Tuesday, October 26
2:30pm-4:00pm

703 - Contract Drafting to Avoid Disputes and Inefficency

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Faculty Biographies

Kenneth A. Adams

Ken Adams is president of AdamsDrafting.

Previously, Mr. Adams practiced corporate law with major US law firms in New York and in Geneva, Switzerland.

He's author of "A Manual of Style for Contract Drafting" (ABA 2d ed. 2008) and a lecturer at the University of Pennsylvania Law School. He gives public and in-house seminars in the US and Canada and acts as a consultant and expert witness. As part of its "Legal Rebels" project, in September 2009 the ABA Journal named Mr. Adams one of fifty leading innovators in the legal profession. He maintains a blog at www.adamsdrafting.com. He is director and secretary of U.S. Friends of Latymer Upper School.

Mr. Adams received a BA from the University of York, England, and received his law degree from the University of Pennsylvania Law School.

Shawn Cheadle

Shawn Cheadle serves in a duel role as general counsel to Surveillance & Navigation Systems, a Lockheed Martin Space Systems Company business unit, and as associate general counsel to Lockheed Martin Space Systems Company. He advises management on matters involving government contracts and subcontracts in major space and ground systems, including compliance to ITAR, FOIA, OCI, FCPA and hospitality, and control of proprietary data, and drafting and negotiating a myriad of domestic and international agreements. As AGC to Space Systems, Mr. Cheadle counsels on internal policies, central procurement, real estate and facilities matters, e-Discovery and records management, and general legal matters to the LM Colorado campuses.

Formerly, Mr. Cheadle served two other aerospace and defense suppliers as senior contracts counsel, general counsel, secretary and regional vice president.

He currently serves on the ACC Law Department Management Committee as chair of the Strategy & Operations subcommittee. As a director for the ACC Colorado chapter, he served in several chapter leadership roles including President. He is a member of the Colorado Bar and Denver Bar Associations, ABA-Public Contract section, NCMA, and ARMA International. Mr. Cheadle also serves on the Dean's Diversity Council in Colorado. He presents on lean law departments, GPS space law, contracts, records management and eDiscovery.

He received his JD from the University of Denver, College of Law, and his BA from San Jose State University.

Session 703

Christopher Koa

Christopher M. Koa is counsel at Dell Inc. in Round Rock, TX responsible for the legal affairs of the company's global infrastructure consulting services and global service delivery divisions.

Mr. Koa previously held in-house and law firm positions including at Microsoft Corporation; Wilson Sonsini Goodrich & Rosati; and Brobeck, Phleger & Harrison. He was also a technology investment banker at WR Hambrecht on the West Coast. Mr. Koa also served as law clerk to United States District Court Judge Edward J. Schwartz (Southern District of California).

Mr. Koa's has also held leadership positions with the National Asian Pacific American Bar Association and other bar associations, and his pro bono activities include serving as former general counsel of the Chinese Software Professionals Association in Silicon Valley.

Mr. Koa earned a JD from New York University School of Law, MPA from the Princeton University Woodrow Wilson School of Public & International Affairs (where he was a Sloan Fellow) and BA from Carleton College.

Florence Pinigis

Florence J. Pinigis is a senior attorney in Southern California Edison Company's law department. Southern California Edison Company (SCE) is a regulated electric utility that serves customers in central and southern California. She is responsible for contracts and intellectual property for SCE, including drafting and negotiating contracts for the steam generator replacement project for San Onofre Nuclear Generating Station (SONGS) and for SCE's smart meter deployment project, which is currently being deployed to SCE customers.

She leads a transactional practice group within SCE to share information and best practices with other transactional attorneys practicing at SCE. This group meets quarterly.

Ms. Pinigis is a graduate of UCLA's law school and also has a master's degree from UCLA.

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When do we start drafting?

- Begin drafting when "ready"
- Start with the end clearly in mind
- Develop a Game Plan with agreement from team
- Realize that drafting is likely to flow from the contract negotiations
- Drive "Quality at the Source," avoid disputes

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How to prepare for contract negotiations: The In-House Perspective

- Understand requirements, policies and objectives
- Know style standards or preferences
- Consider practicalities associated with executing a *new* contract:
  - Is the new contract similar to others you've executed, or is it totally different?
  - How complex is the underlying transaction?
  - How important is this deal to the company?
  - When does the contract needed to be signed?
- Use this information to develop a Game Plan

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What is a Game Plan and when to use one?

- A Game Plan is a document that you create to ensure:
  - Needed resources are in place
  - Major steps to create the specific contract (or set of related contracts) are laid out in an orderly, cohesive manner
  - Results are likely to meet the identified objectives
    - Note: Also known as Checklists, Term Sheets or Deal Points
- The level of detail is likely to vary significantly among transactions
- When to use a Game Plan:
  - Large team
  - Conflicting objectives
  - Complex deal

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Developing the Game Plan

- Identify your contracting team
- Define team roles and responsibilities
  - Include Delegations of Authority, including signatory
  - List internal approvals required (Ops, Legal, Environmental, HR...)
- Timetable: from negotiation to execution
- Describe key business objectives
- List related documents needed for the final contract
  - Identify pre-requisite documents or sections, if any

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Developing the Game Plan (cont.)

- Visualize the final contract document
- Identify key issues likely to arise based on:
  - nature of the transaction,
  - past experience,
  - the counterparty
- Develop a "playbook" to address recurring issues
- A solid Game Plan is "Quality at the Source" and will allow you to avoid disputes

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How to make the drafting process more efficient?

- **In-house counsel perspective:**
  - make sure the deal gets done and we don't get sued; language matters, but is often secondary
- **Outside counsel perspective:**
  - strong need to "do it right"; less need to get the deal done; may be difficult to stop with what is "good enough"
- **Non-lawyer perspective:**
  - **Academic**: language and structure are key to conveying meaning and avoiding disputes
  - **Business Unit**: just get it done; why do we even need a contract; we will be able to work out any issues
  - **Consultant**: no need to reinvent the wheel; there is nothing really "new", just variations on a few themes

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Drafting Efficiency—In-house Counsel Perspective:

- When is the "best" time for in-house counsel to get involved?
- Locating solid, useful contract templates
- Hold pre-negotiation team meetings; rely on contracts team to:
  - Prioritize objectives
  - Identifying the "market" (more about this later)
  - Evaluate the impact an issue will have on the company's business operations
- Improving the efficiency of your internal review processes:
  - Consider who should review and why
  - Circulating drafts:
    - Use soft files (not PDFs) and tracked changes, or a contract editing application
    - Elicit comments
    - Reconcile conflicting comments; coordinate final position
  - Set Deadlines
- Consider using "Lean" principles to create a more efficient internal contracting process

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Drafting Efficiency—Outside Counsel Perspective:

- Use "form" libraries—try not to reinvent the wheel
- Use consistent terms; define terms
- Consider alternative language that can resolve a potential problem in multiple ways
- Speak in the language of the other side, where appropriate:
  - International transactions
  - Industry specific transactions
  - Agency specific transactions
- Maintain a professional and cooperative tone in the negotiations

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Drafting Efficiency—Non-Counsel Perspective:

- Focus on what matters most; don't need to address everything in detail
- Business approach to risks: Which are acceptable and unacceptable? Why?
  - Judge Learned Hand's BPL Formula: ***Benefit ≥ Probability * Loss***
- Establish common terms early in the drafting process
- Weigh importance of deadlines versus resolving all open issues in the preferred way
- Consultants: model contracts, industry nuances (language, terms, etc.), implement Lean principals

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When to use of outside expertise:

- Most valuable when these factors are present:
  - The contract is extremely important to the company;
  - A unique contract: e.g., the first of a series of contracts, one-off—rare deal, rare contract type
  - A unique counterparty: very different culture or business model, they "speak a different language", government, agency
  - The in-house lawyer understands the "gap" that needs to be filled and the qualities required to fill this gap
- Used to provide a "new look" at standard terms and methods of contracting

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How do we figure out what to say in our contracts?

- Determining what is "market"
  - Informal inquiries with industry contacts
  - Inquiries with specialist outside counsel
  - Surveys
  - Review of templates and precedent contracts, whether from your company, industry wide, or something in between

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How do we figure out what to say in our contracts? (cont.)

- Getting input from relevant legal and business personnel
  - Using Google Docs or wikis
  - The perils of decision-making by committee
  - Asking who, what, when, where, and what if?
  - Leaving issues unaddressed

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When we're ready to draft, what can we use as a starting document?

- An existing company template
- Contracts entered into previously by your company
- Contracts on EDGAR
- Templates promulgated by trade groups
- Contracts included in treatises
- A blank sheet of paper…

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How should we modify the starting document to create the custom contract needed?

- Customizing the starting document requires carefully noticing when the facts in your specific deal differ from those stated or assumed in the starting document.
- Customization also should include identifying when the form, structure and language used in the existing contract may not work. [Note: This is one example where the perspective of experts can be very valuable]

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Examples of when the language may not work in a specific context.

- Syntactic ambiguity
  - *Subject to the termination provisions of this Agreement, this Agreement shall be effective from the date it is made and shall continue in force for a period of five (5) years from the date it is made, and thereafter for successive five (5) year terms, unless and until terminated by one year prior notice in writing by either party.*

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Examples of when the language may not work (cont.)

- Lexical ambiguity
  - *that no such termination shall relieve any party … from any liability or damages resulting from the wilful and material breach … by a party of any of its representations, warranties, covenants or agreements set forth in this Agreement*

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Examples of when the language may not work (cont.)

- Distinction between obligations and conditions
  - *Such invoices shall be forwarded to Acme within 90 days following receipt of said invoices by Contractor, and shall be accompanied by appropriate documentation.*
- Redundancy
  - *Indemnify and hold harmless*

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How much effort should you spend on customizing an existing contract?

- While there is no formula, you will need to consider the costs associated with customization, which are likely to include:
  - More time
  - More money (where outside experts are used)
- And then balance these additional costs against the costs of not customizing enough, which can include:
  - Loss of an anticipated benefit under a contract
  - Disputes

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What can you do to reduce the costs of customizing to fit specific deals?

- Two possible approaches:
  - Focus on "pre-customizing" to address the types of deals that are most frequently encountered by your company ("Fix 1")
  - Review and revise all of your company's templates so that they are pre-customized to address future transactions as they arise ("Fix 2")

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What can you do to reduce the costs of customizing to fit specific deals? (cont.)

- Fix 1: Types of Activities that may be beneficial:
  - Create a form library within your organization
  - Circulate outside training materials within your organization for review and comment
  - Conduct in-house training programs
  - Highlight "best practices" recommended by recognized authorities
  - Encourage personnel to share ideas and engage in "lessons learned" from past transactions

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What can you do to reduce the costs of customizing to fit specific deals? (cont.)

- Fix 2: Types of Activities that may be beneficial:
  - Adopt a house style for contract usages and layout
  - Train your personnel in drafting consistent with the house style
  - Redraft your templates consistent with the house style

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Who should perform the activities associated with these fixes?

- For drafting new templates
  - In-house lawyers
  - Outside counsel
  - Whoever is best qualified

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Who should perform the activities associated with these fixes? (cont.)

- For turning templates into deal documents
  - Businessperson
  - In-house Lawyer
- If the drafting process is decentralized, then you need to establish procedures to assure consistency

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How can we make more efficient the process of turning templates into deal documents?

- Using document-assembly software
- Outsourcing your template drafting
- Using "Lean" principles

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How can "Lean" principles make more efficient the contracting process?

