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Analysis of a Software Development Agreement

by Robert Kain

(c. 1987)

This is a brief analysis of a software development agreement between M, a purchaser, and G, a provider of computer hardware and software. The agreement is found in a compilation entitled "Software Contract Forms - 1987 Collection" compiled by the Software Licensing Practices Committee, Computer Law Division, Section of Science and Technology of the American Bar Association. The agreement includes the following sections: introduction, term, termination, services and system development, change of scope, purchase of equipment, non-exclusive agreement and confidentiality, ownership of completed system, representations and warranties, independent contractor, other agreements, modification of contract, forbearance and no waiver clause, choice of law, arbitration, agreement binding on successors, no partnership, assignment restricted, indemnification, failure to perform, limited system warranty and resale of the system. Attached to the agreement is an exhibit setting forth system specification and deliverables. Each of these sections are briefly analyzed.

The *introduction* or *whereas* clauses provide that M (purchaser) is desirous of retaining G (programmer) to perform certain services described in the agreement and G desires to perform these services in accordance with the agreement. The *term* clause states that the agreement begins on a specified date and continues until completion of the service or the termination of the agreement as set forth later.

The *termination* section states that either party may terminate if the other party breaches "any material term or condition" and if that breach remains uncorrected for 30 days following a written notice. Also M can terminate at any time if G fails to meet a milestone within 10 days of the specified date of the milestone. Upon termination, the parties have no further obligations except as set forth in the following sections: non-exclusive and confidentiality, ownership of the completed system, representation and warranties, indemnification and limited system warranty.

The *services and system development* section provides that in consideration or return for the fees set forth later, G will provide services and complete the work described in the agreement in order to develop and deliver the System including delivery of technical documentation. Monthly progress reports are required. G must initially develop a technical system design (herein design plan) including hardware and software specifications, performance specifications, narrative description of the system, and various other input and output descriptions. A specific time is set for delivery of the design plan. Thereafter, M has 10 days to accept. If M rejects the

design plan, the rejection must be in writing and specify the plan's deficiencies. G is to use its best efforts to revise the design plan and make it acceptable to M within the following 10 days. If M rejects the plan a second time, M has an option of repeating this procedure or terminating the agreement in writing.

Upon M's acceptance, M and G shall set milestones and completion dates for the development of the system. Unless the milestone and dates are put in writing and signed by both parties, the milestones do not supersede any provisions of the agreement. G shall deliver the completed system to M and install it no later than a certain date. M has 30 days to accept the system. If M rejects it, the grounds for the rejection must be given and G is to use its best efforts to make the system conform to the design plan and make it acceptable to M as soon as possible. M's rejection and grounds must be in writing. G shall continue to use its best efforts to conform the system to the plan and make it acceptable to M until M accepts or terminates the agreement.

G must provide a certain number of hours of *training* on the system to M over a certain time period. G is also to perform *remedial and preventive maintenance* for the system, but shall not charge M more than a set fee per year for the first two years after acceptance of the system by M. M has a right to terminate the maintenance agreement and G has a right terminate the maintenance agreement if there is a material breach of M.

The *fees* section of the agreement sets forth specific dates and specific amounts that M shall pay G. Further, the fees section includes a clause that if the verifiable, actual cost of developing the system exceeds a gross amount \$X, G shall invoice M for half of the cost exceeding \$X amount up to a maximum of a \$Y. M shall not be liable for such invoiced amount if M does not accept the system. G is to deliver to M monthly reports on G's progress on the system and G's expenses incurred in connection with the system. The agreement requires the reports to contain certain information.

The *change of scope* section provides for the contingency if M wishes to modify the system under development. These changes are to be in writing for any "additional services which alter, amend, enhance, add to or delete from the services and/or time and/or place of performance." G is to evaluate the change request in 10 working days. G's response must include availability of G's personnel and resources, impact on the completion date and changes in cost. G, in its sole discretion, may refuse to accept this change order. M must authorize the change request within a certain time period. G is not obligated to perform any additional services in advance of M's authorization. If G commits resources to the performance of the change request without prior written authorization, "it shall be presumed that performance of such modifications/change request will have no affect on the completion date." Any authorized change request by M modifies the agreement by adjusting the fees and completion date.

