

REVIEWING THE CONTRACT

“What to Look for in the Terms and Conditions”

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Sourcing Process

- Form Team
- Determine Spend
- Develop Strategy
- Develop Scope of Work
- Find Suppliers
- Select Sourcing Tool
- Evaluate Responses
- **Contract Development / Negotiation**
- Implement / Administer Contract



What's your contract responsibility?

- Who's responsible for contract development?
- Reviewing responsibility differs between companies
 - Option A – Legal has full responsibility
 - Option B – Supply Management has full responsibility
 - Option C – Legal and Supply Management share responsibility
- What is your Option?

Contract formation process

- Determine purpose of the contract
- Develop a process that is:
 - Repeatable
 - Logical
 - Minimizes time to set up contract
- Determine process for contract introduction
 - Early in sourcing process
 - Bid / RFP
- Develop a checklist of areas needed to be addressed

Types of contracts

- Master Agreement (Master Services Agreement)
 - Set up once
 - All subsequent purchase orders (contract orders) reference the terms in the MA
- Suppliers template
- Your template
- Purchase Order
- Other?

Whose contract template to use?

- Your contract template

Pro's	Con's
Easy to review	May not be suited to the commodity/service
Drafted in your favor	Supplier may not accept
Contains clauses that work for you	May contain inappropriate terms
Legal may not have to review final contract	May overlook other terms that need to be included
Master services contract	May not include correct specifications
May have multiple customized templates	
Protects your interests	
Standardization	

Whose contract template to use?

- Supplier's contract template

Pro's	Con's
Suited to the commodity/service	Requires close review
Contains terms required or appropriate for commodity/service	May overlook other terms that need to be included
	May contain clauses that are a problem
	Legal will have to review and approve final contract
	Drafted in supplier's favor
	Protects supplier's interests

- Use templates with caution

Contract review

- Create list of all issues
 - Include both legal and business issues
- Create list of all understandings already reached
- Review all correspondence, proposals and documentation
- Check contract to see if all above items are covered in terms, conditions, scope of work
- Read ENTIRE contract for inconsistencies, missing items.

Contract review

- Create “redline” showing your changes
- Have legal review the contract
 - 2nd pair of eyes
- Ensure exhibits are attached
- Number the pages

Creating the redline

- Use change-tracker mode in Word, if available
- As changes are accepted, agreed to by both parties, “accept” the changes in Word.
- Create new file name for EACH version
- If Word not available, use “old fashion” method, a blue or red pen.
- Keep all versions of redline until final agreement is reached.

Important Contract Terms

- Contract terms important to Supply Managers

•Insurance / insurance certificates	•Warranty
•Indemnification	•Limitation of liability
•Governing law / jurisdiction for actions	•Confidentiality
•Intellectual Property	•Safety
•Termination clause, length of contract	•FOB / freight
•Payment terms	•HIPAA

- What is important for YOUR contract?

Create file of sample terms

- In Word, create document with list of all “acceptable or approved” terms clauses
- Include alternate “approved” clauses
- Easy to cut and paste
- Saves time, already approved by legal
- Update regularly

- Also create templates for particular services/products

Checklist

- Develop a checklist
 - Services
 - Products / capital equipment
- Customize as required
- Update regularly
- See handout

Writing the contract

- Use plain and simple language
- Use non-proprietary (generic) terminology and references
- Use present / active tense verbs
- Avoid jargon, vague terms, rambling sentences
- If acronyms are used, provide definitions
- Be precise

Let's look at some samples

Delivery Terms

- **DELIVERY:** Supplier makes no guarantee with respect to delivery. Shipping dates or order times are estimates only. Delivery terms are F.O.B. FACTORY. Risks shall pass at point of shipment unless modified in writing by an executive officer of Supplier.
- (Note: this is a piece of capital equipment)

Delivery Terms (redlined)

- **DELIVERY:** ~~Supplier makes no guarantee with respect to delivery.~~ Shipping dates or order times are estimates only. Delivery terms are F.O.B. ~~FACTORY~~ Destination. Risks shall pass at completion of installation of the system and acceptance by Buyer. Acceptance shall be defined as the full installation of the system and operation of the system for one (1) full week with no operational breakdowns. ~~point of shipment unless modified in writing by an executive officer of Supplier.~~

Payment terms

- **TERMS:** Payment terms for Supplier's equipment and systems are 30% down payment with original purchase order, then 60% due 45 days from receipt of original purchase order and 10% due net 30 days from delivery. Original purchase order is construed to mean, when the first purchase order is sent to Supplier by the purchaser and/or facility indicating the date the equipment is ordered; delays postponements on the part of the facility will not alter the terms of payment. Delivery is construed to mean, when the equipment is off loaded at the site specified by the Customer, whether temporary or permanent. Terms for parts and other services are net 30 days. A late payment charge of 1% per month, which is annual percentage rate of 12% will be assessed on overdue accounts, unless prohibited by law, then the rate shall be modified to rate closest to 1% permitted by law. There will be a 75% monthly storage, handling and float fee charged on the unpaid balance of the contract price for customer delays in delivery extending beyond 30 days.

