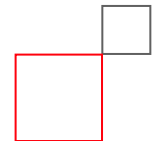




Seven Deadly Sins of Services Agreements

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Program Goals

- Define each topic
 - Understand what each topic means in practical application
- Give applications
 - Present real events or scenarios where most applicable
- Negotiation tips
 - Discuss strategies / tips / ramifications when negotiating



Services Contracting

■ Typical Characteristics

- Complex
 - No parts numbers, difficult to assess
 - Harder to measure/qualify
- Strategic
 - Not Standardized – Can provide competitive advantage or disadvantage
 - Greatly affect customer/market perception
- Uncertainty of Results
 - People factor
 - No secondary market
- Unique Risks



Disclaimer

- What this program is not:
 - The definitive and all inclusive guide to the risks of services contracting. We will be discussing some key risk factors, and mitigation techniques, but negotiation diligence throughout the services contract is required.
 - A replacement for legal advice or counsel. Although this provides insight into some legal terms, like indemnification and limitation of liability, this does not provide ample detail to replace the guidance of legal counsel.
 - Necessarily the position or recommended position of Sprint.
- Content is solely the opinion of the presenter.



The Seven Deadly Sins

- Intellectual Property
- Co-Employment / Independent Contractor
- Statements of Work
- Limitation of Liability
- Warranty
- Proprietary Information Protection
- Key Personnel Turn-Over



Intellectual Property

■ Definition

- Inventions, Reductions to Practice, Works of Authorship
- The rights associated with ownership, like exclusivity, branding, the right to modify, sell
- IP rights usually remain with the conceiver unless otherwise specified in writing

■ Application

- Most applicable in consulting and software development engagements
- Specifying IP ownership in the agreement minimizes future controversy or dispute over IP ownership rights

■ Negotiations

- Understand if IP will be developed.
- Know if IP is important to company (competitive advantage)
- Pre-existing works
- What is paid for should be owned.
- Not funding R&D
- If buyer wants or needs ownership rights, must be clearly stated in the agreement



Co-Employment / Independent Contractor

■ Definition

- Supplier personnel are NOT employees of your company and are in fact EXCLUSIVELY an employee of the Supplier. Co-employment refers to supplier personnel appearing to be employed by both the Supplier and your company

■ Application

- Most applicable in temporary labor scenarios
- Co-employment concerns raised in late 1990 Microsoft case
- IRS considers relevant factors in behavioral control, relationships between the parties and financial control/economic realities in determining if a worker is a contingent worker or an employee for taxes and benefits
- Significant IRS and employee benefit implications

■ Negotiations

- Use contractual language, but language alone is not enough.
- Educate internal resources.
- Key factors



Statements of Work

■ Definition

- The document that fully describes what to expect from the work product, and defines the operational details and deliverables

■ Application

- All services procurements
- Avoid the blank-check syndrome
- Especially key in consulting and software development efforts

■ Negotiations

- 3-way negotiation
- End User ↔ Supply Chain ↔ Supplier
- Emphasize to all need to document all expectations



Limitation of Liability

■ Definition

- Limitation of liability language is an attempt to limit the maximum amount a party would have to the other party, under specific circumstances, like negligence.

■ Application

- All services procurements
- The more business impacting the service, the more potentially extensive the supplier's liability could be
- Customer facing is prime example of business impacting

■ Negotiations

- Understand the scope of the services
- The extent of liability risks for services is hard to define
- Make suppliers step-up to their performance
- If 'price is considerate of risk', remind that 'risk is controllable'.



Warranty

■ Definition

- Legally enforceable promise
- Express or Implied

■ Application

- All procurements
- Beware of warranty disclaimers
- Fitness for specific purpose, virus, title, infringement, workmanship

■ Negotiations

- Understand deliverables, methods and intended benefits
- Consulting efforts are intended for fitness for a specific purpose
- Suppliers control the quality of the work product, so suppliers must warrant that quality



Proprietary Information Protection

■ Definition

- Proprietary Information is information developed, conceived or acquired, not available to the general public. Includes trade secrets, confidential operating details, 'market-moving' financial data, or any information that, if disclosed, would minimize your advantage, or give your competitor an advantage

■ Application

- All procurements, especially with consulting, or on-site work
- Even the most rudimentary services could present issues

■ Negotiations

- In most cases, non-negotiable
- Usually mutual non-disclosure agreements are not strongly contested in negotiations.