The agreement includes a *purchase of equipment* section wherein G is to purchase certain equipment in order to perform the services. G can sell this equipment to H (a third party) under certain circumstances.

The *non-exclusive agreement and confidentiality* section states that M recognizes that G provides other services to other businesses. The agreement does not prohibit G from doing this. Both G and M acknowledge that each has certain confidential information and trade secrets that may be divulged during the agreement. G and M agree to maintain the secrecy of the confidential information, not to use it except in performing the contract and not to disclose it to any third party unless that party has a need to know and is under a requirement of confidentiality. The confidential information does not include publicly available information.

The section regarding *ownership* of the completed system provides that G agrees, upon completion or "termination" of the agreement, for whatever reason or without regard to whether the system has been completed, to provide M, with one copy of all notebooks, data, information, source code, technical documentation and other material acquired or compiled by G with respect to the services or the system. G agrees to deliver to M assignments of a one-half interest in G's copyright and all other intellectual property rights in the system and materials. Both M and G have equal ownership rights in the system. Neither party has the right to license the system to a third party without the other party's prior written consent. A clause also relates to *future modifications* of the system and states that both G and M shall each own one-half interest in the modified or adopted system. A further clause enables G to use its own *proprietary software* programs.

The *representations and warranties* section provides that G represents and warrants to M that G will not "infringe any patent, copyright, trademark, trade secret or other property rights of any person." G also represents that no individuals or any other company involved in performing the services is under an obligation to assign or give any work done under the present agreement to any third party.

The *independent contractor* section provides that G is at all times an independent contractor and is not an employee or agent of M. The "*other agreements*" section states that the present agreement supersedes all previous agreements and overcomes any prior oral representations. The *modification of contract* section provides that no such modification shall be valid unless in writing and signed by the party to be charged with such modification. The *forbearance and no waiver* section provides that if either party does not do any particular act or neglects to do any particular act, that action shall not modify the agreement.

The remaining sections relate generally to legal points of law. For example, the *choice of law* section specifies which state contract law (e.g., Florida, New York) governs the agreement. An *arbitration* section specifies that any controversy or claim arising out of the contract shall be settled by arbitration. The "*agreement binding on successors*" section provides that the agreement shall inure to the benefit of the successors and assigns of M and G. The "*no partnership*" section provides that the agreement shall not be construed to be a partnership or a joint venture. A further section restricts the right of M or G to *assign* the agreement without the written consent of the other party. The *indemnification* section provides that G shall indemnify M for any loss, claim or damage to any persons or property arising out of the agreement, the system or the services if caused by the negligence or breach of G. A *failure to perform* section provides that G shall not be

liable for any failure or delay in performance due to an act of God, strike, accidents or other delays beyond the control of G.

The *limited system warranty* section provides G warrants that the services will be performed in a workmanlike manner and that for a period of 90 days following M's acceptance of the system, the system will perform in accordance with the technical system design. G will repair or replace the system during the 90 day period.

The last section relates to the *resale of the system*. At M's request, G shall cooperate with M in marketing the system for sale or license to third parties. G shall be available to install, maintain and support the system for M's customers and train those customers on terms to be negotiated.

As a formality, the agreement is signed by the president of both M and G.

This summary and analysis of the agreement between M and G is not meant to be exhaustive nor definitive. The agreement called for M to pay \$25,000 over a four month period. In view of the amount of money being spent by M, and the length of time for contract performance by G, it is recommended that both parties seek legal counsel to clarify the various terms in the agreement. If any SFICCA [South Florida Independent Computer Consultant's Association] member or other interested individual wishes to have a copy of this software development agreement, please write or call Robert C. Kain, Jr. at Robert C. Kain, P.A., 750 Southeast Third Avenue, Suite 100, Ft. Lauderdale, Florida 33316-1153, (954) 768-9002. Please refer to the ABA computer software development agreement on page 980 with your request.

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