- Understand the difference between Lean Manufacturing principles and Six Sigma, while both improve process:
  - Lean focuses on cutting waste, increasing efficiency
  - Six Sigma focuses on zero defects
- See ACC Legal Quick Hits archived under the Law Department Management Committee:
  - http://www.acc.com/committees/archivedlqh.cfm?
- *Quality at the Source*: teams, templates, language, reviews
- Navy ManTech: 68% of Lean savings are "on the carpet"

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"Lean" Tools

Kaizen (Improvement) Workshops
5 S (Sort, Straighten, Sweep, Standardize, Sustain, (Safety))
Value Stream Mapping (define value, cut non-value add) Current State, Future State
Brainstorming, PICK Charts, Takt Time, Spaghetti Diagram
Kanban (pull system)
8 Forms of Waste*
GOAL: Eliminate Waste, Improve Process

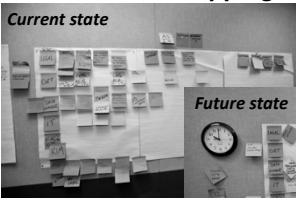*** 8 Forms of Waste:**
Inventory, Transportation, Over-Processing, Waiting/Queue Time, Unnecessary Motion, Defects, Over-Production, Injuries

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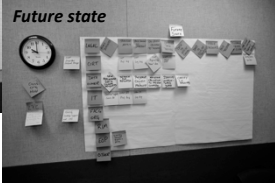Henry B. Gonzalez Convention Center, San Antonio, TX

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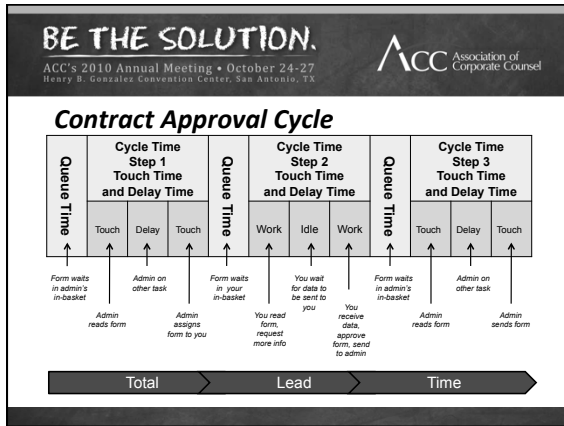
Value Stream Mapping

Current state

Future state

map — • Map Value Stream, As Is
tools — • Brainstorm • PICK Chart
lean — • Map Future State • Mistake Proof

What to Do When the Other Side Wants to Change
Your MSCD-Compliant Language

Kenneth A. Adams

January 20, 2010

In the introduction to *MSCD*, I say that "readers shouldn't notice any jarring difference between a contract containing traditional usages and one drafted consistent with the recommendations in this manual—this manual seeks to work within the prevailing idiom."

But that said, it's likely that anyone who's a slave to traditional usages will, on reviewing an *MSCD*-compliant draft, instinctively seek to change the language back to what they're used to.

An obvious response would be to tell anyone requesting changes that you're only going to consider changes that have a bearing on meaning, and that nothing would be gained by racking up lawyer time discussing stylistic changes. It's standard deal etiquette that you stick with the drafter's language unless you have good reason for asking for a change.

But once the other side sends over their markup, it might be difficult simply to ignore extraneous changes, particularly if your client is hot to do the deal. So you might want to launch a preemptive strike by including something along the lines of the following in any email that accompanies your draft of any contract, or as a footnote in the draft itself:

> Note that in many respects the language used in [the attached] [this] draft complies with the recommendations contained in Kenneth A. Adams, *A Manual of Style for Contract Drafting* (ABA 2d ed. 2008).

> This book demonstrates that many traditional drafting usages are inconsistent with clear, modern, and effective drafting, and it recommends alternatives. Consequently, you may find that some usages that you employ routinely in your contracts aren't present in this draft.

> Before you ask that any traditional usages be restored to this draft, please consider whether restoring them would change the meaning of any contract provisions or make them clearer. If it wouldn't, making those changes would serve no purpose.

> And please consult *A Manual of Style for Contract Drafting* to see what it has to say about any usage that you seek to restore—it may be problematic in ways you hadn't considered. It's in the interests of both sides not to spend time making, or even discussing, changes that have no bearing on the deal or that might confuse matters.

[NAME OF ORGANIZATION]

Statement of Style for Contract Drafting

Version of [date]

Introduction

With a view to ensuring that our contracts are as clear and efficient as possible, we have adopted this statement of style for contract drafting. It specifies guidelines regarding the look of and, more importantly, the language used in our contracts. It applies to everyone in our [organization] who is responsible for drafting or reviewing contracts. We believe that complying with this statement will save time and money and make us more competitive.

Any kind of writing would benefit from use of a style guide. That's particularly the case with contract drafting, given that contract language is so limited and stylized and given that the ramifications of unclear contract language are potentially drastic.

Lawyers have traditionally treated contract drafting as a craft, with differences in drafting usages being attributed to acceptable divergence in individual preferences. That approach has contributed to the inconsistency and lack of clarity that afflicts mainstream contract language. By adopting this statement of style, we're breaking with that tradition.

Following A Manual of Style for Contract Drafting

Once we decided to adopt contract-drafting guidelines, we were faced with two alternatives. We could take advantage of an existing style guide for contract drafting, or we could create our own entirely from scratch.

Only one style guide for contract drafting is currently in existence—*A Manual of Style for Contract Drafting*, or "*MSCD*," by Kenneth A. Adams. Published by the American Bar Association and currently in its second edition, *MSCD* is a work of practical scholarship that has gained a wide following in the legal profession. If we were going to piggy-back off of an existing style guide, *MSCD* would be the only candidate.

We could conceivably create our own version of *MSCD*, but that would be unrealistic—it would require more resources and expertise that we have available to devote to the task.

We could prepare a skimpier version, of perhaps a couple of dozen pages. But any such guide could only skate over the surface of the diverse issues relating to contract language, so it would be of little value—with any form of writing, the devil is in the details. All published style guides for general writing are book-length. Given the technical and demanding nature of contract language, it would be unrealistic to expect that one could make do with anything less for purposes of contract drafting.

Consequently, we have decided to follow *MSCD*. Our guidelines regarding style can be summarized as follows: comply with the recommendations made in *MSCD*. (In future versions of this statement we might in a targeted way supplement that guidance.)

Surrendering Autonomy

We expect that some lawyers will bridle at having to conform to the recommendations in *MSCD*. But sacrificing autonomy is essential to improving the quality and consistency of contract language.

You may be reluctant to assume that *MSCD*'s analysis is reliable. But that's no basis for not following *MSCD*'s recommendations—to some extent, using any reference work requires a leap of faith, and MSCD has established its value. If you take issue with anything in *MSCD*, we suggest that you prepare a detailed analysis and present it to Ken Adams. (Simply parroting the conventional wisdom likely wouldn't be sufficient.) If you don't receive a prompt answer, or you aren't satisfied with it, then contact [title].

Some of the recommendations in this statement of style or in *MSCD* relate to usages that aren't likely to result in any dispute and that may not even affect readability. We nevertheless ask that you comply with those recommendations—consistency is a worthwhile objective in and of itself.

No one will be looking over your shoulder to make sure that you comply with the style guide. But it does have the backing of our [organization]. If you deviate from it or, more particularly, if you insist that junior lawyers deviate from it in drafting contracts on your behalf, don't be surprised if you're asked to explain why.

Layout

We want our contracts have a consistent look. And we don't want our personnel fiddling unnecessarily with contract layout—how blocks of text are positioned on the page, and how they're enumerated. So we hereby stipulate that all contracts we draft should use the numbering scheme recommended in *MSCD*, in either the "articles" or "sections" version. To facilitate that, we have installed on each of your computers The Numbering Assistant, a numbering utility that includes among the built-in schemes the two version of the *MSCD* numbering scheme.

Using either version of the *MSCD* scheme results in text that uses a relatively new Microsoft typeface called Calibri, as opposed to Times New Roman or Arial. That might seem like a controversial change, but recent research has shown that when it comes to typefaces, people like what they're used to. Once you get used to Calibri, you should like it well enough. Typographers certainly regard it more favorably than Times New Roman or Arial. And on the technological front, it's a safe choice.

Using either version of the *MSCD* scheme also results in ragged-right text, rather than fully justified text. Typographers are unanimous that for purpose of word-processed documents, ragged-right margins makes text easier to read.

For more information on these layout issues, see *MSCD*.

[*Drafting Guidelines and Outside Counsel*

We can't unilaterally impose our drafting guidelines on outside counsel. But over time we will favor those firms that make an effort to draft contracts that are consistent with our guidelines.]

Drafting Guidelines from the Perspective of the Reviewer

When you're reviewing a draft submitted by the other side in a transaction, that's not the time to administer drafting lessons. The other side probably wouldn't respond favorably to a general critique of their use of *shall* and their tolerance of archaisms.

But *MSCD* discussed plenty of issues that could create confusion resulting in dispute—for example, whether a given provision is a condition or an obligation, or whether it exhibits syntactic ambiguity. Those are the kinds of issues to focus on when reviewing a contract.

Alerting the Other Side to Our Use of Drafting Guidelines

Readers shouldn't notice any jarring difference between a contract containing traditional usages and one drafted consistent with this statement of style—*MSCD* seeks to work within the prevailing idiom.

But that said, on reviewing an *MSCD*-compliant draft, anyone who's a traditionalist may well seek to change the language back to what they're used to. That would be counterproductive.

An obvious response would be to tell anyone requesting changes that you're only going to consider changes that have a bearing on meaning, and that nothing would be gained by devoting lawyer time to discussing changes that have no bearing on the deal terms. It's standard deal etiquette that you should stick with the drafter's language unless you have good reason to ask for a change.

But once the other side sends over their markup, it might be difficult simply to ignore extraneous changes, particularly if your client is eager to do the deal. So we recommend that as a regular matter you including the following in any email that accompanies your first draft of any contract:

> Note that in many respects the language used in the attached draft complies with the recommendations contained in Kenneth A. Adams, *A Manual of Style for Contract Drafting* (ABA 2d ed. 2008).

> This book demonstrates that many traditional drafting usages are inconsistent with clear, modern, and effective drafting, and it recommends alternatives. Consequently, you may find that some usages that you employ routinely in your contracts aren't present in this draft.

> Before you ask that any traditional usages be restored to this draft, please consider whether restoring them would change the meaning of any contract provisions or make them clearer. If it wouldn't, making those changes would serve no purpose.

> And please consult *A Manual of Style for Contract Drafting* to see what it has to say about any usage that you seek to restore—it may be problematic in ways you hadn't considered. It's in the interests of both sides not to spend time making, or even discussing, changes that have no bearing on the deal or that might confuse matters.

