



“Best Practices” Newsletter Volume 24, March 2005

About This Issue - This March 2005 edition of our newsletter contains more techniques to help our clients & colleagues accomplish their strategic procurement objectives.

Strategic Procurement Solutions is a consulting firm specializing in advanced Strategic Sourcing, Training, and Organizational Improvement services. Robert Dunn, C.P.M. & Mark Trowbridge, C.P.M. are principals in the firm who lead teams of professionals in supporting leading procurement organizations. More information can be found at www.StrategicProcurementSolutions.com.

Mark Your Calendars – On Thursday, April 21st – Friday, April 22nd, we will be presenting a two day seminar on **Advanced Procurement Negotiations**. Attendance of the program, hosted by the Sacramento Valley N.A.P.M., can be arranged by contacting Kathy Uchman at kuchman@mindspring.com.

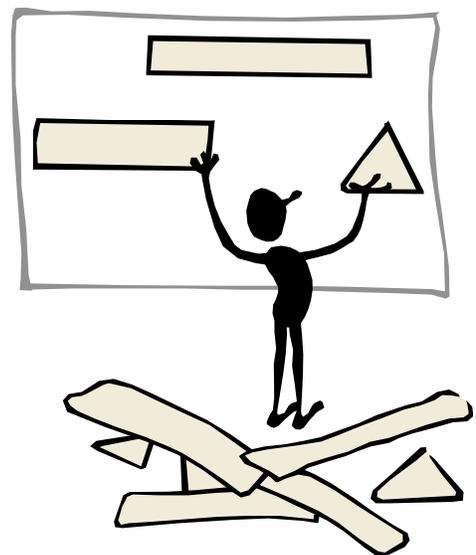
Our two senior partners will also be making two presentations titled **Building the Procurement Superhero** and **Outstanding Customer Service for Procurement Professionals** at the I.S.M. 2005 International Conference in San Antonio, TX on May 8th – 11th. We’ve just been asked by I.S.M. to present the latter topic a second time due to a large number of registrations. If you are attending, please plan to attend these sessions (sponsored by the I.S.M. Services Group) and also drop by Booth #328 in the Exhibit Hall to introduce yourself.

Changes to Article 2 of the UCC – How Will They Affect Me? by Mark Trowbridge, C.P.M.

After many years of discussion, a new and improved “Article 2 – Sales” to the Uniform Commercial Code (“UCC”) has finally been adopted by the National Conference of Commissioners on Uniform State Laws & the American Law Institute.

These changes have been recommended to several states for review for legislative action. If approved by those states, it is expected that these changes will be reviewed and approved by other states that currently have laws reflecting the body of UCC content (in other words, most states other

than Louisiana). The changes should also affect the public sector, since significant State & Federal focus being oriented towards UCC-based contracting protocols.



This article will discuss the major changes being made to the UCC, and strategies for procurement practitioners as various states begin to implement their own legislative versions of the code.

As a brief overview, the non-consumer portions of Article 2 of the Uniform Commercial Code pertain to the Sale of Goods. Unless the procurement action pertains primarily to the purchase/sale of a tangible product, *it is not governed by the UCC*. The acquisition of services is covered by Common Law, unless part of a larger transaction that is primarily for the sale of goods. Leasing of goods is also not covered by Article 2 of the UCC...it is still addressed by Article 2A which is not affected by the changes discussed herein.

Some of the recent amendments to Article 2 include:

<p>Changes the term “Writing” to “Record”</p>	<p>Under the <u>old</u> Article 2, transactions & contracts for the sale of goods had to be recorded as a “Writing” over a certain value. This meant that an oral agreement could be held as invalid if a written document did not record the transactions. The <u>new</u> amendment now defines a “Record” as being <i>“information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form”</i>. This change provides a basis for Email and eProcurement as used in today’s electronic economy. UCC 2-211 was added to provide additional clarification...“a record, signature, or contract cannot be denied legal effect and enforceability merely because it is electronic in form”.</p>
<p>Changes \$500 to \$5,000</p>	<p>Under the old Article 2, as mentioned above, a transaction above \$500 in value had to be documented by a “Writing” to be considered enforceable. <i>The amended Article 2 recognizes that amount is far too low for today’s world...and raises it to \$5,000 per transaction.</i> And as mentioned before, transactions in excess of this amount can be validated by an electronic “Record”.</p>
<p>Battle of the Forms Is Simplified</p>	<p>The new UCC 2-207 simplifies the quagmire often referred to as the “Battle of the Forms” whereby under the old Article 2 the timing of “offer” and “acceptance” actions in two parties’ correspondence created complicated disputes about the actual “contract” formed between them. The amended Article 2 is simplified somewhat, <i>although care still needs to be taken by procurement professionals to clarify the points of agreement with a supplier.</i></p>

**Shipping Terms
Subject to Common
Trade Use**

As discussed in our article titled “Myths About F.O.B. Destination” in the March 2001 edition of this newsletter (downloadable from the Publications web page at www.StrategicProcurementSolutions.com), shipping terms were confusing because of varying interpretations by buyers and sellers and out-of-date use in the UCC. The amended Article 2 deletes many of the references to shipping terms, and simply states that the “effect of a party’s use of shipping terms such as ‘FOB’ or ‘CIF’ absent any express meaning of the terms, must be interpreted in light of any applicable usage of trade and any course of performance or course of dealing between the parties.” **What does this mean to you? That you have to be very careful to define the shipping terms used in contracts and orders. Make sure you clearly spell out (A) Which party pays for the freight? (B) Where does risk of loss/damage transfer from the seller to the buyer? and (C) When does title transfer to the buyer?**

**Termination “for
Convenience” Needs
to Be Fair**

Many buying organizations’ contracts and purchase orders now contain language that allows them to terminate “for convenience”...i.e. without “cause” resulting from the seller’s material breach of the contract. Some one-sided contracts allow this to occur without a notice period. The amended Article 2 requires a balanced approach to this. It says that *“Termination of a contract by one party except on the happening of an agreed event requires that a reasonable notification be received by the other party and agreement dispensing with notification is invalid if its operation would be unconscionable.”*

**Tip 6 – Don’t Assume
the OEM is the Only
Source**

Even though an OEM may be the primary source for proprietary replacement parts & supplies, there may be alternative products that offer better value. This is especially true for generic MRO components that are available through distributors...for example...fasteners, electrical components & wiring, etc. Just be careful that any generic substitutions don’t void your warranty with the OEM, or infringe upon any of their proprietary rights.

