THE CONTRACT PROFESSIONAL'S PLAYBOOK

The Definitive Guide to Maximizing Value through Mastery of Performance- and Outcome-Based Contracting

JEANETTE NYDEN, J.D.
LAWRENCE A. KANE, COP-GOV

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PRAISE FOR THE CONTRACT PROFESSIONAL'S PLAYBOOK

"At IAOP (International Association of Outsourcing Professionals), we have found one of the best ways to navigate the increasing complexities is through training, education and professional certification. That is why *The Contract Professional's Playbook* and eLearning program is so valuable, timely and essential. Arming yourself with the latest knowledge and expertise from the authors on drafting, negotiating and managing performance- in outcome-based contracts will give you a competitive edge."

Debi Hamill, CEO of IAOP

"For more than 35 years, I have provided strategic legal advice to some of the world's leading organizations as they entered into complex outsourcing transactions.

In my experience, the contract negotiation process is the last, best chance to get the customer/ provider relationship right. Contract professionals should use the contract negotiation process, at a time when the parties are on good terms, to identify the issues that could jeopardize the success of the relationship. They can then deal with those issues by leveraging a well-crafted contract framework to address issues as they arise throughout the term of the deal.

While early career practitioners may understand the value of drafting, negotiating, and managing exceptional contracts, they often struggle to master the requisite skills. This comprehensive manual helps structure the negotiation process, thereby minimizing the perilous process of trial-and-error, expediting competency with leading practices and tools that can help reduce risk and speed outcomes for both buy-side and sell-side alike.[1]"

Gregg Kirchhoefer, P.C., IAOP Leadership Hall of Fame Member, Kirkland & Ellis LLP

"For over three decades I've had the privilege of leading the only professional development firm that focuses exclusively on the human side of technology. In that time, I've found that procurement professionals must leverage both art and science to drive value for their organizations, translating business imperatives into solicitation documents, negotiating performance-based contracts, and managing supplier relationships. This manual contains dozens of tools to help draft, negotiate, and manage complex contracts that raise the bar for buy-side and sell-side alike."

Dan Roberts, CEO of Quellette & Associates

"This is a fantastic guide for creating a winning sustainable partnership. Jeanette's methodology outlined in this manual has been instrumental to our company in Identifying and measuring the correct performance objectives which drive our desired outcomes and lead to a transparent and trusting partnership. The checklists, which are excellent, help the reader set up the proper framework and expectations between partners."

Stephen Mcpherson, Americas Returns & Refurbishment, Dell

"This is a comprehensive and practical reference guide for contract negotiators. It can help throughout all phases of a deal and provides great insight to the various nuances of the deal making."

Lula Kosanic, recognized industry expert in complex contract negotiations.

1 The views contained in this comment are mine alone and do not necessarily reflect the views of Kirkland & Ellis LLP or any of its clients.

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ABOUT DEBI HAMILL

As CEO of IAOP, Debi Hamill oversees the entire scope of IAOP's global operations, driving the association's mission for improving business outcomes by bringing together customers, providers and advisors in a collaborative, knowledge-based environment that promotes professional and organizational development, recognition, certification and excellence. She is responsible for providing strategic direction for the association by working with the Strategic Advisory Board (SAB) and the executive management team to establish long-range goals, strategies, plans and policies. She oversees all operations and business activities to ensure they produce the desired results and are consistent with IAOP's overall strategy and mission: to deliver value to our members and the industry at large.

FOREWORD

The contracting world you work in is undergoing dramatic change. While price was once the primary desired outcome in deals, customers today are demanding outcomes like innovation and digital transformation in addition to value and performance. Deals are being completely rewritten to bring in robotics and automation. How do contract and procurement/sales professionals stay relevant and compete?

From our own experience at IAOP, a leading global association serving the needs of providers, customers and advisors working in outsourcing and other collaborative service-delivery models, we have also seen the evolution in our industry over the past 25 years. Disruptive technologies have—and will continue to—create fast-paced change that you need to stay on top of.

We see collaboration and relationships as more important than ever. The mega deals of the late 1990s, which were typically billion-dollar contracts lasting a decade, are long gone. Now, the agreements are complex and interdependent with multiple service providers, stakeholders, and even robots as part of the ecosystem.

At IAOP, we have found one of the best ways to navigate the increasingly complexities is through training, education and professional certification. That is why *The Contract Professional's Playbook* eLearning program is so valuable, timely and essential. Arming yourself with the latest knowledge and expertise from the authors on drafting, negotiating and managing performance in outcome-based contracts will give you a competitive edge.

The skills you'll learn through this competency-based program like identifying and managing risk, increasing your own influence with stakeholders, developing pricing models, and governing these new complex relationships are vital skills to have in the midst of constant change.

I have no doubt that by following the manual, videos, live sessions and using the other tools in *The Contract Professional's Playbook* eLearning program you'll win as a professional and so will your organization with the successful outcome-based contracts you'll be involved in delivering.

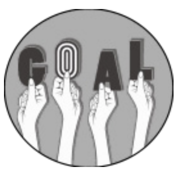
Learn from the experts! Let Jeanette Nyden, commercial contracts expert and Lawrence Kane, a member of IAOP's Think Tank and authorized trainer guide you through the challenges of contracting in an evolving industry. Having known Lawrence for almost a decade professionally and hearing him speak at our annual Summits and lead our professional certification classes, you will go away from this program inspired and with the tools you need to succeed.

Enjoy this book as I have and best wishes in your contracting relationships!

Debi Hamill, CEO of IAOP

CHAPTER 4

HOW DO I WRITE/REVISE/RESPOND TO REQUIREMENTS (SOW AND PERFORMANCE METRICS)?

	*The goal is to align the business objectives, the technical specifications of the work, and the contract Terms and Conditions.* *Alignment means ensuring that the answers to the* **Requirements Checklist** *(tool) are included in the outline of the goods and/or services in the Statement of Work. And all the risks associated with the supplier's work need to be addressed in the contract. The contract then forms the framework to administer, monitor and manage the supplier's performance after the contract has been executed.*
	*The key to your success is to make sure that the supplier understands its role and responsibilities. This is true for the customer and supplier contract professional.*

Connection Between Pre-Award Requirements and Post-Award Contract Management

Work requirements are details about the goods the supplier will deliver or services the supplier must perform. They are typically written by the buying company's line of business, SME and/or contract professional before bidders submit a proposal in an RFx process. The requirements are included in the Technical Specification and/or Statement of Work (SOW) as specifications that the supplier must meet to fully deliver the goods or services.

To stave off problems later on, SOW requirements must reflect the business need a buyer wishes to fulfil via this relationship and be clearly, enforceably, and unambiguously written to assure that both parties are working towards the same goals. In fact, according to the IACCM, 85% of respondents to one of its surveys indicated that raising the quality of requirements was the *number 1* factor critical to improved contract performance.[1].

A common complaint from contract professionals is that "they were involved too late" by others at their organization. Meaning, others at their organization did not feel that the contracting team needed to be engaged to help define and establish requirements (customer), or vet requirements before submitting a proposal (supplier). This is a "worst practice" that often leads to increased operational risks and expensive contract disputes later on.

