

PRINCIPLES OF CONTRACT WRITING



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CLARK HILL

About the Presenter



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Today's Roadmap & Objectives

Agenda

- Drivers of the Deal
- Contract Formation
- Contract Provisions & Risk Allocation
- Sample Contract Review
- Negotiation Strategies



Objectives

- Identify the drivers and key issues behind your contracts.
- Recognize contract provisions and problematic areas.
- Understand key contract negotiation basics.

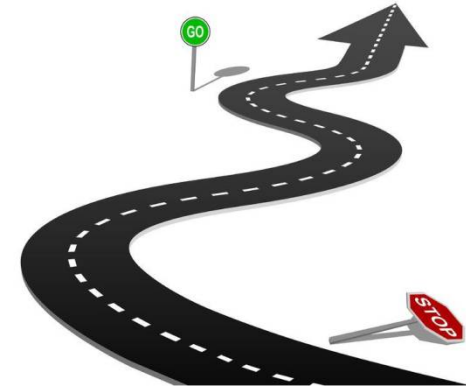
This document is comprised of general information relative to the subject matters discussed herein. It is not intended to give legal advice and does not establish any attorney-client relationship. Entities facing specific issues should seek the assistance of an attorney.

Drivers of the Deal

A contract is intended to be the **“roadmap” for a business transaction**. Building an effective contract requires an understanding of the relationship between the parties, the context of the transaction, the key provisions for the contract, as well as the desired outcome.

Preliminary issues to consider:

- Are we dealing with services or the sale of goods/equipment or construction?
- Are there any statutory or regulatory provisions that mandate or affect the deal?
 - Is there a specific form to follow?
 - Are specific provisions mandated or prohibited by law?
- What are the industry norms for the particular transaction?
- Is there a “course of dealing” between the two parties?
- What process was used for the transaction?
 - Were procurement documents (such as an RFP) used?
 - How will the RFP and Contract intersect?



Drivers of the Deal – Legal Requirements under State Law

Procurement of Supplies, Materials and Equipment – MCL 380.1274

- Board shall adopt **written policies** governing the **procurement of supplies, materials and equipment**; however, *NO SPECIFIC REQUIREMENTS FOR POLICIES*.
- Must obtain **competitive bids** for the purchase or any **item or group of items in a single transaction** costing **\$26,046** or more & **school board must approve purchase**.
- Exceptions:
 - Purchases to State cooperative bulk purchasing program
 - Purchases of **food** in a single transaction costing \$100,000 or less.
- Michigan-based business preference
 - Optional and Requires additional “local policy”
 - Based upon primary contractor or 1 or more subcontractors or primary contractor
 - Cannot be used if paid with federal funds
 - “Michigan-based Business” definition
- No advertising or public bid opening required by State law (but check Board Policy) & must consider Federal law if purchase funded via Federal funds.

Drivers of the Deal – Legal Requirements under State Law

Construction and Repair of School Buildings – MCL 380.1267

- Before commencing construction of new school building, or addition to or repair or renovation of an existing school building, *except repairs in emergency situations*, the school district **shall obtain competitive bids** on all material and labor to complete construction costing **\$26,046** or more.
- Specific Requirements for Bidding Procedures:
 - Advertise once in **local newspaper**
 - Post advertisement on State website for at least 2 weeks
 - Advertisement must specify:
 - Date and Time bids are due
 - Date, time and place where bids will be opened and read aloud
 - School District will not accept or consider late bids
 - Each bid shall be accompanied by sworn and notarized **familial affidavit**
 - Will not accept bid that does not include sworn and notarized familial affidavit
 - A Bid Bond (5% of bid amount) is required
- Reservation of Rights for 1267(5)(late bids) & 1267(6)(reject all and re-bid)
- Michigan-based Business Preference (same requirements as Section 1274)

Drivers of the Deal – Legal Requirements

Common Law

- The common law embodied in court decisions remains the primary source of contract law.
- Often used as the “gap filler” when statutory provisions, like the UCC, are silent.

