsourcing, or the minimum commitment that will be required from the service provider. By forcing the organization to draft an RFP, these different constituencies must come together and resolve their internal disagreements to create a unified document. While such disagreements would inevitably have been resolved at a later date, it is far better for the customer to get all stakeholders on the same page at the earliest possible stage. The RFP provides an ideal vehicle for accomplishing that objective.

[H] Uncovering the Value Proposition

Companies are also increasingly using the RFP process to determine the value proposition that each bidder can bring to the outsourcing engagement. In addition to obtaining basic information through the RFP, these companies are asking bidders to provide information regarding their ability to deliver productivity improvements or otherwise bring value to the customer that transcends the mere delivery of services at a lower price. As with many aspects of the RFP, the key to uncovering such value propositions is to ensure that the bidders are required to provide specific information, and not merely general “brochure speak.”

[I] Deciding Not to Outsource

In many ways, the RFP process increases the inertia towards entering into an outsourcing arrangement. However, the prudent customer will also use the RFP process to determine whether outsourcing is, in fact, the appropriate business decision. The customer may learn from the RFP process that the cost savings it had hoped to achieve is not available in the marketplace or that the company could obtain such savings on its own without the attendant risks of
outsourcing. Similarly, the RFP process may reveal that the technology or business solutions offered by bidders are no better than the solutions that the customer is already providing for itself. Customers should therefore include “not outsourcing” as an option when they embark on the vendor selection process, and assess and score this option in the same manner that they assess each bidder.

§ 4:3.4 Downsides of Using an RFP

There are certain downsides with using an RFP process, although most companies find that the pluses far outweigh the minuses. Nonetheless, it is important for outsourcing customers to be aware of these risks, if for no other reason than to manage the process in order to mitigate their effects. In addition, those favoring an RFP process will want to be prepared to counter the arguments they might hear from those who oppose it.

[A] Time

Perhaps the biggest challenge in using an RFP process is that it can be time-consuming. Senior management’s decision to outsource will typically be accompanied by a mandate to get the deal signed by a specified date. Some will argue that spending part of this allotted time on an RFP process will shorten the negotiation period and place the deal team in an untenable position of rushing to get the deal closed to meet senior management expectations. Others will simply feel that, with each passing month they are not outsourcing, they are spending more money on the services to be outsourced and not enjoying the cost savings, efficiencies, and productivity improvements that might result from outsourcing. These customers will be anxious to get a deal signed and transition to the service provider, rather than take the time to embark on a lengthy RFP process.

As noted above, if the customer is concerned about the length of the RFP process, it should keep in mind that, while the RFP process may indeed add time to the front end of the overall deal process, the customer will reap the benefits from a better deal, and perhaps a better service provider, in the long-run. Moreover, the investment of time in an RFP may actually shorten the overall deal cycle, since the RFP will provide a framework for the MSA.

[B] Resources

Customers also need to consider that an RFP process can consume resources that might otherwise be needed for the actual negotiation of the deal. While most of these “resources” will simply be management time and attention, the reality is that certain key stakeholders and
decision-makers will have a finite amount of time they can devote to
the outsourcing transaction process. If these executives and managers
are required to spend an inordinate amount of time and energy on
the RFP process, they might not be as available to participate in the
negotiation of the ultimate agreement. While this might not be a
sufficient justification to forego the RFP process, customers need
to manage carefully the deal team’s involvement so that it does not
“burn out” during the earliest stages of the process.

[C] Speculation and Rumor

A more significant downside of using an RFP is that it dramatically
increases the likelihood that news of the customer’s outsourcing
intentions will be leaked. While some companies will publicize their
outsourcing plans well in advance of taking any tangible steps in that
direction, many companies will try to maintain the confidentiality of
their plans until they have made a final determination to outsource
and selected a service provider. This will allow the company to control
and package its message, which may be critically important with
respect to the company’s employees, clients, and even its investors.
Most companies would greatly prefer to disclose that they are out-
sourcing “service X” to “provider Y” than deal with speculation and
rumor. If news of the company’s plans becomes public before the
company intends—as a result of the RFP process or otherwise—the
company may quickly find itself confronted with a number of
challenges: employees who lose focus and become unmotivated
because they are concerned about their uncertain future; clients
who are concerned about how their accounts or data will be serviced
in the future; and investors seeking more information about the
company’s direction. It is critical for the customer to maintain
confidentiality throughout the RFP process, and to require bidders
to do so as well.

As an alternative approach, the customer should consider whether
the commencement of the RFP process is a good time to announce
its outsourcing plans to employees. There is a fair likelihood that
employees will learn of the RFP process, particularly as individuals are
added to the team to draft the RFP itself. Announcing its outsourcing
plans internally will allow a company to limit speculation and rumor
and present its business plans in the most productive way possible.

[D] Imperiling Existing Business Relationships

Some companies will also want to forego the RFP process because
they are concerned that they will damage their relationship with an
existing service provider who might have expected to be awarded
the new outsourcing project. While in some cases the customer will
be contractually obligated to award the new project to an existing
provider, or at least offer it an opportunity to bid first, in all other cases, the customer should not use a pre-existing relationship as an excuse to skip the RFP process. If the current service provider is indeed the logical choice for the new project, then this fact will become readily apparent during the RFP process. In other cases, an ideal service provider for a past project might not be the most appropriate choice for the new engagement. Moreover, the RFP process will likely force an existing provider to improve its proposal out of a concern that it might be out-bid.

Companies should also take into account that the growing trend is to minimize risk by using a variety of service providers rather than to award multiple engagements to the same provider. The customer that foregoes the RFP process in order to use an existing provider is fostering an environment in which certain providers will hold larger and larger portfolios of the company’s outsourcing business. This means fewer opportunities to spread the company’s risk over multiple providers.

§ 4:4 Selecting the Pool of Potential Bidders

§ 4:4.1 Compiling the Initial List

An integral part of the RFP process is selecting the pool of bidders with the requisite experience to whom the RFP will be sent. The composition of this group of bidders will ultimately help the customer determine what is “market” for certain business and legal terms, and what it can expect from the winning bidder.

[A] Size of Pool

There is no correct number of bidders that should be part of the initial pool, but many outsourcing customers find that they end up giving serious final consideration to approximately three to five service providers. The initial pool should be large enough so that, after an initial cut, the customer is left with sufficient viable choices. Indeed, the benefits of the RFP process will be sharply diluted if the customer finds that it is choosing finalists from only a small handful of initial bidders. Nevertheless, in certain situations, such as where the engagement is so large or specialized that only a few service providers have the appropriate capabilities, it may be necessary to start with a smaller pool.

On the other hand, customers should be cautious about distributing the initial bid to a pool of bidders that is too large. While the customer may have the mindset that more bidders will only enhance the process, the reality is that each bid will take time to review and process. If the pool is too large, the customer will simply get bogged down in the administration and management of the bids. If the customer finds that its initial pool includes more than eight to ten
bidders, it has likely not been diligent in screening out bidders that are not appropriate for the engagement.

[B] Pool Composition

The right mix of bidders is also important when trying to generate a variety of responses and a robust competitive process. The customer should select a pool of bidders that represents a cross-section of potential service providers. Selecting a group of “look-alike” providers will likely yield similar bids with similar strategic outlooks, thereby defeating one of the principal reasons for embarking on the RFP process. Customers may also want to include bidders that do not fit their ideal model so that they can explore a variety of options and test their premise as to what type of company would be the optimal provider. A desirable pool of bidders might include a mix of:

- service providers with whom the customer has a pre-existing working relationship;
- service providers with whom the customer has had no previous relationship;
- a selection of the market leaders in the specific outsourcing sector (e.g., human resources outsourcing (“HRO”));
- one or two relative newcomers to the field;
- service providers of varying size (based on customer lists, employee headcount, market capitalization, etc.); and
- service providers from different countries (unless the customer has predetermined the country to which it plans to outsource).

With respect to geographic diversity, it should be noted that even if the customer has effectively decided to which country it will outsource, there is a good argument that it should select bidders in one or two other countries to confirm that it has made the right decision. In addition, customers should keep in mind that certain service providers who appear to be domestic providers may, in fact, provide their services through offshore offices or subsidiaries. Similarly, a service provider based in one specific offshore location (e.g., India) may be providing the service through a subsidiary or affiliate located in a different country (e.g., China).

Arriving at an appropriate initial list might not be as simple as the customer believes. While identifying the two or three market leaders may be easy, the customer may be hard-pressed to round-out the list with other potential bidders. By selecting the pool of bidders while the RFP is being drafted, or even beforehand if possible, a customer can provide itself with the maximum amount of time to compile its list.
Resources for Locating Potential Pool Members

While basic online research may yield names of potential bidders, most customers will want to adopt a more informed approach to selecting a pool of potential service providers. To that end, there are a number of resources on which a company can rely.

Existing Service Providers

The customer may find that a good starting point are those service providers who are currently delivering outsourcing services to the customer, or who have an outsourcing capability even if they are currently providing different services to the customer. These service providers bring to the process a familiarity with the customer’s policies and procedures, its service preferences, its management structure, and its corporate culture. To the extent that it is relevant, the service provider may also benefit from having worked with the customer’s technology platform. From the customer’s perspective, the advantage of including an existing service provider is that the customer will be familiar with the service provider’s management and culture and, more importantly, will be aware of the service provider’s strengths and weaknesses. In addition, the customer may want to include the existing service provider in the bid process as a sign of good faith and confidence in the service provider’s abilities.

Previous Bidders

Some customers find it useful to include bidders who have previously participated in other RFP or similar bidding processes with the customer. These bidders may have made the short list for other engagements and may be well suited to bid on the current RFP. The advantage of including these bidders is that the customer may have already conducted due diligence on them in prior bids, making it somewhat easier to evaluate their proposal for the current engagement.

Leads from External Advisors

A customer is likely to find that its consultants and outside counsel can provide meaningful suggestions on service providers that the customer should consider. These external advisors not only will be able to identify the names of potential bidders, but also should have insight into their capabilities and, as a result, be able to advise the customer on whether the service provider is a legitimate contender for the outsourcing engagement. The one cautionary note is that external consultants may have their own short list of preferred service providers, and may thereby introduce some of their own biases into the selection process. A customer should avoid using input from these consultants as the sole source of potential bidders.
[C][4] Independent Research

Independent research is also a useful tool to supplement a customer’s list of potential bidders. In today’s environment there is a wealth of publicly available, reliable information. In addition to online searches, customers will discover that there are numerous vendor databases and outsourcing periodicals that list outsourcing service providers and include brief profiles about their capabilities. Annual reports and other publicly filed documents are useful resources for learning about publicly traded companies, particularly because legal requirements ensure that the information contained therein is accurate. Many customers find it useful to supplement their research by consulting with other companies that have outsourced similar services to learn what service providers they are using or have considered in the past. However, companies should consult with antitrust counsel before contacting any competitors to discuss such issues.

[C][5] Unsolicited Approaches

Customers may be surprised to discover that a number of service providers, having learned about the RFP simply through industry word of mouth or through leaked press reports, will approach the customer themselves. Indeed, some service providers will routinely identify outsourcing prospects and periodically check to see whether the prospect has made any announcements about plans to outsource.

§ 4:4.2 Vetting the Initial List

Before distributing the full RFP, some customers will conduct a round of preliminary due diligence in order to vet the initial list of potential bidders. This is a less detailed round of due diligence than most customers will conduct after the RFP process has begun, its purpose is to eliminate certain bidders based on their failure to meet certain baseline requirements. While some of this diligence will already have occurred unilaterally when the customer developed its initial list, this phase of the process allows the customer to engage with the bidders to obtain more detailed information than might otherwise be publicly available. In addition, it will allow the customer to identify the appropriate contact person at the service provider. A customer cannot simply mail an RFP to a company’s address or even to a department within the service provider. Making this initial contact will not only help ensure that the RFP ends up in the right

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5. For a discussion of RFP due diligence, see section 4:6.2.
hands, but will also start to build a working relationship between the customer and the bidder. The following methods of preliminary vetting will help pare down the initial list of bidders, as well as save time and resources in the long run.

[A] Potential Bidder Questionnaire

This diligence phase usually involves the submission of a series of high-level questions to the potential pool of bidders. In some cases, the customer will have some of this information from its own preliminary diligence or from the RFP itself, and these questions will merely serve to confirm or expand the customer’s understanding. In other cases, these questions will close gaps in the baseline information that the client has gathered.

What follows is a representative sample of questions to help the customer assess the service provider’s stability, its level of expertise, and the bidder’s overall ability to provide services. These questions are often appended to an “initial interest” letter sent out to potential bidders. Such questions might include:

☐ How large is your organization?

☐ What direct experience do you have providing the services we are seeking?
  
  ☐ For how many years have you been providing these services?
  
  ☐ What experience do you have servicing clients in our industry?

☐ How many full-time employees are currently engaged in the provision of such services?

☐ What percentage of your overall outsourcing business can be attributed to these services?

☐ Do you provide these services from onshore or offshore locations?
  
  ☐ If the services we seek are provided offshore, from which countries do you operate?
  
  ☐ [If necessary for the services being outsourced:] Do you have regional offices in areas where we operate?

☐ Are you organized by vertical industry group or by type of service?
Do you provide these services to our competitors? [A list of competitors would be attached.]⁶

Are you subject to any non-compete or similar arrangements that would limit your ability to provide services to us?

