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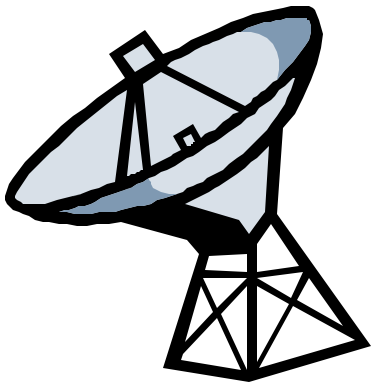
Institute for Supply Management™ Satellite Seminar Series

Contracting Roadblocks: Removing the Barriers

Program Handbook



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VCM32

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SECTION 1:

PROGRAM AGENDA

Contracting Roadblocks: Removing the Barriers

Most supply managers have encountered obstacles on the road to successful contract management. How can you anticipate and avoid these roadblocks? If a problem arises, what are your options? Given the spectrum of simple to complex contracting issues that supply management professionals face, this program focuses on the more complex problems that can arise and the tools that supply managers can use to resolve these difficult situations.

WHO SHOULD ATTEND?

Supply management professionals, including contract managers or others involved in the contracting process, who potentially face challenging issues with contracts and desire to learn how to avoid and resolve these issues.

Program Outline

Segment 1: Success Factors in Overcoming Contract Barriers

A. Contract Clarity
B. Clarity in the Scope of Work
C. Changing Business Relationships
D. Other Success Factors

Segment 2: Contract Language to Avoid Pitfalls

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B. Complex Provisions
C. Beware of Certain Terms
D. Non-Negotiable Contract Elements
E. Global Issues that Add to Contracting Complexity

Segment 3: How Business Relationships and Conditions Affect Contracts

A. Supply Chain Management Perspectives
B. Big Company vs. Small Company
C. Maintaining the Business Relationship
D. Successful Contract Management Techniques

Segment 4: Resolving Contract Disputes

A. Governing and Choice of Law Clauses and Provisions
B. Methods of Resolving Disputes
C. How Company Culture Affects Dispute Resolution Methods

Key Lessons Learned and Program Wrap-Up

About the Panelists

MAIN PRESENTER:

Dwight A. Howes, JD is a partner with the law firm McGuireWoods, based in Pittsburgh, Pennsylvania. Before joining the firm, he served as in-house counsel to Consolidated Natural Gas Company's supply chain management group and now represents Dominion Resources SCM group on a full range of transactions, including software licensing, auction agreements, reverse auction agreements, and standard buy/sell agreements for goods and services. He also represents a variety of other business clients with a broad range of transactions, including mergers and acquisitions (including their impact to existing contracts), commercial litigation, and general corporate counsel. Dwight has significant experience in government. He serves on the American Arbitration Association's Commercial Dispute Resolution, Energy, and International panels as an arbitrator. Dwight received his JD from George Washington University, and he earned his BA from the Columbia College, George Washington University**. E-MAIL: dhowes@mcguirewoods.com**

PANELISTS:

Aaron Howell, C.P.M., CPPO is the purchasing manager and contracts officer for Oregon State University (OSU), where he supervises a staff of seven procurement and contracting professionals who provide central purchasing, capital construction, and contracts services to over 160 departments on campus. His office manages procurement, facilities construction, real property, and personal services contracts for the university, totaling in excess of $250 million per year. Prior to joining OSU in 1996, Aaron worked as a purchasing analyst with the State of Oregon, Department of Administrative Services (ORDAS), placing contracts specifically in technology and high-tech services. He began his career as a subcontract specialist for Battelle Pacific Northwest Laboratories (PNL) in Richland, Washington, the managing and operating contractor for the USDOE Hanford site. His responsibilities in that position included oversight and administration of up to $10 million in very specialized research and development contracts for nuclear waste site remediation. Aaron holds a BS degree in business administration and an MBA, both from Oregon State University. He has held multiple leadership positions for the Oregon Public Purchasing Association (the local NIGP Chapter), and is a certified instructor for NIGP**. E-MAIL: Aaron.Howell@orst.edu**

Dawn Moore, CPIM is the commercial manager of the Global Systems Manufacturing Outsource Group at Intel Corporation, where she is responsible for worldwide supplier and contract management for all board and assembly outsourcing, as well as new business start-up and introduction. She has been with Intel in a supply chain management role in corporate purchasing, new construction/project management, materials management, commodity management, and indirect/services for the past eight years. In addition to her core responsibilities, Dawn is heavily involved in the development and deployment of training and supply chain strategy. Prior to working at Intel, Dawn was a senior subcontract negotiator for Douglas Aircraft Company in Long Beach, California, where she held several roles in procurement, manufacturing, inventory management, and engineering support. She is a graduate of Michigan State University with a BS degree in materials logistics management, and she has an MBA from Pepperdine University. Dawn is a former member of the board of directors for ISM's Electronics Group. **E-MAIL: dawn.moore@intel.com**

Gary T. Prod, C.P.M. is supply chain manager for corporate services and gas and electric operations at We Energies (formerly Wisconsin Electric Power Company) in Milwaukee, Wisconsin, where he is responsible for purchases of approximately $250 million annually. He also is responsible for inventory management, central distribution, and logistics support at 18 satellite storerooms. Gary has over 29 years experience in supply chain management, purchasing, and systems analysis and development in the electrical manufacturing and utility industries, and he has developed strategic alliances for both materials and services, playing a key role in We Energies' reengineering and outsourcing initiatives. Gary has presented seminars on supplier partnering, contract administration and management, outsourcing, and the fundamentals of purchasing management at the University of Wisconsin Management Institute, where he serves on the board of directors for supply chain management programs. Additionally, he has facilitated roundtable discussions and pre-dinner meetings on purchasing and materials management issues and served on the board of directors for ISM's Milwaukee affiliate. Gary has written several articles for ISM publications. He holds a bachelor's degree in business administration from the University of Wisconsin-Madison, and in 2000 he received his lifetime C.P.M. certification from ISM. **E-MAIL: gary.prod@wepco.com**

HOW TO CALL IN A QUESTION

You will have four opportunities during the course of the broadcast to call or send in questions. Five minutes before each Q&A segment, a telephone number will appear on the television screen. Questions of general interest that will appeal to a wide audience are encouraged. Our goal is to balance the amount of time spent on delivering valuable content to viewers and allowing interactive time via live Q&A. As we work within the program's time constraints to reach this balance, not all questions sent in can be answered during the broadcast. ISM program staff will work with the panelists to ensure that a wide variety of questions that are relevant to the program topic are addressed on the air.

Three Ways to Submit Questions:

- **Telephone.** You may call in your question to **480/965-5712**. An ISM staff member will answer the telephone. You can ask your question "live" on the air, or (if time allows) ask to have your question written down and delivered to the program's host in the following Q&A segment. If you'd like to ask your question live on the air, you will be put on hold until the panelists are ready to accept your call. When it's your turn, the program's host will ask you for your question. When you are finished asking the question, the host will thank you and present your question to the presenter(s). You then NEED TO HANG UP the phone to allow other calls to follow. **Please ask only one question per "live" call and, to allow others a chance to ask their questions, please call in only once if your question is used on the air.**

- **Fax**. You may choose to fax your question in during the program at any time. The fax number is **480/965-1998**. Another option is to fax your question in to ISM's headquarters **before** the program date, to the attention of Candace Craig at 480/752-7890. (NOTE: Faxing questions to ISM will only work before the program date. On the day of the program, please fax directly to the television station at 480/965-1998). **You may fax in as many questions as you wish, however only one may be used during the live broadcast.**

- **E-Mail**. Send e-mail to **ISM@asu.edu**.

Question Call-in Form

Use the form on the reverse side of this page to call-in or fax your question. The form has three sections:

- **Section 1.** The location of the call-in phone or the fax machine. The telephone or fax machine at your downlink facility may be located in a room other than where you are viewing the program. The location will be pointed out to you by your local affiliate downlink site coordinator. This section of the question form is for your use to note the phone or fax location before the program begins.

- **Section 2:** This section shows the phone numbers displayed on the television screen for call-in and fax lines. These are completed for you on the form for easy reference.

- **Section 3:** Your name, location, and question. If you call in your question, use the completed form as your "script." If you fax in the question, simply fax in this completed form. Please print clearly.

Procedures for Live Questions

If your question is selected and you choose to ask it "live" on the air, please follow these guidelines:

- Make sure all information on the "Question Call-in Form" is completed.

- Wait to be introduced by the satellite seminar host. Remember that you may be on hold for several minutes while other questions are being answered. While on hold, please remain on the phone and do not talk.

- You will be introduced by the host when it is time to ask your question. Read the completed section of your form where you wrote the question. Speak slowly and clearly.

ISM SATELLITE SEMINAR SERIES
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Location of the call-in phone: _____

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My question is for_____
(name of specific presenter/panelist, or the entire panel)

My question is_____

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You may also e-mail your question to **ISM@asu.edu**

SECTION 2:

REFERENCE ARTICLES

ISM Articles Related to Contracting Issues

The following articles support the content of today's satellite seminar on contracting issues. All of these articles are available in the Articles Database in the Members Only area of the ISM Web site.

Page 1: Lynch, Thomas J., **"Drafting Confidentiality Agreements,"** *Inside Supply Management™,* March 2002, p. 22. *Learn how to protect your organization's trade secrets with confidentiality agreements and how to work with organizations that have their own.* www.ism.ws/ResourceArticles/2002/030222.cfm

Page 4: Mayer, Jeffrey J., **"Managing a Purchasing Crisis,"** *NAPM Annual International Conference Proceedings,* May 2001. *Purchasing professionals often find themselves deeply involved in a legal crisis, unaware that the crisis was already developing and that they had lost opportunities to resolve the crisis short of legal action.* www.ism.ws/ResourceArticles/2001/01/cpMayer.cfm

Page 8: Mayer, Jeffrey J., **"Contract Situations: You Can't Always Get What You Want,"** *Purchasing Today®,* August 2000, p. 24. *Supply managers can devise a claim and delivery contract in order to replevy goods or information that is being withheld by a third party.* www.ism.ws/ResourceArticles/2000/080024.cfm

Page 10: Lynch, Thomas J., **"Contracts Across Multiple Locations,"** *Purchasing Today®,* May 2000, p. 26. *With today's technology and a wide array of sources, you might not dream of limiting your business plans to a particular state or region; be sure, then, that your contracts don't limit you in that regard.* www.ism.ws/ResourceArticles/2000/050026.cfm

Page 12: Glaros, Thomas J., **"Avoiding Contract Pitfalls,"** *Purchasing Today®,* March 2000, p. 12. *Identify and solve common contract management hurdles to ensure a successful relationship with suppliers.* www.ism.ws/ResourceArticles/2000/020012.cfm

Page 14: Galaty, Michael, Jr., **"Get a Handle On It!,"** *Purchasing Today®,* July 1999, p. 12. *The actual technology contract negotiation is the place to help you ensure that you avoid cost overruns in your technology purchase.* www.ism.ws/ResourceArticles/1999/79912.cfm

Article Reprints

Drafting Confidentiality Agreements

by Thomas J. Lynch
Reprinted from *Inside Supply Management™,* March 2002

Learn how to protect your organization's trade secrets with confidentiality agreements and how to work with organizations that have their own.

Trade secrets can be anything from the source code of your computer program, to the secret formula for your food product, to your way of merging customer files to create mailing lists. Trade secrets are things that supply managers deal with on a daily basis, but what are they really, and how do you protect these secrets? A trade secret, generally speaking, is any idea or information, not generally known, that gives an actual or potential commercial advantage to its owner and has been maintained as secret by its owner. From that definition, there are three key points to remember when you are attempting to protect a trade secret:

(1) the idea or information must be something that is not generally known;

(2) the idea or information must be something that is kept secret by its owner; and

(3) the idea or information must be something that gives an actual or potential commercial advantage to the person who holds the idea or information.

Why Protect Trade Secrets?
Protecting trade secrets encourages the sharing of ideas and information between businesses that would otherwise not be made available and also protects the privacy interests of businesses from industrial espionage. A trade secret needs to be protected from unauthorized disclosure to receive protection under the law, and like any other secret, a trade secret only has value if it is still a secret. Trade secret protections are most commonly found in confidentiality agreements. So, as a supply management practitioner, the question arises, how do you assist in drafting the confidentiality agreements to best protect your organization's trade secrets? This article will give some ideas to help in drafting effective confidentiality agreements.

Defining the Confidential Information
The first step in drafting an effective confidentiality agreement is to define the confidential information. A confidentiality agreement must contain a definition of confidential information as well as identify any technology disclosed for that information and technology to be protected. The discloser normally wishes the definition to be as broad as possible, while the recipient will attempt to make the definition of confidential information or the scope of the materials protected by the agreement as narrow as acceptable.

An example of a definition of confidential information might be: *The term "confidential information" shall mean all financial, technical, and other information including all copies thereof (including without limitation, all agreements, files, books, logs, charts, computer programs and software, inventions, processes, trade secrets, technical information, know-how, plans, specifications, identity of customers and identity of suppliers, records, reports, and statistical information), which may be furnished or disclosed to recipient directly or indirectly from disclosing party.*

Exclusions
In order to be reasonable, certain exclusions are normally incorporated into confidentiality agreements. Such exclusions and the reasons for the exclusion are as follows. The first exclusion is material that was in the recipient's possession prior to receipt. This information may be protected by a different confidentiality agreement or it may be of the recipient party's own invention, but either way, information that was in the hands of the recipient before the confidentiality agreement is signed is usually excluded from coverage of the agreement.

