YOSEMITEassociates

Negotiating Supplier & Customer Contracts

Key Terms To Help Protect Enterprise Value

The enterprise value of a business can be created or diminished as a result of customer and supplier contracts that are negotiated through the normal course of business. The list below represents key terms of a contract that should be carefully negotiated as they will be important in the eyes of a future acquirer or investor.

1. Assignability/Transferability – you want language allowing the agreement in place to automatically transfer to your acquirer without the requirement of consents from the other party to the contract. If they insist on consent, provide that consent will not be unreasonably withheld.

2. Right of First Refusal – Never agree to language that gives the other party to the contract the first right to consider acquiring your business before you can consider selling to anyone else.

3. Change of Control – avoid language that terminates the agreement in the event your company changes ownership or takes on an investment from a third party.

4. Fixed Pricing – with your suppliers, you want language that clearly outlines the pricing you will be paying and you want clarity in the agreement related to how price increases will be handled in future periods. Best if firm fixed pricing is negotiated but if increases are negotiated, best if they are tied to a market factor or index (i.e.: tie increases to a commodity cost or a market index such as the consumer price index). Rights to extend agreements and the resulting pricing should be clearly stated.

5. Termination clause – you want language that will stipulate how either party can terminate the agreement and afford parties the time to smoothly wind it down without negative impact on the business. With a supplier, you may want a longer

termination notification period to allow you time to find a suitable alternative and to enable you to support your existing business that has historically included this supplier.

6. Exclusivity language – with a supplier, it may enable your enterprise value if you're the only player in your market having access to a particular supplier and providing you a competitive edge in the market. With customers, it's generally not attractive to provide exclusivity language unless other terms offered in the agreement make it worthwhile financially to offer such language.

7. Payment terms – get language that clearly articulates what your payment terms are and at a minimum try to establish terms that have you paying in a longer time frame than your average customer receivables. Try to get some amount up-front. Include language that gives you the right to pause service for non-payment or pause payment for non-service.

8. IP sharing – avoid all language that gives the supplier or customer any shared rights to your end work product. In situations where you hire third party contractors to help you develop your IP, make sure to include language that explicitly states that the other party is assigning all rights to the IP to your business.

9. Revenue share – avoid having to share revenue with a supplier as this may become unattractive financially for your business as it grows and doing so may mean a disproportionate amount of value has to be shared.

10. Indemnification – include language that indemnifies your company from unauthorized use of your work product by a third party.