1 Contract and Commercial Management, The Operational Guide. IACCM: Van Haren, 2011. Page 104

Developing requirements and vetting requirements is a collaborative process including stakeholders, contract professionals, SMEs, and for the customer any personnel who will receive the goods and services. As the technical and functional specifications become more complex, contract professionals will work more closely to ensure that the supplier's work requirements are clear, complete and meeting the buying company's business objectives.

Customers do not always have the internal SMEs for some highly technical or rapidly evolving types of work (such as digital reality, machine learning, data analytics, or artificial intelligence). Therefore, buying companies may need to bring in external SME's or consultants to facilitate the process. Suppliers, especially incumbents, often offer to help define requirements, but in a competitive bid environment it is a bad idea to allow anyone who helped write the SOW bid on the RFx. When a sole source (directed buy) scenario is appropriate the risk is diminished but it may still be prudent to seek feedback on the SOW from a non-advocate (e.g., consultant) to assure that it is complete and comprehensive before moving forward with negotiations.

Meeting Business Objectives

It is so important for contract professionals to understand this flow: Business objectives drive the requirements, requirements drive the relationship type, which then drives the contract structure (elements and Terms), which then drives the level of management.

The buying company's concerns and problems become the larger business objectives the relationship will address. The person(s) drafting the work requirements will translate the customer's business objectives into a set of technical specifications or SOW for the supplier to perform. For both buy- and sell-side organizations, the contract professional will tie the contact T&Cs to the technical specifications and SOW as written. Note: there's always more than one specification. Things like governance, security, export controls, access, badging, etc. are also core to the SOW (as are SLAs) that the supplier is asked to perform. The contract manager (buy-side) and/or account manager (supply-side) will then administer, monitor and manage the customer/supplier relationship to ensure that the supplier's performance meets the customer's business objectives.

Step 1: Outline the Business Objectives

The business goals/objectives are the starting point for all aspects of the agreement, not the contract template type. Let's reiterate that point. Contract professionals choose the template based on the business goals; they do not fit the business goals to match the contract template—this is true for both the customer and supplier.

Therefore, it is critically important that the people who write the contract requirements understand the business objectives for the customer/supplier relationship. Once the objectives are understood, the buying company's SME or people in the line of business will then outline the contract requirements in such a way that the contract professional can choose the right contract template. If the supplier is using its SOW and contract Terms, this same logic applies. The customer's need and business objectives dictate the supplier's contract requirements. It should never become a solution looking for a problem to solve. This rarely ends well for either party.

The Work Will Answer These Questions

What will the supplier do (services) to meet the customer's business objectives? How will the contract manager/account manager make sure that the supplier is meeting that need? These are questions that will be answered in the technical description of the goods or services the buying company is purchasing.

The customer's needs, or business objectives, can be stated as goals such as:

- Growing revenue, saving money, meeting a schedule, performing a service, speeding new products to market, customer/community satisfaction, creating innovation, corporate social responsibility, etc.
- Meeting internal challenges to the buying company's goals of saving money, meeting schedule deadline, satisfying community needs, etc.
- Meeting external challenges to the buying company's goals of growing revenue, meeting schedule deadline, speeding new products to market, satisfying community needs, creating innovation, etc.
- Meeting a critical level of need of one of the buying company's communities.
- Etc.

Now that the need or problem is defined as a business objective, it is time to define the technical or functional requirements.

Step 2: Understand and Document the Functional and Technical Specifications

This section emphasizes your role to completely define description of the services. For simpler services see the **Requirements Checklist for Service** and follow the instructions.

A. Mapping Out a "Hybrid" Statement of Work

A hybrid SOW includes the purchase of physical items and services associated with the item purchased into one document. The same supplier will provide the good and the service. For example, the purchase of an electrical generator, while the same supplier operates, maintains and repairs that electrical generator is a hybrid SOW. Information Technology (IT) services outsourcing, business process outsourcing, and knowledge process outsourcing are additional examples of hybrid SOWs that tend to encompass both goods and services.

Often contract templates cover one type of purchase. Combining two different types of purchases (goods and services) will require some additional work on the contract requirements and contract templates to get the contract provisions to work efficiently. In those instances, the stakeholders, SME's and contract professional should start with the work that addresses the major purpose of the acquisition and then integrate additional provisions for the secondary acquisition into the final contract. This is true for the requirements and contract Terms and Conditions. The **Requirements Checklist: Hybrid Purchase** will help that collaborative process.

B. Developing Requirements for Outcome-Based, Highly Strategic Work

A highly strategic relationship is one that serves a strategic purpose in the furtherance of a buying company mission. These relationships are often long-term, requiring a close working relationship between the buying company, supplier and others, such as third-party SMEs. Additionally, suppliers bring a significant level of capabilities to the relationship that the buying company would not otherwise have using its own personnel. The downside of these highly strategic relationships is that both companies can become too dependent on one another.

As the technical and functional specifications become more complex, contract professionals will work more closely with stakeholder's, SMEs and technical representatives to ensure that the supplier's work requirements are clear, complete and meeting buying company business objectives. Customers do not always have the SMEs, so they may need to bring in third-party SMEs to the process.

The contract professional's role in developing SOWs in highly strategic work will be that of facilitator of many stakeholder's needs, concerns and objectives. The contract professional will draft the contract T&Cs and ought to be involved at the earliest stages of the requirements development. This is because highly strategic relationships suffer from:

- Incomplete or unclear requirements confusing the buying company and the supplier;
- Requirements dominated by one stakeholder to the detriment of other stakeholders' needs and concerns;
- Flawed requirements due to an unclear understanding of what the market can offer to solve the problem;
- Unclear or incomplete understanding of regulations or policies impacting the work; and
- A tendency to rush to a solicitation without a clear enough understanding of the underlying need the solution will fix.

This section will aid the contract professional in working with multiple stakeholders in developing a healthy, robust and highly effective strategic outcome.

In more strategic relationships, several stakeholders will collaboratively define the business objectives, the desired outcomes, some functional requirements and associated metrics for the supplier agreement. Your function as a contract professional will be to align the various stakeholder's views, wants, and needs into a coherent contract to ensure the customer/ supplier relationship will meet the customer's outcomes.

A word of caution: Some customer's find it hard to identify and develop business outcomes for all but the most financially significant and/or high-risk supplier relationships. This is especially true for customer's that see supplier relationships as transactions rather than critical partners to deliver business outcomes, but may risk missing critical requirements such as security or export controls, or key interfaces such as systems or tools necessary to achieve the desired results.

Because highly strategic relationships further the customer's mission, the starting point is to document the buying company's outcomes for this highly complex work. The outcomes are directly tied to the customer's business objectives. In other words, what does the customer hope to accomplish with this business relationship? Translate these accomplishments into outcomes for the customer that can then be translated into performance objectives the supplier will provide through its work.

The **Stakeholder Analysis** tool from a previous chapter will help the contract professional take a seat at the table to facilitate any conversations the stakeholders have about the topics identified in this section.