Statutory Requirements

- Various Federal and State statutes and regulations govern/mandate the form and content of contracts. Examples that School Districts often encounter include:
 - Michigan Revised School Code
 - Uniform Commercial Code (“UCC”)
 - Federally funded contracts and related federal laws & regulations

Drivers of the Deal – Federal Awards/Programs

- **Uniform Procurement Guidance/Rules**
 - 2 CFR Part 200.317-200.326
 - Applicable for all Federally-funded procurements, including construction, supplies/materials/equipment *and* services.
 - *Must use documented procurement procedures must conform to the Federal regulations, but must also be consistent with all State law requirements.*
- **When/How “Competition” Is Required**
 - Micro Purchases Threshold (\$10,000) – If under MPT, do not require informal or competitive process
 - Simplified Acquisition Threshold (\$250,000) – If over MPT but under SAT, require quotes from adequate number of qualified sources
 - Formal Bidding – If over SAT, require sealed bids.
 - Must ensure objective contractor performance and eliminate unfair competitive advantage.
 - *But must still comply with Section 1274/1267 for bidding (\$26,046) & Board Policy*

Drivers of the Deal – Federal Awards/Programs

- **Required Procurement Processes**

- Must maintain written standards to address conflicts of interest.
- Must engage responsible contractors with ability to perform successfully.
- Do not place unreasonable requirements on contractors to qualify to do work.
- Must take steps to assure that Minority and Women-Owned Businesses are included in process when possible.
- Geographic preferences not allowed (*i.e.*, Michigan-based preference).
- To greatest extent possible, provide preference for purchase of goods, products and materials produced in U.S.A.

- **Required Contract Provisions (below is not exhaustive)**

- Contract Remedies (if contract over \$150,000)
- Termination (Cause and Convenience) if contract over \$10,000
- Buy American in Food Contracts (see also MCL 388.1764c)
- Davis-Bacon Federal Prevailing Wage in Construction Projects (contract over \$2,000)
- Construction Projects must include Equal Employment Opportunity Requirements
- Wage and Hour requirement (contract over \$100,000)

Contract Formation – Role of the Statute of Frauds

The **Statute of Frauds** (“SOF”) is the exception to the rule that contracts do not need to be **in writing** to be enforceable.

- Purpose is to prevent fraud or the opportunity for fraud.
- Applies to **only certain types of contracts**. A few examples are:
 - interests in land
 - contracts with performance beyond 1 year
 - sales of goods over \$1,000
 - modifications of contracts without consideration
- An agreement that is void under the SOF cannot be used for any purpose.
- *However*, courts can enforce the doctrine of part performance if performance was in reliance on an agreement otherwise subject to the SOF if it would be fraud on performing party.

Contract Formation

Express (oral or written) vs. Implied-in-Fact Contracts (action with chance to reject)

A contract must include **certain elements** to be considered **valid and enforceable** and failure to include the essential elements may run the risk that a court will set aside a potentially advantageous contractual arrangement or complete the terms of the contract with provisions other than those desired by one or more of the parties.

Four Essential Elements to a Contract

- Parties competent to contract
- Proper subject matter
- Mutuality of Agreement (Offer and Acceptance)
- Legal Consideration



Contract Formation

To have an effective contract, you should always keep in mind that the purpose of a contract is not to entertain, inform, or convey theories. Rather, the purpose of a contract is to **accurately set forth the intent and agreement of the parties** to the contract. All contract drafting should keep the “big picture” in mind.

Keys to an Effective Contract

- **Clarity**
 - Understand the factual basis for the transaction.
 - Understand the legal context of the transaction.
- **Proper Form**
 - Not all contracts look alike!
- **Proper Structure**
 - Utilize appropriate terms and conditions.



Basic Contract Provisions

Parties to the Contract

- ❑ **If do not correctly identify the parties, there can be repercussions.**
 - Names of parties need to be accurate.
 - Include type of entity (corporation, LLC etc.)
 - Make sure entity is still a valid entity
- ❑ **Beware of Multiple Parties**
 - Who will be liable for contract?
 - What type of consents/notices will be necessary for default, etc.?
- ❑ **Beware of Affiliates!**
 - Parents, subsidiaries, affiliates are separate entities.
 - However, a contract may bind you against all. Example is Beverage Contracts.
- ❑ **Other Issues with the Parties**
 - Parties in different jurisdictions may have different expectations or interpretations.
 - Different idioms and word meanings of the law.

