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The Contract Blueprint: Creating Agreements that Will Work in Practice

by Dr. Sara Cullen, Senior Consultant,
Cutter Consortium

Imagine you and I are building a house without drawings or specifications, instead relying on various tradespeople to use their experience to build what we have in mind. So the concreter lays the slab where he thinks is best, given his experience; the plumber puts the piping where she thinks it should go. The electrician wires the house as he deems it should be, and so on. They've all done this before, so there is no need for a plan, really. You and I don't know how to build a house anyway, and I'm sure we can both live in whatever they come up with, right?

Of course, this will sound extremely silly to anyone who has ever built a house, as well as to most of you who haven't. The place would simply be unlivable.

Nevertheless, this is exactly how outsourcing contracts are usually constructed. Think of the contract as something that not just one family (the customer) has to live in for years; the customer has to share it with another family (the provider). Rarely have I seen a master plan for the contract: typically, lawyers write the "legal bits"; technical folks write a specification of some sort; perhaps some financial type writes up the pricing and invoicing portion and a bit about insurance; and the list goes on. Everyone works independently, without a blueprint to guide them. The result is exactly what would happen if these people were building a house; it becomes unlivable for the occupants.

This is perhaps why the majority of contract managers on both sides (customer and provider) tell me they just put the contract in the drawer, for use if they run into problems they cannot solve, and just figure it all out in

practice instead. The contract is just too big, too complex, too hard to decipher, and too full of conflicting and ambiguous statements — a paper-based maze that is impossible to escape. You have to wonder why both organizations spend so much time and money on something with so little actual value to the businesses.

Of course, having an outsourcing arrangement without a contract poses a higher risk than dealing with one, perhaps even if it is poorly constructed. But it isn't so difficult to construct one that works, and it begins with the master plan, or the *contract blueprint*.

THE BLUEPRINT OVERVIEW

The blueprint begins quite simply with an overview that lists all the intended schedules and clause headings (see Figures 1, 2a, and 2b).

Even if you do nothing more than this, it will help the various people drafting their different bits of the agreement know what else will be covered, and where.

This is important. All of the contracts that I have reviewed over the last few decades, and there have been many, have conflicting statements and a great deal of repetition in them. One of the worst examples involved a performance reward system covered in the service-level agreement (SLA) schedule, but a performance recourse system described in the general conditions. The intellectual property (IP) was defined as owned by the provider in the general conditions but by the client in the special conditions, while different pricing mechanisms were dispersed throughout the document. In addition, many items, such as the work involved, were stated more than once, but in different ways. It was not that the group had set out to write an embarrassing and confusing contract; it was merely a function of who was involved and what they thought they were supposed to do in the absence of clear directions and context of the big picture. All did the best they could, with the skills they had, with their understanding of the task they were given, with their beliefs of what the contract was about.

Before we begin discussing creating a contract blueprint and bringing all of these pieces together to form a livable

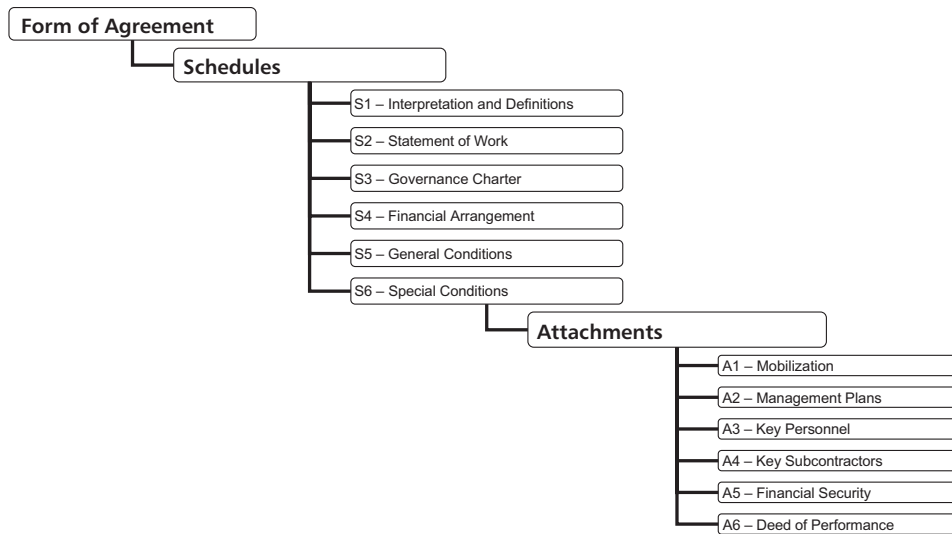


Figure 1 — Example blueprint overview (schedules).

contract, it is important to introduce the role of a *contract architect*. This person has the responsibility of drafting the blueprint and making sure the actual contents of the contract comply with it. The best person for this role would ideally be someone with commercial, financial, operational, and legal understanding of the deal at hand — both strategically and in detail.