What This Means to You: Strategic Relationship Requirements Spreadsheet

To begin to think more generally about business outcomes (rather than discrete performance measures) consider the buying company's business objectives and those objectives' connection to the strategy for the relationship (note: not for the specific supplier). Use the **Strategic Relationship Requirements Spreadsheet** tool to help you in this process. The document will aid all the stakeholders in developing the statement of work and performance metrics. *The spreadsheet is a high-level internal working document only*. This completed document—in an ideal setting—would be approved by all stakeholders before developing the SOW. This goes a long way toward assuring first time quality and preventing contract disputes or operational issues later on.

In the most risky, strategic relationships, customers and their outsource suppliers may work collaboratively throughout the relationships requirements process as a result of a Request for Solution.

The **Strategic Relationship Requirements Spreadsheet** will help that collaborative process.

Additional Advice to Identify Business Objectives

- Get copy of the business case, budget analysis, spreadsheet with projected savings etc. Anything that the stakeholders are using to fund, direct or internally discuss this project.
- Or in the alternative, develop a business objective questionnaire based on the **Stakeholder Analysis** tool, the **Requirements Checklist; Hybrid Purchase,** and your own questions. Send your own questionnaire around for review and discussion. (Be prepared. Stakeholders will have different needs, wants, or requirements.)
- Ask each stakeholder to tell you about at least *two improvements* they want from the relationship that seem obvious to them but need to be communicated to the supplier. (These answers will validate that the technical and functional requirements are complete.)
- Ask stakeholders to identify at least *two potential benefits* for bringing in a supplier beyond those already communicated to you. (These answers will identify service metrics or Service Level Agreements (SLA).)

With this information, identify three to five outcomes for the **Strategic Relationship Requirements Spreadsheet.** Outcomes could look like these:

- Operate a financial system that effectively and efficiently manages *XYZ* spend.
- Optimize the division of services, (between buying company divisions, between suppliers within a buying company, between a buying company and the federal government) leveraging collective capabilities to deliver *ABC* service.
- Minimize environmental impact of *JKL* on the community.

Once the customer and supplier identifies three to five outcomes, place them in the left most column of the **Strategic Relationship Requirements Spreadsheet** (Business Outcome). The next step will be to identify the associated and necessary performance from the supplier. Note that this is different from the traditional way of developing scopes of work. Normally, businesspeople think of the work requirements and then the performance requirements. *In an outcome-based setting, these outcomes lead to performance and then to the work requirements that assure they will be met.*

Working Collaboratively with the Incumbent Supplier

If the customer is developing these requirements with the incumbent supplier for a directed or sole-source buy it is important—if not critical to the customer's success—to share these outcomes with them. Highly strategic relationships demand much more from the supplier than a traditionally transactional relationship. Suppliers are more likely to perform to expectations when they are included at this stage and work collaboratively with the buying company to develop the requirements. They will also be able to leverage what they have learned from other customers to add value in crafting the solution.

Step 3: Refining the Requirements Using Performance Measures (Metrics, SLOs, SLAs, and KPIs)

Just because buyer and supplier have reached agreement on some sort of contractual arrangement does not necessarily mean that what was written on paper will actually come to fruition. There are two common ways of mitigating this performance risk; (1) motivating the supplier through the promise (or expectation) of future work rather than through contractual SLAs and service credits, or (2) getting the metrics right.

There are compelling philosophical arguments regarding the best approach, and both sides have merit, but since what gets measured tends to get done prudent measurements can be highly effective. In this fashion, suppliers have a compelling interest in knowing how their performance will be measured in an empirical way while buying companies will want to incorporate and monitor the supplier's performance metrics.

Keep the buying organization's end goal for the relationship and work in mind, assure that all metrics are reasoned, reasonable, and achievable, and limit what is measured to the few key items that drive needed results without over-prescribing how to get there. In this fashion, buyers communicate the business results that innovation is expected to achieve, and their suppliers can figure out how to get it done.

When chosen, implemented, and monitored, performance measurements can help determine/establish:

- Precise delivery standards, such as quality, responsiveness, and/or efficiency,
- An objective means for determining if ongoing performance meets expectations,
- An objective basis for triggering damages based on poor performance,
- Valuable trends and operational data that enables the buying company to identify and correct problems, and
- A foundation for making informed adjustments in service delivery to meet changing business requirements in the next cycle of bidding/awarding the work.

Defining Performance Standards

- **Service Level Agreements (SLAs)** set an obligation for supplier performance with money (in the form of service credits or liquidated damages for non-performance) at risk for non-compliance. The goal is not to receive these service credits (penalties), but rather to financially motivate the supplier. Oftentimes, there are administratively burdensome earn-back or other governance schemes put in place to manage SLAs fairly and objectively. Regardless, they are based on Critical Success Factors (CSFs) and/or Key Performance Indicators (KPIs), depending on the nature of the deal.
- **Service Level Objectives (SLOs)** sets an obligation for supplier performance without any money at risk for non-compliance. Instead of the risk of penalties, SLOs leverage management attention to motivate the supplier through the governance process. They are typically based on KPIs.
- **Operating Level Agreements (OLAs)** set a performance obligation *among multiple suppliers* who must work together to deliver a service, or between buyer and supplier where both have obligations to assure that the work gets done. It is useful to think of them as the "play nice in the sandbox" clause in your contracts. Like SLOs, they leverage management attention to motivate and align the supplier ecosystem and are usually based on KPIs.
- **Operational Metrics (metrics)** are a list of other required measurements that are reported during the contract. They are used to improve communication and coordination for seamless service delivery, but are rarely shown in governance reviews. They are typically based on historical performance and may use predictive analytics to chart the course into the future.

While SLAs, SLOs, and OLAs are contractual in nature, they are created by analyzing CSFs and KPIs.

- **Critical Success Factors (CSFs)** define what must be done for the company to be successful. They can include things like company financial performance, customer loyalty, employee performance, product and process innovation, service level innovation (of the enterprise to its paying customers), or speed to market.

- **Key Performance Indicators (KPIs)** demonstrate whether or not the company is actually being successful, allowing leaders to course correct as necessary to stay on track. They can include things like cost, profitability, customer satisfaction, skills, competencies, training, system availability, performance, cycle time, scalability, reliability, readiness, relationship satisfaction, billing accuracy, key personnel turnover, data recovery, delivery quality, defect rates, system response time, first contact resolution, or network latency.

The critical difference between CSFs and KPIs is that CSFs measure the buyer's success as an enterprise, whereas KPIs measure whether or not a service (or supplier) is successful in enabling the enterprise to meet that goal.

In order to be useful, all of these metrics must be measurable, comparable, and reportable. And, they must be few and focused in order to motivate the right supplier behaviors without burdensome governance or micromanagement.

The best measures drive performance, learning, and innovation, and are industry "standard" enough to be benchmarkable with industry peers. After all, if the customer's process capability is sub-par, they will want to know what kind of improvements others have achieved in order to set reasonable stretch goals and motivate their supplier to get there.

What This Means to You

A set of KPIs is critical to meet a CSF, but any individual KPI is not necessarily critical on its own. For example, if you are flying from Seattle to New York, you might have a stopover in Chicago. In order to know if you will make it to your ultimate destination on time you might choose to measure various points along the flight path, but the most critical interim milestone is the layover because if you are late for that you risk missing your connecting flight or arriving at your final destination without your checked luggage.

