UNDERSTANDING AND NEGOTIATING YOUR CONTRACT
INTRODUCTIONS

• Name

• Industry

IT’S RABBIT SEASON!

http://education.nationalgeographic.com/media/rabbit-or-duck/
AT TIMES, VICTORY CAN FEEL LIKE...

...BUT, IT DOESN'T HAVE TO!!
Agenda

Icebreaker – Brain Games!

The Basics:

• Principles of Contract Law

• Scope of Agreement

• Express and Implied Warranties

• Understanding General Principles
Agenda

The Basics Con’t ...

• Avoiding and Addressing Potential Problems

• Increasing Possibility of Successful Project Completion

• Forms of Contracts
Session Overview

1. THE BASICS
2. AVOIDING AND ADDRESSING PROBLEMS
3. FORMS OF CONTRACTS

Transcending the Traditional
Transcending the Traditional
A contract is an agreement between parties with binding legal and moral force, usually exchanging goods or services for money or other considerations.
BASIC PRINCIPLES

- Offer
- Acceptance
- Consideration
- Specialized statutes
- Regulations,
- Case law
THE OFFER

– What is an offer?
  (NOTE: YOUR BID RESPONSE COULD END UP BEING YOUR CONTRACT!)

– The offer indicates an intention to be bound to an agreement

– Submitted in the form of “Bids” or “Proposals”
THE OFFER

- Either party can make “offers”

- Offer vs. advertisement

- Advertisements are generally construed to be invitations for offers

- RFP’s and RFQ’s are advertisements. The contractor’s bid constitutes an offer that may or may not be accepted by the government
ACCEPTANCE

- Acceptance is the indication that the intention is to be bound to the exact terms of the offer.

- A response to an offer is one that is:
  - Certain
  - Decided
  - Doubtless.
ACCEPTANCE

- Conditional responses
- Hedging
- Procrastination
- Or anything that leaves the offeror in doubt does not constitute acceptance

Must be **NO** question that the offeree intends to be bound to the exact terms of the offer.

Acceptance must be clearly communicated
CONSIDERATION

1. Something of value that one party of a contract gives to the other contract party in exchange for something else of value.

2. Sufficiency vs. adequacy
CONSIDERATION

3. Sufficient consideration - when the consideration has some value that induces the other party to perform.

4. Adequacy relates to whether the exchange is a fair bargain.

5. The law will not look to the adequacy of the consideration. If a party makes a bad deal, the court will lend no assistance.
SCOPE OF AGREEMENT

• The Scope of Work (SOW)

• A good SOW

• It’s in YOUR best interest that your SOW be clear and unambiguous. A vague SOW does not work in your best interest.
• Lack of certainty concerning the terms and conditions of the contract may render an agreement unenforceable.

• **TERMS MUST BE CLEAR** enough to permit the courts to interpret the duties and obligation to be performed by either party.
RULES OF CONSTRUCTION

Rules of Construction as applied by courts:

• The ordinary meaning generally given to words applies.
• Technical terms and words
• The contract must be read and interpreted as a whole
• Specific terms control vs. general terms
RULES OF CONSTRUCTION

• Ambiguities are interpreted against the drafter of the contract

• Best evidence of the parties’ intention is in the written contract

• Purpose is to bar oral evidence that contradicts, adds to, or otherwise varies the terms of the written contract.
YOUR WARRANTY IS A CONTRACT THAT COMMITS YOU TO STAND BEHIND YOUR PRODUCT OR SERVICE.
EXPRESS WARRANTIES

- Express warranties are affirmative promises about the quality and features of the goods being sold.
- If you said you would provide a specific product, you are bound to deliver that product.
Implied Warranties

• The implied warranties created by the U.C.C. ended the old rule of caveat emptor- "Let the buyer beware."
  Implied warranties allows buyers to purchase goods and be confident that they meet certain minimum standards.

• The two implied warranties the U.C.C. creates are the warranty of "merchantability" of the goods being sold, and the warranty that the goods are "fit for a particular purpose."
Implied Warranty of Merchantability

Goods must be at least of average quality, properly packaged and labeled, and fit for the ordinary purposes they are intended to serve.

For example, a wristwatch would have to be at least of average quality as compared to other watches in the same price range, it must tell time, and it cannot come in a box labeled "Rolex" unless it is, in fact, a "Rolex."
Implied Warranty of Fitness for a Particular Purpose

The implied warranty of fitness for a particular purpose applies if the seller knows or has reason to know that the buyer will be using the goods he is buying for a certain purpose.

