

Top Ten Contract Provisions

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Negotiating client-proposed agreements may present significant challenges for technology professionals from a risk management and professional liability perspective. Technology professionals often ask us to identify the “deal-breakers” so they can focus on the most onerous provisions. Ask and you shall receive! Below are the top ten provisions we recommend you concentrate on when negotiating a professional services contract:

- 1. Standard of Care:** Define the professional standard of care in every contract. Ensure the provision accurately reflects the generally accepted standard and is guided by what a reasonably prudent, practicing technology professional would do when performing similar services at the same locality under similar conditions. Language requiring the “best”; “highest”; “first class”; “first rate”; “world class” or warranties/guarantees/certifications may inappropriately elevate the standard of care to a perfection standard.
- 2. Indemnity:** This is probably the most difficult provision to convince clients to modify, but you must carefully negotiate this section of the contract since indemnity may have a significant impact in the event of a claim. Narrowly define the indemnitees so you only indemnify your client and its officers, directors, and employees; delete any duty to defend since it is not covered by professional liability insurance; and limit your obligation to the extent damages are caused by your negligent performance of services under the agreement. If the indemnity provision is not appropriately negligence-based, you may be exposed to liability beyond that for which you are insured.
- 3. Incorporation by Reference:** Ensure any document incorporated by reference is acceptable since it becomes a part of your contract and is like stapling it to your contract! If you have not reviewed the document incorporated by reference and confirmed it is acceptable, do not execute your agreement. Clarify in your contract that your contract governs in the event of inconsistency or conflict between the documents.
- 4. Compliance with Laws:** Tie your obligation to comply with applicable laws, codes and regulations to the professional standard of care. You do have a duty to exercise usual and customary professional care in your efforts to comply with applicable law, codes, and regulations. Delete language requiring you to strictly comply and certify you have complied with all laws, codes, and regulations and language requiring you to certify that the contractor has complied with all laws and/or your design.

5. **Scope of Services:** Clearly detail and define your scope so you and your client fully understand what services constitute basic and additional services, and what services are excluded from your scope. Avoid ambiguity and open ended words such as “any and all”; “complete”; “each and every”; “all necessary” and “all required” services. To the extent known at the time of negotiation, call out excluded services (i.e., “Services excluded from our scope include, but are not limited to the following...”).

6. **Schedule:** Avoid “time is of the essence” or other language requiring you to strictly adhere to a schedule with no flexibility for events beyond your control. Beware of language requiring you to assume responsibility for all damages if there is a delay. Limit your liability for delay damages to the extent those damages are caused by your negligence.

7. **Use and Ownership of Documents:** Do not grant overly broad use and ownership rights of your work product (especially copyright) to clients. If you must grant ownership, get paid before transferring ownership; limit the client’s use of your work product to completion and use of the project for which it is prepared; and negotiate an indemnity protection in your favor if the client uses, reuses, or modifies the documents without your permission. If you must grant copyright, do all of the above and include language reserving your rights to use your standard details.

8. **Limitation of Liability:** Examine client-proposed provisions that do not provide any real protection because of exceptions to the waiver (e.g., the limitation does not apply to indemnity obligations or damages caused by your negligence) or because the limitation amount is very high as compared to your fee on the project.

9. **Consequential Damages:** Examine client-proposed waiver of consequential damages provisions that do not provide any real protection because of exceptions similar to those noted for limitation of liability provisions.

10. **Dispute Resolution:** Require non-binding mediation as a condition precedent to litigation and avoid arbitration as the method of binding dispute resolution. If you must arbitrate, require at least some limited discovery and adherence to the rules of discovery and limit the scope of the arbitration to claims less than a certain dollar threshold. Delete attorney-fee-shifting provisions requiring the non-prevailing party to pay the prevailing party’s attorney’s fees (even if mutual) since these provisions can be problematic from an insurability standpoint.