Are there any limitations on your ability to meet our general timeline for transition?⁷

[B] Service Provider’s Intent-to-Bid Letter

An alternative approach to vetting the customer list is to require that bidders provide a preliminary indication of their interest in the project by submitting an “intent to bid” letter or form after they have received the RFP.⁸ As its name implies, this is a non-binding letter in which the service provider states that it intends to submit a bid based on the RFP. While such a letter does not guarantee that a bid will be received, it provides the customer with notice as to which service providers have no interest in the project. In the event that too many, or the most promising, bidders drop-out at this early stage, a customer may want to reformulate the scope of its outsourcing plans, and follow-up with bidders as to why they declined to bid.

§ 4:5 Drafting the RFP

§ 4:5.1 Benefits of a Well-Drafted RFP

All too often, customers assume that service providers will be so interested in landing the customer’s business that they will bid on the customer’s outsourcing project regardless of the overall quality or specific provisions of the RFP. These customers view drafting the RFP primarily as a “check-the-box” exercise—a task that they need to undertake in order to get through the vendor selection process, but one that does not hold any strategic value. Many of these customers will relegate the drafting of the RFP to an employee with little

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6. **Note:** Some organizations do not want to use a service provider that is already rendering services to the organization’s key competitors. This is usually out of a concern that the customer’s confidential information might inadvertently flow to that competitor or that new ideas or processes that are developed with the service provider will be used by the provider for the benefit of the competitor. Other customers feel that any such concern is outweighed by the benefit of using a service provider with a proven track record in the industry.

7. For example, would the bidder have to do any technology development, infrastructure builds, or extensive hiring in order to take the customer on as a client?

8. A sample Intent to Bid form is included as Appendix 4A.
experience in outsourcing or complex RFP processes. Others will wait until late in the process to even begin thinking about the RFP, resulting in a document that is cobbled together in great haste as the self-imposed “release the RFP” deadline quickly approaches. There are, however, numerous significant and tangible benefits to releasing a coherent, well-crafted, and strategic RFP—one to which a service provider can provide a reasonable bid response.

**[A] Attracting Quality Candidates**

An ambiguous and poorly constructed RFP makes it difficult for a service provider to understand the scope of the project and develop a suitable bid. Potential bidders receiving such an RFP might not devote the same time or resources to their response. These service providers would prefer to devote their business development energies to engagements that they can quickly assess and for which they can easily develop a rough business model. A customer that does not devote sufficient care to drafting the RFP may find that the bidders it is left with are more desperate for the customer’s business and do not necessarily reflect the best choices.

**[B] Yielding Meaningful Bids**

A well-drafted RFP will yield bid responses that, although different, will each reflect a common understanding of the scope of the project and the customer’s baseline business requirements. These bids can be compared more easily by senior management when it is time to select a service provider or narrow the field of available options. In contrast, if the customer releases an RFP that contains ambiguities or is otherwise vague, the RFP will generate responses from multiple bidders, each of whom is responding to a different perceived scope of services. The customer will be left with a series of bids that it cannot realistically compare. This will force the customer to return to the bidders with a clarified RFP and solicit supplemental responses, a process that could delay the vendor selection process by weeks.

While such a delay can be troublesome, the worst-case scenario for the customer is that the ambiguities of the RFP only become apparent when negotiations with the winning service provider have already commenced. The customer may discover that the winning service provider (and perhaps other bidders) underestimated the cost of providing the requested services, or did not appreciate certain obligations it would need to undertake because of a misunderstanding as to the scope of the services sought. Indeed, the losing bidders may have bid higher because, ironically, they actually understood the scope of services. In other cases, the winning bidder may have bid on the correct scope of services, but other potential bidders were improperly eliminated because their bids were based on a different, and overly
broad, reading of the scope of requested services. Simply stated, a poorly drafted RFP can derail the entire bidder selection process.

[C] The Value of First Impressions

Bidders ultimately want to make a good impression, and the customer should want to do the same. Coming across as an organized and sophisticated organization that bidders want to have as a client generates greater enthusiasm in the bidder pool and yields more cooperation and perhaps even better bids. Since the RFP process is likely to be the customer’s first contact with bidders, it is the first opportunity to make that good impression. A customer that has gotten off on the wrong foot with a bidder because of a poor RFP may find that it is never able to change the service provider’s initial perception.

[D] Establishing a Stronger Negotiating Position

A well-drafted RFP will also elicit responses from the bidders that contain enough specificity that they can be relied upon during the negotiation stage if the bidder is selected. A customer never wants to be in a position during negotiations where the bidder is able to re-interpret its RFP response or argue that there was a misunderstanding as to what it really intended. The more direct the RFP requests, the less likely the bidder will be able to provide general, potentially ambiguous responses. A customer may even want to make sure that the bidder understands that its responses will likely form the basis of the MSA.

§ 4:5.2 Keys to Good Drafting

[A] Avoid Boilerplate RFPs

Some companies have developed a form RFP for all procurement transactions. While such forms provide a good starting point for an outsourcing RFP, the customer should keep in mind that the procurement of outsourcing services can often be a more complex and fact-specific endeavor than other types of procurement. Outsourcing customers that rely too heavily on existing templates may find that they are turning the outsourcing engagement into the purchase of a commodity and are not thinking strategically about their requirements. These customers end up including questions in the RFP that do not elicit the types of information required to make an informed decision about bidder selection.

[B] Post-Drafting Review

As a final step before circulating the RFP, the customer should review the RFP as if it were a potential bidder. By putting itself in the bidder’s shoes, a customer will be able to review the RFP from a fresh perspective and determine whether its questions are clear and
specific, and whether they will yield the information required. Some customers also find it useful to ask someone who was not part of the drafting team to review the RFP to see whether any modifications are necessary before it is issued. This might be an executive from a different area of the organization or an outside advisor who was not part of the drafting process.

§ 4:5.3 Pushing Information Out to Bidders

When drafting the RFP, much of the customer’s focus will be on soliciting information from the bidders. However, an equally important part of the RFP is for the customer to push information about the customer and its outsourcing project out to the bidders. Presenting the customer in the appropriate light is critical, since the goal of the RFP process is to maximize the number of quality responses received so that there will be vigorous competition among potential service bidders.

[A] Overview

The customer’s goal should be to provide bidders with the maximum amount of information that they might require to develop their bid responses. Some customers might be inclined to withhold certain information from the RFP in order to gain a strategic advantage over the service provider. But such an approach will only lead to confrontation with the winning bidder during the negotiation process, and ultimately could delay or even prevent a final agreement from being reached. The one exception to this general rule is in the case of a draft agreement (such as a draft MSA) that a customer might provide for bidder comments.9 With respect to these agreements, customers may want to stake out a favorable position, anticipating that they will likely need to compromise from their starting position during the course of the negotiations.

The customer should also note that withholding information in the RFP can, quite literally, be costly. Bidders who learn additional information about the customer or its outsourcing project after the bid has been won can argue that they should be allowed to revise their bids upwards or pass on additional costs to the customer. For example, if a customer is planning to migrate to a new technology platform in the coming year and does not disclose this fact in the initial RFP, it may find that the winning bidder wants to pass-through the costs it will incur in order to stay current with the customer’s platform, even if the bidder did not include such costs in its initial bid. This might be the case even if the customer has included a “technology

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9. See section 4:5.4[E].
refresh” provision in the MSA that imposes on the service provider a contractual obligation to stay current with the customer’s technology. If the customer decides to make this technology change two years after signing, the service provider will not be able to challenge the provision. However, if the service provider discovers that the customer’s technology migration plan was not disclosed in the RFP, the service provider may assert that the customer effectively engaged in a “bait-and-switch” in order to secure more favorable bids.

Finally, a customer may want to include general descriptions of its future outsourcing plans, such as other services it is considering outsourcing, or potential increases in volume for the services currently being outsourced. Incentivized by the potential for future outsourcing engagements, bidders are likely to provide more attractive bids to win the initial engagement. Indeed, such future derivative or ancillary business is often a key component of the service provider’s revenue model. Letting bidders know that this engagement may be just the first of many opportunities will likely benefit the customer.

[B] Introductory Information About the Customer

After a short statement about the services to be outsourced (this description will be provided in greater detail later in the RFP), most RFPs begin with an overview of the customer’s business, including its main areas of focus, geographic location(s), number of employees, and basic organizational information. This company description should extend beyond those parts of the business that are part of the outsourcing engagement and should cover the organization as a whole, giving prospective bidders a better sense of the company they will be dealing with, as well as a more complete understanding of how the units or services to be outsourced fit into the customer’s overall corporate structure. This section of the RFP also provides the customer with a unique opportunity to package itself and create the branding message that it wants to convey to the outsourcing bidder.

While the customer may think that this information is unnecessary or can easily be found on its corporate website, customers should assume that some of the potential bidders will be unfamiliar with the customer’s business or may have an understanding that is simply out-dated. Some bidders may not engage in any background research, assuming instead that their understanding of the customer is complete and accurate. Moreover, many senior executives or others at the bidder will consider the RFP to be a complete, self-contained document about the bid and will not want to be forced to research basic background facts about the customer.

There is no firm rule as to how much information should be included in this section of the RFP. Some customers include only a very brief overview and leave it to the bidders to gather more
information. Others adopt this approach, but provide links to the parts of its corporate website where additional information can be obtained. Finally, some bidders appreciate that the RFP should ideally be a self-contained unit and incorporate all of the information about the customer that a bidder might realistically need. This might include not just basic factual information, but also any corporate-level information that is necessary to understand the customer’s needs and goals—e.g., descriptions of recent acquisition or divestiture activity that has prompted the interest in outsourcing; a corporate mandate to reduce costs; increased competition in the sector; or recent regulatory changes that have made it more costly for the customer to stay current with changes in law.

[C] Customer Objectives
The RFP should next set forth the specific reasons the customer is outsourcing and the objectives it hopes to achieve through the relationship with the service provider. It is imperative that the customer not simply resort to outsourcing clichés (“our goal is to obtain best-of-breed services at lower costs”). Rather, the customer should convey to bidders the customer’s main areas of concern and its strategic objectives. This not only allows bidders to shape their response to the RFP to address these customer concerns, but also signals to the winning bidder how it should build its service offering.

Similarly, while the customer’s instincts may be to list every conceivable outsourcing objective, it will obtain the best RFP responses, and ultimately select the most appropriate service provider, if it sets forth its actual objectives. For example, an outsourcing objective in the RFP might state:

**Outsourcing Objective:** The Company currently maintains its own call center in _____, employing ___ full time employees to handle customer service inquiries. Call volume, and therefore costs, are seasonal and vary markedly during the course of a year. The Company currently seeks to outsource this functionality in order to convert this variable cost into a monthly fixed cost, and to reduce the number of year-round full-time employees assigned to the call center to perform this task, at current service levels, by ___ percent or more within three (3) years. The Company believes its current service levels, set forth in Schedule __, are appropriate for the services being provided, and although improvements in service levels will be viewed favorably, they are not a requirement of the engagement, nor is the Company willing to pay higher fees for improved service levels.

Customers should also be mindful of the fact that bidders will likely tailor their response to an RFP based on what is stated in the
outsourcing objective. If the customer states that its goal is to improve functionality or productivity, it can be assured that the bidders will focus on this aspect of their service offering in the RFP response. In contrast, if the stated objective focuses on cost savings, the bidders will each focus on why their offering will lower the customer’s costs.

The customer may also want to include language confirming that the statement of objectives is merely intended to provide the bidder with guidance, and that it does not supersede the statement of services included with the bid:

The statement of objectives is a general introduction to the company’s requirements and should not be viewed as expanding or limiting the scope of the winning bidder’s obligations or in any way modifying the service requirements set forth in this RFP. To the extent the statement of objectives does not address a particular circumstance or is otherwise unclear or ambiguous, it is to be interpreted and construed so as to give the fullest possible effect to the goals and objectives set forth in the rest of the RFP and the Statement of Services.

[D] Statement of Services

The RFP should next set forth a detailed description of the services that the customer is seeking to outsource. More than other sections of the RFP, the statement of services will drive the fee proposals that the bidders will make, as well as their proposals for delivery of services. At this stage of the outsourcing process, it is critical that the customer devote adequate time and resources to draft a statement of services that is as complete as possible.

[D][1] Importance of a Carefully Crafted Statement

While the RFP statement of services may not necessarily serve as the final schedule of services to be attached to the MSA, it is highly likely that the RFP statement will serve as the foundation for that schedule. Indeed, customers often find that they repeatedly refer back to the RFP throughout the drafting of the MSA statement of services to determine what they initially included and what services were presented to the bidders as part of the engagement. A well-conceived RFP statement of services can shorten the overall negotiation timeline by reducing the amount of time required to develop the services schedule for the MSA.

A carefully crafted statement of services is also important because the winning bidder will often rely on any change to the initial RFP statement of services as a justification to modify its proposed pricing or otherwise adjust its bid. It is all too easy for a service provider to argue that its bid was premised on certain fundamental service principles and that subsequent changes to the service requirements
that were presented in the RFP necessitate the imposition of additional fees. The customer also runs the risk that the winning bidder will be unable to provide the revised services. While such occurrences are rare, since changes to the description of services after the winning bidder is selected are usually minor, they can create material issues for the parties. For example, the customer may discover that its revised set of services includes new tasks that the service provider is unable or unwilling to provide or that it is prohibited from delivering because of a non-compete it previously entered into with another customer.

