

Driving Innovation in CMS Contracts

Measurements

Remedies

Practical Solutions

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Learning Objectives

- Fundamentals of Contract Formation, Practical Operations and Business Management
- Capacity of Measurement
 - pricing, gainshare and performance metrics
- Value and Consequence of Measurement
 - environmental
 - permit compliance
 - employee health and safety (EHS)
 - contract flexibility

Fundamentals of Contract Formation, Practical Operations and Business Management

- Corporate management approval and operational understanding
- Letter of intent (LOI); request for proposal (RFP); draft scope of services; negotiated total chemical management services agreement (TCMSA)
- Leads to creation of legal, valid and binding obligation enforceable by TCMSA terms
- Reflecting best estimation of real world circumstances, practical operations and proper allocation of legal rights and responsibilities

Capacity of Measurement in TCMSA

- Value what is measured and measurable (not measured value): gainshare, performance, environmental compliance, EHS and labor relations
- Identify and define benchmarks
- Certify corporate buy-in, management and staff qualifications and mutual capabilities
- Frequent measurement
 - cost savings (gainshare)
 - performance matrix
 - covenant compliance
 - certificates and other periodic reports

Cost Savings (Gainshare)

$$GS = \sum_{AllChemicalMaterials} \left(UPB \times \left[\frac{I_2}{I_1} \right] - UP \right) + MCS - M$$

Where:

GS	=	Gainshare
UPB	=	Unit Price Baseline
I_2	=	Index for the year following current year
I_1	=	Index for the month and year before the Effective Date or for the month and year first purchased
UP	=	Unit Price (actual for current year)
MCS	=	Management Cost Savings
M	=	Principal's Minimum

Measure and Value Practical Consequences of Gainshare and Other Measurements

- Identify, define and prepare to adjust scope of services
- Recognize challenges and achievements (historical and future) of TCMSA and related outsourcing
- Measure cost savings and gainshare (CM, MCS and Service Fees)
- Consider other metrics: social, environmental and economic (macro and micro)
- Recognize value and challenges of measuring risk (allocation, management and mitigation) against cost of remedial actions
- Support management commitment to outsourcing
- Convert TCM operations to TCMSA contract management

Measure and Value Consequences of TCMSA (Legal and Practical)

- Create a TCMSA (legal contract) specifying rights and responsibilities, understanding practical context
- Measure TCMSA covenants, pricing, gainshare and permit compliance within practical context
- Enforce TCMSA rights and responsibilities
 - covenants, defaults, terminations and remedies
 - waiver of sovereign immunity
 - consent to jurisdiction, venue and governing law
 - alternative dispute resolution (ADR) and mediation in lieu of civil litigation
- Contract flexibility (within practical context) and TCMSA re-openers

Other Legal and Practical Consequences of Measurement and TCMISA Remedies

- Performance metrics, adjustments, terminations and contract extensions (scope, term and pricing)
- Effect of media, labor relations and other inputs from governments, regulators and civil society
- Insurance coverage, indemnities, hold harmless, representations, warranties and waivers (exclusions)
- Third-party contracts, applicable regulations, bankruptcy law and other legal relations
- IT solutions and continuation of practical operations

Tentative Conclusions

- Understand Values and Limitations of Measurement Tools and TCMSA Enforcement Powers
- Proper TCMSA Allocations (rights, obligations, defaults and remedies) Within Practical Context
- Reflecting Total Cost of TCMSA Formation, Operation and Management (tangible and intangible)
- Consider Value of Template Form (with Annotations) and Forum (CSP) to consider Legal and Practical Measurements of TCMSA

Driving Innovation in CMS Contracts

Measurements, Remedies, Practical Solutions

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