Businesses are under ever-increasing pressure to reduce costs and at the same time promote growth and improve operating efficiencies. Whilst this task has traditionally been tackled by outsourcing business processes to cheap offshore locations, more and more businesses are now turning to Robotic Process Automation, or “RPA”, for a solution.

But for all the trumpeting of more efficient and cost-effective working, RPA is to many a step into the unknown. With this in mind, Slaughter and May’s Strategic Sourcing practice explains in this briefing the rationale behind businesses’ increasing demand for RPA and, drawing on practical experience, provides a checklist of potential issues to consider when first contracting for a RPA solution.

Business-improving technology

An emerging form of process automation technology, RPA employs software “robots” to mimic the actions of human beings. Each RPA solution is configured to manipulate and interpret a business’s existing software applications, becoming something of a “virtual worker” that can operate multiple applications through its own user interface. Importantly:

- the configuration of the majority of RPA solutions does not require any form of coding or programming skill, with that configuration relying instead on a human demonstration of the process to be completed and/or a simple “flowchart” of the steps that need to be taken as part of that process; and

- the deployment of a RPA solution is not dependent on its integration into a business’s existing IT architecture, with the solution accessing the business’s IT applications in the same manner as human employees (e.g. via a logon ID and password on an end user device).

Once configured, a RPA solution can execute business processes with an impressive degree of intuition, auto-adjusting to optimise transaction speeds and operational efficiencies. In turn, this can lead to:

- a reduced cost base for the implementing business, with some RPA solutions costing as little as one third of the price of an offshore
full time employee (“FTE”) and one fifth of the price of an onshore FTE;¹

- increased productivity for the implementing business, with RPA solutions capable of operating on a 24/7 basis and some improving FTE process times by up to 60%;²

- increased accuracy and efficiency for the implementing business, with RPA solutions consistently carrying out tasks without error and in some cases reducing the level of FTE mistakes (and therefore regulatory/compliance risk) by up to 100%;³ and

- improved analytic techniques through feedback loops and increased data gathering, enabling the implementing business to identify those process areas that require improvement.

Fields of deployment

But whilst RPA solutions can have a positive impact on a business’s internal processes, it is clear that they cannot (or at least at the time of writing cannot) be used to supplement or support all outsourced services. Indeed, the scope of RPA solution deployment appears to be limited to processes that are:

- repetitive;
- labour-intensive;
- ruled-based; and
- dependent on constant data feeds.

Quite predictably, RPA solutions are therefore most commonly utilised in areas such as data entry, accounts receivable, SLA monitoring, MI reporting and IT incident diagnosis.

Procurement strategies

So how might a business go about contracting for a RPA solution? Should this approach change if a business has already contracted with an outsourcing provider? Do any contractual provisions take on added importance in the context of RPA procurement?

The following four-part checklist highlights potential issues for a business to deliberate over before putting pen to paper and procuring a RPA solution.

1. Initial considerations

Headline considerations for a business looking to contract for a RPA solution include:

a) What are the business’s objectives in deploying a RPA solution? Is cost-cutting the main driver or are other considerations important, too?

b) Is there sufficient engagement/backing within the business to support the use of a RPA solution?

c) What criteria will the business use to select its RPA solution?

d) Is the business’s existing outsourcing provider able to obtain a RPA solution?

e) Will the business employ dedicated staff to manage the RPA solution? What will happen to staff being replaced by the solution?

Further information on each of these issues is set out in the shaded box at the end of this briefing.
2. Apportionment of risk and choice of contracting parties

There is always a risk that a malfunctioning RPA solution, combined with the tremendous speed and potential 24/7 operating hours of that solution, could lead to large losses for the business that deployed it. But to what extent will that business be able recover those losses from the RPA provider?

RPA providers are often, at least for the time being, SME-type, venture capital/private equity-backed businesses (rather than billion dollar outsourcing providers). It follows that they are unlikely to accept much (if any) liability for losses caused by RPA solutions under the terms of any licence or agreement that they enter into with a customer.