Words and Phrases to Avoid

Black-and-white is simpler than shades of gray—the most straightforward *MSCD* recommendations are those urging you not to use a given word or phrase. Here's a partial list of words and phrases that should as a general matter be absent from your contracts:

at no time	*represents and warrants*
best efforts	*reserves the right to*
covenant	*(s)* (at the end of a noun)
for the avoidance of doubt	*said*
hereinafter referred to as	*same* (used as a pronoun)
including but not limited to	*set forth in*
including without limitation	*shall be*
in consideration of the foregoing	*shall have the right to*
incorporated by reference	*such as*
indemnify and hold harmless	*such* (used as a pointing word)
in lieu of	*subsection*
intending to be legally bound (but see *MSCD* 1.124)	*termination or expiration*
	terms and conditions
in the event of	*that certain*
in witness whereof	*third party*
it being understood	*true and correct*
Latinisms	*under no circumstances*
may at its sole discretion	*unless the context requires otherwise*
moral turpitude	*until such time as*
notwithstanding	*whatsoever*
now therefore	*whereas*
of any kind	*willful*
prior to	*without limiting the generality of the foregoing*
provided, however, that	
provided that	*witnesseth*
pursuant to	

Drafting Corporate Resolutions

Related to drafting contracts is the topic of drafting corporate resolutions. The traditional language of corporate resolutions is if anything more problematic than the traditional language of contracts, leading *MSCD* to propose a major overhaul. We recommend that you adopt MSCD's approach, but we leave it to you to decide whether you wish to.

Transition

Each lawyer in our [organization] will be supplied with a copy of *MSCD*, and we will make available additional training. But we recognize that the transition to a new approach to contract language won't be quick or easy. For one thing, all our precedent contracts use traditional language.

But slow change is still change, and it's preferable to sticking with the current inefficiencies and incoherence. And we'll soon start reaping the rewards.

We'll be monitoring the transition. If you have any questions or comments, please contact [name, title].

New York Law Journal, Tuesday, March 9, 2010

Outside Counsel

THE AAA STANDARD ARBITRATION CLAUSE: ROOM FOR IMPROVEMENT

Kenneth A. Adams

Given that mainstream contract drafting is dysfunctional,[1] it shouldn't come as a surprise that what is touted as model contract language usually exhibits significant shortcomings.

A handy example of that is the standard arbitration clause recommended by the American Arbitration Association, as stated in the introduction to the AAA commercial arbitration rules:

Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

Standard English

Clarity is best served by articulating deal terms in standard English—the English of educated native English speakers—albeit a limited and stylized version of it. (The notion that legalese is more precise was debunked decades ago.)[2] With that in mind, here are some ways I'd tidy up the AAA standard arbitration clause:

- The couplet 'controversy or claim' smacks of redundancy.[3] Why not just say 'disputes'? That's the word used in the first rule stated in the AAA commercial arbitration rules, rule M-1, which refers to 'mediation or conciliation of existing or future disputes.'

- It's standard for a contract to refer to itself as 'this agreement,' not 'this contract.'[4] No confusion could result from that, even if you do without the capital 'A' that most drafters needlessly inflict on *agreement* in 'this agreement.'[5]

- The reference to 'or the breach thereof' is redundant.

- The reference to the AAA commercial arbitration rules constitutes not a reference to a title of a work but to a category of document. After all, other sets of commercial arbitration rules exist—the standard clause acknowledges as much by referring to '*its* Commercial Arbitration Rules.' Furthermore, the AAA commercial arbitration rules don't refer to themselves as such—their title is 'Commercial Arbitration Rules and Mediation Procedures (Including Procedures for Large, Complex Commercial Disputes).' Consistent with the approach to capitalization recommended in 'The Chicago Manual of Style,' a reference to a category of document doesn't merit initial capitals.[6]

- It would be preferable to give the reader a breather by addressing judgment on the award in a separate sentence.

- The *(s)* in 'arbitrator(s)' is clumsy.[7] Using 'one or more arbitrators' would represent an improvement, but it would be more succinct to refer instead to the arbitration itself.

- The 'thereof' in 'jurisdiction thereof' is unnecessary and ponderous.

Categories of Language

But the AAA standard clause also raises more complex issues.

For purposes of business contracts, it's best to use *shall* only to impose a duty on the subject of the sentence, as in *Acme shall purchase the Shares*. The test for this use of *shall* is whether you could replace *shall* with 'has a duty to' and have the provision still make sense.[8]

Use of *shall* in the AAA standard clause—'Any controversy or claim ... shall be settled'—fails this test. That should come as no surprise, as in mainstream drafting *shall* is drastically overused.[9] That overuse not only makes contract prose awkward and confusing, it also helps render drafters oblivious to nuances in expressing who should be doing what in a given provision, and why. Capturing those nuances requires recognizing that any given contract provision falls within one of a number of categories of contract language, each of which should be distinguished by its verb use.[10]

The AAA standard clause demonstrates what can be missed through overreliance on *shall*. It uses the passive voice, with *the parties* as the missing *by*-agent.[11] You could instead use the active voice—*The parties shall settle*—but there's a bigger issue lurking here, in that it doesn't make sense to impose on the parties an obligation to arbitrate all disputes. Some disputes are more serious than others, and presumably a contract party would seek arbitration for only the most serious, as opposed to mediation, informal negotiations, or simply shrugging off a grievance.

The best way to reflect that would be to use language of discretion, so as to allow a party to demand arbitration, but only as the exclusive means of initiating adversarial proceeds. (It would be inappropriate to specify that arbitration is the exclusive means of *resolving* any dispute through adversarial proceedings, as courts have a role to play with respect to interim measures and enforcing or appealing arbitration awards.)

You could instead retain language of obligation by saying that if a party initiates adversarial proceedings, it 'shall' do so by demanding arbitration. But rather than imposing a duty, which presumes the possibility of breach, it would seem simpler to state that arbitration is the only option available.

In addition to language of discretion, it would be a good idea to include language of performance, using *hereby consents*. It's standard for forum-selection provisions in contracts to consider the perspective of both the party bringing a claim and the party subject to a claim—you describe the discretion afforded any party bringing a claim and have the parties consent to any claim being so brought. Applying that approach to arbitration provisions would serve to make them clearer and more comprehensive.

Claims Covered

Let's now consider the phrase *arising out of or relating to*. It features prominently not only in arbitration provisions but also in governing-law provisions. What causes drafters to add *or relating to* to *arising out of*?

One concern relates to the range of potential claims that could be raised in a dispute. Acme might want to bring a claim based on the contract, for example a claim for breach of a contract obligation or breach of warranty. Or it might want to bring a tort claim (for example, a claim for misrepresentation), a claim challenging a patent, or a claim authorized by statute.

Contracts offer predictability in business transactions. It follows that drafters are inclined to arrange matters so that a contract's provisions cover all possible disputes, not just those grounded in contract. (Whether that's in fact a good idea would depend on the context.) And it's not surprising that drafters should avail themselves of *arising out of or relating to*, as *arising out of* would seem to express a narrower meaning than does *relating to*. Think in terms of how one arises out of one's parents but is related to a broader group of people.

But is *arising out of or relating to* the best way to articulate this intended meaning? In a passage relating to drafting arbitration provisions, a treatise deftly summarizes the conventional wisdom regarding *arising out of or relating to*:

> It is essential that an arbitration clause cover precisely the subject matter that the parties intend to be submitted to arbitration. In most contracts that provide for arbitration, the parties intend that all disputes arising out of or relating to the contract be subject to arbitration, and in the United States the phrase 'arising out or relating to' has become the model for broad arbitration clauses. Also effective is the phrase 'in connection with.' By using a more limited description— e.g., one which covers only disputes 'arising out of' the contract, and not those 'relating to' the contract—the parties create the risk that a court will conclude that the parties did not intend the clause to be broad and, in particular, intended to exclude tort claims, which may be considered to 'relate to' the contract but not to 'arise out of' the contract.[12]

Alternative Approach

But consider the disconnect between the first sentence of the quoted paragraph and what follows: it would indeed be a good idea to state precisely what kind of claims are to be submitted to arbitration, but instead of precision, *arising out of or relating to* merely offers two degrees of vagueness.

In this regard, it's no accident that the quoted paragraph uses the phrase 'subject matter.' The clearest way to bring all claims—contract-based and other—within the scope of an arbitration provision would be to allude not only to the contract but also to the activities that the parties will be engaging in as part of the transaction contemplated by the contract. From the standpoint of the reasonable reader, the all-encompassing scope of such a provision would render redundant *or relating to* as a means of covering claims other than those based in contract.

You could express this meaning simply by using *arising out of the subject matter of this agreement*, but to do so might be to invite an argument as to what constitutes the subject matter of the agreement. A more precise alternative would be to state what the subject matter of the contract consists of. For example, if you're dealing with a manufacturing and supply agreement, for purposes of any arbitration provision you could say 'any dispute arising out of this agreement, the Supplier's manufacture of any quantity of the Product under this agreement, or sale of any quantity of the Product by the Supplier to the Buyer under this agreement.'

Whether you refer to the subject matter generally or specifically, this approach represents an improvement over *arising out of or relating to*. Instead of referring to an unduly narrow point of reference—the contract—and relying on a vague standard—*relating to*—to reach beyond it, you refer to the activities under the contract.

Plenty of courts have attributed significance to *arising out of or relating to* in the context of arbitration provisions.[13] But if courts have had occasion to opine as to the meaning of *arising out of or relating to*,

that's because it's unnecessarily vague. The notion of relying on such 'tested' contract language is a poor second-best to using contract language that leaves less room for dispute.[14]

Instead of following the proposed alternative approach, you could refer explicitly to claims that are covered—for example, by saying *including any tort claims*. But there's no guarantee that the transactional lawyer drafting a given contract would have a firm grasp of not only the deal terms but also the kinds of claims that the client might want to bring in the event of some future dispute. But if you know that a particular kind of extra-contractual claim would be relevant for purposes of a given contract, supplementing the proposed alternative language by referring to that kind of extra-contractual claim might provide some belt-and-suspenders comfort.

Activities Covered

A drafter might use *arising out of or relating to* with a view to capturing not just the subject matter of the contract but also other, unspecified activities. But if you can't express what those activities might be, attempting to bring them within the scope of an arbitration provision would seem a matter of guesswork.

And a court might balk at the idea, on the grounds that those activities are too remote. For example, in *Jones v. Halliburton Co.*, No. 08-20380 (5th Cir. Sept. 15, 2009), the U.S. Court of Appeals for the Fifth Circuit held that claims brought by a Halliburton employee arising out of a sexual assault that occurred in worker housing were not 'related to' the plaintiff's employment contract and refused to compel arbitration.

Revised Clause

Here's the net effect of the changes discussed above:

> As the exclusive means of initiating adversarial proceedings to resolve any dispute arising out of this agreement *[general language:* or the subject matter of this agreement*] [example of precise language:*, the Supplier's manufacture of any quantity of the Product under this agreement, or sale of any quantity of the Product by the Supplier to the Buyer under this agreement*]*, a party may demand that any such dispute be resolved by arbitration administered by the American Arbitration Association in accordance with its commercial arbitration rules, and each party hereby consents to any such dispute being so resolved. Judgment on any award rendered in any such arbitration may be entered in any court having jurisdiction.

The AAA's model clause has, in the words of the AAA's 'Drafting Dispute Resolutions: A Practical Guide,' 'consistently received judicial support.' Even if that's the case, that isn't an impediment to improving it. No rational judge would see in the alternative version any source of confusion.

Why not simply leave the standard clause as is? Because the alternative version articulates more accurately than the original what the parties are actually agreeing to, and it does so in clearer prose. And a rational contract process requires consistent contract language: for anyone drafting a contract consistent with 'A Manual of Style for Contract Drafting,' the AAA model clause in its current form would strike a discordant note.

As for the prospects of any of the changes proposed in this article making their way into the AAA standard clause, the AAA is apparently considering revising its commercial arbitration rules. It recently invited suggestions; the deadline was Sept. 1, 2009. But when it comes to contract language, one

shouldn't expect too much in the way of innovation from large legal organizations, as they're prone to both the sluggishness of many large organizations and the legal profession's resistance to change. And they usually do their drafting by committee—an approach conducive to stasis.