The second exclusion is for information developed by the recipient without any access to the information received in confidence from the discloser. This is especially important in large organizations that practice across many fields. It prevents an organization's own research and development from being stifled by a third-party agreement. It also protects the discloser because the company must be able to prove that the research or development that independently created the same output was truly done independently of the confidential information received from the discloser.

The third exclusion is for information that becomes publicly known without breach by the receiving party. If the discloser makes the information public knowledge, it makes no sense for one entity to still be bound to keep such information confidential. After all, information in the public domain is not a trade secret by definition, so you would not want an obligation to keep that information confidential.

The fourth exclusion is for information that is received in good faith from a third party without a corresponding obligation of confidentiality. If you have no reason to suspect that the information that you received is confidential, then you should have no obligation to keep it confidential. This is another common-sense exclusion.

Additionally, there is usually an exclusion from disclosure when the recipient is required to produce the information because of a judicial order or decree or by a governmental entity. Frequently, there is either a requirement to seek a protective order limiting the disclosure of the confidential information, or a requirement

to notify the disclosing party of the request to disclose, so that they may seek a protective order limiting the disclosure of the confidential information. This is because once the information becomes part of the court file, for example, it is very difficult to protect it as confidential.

The obligation of the recipient of the confidential information to keep the information confidential is usually open to negotiation and definition. A typical strategy is to make the recipient utilize the same level of care as they would use to protect confidential information of their own of a similar nature or type; but, in no event less than a reasonable standard of care. In certain circumstances, the discloser will want an absolute guarantee that the information will be protected. In these situations, the discloser needs to decide if the information is too confidential to disclose at all, while the receiving party must decide if it is worth the added expense to keep the information in a specially constructed vault, under armed guards, with dogs patrolling the area.

How Long is Long Enough?

How long should the confidential information be kept confidential? In most circumstances, the length of the confidentiality agreement is subject to negotiation. The discloser normally wants an open-ended period of time, which will exist so long as the information is confidential, and in the possession of the recipient. The recipient typically attempts to negotiate a shorter period of time and to limit to only what is necessary to accomplish whatever goals are contemplated by the agreement. In practice, the more sensitive the information (e.g., the financial records or customer lists), the longer the period that the information should be kept confidential. The less sensitive the material (e.g., a new marketing campaign that will end in six months), the shorter the period that the information should be kept confidential.

Including a return of confidential information clause in the agreement provides another way for the discloser of the confidential information to protect the information. This clause allows for the discloser of the information to request, at any time during the term of the agreement, the return of the confidential information. It will typically allow the recipient party to return the confidential information at any time during the term of the agreement, as well. This allows both parties the protection that they require when concerns arise over how their confidential information is being protected. If the receiving party does not think the information will help them, or they find another party with information that will work better for the business, they can return the confidential information and eliminate the obligation to protect. If the discloser does not like the way that the recipient is protecting the confidential information, they can ask for the information back. This works particularly well when the business sides are not working together well and it's time to look for new opportunities.

Uses for Confidential Information

The confidentiality agreement also needs a "business purpose" or some description of the uses for the confidential information. This describes the uses for which the receiving party may utilize the confidential information and puts fences around the disclosure of the confidential information. The discloser generally wants to restrict the use of the confidential information as much as possible, while the recipient party generally wants to use the confidential information for as many applications as possible.

In order to protect their confidential information, the discloser needs to ensure that the confidentiality agreement contains no transfer of ownership rights. The last thing that you want to have happen is to sign a confidentiality agreement and then have to fight for ownership with a court deciding if you truly intended the agreement to constitute a transfer of ownership of the confidential information. Take the uncertainty out of the equation by including a clause that covers this issue. The discloser also wants to ensure that they disclaim all warranties when providing the confidential information. The discloser is therefore providing the information "as is, without any warranties," and the receiving party is taking all of the risk of using this information for any purpose. This avoids the risk that the receiving party uses the information and disaster strikes (e.g., a server goes down, production stops at a plant, or any other nightmare scenario).

Confidentiality agreements may be stand-alone agreements or they may be incorporated into other documents, such as licensing agreements or employment contracts. If a confidentiality agreement follows other agreements, then the confidentiality agreement should refer to the other agreements that preceded it.

If subsequent agreements are entered into, the subsequent agreements should indicate whether or not the confidentiality agreement applies for that agreement or if there are alternate confidentiality provisions that apply for that agreement. The rule of thumb is to clearly outline the obligations for both parties. Assumptions as to what the other party is thinking can be very dangerous, especially when dealing with confidential information.

As the value of intellectual property continues to grow, the value placed on protecting your firm's intellectual capital will continue to grow. Following these simple tips will help you protect the confidential information that resides within your organization.

Supply managers can best protect their organizations from legal problems regarding proprietary or confidential information by gaining knowledge about the laws and agreements designed to protect such information. These laws and agreements include confidentiality agreements, patents, and intellectual property laws.

Managing a Purchasing Crisis

by Jeffrey J. Mayer, Esq.
Reprinted from *NAPM 86th Annual International Purchasing Conference Proceedings,* May 2001

Abstract
Purchasing professionals often find themselves deeply involved in a legal crisis, unaware that the crisis was already developing and that they lost opportunities to resolve the crisis short of legal action. This paper describes the analytical framework for avoiding such a crisis: (1) understanding and evaluating the contract, non-contractual obligation, and court process; (2) acting appropriately in response with the assistance of counsel; and (3) implementing preventative measures to avoid future crisis. The purchasing professional does not have to exercise legal judgment to avoid a crisis, but does have to recognize restricted activities, the importance of a timely response, and the value of ongoing improvements in the legal relationship between the purchasing and supplying company. This paper will be built around a case study, Cormorant Coatings, Inc. v Buchannan Spindles Worldwide, based on actual events. In this case, the failure to address the crisis turned routine business issues into a significant six-year legal action and a multi-million dollar verdict.

Report
Using actual documents from a purchasing crisis that ended up in a $500 million dollar claim and a multi-million dollar verdict, we will explain the Understand and Evaluate, Act, and Prevent ("UEAP") framework. The underlying facts, letters and documents in Cormorant v. Buchannan Spindles are the same as in the actual crisis. What is critically important to understand about this matter is that it is a crisis that did not inevitably have to happen and in fact, was both predictable and preventable. Additionally, using the same material, we will show how the purchasing professional can work in concert with legal counsel to produce better documents.

Summary of The Cormorant Coating v Buchannan Worldwide Case
Beginning in 1990, Cormorant Coatings coated metal parts for the Durham North Carolina facility of Buchannan Spindles Worldwide under a signed exclusive contract. See Contract #1. The contract, as a result of renewals, was scheduled to continue through 1996. Through the Cormorant contract, Buchannan granted Cormorant the exclusive right to coat its product. Cormorant was a small privately held North Carolina company; Buchannan, as its name implies, is a Worldwide conglomerate that treats the Durham plant as one of its internal suppliers. In light of the volume of parts provided by Buchannan, Cormorant systematically shed itself of other customers. When Cormorant signed the contract in 1990, the Durham facility was a poor performer often unable to keep its internal customers in the Buchannan organization satisfied. During the life of the contract, Cormorant performed poorly, contributing to the Durham plant's problems. From time to time, Cormorant did go the extra mile for Buchannan. Partially as a result of

Cormorant's poor performance, but also as a result of Buchannan's own failings and expedited schedule, from time to time Buchannan obtained coating services from other suppliers. Buchannan also outsourced work colloquially called coating work, but properly called Slidosil coating, from other companies. Cormorant admittedly could not perform Slidosil coating, but wanted to do so as it perceived it as profitable. Buchannan also regularly paid Cormorant on a ninety-day schedule even though the contract required payment within a lesser time period. The Durham plant did so because Buchannan Worldwide never paid in less than ninety days and assumed that Cormorant would never complain.

Beginning in 1993, Buchannan senior management decided that the Durham plant was in desperate need of improvement and put in new management determined to shake things up. Shortly thereafter, Buchannan tightened its rating services, and even though Cormorant had received relatively high ratings in the past its ratings plummeted. As a result of the poor ratings, Buchannan personnel regularly called Cormorant on the carpet and also imposed upon Cormorant various administrative charges for its services. At the same time, Cormorant was skipping a required step in the coating process that led to a potentially serious condition in parts known as fulminating crustation. Cormorant would later claim that Buchannan had requested that the extra-step be omitted for reasons of cost and convenience.

In 1994, as Buchannan systematically tightened its rating systems, Cormorant wrote a series of letters to Buchannan complaining that Buchannan was in breach of the contract because of arbitrary quality procedures and the charge backs. Cormorant demanded higher prices; Buchannan refused. Cormorant threatened to shut down Buchannan if it did not comply with its demands.

In the fall of 1994, out of caution, Buchannan began looking for alternate suppliers. Finally Cormorant invoked its right to terminate the contract. Buchannan did not protest, having lined up a new supplier, and Cormorant promptly went out of business. The new supplier charged Buchannan a huge amount and Buchannan, as a result, lost substantial monies because of the changeover. Cormorant subsequently claimed that it was put out of business because it threatened to blow the whistle on the fact that the parts it coated suffered from fulminating crustation.

It would seem, then, given that Cormorant's poor quality was documented in a rating system, that Buchannan lost money because of the change over, and because Cormorant terminated the contract, that Cormorant would not have much of a case. Nevertheless, Cormorant brought suit claiming:

a) there were direct breaches including the fact that Buchannan always paid late;

b) that it sent coating business to other companies;

c) that it further lost profits because rather than completing the contract in 1996 it stopped functioning in 1994; and

d) it was put out of business by Buchannan Spindles. Buchannan personnel thought the suit was a joke because Cormorant was a poor supplier who quit. In fact, Cormorant did obtain a substantial verdict.

Step One: Understand and Evaluate
The most basic level of understanding means:

(1) reading the written contract and identifying restrictions;

(2) understanding what lawyers call non-contractual obligations; and

(3) understanding the court process.

Purchasing professionals cannot delegate the process of Understanding and Evaluating. Purchasing managers operate through consensual legal relationships -- that is contracts. Contracts are voluntarily assumed obligations. Purchasing professionals' actions also affect non-contractual obligations or legal obligations that exist quite apart from a contract. A non-contractual obligation might be a promise, it might

be a slanderous word, it might be a production estimate. Purchasing professionals are constantly acting by ordering, by evaluating, by negotiating, by accommodating, and obviously many, many other ways. Each of these many actions has a legal significance. Because of these actions, purchasing professionals and lawyers are in an uneasy balance.

While purchasing professionals are acting within these relationships and potentially changing the relationships, lawyers are not present. And too often, purchasing professionals perceive lawyers as burdening their actions, or in the business of saying no and dragging down positive business relationships. At the same time, many purchasing professionals believe that lawyers will, after the fact, seek to fix blame for their actions if something goes wrong. And it certainly is true that purchasing professionals have a need to operate without checking with lawyers throughout the day. Not only would constant checking be cost prohibitive, but it simply would not allow for the swift and unending flow of business that their demanding profession requires.

Thus, for better or worse, the purchasing professional must identify pending legal issues. Identification of legal issues is, however, not the same thing as resolution of that issue. Resolution is for your legal team; identification is for you.

Contract. Contracts form from words. The words in a contract matter. It matters, for example, that Buchannan promised to pay Cormorant within 45 days and did not do so. Most importantly, the words in a contract operate as a restriction on your daily activities.

Permitted v Restricted

Permitted activities are those that your contract allows you to do in whatever quantity or fashion you deem fit. Prominent examples would be ordering goods under these contracts, rating the performance of suppliers, or imposing specific remedies that are set forth in the contract. With regard to the Cormorant contract, for example, there is no specified limit on the amount of goods that can be ordered, there is no limitation on the right to enforce the quality provisions of the contract, there is no limitation on the right to rate the supplier, or the requirement that Cormorant provide all plating racks to this plant.

There are also some clear restrictions. For example, the contract has a term. The contract has payment requirements. In order to have an adequate understanding of the contract, a purchasing professional does not have to be able to reach a conclusion about what the terms mean, but simply to understand that the length of the contract is something that is, in fact, restricted by the written agreement. Thus, it must be understood that any action that affects the term falls into the category of restricted activity.

Importantly, the contract may also be ambiguous. For example, the contract here does not say whether or not Buchannan can charge Cormorant an administrative fee for rejected parts. While purchasing professionals should not be in the business of evaluating ambiguous contract language, he or she should be in the business of identifying such language. If you do not know what it means, nobody will.

Non-Contractual Obligations

The purchasing professional also needs to understand the non-contractual obligations provided by law. Promises, even promises that are not in writing, can form the basis of a court action. Suppliers often create those obligations by using code words. I "trusted" you, you "promised" me, I "relied" upon you are all phrases that the purchasing professional needs to recognize and understand. For example, Cormorant writes Buchannan and said I pulled your "nuts out of the fire." This is a colorful phrase, but one that is also loaded with meaning because it shows that Cormorant has assisted Buchannan without being required to do so under a contract.

Court Process

Third, the purchasing manager needs to understand the court process. First of all, and this is not exaggeration, the process will pick you clean. E-mails, conversations, off-the-record communications, and your dirty laundry will come out. More importantly, the court process is not a pure truth-seeking function. Nor, however, is it a random function. Sometimes the court process works well, but you must have an

understanding of how it works. Generally, oral unbiased testimony trumps oral biased testimony. That is, third-party testimony will trump yours, written record trumps oral conversations, contemporaneous written record trumps after-the-fact written record.