Basic Contract Provisions

❑ Date of the Contract

- A Contract is not invalid without a date.
- Effective Date
 - Date executed
 - Different date before or after date executed

❑ Recitals

- Introduce subject matters and provide context.
- Best to keep “agreements” to body of contract.

❑ Term & Termination

- Law implies “reasonable time” but best to specify time for performance.
- “Time is of the essence” clause is key.
- Define how contract can be terminated.
- Address renewal terms.
- Without termination date, contract is terminable at will.

Basic Contract Provisions

❑ **Payment & Consideration**

- Pre-Payment
- Open Account
- Payment Terms
 - Frequency of Invoicing
 - Frequency of Payment
 - Ability to Dispute Payment

❑ **Remedies**

- Define (or limit) the remedies a party can pursue upon breach.

❑ **Risk Allocation Provisions**

- Insurance, Indemnification, Limitation of Liability

❑ **Signatures**

- Identify Name of Person/Entity & Authority to sign
- Electronic Signatures

10 Minute Break.....



Contract Provisions – Boilerplate Provisions

- ❑ **Boilerplate provisions are often simply cut and paste from one contract to another without much thought about the potential impact of their use. However, these clauses conceal significant legal and business implications that can produce unwanted future results if not tailored to the specific circumstances of the transaction.**
- ❑ **Understanding Boilerplate provisions will aid in the avoidance of pitfalls and unintended consequences in the contract.**
 - All boilerplate is not “boilerplate”
 - Do NOT fall into the “we have this in all our contracts” trap.
 - The more specific will govern over the more general.

Contract Provisions – Boilerplate Provisions

❑ **Choice of Law**

- Tells parties (and court) which substantive law governs.
- Affects substantive rights of the parties.
- Will apply in litigation and arbitration.
- If not selected, creates uncertainty.

❑ **Choice of Forum**

- Determines where disputes will be resolved.
- Many factors to consider
 - Witnesses
 - Costs
 - Local procedures
- Federal, State and County Courts

Contract Provisions – Boilerplate Provisions

❑ **Integration Clause**

- “Entire Agreement” or “Merger” clause
- Excludes any prior written or oral agreements.
- Be sure all desired clauses/agreements are in the final contract

❑ **Notices**

- To whom should they be delivered?
- How should they be delivered?
- When are they deemed delivered?
- Is confirmation of delivery desired?

❑ **Waiver (aka “Anti-waiver”)**

- Purpose is to clarify that failure to timely claim a breach/default or exercise rights does not constitute a waiver of those rights.

Contract Provisions – Boilerplate Provisions

❑ Severability

- Provides court with instruction to uphold validity of contract even if a certain provision is deemed illegal or invalid by severing it.
- Can often work to advantage of one party.
- The severed provision may be critical to business purpose so be careful.

❑ Amendments

- Require that any modification or amendment be in writing.
- Prevents inadvertent changes to the contract.

❑ Assignment and Delegation

- In general, contracts are assignable unless the assignment would:
 - change the duties of the parties, increase the burden or risk on a party, materially impair performance, or materially reduce the contract value; or
 - assignment is prohibited by law or public policy.
- Expressly prohibit any assignment, subcontracting or delegation in contract unless agreed in writing.

Contract Provisions – Boilerplate Provisions

❑ **Successors and Assigns**

- Under certain circumstances, parties may want rights and obligations to transfer to “permitted assigns.”
- Operation of law, sale, merger etc.

❑ **Counterparts**

- Many contracts are not signed with all parties in a room.
- Many use separate signature pages for various parties for logistical reasons.
- Brings all together to complete execution and delivery of the contract.

❑ **No Third Party Beneficiaries**

- Precludes non-parties from having a right to enforce contract provisions.

Contract Provisions – Boilerplate Provisions

❑ Force Majeure

- Excuses a party's performance under certain conditions/circumstances.
- Often has very different effect on buyer vs. seller
- Carefully review all the “what ifs” in these clauses.