[D][2] Level of Detail

The key difference between the services description included in an RFP and the statement of services schedule attached to an MSA is the level of detail. Customers typically do not spend as much time working on the RFP description of services as they do creating the MSA schedule. However, this relative lack of detail in the RFP may actually benefit the customer. During the RFP process, and specifically from its discussions with bidders, the customer will likely gain a far better understanding of how it should describe the services it requires knowledge that will prove valuable when it drafts the MSA schedule. In addition, an RFP statement of services that is too detailed will likely need to undergo some revisions as the customer finalizes its requirements. Such revisions can be problematic since they open the door to the winning bidder arguing that it should be allowed to modify its bid. Nevertheless, more detail may be required if the services themselves are unique or if the customer has specific service requirements that are not typical for the proposed type of engagement. The worst-case scenario for the customer is that the bidders hedge or qualify their bids because they believe that the information provided regarding the description of services was not sufficient.

The customer should also disclose any services or tasks that a service provider would normally expect to include in such an engagement but that will be out-of-scope in this instance. This is particularly important where the customer plans to retain in-house certain individual sub-tasks of the services to be outsourced. These out-of-scope sub-tasks will not only impact the bidders’ fee proposals, but may also knock out certain bidders who are uninterested in bidding on what they perceive to be only partial services. Since the customer benefits by identifying these bidders as early in the process as possible, the description of services can be a useful tool to flush them out.

[D][3] Current State of Affairs

Similarly, the description of services in the RFP should disclose whether the services are already being outsourced to another provider. The bidders will then have a better sense as to the current state of the
services, as well as the amount of transition that may be required to transfer the services from another provider as opposed to transitioning from the customer.

If the customer is switching from another outsourcing provider, it may want to disclose why it is doing so to the extent that this can be accomplished without violating any confidentiality obligations. Understanding any outsourcing problems the customer has had with previous service providers may help a bidder shape its RFP responses to explain why its approach or solution will ensure that the customer’s past problems will not be repeated. In addition, some bidders might actually elect to withdraw, knowing that they will be unable to resolve or avoid the same issue.

[D][4] Checklist

Overall, the RFP statement of services should cover the following key areas:

- scope of services;
- current volume and forecasts for future volume;
- geographic requirements (such as specific countries from which the services must be provided, or specific countries the service provider must avoid, as well as the location of the service recipients);
- proposed effective date for commencement of services;
- proposed term length for the agreement (note that the proposed term, even if given in a range—e.g., three to five years—will be a critical determination in the proposed fees submitted by bidders);
- service levels that must be achieved (and whether these service levels are currently met by the company, or its third-party provider, as applicable);\(^\text{10}\)
- whether any tangible assets will be transferred from the customer to the service provider; and
- whether the customer expects the service provider to extend employment offers to certain customer employees, and the general seniority or salary classes into which these employees fall.

§ 4:5.4 Obtaining Information from Bidders

[A] Overview

The sections that follow the information about the customer and its outsourcing project constitute the heart of the RFP. It is through

\(^{10}\) Service levels are sometimes addressed separately in a requirements table.
these remaining sections that the customer will obtain the key information it requires to evaluate and compare the different bidders. As a general matter, customers should adopt a top-down approach for these sections, seeking both general information about the bidder and its overall qualifications, as well as specific information about the bidder’s capabilities and plans for the outsourcing project. Within each section, the customer needs to strike a careful balance as to how much information it is seeking. On one hand, the customer needs to gather sufficient information so that it can select the winning bidder. On the other hand, too much information can bury the customer in data, rendering it impossible to arrive at any quick or easy conclusions.

[B] General Information

The sections of the RFP seeking information from the bidders typically begin with a series of general questions about the bidder’s “profile.” As with those sections of the RFP that provide an overview of the customer, these questions should help frame the identity of the service provider by requesting information about:

- the bidder’s experience in the applicable industry;
- the bidder’s overall gross revenues and gross revenues relating to outsourcing;
- the number of corporate-wide employees, and the number of employees who devote the majority of their time to outsourcing (with a possible further breakdown by the number of employees who work on the type of outsourcing projects that are the subject of the RFP);
- the service provider’s hiring practices (does the service provider hire employees with specific educational backgrounds, with specific levels of experience, etc.);
- the location of the bidder’s offices, including the locations from which the outsourcing services will likely be provided.

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11. A sample RFP Questionnaire is included as Appendix 4B.
12. See infra section 4:5.4[C].
13. The customer should indicate that, at this stage, it does not seek any non-public information. Confidential information should be provided only when the parties have entered into a non-disclosure agreement and when the number of bidders has been narrowed.
14. The customer may also want to know the extent of the bidder’s resources in a specific location that is critical to the customer. For example, if a customer needs local data center support in Germany, it will want to know if the bidder has a “real” operational office or merely a business development office in that country.
the specific party within the organization that will be providing the services;

- any internal approvals that would be necessary before the bidder could commit to undertake the project; and

- the bidder’s ability to commence providing services as soon as required by the customer (e.g., how much ramp-up time, if any, the bidder requires to purchase equipment, hire personnel, secure a facility, etc.).

The customer might also ask where the outsourcing practice falls within the service provider’s overall business structure. A customer might have a different view of a service provider for whom the services sought are only a small niche of a much larger enterprise as compared to a service provider whose business is devoted to that particular service. Some customers will prefer to work with diversified organizations based on the assumption that they will be more financially stable, while others will be concerned that the services group may get less senior management attention or even become part of a corporate divestiture at some point. Information about the service provider’s structure will also help the customer understand the importance of these services to the bidder, as well as its likely internal reporting structures. For example, a large, multi-faceted services provider that delivers IT services is likely to have an organizational and reporting structure, as well as a corporate culture, different from that of a stand-alone IT services department.

This section of the RFP is also a good place for the customer to gather information about recent changes in the scope of the bidder’s business. For example, if the bidder has recently acquired another service provider, it might be in the midst of an integration effort that could cause instability and disorganization in the near term. This is particularly significant if the acquisition covers the same service area as the proposed outsourcing project. Similarly, if the service provider has recently divested part of its business, it may have short-term capacity constraints or may otherwise be in the midst of a restructuring effort that could impact the customer.

Has the bidder has recently engaged in any major platform or technology upgrades or does it have plans to do so in the near future? The customer will want to know whether the bidder will be, in effect, an early adopter of a new service provider platform, or on the other extreme, whether the service provider will be performing the services on a platform that is nearing obsolescence.

In highly regulated industries, such as financial services, insurance, or healthcare, customers should include questions about the bidder’s capabilities and experience in complying with applicable regulatory regimes such as the Health Insurance Portability and Accountability
Act (“HIPAA”)\textsuperscript{15} and the Gramm-Leach-Bliley (“GLB”) Act.\textsuperscript{16} This includes information on how the service provider tracks legal developments in this area and how it audits itself to ensure that it is in compliance. The customer may also want to get a sense of how conservative or aggressive the bidder is with respect to its compliance practices. For example, customers who come into compliance with new regulations well before they are required to do so may not work well with a service provider that comes into compliance only at the last minute.

Customers should be aware that it is an increasingly common practice of service providers to merely attach promotional materials or website printouts to respond to general background inquiries. The customer should consider whether it wants to discourage the inclusion of such materials (which can sometimes be voluminous) or inform bidders that, while they may include such information, they are also required to provide specific responses to the questions; even if the answers can also be found within the provided promotional materials.

[C] Bidder Experience

In any bidder selection process, a key data point is the extent of the service provider’s relevant experience. At a baseline, any questions about such experience should track internal procurement procedures and guidelines that the customer has adopted. However, given the magnitude of most outsourcing deals, both in terms of cost and duration, the customer should seek an additional level of detailed information. As discussed below, this might include:

\begin{itemize}
\item a greater variety of references than is normally sought;
\item details about customers who terminated or did not renew their agreements with the bidder; and
\item the specific scope of the service provider’s experience not only with respect to the services being outsourced but also with respect to the technology platform used by the customer.
\end{itemize}

The customer should be particularly careful with how it drafts questions regarding bidders’ experience. While this is among the most important information for the customer to gather, it also offers the greatest opportunity for bidders to get creative and spin other, unrelated projects they have handled into direct, relevant experience. The more general the question is, the more susceptible the customer becomes to such creative responses. “Describe your relevant experience”

\textsuperscript{15} For a discussion of HIPAA, see section 8:4.1.
\textsuperscript{16} For a discussion of GLB, see section 8:3.1.
or “List any engagements that you believe are relevant to this project”—which are all too often found in RFPs—may yield responses that look relevant on paper, but are really meaningless to the customer. Moreover, even if the bidder is not trying to be creative, general questions often generate responses like “Provided payroll services to Fortune 200 company,” requiring the customer to engage in another round of questions to get the information it really requires.

The customer should draft questions that go directly to the specific services that the customer requires. These questions should incorporate, as applicable, sections of the Statement of Work in order to hone in on that experience. The following are sample “experience” questions:

**Payroll Processing.** Describe [five] [any] engagements in the last [two] years for which you provided complete payroll services, including gross-to-net, processing payments via check and ETF; tax withholding, remittance, and reporting; and garnishment and administration. For each such engagement, describe the manner in which you interfaced with the customer’s platform and why you believe the scale and complexity of that engagement are comparable to that described in this RFP, including with respect to the number and location of employees for whom processing was provided.

**Application Development and Maintenance.** Describe [five] [any] engagements in the last [two] years for which you developed and maintained applications in [the following areas: _______] [in the areas described in Sections __ of the Description of Services]. For each such engagement, describe (a) your specific role as compared to the customer in the development and maintenance of each application, and (b) why you believe the scale and complexity of that engagement are comparable to that described in this RFP, including with respect to the programming language used, the number of lines of code generated and maintained, and the number of software engineers assigned to each application.

[D] **Business Proposal**

[D][1] **Overview**

The next section of the RFP should require the bidder to provide information about its specific business and/or technology solution. This section of the RFP should also highlight any unique requirements that the bidder must meet. For example, a customer may have a certain security protocol to which the service provider must adhere or may want to require that the provider partition the customer’s data in a specified manner. In other cases, a customer may have requirements for how the service provider must monitor and report on performance or costs. The general rule is if any such requirements could potentially

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impact the bidder’s fee proposal, the requirement should be spelled out in the RFP.

This is also the section of the RFP where companies should ask for any technical certifications or standards that the service provider is expected to achieve. Two standards that are often cited in the outsourcing context are:

- ISO 9001—a set of quality management standards published and maintained by the International Organization for Standardization; and
- Capability Maturity Model Integration (“CMMI”)—a model for describing levels of process maturity on a scale from 1 to 5.17

\[D\][2] Format

In seeking the bidder’s business proposal, customers should avoid questions that are too open-ended. Such questions will generate diverse responses, making it difficult to compare the various bids. At the same time, it is critical for the customer to give bidders sufficient leeway to provide their own strategic solutions. Most customers looking to outsource believe that a service provider can re-engineer a process, provide a service more efficiently, or otherwise improve on the customer’s approach. When a customer describes not only the services solution that it needs delivered, but also the specific approach that it wants bidders to adopt, that customer risks surrendering, at a very early stage, many of the key gains that it might have achieved from outsourcing. Indeed, if the customer is too specific, the success or failure of its entire multi-year outsourcing project may come down to how the customer defines the solution it wants. Even in those cases where the customer is locked into a specific solution, whether for integration, regulatory, or other purposes, it should still couch that solution as the “preferred approach” and allow the bidders to propose their own solutions.

One way to strike a middle ground between general, open-ended questions and those that require a specific solution is to present bidders with business requirements in a table format. Requirements tables are typically presented as actual tables containing rows of customer requirements with a column that the bidder fills out indicating either (a) that it is prepared to meet the requirement without exception or modification (usually by entering “Agreed” or “Yes” in the column or checking a “Confirmed” box), or (b) that it cannot meet the requirement as presented. If the latter is true, the

17. The model was developed by representatives from industry, government, and the Software Engineering Institute. A company cannot self-certify and must be appraised by an independent source. For additional information on CMMI, see www.sei.cmu.edu/cmmi/index.html.
bidder will typically be required to make a counter-proposal or otherwise indicate what parts of the requirement it is unable or unwilling to meet.\textsuperscript{18}

These requirements tables or term sheets typically fall into three categories:

- business terms;
- technical requirements; and
- legal terms.

The business terms can be further subdivided into separate tables or sections for:

- service requirements;
- pricing terms;
- service levels;
- personnel terms;
- transition terms; and
- governance.

