

Telice Gillom: 0:02

Welcome back. You're listening to a bonus episode of the NASPO Pulse podcast. I'm your host, Talese Gillom, and this is another episode in our series called the Basics of Contract Terms and Conditions. This series of episodes is a discussion of the most common contract terms and conditions that we're talking about in an informal way to try to further the understanding of their meanings from a legal and procurement perspective. This bonus episode is a discussion of the terms and conditions that govern where the contracted goods and services take place. I'll be joined again for this episode by Megan Smith, NASPO's Director of Legal Education. Just another disclaimer please remember that our discussion about contract terms and conditions is not legal advice, so be sure to check your agency's legal requirements. Also, subscribe to the NASPO Pulse podcast so you don't miss another episode in this series. Megan and I have coined ourselves Run DOC, the legal and procurement duo. Will we do some 80s style rhyming while talking about contracts? You'll have to subscribe to find out. Feel free to email us with your questions. Now let's take the pulse.

Megan Smyth: 1:17

Before I talk about survivability and severability, I want to plug the Law Institute Talese, because the Law Institute is the place where we all sit around and discuss these things as if we are fangirls and fanboys of these legal terms, and it is a great place to come as an attorney who may be new to procurement and you have heard all of these terms because you went to law school and you took two years or at least a year of contracts but it's nice to hear them in the context of procurement and what it means, and so I encourage anyone who's getting a lot out of this to sign up for, potentially, our new attorney boot camp or Law Institute in general, to expand your education in this area expand your education in this area.

Telice Gillom: 2:09

I got to say I am not an attorney, but I also had a great time at Law Institute because it was really good and I'm not just saying this because Megan is my friend. I had a great time at Law Institute because it was really good to hear attorneys talk about procurement law and I speak their language because I am a procurement professional and I have read a lot of contracts, I know what the contract terms and conditions mean, and so to hear them talking about procurement concepts, terms and conditions and to be surrounded by people who like procurement as much as I do, who like procurement as much as I do.

Megan Smyth: 2:50

It was a good time. I cannot tell a lie. Yes, yes, it is a place of safety and nerdiness and acceptance.

Telice Gillom: 2:55

If you're a procurement nerd, it certainly is.

Megan Smyth: 3:04

Absolutely All right. So survivability, not as exciting as the television show, but fewer mosquitoes. So I know we've actually gotten some member questions about this one. So, and these are actually often called survival clauses or surviving provisions clause. And what this does is it specifies and when I say specify I mean paragraph 3.1.2, section B, like it is very specific which sections, terms or obligations in the contract remain in effect and they are enforceable by a court of law, even after the contract has expired or it's been terminated for whatever reason, for cause, for convenience, if there was a material breach Under any of those circumstances, those items will survive the contract.

Megan Smyth: 3:57

Hence the name to protect critical provisions, especially in the interest of the state and the citizenry, such as confidentiality, intellectual property, indemnification and payment obligations. So what this does is recognizes that maybe the effects of the contract outlive the contract itself. So if you had and I'm going to use a construction example because it's what came to my head, but there's tons of examples of this If you had a road built and let's say your contract with this company went for five years and 10 years later there was a fatal failure of the bridge, let's say you better believe you're going to go back to your contract and see what is

in there that survived the end of the contract, to determine whether or not that contractor has any liability left. Now there's statute of limitations issues. I will always caveat that Now there's statute of limitations issues.

Telice Gillom: 5:05

I will always caveat that.

Megan Smyth: 5:05

But you may be able to extend through the survivability clause and sort of give yourself a longer period of time in which you could make claims against the contractor, the supplier and or maintain some type of confidentiality, trade secret, intellectual property rights and that might come from the company as well. They may also want that. So they say we did an ex-job for you and we created material for you that was new intellectual property right, created material for you that was new intellectual property right. They want survivability so that you can't come after them for taking that intellectual property and using it somewhere else if you agreed to that in the contract. So it's useful for both sides. It is, I would say, equally useful for both sides.

Telice Gillom: 6:02

Definitely, Megan.

Telice Gillom: 6:04

You mentioned that the survivability clause is useful for both sides, and that's especially true when it comes to IT contracts From the procurement side.

Telice Gillom: 6:16

This is another one of those clauses that you definitely want to pay attention to in the procurement office when you're buying IT goods and services. Specifically for software, the survivability clause gives both sides added protection for data breaches or cybersecurity incidents, because once you have fulfilled your obligation, you've paid for your software as a service or you've paid for the software that you purchased from the supplier and the contract has ended, this survivability clause says essentially, or should say, you will not reverse engineer the software you bought. The supplier will continue to support patches and or any upgrades to it and if there is some kind of issue, neither side will be responsible or neither side will. The clause goes on the contract clauses that protect you both will live on even though the contract has ended. Neither side will be liable the limitation of liability that I mentioned before still is in effect and neither side will be left unprotected even though the contract has ended. So this is another one of those very important contract clauses for IT goods and services.

