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OP-ED: Why well-drafted contracts matter: a litigator's perspective

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The contemporary commercial transaction is often complex. The contract can require coordination of numerous, independent components. Things often go wrong. When they do, almost the first thing a lawyer will do is analyze the contract. Lawyers do not do this because they enjoy reading; they do it because the contract defines the rights and responsibilities of the company in the transaction at issue. With rare exceptions, it is the most important document in the dispute.

Disputes cost money and time, and the longer one lasts, the more it costs. Not only are visible expenses – expert witness fees, litigation costs and attorney fees, for example – incurred, but so are less visible expenses such as company resources being assigned to the dispute, lost business opportunities, and damage to business relationships. To avoid these disputes, or win the unavoidable ones, what is one to do?

Spending the time and energy to prepare a contract that meets the unique or important considerations of the transaction at issue should be among one's top priorities. Having litigated contract disputes for more than 20 years, I can say without a doubt that a lot of money and time can be saved if companies take the time necessary to prepare an appropriate contract for the transaction at issue. At a minimum, a well-written

agreement will clearly define the parties' rights and obligations, strive to anticipate potential problems, allocate risk appropriately, and provide for efficient resolution of future problems.

Every transaction is unique and should be analyzed to determine provisions that should be required. However, consider this list of 10 key provisions that virtually all important contracts should include.

1. Scope of work

The contract should clearly define what is being performed and, often equally important, what is not being performed. I have been involved in far too many contract disputes because the parties did not clearly define the scope of work required by the contract.

2. Price and payment provisions

Clearly state the price to be paid and when it will be paid. Consider whether any conditions should occur before the right to payment accrues.

3. Time of performance

Does timing of performance matter? Address it as appropriate.

4. Damage provisions

Should they be limited and, if so, in what way? Should the parties agree upon a liquidated damages amount in lieu of actual damages?

5. Quality standard provisions

What quality of performance do the parties expect? The highest level? The standard within the industry? Is industry defined to include the locale where performance is provided or the entire United States or world? In addition, what warranties are provided? Are they sufficient?

6. Default and termination provisions

Are the events of default clearly spelled out in the contract? Under what circumstances can the agreement be terminated, and what rights and obligations exist after termination?

7. Indemnification provisions

Under what circumstances should each party indemnify the other, if at all?

8. Dispute resolution provisions

If a dispute develops, must the parties continue performance? How is the dispute resolved? Will direct negotiation or mediation be useful before litigation? Would arbitration be better than litigation?

9. Choice of law and venue

If the parties are not located in the same state, what law applies to the transaction? Where can a lawsuit be filed?

10. Written modification



It is important to include a provision that requires a written amendment to a contract to be in writing. Such a provision eliminates the risk that one party may think an oral negotiation was an actual modification or change to the contract.

No contract can account for every possible occurrence; however, a well-prepared contract can and will help avoid very costly and time-consuming disputes or, if the dispute is unavoidable, put one's company in a position to win. View negotiation and preparation of the contract as equally as important as securing the appropriate insurance. It will cost a little money and time on the front end, but save a company considerably on the back end.

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