

**CONSIDERATIONS WHEN
NEGOTIATING AND DRAFTING CONSULTING CONTRACTS**

By: Geoffrey T. Hervey
Partner
Bregman, Berbert, Schwartz & Gilday, LLC
Bethesda, Maryland

Introductory note: this outline is intended to identify topics that should be considered by a consultant when negotiating a contract for services with a client. The consultant may not necessarily wish to raise every issue with the client, but the consultant should give consideration to each point.

I. SCOPE OF ENGAGEMENT

A. Term of Engagement

1. Start date.
2. End date.
3. Should there be automatic renewal for a new term in absence of prior notice of non-renewal?
4. Does the client or consultant have the right to terminate the agreement prior to the end of the term?
 - a. Under what circumstances, for convenience or only for cause?
 - b. What happens in the event of termination with respect to:
 - (1) payment of compensation
 - (2) completion of work product, disposition of partially completed work product

B. Work to be Performed

1. Who will perform the work (any need to identify specific personnel)?
 - a. Can the consultant subcontract any of the work?
2. What will the work entail (or what will it not include) (if there are things that client would probably expect but that the consultant will not provide, these exceptions should be identified)?
 - a. Most consulting contracts contain a fairly general and flexible definition of the work that will be performed. The consultant will want, however, to include a description of the work that is sufficient to avoid disputes later as to whether the engagement was or was not supposed to include certain tasks. Therefore, the consultant may want the description to include or exclude certain specific tasks.
 - b. Work that would generally be provided in the type of consulting relationship at issue but which the consultant will not provide in this case should be specifically identified.
 - c. General limitations should also be included; for example, the agreement should specify that the consultant will not provide legal advice, tax advice, accounting services, etc.
3. What work products/deliverables are expected (or will not be provided) (if there are

things that client would probably expect but that you will not provide, these exceptions should be identified)?

- a. For example, will the consultant deliver, or expressly not deliver, written reports, drawings, spreadsheets or financial analyses, memos or other internal documents for circulation within the company, press releases or other promotional materials, etc. ?
4. Deadlines; dates for completion of work or deliverables should be specified.
- C. Non-Exclusive
 1. The agreement should provide that the consultant may be working with other clients on other matters at the same time and that the consultant will not be devoting 100% of his or her time to this client's project.
 - a. See non-competition concerns below.
- D. Ownership of Deliverables
 1. Who will own the intellectual property rights (copyrights, trademarks, patents), if any, in any deliverables prepared under the agreement?
 - a. This is important if the consultant will want to re-use any templates, PowerPoint presentations, programs, etc., for other clients or use them as models on which to prepare similar works for others.
- E. Changes, Flexibility, SOW
 1. Rather than attempting to identify specific tasks to be performed at outset, it may be preferable to include a general description of the work, then provide that more specific tasks (and the cost of them) will be specified in a separate Statement of Work (work order, task order, purchase order, etc.) to be executed as the need arises.
 - a. A template of the SOW should be attached to the contract so that the parties have an agreed-upon form that they can simply fill out.
 2. If the consultant expects the terms of the engagement to be fluid because of a fluid environment, he or she may want to provide for Change Orders reflecting changes in tasks, timing, cost, etc.
- F. Contact
 1. Identify point of contact for the project within client company.

II. COMPENSATION

- A. Monetary Compensation
 1. Hourly, monthly, project based.
 - a. If project based, include a mechanism for how to determine additional compensation if the project is expanded/changed, or runs over (perhaps allow for change orders?).
 2. Specify whether payment will be made in advance, or invoiced after the fact, and, if invoiced, when payment will be due (for example, net 30).
 3. Specify whether a retainer is to be provided for fees and/or expenses and whether and how it is to be replenished.
 4. Expenses: specify what rights/limits the consultant has to incur expenses, and

describe how they are to be billed, documented, and reimbursed.

