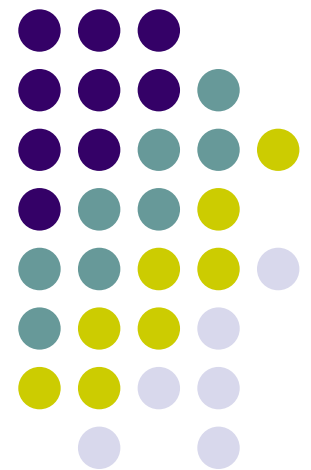
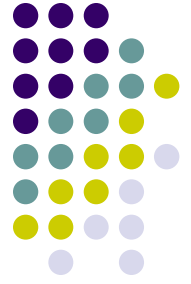


Software Contracting

Nancy A. Armatas
Popovits & Robinson
January 20, 2005



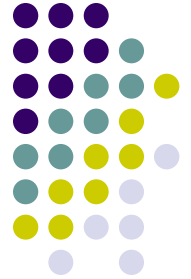


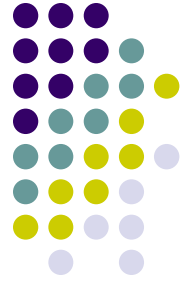
Basics

- Develop detailed specifications/RFP
- Conduct due diligence on vendor
- Put it in writing
- Do not execute pre-printed forms without review

Agreements

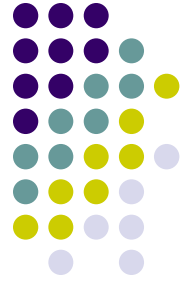
- License Agreement
- Maintenance/Support Agreement
- Source Code Escrow Agreement





Type of License

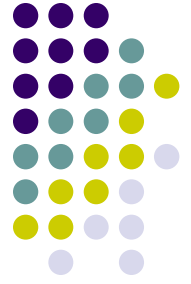
- Transferable/Non-Transferable
- Exclusive/Non-Exclusive
- Perpetual/Terminable
- Enterprise/Affiliates/Sites



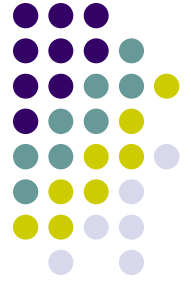
Scope of License

- Permitted Uses
 - Copying
 - Distributing
 - Selling/Transferring
 - Anticipate future needs
- Restrictions
 - Specific hardware
 - Locations
 - Number of users – changes over time

Payment Terms – How Much?



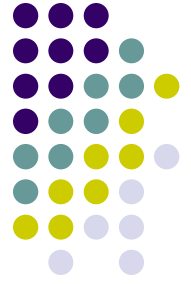
- Fixed vs. time and materials
- Include a clause precluding other costs
- Negotiate up in support if cannot reduce price
- Payment holdbacks/penalties



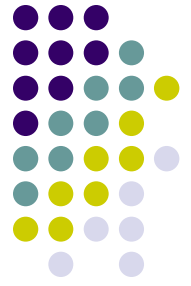
Payment Terms - When

- Payment based on events
 - Execution of agreement
 - Delivery/Installation
 - Acceptant Testing – Pre-live/Post-Live
 - Completion of training
 - Warranty Period
- Payment based on performance

Payment Terms – For what?



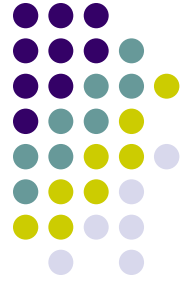
- Upgrades
- New releases
- Enhancements
- Bug fixes



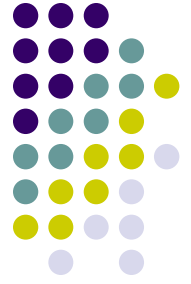
Implementation

- Documentation – User’s Manual
- Training
- Timetable – “Bundles” of functionality
- Progress Meetings/Reports
- Data Transfer/Conversion – No data destruction

Staffing



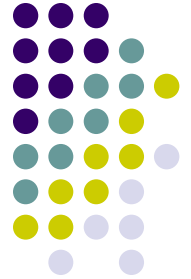
- Minimum personnel commitment
- Replacement of vendor's personnel
- Designation of decision maker
- Non-Solicitation



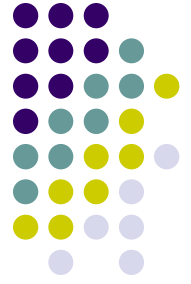
Warranties

- Performance warranties
- “Sunset” warranty
- Warranty against infringement
- Warranty of no illicit code
- Compliance with law
- No virus warranty
- Warranty term

Maintenance/Support



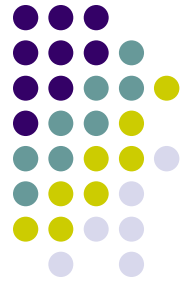
- Warranties
- Separate from license agreement
- Annual increases in fees
- Response times



Source Code Escrow

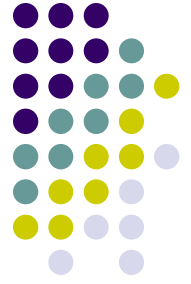
- Attempt to include source code in license
- If not, insist on an escrow
- Escrow must be kept updated
- Three-party escrow agreement
- Release conditions:
 - Failure to perform maintenance obligations
 - Events that indicate financial instability
 - Practicality of using vendor

Confidential & Proprietary Info

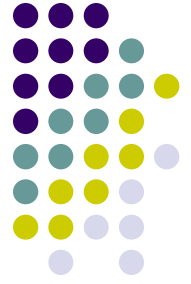


- Proprietary Markings
- Ownership of intellectual property
- Protection of confidential/proprietary information
- Return of Confidential Information
- HIPAA Security Standards
- Business Associate Agreement
- QSO Agreement

Limitation of Liability Indemnification

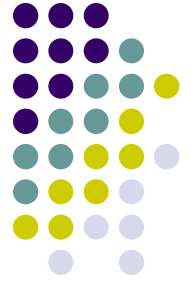


- Negotiate for a larger cap on damages
- Consequential or incidental damages
- Separate indemnification for intellectual property
- Time either party can file a suit
- Insurance



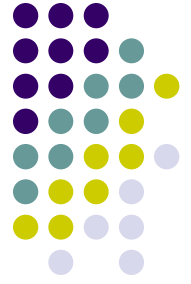
Standard Contract Clauses

- Assignment
- Force Majeure
- Choice of Laws
- Contract Changes
 - Changes in law
 - Changes in technology
 - Changes in specifications
- Integration Clause
- Arbitration/Mediation



Remedies

- Events giving rise to remedies:
 - Implementation deadlines
 - Breach of warranties
 - Support/maintenance obligations
- Available Remedies
 - Termination
 - Payment Penalties
 - Liquidated Damages
 - Specific Performance



- Questions?

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