

# Tech Talks Podcast

## Navigating Facilities Management Outsourcing in a Post-COVID World

*October 21, 2024*

### **Announcer**

Welcome to Mayer Brown's Tech Talks Podcast. Each podcast is designed to provide insights on legal issues relating to Technology & IP Transactions, and keep you up to date on the latest trends in growth & innovation, digital transformation, IP & data monetization and operational improvement by drawing on the perspectives of practitioners who have executed technology and IP transactions around the world. You can subscribe to the show on all major podcasting platforms. We hope you enjoy the program.

### **Julian Dibbell**

Hello and welcome to Tech Talks. Today, we'll talking about the evolving landscape of facilities management outsourcing in a post-COVID world.

I'm your host, Julian Dibbell. I am a senior associate in Mayer Brown's Technology & IP Transactions practice. I'm joined today by Rohith George, a partner in our Northern California office and also a member of our Tech & IP Transactions and Outsourcing practices. Welcome back to the show, Rohith.

### **Rohith George**

Thank you for having me. Glad to be here.

### **Julian Dibbell**

So let's start with the basics. For our listeners who might be unfamiliar, could you explain exactly what facility management or FM outsourcing is?

### **Rohith George**

Yes, absolutely. So, at its core, FM outsourcing is the bundling together of a whole arrange of services that are necessary for running a facility, and then, obviously, hiring a third party to manage those services. The facility could be a manufacturing plant, it could be a R&D lab, it could be an office building. Depending on the type of facility, the actual range of services you need could probably vary but, generally, across all facilities, there's a set of services needed to support the core business activities of a Company.

Examples could include building maintenance, like electrical systems, plumbing, HVAC, elevators and so on. It could also include janitorial services, landscaping, security, and so on and so forth.

**Julian Dibbell**

So having a dedicated team to take care of all the behind-the-scenes operations that keep a building running smoothly, in other words?

**Rohith George**

Yes, exactly. The goal is twofold.

First, it allows a company to focus on its core business activities. It's strategic priorities without having to dedicate time and resource to this essentially non-core, non-revenue generating activity. This is a goal traditional goal with all kinds of outsourcing right.

Second, you can often drive significant cost savings and efficiency improvements through this type of outsourcing. How? Well, as with other types of outsourcing, these services really started out very unbundled. You'd hire a different company to handle your tiller maintenance, then you would hire your cleaning and landscaping. But because certain providers wanted to capture a kind of margin for the full stack of services, because of consolidation between and amongst providers over the past couple decades, and because of a desire from Companies to have a real single point of contact for all things facility-related, these services ultimately started to become integrated into what's sometimes called the IFM model or the integrated facilities management model.

But, ultimately, because of this integration and because of the resulting economies of scale, the FM providers can negotiate lower prices for products and services, they can use their expertise to find efficiencies in order to reduce waste, and then they can ultimately pass on those savings to their customers.

**Julian Dibbell**

That makes a ton of sense. But you mentioned some of the ways in which FM outsourcing is not that different from other forms of outsourcing. I'm curious: what is different about it compared to other forms of outsourcing?

**Rohith George:**

Great question. I think there are a few different things worth mentioning because I do think these differences impact how you may want to negotiate these deals.

First, FM services are inherently physical and involve managing physical spaces. This requires, typically provider personnel that are badged and on-site. They are operating with physical tools and physical equipment. These aren't really remote or offshore services or at least the vast majority of the services aren't remote or off shore like many IT or other back office services, for example.

Then because of that kind of on-site nature of the services, FM providers end up interacting with a wide range of parties on behalf of the Company, whether that's employees or visitors or customers or third party suppliers and even local authorities.

The next thing is around the nature of the service delivery. The multifaceted nature of FM services means that services are often provided by local parties, local subcontractors, that are providing specialized services, your elevator maintenance person, for example. As a result of this, an FM provider is often

managing a whole range of third-party relationships in order to deliver the FM services in line with performance requirements and expectations.

A fourth point I wanted to mention in terms of differences, the pricing model is different for FM outsourcing than many other forms of outsourcing. The costs that are associated with these subcontractors is, most commonly, "passed through" by the FM provider for the Company to pay or reimburse as part of its facilities budget. And then that budget is managed by the FM provider and, using its expertise, using as I mentioned the economies of scale, that they can negotiate contracts system-wide or enterprise-wide. Because of that, that budget can be reduced year-over-year to drive savings for the Company. In exchange for that, the FM provider earns a management fee on top.

**Julian Dibbell**

Alright, so those are interesting wrinkles. On top of that, the topic of our discussion today is the evolution of FM services. What kind of changes are going on right now and what's driving this evolution in facilities management outsourcing?

**Rohith George**

We're seeing a confluence of factors reshaping the FM outsourcing landscape. One of the most significant, and perhaps most obvious, is the COVID-19 pandemic, which has fundamentally altered how and where people work.