Further, the courts will not agree with you as to the relevancy of your records. For example, your carelessness in an unrelated matter may enter the court record as proof of operating problems.

Applying Those Concepts to Cormorant v Buchannan
What does this framework mean for the issues between Cormorant and Buchannan? To begin with, reading the contract demonstrates that Buchannan was engaged in numerous restricted activities. Again, as noted above, simply because activities are restricted, does not also mean the activities are improper. Nonetheless such restricted activities need to be evaluated with counsel. Counsel's analysis may be extraordinarily complicated. For example, even though the contract is exclusive, Buchannan is sending coating work to other companies. It is not easy to determine whether sending work to other companies is in fact a breach of the exclusivity provision. To the extent Cormorant cannot provide those services, or to the extend that Cormorant did not contemplate providing those services, the sending of coating work to other companies should not be actionable. However, some of the diversion was a result of Buchannan's own problems, and Buchannan's own desires for instant turnaround.

Other restrictions are easier to evaluate. Buchannan is chronically paying late and even though Cormorant does not complain, that is a breach of contract. A third set of activities is not directly addressed in the contract. Buchannan is for example, charging Cormorant for its poor quality. The contract neither permits nor forbids such chargebacks.

Finally, and most importantly, the term ends prior to the contemplated date of 1996. Thus, this too is a restricted activity even if Buchannan has done nothing wrong, indeed, even if it is Cormorant who ends the contract. Thus, the varied activities in this matter all required some type of action instead of business as usual.

Non-contractual Obligations
Cormorant also invokes the concept of non-contractual obligations. Its letters repeat the concept that Cormorant has gone the "extra mile" or that Buchannan has made promises that have yet to be fulfilled.

Court Process
Obviously, Buchannan engaged in various activities that are restricted under the contract. Just as importantly, Buchannan's viewpoint is unlikely to be presented favorably. Cormorant took the time to record its concerns in letters. Buchannan's viewpoint depends on oral recollections. For example, Cormorant will claim that Buchannan intended that Cormorant go out of business. In support, Cormorant will note that Buchannan secretly sought out alternative suppliers. Buchannan, of course, will state that Cormorant was already threatening to quit, but those threats are not in writing. Additionally, the Buchannan dirty laundry regarding fulminating crustation will come out. Cormorant will assert that Buchannan terminated the contract because Cormorant wanted to correct the fulminating crustation defect. While Buchannan can argue that Cormorant was involved as well, that argument will not rehabilitate Buchannan in the eyes of the jury and the judge.

Additionally, even though Cormorant was historically a poor performer, the rating system did not reflect this poor performance. Additionally, the late payments were something easily proved in court. The written record when companies appear in court is very straight forward. For years Cormorant received high ratings, and those ratings plummeted when it complained about late payments, diversion of coating business, and the issues relating to fulminating crustation.

Response
What should have been here to prevent the catastrophe for Buchannan and the years of litigation? For each of the restricted activities, Buchannan needed to determine an appropriate course of action in conjunction with its legal staff. With regard to each restricted activity, Buchannan must decide whether to correct the

activity, to keep doing business as usual, to seek to create a record for use in court later, to negotiate a new arrangement, or even to proceed to court or some combination of these courses of action. With regard to payment, for example, Buchannan should not continue to pay late. Such late payment is a direct violation of the contract. First, the Buchannan management should have responded in writing to any expression of concern.

With regard to exclusivity, Buchannan should have documented its need to use other suppliers. Buchannan had sound reasons for using other suppliers both because Cormorant was a poor performer and because some coating services, such as Slidosil, were beyond Cormorant's capacity. Accordingly, Buchannan should have worked with its counsel to structure the proper use of suppliers. To the extent that Cormorant was unable to provide proper service, Buchannan should have provided notice in writing and proceeded to use alternate suppliers. For the Slidosil procedure, Buchannan should have obtained Cormorant's acknowledgment that it was not interested in pursuing Slidosil as a product line. With regard to Buchannan's own failings that prompted the use of other suppliers, Buchannan should have contemporaneously sought to negotiate a resolution with Cormorant. If Cormorant refused to negotiate, and demanded compensation, Buchannan would have been entitled to pay and also inform Cormorant that it was going to look for another supplier.

Prevention
The Buchannan contract may be improved in a variety of ways. Many of the protections normally found in a contract are absent. For example, this contract does not contain a limitation on available damages, a choice of venue provision, or even a right for Buchannan to terminate the contract in the event Cormorant refuses to perform. Many of those issues are matters that may be addressed by counsel in an exercise in legal training. I will leave those issues for a seminar on contract basics. However, the contract also may be improved by developing appropriate provisions relating to specific purchasing concerns.

In particular, the purchasing professional needs to outline for the individual drafting the contract the areas that should be without restriction or, alternatively, with the proper and well-understood restriction. With regard to the payment terms, for example, if the purchasing department knows that 45 days is impossible, the department should reject and contract providing for those terms. Additionally, if the purchasing department believes that it would be appropriate to provide for an administrative fee for poor parts, it should ask that such a provision be included. Consider also the issue of exclusivity. The attorney in charge of the contract may be unaware of all the different types of coating and whether or not an exclusive contract would commit Buchannan to a supplier with insufficient capabilities. Interaction between the purchasing department and those drafting the contract in this regard, may serve to prevent problems with contract compliance before they arise.

Conclusion
Buchannan's relationship with Cormorant was troubled from the start. Buchannan had multiple opportunities to heal or end the relationship at minimal cost. Even at the end, Cormorant demanded payment of $500,000 to end the contract. Buchannan did not even respond to that offer because it seemed outlandish. Yet, six years later, and having expended at least that much in legal and other expenses already, Buchannan faced a hostile jury. The purchasing professionals and other managers also found themselves mired in a lawsuit when they could have been out building their companies and careers.

The investment required to prevent the crisis was relatively minimal and should have been followed.

Contract Situations: You Can't Always Get What You Want

by Jeffrey J. Mayer, Esq.
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Supply managers can devise a claim and delivery contract in order to replevy goods or information that is being withheld by a third party.

When a supplier decides it wants more money than it bargained for, and does not have a lawful method of obtaining those additional monies, the supplier will often hold the purchaser's goods or information hostage. Ex-employees or potential suppliers may also unlawfully secrete or refuse to release a purchaser's property. Common situations where an organization holds goods against another's will include:

- A manufacturer that requires the immediate return of tooling or molds used to manufacture parts for its customer
- A supplier of design services that needs its design and proprietary information returned from a subcontractor when the information is required for the next job

For example, imagine the following crisis: a supplier using the purchaser's unique tooling or molds decides that it is not making enough money from the manufacturing of parts off the tooling. When the supplier refuses to make more parts, and the purchaser decides to move the tools to a new supplier, the first supplier refuses to release the tooling.

Fortunately, the law provides aggrieved purchasers with powerful remedies that usually work well and quickly. While bankruptcy proceedings may complicate recovery, in most circumstances, the proceedings are simple and effective.

"Replevin" or "Claim and Delivery" Actions

Virtually all jurisdictions have "claim and delivery," "replevin," or "writs of possession" statutes. These statutes require a court to issue an order that another organization deliver your property to you in a short period of time (as short as a few hours) if: (1) it's your property (or you have a right to the property) and (2) you want it. The purchaser does not need to demonstrate that it will suffer damages.

Typically, proving that the property is yours is a simple matter. You may have written proof of title. Many contracts provide, and all should provide, that title to unique property is in the buyer. A purchaser also has a right under the Uniform Commercial Code (UCC) §2-716 to goods that are unique, whether or not the buyer has title to the goods. According to that provision, "specific performance [which includes replevin] may be decreed where the goods are unique or in other proper circumstances." Similarly, if the contract provides you with a right to the return of property upon demand, this agreement alone is often sufficient in proof. In all of these situations, your attorney should be able to obtain a hearing in a week or less, depending on the level of emergency.

Using Bonds to Obtain Release

Despite the power of the replevin statutes, it's virtually a given that the party withholding goods or information will oppose your efforts to obtain a court order under the replevin statutes. Retaining these items is its last, best hope to obtain cash or concessions. If the court does not understand the facts, the court may refuse to order the transfer of the property in order to "sort out" the details. As such, the supplier will often bombard the court with multiple and detailed accusations of varying degrees of relevancy and accuracy.

As a backup plan, you can use a bond to ensure the return of your property. A bond is simply a method of guaranteeing payment of a judgment. Sometimes cash is paid into the court; on other occasions a bonding company will guarantee payment. With a bond, a purchaser can short-circuit any opposition to a replevin action. For example, if the supplier wants $1 million more than provided in the purchase order, you can tell the court that you will put up a bond of $1 million. With a bond in place, the organization does not have to pay the $1 million now, but the supplier is nonetheless guaranteed payment. The court will almost certainly release your property with a proper bond because the supplier, if correct, will obtain its money at the end of the case.

Protecting Property
Courts also have mechanisms for protecting purchasers from the most unscrupulous suppliers. For most court proceedings, including claim and delivery actions, you are required to notify the other side that you are going to court. In those exceptional circumstances when the supplier threatens to destroy your property, however, courts also will issue orders regarding your property without first informing the other side. These orders will prohibit the supplier from damaging, moving, or using the property until further order of the court. This order is commonly known as an "ex parte" temporary restraining order. Accordingly, if, during the course of your dealings, the supplier makes threats, make a record through internal memorandums that will allow you to present an accurate affidavit.

What Happens after the Return of the Property?
After the purchaser obtains its property by court order, the case continues. Each side is free to seek money damages from the other party. The purchaser can claim that the property was delivered late or damaged, while the supplier can ask for an increased price. Practically, however, the case should end quickly. The supplier usually does not have a valid claim.

Important Contract Provisions
As is the case in many instances of supplier disputes, you have the ability to protect your interests through a well-drafted contract. Among other important provisions, the contract (or purchase order) can provide that you have title to the goods identified in the contract. You can also provide that, if you are forced to bring a replevin or claim and delivery action, the supplier has to pay your attorney's fees. Consult your counsel for a full analysis.

All supply managers run the risk of being held hostage by rogue suppliers. A powerful contract and honest and quick thinking will stop the blackmailer. In addition, you should always have available bonding sources and attorneys prepared with the proper forms to head to court quickly. With these steps, any court battle for the return of property should be quick and successful.

Contracts Across Multiple Locations

by Thomas J. Lynch
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With today's technology and a wide array of sources, you might not dream of limiting your business plans to a particular state or region; be sure, then, that your contracts don't limit you in that regard.

You have the next big item or are the next dot-com phenom. You are expanding operations and contracting with far-spread suppliers. Should you be concerned about your contracts? Isn't contract law universal among the states? The answers to these questions are "yes" and "no," respectively.

In 1962, the Uniform Commercial Code (UCC) was formalized to try to standardize contract language with respect to transactions. All 50 states have adopted the UCC in some version. The risks as an entire organization and as a purchaser revolve around how the various states adopted the UCC. Variations in adaptation mean variations in interpretation. So, with a resounding "yes," purchasing and supply management professionals can be affected by these variations. Here are some of the differences and how contracts can best be protected.

State by State
UCC section 2-725 provides that an action for breach of contract for sale must be commenced within four years after the cause of action has accrued. The timeframe in which a lawsuit must be filed or it will be lost is called a statute of limitations. Courts generally apply the statute of limitations for the state in which the court resides. For example, a state court in Maine will typically apply Maine law; a federal court in Texas

will typically apply federal law for substantive issues but Texas law for procedural issues. This rule has caused uncertain results in the past because prior to the enactment of the UCC, no universal statute of limitations existed for transactions involving the sale of goods.

Unfortunately, uncertain results remain because not all legislatures adopted section 2-725 as written. For example, in Colorado it is based on the type of claim. Certain claims have a three-year statute and other claims have a two-year statute of limitations. In Mississippi, South Carolina, and Wisconsin, the term is six years. In Oklahoma, not only is the standard term longer than four years - it's five years -- but under certain circumstances it can also be shortened to six months! So, unless you choose to only do business with part of the country, you now have guaranteed uncertainty as a cost of doing business.

Contract Options

How do you protect your organization and minimize the risk? In general, there are three ways to accomplish that goal. First, research the state laws in all of the jurisdictions in which you are going to conduct business. This is a costly and cumbersome process. Second, include a choice of law provision in your contracts. Third, include a choice of forum provision in your contracts. While not eliminating risks, these steps accomplish the goal of minimizing the risk. These solutions are not without certain problems, mainly related to convenience. For example, an organization may have operations in several states, but uses a choice of forum clause relative to its headquarters. If a court enforces that clause, all trial participants might be required to travel to the headquarters' state. If the court deems this too inconvenient, it could set aside the forum selection clause entirely. These possible risks need to be evaluated against the risk inherent in contracts performed across multiple jurisdictions. Purchasers do not want to be faced with a legal battle governed by laws with which they are not familiar.

Choice of Law Clauses

Generally, as a matter of law, parties are free to choose the law that will govern their agreement. Section 187 of the Restatement (Second) of Conflict of Laws states: "The law of the state chosen by the parties to govern their contractual rights and duties will be applied." This means that in each of your contracts, you should have a clause that chooses the law that will govern any disputes that arise under the transaction. The court in *Engis Corp*. v. *Engis Ltd.*, 800 F.Supp. 627 (N.D.Ill. 1992), addressed when a choice of law clause will be enforced by a court. A choice of law clause is enforced unless (1) the chosen state has no substantial relationship to either the transaction or the parties, or (2) application of the chosen law would be contrary to a fundamental public policy of a state with a materially greater interest in the issue in dispute. Unless faced with substantial local-interest public-policy concerns, the courts will enforce these clauses. "The general rule is that courts will give effect to an express agreement that the laws of a specified jurisdiction shall govern, particularly where some material element of the con-tract has a real relation to, or connection with, such jurisdiction" (*Miller* v. *Fannin*, 481 So.2d 261, 262 (Miss. 1985)).

