

In-plant Graphics

Third-party Lease Review

Suppliers word leases for their own benefit. When your organization's lawyers review them, they seldom have your printing needs in mind. An independent expert can help.

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ONE OF the dilemmas in-plant printers have always faced is managing around the ironclad lease agreements forced upon them by capital equipment manufacturers—primarily the digital print engine suppliers.

This is not to suggest that any of these suppliers have delivered lemons or won't provide the expected maintenance support. Generally speaking, with ongoing maintenance, the basic equipment usually performs as expected. This is difficult to ascertain, however, as lawsuit settlements always include a nondisclosure clause hand-cuffing (or "mouth-cuffing") the printer to stop him or her from ever describing their problems with the equipment and the actual settlement features.

The number of lawsuits during the last decade has been increasing and may be surprisingly high to many *IPG* readers. These litigations are always initiated by the manufacturer against the private sector printer for failure to pay contracted fees. The printer, at its attorney's advice, puts the monthly fee into escrow until the problems are resolved or rectified. In short order, the manufacturer sues.

No Funds for the Fight

Very few public sector in-plants are allowed to follow this litigious course of action. The in-plants are forced to live with the suppliers' unfulfilled promises because the public sector does not have funds available to fight a legal battle. However, during the National Government Printers Association (NGPA) conference in 2005, more than one state printer representative described their successful efforts to keep a well known manufacturer off the bidding list for a year because of nonperformance.

This manufacturer's army of attorneys worked nonstop to get its client's name back on the qualified bidders list for the next round of bid solicitations. It was not a changed management philosophy that got them back on the list. It was relentless legal wrangling by the manufacturer against the state purchasing entity. This was a short-lived, though welcome, in-plant victory.

The tip of the iceberg of the problem is well known. For example, the problem consistently arises when volume unpredictably fluctuates, and the basic printing needs change before the life of the lease is up. The lease contract dictates fixed monthly or quarterly minimum charges regardless of lower volumes. Also, premium prices are levied above the all-inclusive charges when volume spikes back up the next period. Converting to the annual volume equivalent "is not possible."

Again almost all of the digital print manufacturers have historically and consistently introduced new equipment and/or software that is faster, cheaper and better than they locked their clients in on only a few months before. Upgrades are certainly possible, but never at a reduced price even when the upgrade sells for less money.

One of the most frustrating case studies was presented during the 2006 MFSA-NAPL Fulfillment Conference. A Philadelphia printer bought the unused and unopened branded toner supplies from a bankrupt competitor at a heavy discount. A manufacturer sued this entrepreneur because his contract stipulated that only toner purchased from that manufacturer was permitted.

The University of Central Florida's in-plant, which was responsible for managing the remote digital copier contracts throughout campus, came up with the best solution ever witnessed by this author. The in-plant manager split this three-year contract between the two top vendors. The resulting competition ensured timely response to service calls and faster implementation of new product offerings. (*See sidebar for full details.*)

While most every college and university could easily follow this UCF model with equally good results, many corporate entities may not have the economy of scale to take advantage of this "split-and-conquer" approach. Actually this article is intended to highlight an altogether different course of action that will benefit every printer, regardless of size. And that is the use of an independent third party expert to review each lease prior to its initiation or during the lawsuit due diligence if need be.

Leases Protect the Supplier

Often the equipment lease is written by the manufacturer's general counsel with the express purpose of protecting the supplier, locking in the customer and maximizing its revenue streams by whatever legal verbiage possible. Capital equipment manufacturers' legal departments go to great lengths to fine-tune this expertise.

Other times, equipment manufacturers do not choose to run their own leasing operations. They form joint ventures with international financial institutions, banks and independent leasing companies. These firms have full-time legal, credit, lease and asset management departments whose only business is leasing. These highly skilled lease professionals write iron-clad contracts that maximize financial returns for *their* benefit and that of their manufacturing partners. It is common knowledge, for example, that the financing arm of General Motors (GMAC) has always made more money on a margin basis than the auto manufacturer itself.

Virtually every printer turns these manufacturers' lease agreements over to their own general council for edit and review. The first problem is that these lawyers are virtually never experts in equipment lease law verbiage. They are generalists not specialists. And the most important problem is that these attorneys never understand the digital printing needs of their corporation and caveats borne from the dynamic unpredictability of the printing business.

Using an Independent Expert

The pot of gold at the end of the rainbow is finding a third-party leasing expert. This individual should not work for any leasing company, lease broker or equipment vendor. He or she should be able to quickly assess the printer's digital printing needs from a straightforward, though thorough, needs assessment survey. Then the expert should review the manufacturer's proposed lease for a multitude of phrases that turn out to be untenable "gotchas" that are most certainly not to the printer's benefit. Quite often the expectant buyer is not even aware of the interest rate, which, believe it or not, is occasionally exorbitant.

From this review a report is prepared listing vulnerable sections and clauses, and proposing more amenable alternate wording. The printer or purchasing agent can then negotiate with the supplier.

This in-house negotiation step is fraught with its own frustrations, as the supplier knows there are only days before the existing lease expires and the new one must go into effect or further usurious fees are enacted from the old lease. Automatic renewals, sometimes as long as 12 months, may be enacted if proper notification lease requirements are not taken. In other words, request the standard equipment lease from the supplier at the time they submit their RFQ response, which is 60 days or more before the old lease expires, or their bid is considered nonresponsive. (The game can be played both ways.)

Many printers find that the most successful methodology is to have this third party lease expert negotiate these new preferred terms for them. This is often done in a conference call with both the printer and expert talking to the manufacturers' lease department. This is the first time that the printer will discover a delightful surprise. (All other surprises described in this article have intentionally been horrific, though unfortunately too often realistic.)

The surprise is that the manufacturer's leasing department is often happy to negotiate the terms of the lease, particularly with another professional who understands what the gobbledygook actually means.

There are two other opportunities to negotiate a lease agreement after it has been signed and is in force. The first is during the due diligence of a merger or acquisition and involves the leases of the firm to be acquired. The second is a lease of a firm undergoing foreclosure. Under both of these circumstances the equipment manufacturers have been reported to be eager to discuss more amenable terms.

Finding An Expert

So where do you find this lease expert? One option is Independent Lease Review, of Bonner Springs, Kansas (www.review)