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Tech Contracts – Key Points for Suppliers

The basic construction of a contract tends to be similar from one IT contract to the next. As a result, there are some things you can be look out for when you negotiate as a supplier of tech services, especially where the customer is large or well-established. Here we explore some of the main issues that you may encounter in this context so that you can be fore-armed.

1. General Points - framework issues

You may from time to time be asked to enter into "framework" or "master services" agreements, particularly in relation to the provision of consultancy/professional services. These set out standard terms which then get "called off" by signing a separate document such as a Statement of Work or Project Description. In these kinds of scenarios, it is worth bearing in mind the following:

1.1.1. they will inevitably be customer-biased and whilst you may take some comfort with the fact that any future statement of work might attempt to override the original standard terms, it is unlikely to work since the standard terms invariably take precedence over any conflict with the statement of work - try to have the statement of work have precedence over the standard terms.

1.1.2. the framework agreement may last for a number of years and included a schedule on pricing - remember to build in a mechanism to allow for charging increases over time - for example, linked to RPI or even just a basic x% increase per year

2. Customer "discretion"

Often overlooked in the dense verbiage of customer-biased contracts, you may find dotted about clauses which allow the customer unilateral rights to require things, or allow the customer to take decisions based on his own *subjective* view of things - here are some examples:

2.1. Right to change/issue instructions

In some contracts the customer is is allowed to make changes to a given contract unilaterally, with only quite limited rights for you to object. Ideally, all changes should be subject to mutual agreement.

Also, where a clause says something along the lines of "***You shall promptly comply with Customer's instructions***" try to qualify this by making the instructions "*reasonable*" and "*reasonably within the scope of the [specified] services*" - otherwise you may find yourself having to do something which incurs costs which can't be passed on to the customer.

2.2. Acceptance of deliverables

Where deliverables (for example, reports or analyses carried out by consultants) are subject to "acceptance" by the customer (which in turn may be a condition of receiving payment), make sure that the acceptance is, as far as possible, based on *objective* criteria, not just the subjective opinion of the customer.

3. Price/Payment clauses

These should be fairly straightforward, but beware the following:

3.1. Currency/exchange rate risk

Try to ensure that the contract is priced in pounds sterling and you receive payment in pounds sterling. But where you are forced to accept payment in another currency, build in the right to change prices where the exchange rate moves against you - for example by a factor of more than 5%.

3.2. Conditional on customer "satisfaction"

You sometimes see something along these lines: "***provided that [the Supplier has performed its obligations in full under this Contract]* OR *[the services have been accepted] to the satisfaction of the Customer, then the Customer will pay the charges….***" Be wary of this wording since it allows the customer to effectively withhold payment for potentially spurious reasons. Try to delete this kind of "contingency" wording - if there is a problem with the provision of the services, it should be dealt with by a *separate complaints/remedy procedure* rather than withholding payment.

3.3. Late payment remedies

Whilst you will often see a provision to allow you to charge some element on interest in late payments by the customer, for some contracts it may also be useful to include the right to *(a) suspend delivery of the Briefing or services (as the case may be); and (b) terminate if payment is more than [x] days late*.

Example wording:

If the Supplier has not received payment within 30 days after the due date, and without prejudice to any other rights and remedies of the Supplier:

(a) the Supplier may, without liability to the Customer, disable the Customer's passwords, accounts and access to all or part of the Services and the Supplier shall be under no obligation to provide any or all of the Services while the invoice(s) concerned remain unpaid; and

(b) interest shall accrue on a daily basis on such due amounts at an annual rate equal to 5% over the then current base lending rate of the Supplier's bankers in the UK from time to time, commencing on the due date and continuing until fully paid, whether before or after judgment.

3.4. Fixed price or time and materials

Make sure that the contract clearly states whether it is one or the other. Sometimes you see fixed price contracts which are in fact simply capped time and materials. Where fixed costs, try if possible to leave some wiggle room for extra costs incurred due to customer delay, lack of co-operation, wrong information and the like. Also, if a fixed price and the customer terminates early, do you still get the fixed price in full?