It is important to recognize that just because we can measure something does not necessarily mean that we should. In order to pick the right things to measure, buyers need to think about the benefits of each KPI to their desired outcome (CSF), make sure that the metric will lead to the kind of performance improvements they are looking for, and assure that they are measuring something that falls within the supplier's span of control so that they can actually be held accountable for meeting it. If your organization is buying performance or an outcome with a Vested™ outsourcing deal a CSF may be appropriate. In traditional outsourcing relationships organizations are buying a result, hence those organizations need to focus on the most important KPIs to drive appropriate SLAs, SLOs, and OLAs.

In most instances only a handful of SLAs are appropriate for any given contract, though customers can have as many SLOs, OLAs, or other performance metrics as prudent to govern the deal. Don't forget that there is a cost of gathering, validating, and reporting data, so even where there is no money at risk through service credits it is still a bad idea to get carried away and try to measure too much. Ideally you are looking for a balanced scorecard or dashboard that assures the desired result without over-controlling how the supplier gets there.

Drafting Simpler Performance Measurements

Performance measurements such as SLAs, SLOs, metrics, and the like answer questions such as: when, by whom, and to what standard is the work to be done. They are fixed, objective measurements. Failure to meet the performance measure would result in a consequence, ranging from an informal communication to the supplier all the way to a formal termination of the contract. When service credits (in the form of liquidated damages) are assessed that is often the only contractual recourse for poor performance, so it is vital to take a balanced perspective on what matters most and measure accordingly. Looking back on the **Requirements Checklist for Service** or **Requirements Checklist: Hybrid Purchase**, use the questions in those tools as prompts clarify the information into a unit of measurement (metric), if you can.

Performance measurement requests from stakeholders often have a "letter to Santa" quality about them. In setting high standards, the stakeholders are oblivious to the cost of that high standard. They believe that the activities they care most about are so important that they must be tracked and if the supplier misses the required performance level, levy liquidated damages. Some functions actually need very high standards, but not all, *and quality costs money.* It is useful to benchmark against industry standards for the various products/services a company wishes to buy to assure that proposed metrics are reasoned and reasonable before finalizing the numbers.

At this stage of the requirements development, the contract professional may need to negotiate with stakeholders to determine which SLAs, SLOs, OLAs, and performance metrics are absolutely necessary and to uncover any additional costs associated with those measures. For example, a 95% on-time delivery SLA might provide adequate timely delivery to a buying company. The supplier could provide a 99% on- time delivery SLA, but at an additional cost to the customer. The contract professionals would help the stakeholder balance the need for on-time delivery with additional costs for near perfect on-time delivery. For instance, with critical-path parts in a just-in-time manufacturing system a 99% (or even higher) on-time delivery requirement may be perfectly appropriate whereas in other scenarios that would be excessive and eat into profit margins.

What This Means to You: Why Performance Metrics Do Not Always Guarantee Performance

To better discuss performance measures with stakeholders, understand why performance measures do not always guarantee performance. There is an interesting phenomenon called the watermelon affect (green on the outside; red on the inside) or "green scores and red faces." This means that the supplier is performing according the performance metric, but the end user is still unsatisfied with the service. Returning to on-time delivery example, the supplier could be delivering incomplete shipments 99% of the time. The supplier is technically meeting the on-time SLA if it is sloppily defined, but missing the intent by delivering partial shipments to meet the on-time delivery SLA.

Why is the "green score and red face" so prevalent? There are many reasons. Let's focus on two causes relevant to performance-based contracts.

First, buying companies set the wrong metric (unit of measurement). For example, template contracts:

- Use what is already written in the template, but that metric, SLA, SLO, etc. is not needed for this supplier relationship;
- The metric, SLA, SLO, etc. is what someone used in a similar situation, but it does not apply here;
- The metric, SLA, SLO, etc. is what someone thinks is a good idea (but neither the buying company or the supplier can collect the right data to support the performance measure);
- The buying company or the supplier collect the wrong data, or insufficient data to support the metric, SLA, SLO, etc.;
- The buying company uses the metric for the wrong purpose. For instance, it is not tied to a business objective (CSF) outlined in stakeholder analysis or business objectives in the requirements checklist; or
- There is insufficient definition describing the metric, SLA, SLO, etc. causing a "he said, she said" atmosphere.

Second, buying companies set the wrong target. Let's look at a commercial example. In a call center setting, a target might be eight calls per representative per hour. But this target could drive the wrong behavior—for instance, cutting calls off before the problem is solved decreasing customer satisfaction. A blended SLA that weights first contact resolution and customer satisfaction higher than number of calls completed and hold times would be more appropriate in most instances. The contract professional needs to understand the impact of the target on the rest of the business objectives.

Returning to on-time delivery, seek to understand the downside as well as the upside of a 99% delivery rate:

1. What is the industry standard (benchmark) delivery rate for this type of product? Is 99% higher or lower than that standard?
2. How critical is a 99% on-time delivery rate to the buyer's overall business objectives?
3. Will a 99% on-time delivery rate incentivize the supplier to short ship?
4. Will it cost a premium to get to a 99% on-time delivery rate?
5. Does it make sense to have a 99% complete shipment requirement with the 99% delivery rate?
6. If so, what would that cost the buying company? What are the upside benefits to any increase in cost that outweigh the increased costs?

Solution: Establish a Baseline

Baseline values have to tie to current capabilities (industry, supplier and/or customer) so that both the customer and the supplier will understand the starting point at contract signing. Over time the values are informed by the customer's business strategy in order to set future goals/improvement targets. If there is no historical data available, a common approach is to negotiate improvement targets but set a baseline using three months of data (after successful transition and assumption of service) to start from.

For instance, let's say the parties agree to set a baseline and increase from that point by 10% per year until the 99% on-time delivery desired target is met. If the initial process capability is an 87% on time delivery, then the supplier could invest in automations and process improvements to increase that baseline by 10% per year. Year one is 87%. Year two would become 95.7%, and year three would cap out at the desired 99.0% target. This is a much fairer (and more realistic) method of obtaining the desired outcome than expecting a supplier to make dramatic improvements from day one. In this fashion, assumption of service stabilizes the process under the supplier's control and then they begin immediate year-over-year improvements.

Drafting More Complex Measures Using the Strategic Relationship Requirements Spreadsheet

Please refer to the **Strategic Relationship Requirements Spreadsheet** for this activity. Start by placing the business objective in the business objectives column on the far left. Now, work to the right. To have a valuable SLA, SLO, or other contractual performance metric it must contribute directly to the buying company's desired business objectives. These questions may prove helpful.

- What outcome is the buying company looking for from this supplier?
- Deliver ____ to ____ on time for proper maintenance of ____.
- Provide a stable "app" that allows ____ to more easily ____ when scheduling appointments with ____.

