Diving into Contracting

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Agenda

• About Contracts
• Fixed-Price vs Cost-Reimbursement
• Contract Termination
• Disputes and Choice of Law
• Liability, Warranty and Indemnification
About Contracts

What is a contract?

- A contract is an agreement between two or more entities that creates a legal obligation between them to do something or not to do something.
Elements of a binding contract

- Offer & Acceptance – a party must make an offer and another party must accept the offer
- Mutuality of Obligation – both parties must intend to be legally bound
- Consideration – something of value is exchanged for something of value, or for action or inaction
- Capacity – each party must be legally able to enter into a contract
- Legality – the contract must be for a legal purpose

Take Note!

- If an agreement meets these criteria, then it is legally binding
- Unless an agreement meets these criteria, it is not legally binding
Common sections of a contract

- **Preamble** – purpose and intent of the parties
- **Duration** – period of performance
- **Consideration** – funding, payment, invoicing
- **Liability** – who is responsible if things go wrong
- **Warranty** – what guarantees does the performer make as to its performance
- **SOW/Deliverables** – what is to be accomplished and by whom

- **Intellectual Property** – who owns the results/deliverables
- **Termination** – by whom and under what circumstances the agreement may be terminated prior to its natural end date; consequences of termination
- **Publication/Publicity** – under what circumstance the work or even the existence of the contract may be made public
Common sections of a contract

- **Changes** – to what extent changes to the terms must be made by formal amendment
- **Choice of Law** – which laws will govern interpretation and performance of the contract
- **Disputes** – how disagreements will be handled
- **Entire Agreement** – establishes the extent to which the agreement represents the entire understanding of the parties relative to the subject matter

**Take Note!**

- The title of the contract should reflect its purpose and the title of a clause should reflect its content, but neither is a given
- Read every sentence in every clause!
Fixed-Price vs Cost-Reimbursement

Fixed-Price Contract

• **Concept**
  – contractor is paid for work completed based upon a pre-agreed or fixed-price for the contracted work
  – Financial risk is on the contractor - must manage costs to stay within agreed price
  – Standard method of contracting for commercial items and between commercial entities
Fixed-Price

**Pros**
- No expenditure restrictions
- No financial reporting
- No audits
- Keep it if you don’t spend it

**Cons**
- If you don’t deliver you don’t get paid
- If you are late with deliverables you may not get paid
- Institutional financial systems are designed around a cost-based model

Take Note
- There is nothing inherently wrong with a FP contract, provided
  - You understand the increased payment risk
  - You modify the associated penalties to a level your institution can accept
Cost-Reimbursement Contract

• **Concept**
  – contractor is paid for expenses incurred toward the SOW up to a total estimated cost
  – Financial risk is on the sponsor
  – Appropriate method of contracting when there are uncertainties in contract performance (e.g., R&D)

Cost-Reimbursement

**Pros**
• When you run out of funds you stop working
• Very low financial risk to institution
• Consistent with institutional financial systems

**Cons**
• Rebudgeting restrictions
• Unallowable costs
• Financial reporting
• Closer Scrutiny
• Auditable
Contract Termination

Termination for Convenience

• **Concept:**
  – Describes the process whereby a party, for its own convenience, may terminate the contract prior to its natural end date.
  – Contract should indicate process and consequences
Take Note

• Make sure to include uncancellable obligations
• With fixed-price contracts you may have to accept payment based upon “work completed”, rather than all incurred expenses.

Termination for Default

• Concept:
  – Describes the process whereby a party, as a result of the other party’s actions, may terminate the contract prior to its natural end date.
• Contract should indicate process and consequences;
• Usually provides opportunity for defaulting party to “cure” defaulting action and avoid termination
Take Note

• Often includes penalties and re-performance against defaulting party
  – Make sure to emasculate clause if you are going to accept it.

Disputes and Choice of Law
Dispute Resolution

• **Concept:**
  – The designated process by which the parties will resolve a disagreement about performance under the contract
  – Often uses arbitration as an initial (and cheaper) method of resolution than litigation

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Take Note

• Make sure to know your institution’s policy - some institutions may not be able to accept *binding* arbitration.
• Arbitration often identifies the location; unless contrary to institutional policy, it’s common to negotiate a mutually agreeable, third party location
Choice of Law

• Concept:
  – Identifies the laws that will apply to interpretation and/or performance of the contract
• The parties can choose a jurisdiction other than the one in which either of the parties reside

Take Note

• You can separate performance from interpretation; performance would best be the institution’s location
• One option that is often acceptable is to remain silent
Liability, Warranty and Indemnification

Limitation of Liability

• Concept:
  – Identifies to what extent each of the parties will be liable in the event of a law suit or other claim related to the contract and made against the party

• Most universities limit this by policy
Warranty

• Concept:
  – A promise or guarantee regarding contract performance, often with penalties for breach, including damages, re-performance, or re-procurement
  – Standard in the commercial world

• Most universities won’t accept this

Take Note

• Many institutions include a clause specifically stating that they make no warranties

• Sample argument to push back on warranty:
  – “The institution is non-profit and performs work at cost; it does not charge a fee and its rates do not include the costs of deferred liabilities, such as warranties and reperformance, that are normally included with commercial efforts”
Indemnification

• Concept:
  – The extent to which one party will defend the other party in the event a lawsuit is brought against that other party.
• Most institutions limit this based on policy

Take Note

• Most institutions are willing to indemnify the sponsor to some degree, but not for IP infringement
• Institutional templates often default to the sponsor indemnifying the institution, which is contrary to the commercial sector
  – Offering reciprocal indemnification can often mitigate resistance from the sponsor
Thank you!