THE BLUEPRINT DETAIL: USING THE FOA AS THE EXAMPLE

Putting the blueprint overview together is the easy part. Now comes the more difficult, most crucial aspect of the blueprint. This is where you put, in plain English, what is to be written in each clause.

We'll begin the detailed blueprint with an easy schedule, the Form of Agreement (FOA). This acts as the "cover sheet" for a contract. This is the first part of the contract and is typically only two pages.

Clause 1: Recital

The recital is the list of key events leading to the contract. The purpose is to provide background information to the reader as to how the parties came to form the contract, in this way giving a bit of context to the contract, while also indicating the nature of evidence

of intent that is present (e.g., a request for a bid and a bid response).

In the blueprint, you list the key events and the dates on which they occurred. If the contract was the result of a tendering exercise, you would give just the date the tender request was issued, the dates responses were received, and the date the deal was awarded to the provider. If it was the result of a renegotiation, just the dates concerning the previous contract's end and the period of negotiation would suffice.

Clause 2: Form of This Contract

This is where the schedules and attachments making up the contract are listed, as well as the order of priority in which to interpret the documents. It is enough to include, for example, the diagram in Figure 1 and state that this order also represents the interpretation priority.

Clause 3: Commencement and Termination Dates

At this point, all the blueprint needs is the start and end dates of the contract. If there are options for extensions, these should be stated here, too.

Clause 4: Authorized Representatives

This clause provides the details of the authorized representatives of both parties. These representatives act on

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<p>THE FORM OF AGREEMENT (FOA) Clause 1 Recital Clause 2 Form of This Contract Clause 3 Commencement and Termination Dates Clause 4 Authorized Representatives Clause 5 Signatories</p> <p>SCHEDULE S1 – INTERPRETATION AND DEFINITIONS Clause 1 About This Schedule Clause 2 Interpretation Clause 3 Standard Definitions Clause 4 Special Definitions</p> <p>SCHEDULE S2 – STATEMENT OF WORK (SoW) Clause 1 About This Schedule Clause 2 Scope Overview Clause 3 Detailed Work Description Clause 4 Performance Management Clause 5 Reporting</p>	<p>SCHEDULE S3 – GOVERNANCE CHARTER Clause 1 About This Schedule Clause 2 Roles and Responsibilities Clause 3 Meetings Clause 4 Reviews and Assessments Clause 5 Issue Management Clause 6 Dispute Management Clause 7 Variation Management</p> <p>SCHEDULE S4 – FINANCIAL ARRANGEMENT Clause 1 About This Schedule Clause 2 Amounts in General Clause 3 Taxes Clause 4 Invoicing and Payment Clause 5 Costs to Be Borne by the Parties Clause 6 Mobilization Costs Clause 7 Accounting by the Contractor Clause 8 Reimbursables</p>
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Figure 2a — Blueprint: FOA and Schedules S1-S4.

<p>Clause 1 About This Schedule</p> <p>Part A: The Agreement Clause 2 Conditions Precedent to the Contract Clause 3 Entire Agreement Clause 4 Governing Law Clause 5 Exercise of Rights Clause 6 Assignment Clause 7 Indemnities Clause 8 Contractor’s Representations and Warranties</p> <p>Part B: The Work Clause 9 Contractor’s Provision of the Work Clause 10 Standards and Procedures Clause 11 Workforce and OHS Clause 12 Subcontracting Clause 13 Force Majeure Clause 14 Extension of Time to Perform the Work</p> <p>Part C: Governance Clause 15 General Obligations of the Parties Clause 16 Relationship of the Parties Clause 17 Authorized Representatives Clause 18 Auditing Clause 19 Official Enquiries Clause 20 Variations Clause 21 Disputes Clause 22 Contractor’s Conflict of Interest Clause 23 Contractor’s Change of Control</p>	<p>Part D: Records, Information, and Communication Clause 24 Records Clause 25 Confidentiality Clause 26 Privacy Clause 27 Notices Clause 28 Use of Client Name, Logo, and Testimonials</p> <p>Part E: Financial Clause 29 Costs Clause 30 Payment Clause 31 Client Right to Offset</p> <p>Part F: Termination Clause 32 Termination in Full Clause 33 Termination in Part Clause 34 Disengagement Clause 35 Settlement of Accounts Clause 36 Post-Termination Clause 37 Termination Notice</p>
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Figure 2b — Blueprint: Schedule S5 (General Conditions).

behalf of the parties they represent. These will usually be the contract managers of the parties, as they are the “active” managers regarding the contract and manage its day-to-day obligations.