Courts allow the parties to contract to terms as required. The courts encourage this to promote certainty in contracts in general but also, as stated in *Herring Gas Co*., *Inc*. v. *Magee*, 22 F.3d 603 (5th Cir. 1994), "[p]rime objectives of contract law are to protect the justified expectations of the parties and to make it possible for them to foretell with accuracy what will be their rights and liabilities under the contract. These objectives may best be obtained in multistate transactions by letting the parties choose the law to govern the validity of the contract and the rights created thereby. *In this way, certainty and predictability of result are most likely to be secured* (emphasis added by the court)." As long as there is a showing that it wasn't forced on one party and was the subject of negotiation, the courts are generally willing to let the parties live by the bargain of their contract. However, if the contract does not reflect an "arm's-length" agreement, the courts have been known to interpret these provisions freely.

In drafting a choice of law provision, always make sure to eliminate the conflict of laws section. A sample choice of law clause might be:

> *The rights and obligations of the parties under this Agreement shall be governed by the laws, other than the choice of law rules, of the State of Michigan.*

Conflict of laws is a procedure set up to determine the governing state law for the dispute when there are multiple interested states. Conflict of laws is resolved based upon a number of factors, such as the place of contracting, the place of negotiation of the contract, the place of performance, and domicile. Many of these factors allow a different forum's law to apply. For example, your contract could allow Ohio law to apply, the performance of the contract occurs in Georgia, and the contract was negotiated in New York. The inherent uncertainty in allowing an undetermined forum's law to govern the contract and what that could do to the "bargain of the parties" can be eliminated by excluding the conflict of laws section. In Engis, the court saved the defendant from a poorly drafted choice of law clause. Don't count on this happening with your organization.

Forum Selection Clauses
Forum selection clauses can be as important as a choice of law clause. A forum selection clause allows the parties to choose the court where any dispute under the agreement will be brought. Based upon bargaining power, one of the parties may end up with the forum of its choice or a neutral forum. A neutral forum allows the parties to avoid courts that are advantageous to only one of the parties. Forum selection clauses generally are enforced by modern courts unless enforcement is shown to be unfair or unreasonable. However, a forum selection provision in a written contract is prima facie valid and enforceable unless the opposing party shows that enforcement would be unreasonable (see *M/S Bremen v. Zapata Off-Shore Co*., 407 U.S. 1, 10 (1972)). This issue was also discussed by the Sixth Circuit Court of Appeals in *Security Watch, Inc. v. Sentinel Systems, Inc., et al.*, 1999 FED App. 0167P (6th Cir.). In *Security Watch*, the Sixth Circuit noted that "the Restatement discusses three situations in which a court might conclude that a forum selection clause was unenforceable. The provision may be unenforceable if (1) it was 'obtained by fraud, duress, the abuse of economic power, or other unconscionable means,' (2) the designated forum 'would be closed to the suit or would not handle it effectively or fairly,' or (3) the designated forum 'would be so seriously an inconvenient forum that to require the plaintiff to bring suit there would be unjust.'"

The U.S. Supreme Court in *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516 (1974), stated that "a contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is ... an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction." This applies almost as much intranationally as it does internationally. Forum selection clauses can provide a measure of assurance as to which courts will resolve any potential disputes. This allows the parties to plan the risks more effectively as there is greater certainty in the outcome of any potential litigation. Increased certainty - and therefore decreased risk - results from the knowledge gained, before the contract is signed, of which law the court will apply and which court will be applying the law. These risks, if not addressed upfront in the contract, could spell doom to an otherwise favorable business opportunity. Don't let it happen.

While nothing will completely eliminate the risk involved in contracting with third parties, following these principles can reduce the risks. Make sure that your contracts include choice of law and choice of forum clauses, or that you have at least considered the issues and weighed the risks. Failure to consider and to address these issues could place you in a courtroom as opposed to the boardroom.

Avoiding Contract Pitfalls

by Stephen Glaros, C.P.M.
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Identify and solve common contract management hurdles to ensure a successful relationship with suppliers.

Contract Management
While there exists a wide range of contract resources for today's purchasing and supply management professionals, there are certain common pitfalls that the purchaser should be aware of. While a few of the solutions may seem common-sense, investing a little bit of time actively addressing them will ensure solid contracts and relationships between suppliers and the purchaser's organization. The list below is not meant to be all-inclusive, but may help to generate an awareness of these and other pitfalls. They have been arranged into three categories: pre-award, negotiations, and post-award.

Pre-Award
Pitfall: Poor source selection
Solution: Understand how to match the organization's requirements with a supplier's capabilities, and reconcile these two expectations into a viable contract.

The contracting process should be a strategic one by adding value to the source selection process and identifying how it affects the resulting contract. Integrate the purchasing and supply management group into the other business functions of an organization to allow the group to quickly and accurately convey requirements to the supplier base in the form of standard contracts. Ask senior management to share support for this integration process. Perform "informational interviews" within the organization and with potential suppliers to build profiles of information that can be used later on in the development of appropriate contracts.

Pitfall: Unfamiliar language and contract templates
Solution: With some exceptions, purchasers should always insist on negotiating using their own documents.

Building a library of standard contract language and templates gives purchasers a great deal of leverage in setting the tone for the relationship. Start by creating two simple, standard contracts: one for products and one for services. Many organizations have housed such templates on an intranet for ease of access. These standard contracts should be provided to the supplier as early as possible and made a part of any request for proposal (RFP) process. From there, negotiate more advantageously, using terms and conditions that (along with your business and legal functions) are familiar. This may also drive down cycle time to execution, since it won't be necessary to become familiar with a different set of contract terms. If faced with using a supplier's contract, use a checklist of terms to add/delete/be aware of to help ensure the organization's contractual requirements are addressed.

Pitfall: Unclear expectations and unclear objectives
Solution: Take the role of relationship manager to make sure that both contracting parties understand the agreement.

The challenge for the purchaser at this point is to become an effective communication conduit in order to relay the organization's requirements to the supplier, and the supplier's capabilities to the organization. Having standard contract templates allows the purchaser to focus more on exhibits and attachments, where important service-level requirements, milestones, and statements of work can be addressed and agreed upon by the parties. When the contract is executed, all parties are clear of the intent, objectives, and obligations in the relationship.

Negotiations
Pitfall: Ambiguous language and terms open to interpretation
Solution: Be clear and specific.

Throughout the contract iteration process, definitions and contract language, which speak to obligations of either party, must be detailed so that what is said and agreed upon matches what actually appears in the contract. For example, take the procurement of a capital asset. If a remedy has been negotiated for the return and refund of the asset in the event of a failure, negotiate a specific depreciation schedule, rather than

relying on terms such as "reasonable wear and tear." In the event a return and refund becomes a reality, both parties can quickly calculate a refund amount.

Pitfall: Attempting to fulfill overly optimistic or unrealistic expectations
Solution: Constantly assess the pre-award objectives against supplier capabilities, ensuring realistic expectations.

The process of negotiation implies some "give and take" that the objectives set in the pre-award stage may change. Remain sensitive to this, using the exhibits or attachments created in the pre-award phase as guides, ensuring that, as the negotiations continue, the expectations do not become overly optimistic or unrealistic. If, at any point, the expectations and capabilities appear to be in misalignment, this should be immediately communicated to the appropriate party for resolution.

Pitfall: Failing to plan for termination
Solution: Develop a termination strategy which identifies what rights can be exercised to avoid liability in cases of convenience.

There is always the possibility that a purchasing organization's requirements or a supplier's capabilities will change, possibly to the point where a relationship may no longer be appropriate. Should a contract ever need to be terminated, ensure that it is done fairly and with as little legal and/or economic liability as possible. Make certain that termination for material breach is enforceable and unambiguous, and that termination for convenience provides indemnification and protection from liability for a supplier's future profits or losses. For example, "To the full extent allowed by any applicable law except as expressly provided in this Agreement, the Supplier agrees that it shall have no rights to damages or indemnification of any nature due to the expiration or termination of this Agreement by the Customer pursuant to its terms."

Post-Award
Pitfall: Assuming the negotiations are over
Solution: Take a proactive approach to managing amendments and revisions to the contract as needed.

Just because a contract is executed does not mean that the work is over. While the contract details the formal relationship between the parties, some business is, realistically, conducted informally with activities undocumented. It's important to continue monitoring the relationship, using the contract as a baseline to understand the ongoing issues that appear in the relationship. Scheduling formal, regular reviews (quarterly or biannually, depending on the commodity or relationship) with suppliers can help maintain the communication links. Facilitate end-user participation, either through regularly scheduled surveys or meetings, or by including end users in the supplier review process. Memorializing even minor changes to the relationship in the form of amendments will, in the long term, serve to keep expectations realistic, avoid surprises, and provide for clear communication and trust.

Integrating the Concept of the Relationship Manager
An overriding theme behind these and many other contract pitfalls is that a contract manager must be an effective relationship manager. Doing so illustrates to the purchasing organization the important role purchasing and supply management plays in facilitating and maintaining relationships with suppliers. As a relationship manager, alert the parties to changes and ways to add value to the relationship. Integrating a contracting function within purchasing helps create this environment. The concept speaks to a broader strategy of leveraging a purchaser's ability to organize information; influence contrary positions; expose the common ground between parties; and maintain long-lasting, mutually beneficial relationships. And to that end, many pitfalls may be avoided in the process.

Get a Handle on It!

by Michael Galaty, Jr.
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The actual technology contract negotiation is the place to help you ensure you avoid cost overruns in your technology purchase.

All critical participants have just signed the technology contract. You want to think the hardest work of negotiating and contracting is complete. Think again. In many cases, the work has just begun.

Under an extensive technology negotiation, certain contract items and issues related to maintenance and operations can emerge.

In fact, extensive maintenance overruns can change the cost of a contract as much as 10 to 50 percent. According to industry experts, license fees represent only 20 percent of your software life cycle costs, typically quoted as a percentage of the list price. How can you avoid unintended costs to the technology contract?

Contract Upfront to Avoid Maintenance Overruns Later
In truth, effective management and maintenance of the technology contract happens upfront. Potential technology contract problems arise when certain issues or areas are not thoroughly considered when negotiating your contract. Therefore, use the contract to keep future management and maintenance of the software deal cost effective. Potential problem areas are listed below with advice on how to turn them into part of a well-prepared contract.

- **No assignment rights.** Assignment rights cover the ability to transfer your rights to someone else, such as another department, division, or subsidiary within your organization, at your discretion, based on your organizational needs, at no additional cost. For example, when one organization consolidated its Canadian data center into U.S. operations, the technology group discovered that the transfer of one supplier's license would cost more than $100,000. Problems such as this can balloon the initial cost of the technology contract. Work assignment rights into your contract to help you avoid excessive, unexpected costs.

- **Poor development of cost elements.** Require all expenditures to be specified and quoted upfront, before you make a commitment to purchase. Ask yourself what might be a common omission: a missing module, extra charges for a long-distance customization that only the supplier is able to provide, or an unusual tax. It's not too much to expect your supplier to be upfront about possible additional costs. In addition, all costs should be defined. Within this area, work for pricing, upgrade, and maintenance caps. If you spend time in this area you can eliminate any or all open-ended costs. Another strategy to understand hidden or unexpected costs is to research and study as much as you can about the technology - or consult with technology experts - to see if any unexpected costs can be predicted.

- **Poor warranty terms.** Warranty terms deal with items such as acceptance and maintenance support. The coverage can be negotiated for any length of time. Create an acceptance criteria document, which lists your expectations about the software and/or hardware's behavior in no uncertain terms. For example, do you expect 30,000 transactions to be processed in an hour? Then make sure your document includes this requirement. As long as you create such a document, you maximize the benefit of the warranty period.

- **Lack of proper terms for enhancements, fixes, and upgrades.** Have all modifications and improvements the supplier makes been included in the annual maintenance charge, and not added separately? Another important point: Require the supplier to install operating system upgrades in a

timely manner, or else you could find yourself operating on unsupported platforms. The latter point is particularly important for integrated systems where it's desirable to upgrade a series of linked applications at the same time.

- **No provisions for support and training.** Work with your supplier to determine if it provides an escalation procedure for severe problems, or whether problems are resolved on a first-come, first-served basis. If you require an escalation procedure because of user needs and the criticality of the technology, work this into the contract. In addition, negotiate a reasonable expenditure for support and training, especially if this supplier will be the recipient of additional income due to continuous upgrades and additional services. You also should set up a clause that creates an option for no-charge for support if the provider fails to adequately support your organization's technology needs. Negotiate travel and living expenses upfront before your supplier sends a consultant to your premises to fix problems. This is an area where costs can exponentially balloon in the technology contract and should be avoided. Finally, is the help desk open 24 hours? This is a critical issue if your technology will be running around-the-clock around the world.

- **Leaving out a clause that protects you from Year 2000 compliance problems.** As December 31, 1999, approaches, make sure you have added proper language to your contract to protect yourself against date-change problems.

- **No renewal options.** Look for this event to be triggered by an action, rather than occur by default. Consciously extend the use of a software product every year; don't be reminded by an invoice.