❑ Interpretation and Definitions

- Tells parties how terms should be interpreted so have intended application.
- If use definitions, be clear and consistently use them.

❑ Further Assurances

- Often useful to require other party to provide documents or instruments to give effect to the contract

❑ Prevailing Party

- Used as fee shifting clause and prevailing party has costs to enforce the contract reimbursed by the non-prevailing party.

Risk Allocation – Representations & Warranties

❑ Representations

- A representation is a **statement of fact**
- One party to the contract will indicate/agree that a **certain fact(s) are true**.

❑ Warranties in General

- A warranty is a **promise that a fact (such as a representation) is true**.
- Warranties are obligations that a party undertakes by agreement or that are imposed by law
- Warranties memorialize the **commitments and expectations** to which the seller and buyer will be held accountable.
- A **warranty is future-oriented** – it effectively acts a promise to indemnify the “promisee” if the fact warranted proves to be false.

❑ Issues to Consider

- What do they cover? How long do they last?
- How does the School District enforce?

Risk Allocation – Covenants & Conditions

❑ Covenants

- A covenant is an **agreement/promise made by a party to take or not take certain actions.**
- **Relate to the future** and often cover ongoing performance.
- Not necessarily identified or segregated as covenants but are intermingled throughout the contract.

❑ Conditions

- A condition is a fact or circumstance that **must be true or fulfilled before a party's obligation or right under the contract becomes binding or effective.**
- Conditions can be either express or implied.
- Court may imply a condition to preserve fairness based on intent or course of dealings.

Risk Allocation – Indemnification

*Indemnification is an obligation by one party to **compensate another party for certain losses, damages, and costs**. These losses could be asserted directly by the other party or by a third party.*

❑ **What does “Contractual Indemnification” usually include?**

- Indemnification – pay for losses caused by 3rd party claim
- Hold Harmless – not hold other party responsible for loss caused by party
- Duty to Defend – indemnifying party must defend against all claims

❑ **What is Enforceable?**

- Laws may limit enforceability. For example, in Michigan law limits indemnification clauses against Michigan municipalities, schools and other public bodies.
- Unconscionability

Risk Allocation – Indemnification

❑ Scope of Coverage

- **Important to define** exactly what parties (and related persons/entities) are covered.
- Important to define the scope of what is covered (claims etc.)
 - Broad = “arising from or in connection with”
 - Narrow = “caused by” or “resulting directly from”
- Important to limit scope
 - Not responsible for losses arising out of indemnified party’s actions
 - Willful vs. gross negligence vs. negligence
 - Acts/Omissions, breach of contract, breach of warranty, etc.

❑ One size does not fit all

- Consider specialty clauses, such as:
 - Environmental
 - Intellectual Property

Contract Provisions – Failure to Specify Terms

❑ Court Interpretation

- Plain and ordinary meaning of contract language
- Ambiguous Terms
- Incomplete Language

❑ Gap Fillers

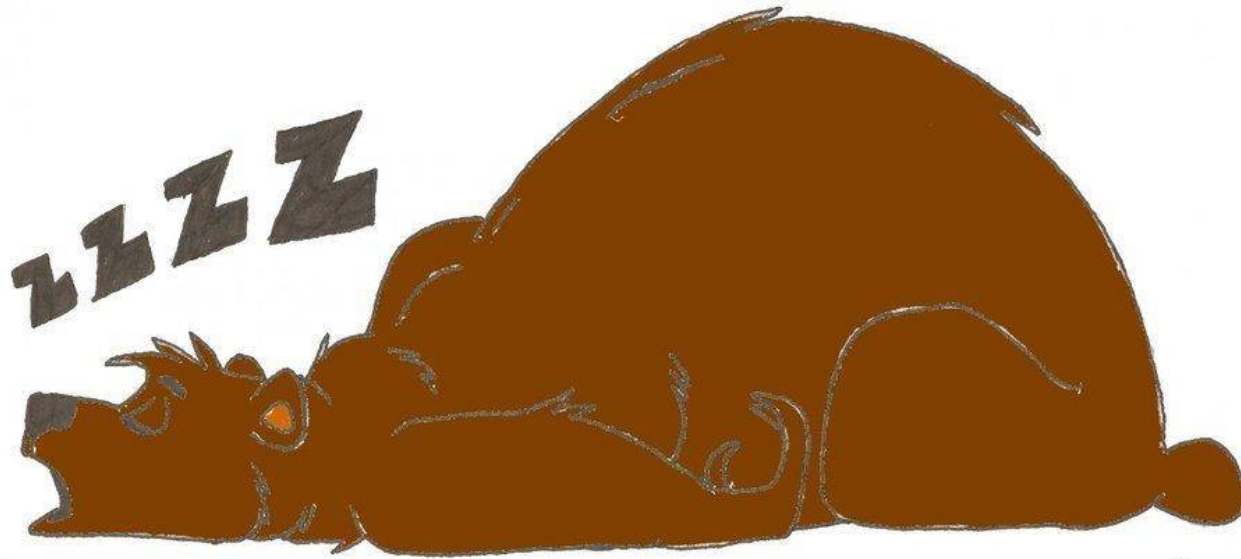
- UCC Article 2 – Sale of Goods
- Course of Dealing