But you don't need the AAA's seal of approval to use my revised version of their standard arbitration clause. If for purposes of a given contract you think, like I do, that it more clearly reflects the intent of the parties, go ahead and use it, and let the AAA play catch-up.

KENNETH A. **ADAMS** is a consultant and speaker on contract drafting, a lecturer at the University of Pennsylvania Law School, and author of 'A Manual of Style for Contract Drafting' (ABA 2d ed. 2008). His blog is at www.adamsdrafting.com.

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[1]   See Kenneth A. Adams, 'Dysfunctional Drafting,' Nat'l L.J., Sept. 8, 2008.

[2]   See Kenneth A. Adams, A Manual of Style for Contract Drafting xxvi (2d ed. 2008).

[3]   See id. at ¶16.11.

[4]   See id. at ¶1.7.

[5]   See id. at ¶1.84.

[6]   See id. at ¶16.45.

[7]   See id. at ¶16.50.

[8]   See id. at ¶2.25.

[9]   See id. at ¶2.32.

[10]   See id. at ¶2.2.

[11]   See id. at ¶2.67.

[12]   See Commercial Contracts: Strategies for Drafting and Negotiating §5.04 [D] [1] (Morton Moskin ed. 2008) (citations omitted).

[13]   See *Pennzoil Exploration & Prod. Co. v. Ramco Energy Ltd.*, 139 F.3d 1061, 1067 (5th Cir. 1998).

[14]   See Adams, supra note 2, at xxvii.

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GC New York

RETOOLING YOUR CONTRACT PROCESS FOR THE DOWNTURN

Kenneth A. Adams

Company law departments haven't been spared the pressures of the current economic crisis. According to a recent national survey by consulting firm Altman Weil, three-quarters of the law department leaders who responded are facing budget cuts for 2009.

The survey indicates that 65 percent of respondents propose cutting costs by bringing more legal work in-house in 2009, and 53 percent plan to use law firms that offer lower rates. Some plan to trim lawyer and staff jobs and compensation. And 12 percent of respondents said they would look to cut costs by sending work overseas.

But given the scale of the current upheaval, such responses seem unimaginative. Even sending work overseas simply represents another way of doing the same work more cheaply, at least for the time being. Instead, what's called for is rethinking the way your law department operates. As Bruce MacEwen, a consultant to law firms on strategic and economic issues, suggests on his blog, 'It's not about cutting costs, but about doing things differently, and smarter. A decent rule of thumb is this: Simplify.'[1] This advice applies equally to law departments.

One area that's ripe for simplification is your company's contract process—or more specifically, the process your company uses in drafting (based on templates), negotiating, signing, archiving, and monitoring performance under a high volume of commercial contracts, whether sale-side or procurement side. Litigation, for example, may come and go, but companies always need to buy and sell. In particular, sales are a company's lifeblood. And not only is the contract process an essential one, it can also require commitment of resources on a grand scale, particularly when it's handled inefficiently.

One aspect of your contract process that merits scrutiny is the templates themselves. First, consider the language they use. Because any given transaction will closely resemble many previous transactions, and because lawyers tend to be risk-averse and wary of change, as things stand contract drafting is essentially an exercise in regurgitation. Add to that the specialized nature of contract language—it's akin to a cross between regular writing and computer code—and it's not surprising that business contracts are riddled with redundancies, archaisms, misconceptions, and other drafting glitches.

In any given template, the cumulative effect of such glitches likely would be considerable. If that template is used hundreds or thousands of times a year, the endlessly repeated inefficiencies would act as a constant drag on the contract process. Deals would take longer than necessary to close; even worse, delays could result in your company's losing out to more nimble competition. And you'd be exposing yourself to greater risk of a mistake that results in a dispute or causes you to lose an anticipated benefit under a given contract.

The substance of your templates would also merit scrutiny. If the terms you offer sales prospects are more onerous than the transaction requires or more onerous than those offered by your competitors,

particularly with respect to hot-button issues such as indemnification, you can expect to lose sales prospects.

Redrafting Templates

The way to address shortcomings of language and substance in your templates would be to redraft them. In terms of language, skillful redrafting using standard English would likely reduce by up to 25 percent the number of words in a given template without cutting any substance, and it would ensure that what remains is vastly clearer. In terms of substance, the benefits of redrafting would depend entirely on the context, but they could be significant.

All told, you'd speed up the contract process significantly, saving time and resources and, in all likelihood, increasing the rate at which you convert prospects into customers. You'd also be reducing the likelihood of a drafting glitch metastasizing into a serious problem.

Decisions on Redrafting

When your company is considering whether to redraft its templates, it would be a good idea to involve personnel who are not directly responsible for the templates. Those who've been working with the templates wouldn't be in much of a position to assess them objectively, and it would be natural for them to protect their turf by resisting scrutiny. Furthermore, the decision whether to redraft would involve broad budgeting considerations that would likely be beyond the purview of contracts personnel.

As to whom should be given primary responsibility for redrafting templates containing less-than-optimal language, an unpromising choice would be any in-house lawyers responsible for those templates—it would be unrealistic to expect them to remedy their own work.

And in any event, making in-house lawyers primarily responsible for redrafting could be problematic: They likely would have their hands full with the day-to-day press of business. They couldn't be counted on to have the necessary expertise in contract language. And you might well end up with drafting by committee—a recipe for muddle and bureaucratic inertia.

An obvious alternative would be to have the job handled by outside counsel. Law firms are good at getting deals done and telling you what the law is, but when it comes to preparing templates, the odds are that any given law firm would offer the dysfunction of mainstream contract drafting, and at a steep price—the equivalent of serving you a TV dinner on a silver platter.

When it comes to redrafting contracts, exactly who does the work is less important than ensuring that they have demonstrated a commitment to, and a grasp of, clear, modern, and efficient contract language. They needn't be well-versed in the transactions in question—such information could be provided to them by designated company personnel.

Risks in Traditional Process

The contract process for any given transaction has traditionally been straightforward: Someone in the legal or contracts function uses word processing to revise a template so as to reflect the deal terms; the draft is negotiated; the final version is distributed and signed; signature pages are exchanged; and a copy of the signed contract is put in a filing cabinet somewhere.

This approach has simplicity in its favor, but it presents a host of inefficiencies. Consider the process of turning a template into deal documents. Whoever does the drafting might inadvertently use obsolete

templates, leading to contracts that incorporate out-of-date business or legal terms. Or they might make unauthorized changes. And if templates are freely accessible, unauthorized personnel would be in a position to create deal documents.

Furthermore, the traditional process of turning a template into a deal contract is subject to delays—changes are marked by hand, then input, with perhaps one or more further rounds of changes to follow. And this sort of low-level, repetitive work can be demoralizing and takes personnel away from higher-level work.

As for getting contracts signed, what should be a straightforward task is in fact often something of a nuisance, involving delays in exchanging signatures by a variety of mechanisms and the need to keep track of the signature pages and who has and hasn't signed.

Once a signed contract has been filed away and those involved have moved on to the next project, the contract might over time disappear from institutional memory. It's safe to assume that at any given moment, red-faced contracts personnel from some company are engaged in a hunt for an errant contract.

Even if copies of a contract are available, that won't do much good if you don't keep track of what's in it. An improvised approach to contract monitoring—for example, relying on a Word abstract of information compiled from a set of contracts—leaves undue room for human error in terms of both the accuracy of contract data and use made of those data. The possible adverse consequences include missing contract deadlines and failing to enforce rights or obligations.

Automation

Problems of process are conducive to information-technology solutions. In recent years a range of effective software tools have been developed to address problems with the contract process. The tasks they perform fall into three basic categories (although contract-process tools increasingly seek to tackle more than one task): document assembly, which involves compiling contracts by selecting from, and plugging information into, preloaded text; signature automation; and contract lifecycle management (CLM), which alerts the user to key contract data.

One document-assembly tool is QShift, produced by Ixio Legal. It allows a company's lawyers to draw from, and freely edit, an online body of annotated contract language prepared by them. It's best suited to use by companies with a low to medium volume of contracts and companies that need to modify templates in unpredictable ways.

An alternative would be to use a logic-driven online document-assembly engine to collate and supplement preloaded contract text based on how the user answers a questionnaire. Given the costs involved, such systems are geared to high-volume documentation that requires relatively predictable customization. Perhaps the leading product in this category is DealBuilder Author, by Business Integrity—it's used by a growing list of major law firms and corporations. (A comparable product is Exari.) Document-assembly functionality is also offered by some CLM products, although one would expect it to be more limited than that offered by DealBuilder.

As for signature automation, a number of sophisticated tools are available depending on your requirements and your budget. Vendors include EchoSign, DocuSign, and Sertifi. Of the contract process tools, the CLM sector is the most mature, with an array of vendors, including Emptoris, I-many, and Selectica.

What solution or combination of solutions would work best for your company would depend on the nature of your contracts, their value, and your contract volume. But for suitable candidates, the benefits are clear—you'd greatly reduce the time to closing, free up your legal personnel, reduce your costs, increase the likelihood of converting prospects into customers, and reduce the odds of the sort of unpleasant surprises that come with an improvised approach to the contract process. And bear in mind that these solutions can be combined with other, more traditional cost-cutting measures.

But technology isn't a cure-all. One sees state-of-the-art document assembly used with archaic contract language—an exercise in garbage in, garbage out. If you're going to automate your contracts, you should take the opportunity to redraft your contract language.

Overcoming Inertia

By reputation, the legal profession is slow to change. That's particularly the case with the precedent driven transactional world.

But change can come in the form of measured change rather than a leap into the unknown—overhauling your templates and your contract process need not be traumatic. The first step would be to determine the spectrum of potential change. Get someone with the requisite skill and objectivity to scrutinize your templates. Meet with vendors of information technology tools that might prove useful. Speak with some of their customers. Attempt to quantify the benefits of change, taking into account your contract flow. Determine the costs.

And obviously, there would be costs—unlike change achieved simply through cost-cutting, creative change requires up-front investment. Whether such investment makes sense, and in what amount, would depend on the company. A given company might well decide to soldier on with its current contract practices, imperfect as they may be.

But what would be less understandable is not bothering to analyze the costs and benefits. The potential rewards of redrafting your templates and using information-technology tools in your contract process are too great to opt for succumbing to inertia.

KENNETH A. **ADAMS** is a consultant and speaker on contract drafting, a lecturer at the University of Pennsylvania Law School, and author of 'A Manual of Style for Contract Drafting' (ABA 2d ed. 2008). His blog is at www.adamsdrafting.com.

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[1]   ''Structural Breaks' and Other Timely Phenomena,' Adam Smith, Dec. 12, 2008, available at http://www.bmacewen.com/blog/archives/2008/12/structural_ breaks_and_oth.html.

MASTER PROFESSIONAL SERVICES AGREEMENT

This MASTER PROFESSIONAL SERVICES AGREEMENT ("***MPSA***") is entered into as of _____, 200_, is by and between Widget Corporation ("***Widget***") and _____, ("***Vendor***") and provides the terms and conditions pursuant to which Vendor agrees to provide to Widget services (the "***Services***") described in the consecutively numbered statements of work ("***Statements of Work***") that are attached hereto as **Exhibit A** and incorporated by reference herein.

