

Good Practice in Writing Contracts

CIPS is expressing beliefs on good practice in writing contracts as this is a fundamental day to day activity of purchasing and supply management professionals. Reference should also be made to the CIPS Knowledge Summary document on the Use of Lawyers.

CIPS
KNOWLEDGE
WORKS

Knowledge
Summary

Introduction

The title of this paper has been carefully chosen to reflect the fact it is concerned in essence with the factors and considerations which should be borne in mind when drawing up the terms and conditions of a contract. The reader should bear in mind that contracts can be verbal; they can be implied by conduct as well as be written documents.

A sound written contract provides a good basis for a successful relationship between the parties. However this not to say that a comprehensive formal written contract is always necessary; the need is dependent on the value and risk associated with the nature of the procurement concerned.

Where a contract serves the purpose of a "relationship framework" (a term which should not be confused with 'partnering') and is to be used only as a supplier performance management tool (which could in fact under some circumstances be contractually binding), then clear, straightforward English should be used and, as far as possible, all legal jargon removed.

It is often the case that legal documents are only referred to when typical relationship management techniques are seen to have failed. However it can be argued that a good contract encourages good project processes and management, one example being the NEC (New Engineering Contract) where this is seen as an important objective even at the pre-drafting stage.

CIPS would encourage purchasing and supply management professionals to be aware of such considerations even when the relationship enjoys the support of a very robust contract.

CIPS Positions on Practice

CIPS views, opinions and beliefs are stated throughout the document; however the broad practice statements which underpin the text are as follows:

- CIPS would underline the need for care when drawing up any Agreement which, correctly drafted, can prove beneficial in the formal contract negotiation process
- CIPS recommends that the salient points of a contract are recorded in the contract schedules
- CIPS recommends that one of the clauses in the contract (or in the case of complex contracts, one of the schedules) should be devoted to a description of the change control procedure to be employed
- CIPS would suggest to purchasing and supply management professionals that they should be alert to the fact that a good contract can be an important factor in achieving and maintaining good project management practice
- CIPS takes the view that certain aspects (for example, who takes responsibility for undertaking specific tasks and

responsibilities) should appear in the schedule(s) rather than form part of the terms and conditions

Composition of the Contract Document

Written contracts often appear merely as standard terms and conditions on the back of purchase orders (subject of course to the avoidance of any confusion which may arise as a result of the 'Battle of the Forms'). This approach is often sufficient as far as low value and low risk orders are concerned.

If the parties consider that a formal detailed written contract is appropriate and necessary then they should be prepared to spend some time coming to an agreement on its contents. Each document will be different; for example, the contract associated with a Public Private Partnership for Information

Technology Services will be very different from that for the construction of a building. The specific terms and conditions which normally appear in written contract documents are: names and addresses of the parties, dates of commencement and completion, deliverables, acceptance procedure, warranties and indemnities, provision for early termination, etc.

CIPS believes that the terms and conditions of a contract need to be harmonised with the scope of work and the obligations and liabilities of each party.

Drafting the Contract

It is unusual for contracts to be drafted from scratch; there is usually a model form that can be used as the basis for negotiations. This is a cost-effective way of drafting the contract, providing the purchasing and supply management professional is familiar with the content and meaning of each clause.

The key point is that all aspects of the contract, whether clauses or schedules, should (where possible) be written in plain English with short succinct sentences that are easy to follow and understand. In those cases involving complex legal issues and concepts it is often instructive and perfectly acceptable to provide a "worked example" to illustrate and underline the form of wording used.

Practice and procedure in drawing up complex contracts will also vary from one sector to another. In the case of the MOD for example, with the emphasis on competitive tendering, it is usual to produce a draft contract which is issued as part of the ITT package.

This enables all tenderers to see the sort of document they would be expected to sign up to and therefore, in theory at least, they can all bid on the same basis. This is not to say of course that post-tender negotiation on terms and conditions will not occur, but at least it can do so with

Good Practice in Writing Contracts

CIPS
KNOWLEDGE
WORKS

Knowledge
Summary

the existing groundwork in place.