If the seller knows the purpose for which the goods are to be used, the seller impliedly warrants that the goods being sold are suitable for that specific purpose.

□ IMPLIED WARRANTIES ONLY
This means that the dealer does not make any specific promises to fix things that need repair when you buy the vehicle or after the time of sale. But, state law “implied warranties” may give you some rights to have the dealer take care of serious problems that were not apparent when you bought the vehicle.

□ WARRANTY

Implied Warranties
For example, a car salesman may sell a car that is perfectly suitable for everyday driving, and therefore is merchantable. BUT, if the car salesman knows the buyer wants to use the car as a race car, the car salesman also impliedly warrants that the car is suitable to use for racing.

THINK ABOUT THE ABOVE EXAMPLE...LET’S DISCUSS HOW WE CAN APPLY THE ABOVE PRINCIPLE TO SOME OF YOUR BUSINESSES/INDUSTRIES.
Because some warranties are imposed by law, it is important to know what is being warranted, as well as **how to disclaim these warranties**.

* Consult with an attorney who can navigate through the legal issues involving warranties.*
Warranties are critically important, but so are these other general contractual principles/provision:

• Scope of work, including plans and codes

  ➢ What's in and what's out of the contract, in terms of scope of work.
Understanding the General Principles

Price of work and payment schedule:

• For subs, price is usually a given, but the payment schedule is often excluded unless you raise it.

• Progress Payments vs. Final Payments

• Whether you are prime or sub, you'll want to set the pay frequency to match the pay cycle you have for your other staff, if possible.
Understanding the General Principles

- Indemnification
- Termination provision
- Default provision
- Force Majeure
- Governing Law
Understanding the General Principles

• Timeline for completion of project
• Insurance coverage
• Change order provisions
• Limitation of Liability
AVOIDING AND ADDRESSING PROBLEMS
Increasing Possibility of Successful Project Completion

• **Pay attention** to the details (or pay someone to pay attention for you) – in your bid response **AND** in your contract

• The requirements of public bidding laws are strictly construed against bidders who fail to comply with bid instructions and statutory requirements. Minor deviations in a bid may be waived; material deviations may not be waived.
Avoiding Problems (cont’d)

What Do I Need to Do To Increase Possibility of Successful Project Completion

• **COMPLY WITH ALL REQUIREMENTS**: The failure to comply with bidding requirements on a public works project — even if a mistake is clerical in nature — can be fatal to an otherwise low bidder.

• **DON’T MAKE MISREPRESENTATIONS**: At times, bidders will make certain representations that they believe the contract agency wants to see, but can’t deliver of those representations. These misrepresentations make your bid award more susceptible to challenge.
What Do I Need to Do To Increase Possibility of Successful Project Completion

• You are an “expert” in YOUR industry – but you may need to build a team.

  Don’t be penny wise and pound foolish.

• Key members of your team may include: accountant, attorney, payroll

• Cost is always a consideration for small businesses when building a team. Inquire about value pricing or alternative fee/billing arrangements that can accommodate your budget.
Increasing Possibility of Successful Project Completion

Determine if the problem is minor or major:

• Minor issues (issues that will not result in loss of contract or litigation) can often be resolved by internal staff

• Major issues (fatal flaw in your bid, contract or threatened litigation) usually require an external resource (i.e. attorney, accountant, auditor)
If it’s a **MAJOR** issue:

Time is of the essence on major issues.

- Even if you’ve engaged outside resources to assist, **YOU MUST STAY ENGAGED**. “My attorney is handling that”, is not the best response. If you are engaged, you know what’s at risk for **YOUR BUSINESS**

- If you have financing in connection with the project, you may be required to notify your lenders in the event of litigation – see your loan documents, if applicable.
If your formal letter of protest is denied:

engage an attorney to assist with legal proceedings

(injunctive relief – to stop the work from moving forward while litigation is pending).
• If there was a major flaw in the winning bid or the bid selection process, you may want to consider filing a protest.

• If you decide to bid, you should first send a formal letter of protest to agency that awarded the contract. You should consult with an attorney before filing this formal letter of protest.
FORMS OF CONTRACTS
TYPES OF CONTRACTS

Several types of contracts, including:

• Fixed-price contract (providing a good or service for a firm price);

• Requirements contract (an indefinite quantity contract for frequently used goods or services);

or

• Cooperative Endeavor Agreement (CEA).
A FEW EXAMPLES:

Remember – If you are the prime, your bid response could be your “contract” – it’s an offer, and the contracting entity could accept your offer “as-is”.


If you are the sub, you need to execute a SUBCONTRACTOR AGREEMENT with the prime.

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