1.0 CONTRACTOR(S); STAFFING.

1.1 Generally. Each individual performing Services for Widget pursuant to this MPSA is referred to herein as a "***Contractor***". Widget will have the right to request and receive relevant background information and credentials in the possession of Vendor concerning personnel performing, or proposed by Vendor to perform, Services. In the event that Widget notifies Vendor that any Contractors performing Services hereunder are found to be unacceptable to Widget, Vendor shall promptly take appropriate corrective actions and replace such Contractors with similarly qualified Contractors. Vendor shall remain fully liable for the acts and omissions of all Contractors. All Services provided hereunder shall be performed in the United States.

1.2 Independent Contractor. It is the express intention of the parties that Vendor and each Contractor are independent contractors and are not employees, agents, joint venturers or partners of Widget for purposes of any federal, state or local income, employment or other taxes, or for any other purposes, including, for purposes of participation in and eligibility for benefits under any employee benefit or compensation plan, program or arrangement offered by Widget or its affiliates (collectively, "***Widget Benefits***"). Vendor shall inform all Contractors that no employment relationship between themselves and Widget exists, is intended or should be construed, and that no Widget Benefits will be provided by Widget.

1.3 Relationship Management; Staffing. Vendor: (a) shall appoint a qualified member of its staff to act as a manager of Vendor's relationship with Widget and as primary liaison between Vendor and Widget for all matters hereunder (the "***Relationship Manager***"); and (b) shall not remove or redeploy any individual Contractors which Widget deems to be important to the continuity of the project outlined in the Statement of Work (collectively referred to, with the Relationship Manager, as "***Key Vendor Contractors***") without the prior written consent of Widget, unless such Key Vendor Contractors leave the employment of Vendor.

2.0 TERM AND TERMINATION.

2.1 Term; Termination. Vendor shall begin providing Services to Widget pursuant to this MPSA on the date set forth in the Statement of Work. This MPSA will terminate immediately upon the request of Widget. Each Statement of Work will terminate on the earliest of: (a) Vendor's successful completion of all Services and, to the extent there are any Deliverables, Widget's Acceptance of all such Deliverables; (b) the occurrence of any termination event specifically provided in such SOW; (c) subject to Section 2.2.2, termination of this MPSA in its entirety; and (d) immediately upon the request of Widget.

2.2 Effect of Termination; Survival.

2.2.1 Upon termination of this MPSA or any Statement of Work: (a) Widget shall pay Vendor for all acceptable Services performed, and Deliverables Accepted (if any), as applicable, up to the date of the notice of termination; and (b) Vendor shall promptly, at no cost to Widget: (i) refund to Widget the pro-rata portion of any prepaid and unearned fees; and (ii) return or destroy Widget's Confidential Information (as such term is defined in the Nondisclosure Agreement, ***"Confidential Information"***).

2.2.2 Unless otherwise specifically provided, termination of a Statement of Work shall not affect any other Statements of Work in effect at the time of such termination. Termination of this MPSA shall terminate all Statements of Work in effect at the time of such termination, unless such termination notice specifically identifies a Statement of Work that shall survive, in which case the terms of this MPSA shall govern such Statement of Work until termination thereof in accordance with Section 2.1. The terms of each Statement of Work shall survive termination thereof with respect to each Service Order (as defined below) not terminated at the time of termination of the applicable Statement of Work.

2.2.3 The following Sections of this MPSA will survive termination of this MPSA: Sections 1.2, 2.2, 7.0, 8.0, 9.0 and 10.0.

3.0 STATEMENTS OF WORK.

3.1 Provision of Services; Statements of Work. Vendor agrees to provide to Widget, and to any Affiliate (as defined below) of Widget, Services under the terms and conditions of this MPSA. For purposes of this MPSA, an "***Affiliate***" is any person or entity that controls, is controlled by or is under common control with the specified person. Vendor shall provide all Services in accordance with Statements of Work agreed to from time to time by Widget, or the applicable Affiliate of Widget, and Vendor. Each such Statement of Work shall be governed by the terms and conditions of this MPSA. Each Services Order shall be governed by the terms and conditions of the Statement of Work under which it is created or, if no Statement of Work applies, only the terms and conditions of this MPSA.

3.2 Ordering Services. Statements of Work may contain descriptions of Services that Widget may order from Vendor from time to time. In such cases, the Statement of Work shall describe the offered Services, the applicable fees and the term for which the Service may be purchased by Widget on the specified terms and conditions. Widget may order such Services by delivering to Vendor a completed, executed counterpart of the Service Order in the form attached hereto as **Exhibit B** (a "***Services Order***") or Widget's standard form of purchase order. For Services that may be described in summary fashion, Widget may execute and deliver a Services Order or a purchase order that refers directly to this MPSA for the terms and conditions without a Statement of Work.

3.3 Order of Precedence. In the event of a conflict between the terms and conditions of this MPSA and the terms and conditions of any Statement of Work, Services Order, purchase order or other notification submitted by Vendor, the terms and conditions of this MPSA shall prevail, unless: (i) a provision of this MPSA explicitly provides that a Statement of Work may amend such provision, in which case such Statement of Work shall prevail solely as to such provision, or (ii) a separate amendment to this MPSA is mutually agreed upon in writing. The terms and conditions of the Statement of Work shall control over any conflicting terms or conditions in any Services Order thereunder.

3.4 Fixed Fee Costs. Vendor will not increase the rates, however charged, for Vendor's personnel or the Services in the first two (2) years following the date of this MPSA or the effective date of the applicable Statement of Work, whichever is later, and any annual rate increase for any subsequent year will be negotiated between the parties in good faith but in no event will such annual rate increases exceed the lesser of (i) the increase in the Consumer Price Index for Urban Consumers, All Items, as issued by the Bureau of Labor Statistics, U.S. Department of Labor, over the prior twelve (12) month period or (ii) five percent (5%). Vendor will provide Widget with written notice at least sixty (60) days in advance of any such rate increase. Furthermore, Vendor will not charge Widget higher rates for personnel assigned to perform Services for Widget who are promoted by Vendor during the term of the applicable Statement of Work, without Widget's prior written consent. Vendor will disclose to Widget upon its request the compensation Vendor pays its Contractors for performing the Services.

3.5 No Obligation Until Execution. Either Party may provide to the other Party a consecutively numbered draft Statement of Work for proposed Services, but Widget will have no obligation with respect to any draft Statement of Work unless and until it is executed by Widget in accordance with Section 10.5. By its execution of a Statement of Work, Services Order or purchase order, Vendor indicates its acceptance of the Statement of Work, Services Order or purchase order and any specifications provided by Widget, Vendor shall not assert any claim as to its inability to perform as required by such Statement of Work, Services Order, purchase order or this MPSA due to a physical or technical environment at Widget's facility which is in accordance with such specifications or plans supplied in response to the request for proposals, or as otherwise due to a condition that was known (or should have been known) by Vendor prior to Vendor's execution of such Statement of Work.

3.6 Changes to the Services. Vendor shall not deviate from the terms and conditions of this MPSA by substitution, modification, deletion, or additions without the prior written approval or consent to waiver signed by a duly authorized representative of Widget. Changes to a Statement of Work, Services Order or purchase order shall not be effective against Widget unless contained in a written change order, signed by a duly authorized officer of Widget, in the form attached hereto as **Exhibit C** (each a "*Change Order*"). Notwithstanding the foregoing, Vendor may not decline to accept any Change Orders solely on the basis that such Change Order (i) reduces the cost of performance, provided that an equitable adjustment in compensation is made for Vendor's reasonable out-of-pocket costs of any performance or preparation already undertaken or (ii) increases the cost or magnitude of performance, provided that the changes are reasonable in scope and a commensurate increase in compensation is mutually agreed upon. Unless the Services are described in a Statement of Work which has been executed and delivered by a duly authorized officer of Widget, or an Affiliate of Widget, and an authorized representative of Vendor and a Services Order ordering such Services has similarly been executed by authorized officers and/or representatives of both parties, as applicable, Vendor shall not be authorized to commence any other Services and Widget shall have no obligation to pay Vendor for such Services, whether or not rendered.

4.0 DELIVERABLES; ACCEPTANCE. Vendor shall deliver, in accordance with the terms and conditions of this MPSA, each applicable Statement of Work, Services Order, and purchase order, all those goods or services specified as deliverables under such Statement of Work, Services Order or purchase order, including any items, milestones, goals or objectives as set forth in such Statement of Work or Services Order to be delivered by Vendor as part of the Services, any and all related Work Product (as defined in Section 9.1) and all materials provided by Vendor in performance of the Services (collectively, *"Deliverables"*). Widget will be entitled to perform an acceptance review to determine whether the relevant Deliverables comply with any and all requirements, specifications and criteria (the *"Acceptance Review"*) and if Widget in its sole discretion determines that such Deliverables comply with the foregoing or otherwise decides in its sole discretion to accept the Deliverables, Widget will notify Vendor in writing of its acceptance of the Deliverables ("*Acceptance*"). Payment by Widget of any fees or other consideration to Vendor or use of the Deliverables by Widget prior to Acceptance will not constitute Widget's Acceptance of such Deliverables. Unless otherwise set forth in a Statement of Work, if the relevant Deliverable or any portion thereof fails to comply with the Acceptance Review and is not accepted by Widget: (a) within five (5) business days (or such other time period as mutually agreed upon by the parties) after receipt of Widget's notice of such failure, Vendor shall correct all deficiencies, at no additional cost to Widget; and (b) within thirty (30) calendar days after such corrections have been made, Widget will review the relevant Deliverables. If the Deliverables still fail Acceptance Review, Vendor shall be granted an additional five (5) business days to correct the Deliverables, at no additional cost to Widget. If the Deliverables fail Acceptance Review after the second iteration, Widget may, in its sole discretion: (x) grant Vendor additional time to correct the outstanding deficiencies at no additional cost to Widget; or (y) without prejudice to any of Widget's other rights and remedies under this MPSA or at law or in equity, terminate the Statement of Work (or portion thereof), Services, purchase order or, at Widget's discretion, this MPSA and (1) return the rejected Deliverables to Vendor in which case Vendor shall refund promptly any fees or other consideration paid to Vendor (if any) hereunder; or (2) retain the rejected Deliverables (in which case Widget's rights, title and interest in the rejected Deliverable shall be the same as if it had been accepted) and pay to Vendor a lesser value than would have been paid had the Deliverables been accepted, such lesser value to be mutually agreed to by the parties.

5.0 COMPLIANCE WITH LAWS, WIDGET POLICIES AND REGULATIONS. Vendor shall, and shall cause each Contractor to, comply at all times with: (a) all applicable laws and regulations; and (b) Widget's rules, regulations, policies and procedures that might affect the Services ("*Widget Policies*"), including Widget's Policies regarding security, privacy, parking, use of equipment, access to facilities and personnel and safety. Without in any way limiting the foregoing, Vendor acknowledges and agrees that, if Services are to be performed at Widget's facilities: (i) Contractors will be required to obtain a Widget identification badge prior to coming on-site or will be escorted by a Widget employee to the location of where such Services are to be performed; and (ii) each Contractor may be subject to reasonable restrictions imposed by Widget in connection with areas of Widget's premises at which such Contractors may be present during their performance of the Services.

