

## COMPUTER SYSTEM MAINTENANCE AGREEMENTS - THINGS TO WATCH OUT FOR

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No software is perfect. All software will contain some errors and fixes are often necessary. Software maintenance agreements can have a number of functions. Primarily they will be to offer "fixes" to problems with the software, but they are also used as a means of updating the software and providing advice for customers unfamiliar with the software's operation and in need of technical or practical assistance. It is important to understand the scope of the services on offer and whether they correspond to your own business needs.

It is sometimes difficult to engage software and hardware owners in negotiation about the maintenance services to be provided. Small suppliers will often only accept one standard of maintenance (as they may not have the resources to offer bespoke services) and large suppliers may simply refuse to vary from their standard terms because they have the contractual clout to do so. It can be worth persevering though, especially where the system is business critical, as there may be some scope for compromise, for example, in the categorisation of "faults".

### 1 Scope of the Services

The type of services that a customer requires will vary widely depending on the purpose and business criticality of the relevant software or hardware. You should look for a detailed definition of the services to be provided to ensure that it covers all services that you are expecting. For example, would you expect to receive practical assistance or only response to technical queries? On a practical note, you should be satisfied that the supplier has both technical and personnel resources to meet the services agreed upon.

**Meaning of "fault".** One of the more important elements to be defined in a maintenance provisions is what the definition is of "defect" or "fault". It may be appropriate to have several categories of fault for which the speed of response/resolution reflects the level of severity of the effect of the fault. This could be described by reference to material or substantial failure to meet technical documentation, user manuals or a functionality specification.

**Response/Resolution times.** The levels of severity of fault should be linked to corresponding resolution and/or response times. While it might be acceptable for minor aesthetic concerns to be remedied in the next version of the software, you would often expect the supplier to fix major incidents (particularly where the software is business critical) in a matter of hours. In particular you should be wary of references to "response times" only, as these do not relate to "fixing" or "resolving" the problem, but merely acknowledging it.

**Maintenance hours.** Often a supplier will limit the hours in which the maintenance services are available. You should consider whether it is reasonable or practical for a major fault reported at 4.30pm on a Friday to be fixed only by, say, 10.30am on a Monday (if the resolution time is two business hours). Often for business critical software it is worth negotiating a 24 hour resolution service for the most severe forms of fault.

**Updates.** Whether you are entitled to new versions, updates or upgrades under (or in addition to) the maintenance fee should be clearly set out in the maintenance agreement. Please note that, in respect of software, often the terms of use of the updates etc will be set out in the licence agreement rather than the maintenance agreement. You will need to be aware of whether the supplier intends to continue to support superseded versions of the software. Often users may have good reasons for wishing to postpone upgrades and a balance needs to be reached between the user's ability to control and phase implementation of new versions of software and the supplier's desire to have all customers using the same product.

**Location.** You should consider whether all services will be provided remotely or whether access to the site of the software or hardware will be necessary.

**Exclusions.** The maintenance agreement will most probably list certain circumstances in which the supplier has no obligation to provide maintenance. These generally include, for example, where the customer (or its subcontractor) has made unauthorised modifications and faults caused by use other than in accordance with user manuals. You should consider whether these exclusions are reasonable in the circumstances.

## **2 Payment**

This could be in regular monthly, quarterly or annual payments irrespective of the amount of services used in a period or on time and materials basis. The latter can be very expensive. You should consider whether the model proposed is appropriate for you in the circumstances.

## **3 Service levels and service credits**

It is beneficial to ensure that the supplier commits to detailed service levels, for example, minimum response and resolution times and amount of downtime/unavailability. Failure to meet these levels should result in the supplier having to pay you service credits. This allows you to demand a high standard of performance and provides you with a proportionate mechanism for enforcement. Without service levels and service credits, you would need to seek remedies through legal claims for damages and/or termination of the agreement for material breach, which will not generally assist you or the supplier unless the situation is untenable.

## **4 Warranties**

In addition to offering warranties in relation to the standard of service to be provided, the maintenance agreement will sometimes cross-refer to the warranties in the software licence agreement or the hardware purchase agreement. Ideally the maintenance agreement will only commence after the warranty period in the licence or purchase agreement has expired. Additionally, the supplier may only offer certain warranties during the period in which maintenance services are paid for. You will need to ensure that the agreement deals with how warranties apply to replacement parts or modified code.

## **5 Limitation of liability**

It has been observed that liability limitations are often not considered as carefully in terms of maintenance as they are in purchase of hardware or licensing of software. However, if the software or hardware is critical to the customer's business, liability for defective services or failure to provide the services could be considerable. If the supplier will or may need to access the premises for the purposes of providing the services you should note that the limitation of liability for damage to property caused by negligence will take on greater significance than most software licences.

## **6 Infringement of a third party's rights**

Similarly to a software licence or hardware purchase agreement you should ensure that the supplier gives you protection in the event that the materials that the supplier provides during the course of the maintenance services (including new versions of the software) infringe a third party's rights including intellectual property rights.

## **7 Services from a third party in relation to software**

If you are entering into an agreement with someone who is not the owner of the software in respect of its maintenance, you should ensure that you are satisfied that the service provider has the right to maintain the software. Without a licence from the software owner (or a sub-licence from you) the service provider could be infringing the rights of the software owner. Please note that most licences prohibit modification of the software and it is rarer still for a software licensee to be given access to the source code of proprietary software. Even if the licence did permit this, you would still need to ensure that you have a right to grant sub-licences to third parties in order to involve another supplier.