- Provide a platform to easily track ____, which will allow the buying company to better track ____for federal grant reporting.
- What other objective factors will the buying company use to verify the work performs according to plan?
- Goods: think of things like, define complete delivery, partial delivery,"defective goods", etc.
- Services: think of things like, number of visits, number of people served, software functions for a time period without failing, reports delivered,etc.
- What are the suggested industry SLAs? Will an industry SLA work for this agreement? Why or why not?
- List the SLA here: ____.
- List the target here: ____. Then answer these questions:
  - Who will record the data about this SLA?
  - How often with the recording party collect the data?
  - In what form will the recording party report the data?
  - How will the receiving party validate that the data is accurate?
  - Who will review that data?
  - Who at the buying company will approve of the data?
  - What happens if the supplier misses the target?
    - The first time?
    - At a critical time in the service?
    - At the beginning of the contract implementation?
    - More than once? In what time frame? (e.g., twice in a year or twice in a month?)

Performance Standards

- Identify any industry-wide performance standards associated with each KPI. This standard will help benchmark supplier's proposals and their performance in these highly strategic arrangements. Place and industry-wide standard in the column titled performance standard. (e.g. 99% uptime, 20% reduction in emissions etc.)
- If there are no known published standards, the stakeholders will create their own performance standard. That performance standard will be placed in the column.

Tolerance

- Identify any allowable tolerance for the performance standard. In other words, if the supplier meets the goal of meeting 90% of a 20% emissions target is that on target, meeting the target,or below target? Use a percentage, or other numeric value. Place the numeric value in the column for tolerance.

Liquidated Damages

- Identify any liquidated damages associated with a missed target. In other words, if the target is to reduce emissions by 20% and the supplier only reduces emissions by 70% of the 20%, should the supplier pay an amount in pre-determined liquidated damages? Place any liquidated damages it the middle column. Note: It is a common practice to add multipliers such that if the supplier misses the same SLA during multiple performance periods they have to pay 2x, 3x, or 5x liquidated damages to incentive fixing the underpinning root cause of the problem. When this is negotiated, the maximum service credits are usually capped (~ 20% of a supplier's monthly fee is a common cap in IT Outsourcing), so that no matter what any individual SLA misses and multipliers might determine the supplier knows in advance what their maximum penalty could be. In this fashion the performance risk is capped, yet the buyer retains the right to change suppliers due to poor performance.

Data

Next identify who will collect the data to support the metric, how the data will be collected and how often. Ask the stakeholders, a technical representative the following questions:

- Ask stakeholders to identify any *reporting requirements* they will need to demonstrate performance to their supervisors. Is it clear to them and to you who will be collecting the data? Is it clear that that party receiving the data will trust the data? Will the data be in a form that is comprehensible to the receiving party?
- Then specifically determine:
  - Which company will collect the data associated with the metric?
  - What data is needed to validate the metric?
  - How will the metric and associated tolerance be calculated?
  - How often does the collecting company need to collect the data?

Place the answers to these questions into the various columns from the middle to the right.

Then finally,

1. Ask the stakeholders about the recommended issue resolution process if the parties do not agree on the contents of the data, especially if that data could lead to a claim of liquidated damages?
2. Ask stakeholders to identify the risks associated with the work from their point of view; things like disruption of services to a vulnerable community, or the delay of another time critical project, or the buying company being out of compliance with a federal regulation or law. The stakeholders, SMEs and any technical representative will identify risks as well, but it is essential to understand the stakeholder's perception of risk before the solicitation for proposal is issued.

What This Means to You: Drafting Outcome-Based Statement of Work

Now that the outcomes, performance and collection of data are identified, the stakeholders, the SMEs, any technical representatives and the contract professional can collaboratively outline the work the supplier must perform to meet the performance requirements. For this portion of the work, the contract professional will likely use the **Requirements Checklist: Hybrid Purchase** as it is likely that the customer will be purchasing several services from the supplier to achieve a holistic outcome. Rather than thinking about goods and a service, think about a primary service and a secondary service when answering the questions in the checklist.

Step 4: Completely Define the Acceptance Criteria and Approval Process

In this step you are starting to think ahead to answer the question: "What happens if the services don't meet expectations?" According to the IACCM, "Acceptance is one of the most fundamental and potentially contentious issues a Contract Manager will face."[2] But, what is "acceptance"? What do lawyers mean when they talk about acceptance? How is acceptance different from approvals? These are all very valid questions shared by many contract professionals.

Law.com[3] defines acceptance as:

n. 1) receiving something from another with the intent to keep it, and showing that this was based on a previous agreement. 2) agreeing verbally or in writing to the Terms of a contract, which is one of the requirements to show there was a contract (an offer and an acceptance of that offer). [...] 3) receiving goods with the intention of paying for them if a sale has been agreed to. 4) agreement to pay a bill of exchange, which can be an "absolute acceptance" (to pay as the bill is written) or "conditional acceptance" (to pay only when some condition actually occurs such as the shipment or delivery of certain goods).

2 Contract and Commercial Management. page 548.
3 http://dictionary.law.com/Default.aspx?selected=2297

Types of Acceptance[4]

An acceptance may be conditional, express, or implied. Let's focus our attention on conditional acceptance. Many, if not most, commercial performance-based contracts contain "conditional acceptance."

Conditional Acceptance, which is also referred to as qualified acceptance, happens when the customer (called an offeree in legal Terms) tells the offeror (who in this case is the supplier) that it (the customer/offeree) is willing to agree to the supplier's (offeror) offer *provided that some changes are made in the offeror's Terms or that some condition or event occurs (such as meeting contract requirements)*.

That very last part of the definition from above (*or that some condition or event occurs (such as meeting a contract requirements*) directs your attention to the scope of work or any other contract provision that lays out the specific requirements for the goods or services.

That is why it is so critical:

- To clearly outline the specifications for the goods or services, and
- To make sure that the suppliers understand to meet these specifications (acceptance).

If the supplier does not meet the requirements, the customer may reject the goods and/or services, ask the supplier to re-do the services, and replace the goods (Corrective Actions), or accept the substandard goods or services for a discounted price (typically through levying a service credit that effectively provides liquidated damages for poor performance). Consider the purchase of a new vehicle by way of example. If it arrives without the technology package you asked for the only remedy may be waiting for an adequate replacement vehicle. Whereas if it is missing some other type of option (e.g., driving lights or custom rims) and you cannot wait to take ownership you may be willing to accept a discount and either accept with what you received or use an aftermarket product to complete your requirements.

The customer accepts the supplier's products and services only when the product or service meets some condition or criteria spelled out in the contract. This is the heart of conditional acceptance. Therefore, to be enforceable, those acceptance criteria in the form of Terms and Conditions have to be spelled out in the contract.

Conditional acceptance requires that customers follow a formal process to validate that the good is physically delivered meeting the specifications or the service was performed to standards. And, that is why acceptance Terms are in your requirements checklist to include in the contract. The acceptance information must be included in final contract, and should be included in any RFx or solicitation.

The formal process could range from an email to a form. The formality comes from the fact that the customer's contract manager took the time to validate that the goods meet the specifications and the services performed to standard.

Each of the **Requirements Checklists** have a whole section called "Acceptance." Those checklists will provide you with some suggestions for creating the formal validation process, or acceptance procedure. Again, it might just be checking the goods are delivered or the services delivered. Or it might be a lengthy testing process that leads to acceptance of the final product. For example, some software or cloud assets may require a burn in, shakedown process, or dry run process to validate that they meet specifications.