These serve to guide bidders’ proposals and help to ensure that the bidders provide responses that meet the customer’s overall requirements. At the same time, requirements tables and term sheets allow for the flexibility bidders need to craft their own solutions.\textsuperscript{19}

\textbf{[D][3] Pricing Proposals}

Many RFPs specify the pricing methodology that bidders must adopt in their proposals. For example, some customers may want bidders to quote only cost-plus pricing, while others will want to see bids with only FTE pricing.\textsuperscript{20} By specifying the pricing model it is seeking, the customer will receive bids that can be easily and accurately compared. At the same time, by limiting the bidders’ options, the customer is possibly cutting off more favorable pricing models. As with the case of proposed technology solutions,\textsuperscript{21} the best-practices approach is for the customer to require all bidders to price their proposals using a “preferred” methodology, but then allow the bidders

\begin{itemize}
\item[18.] Some bidders will check “accepted” or “confirmed,” but then proceed to provide a different proposal. Not surprisingly, such “yes, but” responses are generally not viewed favorably by the customer.
\item[19.] Excerpts of a sample business requirements table are included as Appendix 4C, and a sample cut-over services requirements table is included as Appendix 4D.
\item[20.] FTE (full-time employee) pricing is where the customer pays per full-time employee used to deliver the services.
\item[21.] See supra section 4:5.4[D].
\end{itemize}
the opportunity to make alternative proposals. If the bidder offers such an alternative, it should be required to explain why it believes its model might yield lower prices or be easier to administer for the customer. For example, some bidders might advocate an FTE-based model based on the assertion that it will be easier for the customer to manage and track such pricing than it would using a cost-plus model.

Regardless of the pricing model adopted, the bidder should never be allowed simply to quote a service fee without explaining how it arrived at this number. Such back-up is essential, as it lets the customer compare the different bids it has received and determine if a bidder has made erroneous assumptions. To that end, the customer should ask bidders to include any assumptions or variables on which they have based their pricing. For example, a bidder’s price might be contingent on receiving a certain volume of business that the customer is not certain it can guarantee. Similarly, the bidder should be required to disclose how its prices will fluctuate if those assumptions or variables change over the term of the agreement, such as by increases or decreases in the volume of business or changes in the scope of required services.

The pricing section of the RFP should also require bidders to specify any costs and expenses that they expect to be borne by the customer (such as hardware leases, third-party software licenses, telecommunications lines, installation costs, etc.) so that the customer can determine the “total cost of ownership” of the engagement. All too often, customers lean toward a bidder based on a fee proposal, only to find out that there are material third-party costs and expenses that they are asked to bear. For similar reasons, the customer should require bidders to disclose any implementation or integration fees or upfront payments that the customer might be expected to pay.

Some customers are reluctant to request such information for fear that they will be suggesting to bidders that it is appropriate to pass on such costs. While such concerns may be legitimate in a handful of circumstances, in the majority of cases the bidder will not be deciding whether or not to levy such costs based on inquiries from the customer. The allocation of such costs will already be included, or not, in its pricing proposal, and it is best for the customer to use the RFP process to flush them out.

The customer might also use this section of the RFP to set forth any benchmarking requirement it might want to impose on the service provider.22 Benchmarking can be a critical factor in the service provider’s pricing model, so a bidder will need to know if the customer will want the ability to reset prices (or service levels) through benchmarking. Some bidders may even refuse to allow for any benchmarking under their

22. For a general discussion of benchmarking, see section 6:6.1.
proposed terms. The RFP should ask the bidder to provide proposals on the following key benchmarking factors:

1. whether benchmarking will be allowed;
2. at what point during the term can benchmarking take place; and
3. what adjustments the bidder will be willing to make to its pricing or service levels if the benchmarking reveals that its terms are not consistent with the then-current market terms.

[D][4] Service Levels

A subsection of the business proposal section of the RFP should specify the service levels the bidder must achieve. Customers typically provide a table of their existing or expected service levels and require the bidder to indicate that it will meet or exceed those levels. If the buyer cannot achieve those levels, it will be asked to explain the basis for its response and provide an alternative proposed service level. It should be noted that the customer may need to wait until the bidders have performed adequate diligence on the customer’s processes in order to receive such explanations.

The customer might also require bidders to propose the key SLAs or key performance indicators that they would use to measure their performance, the service levels they hope to achieve, and the tools and measuring devices they will use to track these indicators. Such information from a variety of bidders will be valuable to the customer when it ultimately negotiates an SLA with the selected service provider.

[D][5] Hiring of Customer Employees

The choice of service provider will often depend on a bidder’s proposed treatment of customer employees displaced as a result of the outsourcing engagement. While the customer cannot be guaranteed that its employees will accept employment opportunities at the service provider, the customer can assess the hiring and retention policies of each bidder. In order to clarify the service provider’s views on this issue, some customers include a series of questions in the RFP such as:

- Do you intend to interview and/or hire our company’s employees?

23. The customer can also require, as a condition of closing, that the service provider extend offers to all or certain of its former employees.
• How many of these employees do you anticipate hiring?
• What criteria will you adopt when deciding whether or not to make offers of employment?
• Do you intend to match our salaries and benefits?
• What has been your experience in making employment offers in similar outsourcing contexts?
• Will you give priority to our former employees when employment opportunities arise?
• What retention plan do you intend to put in place?

A customer may learn that a potential service provider is not interested in hiring as many customer employees as the customer had expected, or perhaps that the service provider simply has no interest in hiring any such employees. It is possible that a service provider already has excess capacity that it can allocate to the engagement, and other than hiring a handful of managers for transition or relationship purposes, it has no need for the customer’s other employees. Such information may be a critical data point in deciding whether to eliminate a bidder from consideration.

[D][6] Governance and Relationship Management

The interaction between the customer and the service provider is such an integral part of the outsourcing relationship that some customers require the bidder to identify the relationship manager that will be responsible for the relationship. However, most service providers will not designate these individuals until the customer actually retains the service provider, or at least until they are much further into the selection process. In such cases, requesting a bidder’s selection criteria for determining its relationship managers (such as minimum years of relevant experience) can give customers some insight into how the service provider will handle this aspect of the parties’ relationship.

Even in cases where the customer does not seek information about the bidder’s relationship manager, it may want the bidder to specify its governance model. Understanding how a bidder approaches governance of its outsourcing relationships will often provide a customer with insight as to how easy it will be to work with the bidder, and whether the bidder’s view of the governance of the relationship meshes with that of the customer.

[D][7] Risk Mitigation

As discussed above, one of the key factors that companies must consider when deciding whether to outsource is the potential increase
in their risk profile. Specifically, by entrusting to a third party certain functions that had previously been performed internally, the outsourcing customer is losing some degree of control over those functions. Companies are therefore increasingly using the RFP process to gather information that will help them assess the risk exposure of each bidder. This analysis can be performed through questions covering a wide range of areas in the RFP, including:

- systems security;
- disaster recovery/continuity of business practices;
- the number of customers the bidder is servicing (too many customers may mean the bidder is overextended; too few customers may mean that the bidder does not have the requisite experience);
- years of experience providing the relevant services and/or working with companies in the applicable industry vertical;
- governance structure;
- the manner in which intellectual property, particularly sensitive customer data and trade secrets, is protected;
- the manner in which data privacy is protected;
- audit rights and internal controls; and
- termination rights.

In some cases, customers will combine these various questions into one risk management section so that they can more readily obtain a risk profile on each bidder.

[D][8] Cultural Fit

One of the wildcards in selecting a service provider is determining whether its culture will mesh with that of the customer. Of all the criteria a customer will assess during the vendor selection phase, the culture of a potential service provider is by far the most intangible and difficult to measure. Generally, cultural fit is determined through questions that go to the bidder’s management and organizational philosophy. These questions, which are often asked during face-to-face interviews, might include:

- Does the service provider create an informal or a formal work atmosphere, and how does that translate into how it handles customers?

• Does the service provider adopt a conservative or aggressive approach when it comes to implementing new technologies? Rolling out new services? Expanding into new geographic areas?

• Is the service provider the type of organization that grows slowly and organically or does it look to expand quickly through acquisitions?

• Is the service provider organized in a hierarchical fashion with multiple reporting lines, or is it organized in a relatively flat and decentralized manner?

• Are managers empowered to make important decisions, or do all such decisions need the approval of higher-level executives?

• How willing is the service provider to share information regarding its methodology for providing services, its technology platform, or its system for allocating costs?

• Is the service provider a forward-thinking innovator in the relevant field? (Customers may consider asking bidders to provide examples of new processes they have introduced during the past few years.)

All of this information will help the customer formulate a view of the service provider’s “culture” and hopefully assist the customer in determining the types of characteristics it most values in a provider.

In some cases, “culture” is merely an inexact shorthand for describing whether the key business leads on both sides have connected and believe they will be able to work together in an effective manner. In this respect, it is important for the customer to make sure it is assessing the culture of the service provider as a whole and not just considering the personalities of the few relationship managers it has met. All too often customers select service providers based on good relationships with a few individuals without a thorough examination of the rest of the organization. While these individuals may be representative of the service provider’s overall culture, they may be transferred to different accounts, or they may be business development representatives who are not involved with the operational side of the service provider.

Even if a customer is able to identify the culture of a potential service provider, that customer still must determine what the best fit is for its own culture. Typically, customers look for service providers that replicate their own cultural environment. Customers should keep in mind, however, that choosing the provider whose business philosophy most closely resembles their own does not necessarily mean the best cultural fit. For example, a customer may benefit from entering into an engagement with a service provider that takes a different approach to service delivery and problem-solving. Such a service
provider can offer a variety of alternative solutions that the customer might not have considered if it had selected a bidder that takes an approach similar to the customer.

The challenge of finding the best cultural fit is sometimes exacerbated by the fact that many organizations do not have an accurate perception of their own corporate culture. For example, a company that incorrectly thinks of itself as having a “loose” culture and is convinced that its business philosophy truly encourages risk-taking may choose a bidder with this profile, only to find that it should have opted for a more conservative outsourcing partner.

[E] Required Legal Terms and Conditions

When selecting a bidder, the customer’s decision understandably centers on the bidder’s response to business terms, such as price, proposed solution, and service levels. However, it also is critically important to consider the bidder’s views on the legal terms and conditions that accompany these business terms. Customers often find themselves in a situation where a service provider claims that its bid price was contingent on a certain allocation of risk and liability. To the extent that the customer tries to negotiate that allocation (such as by increasing the liability cap or expanding the triggers for termination), the service provider may argue that it needs to increase its fees. Moreover, even if the bidding service provider is not looking to increase its fees, its “final position” on certain critical legal terms may be outside the scope of what the customer is willing to accept.

In order to avoid these situations, many customers include in the RFP a set of the key legal terms and conditions from the MSA and require that the service provider either confirm that they are acceptable “as is,” or indicate any changes it would require. Many customers are not thinking of legal terms at this point in the outsourcing process, but insight into the bidders’ position on these issues may help determine the best bid. For example, a customer may decide that a bidder that heavily marks up the proposed terms and conditions, even when it is in a bidding process, may be a difficult party with whom to negotiate a final agreement. Furthermore, at this point in the process, when a customer enjoys maximum leverage, it may be easier to extract concessions on the key legal terms than it would during the negotiation phase, when the leverage between customer and service provider balances out and perhaps even benefits the service provider.

The legal terms and conditions can be presented to bidders in a number of formats within the RFP. Some customers go so far as to include a complete MSA and to require that the bidders mark up the entire document, indicating any changes that they would require, and in some instances, providing justifications for their substantive
changes in a separate chart delivered with the bid. The instructions regarding such a mark-up might read as follows:

The Bidder must either accept each contract provision included in this agreement without qualification, or provide specific alternative language for Customer’s consideration. Such alternative language must be presented as both a clean and blacklined version of this draft agreement. The Bidder is also invited to include a separate document explaining the reasons supporting any alternative language. To the extent that a Bidder believes that it can only respond to a provision with more diligence, it should so indicate, but Bidders are encouraged to minimize the number of such comments. Statements of “to be negotiated,” “to be determined,” or similar language will not be deemed acceptable. **You will be deemed to have accepted, without qualification, any contract provisions for which you do not provide specific alternative language.**

You are strongly encouraged to limit your proposed changes to this Agreement. The nature and extent of your comments will be given significant weight in our evaluation process. Excessive, unreasonable, or unexplained comments or positions may result in your disqualification from the selection process, at any time, at the customer’s sole discretion.

By requiring a mark-up of the full MSA, customers gain a window into the bidder’s position—or at least its opening position—on the full gamut of issues that may arise in the course of negotiations. More importantly, an MSA mark-up forces the bidder to reveal its position on some of the transaction’s tougher issues. This is in contrast to the business section of the RFP, where bidders can often cloak their hardline positions on issues by using positive language and framing the discussion in their own terms.

The downside of presenting the full MSA to the bidder is the amount of time and resources that are required to create the MSA, and then to track and analyze responses to it. Unless the customer has a form MSA that it has used in prior deals, circulating a full MSA will mean involving a broader deal team at an earlier stage in order to draft an agreement that the customer would be willing to sign (on the off chance that a bidder said it had no comments and was willing to sign it “as is”). This process entails far more than just having counsel prepare a draft. The customer will have to determine the position it wants to take on every issue—whether it wants to start with a middle-of-the-road position that might be agreeable to bidders or to stake out a more extreme position from which it is willing to negotiate. These decisions will require input from the appropriate business leads and, in some cases, from senior management.
The additional investment of time is not limited to the drafting of a full MSA. When the bids come in, the customer will be faced with multiple blacklines that need to be read, analyzed, and compared. While counsel can summarize and assess the different bids and prepare comparison charts, a full analysis will ultimately require input from the business side as to which points are most important and where there is room to compromise.

If there are multiple rounds to the BFP process the customer may also want to prepare a revised MSA based on the comments it has received and can accept, then recirculate it to the remaining bidders for comment. Such steps will help move the customer and winning bidder closer to a final draft, but this can be a time-consuming process. Customers may also get some push-back from bidders who, at this early stage in the bidding process, do not want to retain counsel to respond to a full MSA, or who will assert that it is difficult for them to respond to legal provisions in the abstract without being able to see the deal in its entirety. For example, a bidder may state that its willingness to compromise on audit or indemnity requires a more detailed understanding of the customer’s own obligations.