- **No limit on right to audit.** Create a provision in your contract that limits, or at least sets, parameters for supplier auditing. A limit on right to audit by the technology supplier governs the amount of disruption your organization will tolerate. Of course a supplier has the right to inspect your proper use of their software. But you don't want them to just show up unannounced at your doorstep and expect you to drop everything. Tremendous amounts of "soft" dollar costs can be incurred here, such as slowdown in productivity.

- **Lack of portability provisions.** This issue covers the cost of migrating an application to a different computer or another site. Generally, the more powerful the computer, the higher the cost of the license; though it's not uncommon for a supplier to charge for every license transfer, even among similarly powered computers.

- **Lack of termination provisions.** When can either party terminate the agreement and what happens upon termination? You might be shocked to find out that in some contracts the supplier can just walk away without any obligation. Make sure your contract includes a provision for proper termination by both sides.

Of special note, due to the flood of mergers and acquisitions in business today, recourse, guarantees, and continuation of warranties with the new (or merged) supplier must be written into your contract. If you fail to provide this type of protection, you could be left without recourse.

Now That You've Signed the Contract, Manage for Cost Savings

Do your homework. Begin by understanding your current costs, and understanding the business impact. Then study and identify the technology's impact. And obviously, obtain management's support. A list of maintenance and management tactics follow.

- Organize staff to support software management, especially users of the technology. For example, set up a reporting system that allows you to check in monthly or quarterly with users to determine how effectively the technology is working for them. You should ask such questions as, "Is the new technology currently meeting your needs?" "Do you have additional needs this technology is not providing?" "Is service and training adequate?" Your own situation will dictate what type of

information you need from users. The main objective is to make sure that you're in constant communication with internal users.

- Put in place maintenance renewal controls. Again, your internal users can be a support here too. Have them make sure that maintenance is being carried out as required by the contract.
- Conduct periodic use and justification audits (see above). A survey or questionnaire specifically designed for this can be a great help.
- Identify and correct supplier pricing errors. This can only happen if you regularly compare charges against the original contract agreements. For complicated software contracts this is critical since hidden charges might be conveniently woven into the invoices.
- Don't pay 100 percent of the software fee upfront -- establish an installment payment structure.
- Terminate all your maintenance renewal agreements at the same time.
- Conduct monthly (or quarterly) meetings with your information technology staff to assess the overall management of the software contract and uncover unexpected problems and challenges. Brainstorm on ways to improve management opportunities of the contract. Encourage the information technology staff to offer suggestions. This is their area of expertise. Their insights might help you save on your technology contract.
- Do regular contract management evaluations. Ongoing evaluation of your software contract is probably the best way to watch for and track problems. In this way, purchasing and supply professionals can avoid cost overruns in their contracts.

Your information technology purchases are considered some of your most important purchases. They can make or break an organization in many ways -- not just because of the expense of some technology contracts. Greater costs to the organization emerge when a technology contract continues to balloon with expenses, or even worse, the wrong technology was purchased in the first place.

Contracting Resources Available from ISM

Books:

- **ISM Technotes:** *Contract Terms and Conditions for Purchase Orders and Other Contractual Agreements.* This resource manual contains a number of contract clauses, listed alphabetically by clause type. Item TN2; USD $55/members $45.

ISM Seminars:

- ***Purchasing and the Law: The Basics You Need to Succeed***
  - December 11-13, 2002, Atlanta, GA
  - February 19-21, 2003, Orlando, FL
- ***Contract Writing Basics: What All the Ts and Cs Mean***
  - November 21-22, 2002, Atlanta, GA
  - March 17-18, 2003, New Orleans, LA
- ***Advanced Contract Writing for Purchasing and Supply Management***
  - November 18-19, 2002, St. Petersburg, FL
  - March 6-7, 2003, Las Vegas, NV
- ***Legal Considerations of Software Licensing and Other Technology Related Agreements***

- December 16-17, 2002, Washington, DC

Online Learning:

- ***Contract Performance Responsibilities and Rights in Contract Relationships*** *(Course #3945);* This is a self-paced online course.

For more details and ordering information for ISM products, or to obtain a catalog, call ISM Customer Service at 800/888-6276, extension 401.

SECTION 3:

PROGRAM

GRAPHICS
and
SAMPLE TERMS

ISM SATELLITE SEMINAR SERIES

CONTRACTING ROADBLOCKS: REMOVING THE BARRIERS

Thursday, October 24, 2002

7:00 a.m.	**Pacific Daylight Time**
8:00 a.m.	**Mountain Daylight Time**
9:00 a.m.	**Central Daylight Time**
10:00 a.m.	**Eastern Daylight Time**

Thank you to the panelists for providing the various clause examples used in this program.

This ISM Satellite Seminar program is designed to provide information relating to the legal aspects of contracting and contract management. All program content is provided for informational purposes only.

ISM is not engaged in rendering legal services, advice, or opinions.
If legal advice or other expert assistance is required,
the services of a qualified professional should be sought.

Thank you to the panelists for providing the various clause examples used in this program.

ISM SATELLITE SEMINAR SERIES

CONTRACTING ROADBLOCKS: REMOVING THE BARRIERS

October 24, 2002

ISM™
institute for supply management

Thank you to the panelists for providing the various clause examples used in this program.

Segment 1:
Overcoming the Barriers to Effective Contracting

- **Choice of Language**
- **Battle of the Forms**
- **Solicitation Documents**
- **The Scope of Work**
- **Change Orders**

4

Thank you to the panelists for providing the various clause examples used in this program.

Segment 2:
Contract Language to Avoid Pitfalls

- **Provisions to Avoid Future Controversy**
- **Provisions that May Involve Complex Negotiations**
- **Beware of Certain Clauses**
- **Non-Negotiable Terms**
- **Contracting Overseas**
- **Regulatory Issues**

5

Thank you to the panelists for providing the various clause examples used in this program.

Segment 3:
How Do Business Relationships and Conditions Affect Contracts?

- **Supply Chain Management Perspectives**
- **Large vs. Small Companies**
- **Contract Management**

6

Segment 4:
Resolving Contract Disputes

- **Exploring the Options**
- **Alternative Dispute Resolution**
- **Arbitration**
- **Escalation**
- **Effects of Company Culture and Conditions**

7

Thank you to the panelists for providing the various clause examples used in this program.

SEGMENT 1:

OVERCOMING THE BARRIERS TO CONTRACTING

8

Thank you to the panelists for providing the various clause examples used in this program.

CONTRACT CLARITY

- **Avoid ambiguous or conflicting terms**
- **Pay attention to choice of language to avoid ambiguity**
- **Avoid conflicts between standard terms and conditions and scope of work or other contract attachments**

9

Thank you to the panelists for providing the various clause examples used in this program.

BATTLE OF THE FORMS DISCLAIMER

… All Purchase orders shall be governed only by the Terms and Conditions of this Agreement notwithstanding any preprinted terms and conditions on Supplier's acknowledgement or Buyer's Purchase Order.

Any additional or different terms in Supplier's documents are hereby deemed to be material alternations and notice of objection to and rejection of them is hereby given.

10

Buyer may purchase and Supplier shall provide the Services and sell the Items as described in Addendum A, at prices specified, and in accordance with the Performance Standards and Quality Requirements of Addendum B, and the Terms and Conditions of this Agreement. All Purchase orders issued to Supplier by Buyer during the term of this agreement shall be governed only by the Terms and Conditions of this Agreement notwithstanding any preprinted terms and conditions on Supplier's acknowledgement or Buyer's Purchase Order. Any additional or different terms in Supplier's documents are hereby deemed to be material alternations and notice of objection to and rejection of them is hereby given.

Thank you to the panelists for providing the various clause examples used in this program.

NO VALID COUNTEROFFER (Purchaser)

... in the event of a counteroffer by Supplier, Supplier acknowledges that a contract does not exist between the parties ... unless and until Buyer accepts such counteroffer in writing.

Any performance by Supplier prior to written acceptance of the terms of the counteroffer by Purchaser shall be under the terms originally issued by Buyer and at the sole risk of Supplier.

11

Non-binding Counteroffer

If Buyer issues a firm offer to purchase from Supplier pursuant to Purchase Order, then, in the event of a counteroffer by Supplier, Supplier acknowledges and agrees that a contract does not exist between the parties on the terms proffered by Supplier unless and until Buyer accepts such counteroffer in writing. Any performance by Supplier prior to written acceptance of the terms of the counteroffer by Buyer shall be under the terms originally issued by Buyer and at the sole risk of Supplier.

Thank you to the panelists for providing the various clause examples used in this program.

START WITH THE SOLICITATION DOCUMENT

Except to the extent that Bidder specifically proposes alternative terms and conditions, Bidder acknowledges and agrees that the General Terms & Conditions attached shall be a part of any Agreement between Bidder and Buyer with respect to the Work.

12

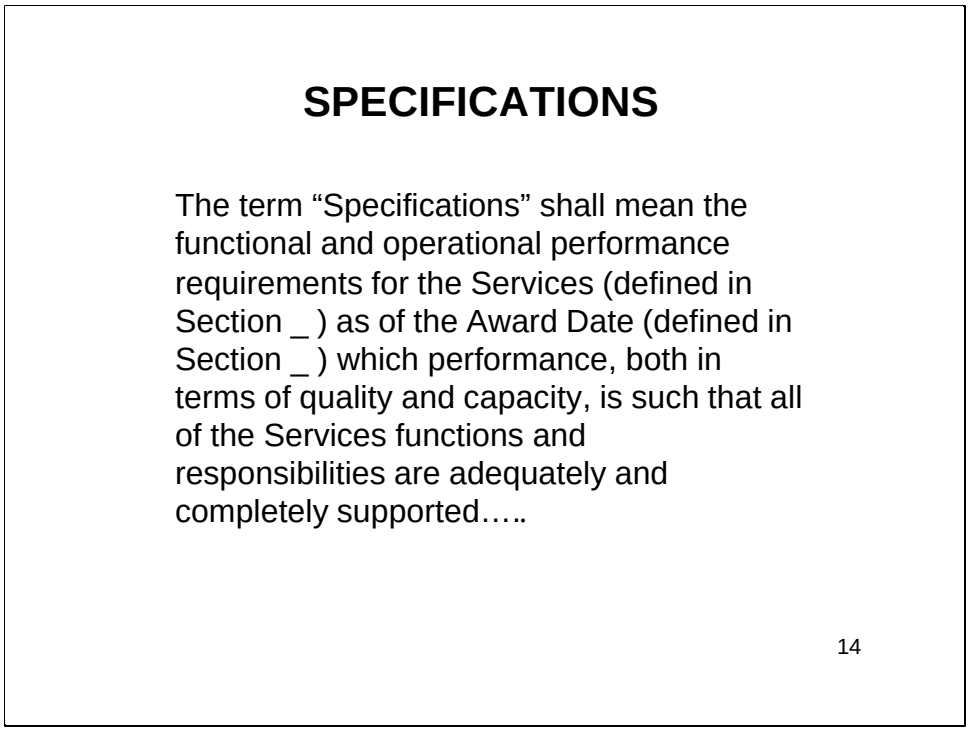
Except to the extent that Bidder specifically proposes alternative terms and conditions in Section [ ] of its response to this Request for Proposal, responding to this request for proposal, and as a condition precedent to being selected to perform the Work (which, in Buyer's sole discretion, may or may not be awarded to any of the Bidders), Bidder acknowledges and agrees that the General Terms & Conditions attached hereto and incorporated herein as Exhibit A shall be a part of any Agreement between Bidder and Buyer with respect to the Work.

THE HEART OF THE CONTRACT: SCOPE OF WORK

- Specifications
- Omissions from Specifications
- Changes in Scope
- Competitive Bids

13

Thank you to the panelists for providing the various clause examples used in this program.



1.0 Service Requirements

1.1 Specifications The term 'Specifications" shall mean the functional and operational performance requirements for the Services (defined in Section _) as of the Award Date (defined in Section _), which performance, both in terms of quality and capacity, is such that all of the Services functions and responsibilities are adequately and completely supported. In order to provide some, but admittedly not all of the requirements for the Services, attached is Specification No___], which details some of the current functional and operational performance levels. Changes in the Specifications that might be necessary during the term of this Agreement can only be implemented using the procedures set forth in this Agreement. The Specifications shall include any such changes, as thus implemented. The Specifications also include all other obligations, and all performance levels, set forth in this Agreement (including all Schedules hereto) and shall be deemed to include those requirements of Buyer put into practice prior to the Award Date.

Thank you to the panelists for providing the various clause examples used in this program.

OMISSIONS FROM SPECIFICATIONS

- Provider acknowledges that Buyer has expended great efforts in preparing the Specifications and in attempting to describe the scope and commitments to its customers.
- However, it is possible that some components might have been involuntarily or inadvertently omitted from the Specifications.

15

1.2 Omissions from Specifications

Supplier acknowledges that Buyer has expended great efforts in preparing the Specifications and in attempting to describe as thoroughly and precisely as possible the scope of its operations, capacities, activities, performance levels, and commitments to its customers, which are detailed in the Specifications. However, despite these efforts, it is possible that some components of these operations, capacities, activities, performance levels, or commitments, might have been involuntarily or inadvertently omitted from the Specifications. Buyer and Supplier agree that: (i) any operation, practice, activity, performance levels, or commitments of Buyer that relates to, is similar to, is complementary to, or is generally consistent with, any operation, capacity, practice, activity, performance level, or commitment set forth in the Specifications will be deemed incorporated by this reference into the relevant portions of this Agreement and win be subject to the terms and conditions of this Agreement; and that (ii) Supplier will perform or fulfill these involuntarily or inadvertently omitted operations, capacities, practices, activities, performance levels or commitments to the same extent and in the same manner as if they had originally been described or listed in the Specifications, at no additional cost to the Buyer. When possible the parties will agree in writing to the changes to be made to the Specifications to add these involuntarily or inadvertently omitted operations, capacities, practices, activities, performance levels, or commitments, and any written document executed by each party that refers to this Section 1.2 shall serve as an amendment to this Agreement. Supplier has reviewed the Specifications and agrees that Buyer's descriptions are accurate and that Supplier will not contest their accuracy.