❑ Unintended Consequences

- End up with undesirable terms
- Terms conflict with desired intent



10 Minute Break.....



Sample Contract Review

CONTRACT FOR SALE AND PURCHASE

Between: XXXXXXXXXXXXXXXXXXXX, a Limited

LLP

and: XXXXXXXXXXXXXXXXXXXX, a Limited

LLP

Notwithstanding to the effect that the subject of this contract is the following property, including fixtures and contents, the parties agree to include the following fixtures and contents in the purchase price of the property, including fixtures and contents, as follows:

1. DESCRIPTION

(a) Legal description of the property: XXXXXXXXXXXXXXXXXXXX, County of XXXX

(b) Street address of the property: XXXXXXXXXXXXXXXXXXXX

(c) Parcel number of the property: XXXXXXXXXXXXXXXXXXXX

(d) Purchase price: XXXXXXXXXXXXXXXXXXXX

2. PURCHASE PRICE

(a) The purchase price of the property is XXXXXXXXXXXXXXXXXXXX.

(b) The purchase price shall be paid in cash.

(c) The purchase price shall be paid in cash.

(d) The purchase price shall be paid in cash.

(e) The purchase price shall be paid in cash.

(f) The purchase price shall be paid in cash.

(g) The purchase price shall be paid in cash.

(h) The purchase price shall be paid in cash.

(i) The purchase price shall be paid in cash.

(j) The purchase price shall be paid in cash.

(k) The purchase price shall be paid in cash.

(l) The purchase price shall be paid in cash.

(m) The purchase price shall be paid in cash.

(n) The purchase price shall be paid in cash.

(o) The purchase price shall be paid in cash.

(p) The purchase price shall be paid in cash.

(q) The purchase price shall be paid in cash.

(r) The purchase price shall be paid in cash.

(s) The purchase price shall be paid in cash.

(t) The purchase price shall be paid in cash.

(u) The purchase price shall be paid in cash.

(v) The purchase price shall be paid in cash.

(w) The purchase price shall be paid in cash.

(x) The purchase price shall be paid in cash.

(y) The purchase price shall be paid in cash.

(z) The purchase price shall be paid in cash.

3. CLOSING

(a) The closing shall take place on the date of the execution of this contract.

(b) The closing shall take place at the office of the seller.

(c) The closing shall take place at the office of the seller.

(d) The closing shall take place at the office of the seller.

(e) The closing shall take place at the office of the seller.

(f) The closing shall take place at the office of the seller.

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(v) The closing shall take place at the office of the seller.

(w) The closing shall take place at the office of the seller.

(x) The closing shall take place at the office of the seller.

(y) The closing shall take place at the office of the seller.

(z) The closing shall take place at the office of the seller.

Contract Form

Many people think or expect that there is a form contract for every type of deal.

BUT.....THERE ISN'T!

- “Forms” should be a starting place, not a finish.
- Distinguish from consistent documents in similar circumstances.
- Many contracts include “meaningless boilerplate” language which often compounds interpretation issues.