For this reason, a business wishing to make use of a RPA solution may want to:

- obtain some form of financial comfort from a parent company of, or an investor in, the RPA provider; or

- if the RPA solution can form part of a wider outsourcing arrangement, contract with a deeper-pocketed outsourcing provider that will obtain the RPA solution itself and accept a higher cap on its liability to the business.

If an outsourcing arrangement is already in place, the business should also consider asking its outsourcing provider to procure the provision of the RPA solution for the benefit of the business under the terms of the existing outsourcing framework. This should allow the business to recover a greater proportion of any losses caused by a malfunctioning RPA solution than if it contracts with the RPA provider directly; the liability caps under the existing framework are likely to be calculated with reference to the value of the outsourcing deal as a whole and therefore set at a much higher level than any caps proposed by the RPA provider. Procuring the RPA solution under the existing contractual framework may also result in the solution being incorporated into the outsourcing provider’s wider service delivery model and it therefore being made available to the business without additional cost (i.e. under the existing charging regime).

Note, however, that an outsourcing provider may be reluctant to procure the provision of a RPA solution under an existing outsourcing framework if:

- the outsourcing provider is unable to flow down to the RPA provider much or all of the outsourcing provider’s liability to the business for RPA-related losses (by reason of the liability caps in the licence/agreement between the RPA provider and the outsourcing provider); and

- the deployment of the RPA solution is likely to reduce revenues generated by the provider under the existing outsourcing arrangement (see “Pricing models”, below).

With this in mind, a business should review its existing outsourcing contract to identify those provisions that support such a RPA procurement request (typically ones relating to innovation, benchmarking and continuous improvement). Where a business has no such provisions to rely upon but still demands that its outsourcing provider procure a RPA solution, the business should not be surprised if the provider in turn demands a share of the benefits generated by that solution (e.g. under a gain share or KPI incentive arrangement).

3. Technological developments and intellectual property

Each RPA solution will, as previously explained, need to be configured by the deploying business in order to operate effectively. As this may require a large investment of time and the use of business-specific know-how and bespoke process designs, the business will need to carefully
consider the following issues and take the time to accurately reflect its chosen position in any governing licences/agreements:

- Will the business or the RPA/outsourcing provider own the IP rights that subsist in the configuration/process design of the RPA solution (if any)? Whilst it is a common knee-jerk reaction for a business to want to own such rights, one should ask whether such ownership is truly necessary and consider the likely commercial impact of taking ownership away from the RPA/outsourcing provider. For example, is the provider likely to charge the business more for a bespoke solution that the provider does not own and/or cannot roll-out across its entire client base? Would the business be comfortable receiving a licence (rather than ownership), provided that the RPA/outsourcing provider is prohibited from licensing the IP rights to the business’s competitors?

- If the business owns the IP rights in the configuration/process design, what rights should the outsourcing provider/RPA provider have to make use of that configuration/process design?

- Should the configuration/process design also be classed as confidential information of the owner of such IP rights?

- Should the RPA provider be required to deposit the source code of the RPA solution with a third party escrow agent to ensure that the solution can be maintained?

- Will an exit plan need to be put in place, or an existing exit plan revised, to ensure that any replacement of the RPA provider/outsourcing provider by the business can be completed without disruption to the RPA services?

- Is it practicably possible for the configuration/process design of the RPA solution to be transferred to a replacement RPA solution on termination/expiry of the business’s licence/agreement with the RPA/outsourcing provider?

- Will any of the answers to the preceding questions change if RPA solutions begin to command true intelligence and self-awareness? If a RPA solution devises a completely new process for achieving an outcome, for example, should the rights in and to that process be owned by the business (to which that process relates) or the RPA provider (who developed the intelligent algorithm that devised the process)?

The business should also look to obtain a robustly-worded IP indemnity from the RPA/outsourcing provider to ensure it can recover any losses it might incur as a result of a claim that its use of the RPA solution infringes a third party’s IP rights. Such a provision, albeit “standard” in outsourcing agreements, takes on added importance in the context of RPA procurement; the mushrooming development of the global RPA industry is likely to lead to both the development of overlapping technologies and the emergence of patent trolls, which in turn are likely to produce a sector ripe for IP infringement claims.

