

CONTRACT REVIEW CHECKLIST

1. Description of Goods/Services

- What is the product or service being purchased? Is the description of the goods or services specific enough regarding what we will receive?

A specific description in the agreement will prevent disputes later.

- Is there a set of requirements or a level of performance that the goods or services must meet? What are those requirements? Are there any warranties and, if so, are they enough?

A warranty provides the standards that the seller must live up to. Watch for disclaimers of warranties or for specifications that are to be defined later.

- What is the quantity to be purchased? Are there any limitations on quantity (maximum or minimum) that might be a problem?
- Are there any other provisions that we might not be able to live up to, such as a requirement to inspect all goods within a specific time after receiving them, or a provision that the goods are deemed to be accepted just because they have been received?

An agreement that states that goods are deemed accepted when received could limit our claim if the goods are defective.

2. *Price and Price Adjustment*

- What is the price and how is it defined (by unit, by hour, etc.)? Does the price include everything we need and expect with this agreement? Will we need to purchase or pay for any other goods or services to make these goods or services work?

- Are there any additional charges that are not included in the price (such as a delivery charge)?

- Does the agreement provide for the price to change for any reason and, if so, by how much?

Watch for terms where the seller can increase the price for internal seller reasons (such as an increase in the seller's costs) or external reasons (such as a shortage).

3. *Term and Termination*

- How long does the agreement last?

- Are there any provisions for a renewal or extension of the term of the agreement? If so, how do they operate?

Watch for “rolling” agreements that may extend for more than one year at a time. Also watch for agreements that require termination by notice before a specific date (such as an anniversary) – these limit flexibility to terminate.

- Is there any provision for an automatic renewal or extension of the agreement for any reason? If so, for how long?

Watch for agreements that provide that they continue automatically unless we give notice by a certain date. These agreements can lock us in for long periods unless we are careful about giving the notice.

- Can we terminate the agreement if we are not satisfied? Can we terminate the agreement if we are satisfied but we still want to terminate?

The most flexible agreements are those that provide that we can terminate at our convenience or after a short notice period. At the very least, the agreement should allow us to terminate it if the seller is not living up to it.

- Can the seller terminate the agreement for the seller's own convenience?

For some agreements, it could be a problem if the seller can terminate the agreement on short notice to us and we must quickly find a replacement supplier.

4. Default

- What happens if the seller does not live up to the agreement? Does the agreement terminate? If so, does the seller have a chance to fix the default first and will that be done quickly enough? Can we recover any damages from the seller? Are there any limitations on what we could sue for or how much in damages we could recover?

The agreement should always provide that we can terminate it if the seller does not perform. Depending on how critical the goods or services are, a short period of time (which could be anywhere from 24 hours to 30 days) to allow the seller to live up to the agreement could be acceptable.

If there is a default, we should be entitled to recover any damages we have because of that default. Most agreements will limit “consequential damages” (our loss of profits) and “punitive damages” (damages that punish the seller). That will generally be acceptable, but should be noted in this sheet.

- What happens if we do not live up to the agreement? Can the seller terminate the agreement? If so, do we have a chance to fix the default first and would we have enough time? Can the seller sue us for damages?

Since, in these agreements, our main obligation will usually be to pay, there should be a reasonable period of time allowed to us to make a late payment (usually 15 to 30 days is reasonable). If we have any other obligations, we should have an opportunity to fix any defaults. Because of the large amounts that could be involved, we should not be liable for consequential damages or punitive damages, as discussed above.

- Are there any other provisions in the agreement where one party agrees to cover the other party's damages? What are they? Are they reasonable?

These are frequently included in agreements by stating that the buyer will "indemnify" the seller for its losses. This can be a very large obligation and should be avoided.

5. *Payment*

- What are the payment terms? Are they in line with our standard terms?
- What is the payment schedule (for example, payment must be made within 10 days after the end of the month)? Can we meet that schedule?
- Are there interest charges or other fees for late payment? What is the rate?

6. *Disputes*

- What happens if there is a dispute? Is there a lawsuit, or is there an arbitration provision?

- Is there a term that specifies a location for the lawsuit or arbitration, and, if so, what is the location?

A term that provides for litigation or arbitration in a distant location (for example, California) might be a problem.

7. Confidentiality

- Is there a confidentiality term in the agreement?
- If so, what information is considered to be confidential? For how long does the obligation last? Are there any exceptions to the obligation?

- If not, should there be a confidentiality term?

If we are disclosing sensitive information to a supplier, there should be a confidentiality term in the agreement or a separate confidentiality agreement to protect our business information.

8. *Insurance*

- Is it necessary that the seller provide insurance for our benefit as part of this agreement?

For example, this is important if the seller will be on our property for any significant period of time.

- If there is an insurance provision, what are the coverages and limits, who is the carrier and what are the other important terms?

9. *Assignment*

- Are there any limitations on the seller's right to assign the agreement? If not, would we be comfortable working with a different seller if the agreement was assigned?

- Are there any limitations on our right to assign the agreement?

10. *One-way provisions*

- Are there any other provisions that benefit the seller and not us? If so, are they significant?

Special Considerations for Employment and Independent Contractor Agreements

11. *Characterization of Relationship*

- Is the relationship characterized as an employment or independent contractor relationship?
- If this is an independent contractor relationship, is it with a legal entity or an individual?

Note that an independent contractor agreement with an individual is more likely to be re-characterized as an employment agreement than if the agreement were with a corporation or other legal entity.

- Are the provisions of the agreement consistent with the characterization? For example, independent contractors should not participate in the company benefit plans, and should be subject to less control over their methods of performance than employees.

12. *Noncompetition/Nonsolicitation provisions*

- Are there noncompetition and nonsolicitation provisions in the agreement?
- What is the scope of those obligations? Have we satisfied ourselves that the scope and duration of the covenants are enforceable under applicable law?
- Is there a statement by the employee/independent contractor that s/he/it is not subject to any obligations that would conflict with performance of this agreement (such as noncompetition obligations under a prior agreement)?