

Contracting: It Pays to Play

You've gone through an exhaustive RFP process and finally gotten everyone on your selection committee to agree on the new systems you need. The County Council has approved and you are ready to make the purchase. Only one more step, sign the contract.

Sign the contract? Hold everything! This may be the most important step in any procurement process and it is often the one that slips by with the least attention paid to it. Few of us are lawyers and our legal counsel may or may not be a contract law specialist. We often are dealing with large companies with "standard" contracts that must be "fair" because so many customers have already signed them. Right? Maybe, maybe not!

In the long run, looking at a few contract details may save you big bucks and will certainly alert you to the need for further review of any contract presented for your approval.

Start by asking the following:

- Does the product described in the contract match the specifications required in your RFP? This simple expectation is the most common contracting shortfall. For example, if you have other systems that must work in harmony with your new purchase, is the latter compatible with the former as you required or is there an interface charge involved that hasn't been identified? Has your new computer been "tested" against military specifications and "passed" as called for in your RFP or is it "designed" to meet those specs?
- Do the prices charged match the vendor's proposal and are these costs proper? Beware of price lists in the contract that are presented in a format that differs from that used in the proposal. Reconciling the two can be confusing and costly. Also, check each charge to ensure it is something for which you are liable. One vendor inserted a training fee that prepared his people to deal with requirements unique to a customer's state. One would think that training a vendor's employees was the vendor's responsibility.
- Does the contract incorporate the performance standards you have established? Legal language is extremely dense and often confounds one's attempts to clearly define promised performance. For example, you expect your new radio system to be able to "transmit and receive 95% of the time in 95% of your county" and that there will be a "four-hour response to any critical malfunction with a replacement part installed within eight hours if an immediate fix is not forthcoming". You must insist on clear, concise language in the contract that says just that and, while you are at it, be sure to succinctly define the term "critical". In addition, beware of exclusions that may appear in long lists such as, "Not responsible for loss of customer data or cost of retrieval if system should fail."
- Is there a provision in the contract in which the vendor acknowledges that he has provided a complete system? Often during the implementation process, a customer discovers a widget required for full system utilization is missing and can only be procured for an additional cost. Make sure this additional cost is borne by the vendor by ensuring a "complete system" clause is inserted in any contract you sign.
- Has the vendor met your insurance and bonding requirements? There should be an insurance certificate provided that specifically names your agency as the holder and all the coverage amounts should be checked to ensure they meet your requirements. Be wary of any "self insurance" claim. Requiring a performance bond will cost you but it weeds out companies who, for one reason or another, cannot be bonded and will certainly be a wise investment if a vendor's performance is less than he promises.

- Does the warranty provide for your money back if the system does not meet specifications? You needed a computer that could operate efficiently in a hot, humid climate especially when it had been sitting in an idle ambulance parked in the sun for an extended period. You stated that clearly in the RFP but the computers you bought slowed almost to a standstill the first summer you used them. The vendor replaced the first lot with no noticeable improvement and now promises to keep trying. Wouldn't you rather be able to retrieve your money and try another vendor?
- Are there penalties assessed if the system is not delivered on time or does not perform up to standard? These are often called "liquidated damages" and the incorporation of them in a contract is fought tooth and nail by most vendors. A "damages" clause turns sales promises into realities with which vendors must live. Almost all large agencies require liquidated damages but most small communities are "talked" out of them.
- Is an acceptance test procedure included in the contract and does it meet your needs? This is key. How will you and the vendor know when a system is acceptable? Insist on mutually agreed upon performance standards that can be demonstrably tested and certified by a neutral authority.
- Are there odd clauses in the contract that your vendor has problems explaining or do not directly apply to your procurement? One large vendor required a clause entitled, "Katz Patients". This company had been successful sued by Mr. Katz for patent infringement and no longer wanted to deal with him. This apparently innocuous clause could transfer their liability to you if Mr. Katz decided to sue again.
- What state law is applicable? It should be yours and, further, should stipulate that any action must take place in your county's courts. Many large vendors substitute "the laws of the State of Delaware." This isn't a random choice!
- Are the limitations placed on the legal remedies that are available to you proper? This is one clause you need your lawyer to read very carefully. Don't assume your vendor's attorney had your welfare in mind when he constructed this statement.

This is not meant to be an exhaustive list. But, if you experience problems with these issues, you should really recheck every detail in the contract that has been presented to you. Remember, the contract you sign trumps any promises you heard or think you heard.

Your object should be a fair and balanced contract. You won't profit if you put something over on your vendor that causes him great financial pain. Nor, will you prosper if you ignore good contract discipline assuming your vendor "has it covered".

It pays to play the contracting game!

