

Good Fences Make Good Neighbors

Drafting and Reviewing a Scope of Work

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A well drafted SOW is the basis for a smooth,
successful process.

A poorly drafted SOW can create a failed contract
and potential litigation.

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Components of a well drafted SOW

- ◆ The SOW includes:
 - ◆ Mandatory words
 - ◆ Active voice
 - ◆ Clear language
- ◆ The SOW relates to and considers the legal or contract terms
- ◆ The SOW avoids:
 - ◆ Jargon and terms of art
 - ◆ Legal or contract terms

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Mandatory Words

The SOW is a part of the contract and provides the obligations of the parties. An important role of the lawyer is to draft or review the language for words of obligation:

Vendor shall deliver the widget no later than November 1, 2023

The closing must occur no later than November 1, 2023*

* [A Manual of Style for Contract Drafting](#) by Kenneth A. Adams (2017) contains a chart and discussion of the use of shall, must, will and may in contracts. A version of the chart is available through his website adamsdrafting.com at a post dated February 3, 2018.

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Active Voice

Clients, especially IT staff, routinely use passive voice in drafting SOW terms:

The weekly report must include the date and time of service calls.

The lawyer's role is to revise SOW terms to clearly assign an obligation to the vendor:

Vendor shall identify the date and time of service calls in the weekly report.

Who, What, When, Where and How!

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Clear Language: The purpose of the SOW is to set forth the parties' obligations in clear, easy to understand language

- ◆ If you don't understand it, a judge likely won't understand it
- ◆ Avoid jargon and terms of art or define them
- ◆ Use the same terms as in the contract body and in the same way

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The SOW is a Part of the Contract

- ◆ Language should relate to the body of the contract
 - ◆ Example: If the warranty is tied to performing in accordance with the specifications, identify the portions of the scope of work containing the specifications
- ◆ Look out for “contract” terms (payment, warranties, or remedies)
- ◆ Priority in the event of conflict
 - ◆ The “master” and “SLA” dilemma
 - ◆ If multiple SOW can be added in the future to a general master agreement, is it desirable for the SOW to allow for modification of master within a future SOW?
 - ◆ Compromise: Allow SOW to take priority only if it identifies a master agreement term by section numbers and specifically states it supersedes the master agreement term.

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Pitfalls

- ◆ Time and details are short
- ◆ Changes
- ◆ Beware the offer or proposal

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After the Fact SOW

Avoid pushing the details later with a “the parties shall negotiate in good faith”:

- ◇ Loss of negotiating leverage
- ◇ Missed deadlines following protracted negotiations
- ◇ Lack of an enforceable contract (no meeting of the minds on a material term)

Consider a two phase project:

- ◇ Initial phase (fixed price) to draft an SOW
- ◇ Option of buyer (client) to proceed to next phase

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Needs and Wants Will Change!

- ◇ Add a change order process that specifies the details and addresses risks. Some possible terms:
 - ◇ Identify what is a change and what is a risk assigned to the vendor
 - ◇ Establish the cost or how to determine cost
 - ◇ Require prior written agreement before costs are incurred
 - ◇ Identify who (person or title) can agree to changes
 - ◇ Address changes to delivery schedule

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Beware Using the Vendor's Offer or Proposal

- ◆ Assumptions

- ◆ If acceptable, turn an assumption into an SOW term

Instead of “vendor assumes client will provide adequate resources,” include “Client shall provide a desk and a wi-fi enabled printer for vendor use on Client business days and during the hours Client’s office is open to the public.”

- ◆ Lack of detail

- ◆ Sales and marketing fluff

- ◆ Ability to dilute obligations

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Questions?

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