

Falconbury Successful Contract Management and Administration

Module 3 Efficient administration techniques and skills

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EFFICIENT ADMINISTRATION TECHNIQUES AND SKILLS

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1. INTELLECTUAL PROPERTY: AN INTRODUCTION

Introduction

Intellectual Property (IP) and Intellectual Property Rights (IPR) are topics which cause people to feel uneasy. This is a complex subject area, especially when international dimensions are considered. Many larger companies have their own IP departments staffed by qualified patent attorneys and other legal staff. Other companies buy in specialist support.

Yet in business almost everything that a company employee touches has a connection with IP. Although IP is intangible (as compared with the tangible property a company has such as machinery), it is nevertheless one of the most important assets that a company possesses. Put simply:

'Today's ideas, know-how and skills are tomorrow's order, profit and security.'

Thus it could be said that it is almost a duty of every employee to grasp something of the basic principles of IP so that the company's future is held securely.

Intellectual Property, sometimes referred to as Industrial Property, could be defined as the intangible property created through the application of the intellect to technical or commercial matters. Since it is a form of property it has an owner or proprietor and has some value. The property is intangible since, although the documents representing the various forms of IP are tangible, the intellectual content is of an intangible nature.

More simply, IP could be described as the ideas, inventions, designs, know-how and reputation which belong to a particular company. IPR are the rights arising from contract, law or statute that entitle the owner of the property to protect and exploit it.

More and more the importance and value of IP and the need to protect and exploit it is being driven home to companies as they have to keep pace with advancements in technology and stay ahead of their competitors.

The commercial value of IP can be realised in basically four ways:

- a) By selling a product which has been made by virtue of the IP – which may be a unique design or a unique manufacturing process or both.
- b) By outright sale of IP. In selling an idea, just as in selling a product, the seller has transferred all legal rights to the buyer who may do with the idea whatever he wishes.
- c) By permitting use by others of the IP in return for some payment. This is known as licensing. Unlike a sale the licensor retains ownership and rights in the property and can exercise control over the use to which the licensee puts the property. Clearly the advantage to the licensee is that by acquiring IP he acquires the ability to enter new technology or geographic markets. This may be an extremely attractive alternative to carrying out his own research and development which may be prohibitively expensive and carries the risk of failure, either to complete the development at all or to complete it in time to enter the particular market. On the other hand, the licensor has the opportunity to indirectly enter markets which hitherto had been closed to him, perhaps because of export or import restrictions. Alternatively the licensor may simply be

seeking a continued income from designs which he may no longer wish to manufacture himself, for example where in his own territory the design is 'old technology' or where his own manufacturing facility has reached the end of its useful life.

The two parties to a licence might agree that the licence will pay the licensor either a royalty based on the value of sales made or a fee not linked directly to the potential value of the licence, or both.

The advantage of a royalty is a potentially continuing source of income for the licensor but with the risk that no sales will be made. A simple fee only gives the licensee the risk of not achieving sufficient sales to recover the cost of the fee, but on the other hand once he has broken-even he has no further payment to make to the licensor. A fee and royalties tend to be used where there is a transfer of technology.

- d) By the enhancement of a product selling price arising from reputation/goodwill. The current trend in 'designer' clothes is an example of this. It has always been the case that 'certain names' will sell better and at a higher price than others, but more and more designers and manufacturers are realising the importance of this aspect of IP.

The concepts

One way of grasping the significant aspects of IP is to imagine the creation of the device called the wheel. The IP in this device might be as follows:

- **Patent:** The invention of the wheel being a circular device revolving on an axle as the basis for a means of moving things.
- **Copyrights:** Any drawings of the wheel.
- **Design:** Blue rim/yellow spokes.
- **Trade mark:** The 'Ride easy'.
- **Trade secret/know-how:** The technique for balancing the wheel.
- **Goodwill:** The reputation gained by the reliability of the wheel.

It is not the intention to explore sources of IP law in detail. It is a subject worthy of further study by the contract administrator and further reading is recommended. The aim here is to provide a basic understanding of the principles.

Patents

What is a patent?

A patent is a pact between an individual and the state. The state grants the individual the right to prevent anyone from making, using, selling or importing his/her invention for up to 20 years. In return, the details of the patent application are made public 18 months after it is filed.

