

Project Contracts

Prepared by Dr. Merna Emad

PMG323

Lecture 5



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Lecture Five

Drafting

Section 1

Section 2

Contract types

Lecture Five

Drafting

Drafting



Clarity

If an overarching theme has been detected yet, hopefully it is that contracts should clarify the rights and obligations of both parties, not confuse them. In cleaning up any draft agreement, always assume that others will eventually have to read it for any number of reasons:

Comply with performance or payment obligations.

Prepare amendments and supplements to the agreement.

Understand the agreement's term and termination provisions.

Drafting

Clarity

If an overarching theme has been detected yet, hopefully it is that contracts should clarify the rights and obligations of both parties, not confuse them. In cleaning up any draft agreement, always assume that others will eventually have to read it for any number of reasons:

Exercise or pursue appropriate breach or default remedies.

Future readers of an agreement will greatly appreciate being able to understand it.

Drafting

Clarity

Whether reviewing your own work or a document from the other side,
follow these rules:

Fix unclear or confusing language.

Remove unnecessary, inapplicable provisions.

Correct internal inconsistencies.

Drafting

Drafting red flags

It is important to not be intimidated when reviewing drafts originated by the other side, even if they bluster that it is their “standard template” and that they usually do not change it.

As a general rule, if you cannot understand a sentence or paragraph after reading it once or twice, flag it. If someone can explain it, require edits consistent with the explanation. If it cannot be explained, strike it.

Drafting red flags

Another red flag is any document that seems suspiciously longer than similar types of agreements.

In addition to burdening and possibly confusing future readers, unnecessarily long documents can increase the likelihood of internal inconsistencies and other errors. While some commercial relationships are unavoidably complex, some contracts are too long simply because of bad drafting. “Over lawyered” templates drafted to cover multiple types of products or services or multiple irrelevant options are common offenders.

Drafting

Drafting red flags

While non-lawyers need to be cautious when editing legal “boilerplate,” removing wholly irrelevant terms from a bloated template always makes for a more readable document.

In general, it is reasonable to take a run at aggressively carving back overly expansive, one-sided legalese written purely for the other party’s benefit.

Completeness

In addition to being clear and concise, contracts need to be complete. While certainly not standardized across all industries and types of agreements, similar legal elements are found across most types of contracts and most contracts are organized using somewhat similar looking headings and sub-headings.

Understanding typical contract structure helps one quickly assess how well a document likely addresses key issues:

Is it clear what the parties intend to accomplish?

Are their mutual obligations spelled out sufficiently?

Does the agreement say what should happen if either party fails to perform?

Completeness

In addition to being clear and concise, contracts need to be complete. While certainly not standardized across all industries and types of agreements, similar legal elements are found across most types of contracts and most contracts are organized using somewhat similar looking headings and sub-headings.

Understanding typical contract structure helps one quickly assess how well a document likely addresses key issues:

How and when can it be terminated?

What happens when it is terminated?

Which parts of the agreement survive termination?

Drafting

Completeness

In addition to being clear and concise, contracts need to be complete. While certainly not standardized across all industries and types of agreements, similar legal elements are found across most types of contracts and most contracts are organized using somewhat similar looking headings and sub-headings.

Understanding typical contract structure helps one quickly assess how well a document likely addresses key issues:

How are intellectual property rights addressed?

How are disputes resolved?

Drafting

Completeness

Disputes and disappointments are less likely with contracts that clearly and completely address these issues. Tight agreements discourage meritless disputes by helping keep everyone more honest. Even if completeness requires accepting provisions that cut both ways, it is generally better to choose the devil you know over the devil you do not.

Sometimes a party to a negotiation will balk at detailing performance obligations, timelines, remedies, termination rights, or other terms discussed. This is sometimes a clue that they have orally over-promised. Do not be deterred, insist on clear commitments and remedies.

Technical details

Technical details are often best addressed in one or more “schedules” or “exhibits” attached at the end of the document. These schedules and exhibits are often captioned “Specifications,” “Technical Specifications,” “Schematics,” “Deliverables,” or “Work Order.”

Placing schedules and exhibits at the end of the document enhances readability, but doing so is no excuse for less rigorous analysis and drafting, or for signing an agreement before its schedules and exhibits are complete.

In fact, schedules and exhibits are often at the heart of one or both parties’ obligations and, as such, critical for ensuring proper performance or resolving disputes over performance. Persons with “subject matter expertise” should review, understand, and take responsibility for complex or technical exhibits, and confirm that each exhibit stands on its own, such that persons with similar expertise will know exactly what it describes and requires.