Megan Smyth: 8:02

Absolutely, and each of these provides their own challenges and benefits, with IT contracting separate and apart from all the other considerations. So then that's a story for another day, as we would say. So severability is again often sometimes goes along with survivability. Court to hold a specific term or condition in the contract to be invalid, unenforceable for some reason, unconscionable or illegal, without voiding every other clause in the contract. So the contract as a whole survives, but the modifications based on the judgment of the court of proper authority will stand. And this is good, because we don't want entire contracts failing because of what could be an innocent mistake or an inappropriately worded clause or something that violates state law or federal law, because there's different, you know, these companies are operating in different states. Maybe they left a term that was valid in one state, not in another. We just don't want these small issues that don't get at the core of the contract. It doesn't get to well, we didn't have an appropriate meaning of the mind, there wasn't an appropriate offer and acceptance. That's not what we're talking about here. We're talking about stuff that you know doesn't get at the fundamental contract itself and allows that to continue to exist. That also would allow the survivability clauses to exist as long as they are not the specific clause determined to be invalid. Okay, so when we say that if a contract has an issue, it needs to go to a court of proper authority, what does that mean? Who is a court of proper authority? And this again, we could

talk about this for another hour, but often this is called choice of laws. That's probably the most often.

Megan Smyth: 10:26

The term that you're most often going to hear is choice of laws, venue, jurisdiction these words get thrown around a lot as if they all mean the same thing. They certainly do not and they all have different implications. So, governing law? This goes back to our tribal tendencies. Everybody wants to be heard on their own turf, in their own town, by their own jury of their peers. Right, we say jury of your peers for a reason, but the court who hears any issue arising out of a contract has to have proper legal authority based on.

Megan Smyth: 11:02

For example, you cannot go file a lawsuit in federal court unless the federal court has standing to hear, has jurisdiction to hear the case, and they have to have venue and jurisdiction over the subject matter and the person, and we'll talk about that just briefly when we get to that part. So venue is the physical location of the court where the case is heard. So when you hear on the news the very famous defendant in Malibu moved for a change of venue, that's because they think they're not going to get a fair trial in the location where they are. So what you do in a contract is you agree before any lawsuits are filed, in which case it might be who got there first. You agree on a venue and in a lot of cases this is going to be on the state's own turf and that goes back to some of those sovereign immunity issues and some of the issues with the state cannot sue a state and another state court issues like that. So a lot of times vendors are going to have to compromise when it comes to these issues.

Megan Smyth: 12:18

Jurisdiction is a separate issue from governing law and venue and you really can't contract away jurisdiction. The court has to have legal authority or power over both the person and the subject matter. So, for example, if it's a criminal matter, let's say a civil matter. If it's a civil matter above \$7,500, it belongs in circuit court. If it's under \$7,500 it belongs in district court. That's an issue of jurisdiction. Who has the legal statutory authority to hear that case and the person. Jurisdiction over the person is a whole treatise of law and this most of us have heard of this based on some sort of movie or TV show where someone gets served by the pizza delivery guy with a subpoena.

Telice Gillom: 13:10

They were not expecting it Not to be confused with you got served Absolutely Not to be no, not to be confused with you got served.

Megan Smyth: 13:16

Absolutely Not to be no, not to be confused with that at all. But you know they hire service processors to deliver subpoenas and divorce paperwork often and you have to actually make contact with the person and give them the paperwork. To actually make contact with the person and give them the paperwork that is indeed, in the year 2024, still often a requirement for a subpoena and then for a court to have personal jurisdiction over a defendant. So if you're trying to be served in a certain jurisdiction, you may avoid it so that you don't get served. You may leave the country, for example. So those aren't necessarily things you can contract away in some situations, but you should think about it. It should be an issue. You should see if the vendor has default terms and conditions in their contract that set these things when they are not contracting with the state, because the likelihood that that company has a template specifically for the state is probably unlikely. But that would be great, that would be super awesome if they do, but it may not be the case.

Megan Smyth: 14:28

Alternative dispute resolution ADR this is a hot topic in the law. ADR this is a hot topic in the law and there are a lot of attorneys who go into mediation and arbitration as they get further on in their career, and that's because we've all seen how very unreasonable people often end up in the courtroom when they could have literally just sat down at a table and sort of talked it out. And that's what mediation and arbitration is. I'm a fan of mediation. I'm a fan of confidential, non-binding mediation. It allows the parties to come together with a

qualified person, a qualified attorney, who can go back and forth, act as a go-between.