We went from fully office-based work pre-pandemic to fully home-based work for a while and then finally to today's office-centered hybrid work model. These kind of swings have prompted Companies to re-evaluate how they are currently utilizing their space and how best to optimize those spaces for the future.

So, whereas before, as a Company, you knew your footprint (plus or minus periodic changes to your portfolio) and then you could go out to an FM provider who could scope, price, and bid on that fairly static portfolio. Now, there's an acknowledgment that things are in flux and Companies are looking for their FM providers to be a little bit more flexible and dynamic in response to the changing environment.

**Julian Dibbell**

So, it's not just about "keeping the lights on" anymore?

**Rohith George**

No. Not solely about that, no. The expectations that Companies have for their FM providers have increased. In the past, FM outsourcing was seen as a relatively low-tech field. But today, technology is much more central to this service. We've seen FM providers increasingly adopting things like sophisticated maintenance platforms in order to proactively manage building systems, promoting Internet of Things (IoT) devices in order to gather real-time data on occupancy on work conditions. Also, working together with their customers to implement smart building platforms in order to optimize energy consumption and so on.

**Julian Dibbell**

Data right? here's a ton of data involved in these services and that sounds like a data gold mine waiting to be tapped, right?

**Rohith George**

It is! And that brings us to another key trend which is data-driven decision-making. With the increased use of these types of technologies and platforms there comes a wealth of data that FM providers can harness

in order to make, and ultimately help Companies make, more informed decisions about things like space utilization or asset performance or energy efficiency or actually how you are going to deliver services. So, they can use this data identifier as for improvement and they can optimize how they are utilizing their resources. They just ultimately create more sustainable and really responsive workplaces or work environments.

**Julian Dibbell**

Alright sustainable. How is sustainability a factor that's playing into the changing landscape of FM outsourcing?

**Rohith George**

Well as you know, and as probably everyone listening knows, sustainability is no longer optional—it's a business imperative for most companies, so we are all under increasing pressure to reduce our environmental footprints and meet ambitious sustainability targets. FM providers kind of have a crucial role to play in this effort. They can help companies implement energy-efficient solutions, they can help them reduce waste, use environmentally friendly cleaning products, and track progress towards sustainability goals as least as it pertains to their use of buildings and work places.

**Julian Dibbell**

So these are all pretty interesting and actually kind of exciting changes going on, but especially the changes around technology and data. Are there any concerns about data rights in FM outsourcing?

**Rohith George**

Yes, that's a really important question. It's definitely something companies need to be mindful of.

As I mentioned, historically, FM outsourcing contracts reflected the fact that the majority of (IP) kind of just flowed from the provider to the Company, sort of low tech, so the provider would license its tools, its platforms, its technology and that's the extent of it. The agreements were really focused on the Company's respective on guaranteeing that Companies had sufficient post-termination rights—their access to ensure a smooth transition at the end of the deal to bring the operations in-house or to move them to another party.

Today, with significant and potentially valuable data flowing from Companies to the provider, it's important to clearly allocate what the ownership and use rights are as between the parties. On top of that, when you have FM providers collecting and analyzing data from your facilities, you need to ensure that any sensitive information is being handled responsibly. So as a result, contracts now, whereas before they didn't, have a need to address data security and privacy head on. So this includes things like specifying what data can be collected, how it can be used, and how it's going to be protected, and ensuring compliance with relevant privacy regulations. This is all traditionally important in any technology agreement and it is much more important in these types of deals as well.

**Julian Dibbell**

So, in other words, it's not just about finding an FM provider with the right technical capabilities anymore; you also have to find a partner you can trust with your data.

**Rohith George**

Exactly. Trust and transparency are paramount in these relationships. That extends to another aspect of FM outsourcing that can be complex: which is from the use of subcontractors. As we talked about, unlike

some other outsourcing models, FM often relies heavily on a network of subcontractors in order to deliver specialized services.

**Julian Dibbell**

That makes sense, right? You can't expect a single FM provider to have in-house expertise on everything from HVAC maintenance to landscaping to catering, right?

**Rohith George**

Precisely. The thing is though, this heavy reliance on subcontractors adds another layer of complexity to these types of deals. Companies need to ensure they have visibility into the subcontracting arrangements, that the FM provider is properly vetting and overseeing its subcontractors, and that the contracts clearly outline liability and responsibility in case something goes wrong.

On top of that, given the on-site nature of the FM services, Companies typically have broader rights regarding the Provider's personnel. Including, in particular, the right to require the provider to remove their personnel or reassign them (including with respect to subcontractors).

It is kind of a double-edged sword. If Provider personnel are on-site, perhaps wearing company badges or company uniforms, and you're directing their work, reimbursing potentially their salaries, there's a heightened risk of co-employment claims, perhaps more than in almost any other type of outsourcing.

So it becomes important then to seek the appropriate indemnities for the Provider to protect against those types of claims, protect against that risk and also taking steps proactively on how you manage your personnel and manage the provider's personnel and subcontractors to limit that risk to prevent those types of claims.

