The ABC’s of MSAs – A Review of Your Agreements May Save You Time and Money

Our industry is unique in that the operation of a vessel, offshore installation or a shipyard requires the hiring of numerous specialists that are needed on an “on again / off again” basis, often on a moment’s notice. Under these conditions, there is almost never an adequate amount of time to locate a vendor, negotiate terms, make the logistical arrangements and get the work done. Thus, companies often enter into Master Service Agreements (MSAs) with contractors that they may have a need to use.

MSAs are contracts between parties that are entered into in advance of the companies doing business together. Although they come in many different forms, they include the agreed upon terms that will govern the future transaction. MSAs often cover a wide range of services that a company can provide and do not obligate the parties to do anything until services are requested that are covered by the agreement. They also remain in place after the services are provided and stands ready to govern the terms of the companies’ next transaction if and when the need arises.

The MSA differs from a usual contract because they often do not include the identification of a specific good or service to be provided or the costs for providing the goods or services. Those terms are often agreed to at the time that the services are requested. These terms are often controlled by pricing formulas, market pricing, terms agreed to when the order is placed or some other method that the parties agree on.

Often, in our industry, a company will have many MSAs in place at any given time. A small company may have a handful of MSAs in place where a large company may have thousands. There is also significant variety in the attention to detail that each MSA provides.
Most MSAs were originally written by an attorney that is familiar with drafting this type of agreement. However, over time, the “form document” is modified to suit the needs of the company or the companies that it does business with. So many “form” agreements have had pertinent sections removed or have adopted language that is inconsistent with other sections of the agreement. As such, it is important to have someone within the company who is responsible for reviewing all MSAs to determine if they are adequate to control the activities of the parties in light of the type of business being transacted.

In the offshore environment, most MSAs include similar terms and conditions. These topics include; a description of the services to be provided, a choice of law provision, indemnity requirements, defense requirements, insurance requirements, payment terms, the legal relationship of the parties, ownership of tools or equipment, management of the work, what documents include the terms of the agreement, notice requirements and regulatory requirements. The terms of a particular agreement can be general, or very specific, depending upon the nature of the operation.

Often, these agreements are entered into at the end of the sales process and the terms are negotiated by the sales people. In these situations, the sales people often agree to the waiver of, or addition of, terms that the company should not allow in their pursuit of “the deal.” When sales people are in charge of putting together the MSA, it may be a good idea to have another person review and approve the MSA before execution to make sure that the modified terms are still adequately protecting the company’s interest.

Although it would be impossible to cover all potential terms in this article, most MSAs include similar language. For example, most MSAs, in the offshore setting, include a “knock for
knock” indemnity agreement that provides that each party is responsible for indemnifying the other party for injuries to its employees. This indemnity obligation is also usually accompanied with a similarly worded insurance requirement that mandates that each party purchase insurance that provides coverage for the indemnity obligation.

Although the concept seems simple, in practice it can be complicated. As MSAs are drafted to be used in a variety of settings, it is often difficult to specifically identify the parties to be indemnified. As such, we have seen agreements use terms such as “subsidiaries,” “related companies,” “members of the company group” or companies “working for or with company.” Although these terms appear innocuous, once you request defense and indemnity from an injured worker’s employer, they may claim that they had no idea that you were within the scope of companies covered by the obligation. With that in mind, it is important to clearly identify the parties to be indemnified and to use language that is clear, easy to understand and can’t be described as being vague or ambiguous.

Another area to be wary of are choice of law provisions. If it is a maritime contract, it is usually safe to agree to a provision that states that maritime law applies. If maritime law does not apply, it is also customary to have the state law of the state in which the companies reside or where the work is being done as a secondary source. If a company suggests that another jurisdiction’s law should apply, look at the issue very carefully.

If the other side is insisting on it and you don’t know why, contact someone who knows before signing, as it probably does not inure to your benefit. An example would be a contract for the provision of necessaries to a vessel that specifies that English Law applies. Although most people would assume that English law is similar to general maritime law, it may not provide for
a general maritime lien against the vessel. Thus, if you provide necessaries and are not paid, you would have inadvertently waived any right that you have to arrest the vessel to recover under the contract. But, during the sales process when everyone was getting along, English law would not seem like a terribly offensive request.

In our practice we also like too include a provision that states that the executed MSA’s provisions control the conduct of the parties and any previously exchanged offers, emails, or other documents are not to be considered as terms of the agreement. In the negotiation process, the parties usually exchange several rounds of offers and counteroffers while ironing out the terms of the agreement. Once the agreement is signed, all of these previous agreements should be cancelled as if they never occurred. Often, if a dispute about the terms of the MSA arises, someone will produce a document that indicated that the term should not have been included, or otherwise modified prior to execution. However, if you include a proper provision, the parties will be deemed to be aware of the terms of the document that they signed and the parties must govern themselves accordingly.

Another area that we often recommend adding language relates to an award of attorneys’ fees that incurred while requesting defense and indemnity. The general maritime law allows for the reimbursement of the attorneys’ fees expended in defending the claim filed by an injured worker, if the MSA included an obligation to defend. However, the general maritime law does not allow for the recovery of the attorneys’ fees expended in pursuing the defense and indemnity claim. Thus, unless you have a specific provision that covers this area, the party that you request defense and indemnity from does not have any real incentive to quickly evaluate your tender. Adding language providing for the reimbursement of these fees increases the likelihood of
recovering all of your fees and has the added benefit of putting pressure on the other side to fairly evaluate your tender.

Considering the importance of entering into an agreement that adequately portrays the company’s intentions, as well as protecting each company’s interest in the event of a dispute, great care should be put into ensuring that MSAs are entered into when appropriate and that each agreement includes the terms necessary for the successful management of the service to be provided. A little time spent coordinating the execution of MSAs and reviewing existing MSAs to make sure that they are adequate can save you a lot of time and expense in the event that a dispute arises. For example, the specific language used in an indemnity agreement could be enforceable or not enforceable under the general maritime law, or different state laws. So, it is a good idea to have someone knowledgeable about the terms of MSAs review these documents, on an ongoing basis, with an eye towards what is customary, reasonable and enforceable. Allocating resources to this task may save you significant time and money by avoiding a future dispute.