Given these complexities, some customers will take the most critical points of the MSA and build them into a key legal terms table. Bidders are then required to indicate whether they are willing to accept the points as drafted or, if not, the modifications that they would require. The benefit of such a table is that it elicits the bidders’ views on the key provisions of the agreements without requiring the drafting of a full MSA. While legal and business input will be required to create such a table, it will be a less time-consuming and all-encompassing exercise than working with a full MSA.

The following is a list of some of the key legal provisions that customers will include in a legal requirements table or term sheet:

- **Scope of services.** Although the scope of services is, in many ways, a business point, the manner in which the services are defined in the agreement can have important ramifications, especially as it relates to “sweep clauses” [the inclusion of sub-tasks that are not explicitly set forth in a statement of work]. The customer may therefore want the bidder to comment on the proposed definition of the scope of services.

- **Intellectual property ownership/licensing.** If the outsourcing engagement is one in which the creation of intellectual property will be critical (such as in the case of applications development and maintenance outsourcing), the customer may want to know the bidders’ position on the criteria that will be applied to determine IP ownership, as well as the scope of any IP licenses to be granted.
Compliance with the law. The customer may want to learn whether the bidder will take on the responsibility, at its own cost, for monitoring and coming into compliance with changes in the law. This is particularly important in many business process outsourcing transactions (such as payroll outsourcing) where compliance with the law is a complex and costly endeavor.

Liability caps. The bidder’s position on proposed liability caps, including whether the bidder wants any carve-outs from such caps, can be critical to evaluating a bid. The customer should require that each bidder disclose any caps it will be demanding, including with respect to the agreement’s indemnity provisions.

Indemnification. Many customers want to know the scope of the indemnification that the service provider is willing to offer. For example, while some service providers will be willing to indemnify for any material breach of the agreement, others may limit their indemnification to instances of gross negligence or willful misconduct. In the case of IT outsourcing, the customer may be particularly interested in the scope of the bidder’s intellectual property indemnity.

Termination rights. The customer might also outline its rights of termination as well as those of the service provider to see if these are acceptable to the bidder. This is particularly important when the customer wants to include a right to terminate for convenience. In such cases, the customer will want to learn about any termination for convenience fees the bidder may require. The customer may also want to specify its expectations regarding the scope of transition assistance and which party will be obligated to pay for it.

These legal terms can be presented to the bidders in one of two ways. The customer can either provide the actual language it plans to use in the MSA or simply paraphrase the concept. The benefit of using the actual language, although it might be more time-consuming to draft and review, is that it provides the customer with the bidders’ exact position on an issue. If the customer opts to use “conceptual” language, it runs the risk that when the bidder marks up the actual language during the negotiations it will adopt positions that, although generally consistent with its RFP proposal, dramatically alter its position.25

25. A sample excerpt of a legal requirements table is included as Appendix 4E.
References

Perhaps the most useful source of information about a bidder’s experience is the bidder’s own customers. The references section of the RFP should ask the bidder to provide the names and contact information for references. Because references provided by the bidder are the ones that the bidder is confident will provide positive feedback, it is important for the customer to try and locate references on its own. For example, the customer might check vendor press releases to learn the identity of the vendor’s clients, or conduct on-line searches about projects the vendor has performed.

In order to obtain a more complete overview of the bidder’s past performance, some customers also ask for the names of customers that terminated agreements prior to the stated term or did not renew their agreements when they expired. Some bidders are reluctant to provide such information and will often cite confidentiality obligations that prevent them from doing so. Other bidders may assert that the experiences of these customers are unique, or that termination was the fault of the customer, and that they do not truly reflect the bidders’ capabilities. Still other bidders will respond that they do not have any such former customers. Nonetheless, if the customer can obtain such information, either from the bidder or from other resources such as external advisors, it may provide valuable insight into a bidder’s actual performance record.

§ 4:5.5 Process and Guidelines

The last section of the RFP—although sometimes included first—deals with the bid process itself. Bidders will need to know the timetable and guidelines for responding to the RFP, and to understand how the overall selection process will unfold. While a customer might want to keep the RFP process informal, the more formal the process, the better the customer will be able to manage the bidders and the more likely it will receive satisfactory bids. This level of formality can be achieved, in part, by including a clear articulation of the process in the RFP itself.

[A] Timetable

The RFP should provide a schedule of dates and deadlines for each action item during the RFP process. (Figure 4-1 below is an example of the key events that might be included in an RFP timetable.) To

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26. The questions that should be asked of such references are described in section 4:6.2[C].

27. Sample RFP Guidelines are included as Appendix 4F.
construct an RFP timetable, the customer should begin with its planned target implementation date and work backwards, budgeting time for vendor selection, diligence, contract negotiation, etc., until the RFP release date is determined. This approach allows the customer to schedule the rest of the deadlines in a manner that permits it to stay on schedule, while at the same time providing bidders with adequate time to prepare their bids. While the customer may want to accelerate the timetable for the RFP process, it should remember that the quality of the proposals it receives from bidders will be directly linked to the amount of time bidders are given to respond. Although the customer can also decide to lengthen the RFP process, it may be viewed as a sign of disorganization if it is unable to keep the process on its scheduled course.

**Figure 4-1**

**RFP Activity Timetable**

<table>
<thead>
<tr>
<th>ACTIVITY</th>
<th>DATE</th>
</tr>
</thead>
<tbody>
<tr>
<td>RFP Released</td>
<td></td>
</tr>
<tr>
<td>Intent to Bid Due</td>
<td></td>
</tr>
<tr>
<td>Rules of Engagement Call</td>
<td></td>
</tr>
<tr>
<td>Deadline for Questions from Bidders</td>
<td></td>
</tr>
<tr>
<td>Distribution of Customer Responses to Questions</td>
<td></td>
</tr>
<tr>
<td>Bid Proposals Due</td>
<td></td>
</tr>
<tr>
<td>Presentations/Preliminary Diligence</td>
<td></td>
</tr>
<tr>
<td>Final Bidder Group Selected</td>
<td></td>
</tr>
<tr>
<td>Full Due Diligence</td>
<td></td>
</tr>
<tr>
<td>Supplemental Materials Required from Final Bidder Group</td>
<td></td>
</tr>
<tr>
<td>Evaluations Complete</td>
<td></td>
</tr>
<tr>
<td>Vendor Selection</td>
<td></td>
</tr>
<tr>
<td>Target Implementation Date</td>
<td></td>
</tr>
</tbody>
</table>
[B] Forms of Submission

Customers should specify a preferred or required format for bid proposals. Without such guidance, some bidders may provide separate responses to individual questions, while others may craft a single narrative covering all of the points, and still others may provide their responses in a spreadsheet format. While all of the required information might be included within each bid proposal, the task of comparing bids in a variety of formats will be exponentially more difficult than if the proposals had all been submitted in the customer’s required format.

The customer should also indicate the medium in which it wants the bids delivered. Today, despite the prevalence of email, many customers require that bids be submitted in hard-copy format, often with multiple copies. This saves the customer the time and expense of making copies and collating each bid. In order to allow for text searching and internal dissemination of the bids, customers should ask that hard copies be accompanied by electronic copies, either in CD-ROM, by electronic attachments to an email, or by other electronic file transfer means.

Instructions for proposal formats might state:

**Submission Format**

In order to be considered for selection, Bidders must submit a complete RFP. Each submitted bid must comply with all of the following conditions:

Proposals must be received by Customer on or before 5:00 P.M. Eastern Standard Time on _______. All proposals must be marked “Confidential” on the outside cover and sent to the attention of the Customer’s primary contact named below. Customer will not accept delivery of a proposal by facsimile. Proposals not received at the address specified in this RFP or that do not include the required number of copies in the specified format and by the time and date specified may be rejected.

One (1) copy of the proposal (marked “original”) is to be signed by an authorized representative of the Bidder. In addition, the Bidder is to provide two (2) identical hard copies of the proposal (individually numbered and marked “copies”), [along with two (2) CD-ROMs with the proposal] [along with an electronic copy sent via email to the address specified above]. All files should be saved using the original filename prefixed with the Bidder’s name or other identifier.

Proposals should be organized in the order in which requirements are presented in the RFP. It is also helpful to cite in your response the applicable paragraph to which you are responding and to replicate the text of the requirement as it appears in the RFP. The proposal should also contain a table of contents that cross-references the RFP.
requirements. Proposals that are not organized in this manner risk elimination from consideration if the result is that we are unable to locate your response to specific inquiries.

[C] Process Guidelines

The RFP should provide bidders with specific guidelines and parameters that govern the process and to which they must adhere during the process. While a customer might assume that many of these guidelines would be unilaterally adopted by bidders as part of their normal course of doing business, the guidelines provide the customer with contractual protection in the event that a bidder does not do so. Indeed, in order to ensure that these guidelines are enforceable, the RFP should state, at a minimum, that acceptance of the RFP constitutes acceptance of the guidelines. Some customers even require that bidders execute a form acknowledging that they have read the RFP guidelines and agree to abide by its terms.

[C][1] General Requirements

The following are illustrative examples of guidelines that customers might want to include in an RFP:

- Distribution of the RFP by the customer does not commit the customer to select any of the proposals it receives from bidders. Indeed, the RFP should state that the customer can withdraw or cancel the RFP at any time without any obligations to the bidders and that it is able to do so without disclosing the basis for its decision.

- The customer has the right to modify or amend the RFP procedures and guidelines at any time in its sole discretion. Note that a customer should exercise this right only if it is absolutely necessary, since it not only risks losing potential bidders who become frustrated by the process, but also may discourage bidders from participating in future RFPs if the customer gains a reputation as being difficult to deal with.

- Bidders acknowledge that their responses are binding and agree that such responses may be included as part of the definitive agreements into which the parties will enter if the bidder is selected. The customer may also require that bidders have an executive sign the RFP and make a representation that all statements are accurate and truthful.

- Bidders are prohibited from forwarding the RFP to any other suppliers, including strategic partners without the permission of the customer. This is particularly important in cases where bidders may want to combine forces to provide a joint bid, or
where the customer is aware that bidders may need to subcontract part of the required services in order to meet the complete set of requirements. Some customers will number each RFP packet that is distributed so that it can track the source of any improper disclosures.

- Bidders must bear their own costs in connection with responding to the RFP, and the customer will not reimburse them for any expenses, including participation in any in-person meetings.

- Bidders must agree that their proposals will remain valid for an extended period (e.g., at least 120 days after bids are due). Although nothing can prevent a bidder from simply withdrawing after it has submitted a proposal, building in this concept should discourage vendors from proffering a bid only to seek to modify it in the days or weeks that follow. This will allow the customer to review the bids without being concerned about unexpected modifications.

- Bidders will only have a single opportunity to bid and will not be allowed to submit a modified or supplemental bid after the specified deadline, unless permitted to do so by the customer (e.g., in cases where finalists are allowed to supplement their bids after a round of due diligence).

- The existence and terms of the RFP are the confidential and proprietary information of the customer, and the RFP may be used solely for evaluation and bidding purposes. Such language is often included even if the bidder was required to sign a non-disclosure agreement. The customer should also require that all copies of the RFP be returned, or require that the bidder certifies that all copies have been destroyed.

- Bidders are prohibited from issuing any press releases or other forms of publicity regarding the existence of the RFP or any information regarding their bidding intentions.

- Bidders may be required to present their proposals in-person as part of the RFP process.

[C][2] Ownership of the RFP Response

The RFP guidelines should also address intellectual property ownership of bid proposals. Ideally, from the customer’s perspective, the customer should retain all intellectual property rights in bids received. This allows the customer to take useful ideas from unsuccessful bids and convey them to the winning bidder for implementation. This approach also minimizes future disputes as to whether the customer or the bidder developed an idea that is embodied in a proposal.
However, customers taking such a position in an RFP should be aware of two potential risks. First, some bidders may not participate in an RFP if they are concerned about losing their valuable intellectual property through an unsuccessful bid. Second, some bidders may provide only general responses to certain RFP questions in order not to disclose any intellectual property that they might forfeit, leaving the customer without the level of detail it requires to evaluate the bid. Overall, determining which approach to take with respect to intellectual property ownership of RFP proposals is an important question that requires analysis on a case-by-case basis.

[C][3] Questions from Bidders

Most RFPs provide bidders with an opportunity to submit clarifying questions regarding the bid. However, the guidelines should specify the manner in which these questions must be submitted, and state that no other methods of inquiry will be accepted. This ensures a fair RFP process and prevents, e.g., a potential bidder from contacting individuals it knows at the customer in order to get “inside” information about the RFP. Bidders should be informed that all RFP questions, and the corresponding customer responses, will be distributed to all of the bidders. (Most customers will not disclose the identity of the bidder that asked a specific question.) Indeed, customers often conduct an open conference call for bidders a few days after the RFP has been distributed during which all bidders can hear the answers to the questions that have been posed. The customer should collect and organize the questions in advance so that no bidder is aware of the identity of any questioner. Such an approach will help ensure a level playing field, encourage potential bidders to submit bids, and increase the likelihood of a successful RFP process.