**Julian Dibbell**

That sounds like a very key point. You said that all of these contracted services are passed through at cost to the Company?

**Rohith George**

That's right. Well, at cost plus management fee, and really as part of an overall budget that the FM provider has to live under. That brings up a couple important points.

First, the Company wants to be sure that its truly paying at cost. If the FM provider is getting the benefit of any rebates or other benefits, in a background way, the Company wants to know about that and get the benefit of those rebates or those benefits

The second point is that, as we've talked about, Companies are wanting more flexibility in how they are managing their spaces. They may want to flex up or flex down their requirements.

But if you're asking a Provider to flex up and do more work, there's an open question as to whether they will get paid for it because if it's not in the budget they may not get paid for it—or, if it causes them to go over budget, they might not get reimbursed for it. This can impede both parties' ability to work effectively together.

**Julian Dibbell**

Right. From the proprietor's perspective, it looks like the Company is trying to have its cake and eat it too.

**Rohith George:**

Yes, exactly. At the end of the day, budget certainty and having cost savings are a critical factor and probably the driving factor in almost all FM deals. But, if you want to build flexibility into your contract as well, then it's important to have a process for handling budget adjustments in a manner that ultimately minimizes the opportunity for dispute, defines triggers for budget adjustment, and allows for some flexibility in the budget.

The key point is that you really have to get to the core of what's controllable for the FM provider and what's not. That may mean taking a more hybrid approach to budgeting. Rather than having one single budget that has all of the spend underneath it, the provider has to manage year-over-year to reduce. You may have to treat controllable spend budgets differently from non-controllable spend budgets, and, treat the requirements as the hard and fast rules that you are setting for each differently, depending on how controllable it is.

**Julian Dibbell**

All and all, it sounds like these FM outsourcing contracts are becoming much more complex than they used to be. Is that right?

**Rohith George**

Yes, I think that's right. They always have been a bit complex, in my opinion. But you're right, with the increased emphasis on technology and data, there are certainly some additional layers added.

**Julian Dibbell**

Okay, so if a company is thinking about entering into or renegotiating an FM outsourcing agreement, what are some key pieces of advice you would offer?

**Rohith George**

Sure. I would say here are a few essential tips to keep in mind:

The first is prioritizing flexibility. As we talk about in today's dynamic work environment flexibility is paramount. The contract needs to allow for adjustments to service levels, space utilization, budget as your needs evolve. That has to be thought of at the beginning of the contract rather than reactively.

The second is treating technology strategically. Don't view technology as an add-on or an afterthought. It should be a core part of your FM outsourcing strategy and you need to ensure that your contract addresses things like technology implementation, IP ownership rights, specific performance expectations around technology, availability of technology, and the use of technology.

The third is addressing data privacy and security. So ensure your contract includes robust provisions for data security, privacy, compliance, especially, as I mentioned, if sensitive information could be collected in the process by the Provider.

The fourth is focus on outcomes rather than dictating specific methods for how the services are to be formed. Consider defining the desired outcomes you want to achieve. So, rather than specifying how often something happens, whether that's how often a bathroom gets cleaned, define what clean means and require that for your agreements. This gives your provider more flexibility to innovate and find the most effective solutions for your actual objectives.

The fifth point we talked about is sustainability. Clearly define your sustainability objectives. Work with your FM provider and incorporate them into the contract. This includes things like energy efficiency targets, waste reduction strategies, use of products, and environmentally friendly practices.

Then finally, important in all outsourcing deals, but particularly here, plan for smooth transitions on and off. So, transition on and off, because of the on-site nature and because of subcontracted nature of FM services, these can be even more involved than you might ordinarily expect in an outsourcing deal.

So consider, for example, for a first generation outsourcing, the Company likely has a host of different agreements, across potentially different regions and countries, with different subcontractors for individual services, and those all need to be either assigned to the new provider or they need to be terminated. There's a diligence process associated with the FM provider accepting an FM budget or accepting these contracts. There's diligence that potentially needs to be conducted on facility equipment; building equipment. There can be a lot of steps to onboarding a FM provider. It's important to focus on this process in the contract to ensure there is appropriate governance in place, milestones to be met, dependencies identified, and so on.

Similarly, on exit, if you don't plan and contract for the same process at expiration or termination with the full assistance with full transparency from your existing FM provider, without that you could face potential disruption at exit when nobody is motivated to assist at that particular point in time.

### **Julian Dibbell**

Great insights, Rohith. Very helpful. Thank you for breaking down this complex topic and for sharing your experience. And listeners, thank you for joining us today.

If you have any questions about today's episode – or an idea for an episode you'd like to hear about anything related to technology and IP transactions and the law – please email us at [TechTransactions@mayerbrown.com](mailto:TechTransactions@mayerbrown.com). Thanks for listening.

### **Announcer**

We hope you enjoyed this program. You can subscribe on all major podcasting platforms. To learn about other Mayer Brown audio programming, visit [mayerbrown.com/podcasts](http://mayerbrown.com/podcasts). Thanks for listening.