Not all language in forms (even the “boilerplate” provisions) should automatically be inserted into each contract, as they may not apply and could even be adverse to the party’s interests.

Sample Services Contract Review

- ❑ **What is the Intent and Subject Matter for this Contract?**
- ❑ **Does the Contract have the 4 essential elements for contract formation?**
 - **Parties competent to contract**
 - **Proper subject matter**
 - **Mutuality of Agreement (Offer and Acceptance)**
 - **Legal Consideration**
- ❑ **What are the problematic issues/terms in the Contract?**

Sample Service Contract Review

Recitals

1. The School District issued a Request For Proposals for Concession Services, dated March 1, 2016 (the “RFP”). The Contractor submitted a response to the RFP, dated March 20, 2016.
2. The School District has concession facilities at its high school, located at 1500 Dimple Way, Happy Town, Michigan 48000 (the “Concession Facilities”).
3. Contractor desires to utilize the Concession Facilities to provide food concession services for designated School District events.
4. The School District desires to grant the Contractor the right to use the Concession Facilities in accordance with the terms and conditions of this Contract.

Sample Services Contract Review

II. TERM AND TERMINATION

- A. The Contract shall commence as of July 1, 2016, and the initial term of the Contract shall be for one (1) year, ending June 30, 2017 (the “Initial Term”). This Contract shall automatically renew on a year-to-year basis unless a party notifies the other party in writing of nonrenewal at least 120 days prior to the end of the current term (each a “Renewal Term” and collectively the “Renewal Terms”).

Sample Services Contract Review

VI. EQUIPMENT, MAINTENANCE AND REPAIRS

- A. In addition to the refrigerators and freezers within the Concession Facilities, the Contractor may use the School District's inventory of food concession equipment, which is set forth in Attachment A (the "Equipment").

Sample Services Contract Review

VII. INSURANCE AND INDEMNIFICATION

- A. Contractor, at its sole cost and expense, shall procure and maintain throughout the Initial Term and any Renewal Term(s) workers' compensation insurance as required by law.
- B. Contractor and any of its employees, agents or contractors shall not use, generate, manufacture, transport, treat, store, process, dispose, discharge, emit, or release any hazardous materials or substances at, on, under or from the Concession Facilities or the School District property.
- C. Both parties agree to indemnify, defend and hold harmless the other party, its employees, and agents from and against any and all claims, counter claims, suits, debts, demands, actions, judgments, liens, liabilities, costs, obligations, damages, or injuries to persons or properties, environmental issues, expenses, including actual attorney's fees and actual expert witness fees, arising out of or in connection with the performance of this Contract.

Sample Services Contract Review

IX. ASSIGNMENT AND SUBLEASE

- A. The Contractor may assign this Contract or sublease the Concession Facilities and its rights or obligations herein, in whole or in part, without the School District's prior written consent.

X. WARRANTIES

- A. The Contractor warrants that all Services will be performed timely.

Sample Services Contract Review

- D. Governing Law. This Contract shall be governed by the laws of the State of Ohio, with venue being Awesome County, Michigan.

ATTACHMENT A

Equipment List

To be Attached

Sample Purchase Order Terms and Conditions Review

PURCHASE ORDER

[Your Company Name]

[Your Company Slogan]

[Street Address], [City, ST ZIP Code]
Phone [000.000.0000] Fax [000.000.0000]
[e-mail]

VENDOR [Name]
[Company Name]
[Street Address]
[City, ST ZIP Code]
[Phone]
Customer ID [ABC12345]

P.O. # [100]
DATE: OCTOBER 25, 2011

SHIP TO [Name]
[Company Name]
[Street Address]
[City, ST ZIP Code]
[Phone]
Customer ID [ABC12345]

SHIPPING METHOD	SHIPPING TERMS	DELIVERY DATE

QTY	ITEM #	DESCRIPTION	JOB	UNIT PRICE	LINE TOTAL

1. Please send two copies of your invoice.
2. Enter this order in accordance with the prices, terms, delivery method, and specifications listed above.
3. Please notify us immediately if you are unable to ship as specified.
4. Send all correspondence to:
[Name]
[Street Address]
[City, ST ZIP Code]
Phone [000.000.0000] Fax [000.000.0000]