It is important for buyers to understand that the changes recommended by the drafting bodies, must be incorporated into your state's law by legislative action. This will increase the importance of Governing Law clauses in a buyer's contract....which stipulate which state's law will govern in the event the contract is disputed between the parties (often saying something like, *"This agreement will be governed by the internal laws of the State of California, without respect to its conflict of law clauses"*). Since most states have passed their own versions of the Code (except for Louisiana), purchase transactions between companies in different states have tended to be treated similarly by the respective state's versions of the Code. *But over the next few months/years, it will be for procurement professionals to be careful on transactions with sellers in other states to ensure which form of Article 2 is reflected in the respective states' laws. This will be a moving target for some time.*

The new Article 2 of the Uniform Commercial Code contains many beneficial changes...many more than can be covered in this brief article. Please take time to review those changes yourself. As with any discussion of law, readers should consult with their own counsel to determine application to their own requirements.

Writing a Statement-of-Work (SOW) To Be An Effective Strategic Procurement Tool (Part 2)... by Robert Dunn, M.B.A., C.P.M.

Today's procurement professionals are using contracts to govern their most-important supplier relationships.

This article continues last-month's discussion of techniques that organizations can use to write excellent Statements-of-Work (SOW) to properly define and manage suppliers in delivering superior products & services.



The Statement-of-Work (SOW) is that portion of a good contract which outlines the specific services a supplier will perform in fulfilling its contractual obligations. The SOW generally indicates the type, level, quantity, and quality of service, as well as the time schedule required. The following 8 steps should provide assistance in Planning & Preparing your SOW requirements:

#1

First – Take time to review the requirements and internal authorizations leading to the contract action; including organizational policies & procedures related to the type of procurement action being contemplated. This will provide a clear framework for the approvals necessary to execute the final contract document.

#2

Second – Identify those persons who should provide input into the SOW. Make sure you include the person(s) who will eventually manage the supplier relationship on a day-to-day basis.

#3

Third – Identify all cost drivers that will apply during the contract term. These may be contained in a separate pricing exhibit of the agreement, but are important to understand as you lay out the descriptions of services to be provided by the supplier.

Failure to understand cost drivers, may result in inadvertently increase the overall cost of the contract services.

#4

Fourth – Break down the scope of work into its component parts. Specify the service objectives, and outline the work tasks in terms of the content required.

#5

Fifth – Prepare a list of data required from your internal contributors to complete all sections of the SOW. Examples - Data elements to be included in the supplier's monthly reports; Technical specifications or diagrams; Security requirements for the supplier; etc.

#6

Sixth – Define the order in which work tasks will occur, and mimic that order in the SOW outline.

#7

Seventh – Note the tasks that will require additional research or special care in presenting. Obtain assistance in those areas as needed.

#8

Eighth – Start writing...

A good SOW should *clearly* and *concisely* describe the actions to be taken by both parties to the agreement. Sloppy wording can mitigate the effectiveness of the contract.

The following tips will improve the clarity of any SOW:

1. **Be clear – use simple, direct language.**
2. **Use active, not passive tenses** (“the seller shall conduct a test”, as opposed to “a test should be conducted by the seller”). Active verbs assign responsibility more clearly than passive verbs.
3. **Be precise – especially about task descriptions.** The clarity of the SOW affects the administration of the contract since it defines the scope of work to be performed. Work outside this scope may result in increased costs.

4. **Spell out the buyer's and seller's obligations carefully.** Don't infer or "back into" work requirements.
5. **Every action in a SOW should be attributed to one of the parties.** Don't say, "Deliveries will be made by 10:00 a.m." Instead, say "Supplier will deliver product to Buyer's specified site by 10:00 a.m."
6. **Contract abbreviations should be defined in the first usage.** Use the unabbreviated term, followed by the capitalized abbreviation in parenthesis and quote marks.
7. **Include procedures.** When immediate actions can't be described in the SOW, it may be possible instead to describe a procedure for making those decisions (for example, "as approved within 5 days by the buyer" or "the seller shall submit a report to the buyer within 3 days after any Category B failure, and buyer will notify seller within 48 hours of the action to be taken in Section 15 below").
8. **Eliminate extraneous statements.** If a statement has no practical value, it shouldn't appear in a SOW.
9. **Use simple language and short sentences.**
10. **Avoid ambiguous statements and words with multiple meanings,** such as: "including", "and/or", "as necessary". Don't use catch-all phrases, such as: "to the extent necessary", "as required", or "as applicable". Instead, describe the specific deliverables to be performed.

Take time to develop a good Statement-of-Work. Without it, superior supplier performance won't be achieved...

Editor's Note: **Strategic Procurement Solutions'** objective is to provide top quality supply management services to client organizations in the private & public sector, and to enable those clients to exceed their internal users' expectations regarding promptness, price, and quality. One means of doing this is through this educational newsletter, which provides bi-monthly articles about "Best Practices" in procurement. Contact us at www.StrategicProcurementSolutions.com for more information about our services, or if you do not wish to receive this newsletter in the future.