A patent can be a valuable commercial asset:

- 1) A patent can be used to prevent competitors from trading in articles or using methods covered by the patent, so patent owners can charge a premium for their products.
- 2) The owner of a patent can earn an income from his/her invention through royalties paid on licensed products.
- 3) A patent can be bought and sold like any other asset.

What inventions can be patented?

An invention can be a new product, a new process, a new apparatus for performing a process or, in certain circumstances, a new use of a known product.

To obtain a patent an invention must be:

- 1) new
- 2) not obvious in the light of what has been done before, and
- 3) have a practical application.

Many inventions are simply improvements upon a prior invention. If the prior invention is less than 20 years old, it may itself be protected by a patent which is still in force.

An invention cannot be patented if knowledge of it is already in the public domain. To be granted a patent, an invention must not have been published or disclosed anywhere in the world before an application is made.

Inventors wanting to study earlier patents to help them with their own R&D can access databases like Esp@cenet for free from the Patent Office web site.

How is a patent enforced?

In the UK, a patent is enforced by bringing legal proceedings in a court of law. If successful, such action can result in an injunction to stop further infringement as well as an award of damages in respect of past infringement.

A United Kingdom patent only grants rights within the UK. To stop someone making use of an invention abroad, inventors must apply for patents in the countries in which they require protection.

The European single market does not override national patent systems. The borders are still there for patented inventions.

For more information on patents contact The Patent Office Central Enquiry Unit on 08459 500505. Also, see The Patent Office web site at www.patent.gov.uk.

Trade Marks

What is a trade mark?

A trade mark is a symbol or sign used by a trader to distinguish his or her product or service from those of other traders. Trade marks can help customers and traders to recognise a business and identify it with the quality of product or service for which the company is known. Trade marks can be words, logos, colours, shapes, sounds or jingles which help to create a distinctive image for a company.

Trade marks are essential for companies to protect their brands, reputations and business.

Trade mark protection is important for any company with a recognisable identity. With markets becoming increasingly competitive and companies frequently offering very similar products, it is important for businesses to make themselves and their products recognisable from their competitors. Companies use their brands to achieve this distinctiveness.

Brands are central to marketing programmes and it is a trade mark that protects the distinctive elements that make up the market identity element of most brands. Many celebrities seek to profit through merchandising using the reputation of their name. By registering their name as a trade mark, they can control the way their reputation is used to endorse products in the marketplace.

What is the difference between a registered trade mark and an unregistered trade mark?

A registered trade mark involves the owner of the mark registering it with the Trade Marks Registry as a mark applying to one or more classes of goods or services. Owners of registered trade marks have the exclusive right to the use of their marks in the territory in which the mark is registered. Unregistered trade marks do not benefit from such formal protection.

International marketing practices mean that in the UK, registered trade marks are identified with the symbol ® whilst unregistered marks are followed by the letters TM.

What trade marks can be registered?

To be registrable, the trade mark must act as a badge of origin for a product or service. It should not be misleading or easily confused with other marks. Sometimes a mark may be eligible because it has been in use for some time and is recognisable as belonging to somebody already.

Laudatory terms may not be registered, nor may descriptive terms in the relevant class (eg, 'apple' in grocery), so that all traders retain basic freedoms.

A trade mark can first be registered for ten years and then renewed for a fee at ten yearly intervals. Subject to renewal, the state allows protection by trade marks only whilst they are in constant, relevant use.

How is a trade mark enforced?

Generally, in the UK, a trade mark is enforced by bringing legal proceedings in a court of law. If successful, an injunction can be obtained to prevent further infringement and an award of damages may be made in respect of past infringement. In counterfeiting cases, the assistance of regulatory authorities such as Customs, Trading Standards and the Police can be used to have the infringing goods seized.

Unregistered trade marks, eg, business names, are generally protected by the common law principle of "passing off". If a name is used sufficiently to establish a reputation for trading in a given field and a competitor appears under the same or a similar name, an action can be taken in the courts on the basis that the competition is falsely passing off their goods and services as yours.

For more information on trade marks contact: The Patent Office Central Enquiry Unit on 08459 500505. Also, see The Patent Office web site at www.patent.gov.uk

Design Registration

What is a registered design?

Once a new design is registered the owner has the right to stop others from making or selling the same or similar designs. Where products are distinguished in the marketplace by their appearance (eg, furniture) design registrations can help. The registrable design may be:

- 1) a new article (eg, the shape of a kettle)
- 2) a new part of an article (eg, an elaborate handle for a knife)
- 3) a new two-dimensional pattern or ornament suitable for use on an article (eg, a floral pattern on plate, or curtains, or clothing etc.).