Understanding the deal

If your role is limited to drafting or editing a contract versus participating in the business discussions to be covered in the contract, get as much background information as possible. Ask who, what, when, where, why, how, how much and a lot of “what ifs” to establish a foundation for your review. Invite yourself to key meetings and conference calls when possible.

Other helpful questions or requests might include:

Please explain the importance, cost and logic of the transaction.

How are the negotiations going?

Are there possible concerns about the partner or the transaction?

Understanding the deal

If your role is limited to drafting or editing a contract versus participating in the business discussions to be covered in the contract, get as much background information as possible. Ask who, what, when, where, why, how, how much and a lot of “what ifs” to establish a foundation for your review. Invite yourself to key meetings and conference calls when possible.

Other helpful questions or requests might include:

What alternatives were considered?

What are the technical or industry-specific considerations?

What are the anticipated implementation processes?

What are the most important potential challenges or points of failure?

Active Analysis

Carefully reading and analyzing a contract is challenging and requires energy, focus and discipline. Even bad contracts can read well and seem to make sense, especially if you fail to think hard about what might be missing.

The following are some helpful tips for ensuring active analysis:

Use any background information you requested to identify unaddressed concerns.

Use a general contract checklist based on customary contract headings and sub-headings to look for important missing provisions.

Active Analysis

Carefully reading and analyzing a contract is challenging and requires energy, focus and discipline. Even bad contracts can read well and seem to make sense, especially if you fail to think hard about what might be missing.

The following are some helpful tips for ensuring active analysis:

Be alert for passages that overreach or that provide too much flexibility or ambiguity in favor of the other party.

Imagine different ways in which the relationship could unfold over time and how those different scenarios could or should be addressed.

Drafting

Active Analysis

Carefully reading and analyzing a contract is challenging and requires energy, focus and discipline. Even bad contracts can read well and seem to make sense, especially if you fail to think hard about what might be missing.

The following are some helpful tips for ensuring active analysis:

Ask yourself whether and how each sentence is relevant, how each sentence relates to the paragraph, how each paragraph relates to the section, and how the section relates to the overall agreement.

Drafting

Draft Marking

When asked to “provide comments” to the other side’s proposed initial draft of an agreement, insist on an editable electronic copy.

All edits by each side should be “marked,” i.e., deletions shown as struck text and additions shown as new text. Do not allow the other party to exchange unmarked re-drafts. Ideally, each “turn” of an edited document from one party back to the other should just show the latest round of edits that have not been agreed to.

Draft Marking

Documents that continue to show all edits ever made to a document, referred to as “cumulative marked changes,” start to look very cluttered, making it harder to identify the latest and most important changes by the other side.

Suggest removing mutually accepted marked changes so you can focus on unresolved issues. Extensive editing is often required to fix a first draft from another party. Never assume that the person who wrote it knew what they were doing, had time to draft it carefully, or had your interests in mind. Mark it up as necessary, but with precision and economy to avoid confusing or irritating the other side. Be ready to explain and justify your changes.

Drafting

Draft Marking

Nitpicking Beats Subservience

If you are new to contract drafting, you may be accused of nitpicking and you may feel awkward about asking a lot of questions. But silently accepting terms you do not understand carries greater risks. It is better to be guarded and cautious than to assume the other party knows what they doing or that they care about your interests.

Review your proposed changes with others on your team whenever possible before sending them to the other side. You might be talked out of an ill-considered edit or realize you missed something. Discussing mark-ups before sending them also gives everyone on the team an opportunity to learn more about the transaction and the proposed agreement.

Drafting

Draft Marking

Nitpicking Beats Subservience

Although it is always best to get electronic agreements to edit, sometimes it is hard to get anything but a scan or photocopy, locked PDF document, or online terms and conditions. Extensively hand marking documents can motivate the other party to make editable electronic versions available.

Initial Draft Issues

In reviewing any third-party's proposed agreement, keep in mind that sloppy drafting and one-sided drafting are both common. In somewhat rare instances, documents proposed by third parties are so bad that they are simply not a valid starting point.

Several choices present themselves when faced with such a document. The path of least resistance is often to edit extensively until it resembles something you would sign.

If the proposed agreement is so far off that it seems unrealistic as a starting point, consider telling the other party as much, and politely ask that they work with outside counsel to produce a better document.

Drafting

Starting from Scratch

Depending on timing and resource constraints, a third alternative, and possibly the most practical approach, is to offer to start from scratch with your own document.