4 See for more information: West's Encyclopedia of American Law, edition 2. Copyright 2008 The Gale Group, Inc. All rights reserved.; Two other types of acceptance are: Express Acceptance (happens when a person clearly and explicitly agrees—verbally or in writing—to an offer, or agrees—verbally or in writing—to pay a draft (bill or invoice) that is presented for payment in exchange for goods delivered or services rendered.) and Implied Acceptance (Acceptance is not directly stated but is demonstrated by any acts indicating a person's agreement to the offer. For example, implied acceptance happens when a shopper selects an item in a supermarket and pays for it.)

Returning to the importance of defining clear requirements in the pre-award phase of the contract life cycle, this means both parties agree on what is required of them as outlined in the contract. Therefore, the contract documents need to be unambiguous and detailed enough to create a common and enforceable understanding.

Approvals

Approvals, on the other hand may not always mean acceptance in your contract. A SME might approve a sample drawing, or sample carpeting tile, or draft maintenance report. But the Subject Matter Expert does not necessarily accept the drawing, installed carpet or final report until it meets all the technical and functional requirements. Therefore, the contract professional must fully understand all of the conditions of the goods and services in order to include acceptance criteria. In performance-based contracting, only when a good or service is accepted can the customer stakeholder approve completion of a phase/milestone and in some instances approve the supplier's invoice for payment.

A Tip for Working with the Contract Template

The contract template will typically have generic acceptance language, and usually refers to the SOW or technical specifications for acceptance criteria. Contract professionals should ensure acceptance aligns with the SOW and technical specifications. There is a section of the **Requirements Checklist** which will provide acceptance criteria. (Acceptance criteria provide guidance about how and when the work is complete. Complete can mean a part of the service is complete allowing the supplier to move on to another phase of the work. Or complete can mean all of the services are complete. Please see the Defined Terms in the contract for the applicable definition.)

After you have completed the steps outlined above, look at any potential contract template or proposed contract language to identify any provisions that are:

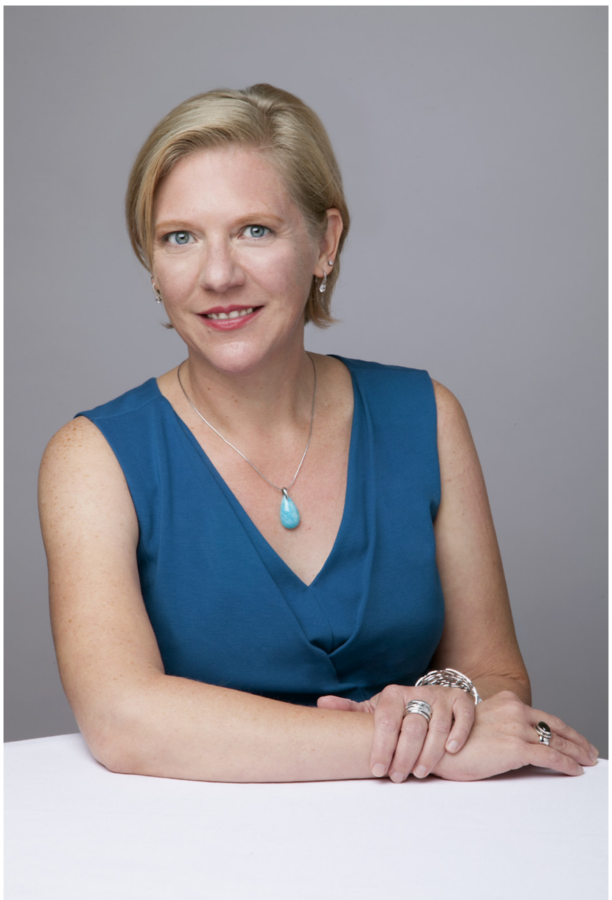
- Missing,
- Conflicting, and/or
- Need to be modified.

Then revisit the SOW and technical specifications to address any issues that the proposed language needs to address that were not originally addressed in the first draft of the contract provisions. This is an interactive process.

Jeanette's Coaching Questions

1. Are the performance requirements clearly outlined in a way that the supplier, when bidding on the work, can easily determine how they can meet that requirement?
2. What gaps have you identified from reviewing the **Requirements Checklist**? Who can you ask to get the answers?
3. Does the buying organization have business objectives for this contract? If not, who can you ask to get that information?
4. How are the business objectives being met in the SOW? Consider the acceptance criteria. Do the criteria ensure that both parties can understand and meet the business objectives?
5. Do you have a clear understanding of the metrics (SLAs, SLOs, OLAs, etc.) the buying organization needs and why the metrics are included in the contract?
6. For outcome-based relationships, have all the stakeholders seen, reviewed and agreed to the **Strategic Relationship Requirements Spreadsheet** (tool)? How will you reach out to any stakeholders who have not been involved to date?
7. Is it clear what organization(s) or individual(s) have the final authority to accept a that a supplier's delivery meets the documented criteria? Does the acceptance process assure necessary safeguards without introducing non-value-added bureaucracy?

ABOUT JEANETTE NYDEN



With more than 20 years of experience drafting and negotiating a variety of agreements, Jeanette guides contract professionals as they negotiate complex performance- and outcome-based agreements. With her assistance, clients enhance their skills at drafting, negotiating and managing complex contracts. Since 2003, she has been providing tactical, customized mentoring, coaching, consulting and training programs to companies as small as 60 million in revenue, as large as Fortune 500 powerhouses, and state governments. Before that Jeanette was a practicing attorney.

Jeanette is a recognized, international expert in the contracting field having authored and/or co-authored a number of white papers, articles, and three books. Notable white papers include Unpacking Collaborative Theory. http://www.jnyden.com/wp-content/uploads/2013/08/Unpacking_Collaborative_Negotiations_.pdf and Unpacking Pricing Models. http://www.jnyden.com/wp-content/uploads/2013/08/Pricing-Models-White-Paper-final-v7.pdf

She was an adjunct professor at Seattle University and taught courses at the University of Tennessee's Center for Executive Education. She earned her Juris Doctorate from Southern Illinois University and for a number of years practiced in both Illinois and Washington state. Jeanette is currently licensed in Washington state and teaches negotiation ethics courses for the Washington State Bar Association.

To access a multitude of free resources all aimed at enhancing the contract professional's skills, visit www.jnyden.com. To link to Jeanette visit https://www.linkedin.com/in/jeanettenyden/. Her Amazon author page is located at www.amazon.com/author/jeanettenyden

For more information about my services visit www.jnyden.com or contact me at jn@jnyden.com or 206-723-3472.

ABOUT LAWRENCE KANE

Lawrence was inducted into the SIG Sourcing Supernova Hall of Fame in 2018 for inspiring, insightful, and innovative work over the course of his career. Currently responsible for Strategic Sourcing Functional Excellence, he institutionalized best practices and created innovations that were instrumental to his organization earning the prestigious Global Excellence in Outsourcing award from the International Association of Outsourcing Professionals (IAOP). See University of Tennessee whitepaper at http://www.jnyden.com/wp-content/uploads/2019/08/GEOAward.pdf for more information about how he did that.