Payment Terms (redlined)

- **TERMS:** Payment terms for Supplier's equipment and systems are ~~30%~~ down payment with original purchase order, then 60% due 45 days from receipt of original purchase order and 10% due net 30 days from delivery 100% due upon installation and acceptance (as described above) within 30 days of acceptance and receipt of invoice. Original purchase order is construed to mean, when the first purchase order is sent to Supplier by the purchaser and/or facility indicating the date the equipment is ordered; delays postponements on the part of the facility will not alter the terms of payment. ~~Delivery is construed to mean, when the equipment is off loaded at the site specified by the Customer, whether temporary or permanent. Terms for parts and other services are net 30 days. A late payment charge of 1% per month, which is annual percentage rate of 12% will be assessed on overdue accounts, unless prohibited by law, then the rate shall be modified to rate closest to 1% permitted by law. There will be a 75% monthly storage, handling and float fee of \$1,000 per month if charged on the unpaid balance of the contract price for customer delays in delivery and installation extending beyond 30-120 days from the date of delivery stated in PO.~~

Confidentiality

- Each party shall hold the following “Confidential Information” in strict confidence and not disclose the same to any other person or entity except as provided herein: all information, pricing and terms relating to or contained in this agreement, all Product data, trade secrets, financial data, pricing, business plans or any other information received from the other party in implementing this agreement; and all information derived from the foregoing.

Confidentiality (redlined)

- Each party shall hold the following “Confidential Information” in strict confidence and not disclose the same to any other person or entity except as provided herein: ~~all information, pricing and terms relating to or contained in this agreement,~~ all Product data, trade secrets, financial data, ~~pricing,~~ business plans or any other information received from the other party in implementing this agreement; and all information derived from the foregoing.

Termination without cause

- After the first anniversary date of this Agreement, either party may terminate this Agreement, without cause, upon one-hundred eighty (180) days written notice to the other party.

Termination without cause (redlined)

- ~~After the first anniversary date of this Agreement,~~
eEither party may terminate this Agreement, without cause, upon ~~sixty one-hundred eighty~~ (~~180~~60) days written notice to the other party.

Limitation of liability

- Supplier's aggregate liability to Customer for all claims of any kind, whether based on contract, warranty, tort (including negligence), strict liability or otherwise, for all losses or damages arising out of Services provided under this Agreement, its performance or breach (including warranty), shall not exceed the amount paid to Supplier for the two months immediately preceding the date that the first claim, action, or cause of action arose out of, under or in connection with this Agreement.

Limitation of liability (redlined)

- ~~Supplier's aggregate liability to Customer for all claims of any kind, whether based on contract, warranty, tort (including negligence), strict liability or otherwise, for all losses or damages arising out of Services provided under this Agreement, its performance or breach (including warranty), shall not exceed the amount paid to Supplier for the two months immediately preceding the date that the first claim, action, or cause of action arose out of, under or in connection with this Agreement.~~

Redline this

- **Supplier Services**
- (a.) Supplier will transfer its services to Company as its current commitments expire and thereafter will use Company as its exclusive provider of services. Company will provide the service at competitive prices based on Supplier's volume. Services include xxxxxxxxxxxx.
- (b.) This section serves as notice to Supplier of its rights governing the use of Customer Proprietary Network Information (CPNI) as required by the Federal Communications Commission under 47 CFR Section 64.200 et seq. through Company's normal procedures. Supplier grants Company the right to share with any Company-Controlled entity, for purposes of marketing services to Supplier: (1) Supplier's commitment to purchase services and related products and (2) Supplier's current and periodic spend information in the aggregate or by product purchased from Company. Supplier grants this right regardless of Supplier's CPNI opt-in or opt-out status related to products purchased from Company.

Contract Negotiation

- Important characteristics
 - Flexibility
 - Creativity
 - Knowledge
 - Limits
- Win – Win Solution
 - Must be good for both parties if long term

Contract Implementation/Administration

- Most important phase of sourcing process
- Most endusers do NOT do this well
- Helpful hints
 - Understand the specifications
 - Know what is expected/required of you
 - Educate your team
 - Sweat the small details
 - Communicate
 - Performance Reviews
 - Know milestones – Meet deadlines



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