[D] Internal Processes at the Customer

An RFP will be only as successful as the customer’s internal controls to manage the RFP process. To that end, the customer should consider distributing internal guidelines to all relevant personnel regarding their conduct during the RFP process. Many of these guidelines will be the customer-side version of the RFP process guidelines that were provided to the bidders. For example, the customer should inform its employees that there is a specified process for bidders to submit questions, and that employees should not respond to any bidder inquiry that does not follow that process. These internal guidelines should also instruct employees not to provide third parties with copies of the RFP or with any additional information about the customer without the company’s explicit permission to do so.

28. See supra section 4:5.5[C].
Customers will find it useful to appoint an individual to serve as the RFP coordinator. This should be someone who is fully familiar with the RFP and the customer’s RFP processes. Typical responsibilities of the RFP coordinator might include:

- coordinating the distribution of the RFP;
- serving as the point-person for questions submitted by bidders, obtaining answers to those questions from within the customer, and then distributing the responses back to the bidders;
- coordinating the diligence process;
- communicating with the bidders;
- supervising the selection process; and
- generally managing the RFP timetable.

[E] Diligence by Bidders

The customer should also consider whether it will allow the bidders to conduct their own diligence of the customer’s operations and, if so, when such diligence will take place. Bidder diligence is important in any outsourcing transaction, particularly in large-scale or complex outsourcing engagements. The information gathered by the bidders will, in most cases, allow them to tailor their bids to the customer’s requirements. Such diligence might include:

- observing the customer’s operations and processes;
- meeting with customer employees to better understand the scope of services and the roles of various customer employees in rendering the services;
- analyzing cost data, particularly if there is a separate profit and loss statement (“P&L”) for the group to be outsourced;
- reviewing historical service performance so that SLAs can be fully evaluated;
- analyzing the customer’s technology platform and performance; and
- reviewing the personnel files of the individual employees that the bidder is being asked to hire in order for the bidder to determine what offers might be extended.

Since much of this information may be sensitive or confidential, a customer should consider allowing bidders only cursory diligence in the preliminary rounds. Once a final bidder group has been established, the customer can allow the remaining bidders to conduct a more robust review.
§ 4:6 Vendor Evaluations

Once the customer has received all of the bidders’ RFP responses, it must undertake the process of evaluating and comparing these responses, ultimately selecting the winning bidder. After bids have been submitted, the bidder-selection process typically progresses in three stages: oral presentations by the bidders, due diligence, and bidder selection. Not every customer will approach these stages in the same way. For example, some customers hear oral presentations and perform due diligence for each bid submitted. Other customers make an initial cut based on the written bids that were submitted and then proceed to oral presentations and diligence with the finalists.

§ 4:6.1 Oral Presentations

A customer should never select an outsourcing service provider based solely on the service provider’s written RFP submission. Rather, the customer should also require each bidder, or at least the finalist group, to make oral presentations. Such presentations give the customer a unique opportunity to gain valuable insight into the culture and personality of each bidder, and provide an efficient forum for the customer to ask follow-up questions about the written submission. To that end, the customer should request that those individuals who are likely to serve as the account executives or relationship managers if that bidder is selected attend the meeting.

The customer should provide bidders with considerable leeway in determining the scope and focus of their oral presentations. This will, in itself, give the customer insight as to what each bidder views as the key areas of the engagement and how it presents its company and its solutions. At the same time, however, the customer needs to provide the bidders with some direction as to the points it would like to see covered, including any specific questions it would like answered by individual bidders. Again, the focus should be on obtaining the best possible information from the bidders.

There are many possible ways to structure oral presentation sessions. Some customers prefer a free-flowing dialogue format, where the parties exchange their perspectives and walk through the bidder’s RFP response, while others opt to ask each bidder the same series of pre-planned questions so that they can draw comparisons between them. These questions might ask each bidder to explain with specificity how it would respond to various hypothetical scenarios—e.g., how would the bidder handle a change in law? The customer might also ask questions about the RFP itself—e.g., what challenges does the bidder foresee in meeting the customer’s expectations. While some bidders might not want to concede any challenges, many will prefer the opportunity to voice concerns at this juncture rather than proceed
with the engagement and at some later point raise concerns that existed all along.

After a general presentation by a vendor, it is usually beneficial for the group to break into smaller meetings, based on areas of expertise, to analyze that bidder’s proposals in greater detail. It is common for these meetings, often called “yellow-pad” sessions, to include break-outs for finance/pricing, technology, and (to the extent the bidders were provided with a form agreement or legal template as part of the RFP package) legal.

Customers should budget at least half a day for each bidder. This includes time for any large-group presentations, a Q&A session, and individual yellow-pad sessions. It also gives the customer time to meet after the presentations to debrief and evaluate the bidder. Such “post-mortem” sessions are critical, and they should be held while the bidder’s presentation is still fresh in everyone’s mind. Customers are sometimes surprised at how bidder presentations tend to blend together even after the first few. Customers will also find it most effective to schedule all bidder meetings over a concentrated period of time in order to facilitate the comparison of bidders.

§ 4:6.2 Due Diligence

[A] Overview

Conducting due diligence of each bidder being considered for an outsourcing project is critical and this process should not be viewed merely as a “check-the-box” exercise. The goal of the diligence phase is to determine whether a bidder is ultimately capable of providing the services at the level and cost that the customer requires, and to validate (or invalidate) the information that the bidder has provided in response to the RFP. It is imperative that customers do not conduct operational due diligence too late in the RFP process. A customer does not want to find itself in the position of being down to two or three remaining bidders only to learn that some or all of them are not viable candidates from an operational perspective.

Due diligence typically includes some or all of the following activities:

• visiting the bidder’s facilities and observing the bidder’s actual operations;
• interviewing the bidder’s management team and employees to get a sense of actual performance;
• reviewing reports of the bidder’s performance in other contexts;
• speaking with references; and
• reviewing a proposal with external consultants.
Customers should keep in mind that due diligence of offshore providers is likely to take far longer than diligence of domestic providers. Not only is the additional travel time required to reach many offshore locations a factor, but basic language barriers and cultural differences frequently mean that the diligence process simply takes longer. Customers may also find that providers in other countries have different operational and management structures than in their own country. The customer will first have to master these differences in order to conduct thorough due diligence. While there are few short-cuts to this stage of the process, many outsourcing customers will simply have to log the travel time and meeting hours necessary to scrutinize each offshore provider.

[B] Vendor Visits

Many customers find that one of the most productive steps in the due diligence process is conducting a personal visit to the bidder’s main operations center. Seeing the primary site from which a bidder provides its services gives the customer a first-hand sense of the bidder’s operations and its overall professionalism and often brings to life many of the statements that the bidder made in its RFP response, even revealing potential deficiencies. For example, an in-person visit to a bidder’s service center provides the most useful way for a customer to, in effect, audit the bidder’s security systems and observe how it physically protects its clients’ data and confidential information.

In addition to meeting with the bidder’s senior management and project executives, a customer paying a visit to a potential service provider will be well served by speaking with a cross-section of employees, particularly the ones actually performing the services. These employees can give the customer a sense of the bidder’s culture, its treatment of employees, and whether the bidder adheres to its processes and protocols, such as those relating to information security and confidentiality. Needless to say, the customer should try to be the one to select the employees to be interviewed since, given that option, the bidder will undoubtedly select those employees with a favorable view of their employer.

Finally, site visits provide the customer with a useful forum in which to discuss with the bidder any RFP responses that the customer thinks are ambiguous or require further clarification. For example, a customer may want to observe the service provider’s call center to see how it is structured and how it operates, or sit through a live training session to better understand the bidder’s written explanation of specific processes. In most cases, discussing these RFP responses in the bidder’s own offices will be more productive than requesting
additional written submissions or even discussing them during the bidder’s oral presentations.

[C] Interviewing Bidder References

Interviewing a bidder’s references is a useful source of due diligence information.\(^29\) Although, as a practical matter, some references will be more responsive than others, and some will not want to disclose information because it is confidential, seeing a potential service provider through the eyes of another customer can be particularly illuminating.

As noted above, reference contacts are typically provided by the bidder, so these references are likely to give glowing reports about the bidder. Ideally, a customer should interview references that have been customers for extended periods of time as well as relatively new clients. Long-time customers are likely to have a better perspective of the bidder’s performance, while a reference that has been a customer for only a short period of time can provide more recent insight into the bidder’s negotiation practices and its ability to provide for a smooth transition. Again, in order to get a more complete picture, customers should consider asking bidders to furnish as references any customers who terminated their relationships with the bidder. In the event that the bidder agrees to provide the identity of such customers, interviews should, of course, be conducted of these former clients to learn the circumstances of the early termination.

When interviewing all bidder references, it is critical that the customer not merely ask broad questions such as whether or not the bidder is delivering good services. Rather than performing a cursory interview, the customer should drill down to gain a more thorough understanding of the bidder’s capabilities and shortcomings. The following are examples of questions that a customer might ask in order to draw out more useful information from the bidder’s references.

- How long have you been a customer of [the bidder]?\(^30\)
- What business needs were you seeking to address?
- What is your company’s organizational structure and corporate culture?
- What has been your overall experience with [the bidder]?

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29. A sample Reference Request Form is included as Appendix 4G.
30. Note that this information might have already been provided when the bidder provided background data about each reference.
As noted, if the reference was provided by the bidder, it is unlikely that the reference will volunteer any negative feedback. The customer should therefore ask more detailed follow-up questions, such as:

- Why did you select [the bidder] to handle your outsourcing requirements?
- What was your experience negotiating with [the bidder]?
- What was your experience transitioning to [the bidder]?
- Has [the bidder] ever been in breach of its contractual commitments? Have you ever had a dispute with [the bidder]?
- What letter grade would you give [the bidder]?
- How has [the bidder] responded to any changes you have sought? How flexible has [the bidder] been in addressing your needs?
- What has been your most negative experience in dealing with [the bidder]?
- Have any of your expectations not been met by [the bidder]?
- Has [the bidder]’s performance been consistent over time, or have there been peaks and valleys?
- If you could change one aspect of [the bidder]’s performance to date, what would that be?
- How would you describe [the bidder]’s culture? How has it meshed with your own corporate culture?
- Does [the bidder] provide other services to you? (An affirmative answer might indicate that the reference trusts the bidder with a variety of its requirements.)
- Has [the bidder] ever made a pitch for other business from you that you rejected?
- What has been the turnover of [the bidder]’s employees during the course of providing outsourcing services to you?

[D] Visiting References

In evaluating bidders, some customers find it useful to visit the offices of a bidder’s customer in order to observe the bidder in action and to conduct an in-person interview of that reference. During such a visit, the customer might also try to get a sense of how the bidder’s employees operate within a client environment. The customer should be aware, however, that a bidder may insist on accompanying the customer on such a visit, so the response the customer receives on a chaperoned visit may not be as candid as one received in a one-on-one telephone interview.
[E] Independent Research

A customer can also obtain a great deal of due diligence information about a bidder by conducting its own research. The kinds of information a customer should seek include:

- any litigation involving the bidder;
- any negative press about the bidder relating to any of its activities, even those not directly related to outsourcing. This is important because performance problems in other areas can sometimes impact a bidder’s conduct in the outsourcing space;
- financial difficulties the bidder has faced, such as weak earnings reports or stock price fluctuations;
- recent large outsourcing engagements that the bidder has been awarded. While such an engagement will generally be viewed favorably, the customer should consider whether the bidder’s best resources and management focus will be devoted to that engagement, and not to the customer, in the coming months;
- any regulatory inquiries the bidder has been the subject of; and
- whether the bidder has announced any plans to offshore or otherwise to expand overseas into regions that might not meet the customer’s requirements.

There are a number of resources that the customer can rely upon to uncover such information, including corporate filings (such as annual reports and 10Qs), online searches, litigation databases, and general SEC searches. In addition, to the extent that it has not already done so, the customer should consult with its outside advisors, including law firms and consultants, to learn any information that they might have about the bidder, including its overall reputation in the industry.

[F] Financial Due Diligence

The financial health of the service provider can often be the difference between a successful outsourcing relationship and an operational disaster. All too frequently customers enter into outsourcing agreements without paying sufficient attention to the financial viability of the provider. These customers might be influenced by the dramatic cost savings the service provider can offer or the technology platform the service provider uses to deliver the services. As discussed in chapter 3,31 any financial distress of the service provider, and particularly a bankruptcy filing, can unleash a chain of events that

31. See infra section 5:3.4 for a discussion of bankruptcy.
will have a material adverse impact on the customer, which often cannot be remedied by a simple “termination in the event of bankruptcy” clause. Therefore, it is in the customer’s best interest to conduct due diligence on the financial stability of the service provider. This includes requesting the bidders’ most recent financial statements and/or annual reports, and asking bidders probative questions about their financial stability, both from a cash flow and balance sheet perspective. Financial due diligence might also extend to a more thorough evaluation of the bidder’s pricing proposal—specifically, understanding how the bidder arrived at its pricing model and whether there were any unique factors that contributed to that model.

§ 4:7 Final Selection Process

Armed with what is hopefully a wealth of information from the RFP responses and due diligence exercises, the customer is ready to begin the process of deciding which bidder will be awarded the outsourcing engagement. The vendor selection process essentially encompasses three steps:

1. assembling an evaluation/selection team;
2. establishing a scoring methodology and selection criteria; and
3. selecting a vendor.