4. Intellectual property issues

It should certainly be non-negotiable that any background IPR used in any remains with you. However, most customer contracts will always start from a position at any *deliverables* are entirely customer owned and this position may need amending, depending on the type of input you have provided.

4.1. Licensing

Make sure that the contract sets out clearly what the customer can and cannot do with the content, particularly with dissemination within/outside the organisation. Assuming access via an online portal, for example, the following wording is suggested:

In relation to the Authorised Users, the Customer undertakes that:

(a) it shall only permit Authorised Users to access and use the Subscription Services;

(b)	*it will not allow any Authorised User Subscription to be used by anyone other than the named Authorised User;*
(c)	*each Authorised User shall keep a secure password for his use of the Services and Documentation, that such password shall be changed regularly and that each Authorised User shall keep his password confidential; and*
(d)	*it shall maintain a written, up to date list of current Authorised Users and provide such list to the Supplier within 5 Business Days of the Supplier's written request at any time or times.*

4.2. Ownership

Whilst ownership of the deliverables is or should be clear, it is possible that the output of any consultancy services may provoke more debate. The point being why should the customer not own the deliverables it has paid to produce. It may be difficult to resist this argument, unless the deliverables contain material owned by third parties (or indeed the IP rights as between you and the consultant have not been assigned to you under the contributor/consultancy agreement). However, if forced to accept this argument, it is probably wise to attempt to carveout from the customer's ownership, any methodologies, algorithms or the like used in the production of the deliverables.

5. Warranties

Pro-customer contracts will invariably include warranties which require goods or services to be provided to the highest standards with all due care and skill (etc., etc.) By and large you should take a risk based proportionate view on these and let them pass. Especially if it manages to included a decent limitation of liability clause within the contract (more on this below).

5.1. "Time of the essence"

Be very careful of allowing the "***time for performance of [your] obligations to be of the essence***". This means that if you miss a deadline by 1 second, the customer can terminate (and sue for damages). So whilst it is ok to say that you will meet deadlines, do try to strike out "time of the essence" wording.

5.2. Remedies

As a further way of limiting liability for breach of warranty, try to give yourself the ability to remedy (i.e. put right) the defective service or product before the customer can take any action and allow a reasonable period of time to allow the implementation of corrective action.

6. Limitations/exclusions of liability

Remember that contracts give rise to *rights on one side* and *obligations on another*. If you are negligent or breach a term of a contract or breach a warranty, this entitles the other party to sue you for damages in respect of the loss they have suffered as a consequence of your breach. They have to show causation and evidence the loss. They also have a general duty to mitigate their losses (i.e. not do anything unreasonable that extends their loss).

Provided they can overcome these hurdles, then you face liability for damages. However, it is possible to include within the contract various limitations and exclusions which may, provided they are enforceable (i.e. in general, this means they are "reasonable"), protect you from some or even all of this liability. Hence it is important that wherever possible you (a) exclude liability for "consequential losses" - these are indirect losses which arise due to special circumstances and (b) limit liability for any other loss.

Do note that if you attempt to exclude liability altogether, it is doubtful the limitation will be enforceable. Better to accept some liability to a limited extent rather than exclude it all together.

Try to resist any attempt by the customer to exclude certain losses from the cap - for example you may sometimes see that claims under an intellectual property infringement indemnity are not capped. In this case, I would suggest counter-proposing that that particular liability is capped at the level of your professional indemnity insurance.

Example wording:

12 This clause 12 sets out the entire financial liability of the Supplier (including any liability for the acts or omissions of its employees, agents and sub-contractors) to the Customer:
(a) arising under or in connection with this Agreement; *(b) in respect of any use made by the Customer of the Services and Documentation or any part of them; and* *(c) in respect of any representation, statement or tortious act or omission (including negligence) arising under or in connection with this Agreement.* *12.1 Except as expressly and specifically provided in this Agreement:*
(a) the Customer assumes sole responsibility for results obtained from the use of the Services and the Documentation by the Customer, and for conclusions drawn from such use. The Supplier shall have no liability for any damage caused by errors or omissions in any information, instructions or scripts provided to the Supplier by the Customer in connection with the Services, or any actions taken by the Supplier at the Customer's direction;

(b) all warranties, representations, conditions and all other terms of any kind whatsoever implied by statute or common law are, to the fullest extent permitted by applicable law, excluded from this Agreement; and

(c) the Services and the Documentation are provided to the Customer on an "as is" basis (to the extent permitted by applicable law).