B. Non-Monetary Compensation

1. Is the consultant willing to accept stock or warrants?
 - a. If so, will stock be provided up front, or will options/warrants vest over time? What is the vesting schedule?
 - b. Anti-dilution concerns should be addressed.
 - c. Will there be any restrictions on transfer of the stock? There probably will be. This will be important if the consultant wants to be able to sell stock or warrants to someone else.

C. Milestones

1. Is compensation tied to completion of milestones or achievement of specific goals?
 - a. If so, include a clear time line.

III. WARRANTIES AND LIMITATION OF LIABILITY

A. Warranties

1. The consultant should try to eliminate or seriously limit warranties.
 - a. Warrant to perform services in professionally competent manner (that is, not negligently).
2. The agreement should include an explicit statement excluding all other warranties, including the exclusion of any warranty that the consultant will achieve specific results, which will vary depending on the contract.
 - a. For example, the contract should specify that the consultant makes no guarantee or warranty that services will result in increased sales or new contracts or acquisition of venture capital, etc.

B. Limitation of Liability

1. The consultant should try to limit liability to the greatest extent possible. At most, if possible, the consultant's liability should be limited to the fees actually paid by client over some recent period of time, such as six months.
2. The agreement should specify that the consultant is not liable for consequential damages, lost profits, punitive damages, etc.
3. These provisions are generally heavily negotiated.

IV. NON-DISCLOSURE, CONFIDENTIALITY, NON-COMPETITION, NON-SOLICITATION CONSIDERATIONS

A. Non-Disclosure and Confidentiality

1. The client will probably expect the consultant to agree to keep the client's information confidential and not disclose it to any third party.
 - a. This is generally reasonable and standard.
2. The period of confidentiality should be limited to a commercially-reasonable period, typically throughout the term of the engagement plus a period after termination, such as 1 or 2 years after termination of the engagement.

- a. A longer period may be appropriate for certain specialized industries, but the consultant should be wary of longer periods and demand an explanation as to why it is appropriate.
- B. Non-Competition
 - 1. The client may expect the consultant not to work for its competitors. Obviously, this will reduce the consultant's ability to get business, and such restrictions must be carefully considered and negotiated, especially the definition what constitutes a competitor and the duration of the restriction.
 - 2. Note that non-competition still will not prevent the consultant from working with third parties who are not competitors of the client, therefore non-exclusive provision (see above) should still be included.
- C. Non-Solicitation
 - 1. The agreement may provide that the client and the consultant agree not to solicit each other's employees.

V. MISCELLANEOUS

- A. Location – where will the work be performed
 - 1. If at client's location, the consultant will abide by all of client's rules and regulations regarding hours of operation, dress code, use of equipment, etc.
 - a. This clause is not necessary but usually makes the client feel good.
- B. Governing law and forum selection
 - 1. These provisions can be heavily negotiated. The consultant wants to be close to home in the event of a dispute, and should ask for the law of his or her home state and a forum in his or her home county. The client may have many consultants and be unwilling to commit itself to different laws and fora for different consultants.
- C. Attorney Fees
 - 1. Consider whether to include a clause under which the prevailing party is entitled to recovery attorney fees. In many instances in which a consultant is not paid, he or she is reluctant to file suit because the attorney fees will be high, perhaps as high as the fees that are owed to the consultant.
- D. Dispute resolution: litigation, binding arbitration, mediation.
 - 1. Many consulting contracts contain an arbitration clause to resolve disputes or, alternatively, a clause that lets the aggrieved party choose between litigation and arbitration. The parties may want to consider mandatory mediation before begin allowed to proceed to litigation or arbitration.
- E. Publicity
 - 1. Does the consultant want to publicize the work that he is doing for the client, and will the client agree to publicity?
 - a. Typical provisions allows the consultant to disclose fact that the consultant is working with the client if the client gives written consent, which consent will not be unreasonably withheld.

F. Authorizations

1. The agreement should specify that the person executing contract represents that he/she is authorized to do so and to bind the company to its terms.
2. The agreement should specify that any necessary board resolutions have been passed, especially with respect to any stock or warrants.