

## Contract Writing and Management For Supply Chain Professionals

Ernest G. Gabbard, JD, C.P.M., CPCM  
Allegheny Technologies, Inc. - 412-252-3168  
[egabbard@alleghenytechnologies.com](mailto:egabbard@alleghenytechnologies.com)

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**Abstract.** The procurement/supply chain profession is clearly transitioning from placing purchase orders to establishing and managing comprehensive contracts with strategic suppliers. This has created a need for procurement/supply chain professionals to develop and refine contract preparation and contract management skills. For some of our more complex transactions, there will also be a need to develop contract administration and management skills among other company employees who will monitor supplier performance on our behalf.

This article will provide a summary of some key elements of contract writing and management which are relevant in the contemporary procurement environment.

**CONTRACT WRITING.** Volumes have been written on this subject, and it is impossible to completely cover such a complex subject in this limited space. However, the following are a few of the key elements of contract writing, which will apply to virtually any contract, regardless of dollar value or the commodity/service being procured..

- A. Start at the RFP/RFQ Stage. The procurement process starts with the RFP or RFQ, and the contract drafting process should commence concurrently. It is important to note that any terms and conditions which the purchaser intends to be included in the ultimate contract should be incorporated into the RFP/RFQ. If we attempt to insert substantive contracting terms after proposals are received, suppliers may have to revise pricing or other proposal elements to address such new terms. The key is to consider the end result desired in the contract when drafting the RFP/RFQ.
- B. Consider the circumstances/requirements for each transaction. There is really no "boilerplate" which will provide appropriate language for all of your substantive transactions. Practicality necessitates the use of some standardized clauses; however, this author's experience indicates that such clauses can be a "trap" if utilized indiscriminately. The sourcing professional should therefore custom tailor clauses for all significant issues that must be addressed in the contract. We will need to look to alternate sources such as our Law Departments or formbooks for appropriate clauses to adequately cover some of the more complex issues. However, never incorporate specific language provided for one contract into another contract without reviewing for applicability. If in doubt, consult your Law Department.
- C. Use templates – but cautiously. The modern electronic work environment enables us to utilize contracting templates, so we do not have to create each contract from scratch. Such templates can save significant time; however, they can be dangerous if not carefully utilized. This author has frequently seen contracts for procurement of services, which contained provisions intended for purchase of a commodity. This is usually because the

drafter utilized a template, but overlooked the need to remove inappropriate provisions. Unfortunately, they may have even failed to include important provisions for that transaction by inappropriate use of a template.

- D. Use a checklist. There is a common misconception that checklists are for the novice, rather than the seasoned contracts/sourcing professional. With many years of contracting experience and a law degree, I would never draft a contract for a significant transaction without a checklist to ensure that all substantive issues are addressed. The important aspect of this recommendation is to find the “right” checklist for your contract drafting. There are many such checklists available in the commercial market. The more valuable checklists provide a discussion of each contractual issue for your consideration, rather than just a title for each recommended clause. As with any checklist, you should be careful to not automatically utilize any/all recommendations without some consideration of the necessity and/or language for your specific transaction.
- E. Don't overlook the specification/statement of work. My experience has been that a substantial majority of the supplier performance problems experienced during the administrative phase of a contract result from inadequate attention to this portion of the RFP and the resulting contract. While most of us consider the specification or statement of work (SOW) to be the primary responsibility of our technical departments, it is incumbent upon us to ensure that this document is clear and comprehensive. Even if you don't completely understand the technical aspects of the procurement, you must learn enough about the specification or SOW to assure that the supplier is receiving unambiguous direction on how to satisfy the specific requirements of this procurement.
- F. Minimum Terms & Conditions. What are the “minimum” contractual provisions that almost every contract should contain? This question is frequently asked, but difficult to answer. The content of each contract should be appropriate for the nature of the transaction, and should consider such items as the type of commodity or service, the dollar value of the procurement, whether it is domestic or international, whether work is to be performed on your premises, etc. In the interest of responding to the threshold question, I would propose that the elements summarized on Exhibit A should be included in the simplest P.O. as well as the more significant contract for complex items. Obviously, this is not all-inclusive, but rather a baseline or starting point.

There are many other aspects to contract drafting. However, this author's experience indicates that the vast majority of “issues” which create contracting and/or legal problems can be traced to the foregoing items.

**CONTRACT ADMINISTRATION.** The well-drafted contract will often be of limited value, unless that contract is properly administered to ensure you receive all of the benefits anticipated when it was drafted. Therefore, good contract writing must be accompanied by effective contract administration. Although this is also a complex subject, the following summarizes some key elements of contract administration/management that should be applied to ensure effective supplier performance of the contract requirements:

1. Effective written communication between purchaser and its suppliers is the KEY to effective contract management. All outgoing correspondence should be logged and suspended to ensure timely response is received from the supplier. All incoming correspondence should likewise be logged and suspended to ensure a timely response is sent to the supplier. In the latter case, timely support from other company organizations (Engineering, QA, Program Office, etc.) may be essential to providing responses.
2. Early identification of performance problems is paramount to avoidance of schedule delays, which would ultimately impact your company's ability to meet its obligations. The first indicators of such supplier problems are generally:
  - a. Delayed response to correspondence – particularly correspondence requesting or confirming supplier performance schedules.
  - b. Supplier requests for delays in scheduled performance reports or performance reviews.
  - c. No visible progress on supplier reports and charts during performance reviews.
  - d. When percentage of progress payments exceeds percentage of performance completion. If this occurs, the purchaser loses a significant tool with which to obtain timely contract performance.
3. Immediate written response to any indications of performance/schedule delays is imperative. A supplier must be clearly held accountable for any identifiable delays, up to and including legal/contractual "show cause" and "termination" procedures.
4. Adherence to the contractual milestone schedule. If a detailed milestone schedule is incorporated in the initial purchase contract, it will be easier to withhold progress payments when milestones are missed; thereby maintaining adequate leverage to ultimately ensure timely performance.
5. Create and maintain a master contract file, where original contract documents are secured and controlled. It is imperative that we recognize these documents could someday be critical to prove our legal rights. They should be treated as such.

**CONTRACT AMENDMENTS.** Exceptional contract drafting and administration necessarily requires that any changes of circumstances be documented to assure continuity of the continuing legal rights and obligations of the contracting parties. Such documentation is generally accomplished with a contract modification or amendment. The key to an effective contract amendment is that the drafter devotes as much effort and expertise to the amendment as was utilized on the original contract.

As may be concluded, effective contract drafting is a complex process, and effective contract administration is an active, rather than a passive process. Implementation of these principles should assure comprehensive drafting of your contracts and timely management of the resulting supplier relationships.

Ernest Gabbard, JD, C.P.M., CPCM, is Director of Corporate Strategic Sourcing for Allegheny Technologies at their global headquarters in Pittsburgh, PA. He is an active member of the Pittsburgh Affiliate of ISM.

***Exhibit A***  
**Recommended Minimum T & C**

- **Price**
  - what is included?
  - what is not included?
  - tax? delivery?
  - pricing validity period?
  
- **Delivery**
  - when?
  - to where?
  - who pays?
    - FOB point?
  
- **Inspection**
  - where?
  - when?
  - acceptance?
  
- **Warranty**
  - when commenced?
  - for how long?
  - for what?
    - materials?
    - workmanship?
  
- **Payment**
  - when due?
  - prompt payment terms?
  
- **Damages and Liabilities**
  - indemnification
  - insurance
  
- **Disputes**
  - how to resolve?
    - mediation?
    - arbitration?
  
- **Termination**
  - for convenience of purchaser
  - for default of seller