SUBTOTAL

SALES TAX

TOTAL

Authorized by

Date

Sample Purchase Order Terms and Conditions Review

1. Acceptance. This Purchase Order ("Purchase Order") is an offer to Seller by Purchaser and does not constitute an acceptance of any offer to sell or proposal made by Seller. Any reference to any offer to sell or proposal made by the Seller is solely for the purpose of incorporating the description and specifications of Goods and services contained in such offer to sell or proposal to the extent that such description and specifications do not conflict with the description and specifications contained in the Purchase Order. Seller's written acceptance, commencement of any work under this Purchase Order, or any other conduct by the Seller which recognizes that the existence of a contract with respect to the subject matter of this Purchase Order shall constitute Seller's acceptance of this Purchase Order, including these terms and conditions. Any terms and conditions proposed by Seller are not part of the agreement unless specifically accepted by Purchaser in writing.

2. Shipping. Seller shall properly pack and mark all Goods which are the subject matter of this Purchase Order ("Goods") in accordance with the requirements of Purchaser and carrier. Seller shall bear all costs of packing and marking unless otherwise stated in this Purchase Order. Seller shall reimburse Purchaser for all expenses incurred by Purchaser as a result for improper packing or marking and for the return of rejected Goods. All shipments must be accompanied by packing slips showing Purchase Order numbers, and copies of all packing slips must be attached to Seller's invoice. All Goods are sold FOB Purchaser's Facility and risk of loss shall pass to Purchaser upon delivery to Purchaser at its Facility, as specified on the face of this Purchase Order. Seller shall obtain a straight bill of lading from the carrier and shall include on each packing slip and bill of lading this Purchase Order number and destination Facility. Seller shall not combine multiple purchase orders in one carton; each purchase order must be packed separately. Seller shall obtain the signature (first and last name) of the authorized representative of Purchaser on all receiving documents.

Sample Purchase Order Terms and Conditions Review

3. Invoices and Payment. Seller shall render invoices in duplicate. Invoices shall include the purchase order number and destination and other information sufficient to enable Purchaser to easily identify the Goods. Separate invoices are required for each individual delivery. If time for payment is not otherwise stated on this Purchase Order, the payment date shall be 30 days following Purchaser's receipt of proper invoice. Time for payment shall not begin until correct and complete invoices are received and Seller's cash discount privileges to Purchaser shall be extended until such time as payment is due. Purchaser may withhold payment pending receipt of evidence, in such form and detail as Purchaser may direct, of absence of any liens, encumbrances or claims on the Goods or services under the Purchase Order. Purchaser may at any time set off any amount owed by Purchaser to Seller against any amount owned by Seller or any of its affiliated companies.

5. Inspection and Audit. Purchaser, at its option, may reject or retain or correct Goods that fail to meet the specifications of the Purchase Order. If Purchaser rejects Goods, it shall hold them for a reasonable period for pick up by Seller or return them, at Seller's cost. If Purchaser corrects non-conforming Goods, it shall consult with Seller on the method of correction. Seller shall reimburse Purchaser for reasonable expenses resulting from rejection or correction of the Goods. The fact that Purchaser may have inspected, tested or failed to inspect or test any Goods shall not affect any right of Purchaser under this Purchase Order. Nothing in this Purchase Order shall relieve Seller from any obligation to inspect or test the Goods. If Seller is to be paid other than on a lump sum basis, Purchaser shall have the right at reasonable times and upon reasonable notice to audit such of Seller's records as are reasonably necessary to verify the amounts due Seller, and Seller shall make such books and records available to Purchaser or its designees and to provide copies of same to Purchaser or its designees upon request.

