THROUGH THE LOOKING GLASS…

PERSPECTIVES ON CONTRACTING FROM THE OTHER SIDE
Speakers

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Agenda

• Learn how different buyers and suppliers approach key terms in a contract

• Understand several ways in which parties can compromise with regards to specific provisions in a contract

• Find out how reasonable approaches lead to better contracts overall for all parties
What is a contract?

In most cases, written or oral expression of a commitment.
Common Forms

• MOU
• Letter Agreement
• Lease
• Service Contract

• Permission
• License
• Purchase order
• Signed proposal
What makes a contract enforceable?

Offer + Acceptance = Contract

Generally, there must be a “meeting of the minds.”
Why is offer and acceptance important?

An offer by one party to perform the basic components of the contract must be accepted by the other party.

Courts have upheld oral contracts where the basic elements of offer and acceptance are present.
A Promise May Lead to an Enforceable Contract

A promise by one party to perform must be supported by consideration from the other party.

Courts have generally found contracts unenforceable without consideration.
Implied Contract

Courts may enforce a “contract” even if no intent by the parties to agree because it is the equitable thing to do.
Why do I need a contract?

1. Identify who are the parties
2. Set expectations, deadlines, terms and conditions
3. Identify and allocate risk
4. Gain a better understanding of what you are buying or selling
Understanding Risk

Risk will be specific to each organization:

- **Buyer Risk** – financial, opportunity loss, value of certification, job security
- **Seller Risk** – delivery, brand, profits

What type of risk is important to you?
How a Contract Helps Manage Risk

Key Provisions – indemnification, limits of liability, other remedies

Contract Detail – scopes of work, proposals

Negotiation – contract helps identify what is important to the other side
Important Elements of a Contract

Reminder

While these elements are usually important to both parties, they may be important in different ways and in varying degrees to any particular party.

*Ask about deal breakers or required contract verbiage upfront*
Obligations

What does the Buyer want?

What does the Seller want?
Warranties/Representations

What is the difference?

Buyer Perspective - General Warranties

Seller Perspective – Specific Warranties
Intellectual Property

What is “IP”?
What is “work for hire” vs “license”?
Can “IP” be shared?
What is the value of the IP?
What is important to Buyers? to Sellers?
Data Security

Questions to Buyer: What is it? Who owns it? How is it used? Is it confidential?

Questions to the Seller: How will it protected? How will I access it? What are your processes to handle a breach?
Termination

Buyer Perspective – ease of ending the relationship, transition assistance to new vendor, return of proprietary materials

Seller Perspective – getting paid, protection of intellectual property, appropriate notice
Boilerplate Language

Beware of “standard” or “form” language.

Not all boilerplate language is bad:

It is expensive and time consuming to negotiate a custom contract.

Don’t rewrite or revise language that works just because it is not your standard language.
Get Legal Involved

How can you get the most effective help from your attorney?

How to communicate (your attorney's) feedback to “the other side”?

When should the attorney's lead the conversation?
Things to Consider When Negotiating Your Own Contract

Understand your risk areas should something go wrong:

- Where is your financial risk?
- What inadvertent liability could be caused to the other party and others…
- Are you giving up intellectual property or other rights?
- Are there hidden obligations and/or penalties?
- What are the potential damage to your certification/certificants?
Things to Consider When Negotiating Your Own Contract

When something goes wrong…

- How do you communicate your concerns to the other party?
- What are your remedies / termination options in case the other party is poorly performing?
- Would you go to court? Can you sustain a lengthy resolution processes in case a case of breach…
Best Practices

1. Use a checklist of contract terms or template
2. Be reasonable in your requests – remember you WANT to work with the other party
3. If you don’t understand a particular position, ask.
4. Seek alternatives provisions or compromises
5. Be willing to walk away
Best Practices

Manage your organizational position:
1. Identify your organization’s “key contract terms” or template language
2. Identify and engage decision makers and scope of authority
3. Manage your legal review process and depth of review

Manage the relationship and negotiation:
1. Be reasonable in your requests – remember you WANT to work with the other party
2. If you don’t understand a particular position, ask.
3. Seek alternatives provisions or compromises
4. Be willing to walk away

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Questions?

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