The other party may simply lack the business and legal sophistication necessary to do better or to even see the problems. Starting from scratch, although burdensome, may be the best way to protect your own interests.

Drafting

Handwritten Changes in Final Draft

Handwritten text inserted into, or deletions of text from, the final copy of any agreement must be initialed in each instance by both parties in a manner that clearly reflects acceptance of the changes by both parties.

Otherwise, it would be easy for the party who has not initialed a change to argue that it is not part of the agreement.

Lecture Five

Contract types

contract types



Contract types

Fixed Price Contracts

In Fixed Price Contracts, a Fixed Amount of consideration is required to be paid by the Buyer to the Seller for the Specified Work. The Specified Work could be Deliverables, a Service or a Result or anything else as defined in the agreement document. It is also called Lump-sum Contract.

Fixed Price Contracts

Contract Attribute	Buyer's Responsibility	Seller's Responsibility
Scope of Work is well defined.	Buyer has a legal obligation to accept finished work as defined in the Scope.	Seller has a legal obligation to complete work as defined in the Scope.
Scope change (modification) is allowed as per the T&C of the contract.	Generally, Buyer has to pay extra (over & above the Fixed Price) for the agreed upon change.	Seller has to complete extra work as defined in the agreed upon change.
Price is Fixed.	Buyer has a legal obligation to pay Fixed Price to the Seller after the work has been completed.	Seller can legally claim full payment after completing the work as defined in Scope.
Cost Risk is in favor of the Buyer.	Buyer has minimal Cost Risk.	Seller has a Risk of losing money. Conversely the Seller can maximize her/his profits.
When is this used?	Buyer can document Scope of Work in detail.	Seller can estimate Cost based on the defined Scope of Work.

Contract types

Fixed Price Contracts

Example projects where this is generally used:

For developing limited scope software projects like developing mobile apps.

For testing strength of telecom signals in a region.

Contract types

Fixed Price Contracts

There are three sub-categories of this type of contract:

Firm Fixed Price (FFP)

Fixed Price Incentive Fee (FPIF)

Fixed Price with Economic Price Adjustments
(FP-EPA)

Fixed Price Contracts

Firm Fixed Price (FFP)

Even though FFP Contract is one of the sub-types of FP Contract but it is just like FP Contract.

The Buyer and the Seller agree upon a Price at the time of signing the Contract.

The Scope of the Contract is well defined.

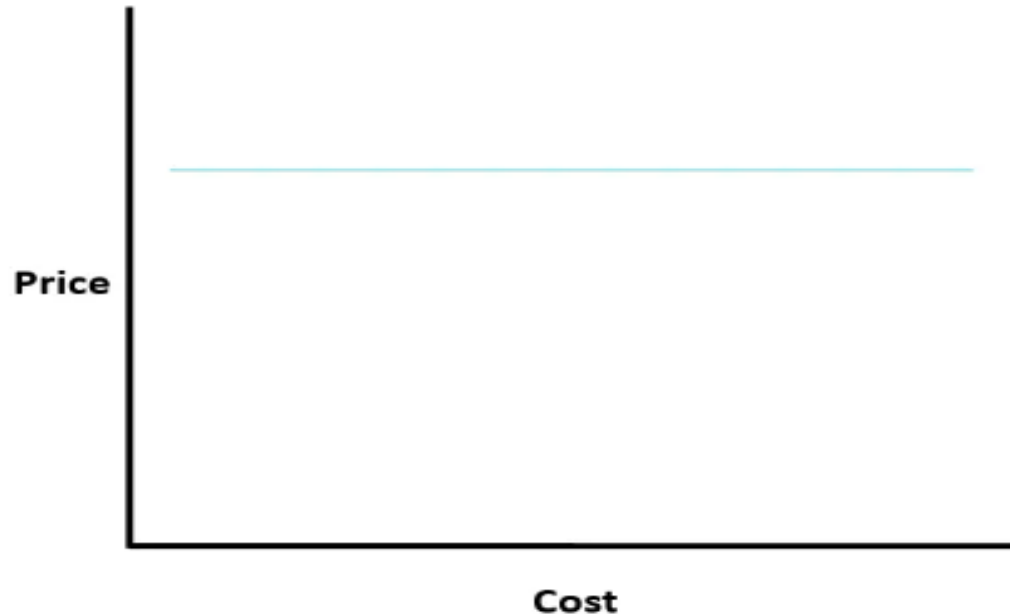
The Price and Scope can be changed only through a formal change control procedure.

