

Current Issues for Internet and Wi-Fi in Hotels and Restaurants: A Sourcing Lawyer's Dispatch from the Transactional Trenches

Marc Lindsey

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Presenter



- Marc Lindsey, partner
- Over 14 years of experience advising Fortune 500 companies on legal, commercial and strategic matters related to information and communications technologies
- Practice focus includes Internet technologies, outsourcing, cloud computing, managed services and telecom
- Systems engineer for GE prior to starting a career in the law

Agenda

- Introduction
- Sourcing Wi-Fi Services
- Attributes of a Modern Wi-Fi Services Deal
- Contract Negotiation Tips
- Heightened Legal Risks
- Questions

Introduction

Why offer HSIA?

- Basic guest high-speed Internet access (HSIA) has been a staple in hotels and cafes
- It's growing more common at restaurant and retail locations
- Traditional HSIA business drivers
 - Revenue from pay-per-use offerings
 - Keep up with the competition

New Opportunities

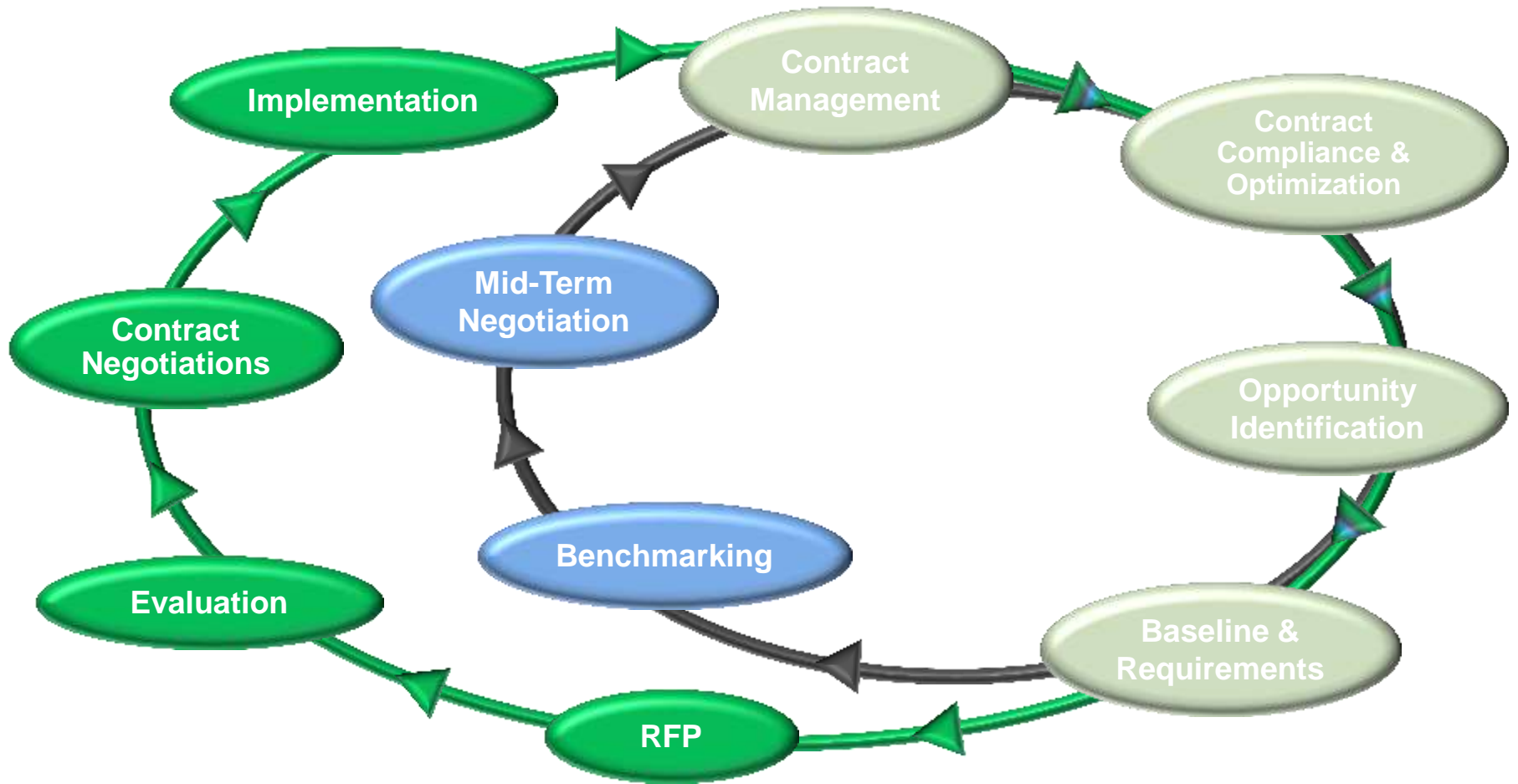
- Wi-Fi in our common spaces is now the norm
 - Consumers and the public generally now expect Wi-Fi everywhere they meet, lounge or lodge
 - Reliable Wi-Fi access is key to a quality guest experience
 - And most consumers want it for free!
- Ubiquity of Wi-Fi-enabled smart mobile devices creates new opportunities
 - Reliable and high-capacity wireless Internet access
 - Independent of carrier-provided data services
 - New back-of-the house mobile device apps
 - Mobile devices and apps that improve the guest experience
 - Mobile payments, kiosk apps, on-location service requests, location-aware advertising