6.0 FEES AND INVOICING.

6.1 Fees; Taxes. The fees for the Services performed under

this MPSA are set forth in the applicable Statement of Work, Service Order or purchase order. Widget will pay to Vendor any sales tax relating to the taxable purchases of Services at the appropriate rate. Vendor shall assign to Widget any applicable refund of the sales tax relating to this MPSA. Vendor and Widget will cooperate to properly calculate any applicable taxes. Notwithstanding anything to the contrary in this MPSA: (a) Vendor shall not be entitled to any compensation for, and shall not invoice Widget with respect to, Services performed to correct any deficiencies in any Deliverable pursuant to Section 4.0; and (b) unless otherwise set forth in a Statement of Work, no fees will accrue, or be due or owed, with respect to any Services unless and until Widget: (i) Accepts the relevant Deliverables pursuant to Section 4.0; or (ii) retains the relevant rejected Deliverables pursuant to Section 4.0 and the parties mutually agree to a value for such Deliverable.

6.2 Out of Pocket Expenses; Overtime. Widget will not be responsible for any out of pocket expenses whatsoever of Vendor or of any Contractor (including travel, hotel and meals) which have not been documented and approved by Widget in writing in advance and any such expenses which Widget agrees to pay in writing, in advance, will be reimbursed in accordance with Widget's then current travel and accommodations policy. If Services are performed and invoiced on a time and materials basis, Vendor will not charge and will not invoice Widget for any overtime hours, including hours worked by any individual performing Services that exceed (a) ten (10) hours of actual work in any work day or (b) exceed fifty (50) hours of actual work in a one (1) week period, unless such hours are authorized in advance, in writing, by Widget.

6.3 Invoices. Vendor shall submit correct, itemized invoices of charges based on the rates set forth in the applicable Statement of Work, Services Order or purchase order. For Services performed on an ongoing, monthly billed basis, Vendor shall submit invoices on a monthly basis for all Services provided to Widget for the preceding calendar month, or as otherwise specified in the Statement of Work. The invoice will include the actual number of days and hours worked by each Contractor, plus tax (if applicable), plus out of pocket expenses, as a separately stated line item on each invoice. All Invoices (or quotes to the extent provided for hereunder) shall reference the applicable Statement of Work, Services Order and purchase order number as well as any applicable Service Order date and corresponding purchase order number. Widget shall not be obligated to pay any invoices submitted by Vendor more than six (6) months after the Services being invoiced were provided. Widget will pay all undisputed invoices to Vendor within thirty (30) days of receipt thereof. Widget may withhold payment of particular charges that Widget disputes in good faith, pending resolution of the dispute. Vendor shall not suspend or discontinue the Services pending resolution of such good faith dispute.

7.0   WARRANTIES.

7.1 Services Personnel. Vendor represents, warrants and covenants to Widget that: (a) each Contractor assigned to perform Services hereunder will have the proper and necessary skill, training and background so as to be able to perform the Services in a professional and workmanlike manner; (b) Vendor shall be solely responsible for processing and procuring all necessary visas and passport documents for its employees in advance of their assignment under this MPSA, the Statement of Work and the applicable Services

Order; (c) in accordance with Widget Policies and the Federal Violent Crime Control and Law Enforcement Act of 1994, no Contractor providing Services under the Services Order has been convicted of: (i) a felony; or (ii) a misdemeanor involving violence, sexual misconduct, or dishonesty; and (d) Vendor shall conduct background checks acceptable to Widget and in accordance with the provisions of **Exhibit D** on any Contractor who is to enter facilities of Widget or who otherwise connects or is authorized to connect or remotely access Widget's computer systems or who otherwise has access to Widget's confidential information or data. Upon request by a representative of Widget, Vendor will certify its compliance with this section 7.1. Widget will be entitled, upon reasonable notice to Vendor, to audit compliance with this Section.

7.2 Right to Use and License; No Infringement. Vendor represents, warrants and covenants to Widget that: (a) Vendor is either the owner of or has the right to use (or is authorized to use and, when necessary, is authorized to grant to Widget the right to use) all software, hardware, methods, methodologies, and Third Party Materials (as defined in Section 9.1) used in connection with the Services that are not otherwise owned or licensed by Widget; (b) Vendor is the sole creator of the Work Product (as defined in Section 9.1), has not previously published the Work Product and has not made any commitment for the use or publish the Work Product, the Services or any Deliverable (or part thereof); (c) the Services and Work Product do not and will not contain any matter which is contrary to applicable law; (d) the receipt or use of any Services and any Work Product by Widget does not and will not infringe, or constitute an infringement, a misappropriation or an unauthorized use of (or permit any third party to make a claim against Widget with respect to) any patent, copyright, trademark, trade secret, license or other property or proprietary right of any third party and there are no claims, demands or proceedings that have been instituted, or are pending or threatened, by any person against Vendor or, to Vendor's knowledge, any customer of Vendor, alleging any matter contrary to the foregoing; and (e) all Deliverables will function properly and in conformity with such Deliverable's applicable requirements, specifications and documentation.

8.0 INDEMNIFICATION.

8.1 Generally. Vendor shall indemnify, defend, save and hold Widget and each of its affiliates, and their respective officers, directors, employees, agents, customers, contractors, consultants, third-party service providers, successors and assigns (collectively, the **"Widget Indemnitees"**) harmless from and against all claims, allegations, causes of action, or demands that are presented to or brought against one or more of Widget Indemnitees by a third party (including any Contractor), and any losses, liabilities, damages, lost premium, fines, penalties, assessments and related costs and expenses (including reasonable attorney's fees, expert fees, court costs, reasonable costs of investigation, litigation, settlement, judgment, appeal, interest, penalties and attorneys' fees to enforce any right under this MPSA) (collectively, **"Losses"**) arising out of, in connection with or relating to: (a) the death of or injury to any agent, employee, invitee, visitor or other person or to Widget's or any of its Affiliates' personal or real property resulting in any way from any act, omission, or negligence on the part of Vendor or any Contractor; (b) Vendor's or any Contractor's acts or omissions which cause loss or disclosure of Confidential Information; (c) Widget Benefits allegedly owed to any

Contractor; (d) Vendor's acts or omissions with regard to labor practices including payments of wages, issuance of benefits or termination of employment to the extent that such acts of omissions arise from, are related to, or are connected with the Services performed hereunder; (e) any breach of Vendor's representations, covenants or warranties under this MPSA or the Statement of Work; or (f) any infringement, violation, misappropriation or unauthorized use of any Intellectual Property Rights, Work Product (as such terms are defined in Section 9.1) (if applicable), Deliverables (if applicable) or Services or any claim that any of the foregoing or the use thereof constitutes unfair competition under applicable law. If any Work Product, Deliverable or Service becomes, or in Vendor's opinion is likely to become, the subject of an allegation, demand, claim or action described above in Section 8.1(f), Vendor may, at its option: (i) modify such Work Product, Deliverable or Service to make it noninfringing, non-violating and non-misappropriating or cure any claimed unauthorized use, provided such modification does not adversely affect the functionality of the Work Product, Deliverable or the completeness or accuracy of the Service; (ii) procure for Widget and its Affiliates (as applicable) the right to continue using the Work Product, Deliverable and Service; or (iii) replace the Work Product, Deliverable or Service with substantially equivalent equipment or services that are noninfringing, non-violating and non-misappropriating and that are free of claimed unauthorized use. Any costs associated with implementing any of the above alternatives shall be borne by Vendor.

8.2 <u>Process</u>. If a Widget Indemnitee seeks indemnification under this MPSA, it shall give Vendor: (a) reasonably prompt notice of the relevant claim; provided, however, that failure to provide such notice shall not relieve Vendor from its liability or obligation under this MPSA except to the extent Vendor is materially prejudiced as a direct result of such failure, and (b) reasonable cooperation in the defense of such claim. Vendor shall have the right to control the defense and settlement of such claim; provided, however, that: (i) the relevant Widget Indemnitees shall be entitled to participate in the defense of such claim and to employ counsel at their own expense to assist in the handling of such claim; and (ii) Vendor shall obtain the prior written approval of all relevant Widget Indemnitees before entering into any settlement of such claim or ceasing to defend against such claim.

9.0 INTELLECTUAL PROPERTY

9.1 <u>Certain Definitions</u>. As used herein: (a) the term ***"Intellectual Property Rights"*** means any and all intellectual property rights existing from time to time under any law or regulations, including: (i) patent law (including rights under patents, letters patent, inventor's certificates, continued prosecution applications, requests for continued examination, and other similar filings or stages thereof provided for under the laws of the United States, or of any other country), copyright law, semiconductor chip protection law, moral rights law, trade secret law, trademark law (together with all of the goodwill associated therewith), unfair competition law, publicity rights law, or privacy rights law and any and all other proprietary rights; and (ii) any and all applications, renewals, provisionals, substitutions, extensions, reissues, restorations, divisions or continuations (in whole or in part) of any of the foregoing, now or hereafter in force and effect worldwide; and (b) the term ***"Work Product"***: (i) means all tangible and intangible results of the Services, including any and all software object and source code, HTML, CGI, XML formatting, computer system designs,

documentation, any writings of any kind, user interfaces, audio-visual works, "look and feel," artwork, illustrations, images, photographs, printed or graphic matter, trademarks (including service marks, trade dress, trade names, logos, corporate names, and Internet domain names), copyrights and copyrightable works (including mask works), preparatory materials, charts, diagrams, memoranda, drafts, sketches, outlines, developments, materials, data, inventions (whether patentable or not), improvements, processes, discoveries, ideas, know-how, techniques, formulae, compositions, methodologies, program materials, notes, lists, compilations, manuscripts, pictorial materials, schematics, drawings, specifications, blueprints, flowcharts, schematics, protocols, designs, design rights, plans, business plans, proposals, technical data, financial and marketing plans and customer and supplier lists and information, and other items, created, developed or supplied in connection with the Services; and (ii) notwithstanding the foregoing, shall not include: (A) those pre-existing concepts, ideas, models, know-how, software, methodologies, technologies or techniques owned by Vendor that are either identified in the Statement of Work or a Services Order or licensed to Widget pursuant to a separate license agreement (***"Vendor Materials"***); or (B) those materials that are specifically listed in the Statement of Work or a Services Order as belonging to a third party (including data, content, development tools, system tools, software, compilers, or diagnostics) that Vendor represents to Widget are incorporated into, or are otherwise necessary to create, use, modify, reproduce, or maintain any Work Product or provide the Services, and which require rights licenses, permissions, or other clearances to be obtained from a third party (***"Third Party Materials"***).

9.2 <u>Ownership of the Work Product</u>. Widget will be the sole and exclusive owner of all right, title, interest and ownership throughout the world in any Work Product, and all Intellectual Property Rights in and to the Work Product. Vendor hereby automatically irrevocably assigns to Widget, agrees to assign without further consideration to Widget and agrees to cause each Contractor to irrevocably assign to Vendor and then to Widget, any and all right, title, interest and ownership throughout the world in any Work Product, and all Intellectual Property Rights in and to the Work Product created by Vendor or any Contractor. Vendor agrees, and Vendor shall cause each Contractor to agree, that, to the fullest extent permitted under the United States or other relevant Copyright Act or law, Widget will be the sole owner of the copyright to the Work Product, and that Vendor shall develop such Work Product as "work made for hire" (as defined in 17 U.S.C. §101). All uses of any trademarks, service marks and trade names in the Work Product, and the goodwill associated therewith, whether by Vendor or third parties, inures and will inure to the benefit of Widget.