Initially the right lasts for five years, renewable every five years to a maximum of 25 years. Like any other business commodity, it can be sold or licensed under terms agreed with the registered owner. The design protected by registration can also enjoy parallel protection through copyright or unregistered design right if appropriate.

How are designs registered?

An application for design registration only requires a few pictures showing different views of the design, and an indication as to what the design might be applied to (though this does not limit the legal protection just to that application). Registration is possible even for handicraft items and one-off items.

There must have been a 'freedom of design' in the creation, so where a jug has a distinctive shape it is registrable because it could have had many other shapes and still have been a jug. However, where form is dictated by function, or dictated by the need to fit with other parts (eg: a brake pad which needs to fit in the callipers) no registration is possible.

The design must be new on the day the application is filed, that is to say not likely to be previously known anywhere in the world by a designer working in the same field. Furthermore, the design must have 'individual character'. This means it must not give the notion of 'déjà vu' in the mind of an 'informed user', namely one familiar with the product in question who is not a designer. For example, if a stationer would not easily discern the differences between an existing pen and a new pen seeking registration, the latter would fail.

The design will still be judged as novel on the filing date even if the designer has disclosed their design (eg, sold it) at any time in the 12 months prior to filing. This one-year 'grace period' allows designers to test the market before deciding if registration is appropriate. However, any disclosures by others of designs which are the same or similar, even if they occur during those most recent 12 months, will count against the applicant when assessing novelty.

Is there an international registration for designs?

At the moment there is no all-embracing international registration for designs. To ensure protection for a design outside the UK, separate applications for registrations need to be made in each country in which you want protection. However, Europe has recently harmonised its rules so the same registrability criteria and duration of protection now apply in all EC member states. A single EU-wide right, administered by OHIM in Alicante, became available during 2003.

Copyright*What is copyright?*

Copyright is a property right that protects original literary, dramatic, musical and artistic works, published editions of works, sound recordings, films and broadcasts.

Copyright protection in the UK exists automatically if the work has been “fixed” in some manner - if it physically exists - in the form of a manuscript or computer program for example. There is no formal registration system for copyright in the UK.

There is no copyright in a name, title, slogan or phrase, although these may be eligible for registration as trademarks.

Copyright cannot protect an idea, it may protect the work that expresses an idea but not the idea behind it.

Copyright in a literary, dramatic, musical or artistic work lasts for 70 years after the death of the author. Sound recordings, broadcasts and cable programmes are protected for 50 years and published editions are protected for 25 years. These terms only apply to work originating in the UK or another state of the European Union. In all other cases the term of protection is that granted by the country of origin of the work.

Although some countries require that work be marked with the international © mark, followed by the name of the copyright owner and year of publication, this is not essential in the UK or most other European countries.

As a form of intellectual property, copyright can be bought, sold or otherwise transferred. Copyright owners can choose to license others to use their works whilst retaining ownership over the rights themselves.

Who owns copyright?

Copyright exists independently of the medium on which it is recorded. Buying a copy of a book or CD does not necessarily give you the right to make further copies - even if they are for private use. Photocopying a work, scanning a work to produce an electronic copy or downloading a copy which is in electronic form all involve copying the work and will also require permission.

Permission to use copyright material is obtained by approaching the copyright owner. The owner of copyright in a work is usually its author or creator. However, the copyright in an employee’s creations is automatically assigned to their employer. Conversely, a contractor retains the copyright in any commissioned work unless their contract is explicit to the contrary.

There are certain circumstances where permission to copy or use copyright material is not needed. Limited use of works is permitted for research and private study, criticism or review, reporting current events, judicial proceedings and teaching in schools. However, copying large amounts of material or making multiple copies will require permission. Publication of excerpts, such as quotes, from a copyright work will require an acknowledgement.

Copyright and the Internet

Copyright law applies on the Internet as it does to paper.

It is an infringement of copyright to post material on a web site without the consent of the copyright holder. This applies whether the site is on an intranet (accessible only to members of an organisation) or the Internet.

The World Wide Web is subject to copyright in many different ways:

Web pages and any textual articles contained on a web page are separate literary works. Graphics are generally artistic works, whilst any sound files are sound recordings which contain separate musical works. In a single web page there are likely to be many different copyrights.