12.3 Nothing in this Agreement excludes the liability of the

Supplier: (a) for death or personal injury caused by the

Supplier's negligence; or

(b) for fraud or fraudulent misrepresentation.

12.4 Subject to clause 12.2 and clause 12.3:

(a) the Supplier shall not be liable whether in tort (including for negligence or breach of statutory duty), contract, misrepresentation, restitution or otherwise for any loss of profits, loss of business, depletion of goodwill and/or similar losses or loss or corruption of data or information, or pure economic loss, or for any special, indirect or consequential loss, costs, damages, charges or expenses however arising under this Agreement; and

(b) the Supplier's total aggregate liability in contract, tort (including negligence or breach of statutory duty), misrepresentation, restitution or otherwise, arising in connection with the performance or contemplated performance of this Agreement shall be limited to the total Fees paid during the 12 months immediately preceding the date on which the claim arose.

7. Indemnities

Indemnities are like an *insurance* - an indemnity provides pound-for-pound compensation for the person claiming under the indemnity in respect of the "indemnified event" or loss. *There is no need to prove causation and no need to mitigate loss (unlike being sued for damages)*. The beneficiary can simply state "this is my loss - the indemnity covers this loss - and here is my invoice".

So if you see the words "indemnity" or "indemnify" pay very special attention. If at all possible, try to strike out general indemnities that attempt to allow the customer to get an indemnity recovery simply for any act or omission by you or for any breach of the agreement (although query whether such a broad indemnity is enforceable since it is so wide as to be uncertain). However, it is good practice to try to make any indemnity limited in scope/ambit - i.e. spell out exactly what the indemnified loss is to be; and it should be limited in time as well if possible.

You will often be asked to provide an indemnity in respect of intellectual property infringement and perhaps defamation actions - it is difficult to

argue against this (although you should make sure your contributors are contracted under an agreement where they warrant that they haven't infringed (i.e. copied) any third party IP). However, it is nevertheless a good idea to include some "qualifications" on the basis that you are essentially picking up the tab and writing the cheque, so should be permitted to have some control over the claim.

Example wording:

10.2. [Subject to the Licensee's compliance with Clause [10.3],] the Licensor will indemnify and will keep indemnified the Licensee against all liabilities, damages, losses, costs and expenses (including legal expenses and amounts paid [upon legal advice] in settlement of any disputes) suffered or incurred by the Licensee and arising as a result of any infringement of any third party's Intellectual Property Rights in [any jurisdiction] and under [any applicable law] (a "Licensor Indemnity Event").

10.3. The Licensee will:

(a) upon becoming aware of an actual or potential Licensor Indemnity Event, notify the Licensor;

(b) provide to the Licensor [all] reasonable assistance in relation to the Licensor Indemnity Event;

(c) allow the Licensor the exclusive conduct of all disputes, proceedings, negotiations and settlements relating to the Licensor Indemnity Event; and

(d) not admit liability in connection with the Licensor Indemnity Event or settle the Licensor Indemnity Event without the prior written consent of the Licensor.]

It is important that you have this control since of course you may be facing claims from multiple customers in respect of one article - you need to manage them "globally". Certainly your insurer will be looking to do this as well.

8. Insurance

You may be required to have appropriate insurance in place – usually, professional indemnity insurance ("PI"). *Make sure that the limit of the insurance required under the contract is no greater than the insurance currently held*.

Also, take a close look at the PI policy - there will be a number of exclusions and carve-outs which will mean that a potential action by a customer will not be covered. For example, are intellectual property infringement actions in the US or Canada are often excluded. Do also check whether the policy requires your contracts to include standard limitations and exclusions of liability (for example, excluding consequential loss etc.).