9.3 <u>Use of Work Product and Widget Materials</u>. Vendor agrees that it will not provide to its other clients and customers, nor use in any way in the course of later engagements, the Work Product nor any other materials containing any Widget Materials where the term ***"Widget Materials"*** means any and all data, designs, specifications, inventions, discoveries, improvements, processes, methodologies, ideas, know-how, techniques, materials, program materials, flow charts, notes, outlines, lists, compilations, manuscripts, writings, pictorial materials, schematics, trademarks and service marks, and other items, supplied by Widget to Vendor in connection with the Services hereunder. As between Widget and Vendor, Widget will retain all title to all Work Product and Widget Materials and all

embodiments thereof, including all copies thereof and all Intellectual Property Rights inherent in such Work Product and Widget Materials. Vendor will not, by virtue of this MPSA or otherwise, acquire any Intellectual Property Rights whatsoever in Work Product or Widget Materials.

9.4 <u>License to Vendor Materials</u>. Vendor hereby grants to Widget a non-exclusive, perpetual, irrevocable, royalty-free, world-wide, non-transferable (except as set forth below) right and license to use, maintain, reproduce, modify or create derivative works from (in any and all media) Vendor Materials incorporated into or otherwise necessary to use, modify, reproduce, or maintain any Work Product (a) for the internal use of Widget and its affiliates, or (b) for the benefit of Widget's or any of its affiliate's agents, business partners (including insurance agents), customers and prospective customers, or (c) otherwise in commerce in the normal course of Widget's business, provided that Widget's right to modify, maintain or create derivative works from any Vendor Materials is limited to its use solely within or in connection with the Work Product. The license granted in this Section 9.4 includes the right of an unlimited number of employees of (i) Widget, (ii) its affiliates, or (iii) the agents, business partners (including insurance agents), customers and prospective customers, and suppliers of Widget and its affiliates, to use, maintain, reproduce, modify or create derivative works (in any and all media) from such Vendor Materials within or in connection with the Work Product (such modifications and enhancements, the **"Widget Modifications"**). Widget will own all right, title and interest in and to Widget Modifications, including all Intellectual Property Rights in and to Widget Modifications. Any modifications, improvements, or amendments to any Vendor Materials will, be solely owned by Vendor only if such improvements, amendments or modifications are not included or incorporated in any way in any Work Product. Widget's license to Vendor Materials is transferable or freely assignable to any affiliate, and may be transferred or assigned to any third party other than an affiliate in connection with the sale, merger or disposition of the Work Product or Widget or affiliate business which is related to the Work Product.

9.5 <u>Third Party Materials</u>. Unless it obtains Widget's prior written approval, in performing the Services Vendor shall not use any Third Party Materials (including any software or work subject to an open source license (including the GNU Public License) or any "copyleft" restrictions): (a) to which a license is required in order to use any Deliverables; (b) the terms of which impose any restrictions on the use of any Deliverables, or (c) the terms of which in any way limit Widget's Intellectual Property Rights in any Work Product. If Vendor obtains Widget's approval as set forth above, Vendor will clearly identify in the Statement of Work or Work Order all Third Party Materials and Widget's need and responsibility to license such software prior to Vendor's inclusion of the software in the Work Product.

10.0   MISCELLANEOUS.

10.1   <u>Nondisclosure Agreement</u>. If confidential information is exchanged between the parties, the parties' confidentiality obligations will be governed by that certain nondisclosure agreement ("***Nondisclosure Agreement***") that is attached hereto and incorporated herein as **Exhibit E**.

10.2   <u>Insurance</u>. Vendor shall maintain insurance coverage as set forth more fully in **Exhibit F**.

10.3   <u>Lack of Deliverables</u>.   If a Statement of Work specifically provides that no Deliverables are being delivered

pursuant to such Statement of Work: (a) Sections 4.0 and 9.0 hereof shall not be applicable to such Statement of Work; and (b) with respect to Services under such Statement of Work, Sections 6.1(a) and (b) are hereby replaced in their entirety with the following language "no fees will accrue, or be due or owed, with respect to any Services unless and until Widget receives an invoice in accordance with Section 6.3 for the relevant fees."

10.4   <u>Binding Nature and Assignment</u>.   Vendor may not assign, voluntarily or by operation of law, any of its rights or obligations under this MPSA without the prior written consent of Widget. Widget may at all times assign its rights and obligations under this MPSA, including to any Affiliate.

10.5   <u>Amendment; No Electronic Signatures</u>.   This MPSA may be amended or supplemented only by means of a physical writing manually signed by the parties. No terms and conditions contained in any "click-wrap" license or similar electronic notification will be of force or effect, nor will any terms and conditions contained in any invoice, Service Order or other transactional document used or amended by Vendor be deemed to amend or supplement this MPSA. Widget does not agree to the use of electronic signatures with respect to this MPSA or any amendment, modification or transactional document relating hereto. Vendor shall not deviate from the terms and conditions of this MPSA, any Statement of Work or any Services Order without the prior written consent of a duly authorized representative of Widget.

10.6   <u>Entire Agreement; Waiver; Interpretation</u>.   This MPSA, and the documents and agreements listed in this MPSA to be incorporated into this MPSA, set forth the entire agreement of the parties with respect to the subject matter of this MPSA, and supersede any and all prior proposals, agreements, understandings, and contemporaneous discussions, whether oral or written, between the parties with respect to the subject matter of this MPSA. No waiver of any of the provisions of this MPSA will constitute a waiver of any other provision (whether or not similar) nor will such waiver constitute a continuing waiver unless otherwise expressly provided. This MPSA may be executed in two or more counterparts, each of which will be deemed an original, but all of which, when taken together, will constitute one and the same instrument. Whenever terms such as "include" or "including" are used in this MPSA, they shall mean "include" or "including," as the case may be, without limiting the generality of any description or word preceding such term. Any provision in this MPSA that is prohibited, invalid or unenforceable in any jurisdiction will, as to such jurisdiction, be ineffective to the extent of such prohibition or unenforceability without invalidating the remaining provisions or affecting the validity or enforceability of such provision in any other jurisdiction.

10.7   <u>Use of Name</u>. Vendor agrees that it will not directly or indirectly, without the prior written consent of Widget's Corporate Relations Department, issue a press release related to Widget or any affiliates or use for the purposes of advertising, promotion, or publicity, or otherwise, the name of Widget or any of its divisions, subsidiaries or affiliates, or any trademarks, trade names, service marks, logos, symbols or any abbreviation thereof, of Widget or of any of its divisions, subsidiaries or affiliates.

10.8   <u>Governing Law; Jurisdiction and Venue</u>. All questions concerning the validity, interpretation and performance of this MPSA will be governed by and decided in accordance with the Laws of the State of Widgetonia, without regard to any conflicts of laws and principles thereof. The parties hereby submit and consent to the exclusive jurisdiction of the state or

federal courts located within Widgetville County, Widgetonia, and agree that all actions or proceedings relating to this MPSA will be litigated in such courts, and each of the parties waives any objection which it may have based on improper venue or *forum non conveniens* to the conduct of any such action or proceeding in such court.

10.9 Notices. Any notice, demand or other communication required or permitted to be given under this MPSA will be in writing and will be deemed delivered to a Party: (i) when delivered by hand or nationally recognized overnight courier; or (ii) six (6) days after the date of mailing if mailed by United States certified mail, return receipt requested, postage prepaid, in each case to the address of such Party set forth underneath the signatures below (or at such other address as the Party may from time to time specify by notice delivered in the foregoing manner).

10.10 Remedies. Unless otherwise specified in this MPSA, each Party's rights and remedies are cumulative and not exclusive, are in addition to any other rights and remedies provided at law, in equity, or under this MPSA, and may be pursued separately or concurrently as such Party determines. The parties agree that in the event of any breach or threatened breach of any provision of this MPSA or any attachments concerning Confidential Information or Intellectual Property Rights, money damages would be an inadequate remedy, and either Party will be entitled to seek injunctive relief.

IN WITNESS WHEREOF, the undersigned have caused this MPSA to be effective as of the date first written above.

WIDGET CORPORATION

By:_____

Name:_____

Date:_____

Title:_____

Notice Address: Widget Corporation
                 10 Widget Drive
                 Widgetville, Widgetonia 99999
                 Attn.: VP, Corporate Procurement

* With one additional copy to the same address specified above but to the Attention of the "Director of Corporate Law"

Vendor:

By:_____

Name:_____

Date:_____

Title:_____

Vendor Notice Address:

_____

_____

_____

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This MASTER PROFESSIONAL SERVICES AGREEMENT ("**MPSA**") is entered into as of _____, 200_, is by and between Widget Corporation ("**Widget**") and _____, ("**Vendor**") and provides the terms and conditions pursuant to which Vendor agrees to provide to Widget services (the "**Services**") described in the consecutively numbered statements of work ("**Statements of Work**") that are attached hereto as **Exhibit A** and incorporated by reference herein.

1.0 CONTRACTOR(S); STAFFING.

1.1 Generally. Each individual performing Services for Widget pursuant to this MPSA is referred to herein as a "**Contractor**". Widget will have the right to request and receive relevant background information and credentials in the possession of Vendor concerning personnel performing, or proposed by Vendor to perform, Services. In the event that Widget notifies Vendor that any Contractors performing Services hereunder are found to be unacceptable to Widget, Vendor shall promptly take appropriate corrective actions and replace such Contractors with similarly qualified Contractors. Vendor shall remain fully liable for the acts and omissions of all Contractors. All Services provided hereunder shall be performed in the United States.

1.2 Independent Contractor. It is the express intention of the parties that Vendor and each Contractor are independent contractors and are not employees, agents, joint venturers or partners of Widget for purposes of any federal, state or local income, employment or other taxes, or for any other purposes, including, for purposes of participation in and eligibility for benefits under any employee benefit or compensation plan, program or arrangement offered by Widget or its affiliates (collectively, "**Widget Benefits**"). Vendor shall inform all Contractors that no employment relationship between themselves and Widget exists, is intended or should be construed, and that no Widget Benefits will be provided by Widget.

1.3 Relationship Management; Staffing. Vendor: (a) shall appoint a qualified member of its staff to act as a manager of Vendor's relationship with Widget and as primary liaison between Vendor and Widget for all matters hereunder (the "**Relationship Manager**"); and (b) shall not remove or redeploy any individual Contractors which Widget deems to be important to the continuity of the project outlined in the Statement of Work (collectively referred to, with the Relationship Manager, as "**Key Vendor Contractors**") without the prior written consent of Widget, unless such Key Vendor Contractors leave the employment of Vendor.

2.0 TERM AND TERMINATION.

2.1 Term; Termination. Vendor shall begin providing Services to Widget pursuant to this MPSA on the date set forth in the Statement of Work. This MPSA will terminate immediately upon the request of Widget. Each Statement of Work will terminate on the earliest of: (a) Vendor's successful completion of all Services and, to the extent there are any Deliverables, Widget's Acceptance of all such Deliverables; (b) the occurrence of any termination event specifically provided in such SOW; (c) subject to Section 2.2.2, termination of this MPSA in its entirety; and (d) immediately upon the request of Widget.

2.2 Effect of Termination; Survival.

2.2.1 Upon termination of this MPSA or any Statement of Work: (a) Widget shall pay Vendor for all acceptable Services performed, and Deliverables Accepted (if any), as applicable, up to the date of the notice of termination; and (b) Vendor

shall promptly, at no cost to Widget: (i) refund to Widget the pro-rata portion of any prepaid and unearned fees; and (ii) return or destroy Widget's Confidential Information (as such term is defined in the Nondisclosure Agreement, "**Confidential Information**").