Key Personnel Turnover

■ Definition

- In long term service engagements, a supplier will typically have one or more prime point of contact (POC), Project Managers, Program Managers, Partners or project managerial personnel.

■ Application

- Most typical on long term engagements (3 Mo +)
- Process or system

■ Negotiations

- Understand the risks of supplier personnel turn-over
- Understand labor law application



Activity

- Clear and explicit language in the contract, stating that the supplier is an independent contractor, and in no way an employee of the buyer's company is adequate protection.
- By accepting a limitation of liability clause, you immediately incur risks of a loss as a result of a third party suit.
- Proprietary information protection is only needed for strategic consulting or outsourcing engagements.
- A statement of work is not needed if the deal is framed for payment by the hour.
- If there's nothing in the contract, the buyer has IP ownership rights to all deliverables.
- You actually learned something here today.



Q&A

Questions and Answers



Exhibit A - The 20 factor “Right to Control” test used by IRS

- 1. Instructions
- 2. Training
- 3. Integration
- 4. Services Rendered Personally
- 5. Hiring Assistants
- 6. Continuing the Relationship
- 7. Set Hours of Work
- 8. Full-time Work Required
- 9. Work Done on Premises
- 10. Sequence of Work
- 11. Reports
- 12. Method of Payments
- 13. Expenses
- 14. Tools and Materials
- 15. Investment
- 16. Profit or Loss
- 17. Non-Exclusivity
- 18. Services Offered to the General Public
- 19. Right to Quit
- 20. Right to Terminate



Exhibit A – (cont)

Warning if buyer provides

- ✓ Instruction on when, where or how to work.
- ✓ Training
- ✓ Mandatory operational meetings, or services highly integrated into buyer's operations
- ✓ A work environment, work rules, assignments and expectations akin to its own employees
- ✓ Mandatory specific work hours
- ✓ Exclusive work at buyer's premises
- ✓ Long term engagements (<6 months)
- ✓ Hiring or paying contractor's assistants
- ✓ Daily operations management
- ✓ Direct travel or expense reimbursement
- ✓ Furnishing of computers or tools
- ✓ Engagement to a person, not a company
- ✓ Contractor has the right to terminate for other than breach



Exhibit B – Definitions*

INDEPENDENT CONTRACTOR

The following elements are essential to establish the relationship of an independent contractor to a client, as contrasted with the relationship of an agent to a principal. An independent contractor must: (1) exercise independent judgment as to the means used to accomplish the result; 2) be free from control or orders from any other person; and (3) be responsible only under the contract with the client for the result obtained.

INTELLECTUAL PROPERTY

Various types of intangible personal property that have an inherent commercial value and are protected by the government in different ways. They include copyrights, patents, trade secrets, and trademarks.

LIMITATION OF LIABILITY

Suppliers will frequently try to limit their liability for damages and loss in the event of warranty claims or other breaches of contract. Such limitations may restrict the purchaser's remedies or the amount of damages recoverable in a lawsuit.



*ISM Glossary of Key Purchasing and Supply Terms as of 10/28/2004

Exhibit B – Definitions* (cont)

STATEMENT OF WORK (SOW)

A statement outlining the specific services a contractor is expected to perform, generally indicating the type, level, and quality of service, as well as the time schedule required.

WARRANTY

■ A promise made by a seller that is legally enforceable.

IMPLIED WARRANTY

A specific assurance made by the seller concerning the performance, quality, or character of the goods or services sold. An express warranty often delineates the rights and obligations of the parties in the event of defective items or services. The term is sometimes used interchangeably with “guarantee.”

EXPRESS WARRANTY

A specific assurance made by the seller concerning the performance, quality, or nature of the goods or services sold. An express warranty often delineates the rights and obligations of the parties in the event of defective items or services. The term is sometimes used interchangeably with “guarantee.”



*ISM Glossary of Key Purchasing and Supply Terms as of 10/28/2004