A member of the SIG University Advisory Board, IAOP Training & Certification Committee, and IAOP Think Tank, he helped create many of the industry's leading practices and regularly advances thought leadership in strategic sourcing, procurement, supplier innovation, and digital transformation at industry conferences. He is a contributing author to the Outsourcing Professional Body of Knowledge (OPBOK), Strategic Sourcing in the New Economy, and Unpacking Collaborative Bidding, among other works and has co-published whitepapers on defining and managing an optimal sourcing mix, contract renegotiations, and strategic use of benchmarking, primarily with ISG.

Over the last two decades he has saved his company more than $2.9B by architecting sourcing strategies, designing full sourcing lifecycle management processes and tools, developing future leaders, conducting procurements, negotiating with suppliers, and benchmarking resultant contracts. He is also the bestselling author of 17 books (see www.amazon.com/-/e/B001JOYS9U for his bibliography). You can connect with him on LinkedIn at https://www.linkedin.com/in/lawrenceakane/

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Requirements Checklist: Hybrid Purchase

Use this checklist to define the functional and technical requirements for a hybrid statement of work (goods and services).

A hybrid statement of work includes the purchase of physical items and services associated with the item purchased. For example, the purchase of an electrical generator, operation, maintenance and repairs of that electrical generator is a hybrid scope of work. The purchase of computer equipment and custom designed software code is also a hybrid scope of work. Combining two different types of purchase will require some additional work on the statement of work to get the contract provisions to work efficiently.

Treat each of the purchases individually before looking at how they interact with one another. Once the contract professional chooses the contract template for the primary purpose of the purchase, he/she will then work with others in the organization to ensure that the secondary aspect of the purchase is adequately addressed in the contract Terms. Often contract templates cover only one type of purchase.

Instructions

1. **For Customers and Suppliers:** Please answer each relevant question. Your answers to these questions will help finalize the Statement of Work and will influence some of the Terms and Conditions in the final contract. Use the answers to align the parties around these requirements and the contract Terms and Conditions.
2. These lists are not exhaustive; these questions are just the beginning of your conversation between you and your stakeholders. So, in your own daily work, start with this list and build on it.
3. These questions may also help you identify risks and associated losses. Please see the **Risk Checklists** document for instructions on the identification and documentation of risk, and inclusion of your answers in the **Risk Monitoring Template**.
4. These questions and answers will also help inform your organization's **Contract Management Plan** and **Contract Summary.**

Business Objectives (Why do the work)

- ❑ What is causing the need, problem, challenge or issue?
- ❑ What is the supplier doing to meet this need, problem or challenge?
- ❑ Is the supplier providing goods and services directly to the customer or providing goods and services to the community on behalf of the customer? (Potential risk to monitor)
- ❑ What outcome is the customer looking for from this supplier?
    - o Deliver __________ to ____________ on time for proper maintenance of _____________.

  - Provide a stable "app" that allows _________ to more easily _________ when scheduling appointments with __________________.
  - Provide a platform to easily track _________________, which will allow the customer to better track ___________ for federal grant reporting.

- ❑ *Summarize here:* What is the purpose of the contract? (This will be used in any solicitation for a competitive bid/quote or as part of the supplier's response.)

Developing the Specifications (What is the work)

Goods

- ❑ What is the good being purchased? Be very specific here.
- ❑ How does the good properly function? (Note, these are your technical and functional requirements.) Size, shape, dimensions, weight, environment the good will be used in, etc.
- ❑ Is the supplier buying materials for the customer from another supplier? (Potential risk to monitor) If yes,
  - Is the supplier passing through warranties from the third-party manufacturer?
  - Or, is the supplier using their own warranty provision to warrant the materials?
- ❑ If the customer is providing any goods/equipment for this purchase, how does the customer stay within the provisions of the OEM warranty for that good/equipment as the supplier accesses the items with the good it provides? (Potential risk to monitor)
- ❑ What are the customer's obligations to the supplier (technical drawings, approvals, etc.)? (Potential risk to monitor) List those customer's requirements to include them in the contract.
- ❑ Should the customer's policy, regulatory and statutory requirements be documented here in the functional requirements? In other words, does the good need to meet a regulatory or policy obligation? (Potential risk to monitor) List them.
- ❑ List any required qualifications for the good, such as meeting the customer's internal compliance standards? (Potential risk to monitor)
- ❑ Does the good (item) have its own software of any kind at all? If so, how does this code impact any existing software the customer is using? (Potential risk to monitor)
- ❑ *Check your work:* Are the functional and technical requirements clearly written in a form that the supplier and the customer both understand?
  - Use simple sentences, verbs, industry terms, and industry standards.
  - Are there *implied* requirements (such as one party providing the other party data or drawings or access to a secured building) that are not outlined so far? (Potential risk to monitor) List them.

Services

- ❑ How does the service function in connection to the good? (Note, these are your technical and functional *service* requirements.) List the specific tasks or duties the supplier will provide. Place these duties or tasks in order of importance, with the most important being numbered 1. (Use verbs; design, deliver, maintain, repair, etc.). The ranking is to ensure that the acceptance criteria ties to the most important functions of the service.

- ❑ What are the customer's obligations to the supplier (access to a building, computer system, etc.)? List those customer requirements so the contract professional can determine how to include them in the contract. (Potential risk to monitor)
- ❑ Should your customer's policy, regulatory and statutory requirements be documented here in the service requirements? In other words, does the service need to meet a regulatory or policy obligation? (Potential risk to monitor) List them.
- ❑ List any required qualifications of the supplier and/or their staff to perform the services? (Potential risk to monitor)
- ❑ *Check your work:* Are the functional and technical requirements clearly written in a form that the supplier and the customer both understand?
  - Use simple sentences, verbs, industry terms, and industry standards.
  - Are there *implied* requirements (such as one party providing the other party data or drawings or access to a secure building) that are not outlined so far? (Potential risk to monitor) List them.

Describing Performance (How and when is the work done to specifications)

- ❑ When do the goods need to be delivered?
- ❑ When does the service need to start?
- ❑ Which one is dependent on the other? Does the good arrive first or does the service start first?
- ❑ Does anything have to happen before this work can be done, such as another supplier completing an audit or software consultants completing reports or designs?
- ❑ Is the timeline for performance/delivery etc. clearly outlined?
  - Are there gaps in the delivery dates or "TBD's"?
  - Who, when and how will the "TBD's" be determined?
- ❑ Are there milestones (or gateway reviews or progress reports) to track performance/delivery? (Potential risk to monitor)
  - Are they tied to a report? When, by whom, how will the report be delivered?
  - Are the milestone dates tied to payment terms? How is this outlined?
  - How often are milestones monitored and by whom at your customer?
- ❑ What documents/reports will the customer need to verify delivery of goods and services? How will these documents paint a complete picture for the stakeholder who will approve the work?
- ❑ What objective factors will the customer use to verify the good meets technical requirements and that the services meet performance requirements? These are your performance measures which will become performance measures.
- ❑ What are the suggested industry performance measures? Will an industry performance measure work for this agreement? Why or why not?
- ❑ List the performance measure here: _____.
- ❑ List the performance measure target here: _____.
- ❑ Then answer these questions:
  - Who will record the data about this performance measure?
  - How often with the recording party collect the data?
  - In what form will the recording party report the data?
  - How will the receiving party validate that the data is accurate?
  - Who will review that data?