A customer might think that this process will be relatively quick given all of the information that it has gathered to date; however, the reality is that the final selection process, particularly for complex transactions, can often take close to a month to complete.

§ 4:7.1 The Evaluation and Selection Team

[A] Assembling the Team

In assembling an evaluation and selection team, the customer first needs to determine who within its organization will participate in the bidder selection process and who will make the ultimate decision as to the winning bidder. Typically, the team comprises business leads with direct responsibility for the services to be outsourced; the individual who will most likely serve as the customer’s relationship manager to the service provider; members of the organization’s procurement team; and the appropriate representative of senior management, such as the Chief Financial Officer or Chief Technology Officer, based on the nature of the services to be outsourced. In some organizations, the selection team merely has the authority to make a recommendation to senior management, who makes the final determination. For very large outsourcing deals—especially ones that will transform
how the customer operates on a going-forward basis, or those involving a significant displacement of personnel—board approval may also be required.

Many organizations find it useful to include in the selection team individuals who were not part of the RFP process. This might seem counterintuitive, given the valuable insight gained from personal interaction with potential service providers. However, organizations sometimes find that team members who participated in the RFP process can have biases arising from such personal interactions, and that outsiders can conduct a more objective analysis.

[B] Input from Specialists

It often makes sense for a customer to bring in specialists from within the company to help evaluate specific aspects of a bidder’s proposal. For example, the customer may include in the team the individual responsible for business continuity within the organization to assess each bidder’s disaster recovery program. Specialists should vote on criteria in their field of expertise; not every member of the evaluation team will vote on every aspect of the bid. For example, in an HRO deal, it might make sense for the CTO to vote on which vendor has the best technology solution, but that expert should not have a say in which bidder offers the most competitive pricing or has the most attractive “compliance with law” program. Indeed, not only do specialists lack the expertise to opin on areas outside their particular fields, they may be biased in favor of the bidder that best meets the criteria they care most about.

[C] Lawyers and Outside Consultants

The customer may want to involve its outside specialists in the final selection process. Consultants can help evaluate the financial and services package being offered by each bidder and assess any proposed service levels. Lawyers can assist with comparing the bidder’s mark-up of the MSA or any legal terms and conditions that were provided for comment. In addition, all of these consultants will likely have had experience with other outsourcing transactions, and can provide insight into whether a bidder’s RFP response is consistent with what can be expected in the marketplace.

§ 4:7.2 Selection Criteria

The customer should establish the selection criteria for evaluating the bidders early in the RFP process so that the RFP questions and due diligence exercises are geared towards obtaining data that can feed into these criteria. For the customer that has not yet
articulated selection criteria, the end of the RFP process marks the point at which these criteria must be developed.\textsuperscript{32}

In general, selection criteria vary from project to project and depend heavily on the customer’s key areas of focus. Moreover, in many cases, customers find that new criteria reveal themselves during the RFP process. For example, in an HR outsourcing engagement, a customer may find material differences between bidders with respect to the quality of the remote access services that they can offer to the customer’s employees. While this might not have originally been an issue for the customer, it may find that these differences are significant enough that they need to be included in a list of selection criteria. In most cases, however, the selection criteria the customers apply at the end of an RFP process closely mirror those that the customer did list, or would have listed, at the start of the process. For example, a customer looking to move to a best-of-breed technology solution will, of course, focus on the different technology platforms offered by the bidders, while one whose main focus is to consolidate different types of services with a single service provider (such as a suite of HR services) will consider the breadth of each bidder’s service offering. The key at this stage is for the customer to go back and reconsider its justifications for outsourcing in order to determine if its current selection criteria are still consistent with these justifications.

Customers are best served by first establishing general subject areas and then focusing on specific sub-topics listed within each of those areas. For example, in establishing its selection criteria, a customer might identify “the bidder’s technology platform” as a general area and specifically focus on the following specific sub-topics:

- the functionality offered;
- whether the platform was developed by the bidder or relies heavily on third-party applications or resources;
- the size and strength of the bidder’s IT team and the resources it has committed to maintain the platform in the future;
- the commitment of the bidder’s management and overall culture to support ongoing technology improvements;
- whether the platform is considered current with industry standards;
- whether the platform has recently been released and, if so, whether any other customers have been on the platform for a reasonable length of time;

\textsuperscript{32} A sample set of evaluation criteria is included as Appendix 4H.
• the number of times each year that the bidder updates the platform, and whether the bidder has any planned upgrades or new releases in the near future;
• the ease with which the bidder’s platform can be integrated with the customer’s own systems, including whether the customer will need to purchase any additional equipment or make other capital improvements to use the bidder’s platform;
• whether the bidder’s platform is static or provides a dynamic base off of which the vendor can easily expand or modify its functionality;
• the extent to which the platform can be easily customized to meet the customer’s specific needs;
• whether the platform has experienced a high failure rate or material errors, as reflected in error logs provided during the diligence process;
• the physical and data security processes used to protect the platform;
• the bidder’s ability to meet or exceed the customer’s proposed service levels (e.g., the speed of transaction processing); and
• the robustness of the bidder’s disaster recovery program, including whether it is consistent with the customer’s own internal requirements and can easily integrate with what the customer requires in other areas.

Some customers communicate their criteria to the bidders so that they fully understand the key factors the customer is considering in evaluating service providers. Other customers feel that providing this information means bidders will artificially tailor their responses to highlight these criteria, and that a customer is better served by having the bidders “go in blind.”

§ 4:7.3 Potential Pitfalls

Although the bidder evaluation process should be relatively straightforward, customers need to be aware of a few potential pitfalls and the steps they can take to avoid them.

Designate a separate evaluation team. While designating a separate evaluation team may not always be practical, customers should be aware that evaluators who also select the final bidder can have preconceived notions about which bidder will prevail. Using separate teams helps minimize such biases.

Do not solely rely on past experiences. Customers should direct the evaluation team to make its assessment based on actual information gathered during the RFP process. A customer is not well served if an
evaluator gives a bidder high scores in an area such as technological capability—even though the bidder’s RFP proposal does not bear this out—simply because that evaluator knows from prior experience that this particular bidder is strong in that area. While in some cases this may mean that a bidder is being penalized because its RFP was not drafted clearly enough to highlight its capabilities, this risk is well worth taking in order to avoid a situation where the evaluator’s prior positive experience is not, in fact, reflective of the bidder’s current and actual capabilities with respect to the project on which it is now bidding.

Exercise a healthy degree of skepticism. The evaluation team should not be oversold by a bidder’s proposal. All bidders want to present themselves in the best possible light and so will emphasize their capabilities and gloss over their weaknesses. Evaluators should be diligent and look to pick up on weaknesses or omissions in each bidder’s proposal. Without measured analysis, evaluators are likely to give every bidder high marks.

Study each bid carefully. Bidders will have chosen their words carefully, providing honest responses but at the same time avoiding difficult questions. The team should make sure it has received complete responses to each of the questions in the RFP, following up where it believes a bidder has side-stepped an issue.

Evaluate candidates without bias. If a bidder is strong in an area that is important to the customer (e.g., pricing), it will be tempting for the team to give that bidder high scores across the board. A bidder that is willing to provide services at a lower price point than the competition will score high with respect to its pricing, but the selection team should not let that high score influence its scoring in areas such as technology solution, strength of management, or overall ability to deliver the services.

Normalize the bids. Because each bidder is likely to respond to the RFP using terminology or methodologies that are unique to its particular organization and culture, the evaluation team faces the challenge of “normalizing” the bids across a common nomenclature so that all the bids can be meaningfully compared. This process requires a careful reading of each bidder’s response and may also entail clarification calls or emails to better understand each bidder’s intent.

Be willing to acknowledge the RFP was poorly drafted. If the RFP has not yielded the proposals the customer expected, it may be because it was poorly drafted. For example, if the description of services is drafted ambiguously, bidders’ service proposals may not adequately capture how those services will be performed. Where the evaluation team suspects poor drafting is to blame for incomplete or inadequate bidder proposals, it needs to be prepared to go back to the RFP management team and suggest that, rather than evaluating the bids
at this juncture, they should provide supplemental information to the bidders and ask them to recast their proposals. This situation is far from ideal, but it is better than performing an evaluation based on incomplete proposals.

§ 4:7.4 SWOT Analysis

As part of its evaluation of potential service providers, a potential outsourcing customer may find it useful to undertake a “Strengths, Weaknesses, Opportunities, and Threats” analysis of the outsourcing project. Generally speaking, this so-called SWOT analysis involves determining a party’s objective and analyzing the internal and external factors that may impact that objective. A successful SWOT analysis is one that yields new strategic thinking about the outsourcing objective. Specifically, an organization considering outsourcing will evaluate its own attributes and those of potential vendors that are likely to help achieve its objective (“strengths”); those attributes that might prevent it from achieving that objective (“weaknesses”); any external conditions that will be beneficial (“opportunities”); and any external conditions that might prove detrimental to achieving the objective (“threats”). External threats can include areas such as changes in economic conditions, technological changes, changes in the law, as well as cultural and language differences with respect to offshore outsourcing.

More than just capturing areas that a company may already be analyzing, a SWOT analysis provides a framework within which the company can analyze these factors, forcing the company to consider whether an objective is, in fact, achievable. Once a company decides to move forward with a transaction, a SWOT analysis helps the company stay focused on playing to its strengths and opportunities while protecting against its weaknesses and external threats.

To help identify possible legal risks or threats, a company may ask lawyers to contribute to the SWOT process. A lawyer can highlight unusual legal requirements in a specific jurisdiction, explain how these legal issues will have a practical impact in areas such as risk allocation or cost-savings, or help create a beneficial tax structure.

While many feel that a SWOT analysis is useful, some companies feel that it over-simplifies a strategic business process by classifying each factor into a positive or a negative. According to this criticism, a SWOT analysis does not capture the nuances of numerous factors that cannot clearly be classified as a strength or a weakness.

33. See infra section 4:6.3 for discussion of the use of SWOT analysis in the vendor selection process.
§ 4:7.5 Scoring

As the customer evaluates each bidder’s performance, it will want to establish a formal scoring methodology so that it can score each bidder’s response and weigh and compare the differences. Some customers do not bother with a formal scoring methodology, opting instead to engage in an internal dialogue to determine which bidder provides the most attractive offer. This approach can be useful where:

- the outsourcing engagement is relatively straightforward and there is not a wide range of criteria to evaluate;
- there are only two or three bidders and it is relatively easy to distinguish their RFP responses;
- the ultimate evaluation has come down to a comparison of intangible criteria rather than “hard facts”; or
- the customer does not require a formal selection process for audit or other internal review reasons.

In all other cases, some form of scoring should be used to select a winning bidder.

[A] Weighted Scoring Tables

Where the customer chooses to apply a more formal scoring methodology, one common approach is to use a system of weightings. Under this approach, each criteria is assigned a weight, and then the selection team is asked to score the bidders on each criteria. A bidder’s “final” score for each criteria is the product of the weight assigned to that criteria and the score the bidder received.

Weightings are typically assigned in one of two ways: (a) each criteria is assigned a percentage, with the total of all criteria adding up to 100%; or (b) criteria are evaluated using a whole-number system (e.g., 1 to 10), where the number assigned reflects the relative importance of the criterion to the engagement. In order to make it easier to conduct comparisons and build models, some customers require that the total weight must equal 100. It is best to assign weightings at the beginning of the RFP process so that these designations are as objective as possible and not influenced by the responses submitted by individual bidders. Indeed, while the weightings might shift somewhat at the end of the RFP in response to the customer’s realization that certain areas are more (or less) important than it expected, customers often find that their initial instincts were the best barometer of how to assess the different bids that are received.

Once these weightings are finalized, members of the selection team are asked to score each of the selection criteria. This scoring system can be based on any numerical or alphabetical range that makes logical business sense. Typically, customers score selection criteria using a
1-to-5 range. Where it is necessary to make finer distinctions between the bidders, a 1-to-10 range can be applied. Some customers opt for a letter-grade ranking (A, A-, B+, etc.), but this approach can make totaling up a bidder’s scores difficult. Once weights are assigned and team members have scored each of the selection criteria, totaling the scores is simply a matter of multiplying the weights by the score and adding the results.

Figure 4-2 is an example of scoring using a whole-number weighting system and a 1-to-5 scoring range. In most cases, each of these criteria would comprise many sub-criteria that had also been similarly evaluated, weighted, and scored in order to arrive at this final table.