To copy and paste anything from a web page into a document of your own or to print out a web page, you should obtain the permission of the copyright owner. Many web sites contain a copyright notice detailing how the material they contain may be used. Permission may already have been granted within this notice.

If you include a hyperlink on a web page, although you are not actually copying, you may be authorising somebody else to make a copy of the material which you are linking to. Permission should always be obtained before a link is established. Webmasters are usually happy for other sites to link to theirs, as more links mean more hits to their site.

How is copyright enforced?

Because copyright is not registered like the other three IP rights, three hurdles must be overcome to bring an action against infringers. First, you must convince a court that your complaint concerns copying: if another's work is the same or similar to yours by coincidence then you have no case against them. Second, you must show that you own the copyright in the original work you allege has been copied. Finally, you must show that the work in question falls within the scope of those creative works afforded protection under the Copyright, Designs & Patent Act 1988.

For more information on copyright contact: The Copyright Directorate on 08459 500505. Also, see The Patent Office web site at www.patent.gov.uk.

Common Errors

“Mr X has applied to have his name copyrighted”

There is no copyright in a name, title, slogan or phrase, although these may be eligible for registration as trade marks.

“Last year 3000 inventions were copyrighted in the UK”

Inventions are protected by patents. An invention can be patented but you cannot copyright an invention.

“Mr X wants to copyright his idea”

Copyright cannot protect an idea. It may protect the work that expresses an idea but not the idea behind it.

“Mr X has applied to patent his design”

Designs cannot be patented. Designs are protected by registration through the UK Designs Registry.

“Mr X has infringed the copyright of Mr Y’s patent”

Copyright and patents are two completely separate forms of intellectual property rights.

Copyright infringement affects an original literary, dramatic, musical and artistic work, sound recording, film, broadcast, blueprint or schematic, whilst patent infringements affect technical or functional inventions.

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Commonplace considerations

The foregoing serves as a very good introduction, but nevertheless an introduction only. It is not suggested that contract administrators should consider themselves equipped for patent filing or deciding between design registration or non-registration. Such things are strictly for the experts. However, very many commonplace contracts implicitly touch upon IP matters and to the extent that this is so there should be express terms in the contract. If the contract is for the supply of goods only the physical property transfers to the buyer who can do whatever he likes with them, to use them, modify them (which may invalidate any warranties) or sell them. Of course he only buys the physical property and thus has no right to manufacture or sell copies as no rights in the design have been sold.

In contracts which go beyond the pure and simple supply of goods there is the need to think about IPR issues, for example in the following instances:

- a) If the contract calls for the provision of documents, handbooks or reports, whose is the copyright? Can the buyer make and distribute copies?
- b) If the contract calls for design and development work, who owns the design? Can the seller and/or buyer exploit it commercially? Are there any licence arrangements to make?
- c) If the seller is providing a design and the rights to exploit the design, what is the position regarding any proprietary features?
- d) If, as a result of the contract, the IPR of a third party are infringed, is the buyer or seller or both or neither liable?

These are the situations that need to be thought through on a case by case basis. The point here is that the two parties to the contract can make any agreement they like as regards ownership of any rights in their respective IP. If there is a third party IP involved then their freedom will be limited by whatever is the contract or licence under which the third party IP is available to them.

Although all is open for negotiation and agreement, some general comments usually apply:

- a) Ownership of proprietary information remains with the proprietor and the ‘buyer’ obtains rights under licence. The rights acquired are usually the minimum necessary to meet his needs. More rights – more cost.
- b) Where the buyer or client is paying for the creation of a design and its associated documentation, IP may belong to the designer in which case the contract secures rights for the buyer as in (a) above. The IP may belong to the buyer in which event the designer may have rights under the contract to use the design for his purposes.
- c) Use of somebody else’s IPR usually involves a sum of money, either as a licence fee or royalty. In respect of his own IPR the seller may include the sum within the price for the work.

- d) Where the contract is based upon IP to be provided by the seller it is usual for the seller to indemnify the buyer against third party action for infringement or alleged infringement. The converse also applies.
- e) Where the buyer needs to acquire rights from the seller not only for his own internal purposes but also to pass on to his customers, these rights to 'sublicense' must also be secured under the contract.

Wherever IPR are involved, whether they belong to the parties (to the contract or to third parties) the ownership and terms (ie monetary sums and conditions) must be somewhere recorded in writing. This can be either within the express provisions of the contract or by a separate licence agreement.

