



Consideration

What makes it Good and Valuable?

By Gail S. Kelley, P.E., Esq.

From time to time, an A/E may be presented with a contract that starts off with the phrase “For good and valuable consideration, the parties do hereby covenant...” Alternatively, the consideration may be described as “mutually-agreed upon.” This begs the question – what is consideration? And what makes it good and valuable?

Legal Meaning

The confusion is partly due to the fact that the legal meaning of the word consideration (its meaning when used in legal documents such as contracts) has nothing to do with its ordinary meaning. When used in a legal document, “consideration” means something of legal value. Consideration can be money or goods (either tangible or intangible), but it can also be a promise to do something or refrain from doing something.

Required for Both Parties

A contract is not enforceable in court unless both parties provide consideration. In a typical business contract, both parties provide consideration in the form of a promise. One party promises to either supply goods or perform a service; the other party promises to pay for the goods or service.

The requirement for consideration is an attempt to ensure that the contract is a legitimate bargained-for agreement. Often a promise will indicate what someone will try to do, or would like to do, but there is no guarantee they will be able to carry out their promise. A court will not penalize someone for failing to keep a promise if the other party did not provide anything of value in exchange. This means courts will not enforce a promise of a gift or a promise to provide a free service. Even if the other party does not receive the gift or service, its position is no worse than it was before the promise was made.

A Promise not to Do Something

Although consideration is typically a promise to do something, it can also be a promise not to do something. This is referred to as *forbearance* and is the basis for settlement of a claim.

If a party believes, in good faith, that it has a claim against another party, whether for breach of contract or some type of injury, their promise NOT to sue is their consideration for the settlement. The other party’s consideration is the amount it pays for the settlement.

It is not valid consideration unless the party is giving up something it is legally entitled to do, however. As an example, a neighboring business might be parking its trucks in such a way that it is difficult to access a project site. The project owner could promise to pay the drivers a certain sum when the project is complete if they promise to park their trucks somewhere else. If it turns out that it is not legal to park in front of the job site anyway, the contract is not enforceable. Nevertheless, the owner might want to ensure access to the site. The parties could make the agreement, and if both sides carried out their side of the bargain as agreed, there would be no problem. However, if the owner subsequently refused to pay, the drivers could not get a court to enforce the contract.

Action versus Promise

As noted above, the typical business contract consists of reciprocal promises; this is referred to as a *bilateral contract*. It is also possible to have a *unilateral contract*, where one party’s consideration is a promise and the other party’s consideration is an action. In unilateral contracts or agreements, the promise will typically be conditional. For example, the client may agree to pay the A/E an additional fee if the drawings are finished by a certain date. The A/E might not think this can be done, so is not willing to agree to the specified date, but decides to try and ultimately succeeds. The client’s consideration is the (conditional) promise to pay an additional fee. The A/E’s consideration is the action of getting the drawings done by the specified date.

The party must not be under a pre-existing duty to perform the requested action. If the A/E’s contract required the drawings to be done by the specified date, it would not be supplying any consideration. If the owner refused to pay the additional fee, the A/E would have no basis for a claim. There is nothing to prevent the owner from paying the agreed upon fee, but the payment would be a gift, rather than fulfillment of the agreement.

View of the Court

Although a contract is not enforceable unless both parties provide valid consideration, the parties’ right to contract under their own terms is a cornerstone of contract law in this country. Thus, courts will not examine whether the consideration provided by each side is equivalent, or even appropriate. The only exception is if there are allegations of fraud or duress, i.e. if one of the parties misrepresented the value of the goods or services it provided, or one of the parties was forced to sign the contract by threats of physical violence.

Sometimes contracts, particularly contracts for real estate, use the phrase “For good and valuable consideration and ten (10) dollars.” It does not matter whether the money referred to is ever exchanged. When both parties have signed a contract agreeing that the money was exchanged, neither party can subsequently claim that the exchange never took place.

Good and Valuable Consideration

Finally, to answer the original question, good consideration is defined as consideration founded on natural affection, generosity, love or moral duty. By itself, good consideration is not enough to make a contract enforceable; the consideration must also have legal value. Valuable consideration must involve doing something one does not already have a legal obligation to do, or refraining from doing something one has the legal right to do.

The phrase “good and valuable consideration” was once common in contracts; the intent was to emphasize that the parties were exchanging valid consideration and thus the contract was enforceable. Although the phrase is not used in any of the current industry standard form contracts (AIA, EJCDC, ConsensusDOCS), it is sometimes used in custom contracts. There is no harm in including the phrase in a contract, but it really has no meaning; it is generally clear enough from the contract language whether the consideration is valid. And if the consideration is not valid, describing it as good and valuable will not make the contract enforceable. ■

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