Sample Purchase Order Terms and Conditions Review

7. Termination. In addition to any other rights of Purchaser to cancel or terminate this Purchase Order, Purchaser may terminate its obligations in whole or in part, at any time for any reason, by written notice of termination to the Seller. Purchaser shall have such right of termination notwithstanding the existence of an excusable delay under Section 4. Upon any such termination Purchaser's obligation to Seller shall be: (i) the Purchase Order price for finished and completed services that conform to the requirements of this Purchase Order, (ii) Seller's actual costs of work-in-process and parts and materials that Seller produced or acquired hereunder and transfers to Purchaser, (iii) Seller's actual costs of immediately terminating subcontracts and settling claims of subcontractors, and (iv) Seller's actual costs of protecting Purchaser's property that is in Seller's possession. Purchaser will make no payments for finished Goods, work-in-process or raw materials fabricated or procured by Seller in amounts in excess of those authorized in delivery releases or schedules nor any undelivered Goods which are in Seller's standard stock or are readily marketable. Purchaser's obligations upon termination shall not exceed those Purchaser would have had to Seller in the absence of termination. Seller shall furnish to Purchaser, within one month after the date of termination, Seller's termination claim, which shall consist exclusively of the items of Purchaser's obligation to Seller under the preceding subsection. Purchaser may audit Seller's records before or subsequent to payment to verify Seller's termination claim. Purchaser shall have no obligation to Seller if Purchaser terminates its purchase obligation because of default by Seller under Section 9.

8. Warranty. Seller warrants that all Goods and services covered by this Purchase Order will: (a) conform to the specifications, drawings, written instructions, samples, or descriptions furnished to or by Purchaser; (b) be of good quality and workmanship; (c) be free of defects in design (unless Purchaser provided the design), materials and workmanship; (d) be merchantable; (e) be fit for particular purposes applicable to the design, function or use of the Goods. Seller acknowledges that Seller knows of Purchaser's intended use and expressly warrants that all Goods covered by this Purchase Order which may have been selected, designed, manufactured or assembled by Seller, based upon Purchaser's stated use, will be fit and sufficient for the particular purposes intended by Purchaser. Seller shall immediately notify Purchaser of any errors in specifications or drawings provided by Purchaser which are patent or which are otherwise known to or should have been discovered by Seller.

Contract Negotiations – The Method Behind the Madness

Contract Drafting and Negotiation Basics:

- Understand the parties
- Understand the subject matter
- Understand the purpose for the contract
- Understand the underlying drivers of the contract (was there an RFP etc.)
- Keep drafts non-binding

Negotiations will often focus on these concerns so it is imperative that they be understood and are able to be conveyed to legal counsel.

Even if a form can be found for a particular transaction, it still needs to be carefully reviewed so that the key issues and proper considerations that need to be addressed are completed in the correct manner and context.

Contract Negotiations – The Method Behind the Madness

❑ Preliminary Best Practices for Contract Negotiations

- Use clear, plain and unambiguous language.
- If ambiguous, clarify it. If get push back, may want to rethink transaction.
- Do NOT assume all the “legal stuff” is standard. Make sure you understand it.
- Run down all the “what ifs” for the transaction and particular provisions.
- Anticipate the obvious.
- Use definitions for ease of interpretation and be consistent.
- “Backyard BBQ Test” – How would you explain to your half-drunk neighbor?
- Understand the course of dealings between the parties.
- Boilerplate is not always boilerplate.
- You are responsible for what you sign, even if you do not understand it!

Contract Negotiations – The Method Behind the Madness

❑ **Drafting and Negotiating the Contract**

- Keep drafts non-binding.
- Pursue exaggerated interests with caution...may lead to protracted negotiations.
- Consider confidentiality and non-disclosure agreements.

❑ **Avoiding the Battle of the Forms**

- Buyer and Seller's "forms" have competing terms and no signed contract.
- Common Law - Mirror Image Rule
 - Acceptance must match offer exactly or no contract
- Common Law – Last Shot Rule
 - If accept by performance, for example, last document will control.

Contract Negotiations – Rules to Live By

❑ Know Your Leverage

- Eating the Elephant vs. Eating the Peanut
- Contractual Right vs. Commercial Relationship

❑ Stick to the CRAPP....Really!

- C = Clear and Concise
- R = Reasonable
- A = Avoid Ambiguity
- P = Practicable
- P = Prophylactic – Anticipate...Think twice draft once



❑ Follow The Golden Rule

- Do not ask for something you are not willing to give in return!

THANK YOU! Any Questions?



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