For blueprint purposes, state the positions that will act as the expected authorized representatives in both parties for this contract.

Clause 5: Signatories

Most organizations have found it useful to have the signatures up front in order to be able to quickly identify who actually signed the agreement, which is why it is in the FOA.

So, in the blueprint, state the positions that you expect to be the signatories in both parties.

FINISHING THE BLUEPRINT AND THE CONTRACT

This process continues for every schedule, every clause. While that may sound a bit onerous initially, the ratio is no more than one blueprint page for every three contract pages.

This is quite a minor investment to make in getting the deal written up well. First of all, it provides the master plan so sorely needed when preparing any out-sourcing contract. Then, by focusing on the intent, and not the exact wording, all the different but interrelated concepts that comprise a contract are worked out at a tactical level.

For example, let’s say that a key objective of the contract is to obtain technological innovations. Some of the interrelated issues are the specifications, KPIs,

pricing, IP, governance, and perhaps risk/reward. Without a blueprint, the likely result would be the absence of an innovation specification (typically, a process specification for how innovative ideas will be raised, business cases prepared, approvals made or not, piloting and/or adoption, investments made, and benefit realization monitored and reported). There might not be any KPIs regarding innovation, since the focus usually centers on operational KPIs, such as response times. The IP clauses may actually interfere with the intent (i.e., having the client own all created IP, ensuring innovation will not occur); and pricing might not cater for the investment and benefit realization cycle.

It is the contract architect's role to make sure the blueprint makes sense in totality with regard to what the contract is supposed to achieve. Then it can be given to the contract draftsman (a legal representative or a commercial drafter), or the *contract builder*. Note that the blueprint is actually an exemplary brief for any lawyer and can cut your legal cost to a fraction of what it would have been.

The contract architect would be on call for questions from the contract builder and may make period checks on progress. Once the fine print of the contract is completed, the contract architect would also make sure the final result is as it should be.

The result will be a contract that is concise, straightforward, and coherent. All the things that make contracts so frustrating to implement will be gone — such as:

- **Dead ends** — clauses that refer to things that don't exist
- **Infinite loops** — clauses that refer to clauses that refer to other clauses that refer back to the original clause
- **Irrelevant provisions** — for example, requiring product liability insurance for a labor contract
- **Conflicting statements** — saying one thing in one place and another thing altogether somewhere else
- **Repetition** — saying the same thing over and over

Without a contract blueprint and the role of contract architect as a key part of your contract-building process, the result will be a contract built with doors that won't open, rooms without windows, and sinks without plumbing. A shame that it's so easily avoidable.

ABOUT THE AUTHOR

Sara Cullen is a Senior Consultant with Cutter Consortium's Sourcing & Vendor Relationships and Enterprise Risk Management & Governance practices. She is the Managing Director of The Cullen Group, a specialist organization offering consulting, training, and methodologies regarding commercial agreements. Dr. Cullen was a former national partner at Deloitte in Australia, where she ran the outsourcing consulting division. She has consulted to more than 110 private- and public-sector organizations, spanning 51 countries, in more than 140 outsourcing projects with contract values up to US \$1.5 billion per year.

Dr. Cullen is a widely published author. Her publications include *The Contract Scorecard*, *Intelligent IT Outsourcing*, *Outsourcing: Exploding the Myths*, *Contract Management Better Practice Guide*, *Best Practices in ITO*, *Lessons Learnt in Outsourcing*, *Service Provider Management*, *Outsourcing Guidelines*, and *Outsourcing: What Auditors Need to Know*, in addition to research with various universities since 1994, including the London School of Economics, University of Melbourne, Oxford University, and the University of Warwick. She has been featured in such publications as *Australian Financial Review*, *Business Review Weekly*, *Computerworld*, *Directions in Government*, *European Journal of Information Systems*, *Information Economics Journal*, *Journal of Strategic Information Systems*, *Information Technology Report*, *Insurance Directions*, *Oxford Handbook*, *MIS*, and *MISQ Executive*. Her expertise is globally recognized, and she performs peer reviews of outsourcing research for *Harvard Business Review*, *California Management Review*, and *European Conference on Information Systems*. Dr. Cullen has lectured at many universities, including the University of Seoul, the University of Melbourne, the University of Monash, the University of Swinburne, Queensland University of Technology, and the Royal Melbourne University of Technology. Dr. Cullen earned a BS in accounting from St. Cloud State University (US); she was awarded a master's of management (technology) from Melbourne Business School, and earned her PhD from the University of Melbourne. She is also a Chartered Accountant in the US. She can be reached at scullen@cutter.com.