- Who at the customer will approve of the data?
- What happens if the supplier misses the target? (Potential risk to monitor)
  - The first time?
  - At a critical time in the service?
  - At the beginning of the contract implementation?
  - More than once? In what time frame? (twice in a year or twice in a month?)
- What should happen if the *good* does not meet the requirements? (Note, these will be incorporated into the contract Terms and Conditions.) (Potential risk to monitor)
  - Will the supplier replace the good or item? What is that process? Who will pay for shipping the defective item back to the supplier and shipping the replacement item to the customer? Does the item need to be new or the refurbished version of the defective item originally delivered?
- What should happen if the *service* does not meet the requirements? (Note, these will be incorporated into the contract Terms and Conditions.) (Potential risk to monitor)
  - Will the supplier have the right, time and ability to "cure" or fix the service or deliverable (software)? How will that work? What timeframe? Who would be negatively impacted if the service is defective?
- How do you know that the work is "finished"? What is the least the supplier can do to call the project done? (Potential risk to monitor)
- *Check your work:* Are the performance requirements clearly written so the parties can demonstrate performance or demonstrate the lack of performance when talking to each other about its performance?

Acceptance (What happens if the goods and/or services don't meet expectations)

The contract template will have generic acceptance language, and usually refers back to the scope of work or technical specifications for acceptance criteria. This section will provide the customer and the supplier acceptance criteria. (Acceptance criteria provide guidance about how and when the work is complete. Complete can mean a part of the service is complete or all of the services are complete. Please see the Defined Terms in the contract for the applicable definition.)

- What objective criteria will the customer use to verify that the *goods* meet specifications?
- Who at the customer will verify that the *goods* are delivered? What does that person need to verify that the goods are delivered?
- Who at the customer will verify that the *goods* meet the technical and functional specifications? In other words, that the goods are the size, shape and form ordered?
- What objective criteria will the customer use to verify that the *services* meet specifications?
- Who at the customer will verify that the *services* are delivered on time? What does that person need to verify that the services are delivered on time?
- Who at the customer will verify that the *services* meet the technical and functional specifications? What does that person need to verify that the services meet the customer's requirements?

- ❑ Are there inspections of *goods*? When, by whom and at what point? The supplier at the point of shipment or the customer at time of delivery?
- ❑ Is testing required to validate performance of either the *good or service*? When, by whom and how are those tests to be done?
- ❑ Does this *good* or does the *service* require Quality Assurance (QA) audits, or other procedures to verify or validate performance? When, by whom and how are those to be done?
- ❑ Are there additional expenses for inspections or certificates of compliance etc. Who pays for them?
- ❑ What if something is rejected and needs to be inspected again or tested again? Who pays for that process?
- ❑ Does the purchase of the *good* constitute acceptance or does a successful test with the incorporation of the *service* constitute acceptance?
- ❑ How do the parties enforce these performance requirements? (Look at the contract Terms for Corrective Action Plans and Cure Periods, etc.)
- ❑ *Check your work:* Is the acceptance process clearly outlined so the supplier knows exactly what is expected and the customer can formally accept or reject the *goods and services*? (Note, acceptance leads to payment, and rejection leads to replacement/re-work).

MAP OUT THE DEPENDENCIES

The handing off of work back and forth from the customer to the supplier and back again to the customer is an overlooked and underappreciated operational risk. The process of understanding downstream and upstream dependencies is one way to identify opportunities to mitigate interdependency operational risks.

A dependency means that one party depends on another party to provide something either before or after a scheduled deliverable.

EXAMPLE

Downstream: A very simple example of a downstream dependency is an auto-repair shop waiting for a part from a distributor to arrive before completing repairs on your automobile.

Upstream: A very simple example of an upstream dependency is an auto-repair shop waiting on your approval before making an expensive and unexpected repair to your automobile.

The goal is to minimize the impact of one party failing to complete its designated task by:

- Assigning the task in the Statement of Work,
- Monitoring the performance of the task, and
- Controlling the performance of the task.

It is well worth the contract professional's time and effort to map out the upstream and downstream dependencies. Consider the following:

- ❑ What is the supplier depending on to do its work?
- ❑ Who is the supplier going to depend on to receive information, data, approvals, etc.?
- ❑ What is the customer depending on? (Data, reports, samples, draft versions, etc.)

- ❑ Who is the customer going to depend on for this information (from this supplier or another supplier)?
- ❑ Who will test, inspect or accept work? (In other words, does that person need credentials, or approval authority, or ability to travel to a location to test a system?)
- ❑ Who within the customer will approve hand-offs and is that the same person who will formally accept the work according to the performance criteria?
- ❑ What are the time frames associated with these dependencies?
- ❑ What are the potential barriers to receiving adequate information, data or approvals associated with the dependency?
- ❑ Transition Planning Schedule.
  - Have the parties created a transition planning schedule? This is a schedule to transition work from one party to another. It is not the same as supplier milestone dates, which is supplier specific.
  - This Transition Planning Schedule will include anticipated dates the customer or possibly another supplier will transition its work to the supplier in this relationship, or back again to the customer or another supplier.
  - This Transition Planning Schedule language would outline the customer criteria for approving the transition of work from the supplier to the customer or from one supplier to another supplier.
- ❑ Milestone Dates. There are different categories for supplier delivery, customer approval/acceptance, and invoice submittals and payments. Are they tied to the various hand-offs outlined in this part of the checklist?
- ❑ Reports and Reporting Timeline. The supplier will need to demonstrate its compliance with transitions in the form of a report of some kind. And, how often does the customer wish to receive these reports. Consider tying them to the acceptance criteria.

Risk

STOP

Please review the **Risk Checklists** before completing the bid package or proposal package. More detailed risk related questions are included in those checklists. The **Risk Monitoring Template** after negotiations and contract execution will become the **Risk Register**.

Notes

"At IAOP (International Association of Outsourcing Professionals), we have found one of the best ways to navigate the increasing complexities is through training, education and professional certification. That is why The Contract Professional's Playbook and eLearning program is so valuable, timely and essential. Arming yourself with the latest knowledge and expertise from the authors on drafting, negotiating and managing performance in outcome- based contracts will give you a competitive edge."

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"This is a fantastic guide for creating a winning sustainable partnership. Jeanette's methodology outlined in this manual has been instrumental to our company in Identifying and measuring the correct performance objectives which drive our desired outcomes and lead to a transparent and trusting partnership. The checklists, which are excellent, help the reader set up the proper framework and expectations between partners."

Stephen Mcpherson, Americas Returns & Refurbishment, Dell

Jeanette Nyden, JD

With more than 20 years of experience drafting and negotiating a variety of agreements, Jeanette guides contract professionals as they negotiate complex performance- and outcome-based agreements.

Lawrence A. Kane, COP-GOV

Lawrence was inducted into the SIG (Sourcing Industry Group) Sourcing Supernova Hall of Fame in 2018 for inspiring, insightful, and innovative work in strategic sourcing and procurement over the course of his career.

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