INCREASING COMPLIANCE, DECREASING RISK—

Putting the Spotlight on the Key Role of the Contract Manager

BY VIRGINIA A. SUVEIU

It is strange how little attention is given to the actual importance of a contract. TV commercials for cell phone services tout "no contract" as a marketing ploy, when—as we all too well know—the contract itself is the basis for the transaction. This simple example points to a broader misconception that a "contract" is just another boring legal paper, referred to only when a dispute arises (that is assuming, of course, the organization can actually *find* it.)

If contracts get so little attention, then certainly misconceptions and confusion surrounding the contract management profession abound. Does the contract manager belong in the requirements, project, finance, legal, or compliance offices–or simply "none of the above"?

Further compounding the confusion is the changing role of the contract manager in an uncertain and more complex world. As their volume of complicated contracts becomes heavier, organizations tend to become more ineffective at managing their contracts, collectively costing them more than $150 billion annually.[1]

The lead paragraph in NCMA's vision statement reads:

> Contract management will be *viewed* by all organizations and leaders–public and private–as an essential business management function that directly contributes to organizational success.[2]

The word "viewed" is important because the lack of understanding and appreciating the key role that the contract manager plays in increasing compliance and decreasing negative risk deals a heavy blow to an organization's overall success.

First, Some Definitions

What is *compliance*? It can be defined as conforming to relevant laws, regulations, policies, codes of conduct, and ethics, standards, procedures, and contractual obligations.[3] The compliance function, it then follows, "consists of efforts organizations undertake to ensure that employees and others associated with the firm do not violate applicable rules, regulations, or norms."[4]

We then get to risk. You may be rather surprised to find that the International Organization for Standardization (ISO) views risk as *neither* positive *nor* negative; instead, *risk* is the effect of uncertainty on an organization's ability to meet its objectives.[5] Further, the *Contract Management Body of Knowledge* (*CMBOK*) discusses uncertainty and risk in contract management.[6] With uncertainty, in essence, there is no background information whatsoever; however, this is not the same as an unknown risk.[7]

These concepts are continually evolving. With this in mind, we then come back to the contract manager. As defined by the *CMBOK*–

> [*Contract management* is] the process of managing contracts by a contract manager to develop solicitations, develop offers, form contracts, perform contracts, and close contracts. It is a specialized profession with broad responsibilities that include managing contract features such as deliverables, deadlines, and contract terms and conditions.[8]

The contract manager thoroughly understands that the contract itself is a core risk management tool, helping to curb negative risk and increase compliance.

Some misconceptions, however, include lack of understanding that contract management is a specialized profession and erroneously concluding that the process of managing contracts can be done by someone without contract management experience and merely as an additional job task, or solely to be done unchecked by software.

Misconceptions Lead to Big Problems

A recent survey of more than 160 CEOs and directors of North American public and private companies by Stanford University[9] revealed that directors and boards have varying views and priorities regarding regulatory compliance. One question in the survey asked what impact an unexpected regulatory problem would have on their overall evaluation. Of the CEOs and directors surveyed, 54.7% of directors stated it would have a "moderately negative impact," whereas only 42.3% of CEOs stated the same. Interestingly, and perhaps unsurprisingly, another question asked what impact missed forecasts of revenues/earnings would have, and 58.7% of directors answered it would have a "moderately negative impact," whereas 69.1% of CEOs stated the same.

Such statistics begin to paint a picture of the lack of understanding and appreciation on the part of some leaders of the key role contract managers play in not just curbing or avoiding entirely unexpected regulatory problems, but also the role that the contract manager plays in adding to the organization's bottom line. Furthermore, this lack of understanding and appreciation flow down to other areas of the organization.

Let us consider the topic of job descriptions for a moment. Recent research in the UK[10] concluded that poorly defined job descriptions drive staff turnover. Specifically, 68% of HR managers believe that poor job descriptions directly contribute to weak candidate pools, which exacerbates the problem of poor candidate fit. Further, 79% of HR managers responded that actually getting good job descriptions from management is difficult and time consuming. The question then arises: Does management actually understand what the organization needs?

Some have concluded (and in some corners, there is growing advocacy for this notion)[11] that in order to simultaneously solve the problems of increased costs, growing contract complexity, dangers of noncompliance, and poor candidate fit, technology is the only solution, and can even completely replace the contracting professionals currently doing all the work. Such a misguided conclusion is dangerous to automatically leap to. If one does not understand the role of the contract manager, how can one claim to have found the contract manager's replacement?

Given this backdrop, are contracting professionals fully aware of just how important their roles actually are? In October 2017, the Department of Justice's (DOJ) Office of the Inspector General (OIG) found that one of its major challenges was insufficient oversight of DOJ's contracts and the failure to comply with the *Federal Acquisition Regulation* (*FAR*).[12] This lack of oversight was of particular concern given that in fiscal year 2017, 27% (or $1.95 billion) of its contracts were time-and-material and labor-hour contract awards. The OIG found systemic problems, such as:

- Failure to adequately review invoices, and to pay them in a timely manner;
- Failure to maintain sufficient documentation in the contract; or
- Failure to enter accurate information into the Federal Procurement Data System.