9. Termination issues

9.1. Early termination by the customer

Some contracts allow the customer to *terminate the contract early on notice, perhaps minimal, without any early break fees* (other than paying up to the date of termination) - in essence rendering what looks like a multi-year contract into a contract which is no longer than the duration of the termination notice. What looks (and may be accounted for) as fixed long term revenue therefore becomes much less secure. It is suggested that you look to include some mechanism to allow you to charge an early termination fee (based on what it would have been paid if it had gone full term, less some sort of discount)

Example wording:

Early termination fee.

In the event the Customer wishes to terminate this Agreement pursuant to clause [ ], such termination shall be conditional upon the Customer first paying to the Supplier an amount (Early Termination Fee) equivalent to the net present value with a discount rate of 7% (NPV) of the Agreement as at the date of termination. The Supplier will calculate the NPV in accordance with generally accepted accounting principles in the UK, and may invoice the Customer for the Early Termination Fee at any time following the Customer's early termination notice provided under Clause []. The Customer must pay such invoice by the earlier of the date of termination or 10 Business Days from the date of invoice. The Supplier shall provide to the Customer a calculation of the NPV within 5 Business Days of a request by the Customer to do so.

9.2. Early termination provisions "with cause"

Most contracts will give the customer the right to terminate for breach - try to make sure that the breach is material and try to allow a remedy period before termination is effective.

Example wording:

Without affecting any other right or remedy available to it, either party may terminate this Agreement with immediate effect by giving written notice to the other party if:

....

(b) the other party commits a material breach of any other term of this Agreement which breach is irremediable or (if such breach is remediable) fails to remedy that breach within a period of 30 days after being notified in writing to do so;

You may also see clauses that allow the customer to terminate in the event that your corporate control (i.e. your shareholders/owners) change - these should be resisted since there is no real justification in these circumstances.

10. Governing Law and Jurisdiction

Most likely to one of the least negotiated areas, but it can be important, as outlined below. The *law* that governs a contract is the legal rules that will dictate how it is interpreted in the event of a dispute. The *jurisdiction* dictates WHERE and by WHOM the dispute will be dealt with. Never be silent on the issue since this can get very expensive in the event of a dispute and never accept a solution which says that the law of the contract will be the law of the party bringing the action - this is a recipe of huge expense as well.

10.1. Governing Law

Ideally this should always be English, but clearly when dealing with large foreign organisations (such as the EU) this is going to be difficult to negotiate. The point to bear in mind is that continental legal systems are based on the "Civil Code" which sets out the rules that apply to contracts. In the UK (and the States and other commonwealth countries) we have a common law system - the rules are precedent-based - i.e. what the courts have most recently said on an issue. This can change over time. That said, commercial agreements will (very broadly) be similarly governed whatever the law (within reason) - so this shouldn't be a show stopper.

10.2. Jurisdiction

Again, ideally, this should be the Courts of England and Wales. But another alternative to court action is arbitration - again ideally this should happen in England but it can be held anywhere in the world. Remember arbitration and court proceedings are basically mutually exclusive.
Sometimes, a useful compromise is to have the contract governed by, say, English law, but the dispute action be heard in the courts of (or arbitrated in) the other party's jurisdiction.

11. Miscellaneous

11.1. Sub-contracting

Many pro-customer standard contracts will prohibit sub-contracting without consent as a matter of course. (As an aside - you can sub-contract to anyone unless the contract says otherwise). Whilst you are unlikely to get this knocked out as a whole, it is possible that you will be able to carve out individual contractors/consultants which of course covers your contributors - use language along these lines:

Other than in respect of individual freelancers, consultants or contractors (or their personal service companies) ... (your company name) will not sub-contract…

11.2. Restrictive Covenants

It might be useful to include a provision to prevent customers from poaching your contributors/consultants to work directly for the customer.

Please be aware that these notes have been compiled for general guidance only and should not be considered as specific legal advice.