The Sellers have more Cost Risk than the Buyers in this type of Contract.

Fixed Price Contracts

Firm Fixed Price (FFP)

$$\text{Price} = \text{Cost} + \text{Fee}$$

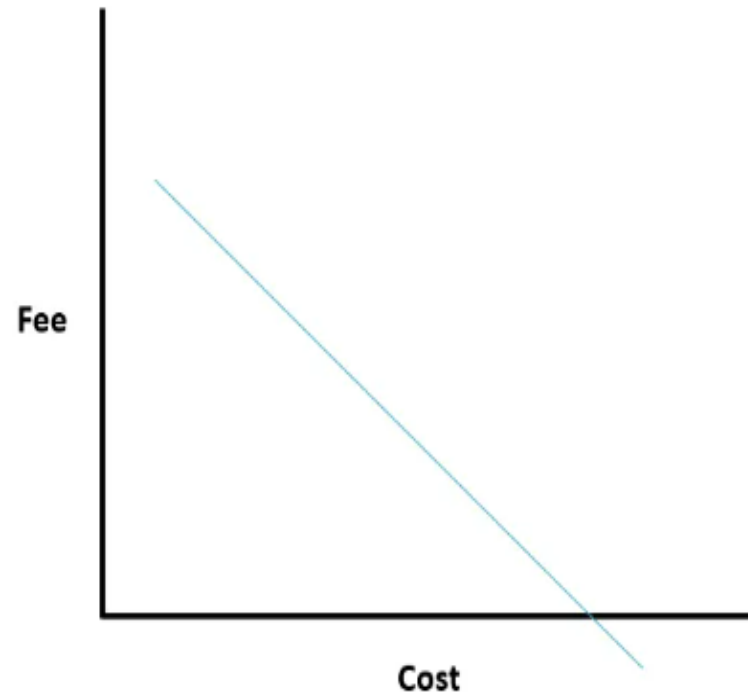


Buyer's Price remains fixed even as Cost increases

Fixed Price Contracts

Firm Fixed Price (FFP)

$$\text{Price} = \text{Cost} + \text{Fee}$$



Seller's Fee goes down as Cost increases

Fixed Price Contracts

Fixed Price Incentive Fee (FPIF)

The basic nature of FPIF Contract is very much like a FP Contract but there is some price flexibility built into the contract. The price flexibility is achieved through financial incentive(s). The Buyer and Seller agree upon financial incentive(s) and establish some performance criteria as part of the contract. The Seller is entitled to the agreed upon incentive(s) after meeting or exceeding the established performance criteria.

FPIF Contracts can have provision for negative incentives also. These are often called penalties. The penalties are levied in case the Seller does not meet established performance criteria.

Contract types

Fixed Price Contracts

Fixed Price Incentive Fee (FPIF)

In FPIF Contract, the final price is determined only after completion of the contracted work. The final price can vary based on the performance of the Seller.

Fixed Price Contracts

Performance Criteria of Fixed Price Incentive Fee (FPIF)

In FPIF Contract, the Buyer and the Seller can use any project parameter to establish the performance criteria. Project parameters can include Schedule, Cost, Quality, technical performance etc.

Following are some examples of performance criteria.

Finishing the contractual work one month before the due date

Product downtime is less than 0.1%

Fixed Price Contracts

Performance Criteria of Fixed Price Incentive Fee (FPIF)

The defined performance criteria can be based on a single project parameter or on a combination of multiple project parameters. One of the more popular performance criteria is based on cost performance of the Seller. The cost performance is established by defining Cost Targets at the outset.

The same general formula that we discussed for FFP contract, is applicable for FPIF Contract also.

$$\text{Price} = \text{Cost} + \text{Fee}$$

The Fee calculation can be done only after determining the Incentives as defined in the Contract.

Contract types

Fixed Price Contracts

Fixed Price with Economic Price Adjustments (FP-EPA)

The basic nature of FP-EPA Contract is very much like an FP Contract. But in FP-EPA Contract, special provision is made to allow price adjustments. At the beginning of the contract, the Buyer and the Seller agree upon predefined criteria for such price adjustments. This is done due to uncertainties and vagaries that are inherently present in the markets. The market dynamics and economic conditions change with time. Usually, these contracts run for a very long period spanning multiple years.

Contract types

Fixed Price Contracts

Fixed Price with Economic Price Adjustments (FP-EPA)

Some of the common characteristics of this type of Contract are:

The Buyer and the Seller agree upon a Fixed Price at the time of the signing of the Contract.