Thank you to the panelists for providing the various clause examples used in this program.

CHANGES IN SCOPE

- Buyer shall have the right to make changes in the scope.
- The related cost changes shall be subject to the mutual agreement of the parties.
- Appropriate written authorization for such changes shall be provided on a Contract Revision prior to performance of the Services.
- Buyer will not be liable for any cost increases not authorized by the Buyer in advance.

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The Buyer shall have the right at any time during the term of this Agreement to make changes in the scope of the Services to be performed. The related cost changes shall be subject to the mutual agreement of the parties. Appropriate written authorization for such changes shall be provided on a Contract Revision furnished by the Buyer prior to performance of the affected Services. The Buyer will not be liable for any increases in costs of the Services, not authorized by the Buyer in advance.

Thank you to the panelists for providing the various clause examples used in this program.

COMPETITIVE BIDS

- At any time during the term of this Agreement, in the event that Buyer intends to expand the scope of the Services, Buyer shall have the right to seek competitive bids from third parties for Services in connection with such expansion.
- Buyer shall have the sole discretion to award such Services to any bidder, if at all.

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Thank you to the panelists for providing the various clause examples used in this program.

SCOPE CHECKLIST

- **Schedules/Milestones**
- **Deliverables**
- **Documentation**
- **Specifications**
- **Personnel**
- **Methodologies**
- **Ownership of Work**

18

Thank you to the panelists for providing the various clause examples used in this program.

CHANGE ORDERS

- Documentation
- Time needed to accept agreement
- Parties authorized to make changes
- Potential need to modify price
- What happens during time that change is negotiated?
- What if the parties cannot agree to change?

19

Thank you to the panelists for providing the various clause examples used in this program.

KEY LESSONS LEARNED IN SEGMENT 1

20

Thank you to the panelists for providing the various clause examples used in this program.

SEGMENT 2:

CONTRACT LANGUAGE TO AVOID PITFALLS

21

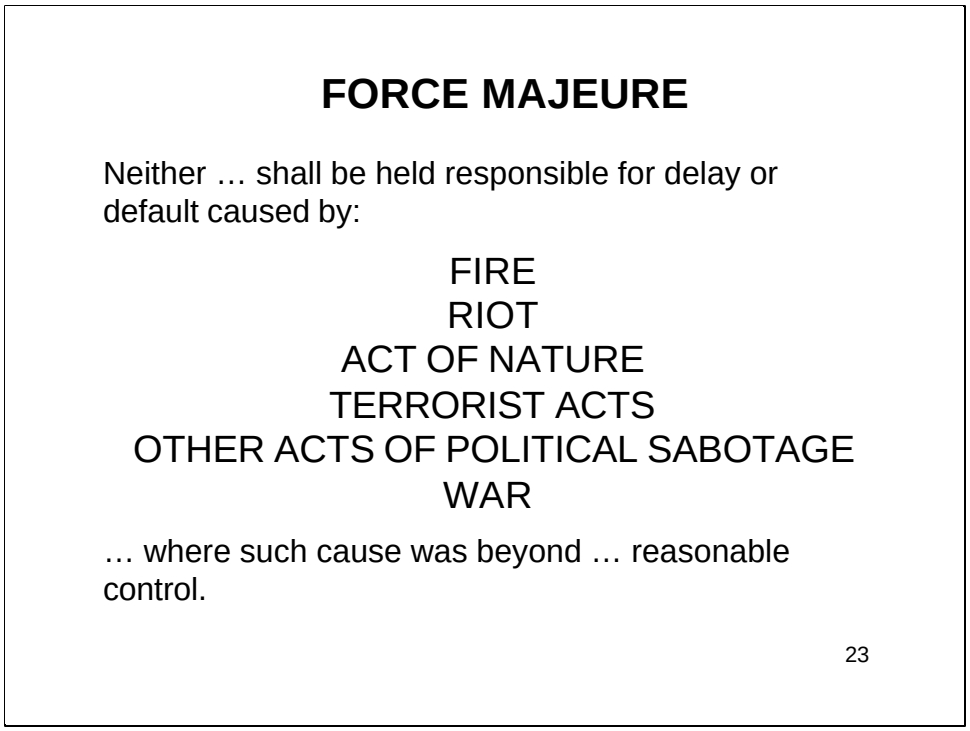
Thank you to the panelists for providing the various clause examples used in this program.

KEY PROVISIONS TO AVOID FUTURE CONTROVERSY

- Definitions
- Notice
- Force Majeure
- Compliance with Law
- Confidentiality
- Survivability
- Entirety
- Third Party Beneficiaries
- Most Favored Customer
- Legal Status of Parties
- Severability
- Security Matters / Fraud
- Contract Execution
- Service Continuity

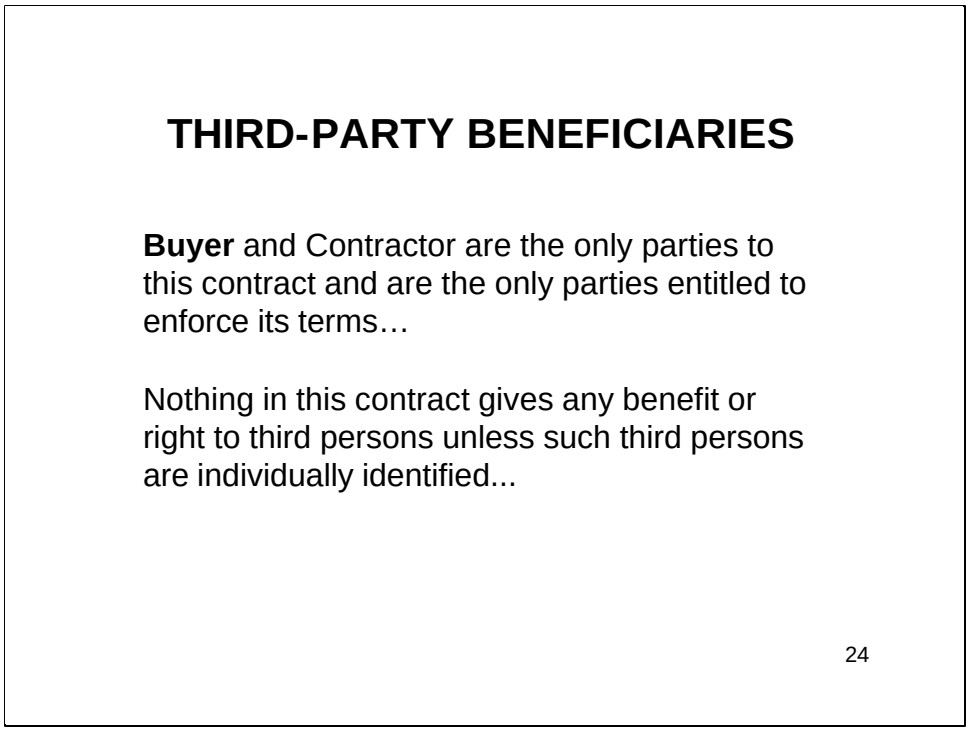
22

Thank you to the panelists for providing the various clause examples used in this program.



Neither Buyer nor Contractor shall be held responsible for delay or default caused by fire, riot, act of nature, terrorist acts, or other acts of political sabotage, or war where such cause was beyond, respectively, Buyer's or Contractor's reasonable control. Contractor shall, however, make all reasonable efforts to remove or eliminate such a cause for delay or default and shall, upon cessation of the cause, diligently pursue performance of its obligations under this Contract.

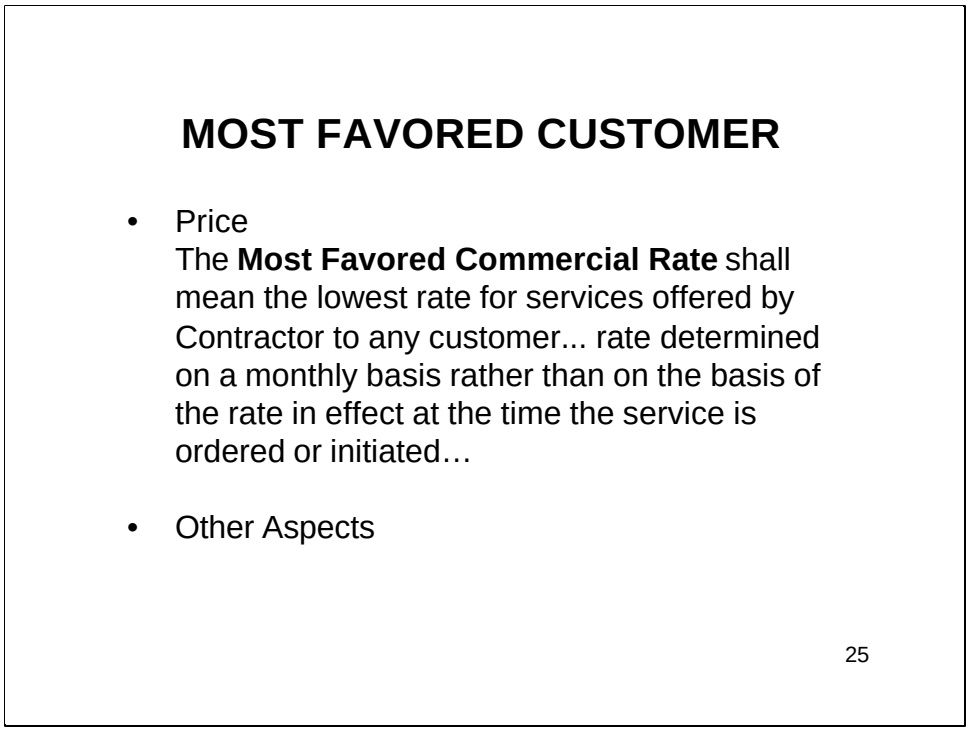
Thank you to the panelists for providing the various clause examples used in this program.



No Third-Party Beneficiaries

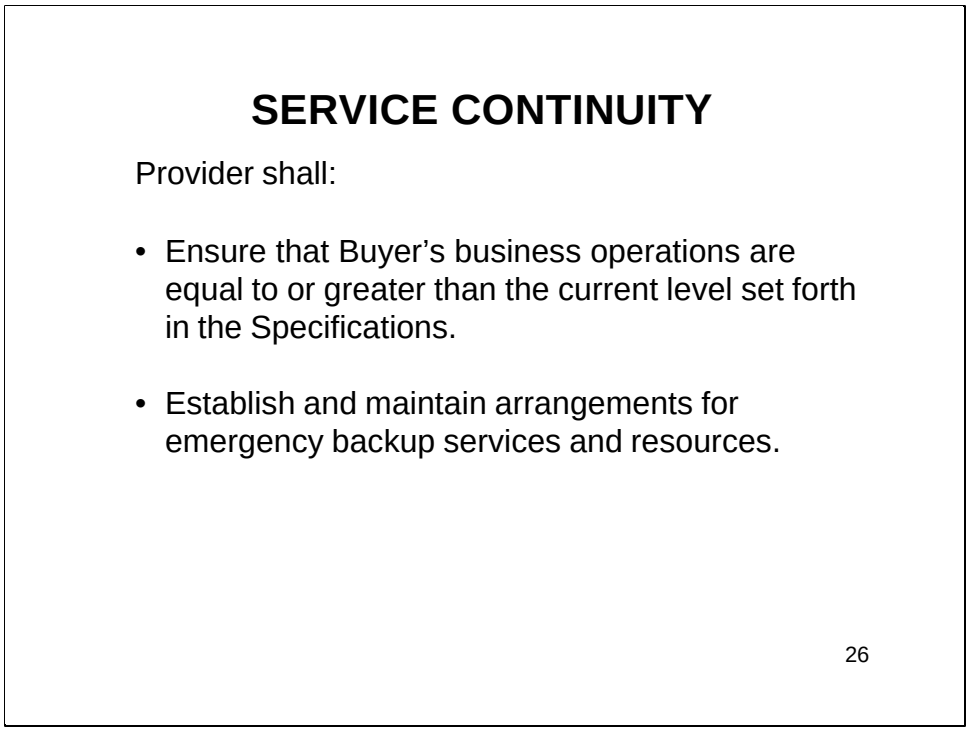
Buyer and Contractor are the only parties to this contract and are the only parties entitled to enforce its terms. Nothing in this contract gives, is intended to give, or shall be construed to give or provide any benefit or right, whether directly, indirectly, or otherwise, to third persons unless such third persons are individually identified by name herein and expressly described as intended beneficiaries of the terms of this contract.

Thank you to the panelists for providing the various clause examples used in this program.



The **MOST FAVORED COMMERCIAL RATE** shall mean the lowest rate for (list services here) offered by Contractor to any customer for the capacity and class of Service provided to Buyer. This rate shall be determined on a monthly basis rather than on the basis of the rate in effect at the time the Service to Buyer is ordered or initiated. For instance, if the lowest rate in effect for any customer with USE AN EXAMPLE: (DS-1 dedicated service is $ ----- per month at the time Service to Buyer is ordered or initiated, but six months later Contractor offers another customer DS-1 dedicated service at $----1 per month, the MOST FAVORED COMMERCIAL RATE would be reduced to $-----1 per month at that time).