A typical contract clause covering IPR is as follows:

Example A

Ownership and Use of Technical Data

- 1) Save as provided in this condition the Intellectual Property Rights in the Technical Data shall vest in the Subcontractor.
- 2) For the purpose of this condition 'Technical Data' shall mean all materials produced and delivered by the Subcontractor, its servants or agents for the Contractor pursuant to any development work performed under this Contract and shall include all specifications, production and working drawings, calculations, formulae, bills of material, technical information, computer software and firmware and other documents, models, mock-ups and all other data called for in and arising from such development work.
- 3) The Subcontractor hereby grants to the Contractor a royalty free non-exclusive, irrevocable licence to manufacture for the Contractor, for its own use in the event that the Sub-contractor is unable or unwilling to meet the reasonable requirements of the Contractor for price and delivery, those items necessary to maintain, modify or support existing equipments or to manufacture complete systems as required by the Contractor.
- 4) The Contractor is hereby granted the right to use, reproduce, adapt or otherwise modify software deliverables under this Contract for its own purposes. Such use, reproduction, adaptation or modification shall not be guaranteed by the Subcontractor unless such use, reproduction, adaptation, modification shall result from work contracted to it.
- 5) The Contractor is hereby granted the right to use, reproduce, adapt or otherwise modify Technical Data deliverables under this Contract for its own purposes. Such use, reproduction; adaptation or modification shall not be guaranteed by the Subcontractor unless such use, reproduction, adaptation or modification shall result from work contracted to it.
- 6) Before applying for Letters Patent or Registration of Design in respect of any invention or design first evolved, discovered or reduced to practice during work under this Contract, the Subcontractor shall consult with the Contractor with a view to determining whether an officer or employee of the Contractor is a part inventor of an invention or a part author of the design, and if so to agree the conditions under which the Contractor or its officer or employees shall be a party to the application.

- 7) Nothing contained herein shall derogate or purport to derogate in any way from the right of the Contractor, or a person authorised in writing by the Contractor, to use any invention or design pursuant to the Patents Act 1952 or such other as may for the time being be in force in relation to inventions and designs.

This example is extracted from a real contract. This was chosen rather than a hypothetical example to demonstrate how the wording (which is a little clumsy) ends up as a compromise of drafting between the two sides but also how pragmatic it is in its endeavours to address real issues rather than theoretical possibilities.

Clause 1 provides an unequivocal statement that the IPR belong to the subcontractor except to the extent that rights are conveyed to the contractor under later clauses.

Clause 2 provides a definition of the material captured by the IPR condition. It is important not only insofar as it lists the categories of material that are included but also because it specifies 'all materials produced and delivered'. This means that it is not limited to IP generated at the expense of the contractor but that it includes pre-existing IP which the subcontractor brings to the contract. It also embraces the idea of 'delivered by the subcontractor, its servants or agents'. This says that the subcontractor must be careful to secure similar rights with his suppliers so as to be free to perform his own obligations to the contractor. The definition is also interesting because it catches items such as working drawings and calculations which on the face of it are background information and not strictly essential.

Clause 3 includes a number of important concepts. In this the subcontractor grants a licence to the contractor to be operative only in the specified circumstances of the subcontractor's inability to meet the contractor's potential future needs. 'Royalty free' means that the contractor will not have to pay for such rights. 'Irrevocable' means the subcontractor cannot later change his mind and withdraw the licence grant. With this extensive right of the contractor the purpose of the catch-all definition in Clause 2 becomes clear. If the contractor could later find himself in the position of manufacturing spare or replacement units to the subcontractor's design then he needs as much background information as possible.

In Clauses 4 and 5 is found the basic grant of rights. This is quite extensive as the rights are only bounded by words 'for its own purposes'. As the purpose could be to compete against the subcontractor with his own product in his own markets this could expose the subcontractor to quite a risk. The final sentence in each case is quite reasonable as it relieves the subcontractor of any liability for work which he himself did not do.

Clause 6 is consistent with Clause 1 in that it recognises that the responsibilities for and the benefits deriving from patent application and design registration lie with the subcontractor except to the extent that the contractor might have participated in creating the invention or design. The clause contemplates a separate agreement as to the terms relating to joint inventions. Although strictly speaking an agreement to agree is not legally enforceable the parties are saying that whilst conceptually joint inventions might arise, there is no point in establishing, nor indeed is there any basis for determining, the terms for that eventuality.