The Buyer and the Seller agree upon definite criteria for Adjusting the Final Price.

The criteria are based on the market and economic conditions as they are beyond the Buyer's or Seller's control.

Fixed Price Contracts

Fixed Price with Economic Price Adjustments (FP-EPA)

Some of the common characteristics of this type of Contract are:

Usually, the Scope of the Contract is well defined.

Usually, these contracts run for multiple years.

Usually, these contracts involve a lot of administrative difficulties, but money at risk outweighs the difficulties of administration.

Fixed Price Contracts

How is an FP-EPA Contract Framed?

The uncertainties can arise due to any of the following factors:

Changes in labor, material or other resource costs

General inflation

Price fluctuations in commodities

Changes in bank interest rates

Fluctuations in currency markets

Fixed Price Contracts

How is an FP-EPA Contract Framed?

This is not a complete list. There could be many more factors that can lead to market uncertainty. The Buyer and the Seller frame a FP-EPA Contract if they believe that such factors can influence the cost of completing the contracted work. They can either develop a simple or a complex criteria based on these factor(s).

Fixed Price Contracts

FP-EPA

Examples

– A multi-year software development project outsourced to a different country: interest rates & currency exchange rates fluctuate with time.

– A multi-year oil and gas exploration work: Labor & commodity rates change with time.

Time & Material Contracts

In Time & Material Contracts, a Fixed Rate is required to be paid by the Buyer to the Seller for the Specified Unit. The Specified Unit could be Labor Duration Unit or a Material Unit as mutually decided between the Buyer and the Seller. The Quantity of Labor or Material is not specified at the beginning. The Quantity is taken as per the actual consumption.

It is also called Rate Contract or Unit Price Contract.

General Attribute	Buyer's Responsibility	Seller's Responsibility
Scope of Work is broadly defined. Quantity is undefined.	Buyer provides acceptance only after work is satisfactorily completed.	Seller has a legal obligation to complete the work as defined by the Buyer.
Scope change (modification) is allowed as per the T&C of the contract.	Buyer has a legal obligation to pay for the extra units that were used due to changes.	Seller can legally claim payment for the extra units that were used due to changes.
Rate is fixed.	Buyer has a legal obligation to make payment for each unit delivered by the Seller at the predefined rate.	Seller can legally claim payments at predefined rate after delivering the units.
Buyer and Seller share the Cost Risk.	Buyer has to pay predefined rate for each delivered unit even if the work is not completed.	Seller can claim only predefined rate for each delivered unit even if the costs escalate.
When is this used?	Buyer is unable to estimate the quantity due to uncertainty of requirements or for some other reason.	Seller cannot estimate the total cost due to the absence of well defined Scope of Work.

Examples of Time & Material Contracts

For providing services of skilled/unskilled labor at a predefined rate e.g. services of lab technicians.

For delivering standard off-the-shelf consumable products at a predefined rate like machine parts.

Cost Reimbursable Contracts

In Cost Reimbursable Contracts, the Buyer is required to reimburse Actual Cost of Work and an Agreed Upon Fee to the Seller for the Specified Work. The Specified Work is usually loosely defined in the agreement document. It is also called Cost Plus Contract.

Contract Attribute	Buyer's Responsibility	Seller's Responsibility
Scope of Work is either undefined or loosely defined.	Buyer provides acceptance only after work is satisfactorily completed.	Seller has a legal obligation to complete the work as defined by the Buyer.
Scope change (modification) is allowed as per the T&C of the contract.	Buyer has a legal obligation to reimburse extra cost and additional fee that arises because of changes.	Seller can legally claim extra cost and additional fee that arises because of changes.
Price is not fixed.	Buyer has a legal obligation to reimburse the Actual Cost and agreed upon fee to the Seller.	Seller can legally claim reimbursement of the Actual Cost and agreed upon fee after delivering the best effort.
Contract Fee is well defined.	Buyer has a legal obligation to pay the agreed upon Fee to the Seller.	Seller can legally claim Fee after delivering the best effort.
Cost Risk is in favor of the Seller.	Buyer has maximum Cost Risk.	Seller has almost no Risk of losing money.
When is this used?	Buyer is unable to define Scope of Work due to lack of information or for some other reason.	Seller cannot estimate Cost due to absence of well defined Scope of Work and changing economic conditions.

Examples of Cost Reimbursable Contracts

Large infrastructure projects where cost of goods changes from time to time e.g. cost of cement bags.

Projects involving lot of travel by project personnel.



Thank You