4. Pricing models

Outsourcing providers are masters at removing unnecessary fat from a business’s processes, be it by cutting personnel costs, improving service methodologies or restructuring supply chains. While this normally results in a descending “glide path” of savings for an outsourcing business over the term of its outsourcing arrangement, this is likely to change if a RPA solution is deployed; faster and more efficient processes and lower employee numbers will mean that the cost of providing the outsourced service falls immediately (and perhaps dramatically) on the roll-out of the solution.

A business that is looking to incorporate a RPA solution into an existing outsourcing arrangement
should therefore revisit and if necessary seek to revise its pricing model to ensure that the model reflects the savings that will be made on the solution’s deployment. The business may also wish to discuss and agree with its outsourcing provider how cost savings will be achieved during the remainder of the term; the provider might, in order to make incremental “glide path” savings going forward, require the business to implement measures or make changes to its operations that the business is uncomfortable with.

Businesses should also be prepared for a shift in standard price calculation metrics. Indeed, whilst current metrics often incorporate charges linked to FTE numbers, this will no longer make commercial sense if workforces are replaced with RPA solutions. Will we therefore see a move towards outcome-based pricing where charges are linked to results rather than utilisation or consumption figures? Or will existing charges linked to FTE numbers simply be replaced with charges linked to the number of robots/software licences used (i.e. a unit-based model)? Current market trends suggest the latter, but this might just be a temporary turn to the easier of the two options; one hopes that the clear compatibility between RPA and outcome-based pricing will encourage providers to develop a workable outcome-based pricing model for the long term.

Conclusions

Whilst currently limited to the more mundane and rule-based processes, the scope of potential uses for RPA will expand greatly with advances in technology, particularly artificial intelligence. However, businesses must not jump feet first into the RPA world without appropriate preparation; the procurement and deployment of a RPA solution is far from a run-of-the-mill outsourcing transaction, and requires businesses to consider different issues to those associated with more traditional outsourcing arrangements. Ultimately, RPA presents businesses with real opportunities and tangible benefits, but also poses material risks to those that do not take a careful and considered approach to its adoption.

For further information on the matters highlighted in this briefing, please contact one of the following or your usual Slaughter and May contact.

Oliver Howley  
T +44 (0)20 7090 3495  
E oliver.howley@slaughterandmay.com

Duncan Blaikie  
T +44 (0)20 7090 4275  
E duncan.blaikie@slaughterandmay.com

© Slaughter and May 2016  
This material is for general information only and is not intended to provide legal advice.
RPA Procurement - Initial Considerations

What are the business’s objectives in deploying a RPA solution? Is cost-cutting the main driver or are other considerations important, too?

A business should carefully consider the rationale behind its proposed procurement of a RPA solution and what specific aims it seeks to achieve by deploying such technology. These aims should be time-framed, taking into account the probable need for tailoring and testing of the RPA solution before its roll-out. Such an exercise will assist not only in establishing an internal business case for procurement but support any post-procurement assessment regarding the effectiveness of the chosen solution.

Is there sufficient engagement/backing within the business to support the use of a RPA solution?

The success of preliminary RPA deployments (and subsequent roll-outs into other process areas) is often dependent on senior staff engagement and backing. Time should therefore be taken to brief such staff on the positive impact that the RPA solution is expected to have on the business and, if that solution is then deployed, to update those staff on the achievements made through its use.