The importance of the pre-contract stage is often underestimated but it is vital to invest time and effort at this point not only for the clarification of the respective roles and responsibilities but also to facilitate the drafting process and minimise the risk of future misunderstandings. That said, it is important to avoid going into excessive and potentially confusing detail.

Where a contract has to be drafted from first principles or largely separately from the usual model, it is good practice for purchasing and supply management professionals to negotiate Heads of Agreement as a first step.

CIPS would also advise taking care when drawing up Heads of Agreement, avoiding the risk of creating an agreement that is in any way prejudicial to satisfactory and mutually beneficial formal contract negotiations.

The purchasing and supply management professional can subsequently work with lawyers, as appropriate, on the contract drafting process. If the clauses are drafted, i.e. the precise wording agreed, at the time the Heads of Agreement are agreed, effectively two stages in the process are being compressed and the benefit of thinking through the principles separately is being obscured.

It can therefore be an additionally laborious and time-consuming process. Further, if lawyers are involved in such a process, the cost of their services would be substantial and in most cases would not represent value for money.

CIPS believes that it represents good practice to put the specific (non-standard details) of the contractual relationship for example, who is responsible for doing what and by when, in the schedules to the contract, rather than in the terms and conditions of the document.

Any changes to the standard terms or additional special clauses should be put in a separate section and highlighted. This means that differences between each contract are readily identifiable and those who are not directly involved in the contract negotiations can easily see what has been agreed.

Disputes

Only a small percentage of cases in procurement ever come to litigation not least because litigation is a painful and expensive process, and usually the parties involved have a strong commercial interest in continued constructive relations. A further reason is that purchasing and supply management professionals effectively manage the supplier/buying organisation relationship, identifying problems and dealing with them before they can develop further.

Under English law, contracts for construction are required to provide an adjudication process before a dispute can reach the courts. This is a desirable practice that can usefully be applied in many procurement contracts.

Adjudication is generally regarded as a best practice process. The traditional dispute resolution process of arbitration is widely considered by clients to be legalistic, expensive and needlessly confrontational and where there is a choice, should normally be avoided, as should going directly from adjudication to litigation.

Contract Amendments

It is important that the contract documentation should contain guidance as to who has the authority to make amendments, as well as the level of entitlement of the other party or parties to agree or reject such changes.

CIPS recognises that different organisations refer to changes to contracts, once they have been let, in different ways i.e. change or variation orders, contract amendments etc. When a change is required the purchasing and supply management professional should follow the procedures and policies of his/her organisation. It is far easier to make changes to contracts if such a change is in one of the schedules rather than the body of the contractual terms; this is why CIPS advocates that the salient points of each contract are recorded in the schedules.

CIPS advocates the use of an appropriate change control procedure which, as well as unambiguously setting out the procedures to follow, should also state who is authorised to make these changes.

This does not necessarily imply drawing up a list of authorised signatories but should be sufficient to prevent end-users making their own amendments at will. If, however, certain end-users are in fact given delegated authority to make changes then this needs to be clearly set out so that the supplier is made aware of who does, or can, represent the customer.

It has been suggested that every change reflects a lack of foresight at the drafting stage. However it is not a perfect world and so CIPS recommends that a clause, (or, in extensive or complex contracts, a schedule), should be devoted to Change Control, setting down the agreed process as well as the requisite escalation clauses and arbitration procedures.

CIPS recommends that such clauses be as precise and unambiguous as possible; vague generalisations about, for example, 'reasonable prices' should be avoided as they can so easily lead to misunderstandings and bad feeling between the parties.

Conclusion

Whilst acknowledging that it is permissible for contracts to be verbal in form and that as such they carry full legal force, the CIPS is of course fully aware that most commercial contracts are, for avoidance of doubt almost always in writing.

CIPS considers however that such a document need not be confrontational; on the contrary, correctly and carefully drafted it can provide a sound basis not only for a successful relationship between the parties but can also serve as a solid foundation for project management processes.

It has nevertheless to be admitted that even with carefully drafted contracts, disputes can and do occur; in such cases adjudication, in the opinion of CIPS, offers the best chance of success.