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## CONTRACTING IN THE COMPUTER INDUSTRY

RICHARD L. BERNACCHI\*

The computer industry has grown dramatically in the past twenty years. Data processing systems have assumed an integral role in an increasing number of businesses. The installation and maintenance of these systems represents a substantial financial commitment on the part of the user organization, whether the items are purchased, leased, or licensed. It is interesting, therefore, to take a look at the contracting procedures usually followed in the computer industry, and to examine the role of the lawyer in shaping the development of legal standards in this area.

The contracting procedures currently followed in the computer industry do not reach the level of sophistication that contracting has achieved in other commercial areas. There are several reasons for this. Because of the technological complexities involved in data processing, most lawyers have hesitated to negotiate computer contracts. It should be recognized, however, that the kinds of problems present in contracting for data processing products are the same as those present in other areas of contracting. For example, the skills used in negotiating and drafting contracts for the construction industry or for the acquisition of other types of business products apply with equal force to the computer industry. Only the technological concepts involved differ from industry to industry.

The lawyer entering this field will quickly discover that those in the industry itself rarely agree upon definitions for technological terms. Thus, the lawyer's first task is to define data processing terms in language which can be understood not only by manufacturers and users but also by judges and juries in the event that legal review of the contract becomes necessary. This definition process is similar to the procedures used in drafting other commercial contracts.

Once commonly accepted definitions for technological terms have been agreed upon, it is necessary to develop standards that will protect

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the reasonable expectations of the parties. The typical data processing contract is deficient in several respects. For example, the contract usually has no specific delivery date for the products. Even if the vendor is operating under a projected timetable, what actually constitutes delivery of the goods is a perplexing question. Most standard form contracts state that delivery shall occur when the vendor gives notice that the equipment has been installed and is ready for use. The meaning of the term "installed," however, is open to debate. Although it probably means that the equipment has met some operational standard, that "standard" is not uniformly recognized throughout the industry.

The typical data processing contract also lacks any warranty that the equipment meets the manufacturer's published specifications. Without such warranties there are no standards against which to gauge the equipment's performance. Moreover, even if there are representations that the equipment meets the manufacturer's specifications, there are no assurances that it will meet the specific needs of the user for which the system was designed. In fact, one of the critical elements in the successful operation of the system, and frequently the motivating factor in the system's procurement, is the performance of the accompanying software equipment; yet many data processing contracts fail even to mention the application software.

These examples illustrate some of the inadequacies with current contracting procedures in the computer industry. It is the responsibility of the lawyer to upgrade those procedures in order to meet the needs of the computer user. Simply incorporating by reference the proposals, correspondence, and communications between the parties would do much to improve the legal position of the purchaser. Moreover, by establishing firm standards that would govern delivery dates, warranties, and software performance, satisfaction of the parties' reasonable expectations would be aided greatly. The key is to draft a contract that views the procurement process from the user's perspective. The user expects an entire system designed to meet his specific needs. The contract, therefore, should be a guide to performance; a means of identifying the specific steps to be met in the procurement process.

Any sophisticated installation of data processing equipment requires the development of a specific program for the individual needs of the user organization. This program may call for either the design and installation of an entirely new system or the conversion from an existing system to a new one. The best way to insure that the process will be

understood and performed by both parties is to specify in the contract the steps that are to be accomplished within given time periods. Compensation should be tied to the specific performance of each step in order to serve as an incentive to the vendor to complete performance. In addition, the contract ought to provide for practical remedies in the event of a breach. The objective of such remedies should be to establish a means by which the non-breaching party can meet his immediate needs without resort to the courts. For example, the contract might provide that in the event the manufacturer fails to deliver on time, the user has a right to buy time on another user's computer compatible with the one being acquired and to charge that time to the vendor. The entire area of providing creative and constructive methods by which the computer user's objectives may be accomplished has not yet been adequately explored by lawyers. It is an area, however, in which the lawyer is especially well equipped to play a meaningful role.

In conclusion, it is time for the legal profession to recognize that the computer industry is here to stay and to accept its responsibility to provide meaningful standards under which both manufacturers and users of computer equipment can operate. The industry's technological complexities are not so great as to prevent a good lawyer who has skill in negotiating commercial contracts from serving a very useful role. Once that fact is recognized, lawyers will find that there is no end to the challenging and interesting work available in the computer field.