### Figure 4-2

**Weighted Evaluation of Selection Criteria**

<table>
<thead>
<tr>
<th>Selection Criteria</th>
<th>Weight (Importance to Engagement) (1–10)</th>
<th>Bidder Score (1–5)</th>
<th>Criteria Score</th>
</tr>
</thead>
<tbody>
<tr>
<td>Management Commitment</td>
<td>10</td>
<td>4</td>
<td>40</td>
</tr>
<tr>
<td>The bidder’s commitment to provide the services, meet or exceed all requirements, and develop and maintain a good business relationship with the customer.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Service Levels</td>
<td>10</td>
<td>4</td>
<td>40</td>
</tr>
<tr>
<td>The extent to which the bidder is willing to meet or exceed the customer’s proposed service levels.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Service Offering</td>
<td>10</td>
<td>3</td>
<td>30</td>
</tr>
<tr>
<td>The completeness of the services proposed in relation to the customer’s expressed requirements.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Service Quality</td>
<td>10</td>
<td>4</td>
<td>40</td>
</tr>
<tr>
<td>The likelihood that the bidder’s solution will assure consistently high quality service.</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

34. It also is very useful to include references to the page number within the RFP where the customer covered the criteria being evaluated in order to allow evaluators or the selection team to locate quickly the underlying materials that went into the scoring.
<table>
<thead>
<tr>
<th>Selection Criteria</th>
<th>Weight (Importance to Engagement) (1–10)</th>
<th>Bidder Score (1–5)</th>
<th>Criteria Score</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Bidder Viability</strong></td>
<td>9</td>
<td>3</td>
<td>27</td>
</tr>
<tr>
<td>The bidder’s size, financial stability, industry track record, and capacity to provide the resources to deliver the services over the required time period.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Technology Solutions</strong></td>
<td>8</td>
<td>4</td>
<td>32</td>
</tr>
<tr>
<td>The quality and flexibility of the bidder’s technology platform in relation to industry standards.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Flexibility</strong></td>
<td>8</td>
<td>5</td>
<td>40</td>
</tr>
<tr>
<td>The bidder’s ability and willingness to adjust to changes in the customer’s business requirements, size and business model over the term of the Agreement.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Experience in Providing Comparable Services</strong></td>
<td>7</td>
<td>3</td>
<td>21</td>
</tr>
<tr>
<td>The bidder’s specific experience and demonstrated ability in providing the services to companies on a scale and/or complexity comparable to that described in the RFP.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Technical Competence</strong></td>
<td>7</td>
<td>3</td>
<td>21</td>
</tr>
<tr>
<td>The bidder’s demonstrated ability, over time, to support a large environment, and experience in migrating customers to an outsourced environment.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Agreement Terms</strong></td>
<td>7</td>
<td>5</td>
<td>35</td>
</tr>
<tr>
<td>The bidder’s willingness to meet the customer’s key contract terms.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Transformation</strong></td>
<td>6</td>
<td>4</td>
<td>24</td>
</tr>
<tr>
<td>The bidder’s plan to transform the current environment by leveraging new technologies and designs while maintaining operational integrity and availability through the use of effective project management techniques.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Staff Development and Retention</strong></td>
<td>6</td>
<td>3</td>
<td>18</td>
</tr>
<tr>
<td>The bidder’s commitment to retaining transferred employees as demonstrated by employee retention/turnover data, and training and development investments over the past year.</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

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[B] Value Equations

Another formal scoring methodology is the “value equation”:

\[ \text{Value} = \frac{\text{Performance}}{\text{Price}} \]

In this equation, the numerator “Performance” typically represents all non-price scoring, such as scope of service offering, technical competence, experience, and willingness to agree to terms that have been provided. In assigning a “Performance” value (e.g., on a scale of 1 to 100), the higher the number, the better the performance. The price metric in the denominator represents the score given to the bidder’s pricing proposal (e.g., on a scale of 1 to 5), where the lower price, the lower the score.

Thus, if an evaluator scores a Bidder X’s performance as 86 and pricing as 4, Bidder X’s overall value score (“Value\(_x\)”) would be:

\[ \text{Value}_x = \frac{86}{4} \]

\[ \text{Value}_x = 21.5 \]

If that same evaluator gives Bidder Y a performance score of 60 and a pricing score of 2, Bidder Y’s overall value score would be:

\[ \text{Value}_y = \frac{60}{2} \]

\[ \text{Value}_y = 30 \]

The benefit of value scoring is that it reduces several different scores into a single number, making for easy comparison of bidders. However, some feel that value scoring places an inordinate amount of emphasis on price. For example, in the comparison above, looking at just the final value scores, Bidder Y outscores Bidder X 30 to 21.5, even though Bidder Y had a much lower performance score (60, compared to 86). Some customers address this discrepancy by scoring pricing using the same scale as performance. Thus, if performance is scored on a scale of 1 to 100, pricing will also be scored using that same scale (again, with 1 representing the lowest possible price).

[C] Harvey Balls

Another common scoring methodology, so-called Harvey Balls, first developed in the 1980s by Harvey Poppel of Booz Allen Hamilton, uses circles with various degrees of shading to indicate a bidder’s score
for a particular evaluation criteria. The balls range from empty (the lowest possible rating) to completely shaded (the highest possible rating), with balls of ¼, ½, and ¾ shading to indicate the quality levels in between.

The benefit of the Harvey Ball chart is that it provides a quick and easy-to-read graphic representation not only of each bidder, but also of each category being analyzed. Consider Figure 4-3 below, a sample RFP analysis of four bidders that uses Harvey Balls to score each bidder in seven criteria. The customer has considered bidders with varying degrees of experience and has obtained a good range of price proposals. However, the fact that each bidder has provided a less than satisfactory response to the legal provisions contained in the RFP might suggest that the customer has adopted legal positions that are unrealistic.

**Figure 4-3**

**Harvey Ball Evaluation of Selection Criteria**

<table>
<thead>
<tr>
<th>Experience</th>
<th>Price</th>
<th>Technology</th>
<th>Legal</th>
<th>Viability</th>
<th>Geography</th>
<th>Overall Impression</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bidder W</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>☀</td>
</tr>
<tr>
<td>Bidder X</td>
<td>☀</td>
<td>☀</td>
<td>☀</td>
<td>☀</td>
<td>☀</td>
<td>☀</td>
</tr>
<tr>
<td>Bidder Y</td>
<td>☀</td>
<td>☀</td>
<td>☀</td>
<td>☀</td>
<td>☐</td>
<td>☐</td>
</tr>
<tr>
<td>Bidder Z</td>
<td>☐</td>
<td>☐</td>
<td>☐</td>
<td>☐</td>
<td>☐</td>
<td>☐</td>
</tr>
</tbody>
</table>

A Harvey Ball analysis does not aggregate the different scores into a composite. Rather, it provides a quick reference tool for reviewing and making decisions about different aspects of the bids. For example, for the customer for whom a lack of experience is a non-starter, the Harvey Ball chart above would quickly reveal that Bidder X and Bidder Y need to be eliminated from consideration. For another customer, the same chart might show that Bidder X’s strong technology and appropriate geographic location override its lack of experience.
It should be noted that many customers find any scoring, regardless of the methodology, to be an unsatisfying conclusion to the RFP process. The selection of a service provider cannot be reduced to a pure quantitative process or mathematical formula that spits out the “right” service provider to select, where a bidder that scores a 97 is selected over the bidder with a score of 93. Raw number comparisons may not necessarily provide real insight into a bidder’s service offerings and often cloud the judgment of the selection committee. Similarly, a “total number ranking” glosses over what might be important distinctions between bidders. For example, a bidder with a high price might score very low in the finance category but slightly higher in enough other categories to carry the day in terms of overall score. In other cases, bidders might have very similar proposals, but one bidder will come out ahead because it scored far better in relatively unimportant criteria. While weighting will catch some of these outlier cases, it surely will not catch them all.

For these reasons, many customers choose not to rely solely on scoring, preferring instead an approach where scoring charts are just one more piece of information to be considered during the evaluation process. Indeed, the most important benefit of the scoring approach may be that it requires the selection team to make some hard decisions about which criteria are the most significant. This can include criteria that just cannot be assigned a number value, such as the qualitative “feel” a customer gets for each bidder based on interactions with the bidder’s references and the bidder itself.

Finally, scoring charts can be an essential part of the RFP process when these numbers are required by internal audit or by the organization’s procurement group. A selection committee may even need to justify in some cases why it did not select the vendor that presented the best overall score. And, in the event the relationship with the service provider needs to be terminated, scoring charts will prove useful in analyzing whether the service provider’s shortcomings should have been discovered during the RFP selection process—information that will help the customer avoid a similar problem in the future. For these reasons, some customers should preserve all charts and documents that relate to evaluation and scoring, as well as all other records from the selection process.

§ 4:8 Negotiating with Two Bidders

In some large outsourcing transactions, the customer will narrow the field down to two finalists and negotiate with each bidder simultaneously, selecting a winning bidder only when the negotiations are complete. This is done either by design or because the customer
simply cannot yet make a decision after the RFP process. By negotiating with two bidders, the customer will enjoy the benefit of gaining additional information and insight into the bidder’s culture, its management structure, how easily problems can be escalated and resolved, and how accommodating the service provider is willing to be to win the customer’s business. It also means that the customer does not have to guess what the MSA will ultimately look like or whether the bidder’s final pricing and service level models will reveal new terms or assumptions that did not come up during the RFP process.

Simultaneous negotiations with two bidders also allows the customer to play one bidder off of the other. The customer can go back and forth between the two bidders, raising the bar based on what the other bidder offered. A bidder is more likely to compromise if it is concerned that there is another bidder, perhaps literally on another floor of the building, that is willing to offer better terms. Such bidders may also be reluctant to assert that “no one in the industry would agree to such a demand” if they suspect that another bidder might have already agreed to that term.

Despite the benefits of negotiating with two (or even three) bidders simultaneously, customers should be aware of certain downsides with this approach. First, the dual-negotiation approach can be incredibly time consuming and resource draining on the customer’s outsourcing team. While negotiating with two bidders at the same time will be quicker than negotiating with each bidder separately, the negotiation period will be extremely intense and effectively require that team members forego their other responsibilities during this period. While some customers set up two separate negotiating teams in order to relieve the team’s burden, the reality is that in most cases the same key individuals will need to participate in both sets of meetings since they have the business and/or legal background necessary to make concessions or take hard-line positions on discrete issues.

Simultaneous negotiations also require concentrated periods of senior management attention that, as a practical matter, might not be available to the negotiating team. Customers that engage in such negotiations find that they have far more meetings and conference calls than they do during one-party negotiations, since they are constantly assessing and reassessing which bidder is offering the better package. This means more frequent open-issues charts, comparative spreadsheets, and escalation of high-level issues to senior management. Indeed, the customer negotiating with two separate bidders at the same time may find itself simply “lost in the weeds”—inundated with information as it tries to evaluate the bidders’ respective positions.
The customer also faces the challenge of keeping both bidders interested and engaged until a final decision is made—an endeavor that can be particularly tricky if one bidder has become the clear favorite before the decision is announced. Once a bidder learns that its competition is no longer receiving serious consideration, the bidder is likely to begin adopting harder-line positions on issues. Similarly, a bidder that begins to sense that it is not going to win the bid and is merely being used as a stalking horse may become less responsive to customer inquiries and less interested in participating in negotiations.

§ 4:9 Pilot Projects

Another alternative that a few companies adopt before making a final vendor selection is to enter into a limited pilot project with a preferred provider. This approach is sensible: (a) when the project is sufficiently large to warrant a pilot project, (b) the customer is not fully convinced of the vendor’s capabilities (or there is some internal dissent regarding the provider) and (c) a pilot project can be rolled out without a tremendous investment of time or resources by each party. The ideal pilot project will highlight the service provider’s key capabilities—particularly in areas where there is doubt about the provider’s capabilities—and will become folded into the larger engagement if the provider is ultimately selected.

Companies that engage in pilot projects should make sure that they have established criteria for how they will evaluate the performance of the service provider at the end of a defined period. Without such criteria, customers can find themselves right back where they started from—namely, with an unclear path to making a final decision. The criteria should focus on those areas that are of greatest concern to the customer and that are easily quantifiable. For example, if the outsourcing project involves application development and maintenance, the customer may want to give the service provider two or three discrete applications to work on, and set clear guidelines as to how the finished work product will be assessed. These guidelines might focus on the quality of the provider’s work product or the speed with which individual tasks are completed.

Perhaps the greatest challenge that companies face when entering into a pilot project is determining the agreement that will govern the parties’ relationship. Needless to say, the parties will not want to enter into a full-blown MSA, since that will take far too long to negotiate given the parties’ limited needs and will include terms that are not necessary for the engagement. On the other hand, a short-form agreement might not provide adequate protection for the parties in the event that something goes wrong during the pilot project.
Parties sometimes address this dilemma by using a form procurement contract that they use in other contexts. While this agreement might not be ideal, it should cover the basic allocation of risk that most concerns the parties.

Vendor Selection Best Practices

☐ Engage in a competitive process such as an RFP to select a service provider.

☐ Get time and resource commitments from key stakeholders and be sure they appreciate that the RFP can be a time-consuming but critically important process.

☐ Remember that the internal assessment and evaluation process is as critical as the interaction with the bidders.

☐ Draft clear and detailed RFPs so that the responses provide an accurate snapshot of each bidder.

☐ Do not withhold information in the RFP that might impact the bidder’s responses.

☐ Develop a bidder pool large enough so it can be whittled down to a few finalists, but not so large that it makes the process unwieldy.

☐ Include bidders of various sizes, levels of experience, and geographic locations even if you have a pre-conceived notion of the “ideal” provider.

☐ Specify a “preferred” approach in areas such as pricing or technology solution, but leave the bidders with sufficient flexibility to suggest alternative approaches.

☐ Set clear guidelines for the RFP process and disclose them to the bidders and to internal team members.

☐ Conduct independent due diligence of the bidders, including their references.

☐ Set clear criteria and scoring methods; do not become overly influenced by a single criteria.

☐ Do not merely focus on a bidder’s price; focus on whether the provider’s strength and capabilities are in line with yours.

☐ Be willing to conclude that outsourcing is not a viable alternative.