New Opportunities

- Additional business drivers
 - Push users to targeted content via walled-garden “portal”
 - Increase foot traffic and time spent at the location, which could increase food/beverage and impulse purchases
 - Collect / analyze rich new data about customer behavior
 - Link free access to use of social network apps like Facebook
 - Track movements in and through the locations
 - Outsourcing to improve (short-term) cash flow – but you must respect the “law” of outsourcing economics
 - Share technology refresh costs with a new HSIA vendor

Sourcing Wi-Fi Services

Sourcing Plan



Picking the Right Service Model

- Do-it-yourself
 - Customer buys or leases the equipment
 - Design, deployment and installation performed in house
 - Day-2 tasks performed in house except . . .
 - Basic hardware device and software maintenance (*e.g.*, spare parts and RMSA support) usually provided by the manufacturer or another third party
 - Cabling / inside wiring
 - WAN services are either centrally procured or procured-per location

Picking the Right Service Model

- Let someone else do it for you
 - Managed services
 - Customer
 - Defines the WLAN requirements
 - Owns the equipment
 - Sets the strategic/technology direction
 - Vendor
 - Designs, deploys, and installs WLAN and authentication systems
 - Responsible for Day-2 activities
 - Fully outsourced with either revenue sharing or shared services model

Picking the Right Vendor

- When preparing to issue an RFP, pick 4-5 vendors; at least 1 will probably not submit a bid
- Vet potential bidders before including them in the RFP process
- Top Wi-Fi service providers
 - Leading full service vendors
 - AT&T Wi-Fi Services
 - Swisscom
 - BT and BT Openzone
 - Leading hospitality focused vendors
 - iBahn
 - GuesTek
 - LodgeNet
 - Other contenders
 - T-Mobile
 - Boingo

Impact on Related Contracts

- Adding Wi-Fi-based HSIA may
 - Impact future WAN spend/commitments
 - Require inside wiring improvements
- Inventory, and develop a plan to manage, existing contracts
 - Equipment maintenance/management agreements
 - Software licenses
 - WAN services
 - Building lease agreements
 - LAN management or desktop support outsourcing
 - Back-office / property management systems

Attributes of a Modern Wi-Fi Services Deal

Term and Commitment

- Contract duration of 3 years, with two 1-year optional renewals
 - Inverse relationship between term and enterprise customer satisfaction
- Minimum room, device or revenue commitments are disfavored
 - Vendors will build in volume floors, volume discounts, and early termination fees (ETFs) to get to the same outcome
 - If there are minimum consumption thresholds
 - Reduce your shortfall exposure with a comfortable cushion
 - Negotiate reductions in commitments when certain events occur (e.g., closing/consolidating locations, divestitures, technology migrations, general business downturn, RIFs, partial terminations, and SLA failures)

Pricing

- Unit prices – recurring charge based on unit rates multiplied by the number of in-scope resource units
 - MRC per room
 - Ignores the effect of occupancy and HSIA usage rates
 - Good for outsourced environments when revenue sharing is not desired
 - MRC per device
 - Low correlation between price and “outcomes”
 - Best for DIY and limited-scope maintenance services deals
 - MRC per help desk call
 - Rewards the wrong vendor behavior – revenues go up when the quality of the guest Internet experience goes down
 - Useful for help desk services contracts only