Thank you to the panelists for providing the various clause examples used in this program.



Service Continuity

Supplier shall be responsible for ensuring that, at all times, Buyer's business operations are equal to or greater than the current level set forth in the Specifications. Supplier shall establish and maintain arrangements to the extent currently maintained by the Buyer for emergency backup services and resources for the Services. Supplier agrees that such backup will be available at all times. In addition, Supplier shall organize, implement, monitor and apply all disaster protection mechanisms as required to avoid or minimize the damage that might be caused by natural or other disasters (such as fire, flood, power outage and the like). Other disaster protection measures, if applicable, shall be in accordance with the Disaster Recovery Plan that is described in the Specifications, and such measures shall be kept current at all times and tested in accordance with the Disaster Recovery Plan or upon request of the Buyer. Supplier will work diligently and with its best efforts in an emergency to restore the Buyer's business operations to at least the level set forth in the Specifications.

Thank you to the panelists for providing the various clause examples used in this program.

PROVISIONS THAT MAY INVOLVE COMPLEX NEGOTIATIONS

- Assignment
- Sharing Risk / Reward
- Liquidated Damages
- Acceptance
- Termination
- Indemnity
- Ownership of Intellectual Property
- No-Hire
- Non-Compete
- Limitations on Liability / Consequential Damages
- Warranties
- Audit Rights
- Set-Off
- Default and Remedies
- Escrow / Source Code Trust Provision

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Thank you to the panelists for providing the various clause examples used in this program.

ASSIGNMENT

Buyer: This Agreement may be directly or indirectly assigned, sold, or otherwise disposed of by the Buyer without the prior written consent of Provider.

Supplier: Neither this Agreement nor any interest in the rights of the Supplier may be directly or indirectly assigned, sold, or otherwise disposed of by Supplier. Supplier may not subcontract or delegate any obligations under this Agreement to third parties, except...

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Non-Assignment

15.2.1 Buyer

This Agreement and any interest therein, and any of the rights and obligations of Company hereunder, may be directly or indirectly assigned, sold or otherwise disposed of by the Buyer without the prior written consent of Supplier. In the event of a permitted assignment the assignee shall be bound by this Agreement.

15.2.2 Supplier

Neither this Agreement nor any interest in the rights of Supplier hereunder, may be directly or indirectly assigned, sold or otherwise disposed of by the Supplier. Supplier may not directly or indirectly subcontract or delegate any of its obligations under this Agreement to third parties, except with the Buyer's prior written approval, which shall be given only in the exercise of the Buyer's sole discretion. If such consent is granted, Supplier shall be responsible for supervising the activities and performance of each subcontractor and shall be jointly and severally responsible with each subcontractor for any act or failure to act of such subcontractor. If the Buyer determines that the performance or conduct of any Supplier subcontractor is unsatisfactory, the Buyer shall notify Supplier of its determination in writing, indicating the reasons therefor. Supplier shall promptly take all necessary actions to immediately remedy the performance or conduct of such contractor or to replace such contractor by another third party or by Supplier personnel.

Thank you to the panelists for providing the various clause examples used in this program.

OWNERSHIP OF INTELLECTUAL PROPERTY

Supplier agrees that any and all creations designed, developed, produced, made or supplied by Supplier or its subcontractors in connection with this Agreement shall be considered "works made for hire" under the copyright laws of the United States and shall be the sole and exclusive property of the Buyer. Buyer shall own all right, title and interest in and to the copyrights for such creations….

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Supplier agrees that any and all creations designed, developed, produced, made or supplied by Supplier or its subcontractors, if any, in connection with this Agreement shall be considered "works made for hire" under the copyright laws of the United States and shall be the sole and exclusive property of Buyer. Buyer shall own all right, title and interest in and to the copyrights for such creations. If such creations are not deemed to be works made for hire under 17 U.S.C. §101, Supplier hereby transfers and assigns to Buyer, and Buyer hereby accepts all right, title and interest in and to all such copyrights to Buyer. Supplier hereby transfers and assigns to Buyer, and Buyer hereby accepts, all right, title and interest in and to any and all trade secrets, inventions, and other intellectual property developed hereunder. Supplier further agrees to give all further assurances and to execute all documents which Buyer believes are necessary to evidence title and ownership in Buyer. Buyer shall prepare such documents, at Buyer's expense. Supplier agrees to incorporate the substance of this Article in all subcontracts under this Agreement.

Supplier agrees that despite any notices or markings to the contrary: (i) Buyer owns all right, title, interest in and to and has the unrestricted right to reproduce and utilize any and all Work Products created, invented, developed or produced pursuant to this Agreement, and (ii) Buyer shall retain ownership of all information, design, materials and data provided to Supplier, unless otherwise provided herein.

Thank you to the panelists for providing the various clause examples used in this program.

NO-HIRE

The Buyer and the Supplier agree not to employ or hire by contract any employee of the other party during the term of this Agreement and for a period of ____from the termination of this Agreement, unless other arrangements are mutually agreed to in writing …

OR

The Buyer shall have the option after ___ months to convert (EMPLOYEE) to full employment status.

30

Agreement Not To Employ

The Buyer and the Supplier agree not to employ or hire by contract, in any capacity whatsoever, any employee of the other party during the term of this Agreement and for a period of _____ from the termination of this Agreement, unless other arrangements for an individual employee are mutually agreed to in writing and signed by both parties.

OR

The Buyer shall have the option after ___ months to convert _____ to full employment status.

Thank you to the panelists for providing the various clause examples used in this program.

AGREEMENT NOT TO COMPETE

The Supplier agrees that for the duration of this Agreement and for a period of _____ following the termination of this Agreement, for any reason, the Supplier will not directly or indirectly provide _____ services in competition with the Buyer.

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Thank you to the panelists for providing the various clause examples used in this program.

BEWARE OF THESE CLAUSES

- Exclusivity / Conflict of Interest
- Volume & Price Guarantees
- Minimum Purchase Provisions
- Reference to Other Documents
- Limitation of Liability
- Dispute Resolution
- Warranties

32

Thank you to the panelists for providing the various clause examples used in this program.

CONFLICT OF INTEREST

This Agreement is intended to secure to the Buyer the assistance and cooperation of the Supplier and shall operate to preclude the Supplier from performing services for others during the term of this Agreement that could reasonably result in a conflict of interest.

If the Supplier does undertake such services, the Supplier shall promptly notify the Buyer and the Buyer may, at its option, terminate this Agreement.

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NON-NEGOTIABLE TERMS

- Automatic Acceptance
  - Shrink Wrap and Click Wrap -- Beware of breaking the seal or clicking too soon
  - Electronic contracting and e-signatures
- Include Terms and Conditions as a condition for bidding -- What do you absolutely need?

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Thank you to the panelists for providing the various clause examples used in this program.

CONTRACTING OVERSEAS

- Child / Employee Labor Laws
- Export Controls
- Tax Issues
- Foreign Corrupt Practices / Bribery
- Dispute Resolution

35

Thank you to the panelists for providing the various clause examples used in this program.

REGULATORY ISSUES

- Environmental Requirements - Clean Air and Water
- Minority- and Women-Owned Businesses
- EEO Requirements
- Other Regulations -- Where can you look for information to ensure that your contract is complete?

36

Thank you to the panelists for providing the various clause examples used in this program.

KEY LESSONS LEARNED IN SEGMENT 2

37

Thank you to the panelists for providing the various clause examples used in this program.

ISM SATELLITE SEMINAR SERIES

Contracting Roadblocks: Removing the Barriers

We'll be back in a few minutes….

Thank you to the panelists for providing the various clause examples used in this program.

SEGMENT 3:

HOW DO BUSINESS RELATIONSHIPS AND CONDITIONS AFFECT CONTRACTS?

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SUPPLY CHAIN MANAGEMENT PERSPECTIVES

- Suppliers might also be customers
- Communication is key to maintaining the relationship
- Anticipate personnel changes
- Anticipate changes in business conditions
- Impact of mergers and acquisitions
- Shifts in business focus - different technology or service needs
- Consider possibility of insolvency / bankruptcy before it happens

40

Thank you to the panelists for providing the various clause examples used in this program.

INSOLVENCY

This Agreement shall automatically terminate in the event that Supplier:

- authorizes or files a voluntary petition in bankruptcy
- suffers an order for relief under any applicable bankruptcy law, or
- applies for or consents to the application of any bankruptcy, reorganization, arrangement, readjustment of debt, insolvency, dissolution, liquidation or other similar law ...

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Insolvency

This Agreement shall automatically terminate without notice from either Party, in the event that:

Supplier shall make an assignment for the benefit of, or enter into any composition or arrangement for the benefit of, or enter into any composition or arrangement with, creditors; or

Supplier shall apply for or consent (by admission of material allegations of a petition or otherwise) to the appointment of a receiver, custodian, trustee or liquidator of it or of any part of its properties, or authorize such application or consent, or proceedings seeking such appointment shall be commenced without such authorization, consent or application against it and such involuntary proceedings continue undismissed for thirty (30) days; or

Supplier shall authorize or file a voluntary petition in bankruptcy, suffer an order for relief under any applicable bankruptcy law, or apply for or consent (by admission of material allegations of a petition or otherwise) to the application of any bankruptcy, reorganization, arrangement, readjustment of debt, insolvency, dissolution, liquidation or other similar law of any jurisdiction, or authorize such application or consent, or proceedings to such end shall be instituted against it without such authorization, application or consent and be approved as properly instituted and such involuntary proceedings remain undismissed for ninety (90) days

Thank you to the panelists for providing the various clause examples used in this program.

LARGE vs. SMALL COMPANIES

- Differences in Contracting Issues
- What are the Expectations?
- Single and Multiple Sources

42

Thank you to the panelists for providing the various clause examples used in this program.

GOOD CONTRACT MANAGEMENT MAINTAINS GOOD RELATIONS

- Designate accountability for maintaining the contract
- Use contract databases to track renewals, terminations, etc.
- Maintain “institutional memory”
- Keep a library of standard Ts & Cs
- Pay attention to Interagency Agreements

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Thank you to the panelists for providing the various clause examples used in this program.

KEY LESSONS LEARNED IN SEGMENT 3

44

Thank you to the panelists for providing the various clause examples used in this program.

SEGMENT 4:

RESOLVING CONTRACT DISPUTES

45

Thank you to the panelists for providing the various clause examples used in this program.

WHAT ARE THE OPTIONS?

- Work through the business relationship
- Escalation
- Litigation or Alternative Dispute Resolution
- Intermediate options
- Provisions for continuity of services and payment

46

Thank you to the panelists for providing the various clause examples used in this program.

ALTERNATIVE DISPUTE RESOLUTION

PRO'S	CON'S
• Flexibility	• Not subject to appeal
• Parties can control timing	• More attractive to smaller organizations (with limited resources to pursue litigation)
• Usually less expensive	• Less span of outcome
• Clear path of resolution	• No rules binding an arbitrator

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Thank you to the panelists for providing the various clause examples used in this program.

DISPUTE RESOLUTION

Arbitration shall be the exclusive and final means for resolving any and all disputes in connection with this Agreement, or any commercial relationship or dealings that are in connection with the subject matter of this Agreement.

Arbitration shall be conducted according to the Commercial Dispute Resolution Rules of the American Arbitration Association (AAA)...

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The Parties agree that arbitration shall be the exclusive and final means for resolving any and all disputes, controversies, claims, and differences ("Disputes") related to or arising out of or in connection with this Agreement, or any commercial relationship or dealings of the Parties that are related to or arise out of or in connection with the subject matter of this Agreement (including without limitation any questions concerning the scope and application of this arbitration clause or the arbitrability of any Dispute under this clause), which arbitration shall be conducted according to the Commercial Dispute Resolution Rules then in effect of the American Arbitration Association (the "AAA"), or such other rules as the AAA may designate. Notwithstanding the foregoing, if either Party may have a claim for injunctive relief against the other Party, the Parties hereby agree and acknowledge that such claim shall be remain in the exclusive in person and jurisdiction of the state and federal courts located in Minneapolis, Minnesota and that the Parties may proceed with such claim without respect of this Article [ ].

Thank you to the panelists for providing the various clause examples used in this program.

