

Q&A – COVID-19 Pandemic Contract Issues and Concerns: Part IV (Business Continuity Plans and Transition Assistance)

The COVID-19 pandemic has caused many disruptions in business operations. Many of our clients have been asking what they can do, prospectively through their vendor agreements, to minimize the types of business disruptions that occurred over the past few months. In this Q&A we will address considerations for minimizing the risk of unanticipated business disruption.

Question: What is a Business Continuity Plan and how can it help me manage an unanticipated business disruption?

Answer: A business continuity plan (BCP) is a plan that outlines how a business intends to continue its operations upon the occurrence of a force majeure event or other disruptive incident. It should map out the procedures to follow under such circumstances. The BCP should identify critical and non-critical suppliers, including potential alternatives, prioritize actions for personnel to take in the event of an unplanned disruption, and provide for active communication between personnel and with suppliers. You should test your BCP regularly and fix any issues that arise as part of the testing to ensure the BCP can be implemented quickly and effectively during an unplanned disruption.

Question: What can I do to ensure that my vendor is prepared to manage and continue to provide services throughout an unplanned business disruption?

Answer: In addition to maintaining your own business continuity plan (BCP), ensure that critical vendors have prepared and maintain a BCP to continue providing services despite an unplanned disruption such as the recent COVID-19 related disruptions. Discuss your vendor's BCP with them to ensure their procedures are consistent with your expectations and your own BCP. The COVID-19 pandemic has demonstrated that, oftentimes, BCPs were not designed to account for pandemics. Confirm with your critical vendors that their BCPs have been updated to account for the type of disruptions experienced during the COVID-19 pandemic.

Question: What should I be looking for in a vendor's business continuity plan or in contractual obligations relating to business continuity plans?

Answer: The content to be addressed by a business continuity plan (BCP) depends on the services the vendor is providing. One thing to look for is a satisfactory disaster recovery plan. A disaster recovery plan should contain information related to data back-ups, location of back-up sites, and metrics that sets forth acceptable recovery time objectives (RTOs) and recovery point objectives (RPOs). Your contract with the vendor should require them to ensure that the BCP is tested at least annually to ensure the BCP can be implemented effectively during an unplanned disruption.

Question: How can I minimize business disruption resulting from termination of an agreement with a vendor?

Answer: One way to minimize business disruptions associated with vendor transitions is to prospectively incorporate a transition services provision into the agreement with your vendor. The purpose of transition services is to require the vendor to continue to provide the services in accordance with the terms of the agreement for a predetermined period of time. This allows for a more seamless transition to another vendor (or an in-house solution) after the expiration or termination of an agreement.

The COVID-19 pandemic is and will continue to impact commercial parties and their existing contracts, as well as raise concerns about contracts being negotiated now or in the future. Bodman's attorneys are available to assist you as businesses adjust to this difficult time, please contact any member of Bodman's Enterprise Procurement Group if you need assistance. We will be providing frequent updates and additional FAQs as the situation develops. Bodman cannot respond to your questions or receive information from you without first clearing potential conflicts with other clients. Thank you for your patience and understanding.

ENTERPRISE PROCUREMENT PRACTICE GROUP	Jonathan P. Burleigh Chair 248.743.6012 jburleigh@bodmanlaw.com	Courtland W. Anderson 248.743.6063 canderson@bodmanlaw.com	Jonathan S. Berg 248.743.6061 jberg@bodmanlaw.com
	Katherine Razdolsky Rothstein 248.743.6010 krothstein@bodmanlaw.com	Alex E. Haney 248.457.3164 ahaney@bodmanlaw.com	Kyle W. Traver 248.743.6042 ktraver@bodmanlaw.com