Pricing

- Revenue sharing
 - Vendor covers the costs for installing, operating, and managing the environment, and marketing the services to consumers
 - Billing and collection responsibilities vary by deal
 - Vendor and customer (either corporate or per franchisee) split the revenues
 - Revenue allocation varies by geographic region
 - It also depends on whether the customer or provider pays for the install and Wi-Fi gear
 - Circuit fees may be excluded
 - Customer may get a kicker for over-performance against revenue targets
 - ETFs are tricky because the vendor will want to recoup its investment
 - Audit rights and true-up mechanisms are critical
 - Cuts against the trend towards free Wi-Fi

Pricing

- T&M
 - Customer pays provider hourly/daily rates per FTE, plus incurred expenses
 - Vendors are not motivated to perform efficiently
 - Reliable budgeting can be difficult
 - Best used for highly skilled *ad hoc* consulting services

Pricing

- Non-recurring charges can add up
 - Site surveys or initial vendor site certifications
 - Program implementation and hand-off costs
 - MACDs
 - Equipment purchases, staging and configuration
 - Build/install costs for new locations
 - Convention work and conference facilities are often pulled out of scope and competitively bid

Benchmarking

- Benchmarking ensures that price and service quality are within acceptable market parameters
 - Top quartile and best-in-breed approaches are losing favor
 - Employ a reasonable approach to keep the deal in-market
 - Agree in advance on acceptable and independent benchmarkers (*e.g.*, ISG, ProBenchmark, Accenture, PwC, Deloitte), and allocation of benchmarking fees
 - Vendors will try to convince customers that prices should also go up if their deals are better than average
- Most favored nation clauses (“MFNs”)
 - May work for government entities
 - Not usually effective in the private sector

Value Enhancers

- Vendor hotspot programs
 - Vendors want to increase their Wi-Fi hotspot footprints by adding hotel and restaurant locations
 - Sweeteners for hotels and restaurants should be considerable
 - Monitoring and apportioning the additional hotspot-related costs is an essential T&C
 - For locations that charge for use, this will cannibalize your HSIA revenue base
 - Factor this into the provider's sweeteners
 - Build-in opt-out triggers if the revenue hit is too big
 - Conflicting expectations for joint customers can be hard to manage – whose customers are they anyway!