The business may find that certain departments and staff circles are more sceptical of RPA than others, seeing the deployment of a solution as a radical and unnecessary move. Past experience suggests that Compliance and IT teams are often the most concerned, worried by:

- the potential for multiple undetected regulatory breaches by malfunctioning solutions (which can be mitigated by solution design, dedicated human monitoring and limiting operating periods to office hours (during which malfunctions can be more quickly detected and rectified));

- the extent to which related financial losses can be recovered from the RPA/outsourcing provider (which will depend on the terms of the governing contract (see “Apportionment of risk”, above));

- fears that the installed RPA solution will disrupt or pose a cyber security risk to underlying IT systems (which are often based on a failure to fully appreciate the “non-invasive” IT requirements of RPA solutions (see “Business-improving technology”, above)); and

- the potential for increased demands on technical support functions (which can be mitigated by “easy to use” functionalities and the selection of a RPA provider that offers a help desk, hotline or equivalent support facility).

Indeed, in some cases it might take a change in the servicing status quo to prompt or persuade a business’s management to roll-out a RPA solution. For example, we are aware of one financial institution that decided to deploy a previously-mothballed RPA solution only when that institution’s India-based BPO provider failed to provide a full service due to mass flooding in the country.
What criteria will the business use to select its RPA solution?

A key question for a business wishing to make use of RPA is, of course, what solution is best suited to the business’s commercial needs. Issues to consider when reviewing potential solutions include:

- what is the RPA solution’s price point/charging model and how does this compare to other available solutions?
- will there be an opportunity for the business to trial/beta test the RPA solution?
- how quickly can the RPA solution be implemented and will on-site support from the provider be required at the point of installation?
- to what extent will the RPA provider accept liability for losses caused by the RPA solution?
- how easy is it to configure and operate the RPA solution?
- what data inputs and output types does the RPA solution support (e.g. e-mail/xls/ppt/pdf)?
- at what speed does the RPA solution operate and can this speed be varied in order to allow for more effective monitoring by staff?
- what checks/safeguards can be implemented to mitigate the effect of process errors made by the RPA solution?
- what analytics are produced by the RPA solution to allow the business to organise and analyse workflow metrics and identify areas where improvements can be made?
- what ongoing support, maintenance and update arrangements will be made available to the business by the provider of the RPA solution?
- how scalable is the RPA solution if it proves a success and the business wishes to increase the number of processes that the solution carries out?; and
- how portable will the RPA solution be on expiry/termination of the business’s relationship with its provider?

Is the business’s existing outsourcing provider able to obtain a RPA solution?

The market is still waiting to see how the world’s major outsourcing providers will respond to increasing customer demand for intelligent automation. Will they purchase or enter into joint ventures with promising RPA solution providers in order to gain a foothold in the sector? Will they ramp down or even close their offshore operations in favour of onshore RPA projects? Will they self-cannibalise and replace large sections of their workforce with robots?
In the meantime, if a business wishes to make use of a RPA solution as part of an existing outsourcing arrangement, it should consider asking or requiring its outsourcing provider to obtain and deploy such a solution (rather than the business approach a RPA provider independently). Such an approach should help the business to:

- avoid the disruption that could otherwise be caused by the business’s introduction of a provider unknown to the outsourcing provider into the outsourcing arrangement;

- maintain a sense of service continuity and stability, with the outsourcing provider already having an understanding of the business’s existing processes; and

- avoid (or at least avoid to some extent) difficult negotiations regarding caps on a new RPA provider’s liability by keeping the procurement of the RPA solution within the outsourcing arrangement’s existing contractual framework.

Please see “Apportionment of risk and choice of contracting parties” above for further information on procurement under an existing outsourcing arrangement.

**Will the business employ dedicated staff to manage the RPA solution? What will happen to staff being replaced by the solution?**

There is a new and growing trend in the market for businesses to employ staff whose sole or primary role is to monitor and manage RPA solutions that those businesses have deployed. This appears to have taken on added importance in regulated sectors, with dedicated staff members monitoring each step taken by their various RPA solutions to ensure compliance standards are met.

However, the operating efficiency of RPA solutions is also expected to lead to the displacement of staff that are no longer needed, particularly as a move from a human to robotic servicing model is unlikely to constitute a “service provision change” and trigger a transfer of employment from the business to the RPA/outsourcing provider under UK TUPE legislation. Thought must therefore be given by the business to the potential need for a redundancy programme or internal staff reorganisation before any RPA roll-out takes place.