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## **Software Contracting From Legal and Cost Perspectives**

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### **UCC**

- Goods not services
- Software will become a good in the new UCC
- For now treat software as neither a good nor a service
- Key words: TIME AND MATERIALS

## **Warranties**

- Express
- Implied
- DISCLAIMERS

## **Uniform Commercial Code**

- Implied warranties
  - Merchantability §2-314
  - Fitness for Particular Purpose §2-315

## **Uniform Commercial Code**

- Disclaimer of Warranties §2-316
  - Conspicuous
  - Cannot contradict
  - Must mention implied warranties specifically

## **General Clauses to Add to Agreements**

- All Remedies at Law or in Equity
- Remedies are Cumulative
- Right to Set-Off

## **Three Most Basic Remedies**

- Repair
- Replace
- Return

## **Brother/Sister Remedies**

- Resell
- Cover
- Termination for Cause
- Termination for Convenience
- Injunction
- Specific Performance

## **Damages**

- Actual/Direct
- Consequential/Indirect
- Incidental
- Liquidated
- Punitive

## **What can you change in a contract?**

- Front of the PO vs. back of the PO
- Never change “magic language”
- Run important changes by legal
- Know implications of what you’re changing
- Making a clause “mutual” may not be the answer

## **Software Costs - Key Points to Consider**

### **Cost Considerations**

- Initial investment (cap ex)
- Ongoing (op ex)
- The upfront negotiations will largely determine the ongoing costs of ownership.
- The costs that are hidden are the ones to worry about.

## **Initial Investment**

- Type of license contemplated
  - Named users
  - Core/processor-based
  - Concurrent users
  - Site/enterprise license
  - Subscription-based
  - Software-as-a-Service (SaaS)

Costs vary greatly between the license types

## **Primary Costs**

- Primary & third party licensing
- Hardware
- Escrow
- Maintenance/support
  - Future upgrades
    - » Minor vs. major releases
- Implementation services
  - Rates
  - Labor classifications
  - Level of effort
- Test bed

## Secondary Costs

- Acceptance provisions
- Payment schedule
- Increases/caps to maintenance/support
- Additional future licensing
- Decommissioning unused licenses/modules

## Ongoing

- Annual Support
  - Remote vs. onsite
  - Response time vs. resolution
- Upgrades
  - Minor releases
  - Major releases
    - Obsolescence
    - Infringement issues related to upgrades
  - New operating systems
  - Hardware costs

## **Points to Consider**

- Are there multiple providers in the market?
- What is the best license type for your situation?
- How is an upgrade defined?
- How long will previous versions be supported?
- What guarantees come with support?
- Can support be done in-house? Warranty issues?
- Implementation costs
- What is the true cost of ownership?

## **Wrap Up**

- Questions?