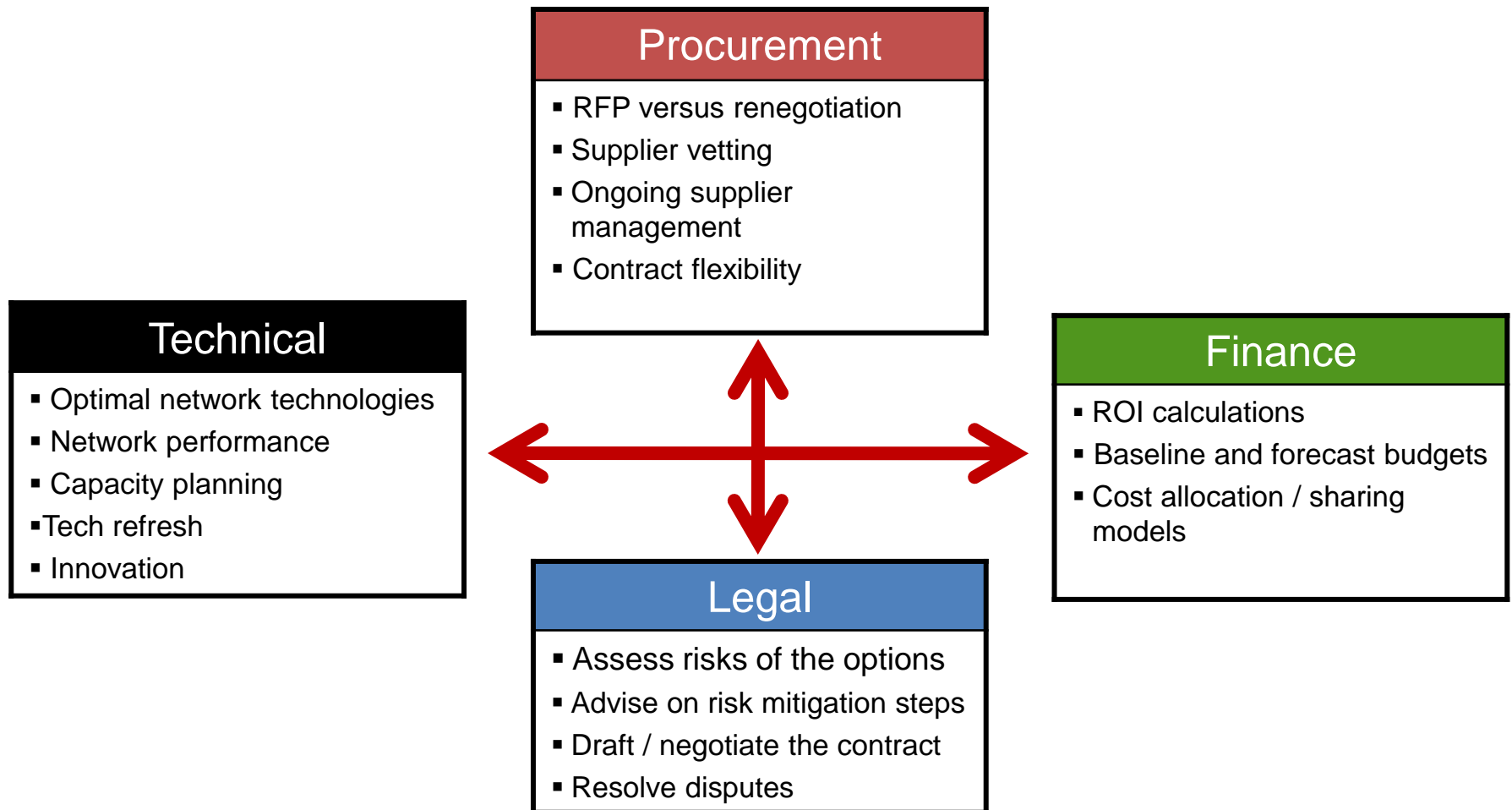
Value Enhancers

- The value of provider bundling
 - Full service vendors will want to leverage their WAN / Internet access offerings, and anything else to “win” business – should you consider it?
 - There will be “gotchas”
 - Counting the savings more than once
 - Coupling competitive Wi-Fi services rates with above-market-price WAN, wireless (etc.) services
 - Extending the term or increasing the revenue commitment in the network services agreement
 - Conditioning Wi-Fi services on the purchase of Internet access or other WAN services
 - What happens to the other services if the financially “dependent” services are cancelled!?

Contract Negotiation Tips

Manage the Negotiations

Coordinating the Multi-disciplinary Endeavor



The SOW

- For managed and outsourced Wi-Fi services deals, negotiating a solid SOW is critical to success
- Button up the SOW with key scope management clauses
 - How do I add, delete, move or change components in my WLAN?
 - What happens if the parties disagree whether something is “in scope” or “new stuff”?
 - Scope creep – a well defined and detailed change control procedure will help
 - Scope leak (*i.e.*, vendor claims expected work is out of scope)
 - How will technology refresh be handled?
 - Is it in the customer’s discretion?
 - Can the vendor demand a refresh or increase charges to support legacy hardware?
 - Support for the customer’s new technology initiatives
 - Include a “catch-all” to make sure that you won’t get charged for incidental services not expressly identified in the SOW

Service Level Agreements

- The SLA is the second most important document
- Deconstructing the SLA
 - The three distinct parts of an SLA
 - The metrics and minimum requirements
 - The remedies
 - Pay credits
 - Fix it
 - Let the customer go
 - The conditions

Service Level Agreements

- Typical SLA metrics
 - Service and component availability / uptime
 - Incident response
 - Incident resolution (a/k/a MTTR)
 - Provisioning and MACD timeliness
 - End user connection rate success
 - Service desk performance (avg. speed of answer and call abandonment rate)
 - End-user satisfaction survey results

Service Level Agreements

- Troublesome conditions
 - “SLAs are the sole and exclusive remedies”
 - Eliminate this, but
 - Carve out rights associated with material breach
 - More on credit caps
 - What is the financial incentive once the credits are exhausted?
 - Limit how caps apply
 - Use cap exhaustion as a trigger for other remedies
 - Breach two (or more) SLAs but only one remedy applies

Infrastructure Considerations

- Equipment
 - Decide who will pay for and own the equipment
 - If provider owned, build in a right to buy the hardware (at NBV preferably) when the deal ends
 - If customer owned, drilling down on technical specs may be necessary
 - Use only standard customer-approved equipment and configurations
 - Routine site audits to confirm WLAN meets spec and standards
- Cabling and inside wiring
 - Don't underestimate the cost and hassle
 - Clearly define whose responsible for the cabling plant
 - Customer should own the cabling plant at the end of the deal
- Include per-location acceptance rights, both for the equipment and the overall WLAN once integrated