In Clause 7 reference is made to the Patents Act 1952 (which has subsequently been updated). Under this Act the Crown is empowered to authorise the use of patented inventions by persons other than the patent holder. The wording in Clause 7 is simply saying that the statutory law of the land has precedence over the contract condition. This is a general principle, that people cannot override national laws by making a provision in a contract – unless the law specifically allows it to be so excluded.

This particular condition does not include the conventional IPR indemnity clause mentioned earlier. This may be because it was covered elsewhere in the contract or maybe the contractor forgot or neglected to press for it. After all, the subcontractor (in this case) is not likely to volunteer it. If the contractor's usage of the IP leads to a third party action for infringement, the action would be against the contractor and if there is no indemnity provision the contractor would be liable.

Background and foreground material

One of the distinctions that must be considered is between so-called background and foreground material. In a contract where the buyer specifically commissions and agrees to pay for the development and design of a product there are fundamental questions to answer as to which of the parties will own the Intellectual Property in the design and whether or not the other party will nevertheless have any rights in the design.

At one extreme the buyer will own the IP in an outright sense and leave the designer with no rights whatsoever. This gives the buyer the complete freedom to sell or license the design to others, to have made and to sell goods to the design, to modify the design and to enjoy the benefits of the legal protection for his IP under copyright, patent and so on. The designer in these circumstances simply has no rights.

At the other extreme the designer owns the IP that he has created, is free to exploit it and enjoys the benefits of legal protection. The buyer's right would be limited to buying goods of the design from the designer and then to use those goods for his own purposes.

The former situation might arise where the buyer is in business to manufacture and sell goods of specialised design but chooses to commission designs from an outside specialist rather than possess intramural design and development skills. Thus, the zero grant of rights to the designer is logically correct as the buyer would not wish his designer to become a manufacturing competitor. The latter case would arise where the buyer needs goods of a special design for a particular purpose but has no interest in exploiting the design by himself. A builder of power stations might need to commission the design of a special pump but has no intention of becoming a seller of pumps. Thus, provided he has acquired the pump for his power station, he is content for the seller to own the pump design and to exploit it commercially (but perhaps not to other power station builders), perhaps in return for a levy of some sort.

Many compromise positions can be developed between these two extremes with joint ownership of IP, marketing agreements covering customers or territories that each would address, joint manufacturing, distributorship and agency deals.

However, once the fundamentals have been sorted out covering ownership and rights then it is necessary to consider in a little more detail the actual design material. In the first example, where the IP and all associated rights are to belong to the buyer, let us suppose that the buyer plans to manufacture goods to the design created by the supplier and let us suppose that the designer is also a manufacturer of goods of a similar nature. The buyer in this scenario wishes to acquire the detailed design and the know-how associated with manufacturing that design. The seller wishes to convey only details of the design – after all, that is what the contract price ostensibly relates to – and not to reveal his know-how. If his know-

how is divulged then he weakens his chance of getting future design work and puts his customer possibly in the position of being a stronger competitor to himself.

In this case the essence of foreground and background material can be seen. Foreground material is the IP created under the contract. Background material is the pre-existing knowledge that is brought to the contract without which the foreground IP cannot be created at all.

For example, an element of the design may be a metal plate with holes. The designer would say that he is being commissioned only to supply a drawing of the plate giving details only of dimensions, weight and composition. The buyer would say that he also needs to know how to make the plate with the minimum of scrap or rework, with the holes precisely drilled, whether the plate is to be cast or machined from solid, etc. The 'what' is foreground material. The 'how' is background material.

In practice arguments over the definition and delivery or availability of background information are sorted out. A number of possibilities arise:

- a) If the price is high enough perhaps the designer will happily provide all background data.
- b) The contract might specify that the work is to include the design of the product and the method of manufacture.
- c) The designer might specify or supply special manufacturing equipment.
- d) The designer might offer to provide technical assistance to the buyer's manufacturing process.
- e) In return for background data the buyer may agree to order a certain number of units from the designer rather than manufacture them himself.

Items (d) and (e) are in any event a good idea because it is rarely the case that manufacturer A can build to designer B's design without some initial problem.

2. EFFICIENT ADMINISTRATION TECHNIQUES

Introduction

This section examines the techniques associated with good contract administration.

Good contract administration relies upon data. For data to be useful they must be accessible; to be accessible they must be recorded. Whether recorded manually on paper or held in a computer, the two most helpful methods of recording data or headings for data are on checklists and registers.

