



Procurement: Contract Terms and Conditions June 22, 2011

Karima Kanani

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Agenda

- Procurement rules on contract terms and contract management
- Options for meeting procurement requirements
- Using the procurement process for strategic negotiation of contract terms
- A review of key contract terms and conditions

Procurement Rules

- *Broader Public Sector Accountability Act*
- Procurement Directive
- Expense Directive

Contract Requirements

- Mandatory Requirement #15: Executing the Contract
- Mandatory Requirement #16: Establishing the Contract
- Mandatory Requirement #17: Termination Clauses
- Mandatory Requirement #22: Contract Management

MR #15: Executing the Contract

- The agreement between the Organization and the successful supplier must be formally defined in a signed written contract.
- Where an immediate need exists for goods or services, and the Organization and the supplier are unable to finalize the contract as described above, an interim purchase order may be used. The justification of such decision must be documented and approved by the appropriate authority.

MR #16: Establishing the Contract

- The contract must be finalized using the form of agreement that was released with the procurement documents.
- In circumstances where an alternative procurement strategy has been used (i.e., a form of agreement was not released with the procurement document), the agreement between the Organization and the successful supplier must be defined formally in a signed written contract before the provision of supplying goods or services commences.

MR #17: Termination Clauses

- All contracts must include appropriate cancellation or termination clauses. Organizations should seek legal advice on the development of such clauses.
- When conducting complex procurements, organizations should consider, as appropriate, the use of contract clauses that permit cancellation or termination at critical project life-cycle stages.

MR #22: Contract Management

- Procurements and the resulting contracts must be managed responsibly and effectively.
- Payments must be made in accordance with provisions of the contract. All invoices must contain detailed information sufficient to warrant payment. Any overpayments must be recovered in a timely manner.
- Assignments must be properly documented. Supplier performance must be managed and documented, and any performance issues must be addressed.

MR #22: Contract Management cont...

- To manage disputes with suppliers through the life of the contract, Organizations should include a dispute resolution process in their contracts.
- For services, organizations must:
 - Establish clear terms of reference for the assignment. The terms should include objectives, background, scope, constraints, staff responsibilities, tangible deliverables, timing, progress reporting, approval requirements, and knowledge transfer requirements.

MR #22: Contract Management cont...

- Establish expense claim and reimbursement rules compliant with the Broader Public Sector Expenses Directive and ensure all expenses are claimed and reimbursed in accordance with these rules.
- Ensure that expenses are claimed and reimbursed only where the contract explicitly provides for reimbursement of expenses.

Procurement Process

- Releasing a form of agreement with the procurement documents
- Alternative approaches
- Strategic considerations

Key Parts of a Contract

- Parties
- Recitals
- Definitions
- Terms of Agreement
- Consideration
- Term and Termination
- Representations, Warranties and Covenants
- Indemnities and Insurance
- Confidentiality and Privacy
- Dispute Resolution
- General Provisions
- Signatures

Parties

ABC Corporation

123 Blank Road
Nowhere, Ontario
N4M 3N3

(the “**Provider**”)

- and -

XYZ HOSPITAL

234 Everywhere Drive
Nowhere, Ontario
N4M 3A2

(the “**Hospital**”)

Recitals

- May explain the purpose of the contract
- May provide background information through recitations of mutual understanding of fact
- Some courts have held that recitals are conclusive evidence of the facts they state
- Recitals are part of the contract so only include facts that you are absolutely certain are correct

Definitions

- Alphabetic listing of terminology to be used in the contract

Examples:

- “**WSIB**” means the Workplace Safety and Insurance Board
- “**Term**” has the meaning ascribed thereto in Section 6 hereof

Terms of Agreement

- Promises made by each of the parties
- States and makes explicit the obligations of each of the parties under the Agreement
- Clear and specific description with detail often contained in schedules to be attached

Examples:

- Scope and level of services
- Equipment specifications
- Include all obligations from RFP and Response

Consideration

- Each party to a contract must give some consideration to the other party
- Consideration means the cause, motive, price or impelling influence which induces a contracting party to enter into a contract
- It can be anything of value to the other party

Term and Termination

- States the duration of the contract and options for renewal
- Provides for exit mechanisms (i.e. circumstances allowing for voluntary and automatic termination of the contractual relationship)
- Address how matters will be dealt with upon termination (e.g. payment, assets, information)

Representations, Warranties and Covenants

- A Representation is:
 - a factual statement in regard to some past or existing fact, circumstance or state of facts pertinent to the contract
- A Warranty is:
 - a promise by one party which provides assurance to the other party of the existence of fact upon which the other party may rely
- A Covenant is:
 - a promise that something is either done or shall be done or shall not be done

Indemnities and Insurance

- Indemnity is:
 - an obligation to make another party whole for third party claims resulting from the first party's negligence, breach of contract or statutory violation
- Insurance is:
 - evidence that a party will have the financial means to satisfy its indemnity obligations
- Indemnities and Insurance may be given a monetary limit under the contract

Confidentiality and Privacy

- Of each other's information
- Of patient information
- In compliance with regulatory requirements

Dispute Resolution

- Problem solving during the relationship is an important consideration
- Provides a mechanism for dealing with disputes between the parties before they go to court
- May involve discussion between senior management, mediation, arbitration

General Provisions

- Assignment
- Amendment
- Force Majeure
- Governing Law
- Independent Contractor
- Counterparts

Contract Management

- Contract management office/teams
- Bookmark key dates
- Review, document, enforce

Closing Thoughts

- Procurement process is important but contracting requires equal attention
- Contract will govern the legal and operational relationship on a go-forward basis

Karima Kanani
kkanani@millerthomson.com
T: 416.595.7908
F: 416.595.8695

Karima Kanani is a Partner and leads the corporate/commercial practice in the Health Industry Group at Miller Thomson LLP, Toronto, Ontario

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