All of these issues, of course, are in noncompliance with the *FAR*. The OIG's audit highlights the challenge facing DOJ in ensuring that contracting officials truly understand the extent of their responsibilities regarding contract administration and oversight.

Another interesting example concerns the issue of cybersecurity. Contractors that do not make cybersecurity compliance a priority *now* will not only be left behind, but will also be more likely to face harsh consequences, such as False Claims Act allegations, suspension, or debarment. FAR 52.204-21, "Basic Safeguarding of Covered Contractor Information Systems," essentially imposes specific requirements for contract information systems processing or transmitting "federal contract information."[13] At first glance, the requirements seem straightforward, such as limiting access to your information system–yet, compliance can be quite onerous and expensive. Although a modification or equitable adjustment could be sought, a smarter approach would be to fully utilize your contract manager's skills to understand and discuss the *FAR*'s requirements with the appropriate stakeholders and customer at the proposal stage.

Conclusion

The answer fundamentally lies in NCMA's vision statement; that contract management "will be viewed as an essential business management function directly contributing to organizational success." Obtaining and maintaining that visibility is essential. Already, increasing attention is being given to contract risk management issues, and that can be used to the profession's advantage as it evolves. For instance, the Office of the Comptroller of the Currency (OCC), in its guidance to national banks and federal savings associations, highlighted a major area of concern for contracting professionals to pay attention to: Standards for third-party services contracts.[14]

Contract management is a specialized profession, and the profession is changing.[15] The role of technology in not a panacea; rather, it is a tool to help free up time on task-oriented activities, to then allow more time for the contract manager in relationship-building, negotiation, leadership, etc. In this era of tighter budgets and extra pressure to show value, a good idea is to align budget requests for necessary technology to the wider business strategy. Professional organizations such as NCMA must play an increasingly important role in advocacy and education, which also includes more emphasis on title and job description terminology standardization. CM

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ENDNOTES

1. *See* Prosidian Consulting LLC, *Managing Contract Risks: The Increased Importance of Contracts as a Risk Management Tool* (2011): 3, *available at* www.prosidian.com/assets/pdfs/Managing%20Contract%20Risks%20-%20Importance%20Of%20Contracts%20As%20A%20Risk%20Risk%20Management%20Tool.pdf.
2. *See Contract Management Body of Knowledge (CMBOK)*, fifth edition (Ashburn, VA: National Contract Management Association, 2017): 20. (Emphasis added.)
3. *See* Weinstein and Wild, *Legal Risk Management, Governance and Compliance* (Globe Publishers, 2012).
4. Geoffrey P. Miller, "The Compliance Function: An Overview," *New York University Law and Economics Working Papers* (2014): Paper 393, *available at* http://lsr.nellco.org/nyu_lewp/393.
5. ISO 31000:2009, "Risk Management–Principles and Guidelines" (*see* www.iso.org/iso-31000-risk-management.html). (Note: A new version of ISO 31000 is due to be unveiled later this year.)
6. *See* note 2, at Section 2.4.2.2.
7. While the *Project Management Body of Knowledge* describes *uncertainty* as a lack of total certainty, it is difficult, if not impossible, to fully grasp the concept of uncertainty.
8. *See* note 2, at 2.
9. Stanford University, Center for Leadership Development and Research, Stanford Graduate School of Business, Rock Center for Corporate Governance & The Miles Group; "2013 Survey on CEO Performance Evaluations" (2013).
10. Conducted by the Hay Group (2015) (*see* http://www2.cipd.co.uk/pm/peoplemanagement/b/weblog/archive/2015/06/19/poorly-defined-job-descriptions-drive-staff-turnover-finds-research.aspx).
11. *See, e.g.*, Kathryn D. Betts and Kyle R. Jaep, "The Dawn of Fully Automated Contract Drafting: Machine Learning Breathes New Life Into a Decades-old Promise," *Duke Law & Technology Review* (2017).
12. "Top Management and Performance Challenges Facing the Department of Justice," *available at* https://oig.justice.gov/challenges/2017.pdf#page=19.
13. FAR 52.204-21 defines *federal contract information* as any acquisition-related information not public and not purely for transactional purposes. This broad definition signifies that the clause covers most federal contractors. Likewise, this clause flows down to subcontractors that "may have" federal contract information in or flowing through their systems.
14. "OCC Guidance on Third-Party Risk Management" (2013), *available at* www.occ.gov.
15. *See, e.g.*, Michael Fischetti, "Changing the Role of Contract Managers" (September 26, 2016), *Federal Times*, *available at* www.federaltimes.com/smr/acquisition/2016/09/26/changing-the-role-of-contract-managers/.

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