ARBITRATION

- Right to arbitration
- State of jurisdiction
- Demand for arbitration
- Time limitations

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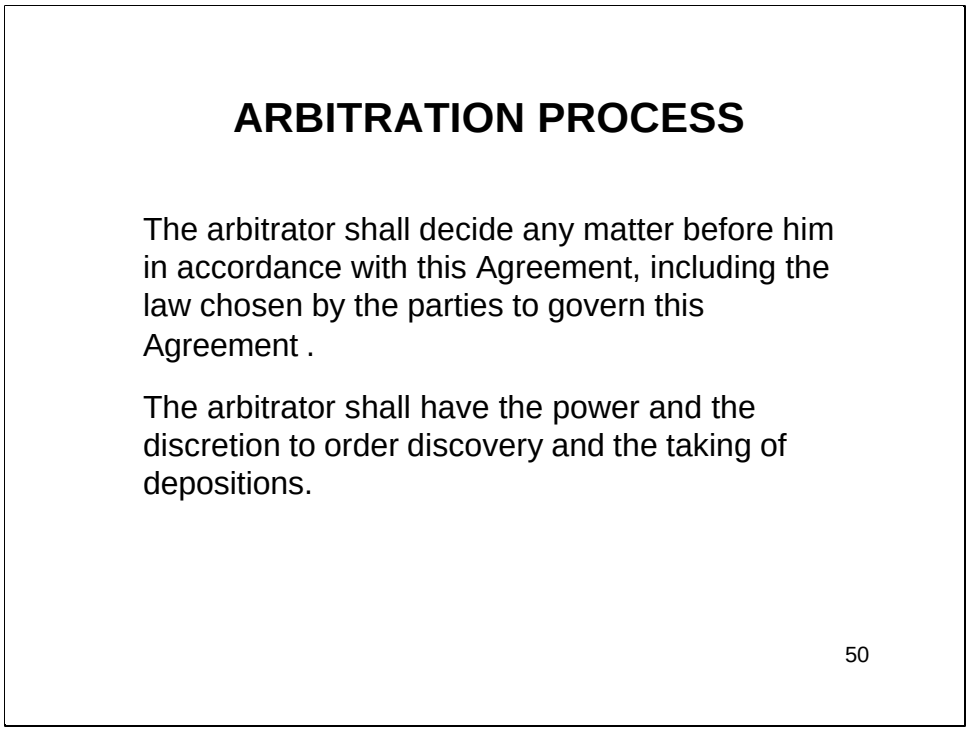
The right of any Party to require the arbitration of any Dispute in accordance with this section shall be governed by the Federal laws of the United States (including expressly, but without limitation, the Federal Arbitration Act).

The arbitration shall be held in Minneapolis, Minnesota and shall be administered by the rules then in effect of the AAA (the "Rules").

Demand for arbitration shall be served upon the Party (or parties) to whom the demand is made, in accordance with the procedure set forth in the Rules.

The Parties shall agree upon an arbitrator within thirty (30) calendar days after the demand for arbitration is served. If they fail to do so within such time, the arbitrator shall be appointed by the AAA within the next twenty (20) calendar days. If the arbitrator dies, becomes disqualified or incapacitated, or fails or refuses to act before the matter or matters subjected to such arbitration have been determined, then, in place of such arbitrator, a new arbitrator shall promptly be appointed in the same manner as such arbitrator.

Thank you to the panelists for providing the various clause examples used in this program.



The arbitrator shall decide any matter before him in accordance with this Agreement, including without limitation the law chosen by the parties in Section [ ] to govern this Agreement, which law shall also be the applicable law to govern the arbitration proceedings. The arbitrator shall have the power and the discretion to order discovery and the taking of depositions. The arbitrator shall only have the power to order or grant relief in a manner that is directly related to the subject matter of the dispute before the arbitrator, and the relief or order that may be granted by the arbitrator shall be limited that which a court of competent jurisdiction would have had the power to order or grant were the dispute to have been heard before such court.

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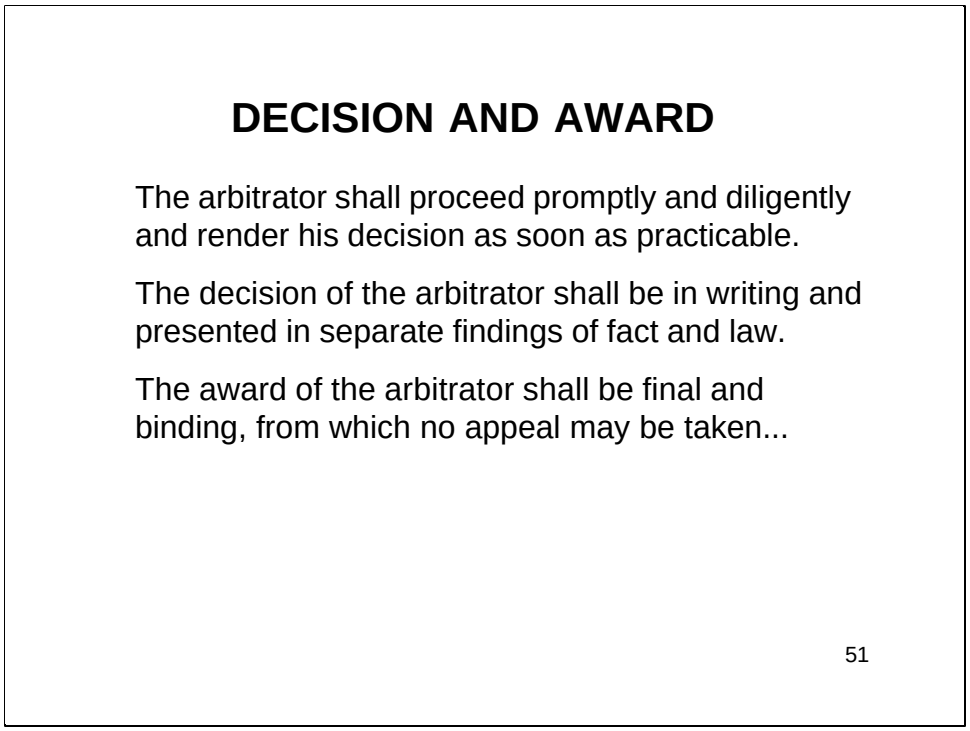

The arbitrator shall proceed promptly and diligently and render his decision as soon as practicable. The decision of the arbitrator shall be in writing and presented in separate findings of fact and law. The award of the arbitrator shall be a final and binding award on the parties from which no appeal may be taken, and an order confirming the award or judgment upon the award may be entered in any court having jurisdiction thereto. The award of the arbitrator may include pre-award interest and equitable relief to the extent the arbitrator deems appropriate, and may at the discretion of the arbitrator include interest from the date of the award until paid in full at a rate to be fixed by the arbitrator but in no event in excess of the prime rate (the base rate on corporate loans at large U.S. money center commercial banks) published in the “Money Rates” section of *The Wall Street Journal* on the business day immediately prior to the date of the award.

The arbitrator, in the award, may assess the fees and expenses of the arbitrator and the arbitration, and the witness and attorneys' fees of the parties, or any part thereof, against any party or parties, taking into account the circumstances of the case. Except as assessed by the arbitrator in the award, the fees and expenses of the proceeding, including the fees and expenses of the arbitrator, shall be divided equally between the Parties, and each Party shall bear its own witness and attorneys' fees.

Notwithstanding the initiation of an arbitration proceeding, each Party shall continue to perform all duties and obligations under this Agreement, without prejudice.

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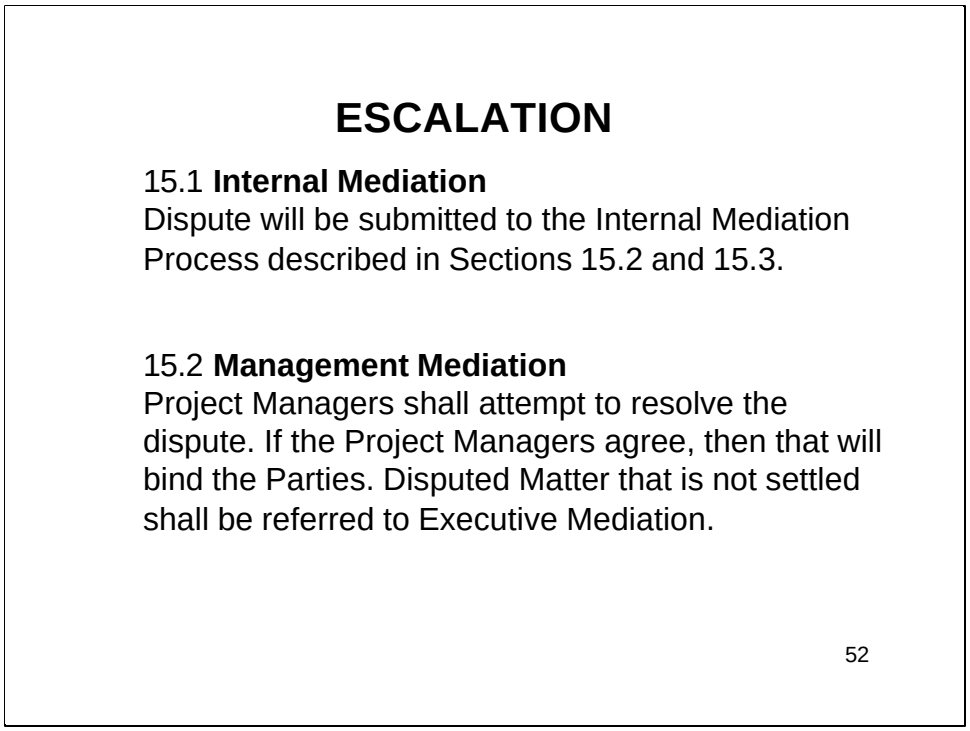

15.1 Internal Mediation

Any dispute, disagreement, claim or controversy between the Parties arising out of or relating to the interpretation or application or validity of this Agreement, its breach or the interpretation or applicability of the dispute resolution procedures in this Section 15 (the "Disputed Matter") will be submitted to the Internal Mediation Process described in Sections 15.2 and 15.3.

15.2 Management Mediation

Each Party shall designate a Project Manager who will be the primary point of contact for Notices under this Agreement and who shall have day-to-day management responsibility for implementing it. The Disputed Matter will be considered by the Project Managers. The Project Managers shall attempt to resolve the dispute within 10 business days. If the Project Managers agree, then that will bind the Parties. Each Disputed Matter that is not settled within 10 days shall be referred to Executive Mediation.

Thank you to the panelists for providing the various clause examples used in this program.

ESCALATION (continued)

15.3 **Executive Mediation**
Either Party may, upon written notice and within 10 days after the conclusion of the procedures set forth in Section 15.2, elect to use a non-binding resolution procedure whereby each Party presents its case at a hearing before a panel consisting of a senior executive of each of the Parties and a mutually acceptable neutral adviser.

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15.3 Executive Mediation

Either Party may, upon written notice and within 10 days after the conclusion of the procedures set forth in Section 15.2, elect to use a non-binding resolution procedure whereby each Party presents its case at a hearing before a panel consisting of a senior executive of each of the Parties and a mutually acceptable neutral adviser. If a Party elects to use Executive Mediation, the other Party agrees to participate. The hearing shall occur no more than 15 days after a Party serves written notice to use Executive Mediation. Each Party may be represented at the hearing by their attorneys. If the matter cannot be resolved at the hearing by the senior executives, the neutral adviser may be asked to assist the senior executives in evaluating the strengths and weaknesses of each Party's position on the merits of the Disputed Matter. Thereafter, the senior executives shall meet and try again to resolve the matter. If the matter still cannot be resolved, either Party may seek recourse to binding arbitration pursuant to Section 15.4 and the Executive Mediation proceedings will have been without prejudice to the legal position of either Party. Neither Party may commence an arbitration proceeding concerning the Disputed Matter, however, until 15 days have elapsed from the first day of the hearing. The Parties shall each bear their respective costs incurred in connection with this procedure, except that they shall share equally the fees and expenses of the neutral adviser and the costs of the facility for the hearing, which shall be held at a place agreeable to the Parties.

Thank you to the panelists for providing the various clause examples used in this program.

NO SUSPENSION CLAUSE

If a problem or dispute arises between the parties, in no event nor for any reason shall Supplier interrupt the performance of the Services or any other obligation hereunder, disable any equipment used in the Services, or perform any other action that prevents, slows down, or reduces the performance of the Services or Buyer's ability to conduct its business.

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No Termination or Suspension of Services

Notwithstanding anything to the contrary contained herein, if any problem or dispute arises between the parties, in no event nor for any reason and unless and until authorized by a court of competent jurisdiction, shall Supplier interrupt the performance of the Services or any other obligation hereunder, disable any equipment used in the Services, or perform any other action that prevents, slows down, or reduces in any way the performance of the Services or Buyer's ability to conduct its business.

Thank you to the panelists for providing the various clause examples used in this program.

HOW COMPANY CULTURE AND CONDITIONS AFFECT DISPUTE RESOLUTION

- How hard are you willing to fight?
- Does the end result warrant the fight?
- Dispute life cycle -- Get the anger out of the way first.
- Visibility of litigation - public perception
- Career implications driving disputes

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The right of any Party to require the arbitration of any Dispute in accordance with this section shall be governed by the Federal laws of the United States (including expressly, but without limitation, the Federal Arbitration Act).

The arbitration shall be held in Minneapolis, Minnesota and shall be administered by the rules then in effect of the AAA (the "Rules").

Demand for arbitration shall be served upon the Party (or parties) to whom the demand is made, in accordance with the procedure set forth in the Rules.

The Parties shall agree upon an arbitrator within thirty (30) calendar days after the demand for arbitration is served. If they fail to do so within such time, the arbitrator shall be appointed by the AAA within the next twenty (20) calendar days. If the arbitrator dies, becomes disqualified or incapacitated, or fails or refuses to act before the matter or matters subjected to such arbitration have been determined, then, in place of such arbitrator, a new arbitrator shall promptly be appointed in the same manner as such arbitrator.

Thank you to the panelists for providing the various clause examples used in this program.

KEY LESSONS LEARNED IN SEGMENT 4

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Thank you to the panelists for providing the various clause examples used in this program.

Today's Presenters

Main Presenter:

- Dwight A. Howes, JD, McGuireWoods LLP

Panelists:

- Aaron Howell, C.P.M. , CPPO, Oregon State University
- Dawn Moore, CPIM, Intel Corporation
- Gary T. Prod, C.P.M., We Energies

Moderator:

- Bill Andres, BJC Public Relations Consultants

Refer to your Program Handbook for contact information.

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