Exit Strategies

- Termination for convenience
 - Most vendors require an ETF of some sort
 - The ETF should not be unduly punitive, but also should not deprive the Wi-Fi services provider of the legitimate benefit of its bargain
 - The ETF should ramp down to zero by the end of the term
- Termination without liability
 - Unsatisfactory benchmark result
- Termination for cause
 - Uncured material breach by either party
 - Wi-Fi services vendor causes a “Critical Performance Failure” [definition negotiable]

Exit Strategies

- Post-termination rights
 - Cooperation and assistance with the replacement vendor or the company's in-house team
 - Migration assistance over an appropriate period
 - Transfer of third-party support contracts covering assets retained or purchased by the customer
 - Equipment buyback
 - Ownership / possession of inside wiring / cabling and other location improvements made by the vendor
 - Transfer of customer data in customer's preferred format

Key Legal Risks

Heightened Risks

- Patent infringement
 - The risks for core technologies such as authentication and Wi-Fi are REAL!
 - Vendors know the risks, and will try to contract around them
 - Customers must aggressively push for appropriate indemnification and enjoined use clauses
 - Narrowly tailor the combination carve out
 - Avoid geographic restrictions
 - Reject cross-indemnities
 - Exclude the indemnity from the LOL and damages disclaimer

Heightened Risks

- Copyright infringement
 - Transient guests will engage in copyright infringement (*e.g.*, BitTorrent)
 - Take advantage of the DMCA safe harbor protections (17 U.S.C. § 512)
 - Adopt and implement a policy that repeat infringers will be denied service
 - Take action to quickly disable access when infringing activity is detected
 - Derive no financial gain from the infringing conduct
 - Register an agent with the Copyright Office
 - Consider vendors with the technical capability to track down bad user activity and block those bad users from future access to the network
 - Set ground rules with your providers on responding to subpoenas
 - Don't waive your contractual confidentiality protections
 - Require providers to obtain an appropriate protective order
 - Get copies of what's produced

Heightened Risks

- Customer data
 - Whose privacy policy should apply?
 - How is it/are they disclosed?
 - Who owns and controls the customer data?
- Legacy privacy and info sec compliance risks
 - Existing PII obligations (*e.g.*, breach-notice laws, US - EU Safe Harbor)
 - FTC red flag rules on identity theft
 - Payment card industry data security standards

Heightened Risks

- Mobile device data
 - Creates new business opportunities, and
 - New privacy headaches for in-house counsel!
 - Tracking consumer location data is a hot-button issue in Washington
 - Behavioral marketing on the Web may lead to FTC rules on location-aware marketing
 - For now, consult privacy counsel and observe some basic principles
 - Collect only what you can use and try to avoid linking to PII
 - Destroy it when you don't need it anymore
 - Fully disclose to your customers what you're collecting and how it will be used
 - Allow them to opt-out
 - Follow the issue before the FTC and FCC

Heightened Risks

- Liability exposure resulting from end user misuse
 - Copyright infringement, SPAM, hacking, ease dropping on others, and other computer crimes will be tracked back to your IP addresses!
 - Adopt and enforce reasonable end-user terms and conditions
 - Include necessary disclosures and set usage rules
 - Decide whose (provider's or customer's) end-user Ts&Cs should apply and agree on an approval process for changes
 - Employ processes, procedures, and technical measures
 - Enable guests to report abuses
 - Allow you or the vendor to investigate the abuse
 - Take action when abuses are detected

Closing Thoughts

Key Success Factors

- Successful managed or outsourced Wi-Fi services deals share many common elements
 - Formal governance organization
 - Regular communication between vendor and customer
 - Weekly meetings between customer and vendor on routine matters
 - Regular reports from the vendor
 - Effective bi-directional knowledge transfer during hand-off
 - “Fit” between customer and vendor
 - Comprehensive service agreements with solid SOWs and SLAs
 - Clearly understood sourcing objectives
 - Short term (inverse relationship between deal term and client satisfaction)
 - Positive support of top executives

Questions?

Speaker Information

Marc Lindsey

Levine, Blaszak, Block & Boothby, LLP (“LB3”)

2001 L Street, NW, Suite 900

Washington, DC 20036

Office: (202) 857-2564

Mobile: (202) 491-3230

Email: mlindsey@lb3law.com

Web site: <http://www.lb3law.com/attorneys.php?PeopleID=14>

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