We have already looked at the usefulness of checklists. This section introduces particular registers of information for specific functions which are the responsibility of the contract administrator.

Keeping the contract up-to-date

It is vital that there is always immediately to hand a complete and up-to-date copy of the contract. To say that it must be kept up-to-date implies that the contract as originally agreed and signed will have been subject to change. Changes fall into three categories:

- a) Changes to the express conditions given effect by the formality of a numbered contract amendment and acceptance thereof.
- b) Changes to an aspect of the contract (eg technical specifications) which take place under an 'enabling' condition of the contract but where no contract amendment per se is utilised.
- c) Changes to the understanding or interpretation of the contract effected by a separate letter, report or meeting minutes.

Regarding (a), a register should be maintained to track the amendment status of the contract and to provide a rapidly accessible diary of the life of the contract and how the various amendments affect it. For example, it is useful to track the changing value of the contract. It is important to remember that contract amendments come into legal effect only once they have been accepted. The contract amendment register should therefore record not only the ostensible date of the amendment but also the date of the acceptance. An example of a contract amendment register is given in the diagram below.

Not only does the register provide a quick record of events but it also acts as a very useful aide-memoire to the contract administrator who must ensure that all offered amendments receive a response, whether it be an acceptance, a rejection or a holding reply.

Regarding the type of changes referred to in (b), it is equally important that a proper record is kept of the changes. This is discussed in more detail elsewhere in this section but a useful technique to adopt is that the record of the changes is added formally to the contract from time to time using the contract amendment procedure. In this way there is a link between the contract amendment register and changes being authorised and recorded elsewhere.

It is more difficult to keep track of alterations to interpretation of the contract where these appear in separate correspondence or in the minutes of meetings. The best way is to make a note in the contract amendment register and annotate the working copy of the contract with a cross-reference to the relevant material.

Contract amendment register

Contract: 14C/130 Description: Supply of Type 14 trailers								
Customer: Preston Engineering Ltd								
Amendment No.	Date	Type	Acceptance date	Old value	Change	New value	Description	Comment
–	4.1	Docs	6.1	£100K	–	£100K	Contract documents	
1	28.4	Telex	28.4	£100K	–	£100K	Consignee address	
2	6.6	Letter	10.6	£100K	–	£100K	New payment scheme	
3	8.8	Letter	10.8	£100K	£50K	£150K	Quantity increase	
4	5.10	Letter	Rejected	£150K			Type 14A requested	Too late to change see letter 17.10

As far as a working copy of the contract is concerned, it is as well to be clear as to the following distinction:

- **MASTER COPY:** Original document plus original amendments.
- **WORKING COPY:** Photocopy of the original documents with amendments incorporated.

It is very convenient to maintain the working copy in an up-to-date state by word processor which enhances the readability of the document, especially where there have been many changes. If a word processor is used it is as well to make margin notes to show where amendments have been made.

A useful trick is to use a photocopier to produce a ‘pocket’ sized (maybe A5) version of the working copy. This is much easier to take to and use at meetings, rather than carry around large heavy documents.

It is most important that the original contract documents and the original amendments are kept separately and intact so that at any time – where for example there is doubt about the integrity or accuracy of the working copy – a check back may be made to discover what actually changed.

To avoid one of the pitfalls of using a working copy – particularly where copies are distributed – it is important that the document carries a note of any caveats or qualifications to the contract or its amendments that may have legal effect.

In addition to the master and working copies of the contract it is wise to keep an additional security or back-up copy with its amendments in a separate building as insurance against fire or other risks to the documents.

The contract file

As far as filing systems go, there are generally only two approaches that are followed:

- THE HEAP SYSTEM
- THE HIERARCHY SYSTEM

In the Heap System everything – including the contract and related correspondence, memoranda and minutes – is kept in the same file in one continuous heap. In the Hierarchy System the papers are broken down into discrete topics and each has its own file. This gives order to the papers whereas in the Heap System filing by date order is the only discipline.

The Heap System has the advantage that all the papers are together and a logical, chronological story can be followed. The disadvantage is that files can be bulky and the individual papers relevant to a particular topic will be dispersed amongst many others.

The Hierarchy System has the advantage of smaller files and easier access to specific topics but the disadvantage is that if particular material is required that does not obviously belong to a single topic or topics then a search will be necessary across several files. Copying papers across files may help to counteract this but it is wasteful and requires enormous discipline if it is to be thorough.