Megan Smyth: 15:15

Oftentimes you literally sit in separate rooms and you work out your issues. That's literally what it is. So that can often, you can, oftentimes if there are miscommunications, if the parties do not understand the evidence or information that the other party has. Sometimes that's all it takes is hey, this is what I've got, what do you have? And then let us try to find a compromise. Arbitration is a favorite of corporate America for not good reasons. They often force their customers into arbitration if they want to sue a company for any reason. Most of the time, and a lot of times, you're agreeing to that by simply using the product or the service.

Telice Gillom: 16:01

That's right iTunes.

Megan Smyth: 16:04

So agreeing to arbitration can often be a click through agreement, something that you didn't really see or pay attention to, and it's never a good situation to be in because you're going to have to go to court to get out of the arbitration clause and then that's going to be a whole argument about you know whether arbitration is appropriate or not, and that's a problem because arbitration can often be binding arbitration and you're not technically allowed to go get an appeal on that, which is troublesome. The US court system is built on appeals, so you don't really want to put yourself in a situation where you cannot appeal a decision to a higher authority.

Telice Gillom: 16:45

Megan, you mentioned click through agreements of public agencies are banning any software or any programs that require click-through agreements because the odds of people actually reading them are low and they do often require arbitration binding arbitration and those directly go against the public agency's standard contracts, even if it's for something like reading a document that is, you know, online. Increasingly I'm seeing that the standard Policies and procedures for public agencies are no click through acceptance, no click through agreements for any reason.

Megan Smyth: 17:46

Yeah, and I don't blame them because, you're right, most people don't read them. And again, you know contracts should not be a game of gotcha. And you're basically giving the authority to any person in the state who clicks on a click-through agreement to bind the state to, let's say, an arbitration agreement. And the state cannot allow that. And a lot of states are specifically legislating against that. They are legislating clauses into their state contracts. So that's literally what it sounds like. The legislature passes a law and says no state uh, no state government employee has the authority to bind the state for any reason to the following things right, and that's in the statute. So the state can do things to prevent that. Also, in addition to not allowing that and saying that they're not allowing that, putting that in policy, they can also just basically put it in statute that the state cannot be held responsible for the actions of an individual state employee.

Telice Gillom: 19:05

And it's interesting where you're seeing them. If you are trying to read an article online in what seems like a reputable, you know, a reputable source, a reputable publication, click here to accept, click here to agree. You know, check this box and click here and there's an agreement. You know that you have to scroll to the bottom, or there's an agreement attached to it and you may or may not see it and you click to accept and you've agreed to something that you haven't read, just to read an article, and it's not you know Jim's website full of conspiracies. It's a reputable, a reputable publication, or at least it seems to be, and it's it's. You know, it's not a contract term and condition that we're, you know, mentioning for today's episode, but those click through agreements are popping up more and more and it's one of the things that is turning up in standard terms and conditions for public agencies no click-through agreements.

Megan Smyth: 20:23

Absolutely and you know, would you want to be susceptible to something like that because you weren't paying attention, like that's. You know a lot of some of the law is based on, you know, the interest of the public public and is not in the interest of public policy to allow corporations and companies to dupe you into agreeing to some sort of crazy set of terms and conditions. That's not anybody's interest. Oh, and also, I would say, an important thing for everyone, everyone to understand, is that the valuable commodity in this situation is data right, absolutely, if you're, it's, it's track, the, they're tracked.

Megan Smyth: 21:12

Whatever your it vendor is, they're tracking something. Because there's nothing free. Right, if it's free, you are the product.

Telice Gillom: 21:21

That's right.

Megan Smyth: 21:23

And that's true for a lot of the open AIs that are available right now. And there's reasons. The state is blocking those sites and blocking generative AI because they don't have the appropriate security systems in place to deal with it. And, yeah, it just caused a lot of problems. So just keep in mind that data is the valuable commodity. Like what? How does Facebook and Twitter, like, how are they making money? Data? That's how they're making money. They're selling it. So we think think about how does this contract? How are they getting our data? Because they're getting it somehow. So how are they getting it? How are they using it? What are they going to use it for and what do I need to mitigate about that?

Telice Gillom: 22:11

That's a great point, and another thing that should be considered in the context of this entire conversation is that these terms and conditions that we're talking about will have to change in the face of AI. You know, when they're revising their contract clauses, their standard contract clauses, they all of the data for the purposes of, fill in the blank, generative AI, where your products that you already have installed in your system are using generative AI. And what does that mean for your agency? Generative AI and what does that mean for your agency? So all of these things that we're talking about are the standard terms and conditions or contract clauses that are in use for public agencies now, but they're all going to have to change in the face of emerging technology. Emerging technology We'll see what happens. It'll be interesting, we'll all see what happens. We will all see. I wonder if the Terminator series of movies was a foreshadowing event. Perhaps Of some kind, of some kind, perhaps. Maybe we should go ask linda hamilton. Will she have answers for us? I don't know.