

# Performance tests

A robust service-level agreement can help to guarantee that a supplier's work meets expectations. Jimmy Desai identifies the seven features purchasers must remember

**When drawing up contracts for services, it is crucial for purchasers to define clearly what they expect of suppliers. This is often addressed in a service-level agreement (SLA), which sets out what the service includes and the required standards.**

Although mistakes in SLAs can be expensive for both purchaser and supplier, getting it right can lead to lengthy and mutually profitable purchaser-supplier relationships that deliver real competitive edge.

When drafting these types of contracts, you should cover seven areas.

## 1. Service requirements

Conduct a thorough audit of existing services. Sometimes the purchaser may be acquiring services from a third party. If this is the case, they may not have detailed information about service levels and targets.

However, if the purchaser can assemble as much information as possible relating to the services as needed at an early stage, it will be easier to explain the requirements and standards to a supplier. In addition, it will make agreeing and completing the SLA simpler and quicker.

The Supply of Goods and Services Act 1982 (as amended) requires the supplier of a service to carry it out with reasonable care and skill and, unless agreed to the contrary, within a reasonable time and make no more than a reasonable charge. However, purchasers and suppliers can amend how far, if at all, this applies in their SLAs.

## 2. Key performance indicators

KPIs cover the level of service provided. Some issues to consider when agreeing KPIs are that:

- There should not be too many indicators, otherwise monitoring them may take too long and not be particularly useful.
- They should be chosen and set at levels so that if they are all met, the purchaser will receive the service it requires.
- KPIs should relate to what is fundamental to the purchaser rather than setting them for all measurable aspects of the services.

## 3. Credits

The supplier may give the purchaser credits if it fails to meet defined KPIs. The legal position is that if credits are punitive rather than being calculated to properly compensate the purchaser for losses suffered, they could be legally unenforceable.

Laws such as the Unfair Contract Terms Act 1977 (UCTA) should be reviewed in order to ensure that the provisions of SLAs and the exclusions and limitations in them do not breach the act.

For instance, a provision that excludes death or personal injury due to a party's negligence will fall foul of the act and be void. Also, if the purchaser is contracting on the supplier's standard terms and conditions, then it is more likely the UCTA will apply.

There are a range of cases that should be considered when limitations on liability are being considered, including *St Albans City & District Council v ICL and Watford Electronics v Sanderson CFL* (see Law, 17 January 2002).

When drafting these type of contracts, it is important to distinguish between where service credits are an adequate remedy (for minor breaches) and where the service credit regime no longer applies (where losses have exceeded a certain amount and when ordinary contractual principles kick in).

However, these losses should still be subject to limitations of liability, which should be negotiated between the supplier and the purchaser. External advice should be sought on this.

## 4. Company buy-in

Some purchasers believe the SLA for, say, IT outsourcing projects should be negotiated only by the IT department. This approach could have unwanted effects for other departments and the organisation as a whole.

Therefore, to achieve organisational buy-in, the relevant input should be sought from the IT, finance and legal departments, together with any functions that will be affected by the SLA before it is completed.

## 5. Keep talking

SLAs often go wrong because the parties do not spend enough time talking about any problems they are encountering or only talk once problems have deteriorated too far.

Typically, there will be provisions in the SLA so that problems are escalated within set periods if they cannot be resolved by the staff working on the project on a day-to-day basis. A common saying is "get senior soon", meaning that disputes should be escalated to senior management fairly quickly rather than lingering on for a long time at ground level.

Provisions relating to mediation (for example, using the Centre for Effective Dispute Resolution methods), binding arbitration or going to court may be in the SLA. The options for resolving disputes should be examined carefully and set out in the contract.

## 6. Get external advice

External advisers who regularly deal with SLAs can often help to ensure that it covers all the relevant issues.

Sometimes external advisers are asked to provide proforma SLAs that the parties can amend to reflect their negotiations. This enables them to control spending on experts.

You should certainly consider using external advisers if:

- either party is unfamiliar with all of the concepts involved in SLAs;
- the services covered are high value;
- the services covered are business critical, such as IT systems.

## 7. Keep it simple

Agreements that are complicated or hard to follow are likely to fail. In addition, because SLAs are likely to change over the course of time to meet the parties' changing business requirements, there should also be built-in change control mechanisms to ensure that the SLA is flexible enough to cope.

### Checklist

Service-level agreements in law

Relevant acts

- Unfair Contract Terms Act 1977
- Supply of Goods and Services Act 1982

Relevant cases

- St Albans City & District Council v ICL
- Watford Electronics v Sanderson CFL.

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