Contract management, sometimes referred to as contract administration, refers to the processes and procedures that companies may implement in order to manage the negotiation, execution, performance, modification and termination of contracts with various parties including customers, vendors, distributors, contractors and employees. While businesspeople often dismiss contract preparation as “lawyer’s work” that has little or nothing to do with the important aspects of the working relationship between the contractual parties, contracting is actually one of the crucial activities in determining the success of any business arrangement.

We assume that one of your roles as in-house counsel will be assisting your internal clients with contract preparations and it is absolutely essential that you work closely with your clients to establish well in advance your mutual expectations regarding the role that you will be expected to play in the negotiation, drafting, finalization and monitoring of a particular contract. In most cases, you should expect to be responsible for drafting the contract and all related documents as well as spotting and resolving specific legal issues. Managers inside your company will typically be responsible for identifying and resolving all of the business and risk management issues associated with the contract and the underlying relationship between the parties. However, in-house counsel do sometimes become heavily involved in negotiation of business issues and to have a great deal of input into the strategy goals and objectives of a particular contractual arrangement.

For each proposed contractual arrangement you should get in the habit of going through a checklist of the actions that you might be expect to take in order to assist the company. You’ll eventually develop your own checklist that you can refer to as time goes by; however, when you are first starting out we recommend that you consider each of the following “Top 10 Steps for Effective Contract Management”:

1. -
Make sure that you begin with a thorough investigation of both the business and legal background for the contract and the proposed transaction and business relationship in which the contract is to be used. Appropriate representatives of the company should be interviewed to determine how the relationship has evolved and what, if any, commitments may have already been made by the parties. This is also the time to give special consideration to the actual and potential impact on the company’s existing obligations and business relationships.

2. - Working with the appropriate representatives of the company, you should identify the steps that need to be taken in order to comply with the requirements of any contract review and signature authority policies and procedures that have been established by the company. For example, does the contract need to be reviewed and approved by senior management and/or the board of directors and, if so, what needs to be done in order to expedite review and consideration.

3. - Once you have a good understanding the scope of the proposed business relationship you should identify the contracts and related documents required to document the relationship and complete any immediate transaction and then proceed with collecting and reviewing examples of the necessary contracts to expedite the drafting process and isolate specific questions that the company will need to answer in order for the contract to be complete and accurate.

4. - If warranted by the complexity of the proposed transaction, you should prepare a time and responsibility schedule for drafting, review, discussion, revision and completion of all required items and activities. For example, a time and responsibility schedule is often useful for a financing transaction that must pass through several stages over an extended period of time including preparation of a business plan, presentations to potential capital providers, preparation of financing documents and satisfaction of closing conditions.

5. - Taking into account discussions with company representatives regarding your role, you should participate in the negotiation of the essential terms of each contract and, if appropriate and useful, prepare a term sheet or letter of understanding to be sure that the parties are in agreement regarding the essential terms before time and effort is spent on contract preparation. If you are not to be directly involved in negotiations you should, at a minimum, provide company representatives with a list of questions that will need to be answered in order for the contracts to be completed so that the representatives can discuss them with their counterparts from the opposite party.

6. - Once background information has been collected and preliminary agreement has been reached on the essential terms, you should prepare the initial draft of each of the required contracts and related documents or, in cases where the opposite party is responsible for drafting, review the initial draft of such items prepared by the opposite party; discuss and negotiate necessary changes in the initial drafts and make sure that revised drafts are circulated for review and finalization. The timing of the drafting and revision process is crucial since delays can push the relationship off track and jeopardize realization of the business opportunities anticipated by both parties.

7. - Once the documentation is finalized you should prepare for the closing of the transaction, including pre-closing meetings and preparation of closing checklists and memoranda. If certificates and/or consents from outside parties are required in order for the contracts to be finalized and become effective they must be planned for well in advance and may themselves require time-consuming negotiations.

8. - Once all conditions to consummation of the proposed business relationship have been satisfied or waived, you should oversee completion of the closing of the transaction at which time all contracts and related documents are executed.
and exchanged and any required performance at the closing (e.g., cash payments) is completed.

9. -
Once the closing is completed you should make sure that all of the closing documents are organized and that copies are delivered to all interested parties. This is also the time for you to make sure that the files relating to the transaction that have been opened during the process described above are organized so that they can be easily accessed in the future should questions arise.

0. -
Working with company representatives, you should establish a plan for ongoing review of the performance of each of the parties under the terms of the contract, at least in those cases where the contract is long-term and calls for continuous performance over an extended period of time. As part of the plan you should calendar any dates identified in the contracts that may require follow up action, such as performance milestones and option elections.

We cannot overemphasize the importance of determining your role in the contracting process and the level of active involvement that you may have in negotiations relating to the contract. In-house counsel’s role can vary from active negotiator to behind-the-scenes scrivener. In all situations where you are empowered to take some actions without managers being present, you should make sure that procedures are in place to promptly communicate any new development to the appropriate businesspersons within the company. Absent this type of communication, and a clear delineation of responsibility between you and other company participants, you may find that responsible managers within the company are unhappy with the way the company is being represented. Moreover, lack of coordination increases the risk of embarrassing conflicts and misunderstanding that send the wrong message to the parties on the other side of the transaction.

Even if you are not expected to play a primary role in negotiating the terms of the contract, you should make every effort to encourage managers to notify you as soon as possible that the transaction is contemplated. While businesspersons do not always do the best job of informing their lawyers in advance, even in the best of circumstances, you should always attempt to sensitize managers and other involved parties within the company to the possibility that unforeseen legal issues may emerge from a particular business decision. With that knowledge and understanding, businesspersons can be trained to always discuss business points with the caveat that a final decision will ultimately depend on review by “legal”. This Top Ten helps in-house counsel define the important considerations in the contract management process, regardless of their role.

The information in this Top Ten should not be construed as legal advice or legal opinion on specific facts and should not be considered representative of the views of its authors, its sponsors, and/or the ACC. This Top Ten is not intended as a definitive statement on the subject addressed. Rather, it is intended to serve as a tool providing practical advice and references for the busy in-house practitioner and other readers.

Reprinted with permission from the Association of Corporate Counsel (ACC)
2014 All Rights Reserved.

http://www.acc.com/legalresources/publications/topten/ttsecm.cfm