

Considerations in Offshore Software Development

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Software companies often consider whether moving their software development efforts offshore to a third party is a good decision for their business. Over the past few years, the practice of engaging offshore development companies to provide key development and support functions has been on the rise. Offshore development involves the engagement of a third-party entity in a country outside the US on an independent contractor basis for the purposes of providing certain software development and related business or operational functions. For example, you may be interested in hiring a development firm in Turkey to develop a custom software solution or leveraging a firm in India to provide support services during your nonbusiness hours. These types of arrangements offer many benefits but can also present material risks. This post is intended to provide a high-level overview of some of those benefits and risks – and provide you with key considerations as you evaluate whether offshoring software development makes sense for your business.

What are some of the benefits of offshore software development?

Cost

Outsourcing work offshore is typically much less expensive than outsourcing to US businesses (or doing it in house). Outsourcing certain functions offshore can result in significant operational cost savings when compared to hiring in-house employees. Not only could you potentially save on salary and benefit-related costs, but also you might save on talent recruiting expenses, relocation fees, overhead (such as office space), and onboarding and training.

Skill

Many offshore development firms employ talented, well-trained and highly skilled programmers and other workers. Engaging such a firm often provides you with access to an experienced team of individuals with a broad range of skill sets, so that it can serve as a “one-stop shop” for your outsourcing needs. It can be a great way to supplement your in-house talent.

Flexibility

Offshore development firms are located all over the world, and many have offices in multiple locations. Having support from teams in different time zones allows your company to ensure that you have coverage for your IT needs outside of your normal business hours. Engaging a firm in Asia to provide customer support, for example, allows you to expand your customer base outside the US and offer support terms that are practical for your customers’ business needs. You also typically have greater flexibility to increase or decrease the size of your team without the associated costs and headaches of doing the same thing with your own employees.

What are some of the risks of offshore software development?

Application of multiple legal frameworks

When engaging with an international firm, the intellectual property (IP) laws of multiple countries may govern. Other countries may have different legal requirements with respect to the protection and enforcement of IP. Further, in the event of an infringement abroad, you may be stuck trying to enforce your rights in the country where the infringement occurred, which requires significant time and effort (and without a clear understanding of the outcome or how such country enforces its laws).

Limited oversight

While offshore development firms provide you with access to a broad range of resources, those resources sometimes do not include a team that is specifically dedicated to your company's needs. You may need to be flexible in terms of timing or availability of personnel, as many firms juggle multiple competing customer demands. Further, with the services performed halfway across the world or in different time zones, you have a more limited opportunity to provide oversight over such services than if you are working with an in-house team.

Data issues

Many functions you may consider outsourcing offshore likely involve the sharing of personal information or confidential or sensitive business information. Disclosing such information to a third party comes with the risk that the information is mishandled or will be subject to a security breach. Further, the offshore development firm's access to or processing of certain information may implicate privacy laws, rules and regulations inside and outside the US.

Commitment

The commitment of an outsourced team is almost never the same as that of your own employees. This can manifest in a variety of different ways, including a higher turnover rate for the outsourced team compared to the internal team.

What are some key contractual considerations for engaging with offshore development firms?

IP ownership

Owning any developed IP is key in any outsourcing relationship. As such, it is important to consider and understand the legal framework within the country or countries in which the outsourced tasks will be performed – as it pertains to the protection, enforcement and transfer of IP ownership, as well as how those laws might affect your ability to protect and enforce your IP rights within the US. Merely selecting US governing law and forum within your contract with the outsourcing firm does not necessarily obviate the need to consider and apply the laws of other applicable jurisdictions. You also will want to contractually ensure that the deliverables are not entangled with third-party IP, either through open-source contamination or use of other third-party IP.

Confidentiality/data security

Think about the types of information or IP you plan to share with the outsourcing firm. If you are sharing confidential or sensitive IP or information (including any customer data or source code), make sure you are comfortable with the physical, technical and administrative safeguards of the outsourcing firm. Your commercial agreement with such firm should address these safeguards, restrictions on use and liability arising from security breaches and other misuse or mishandling of information. If any agreements

entered into with your customers include data security and privacy requirements that apply to your subcontractors, those requirements need to flow down in your agreements with the offshore development firm. Finally, it is important to understand what laws, rules and regulations apply to such firm's access to and processing of the information you share – and compliance with those requirements should be addressed in the agreement between your business and the offshore development firm.

Clear objectives

Make sure the statement of work or underlying agreement clearly states the parties' objectives, including, as applicable, with respect to milestones, timelines, fees, acceptance and rejection procedures, and specifications, among other considerations. Because you will have limited oversight, it is important to build in contractual rights to ensure that a project or specific set of services will be performed in accordance with your expectations. The more detail, the better.

Flexibility

Make sure you can increase or decrease the size of the team in a way that makes sense. Without a contractual right to make these sorts of changes, you lose some of the benefits of offshoring development in the first place. Of course, there are other important legal considerations in drafting and negotiating an offshore development contract. Having a solid contract is a key factor in being able to reap the benefits of offshore development.

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Key Contacts

Adam Chase Washington, DC	achase@cooley.com +1 202 776 2455
Chris Coulter London	ccoulter@cooley.com +44 (0) 20 7556 4262
Keith Berets Colorado	kberets@cooley.com +1 720 566 4196

Charles Haley Palo Alto	chaley@cooley.com +1 650 843 5146
Len Jacoby New York	ljacoby@cooley.com +1 212 479 6880
Kimberly Nguyen Reston	knguyen@cooley.com +1 703 456 8501
Tracy Rubin Palo Alto	trubin@cooley.com +1 650 843 5568
Adam Ruttenberg Washington, DC	aruttenberg@cooley.com +1 202 842 7804

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