A Hierarchy System may comprise the following:

- 100: File series: 2 Stage heat shields – Williams Ltd
- 101: Pre-contract correspondence
- 102: Request for bids
- 103: Bid committee papers
- 104: Price and cost estimates
- 105: Quotation and proposal
- 106: Contract – master copy with amendments
- 107: Contract – working copy
- 108: Works order
- 109: Post-contract correspondence
- 110: Subcontract correspondence
 - 110/1 – Makeshift Components Ltd
 - 110/2 – Jerrybuilt Shelters Ltd
 - 110/3 – Tinpot Metal Bashers plc
- 111: Future licences
- 112: Committee papers
 - 112/1 – Health and safety
 - 112/2 – Quality control
 - 112/3 – Technical progress
- 113: Engineering change proposals

The aim is simply to divide the papers into sensible and manageable parts.

Contract file record sheet

Enclosure No.	Date	Description	Key document
1	1.2	Contract documents	Yes
2	4.2	Publicity notice	No
3	5.2	Acceptance letter with caveats	Yes
4	6.3	Acknowledgement of E3	No
5	10.4	Memo re: delivery dates	No
6	17.4	Response to E3	Yes
7	10.6	Quotation Item 6	Yes
8	14.8	Internal progress notes	No
9	21.9	Manuscript notes on negotiation of E7	Yes
10	6.10	Amendment NO.6	Yes
11	12.11	Amendment NO.7	Yes
12	14.11	Internal comment on E10/11	No
13	28.11	Response to E10/11	Yes
14	30.11	Progress report NO.1	Yes
15	16.12	Minutes progress meeting NO.1	Yes
16	17.12	Christmas invitations	No
17			
18			
19			
20			

Choice of the Heap or Hierarchy System is a matter of personal preference. Whichever is used, a useful technique is to mark each of the papers in the file with an 'enclosure' number and keep a list, either on the cover of the file or just inside, recording what the contents are. An example of this is given in the diagram above. Notice in particular the annotation as to whether the document is a key document or not. This will be useful later when the contract file is to be reviewed for closure purposes.

Quotations register

One of the key roles that the contract administrator usually performs is the processing of requests for quotations and the responses. This is another task where the use of a register is an invaluable aid in managing the activity and ensuring that things do not get forgotten.

Depending upon the volume and type of enquiries processed the register can be maintained as a:

Total list

- List by contract
- List by customer
- List by territory
- List by product/service

An example of a quotations register is given in the following diagram.

This is one example where establishing and maintaining the register on a computer database is very valuable so that repeats can be generated using any parameter or combinations of parameters, eg:

- a) By enquiry date and value.
- b) By quotation validity and customer.

As with all registers that record something dynamic it is important that the final column always gives the outcome. The purpose in providing quotations is not to provide quotations but to secure business.

Key contract details

Although it can seem a chore to keep it up-to-date, a register of key contract details (see following diagram) can lead not only to efficient contract administration but also to the speedy answering of requests for information that would otherwise take many hours of tedious research. For example, demands of the following nature are frequently made:

Example 1

List all contracts over 12 months' duration and £500K in value.

Example 2

List all contracts and their value in which liquidated damages apply.

Example 3

List all contracts in which issues of government property are made.

Example 4

List all contracts that include standard conditions 141, 153, 166 and 167.

The key contract details register is really one that must be developed on a customised basis but the diagram below gives a good indication of the type of register to set up.

Key contract details register

- 1) Customer name and address:
- 2) Contract number:
- 3) Contract description:
- 4) Contract price(s):
- | | |
|---------|---|
| Item 1: | £ |
| Item 2: | £ |
| Item 3: | £ |
| Item 4: | £ |
- 5) Contract delivery/Duration: - / - / - to - / - / -
- 6) Key terms:
- | | <i>Included</i> | <i>Relevant</i> | <i>Comment</i> |
|------------------------|-----------------|-----------------|----------------|
| | Y or N | Period | |
| a) Liquidated damages | | | |
| b) Bonds/guarantees | | | |
| c) Free issue property | | | |
| d) Security provisions | | | |
| e) Data retention | | | |
| f) Government audit | | | |
| g) Payment | | | |
| (i) On delivery | | | |
| (ii) Stage | | | |
| (iii) Progress | | | |
| h) Cancellation | | | |
| i) Standard Conditions | No 1 | | |
| | No 2 | | |
| | No 3 | | |
| | No 4 | | |