

Service Providers and Contracts

By Judith Silver, Esq.¹

Having a Contract

As the customer, it is common and expected that you may request a contract for the work. There is no reason to feel guilty or apologetic for making sure that things are clear and you get what you paying for. Additionally, how easily the contractor agrees to your requests foreshadows the entire project. If you are paying more than a small amount or the result is important, it is always a good idea to have your lawyer prepare a contract.

Contract Provisions

Owning the Work Product

Under Copyright law, the person who creates something owns the copyright to it unless otherwise stated in writing. If you want to own what you're hiring the contractor to create, it is important to include language as required by the Copyright Act. *If you do not put anything in writing, the contractor owns what he creates.*

Confidentiality

With many projects, contractors will be exposed or have access to sensitive information about your business through the workplace, files, employees and online systems. The contract should state that the contractor agrees not to disclose or misuse such information – just in case the contractor's next project for your competitors.

Description of the Work Product and Payment

While people often complain and scoff at the value of a contract, one thing that a well written agreement does is force both parties to think clearly about what they want. Often, while going through this process, the parties discover that they had different ideas about the project. Being forced to write out their ideas and answer a lawyer's questions about the work product helps the parties to think through the creation process and the result.

When doing a large or expensive project, it is very important to write a clear description of what the result should be – or, put another way -- when the contractor will have nothing further to perform and should be paid in full. Splitting large projects into milestones tied to payments is

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helpful. Upon completion of each milestone, the result is tested or inspected and approved by the customer, and then the contractor is paid for that milestone.

Warranties

When having a contractor create an item to perform tasks, such as software, it is best to have, at minimum, at thirty day warranty on the completed work product. Part of the purpose of describing the work product is so that both parties can tell what specifications or functionality the product should have when it performs properly. During this warranty period, if the Customer finds anything does not work as described in the contract, the contractor should fix this item without charge.

It is also wise to have a warranty of non-infringement in which the contractor states that whatever he is creating does not infringe the rights, including copyright, trade secret, trademark or patent of any third party – in other words, he did not copy or steal what he is creating from his last customer or someone else.

If the contractor has had a good lawyer prepare his proposed changes to your contract, he will try to add a lot language in capital letters and bold print stating that warranties are disclaimed and that he is not responsible for “consequential, indirect, and special” damages. These are fairly standard requests and often not unreasonable as long as the basic warranties remain and your lawyer reviews the rest of the language.

Indemnification

To complement the contractor’s warranties to you, you may also want her to indemnify for breach of her warranties. This means that if any of her warranties are untrue and you are sued by a third party, she will pay you for all damages that you have to pay anyone else and your court costs to fight the charge.

It is helpful to remember, however, that an indemnification clause is only as good as the money behind it, so that if your contractor has no money and no insurance, this clause is meaningless. Often a contract will also include a requirement that the contractor have insurance as well for this reason.

The Relationship

A good contracts states clearly that each party is a contractor, separate from the other. This clause is important because by law, employers must pay taxes and benefits for employees which are not due for contractors. Also, partnerships and other legal relationships may be implied by law based on behavior if nothing is stated in writing. These relationships can impose liabilities or financial obligations that the parties may not be aware of or desire.

Jurisdiction

Jurisdiction is one of the topics that makes most peoples' eyes roll back in their heads, but it is one of the most important in any contract. One of the strongest positions a party has during a dispute is "home court advantage". If you are the customer, you should have the choice of law and jurisdiction where you are located. This means that if any dispute ends up in court, the contractor is the one who has to hire lawyers in another town and pay for travel and expenses for the depositions, hearings and trial. It also means that the jury and judge will be from your town – sad to say, but that often can make a big impact on the outcome of a dispute.

Limiting Liability

The contractor may try to limit her liability under the contract to a certain dollar amount or some times even to nothing. Depending on how much the customer is paying, an amount equal to or a multiple of what the customer pays is appropriate. If you agree to a contractor limiting her liability, be sure that your lawyer also comparably limits yours.

Conclusion

Contractors can add a helpful and beneficial contribution to your work force, especially with the right contract to ensure you own the results and get what you want.