2.2.2 Unless otherwise specifically provided, termination of a Statement of Work shall not affect any other Statements of Work in effect at the time of such termination. Termination of this MPSA shall terminate all Statements of Work in effect at the time of such termination, unless such termination notice specifically identifies a Statement of Work that shall survive, in which case the terms of this MPSA shall govern such Statement of Work until termination thereof in accordance with Section 2.1. The terms of each Statement of Work shall survive termination thereof with respect to each Service Order (as defined below) not terminated at the time of termination of the applicable Statement of Work.

2.2.3 The following Sections of this MPSA will survive termination of this MPSA: Sections 1.2, 2.2, 7.0, 8.0, 9.0 and 10.0.

3.0 STATEMENTS OF WORK.

3.1 Provision of Services; Statements of Work. Vendor agrees to provide to Widget, and to any Affiliate (as defined below) of Widget, Services under the terms and conditions of this MPSA. For purposes of this MPSA, an "**Affiliate**" is any person or entity that controls, is controlled by or is under common control with the specified person. Vendor shall provide all Services in accordance with Statements of Work agreed to from time to time by Widget, or the applicable Affiliate of Widget, and Vendor. Each such Statement of Work shall be governed by the terms and conditions of this MPSA. Each Services Order shall be governed by the terms and conditions of the Statement of Work under which it is created or, if no Statement of Work applies, only the terms and conditions of this MPSA.

3.2 Ordering Services. Statements of Work may contain descriptions of Services that Widget may order from Vendor from time to time. In such cases, the Statement of Work shall describe the offered Services, the applicable fees and the term for which the Service may be purchased by Widget on the specified terms and conditions. Widget may order such Services by delivering to Vendor a completed, executed counterpart of the Service Order in the form attached hereto as **Exhibit B** (a "**Services Order**") or Widget's standard form of purchase order. For Services that may be described in summary fashion, Widget may execute and deliver a Services Order or a purchase order that refers directly to this MPSA for the terms and conditions without a Statement of Work.

3.3 Order of Precedence. In the event of a conflict between the terms and conditions of this MPSA and the terms and conditions of any Statement of Work, Services Order, purchase order or other notification submitted by Vendor, the terms and conditions of this MPSA shall prevail, unless: (i) a provision of this MPSA explicitly provides that a Statement of Work may amend such provision, in which case such Statement of Work shall prevail solely as to such provision, or (ii) a separate amendment to this MPSA is mutually agreed upon in writing. The terms and conditions of the Statement of Work shall control over any conflicting terms or conditions in any Services Order thereunder.

3.4 Fixed Fee Costs. Vendor will not increase the rates, however charged, for Vendor's personnel or the Services in the first two (2) years following the date of this MPSA or the

Annotated with comments by Kenneth A. Adams, November 21, 2008

effective date of the applicable Statement of Work, whichever is later, and any annual rate increase for any subsequent year will be negotiated between the parties in good faith but in no event will such annual rate increases exceed the lesser of (i) the increase in the Consumer Price Index for Urban Consumers, All Items, as issued by the Bureau of Labor Statistics, U.S. Department of Labor, over the prior twelve (12) month period or (ii) five percent (5%). Vendor will provide Widget with written notice at least sixty (60) days in advance of any such rate increase. Furthermore, Vendor will not charge Widget higher rates for personnel assigned to perform Services for Widget who are promoted by Vendor during the term of the applicable Statement of Work, without Widget's prior written consent. Vendor will disclose to Widget upon its request the compensation Vendor pays its Contractors for performing the Services.

3.5 No Obligation Until Execution. Either Party may provide to the other Party a consecutively numbered draft Statement of Work for proposed Services, but Widget will have no obligation with respect to any draft Statement of Work unless and until it is executed by Widget in accordance with Section 10.5. By its execution of a Statement of Work, Services Order or purchase order, Vendor indicates its acceptance of the Statement of Work, Services Order or purchase order and any specifications provided by Widget, Vendor shall not assert any claim as to its inability to perform as required by such Statement of Work, Services Order, purchase order or this MPSA due to a physical or technical environment at Widget's facility which is in accordance with such specifications or plans supplied in response to the request for proposals, or as otherwise due to a condition that was known (or should have been known) by Vendor prior to Vendor's execution of such Statement of Work.

3.6 Changes to the Services. Vendor shall not deviate from the terms and conditions of this MPSA by substitution, modification, deletion, or additions without the prior written approval or consent to waiver signed by a duly authorized representative of Widget. Changes to a Statement of Work, Services Order or purchase order shall not be effective against Widget unless contained in a written change order, signed by a duly authorized officer of Widget, in the form attached hereto as **Exhibit C** (each a "*Change Order*"). Notwithstanding the foregoing, Vendor may not decline to accept any Change Orders solely on the basis that such Change Order (i) reduces the cost of performance, provided that an equitable adjustment in compensation is made for Vendor's reasonable out-of-pocket costs of any performance or preparation already undertaken or (ii) increases the cost or magnitude of performance, provided that the changes are reasonable in scope and a commensurate increase in compensation is mutually agreed upon. Unless the Services are described in a Statement of Work which has been executed and delivered by a duly authorized officer of Widget, or an Affiliate of Widget, and an authorized representative of Vendor and a Services Order ordering such Services has similarly been executed by authorized officers and/or representatives of both parties, as applicable, Vendor shall not be authorized to commence any other Services and Widget shall have no obligation to pay Vendor for such Services, whether or not rendered.

4.0 **DELIVERABLES; ACCEPTANCE**. Vendor shall deliver, in accordance with the terms and conditions of this MPSA, each applicable Statement of Work, Services Order, and purchase order, all those goods or services specified as deliverables under such Statement of Work, Services Order

Annotated with comments by Kenneth A. Adams, November 21, 2008

or purchase order, including any items, milestones, goals or objectives as set forth in such Statement of Work or Services Order to be delivered by Vendor as part of the Services, any and all related Work Product (as defined in Section 9.1) and all materials provided by Vendor in performance of the Services (collectively, *"Deliverables"*). Widget will be entitled to perform an acceptance review to determine whether the relevant Deliverables comply with any and all requirements, specifications and criteria (the *"Acceptance Review"*) and if Widget in its sole discretion determines that such Deliverables comply with the foregoing or otherwise decides in its sole discretion to accept the Deliverables, Widget will notify Vendor in writing of its acceptance of the Deliverables ("*Acceptance*"). Payment by Widget of any fees or other consideration to Vendor or use of the Deliverables by Widget prior to Acceptance will not constitute Widget's Acceptance of such Deliverables. Unless otherwise set forth in a Statement of Work, if the relevant Deliverable or any portion thereof fails to comply with the Acceptance Review and is not accepted by Widget: (a) within five (5) business days (or such other time period as mutually agreed upon by the parties) after receipt of Widget's notice of such failure, Vendor shall correct all deficiencies, at no additional cost to Widget; and (b) within thirty (30) calendar days after such corrections have been made, Widget will review the relevant Deliverables. If the Deliverables still fail Acceptance Review, Vendor shall be granted an additional five (5) business days to correct the Deliverables, at no additional cost to Widget. If the Deliverables fail Acceptance Review after the second iteration, Widget may, in its sole discretion: (x) grant Vendor additional time to correct the outstanding deficiencies at no additional cost to Widget; or (y) without prejudice to any of Widget's other rights and remedies under this MPSA or at law or in equity, terminate the Statement of Work (or portion thereof), Services, purchase order or, at Widget's discretion, this MPSA and (1) return the rejected Deliverables to Vendor in which case Vendor shall refund promptly any fees or other consideration paid to Vendor (if any) hereunder; or (2) retain the rejected Deliverables (in which case Widget's rights, title and interest in the rejected Deliverable shall be the same as if it had been accepted) and pay to Vendor a lesser value than would have been paid had the Deliverables been accepted, such lesser value to be mutually agreed to by the parties.

Comment	Author & Date	Ref
Could be read as "the first two...	Kenneth A. Adams 11/19/08 11:35 PM	[35]
This assumes only annual incr...	Kenneth A. Adams 10/29/08 7:16 PM	[36]
Use the active voice (see MSC...	Kenneth A. Adams 10/29/08 7:21 PM	[37]
Wordy construction.	Kenneth A. Adams 10/29/08 7:21 PM	[38]
Use instead language of prohi...	Kenneth A. Adams 10/29/08 7:22 PM	[39]
Use instead "any such."	Kenneth A. Adams 10/29/08 7:23 PM	[40]
Use instead "previous," which...	Kenneth A. Adams 10/29/08 7:23 PM	[41]
Use numerals for numbers 11...	Kenneth A. Adams 10/29/08 7:28 PM	[42]
Logic requires "and" instead; s...	Kenneth A. Adams 10/29/08 7:26 PM	[43]
Use words for whole numbers	Kenneth A. Adams 1/20/08 4:34 PM	[44]
Is this a condition or an obliga...	Kenneth A. Adams 10/29/08 7:33 PM	[45]
Word more suited to narrative...	Kenneth A. Adams 10/29/08 7:32 PM	[46]
Use "shall not" in language of...	Kenneth A. Adams 10/29/08 7:32 PM	[47]
Use the active voice; see MSC...	Kenneth A. Adams 10/29/08 7:34 PM	[48]
Place earlier in the sentence.	Kenneth A. Adams 11/19/08 11:46 PM	[49]
Rephrase using conditional cla...	Kenneth A. Adams 10/29/08 7:36 PM	[50]
Use "shall" to impose an oblig...	Kenneth A. Adams 10/29/08 7:34 PM	[51]
Awkward.	Kenneth A. Adams 11/19/08 11:50 PM	[52]
Redundant, given "pays."	Kenneth A. Adams 10/29/08 7:37 PM	[53]
Inappropriate, given how "Cor...	Kenneth A. Adams 10/29/08 7:37 PM	[54]
Omit.	Kenneth A. Adams 11/19/08 11:48 PM	[55]
Move to section 1.	Kenneth A. Adams 10/29/08 7:41 PM	[56]
Not defined. And it's preferab...	Kenneth A. Adams 10/29/08 7:42 PM	[57]
Say instead that Statement of...	Kenneth A. Adams 10/29/08 7:43 PM	[58]
Redundancy.	Kenneth A. Adams 10/29/08 7:44 PM	[59]
Use instead "signed"; see MSC...	Kenneth A. Adams 10/29/08 7:46 PM	[60]
See MSCD 3.75.	Kenneth A. Adams 10/29/08 7:47 PM	[61]
Use instead "signing"; see MS...	Kenneth A. Adams 10/29/08 7:48 PM	[62]
Use instead "will be deemed t...	Kenneth A. Adams 10/29/08 7:48 PM	[63]
Buried verb; see MSCD 16.7.	Kenneth A. Adams 1/20/08 5:19 PM	[64]
	Kenneth A. Adams 10/29/08 7:52 PM	[65]
	Kenneth A. Adams 1/20/08 5:20 PM	[66]
	Kenneth A. Adams 1/20/08 5:21 PM	[67]
	Kenneth A. Adams 1/22/08 2:05 PM	[68]

9 703 KAA Contract Before Annotated 8.16.10.doc [Compatibility Mode]

Main document changes and comments		
Page 1: Comment	**Kenneth A. Adams**	**10/28/08 3:56 PM**

Use all lowercase letters; see MSCD 1.14.

Page 1: Comment	**Kenneth A. Adams**	**10/28/08 3:57 PM**

Refer instead to "this agreement"; see MSCD 1.84.

Page 1: Comment	**Kenneth A. Adams**	**10/28/08 3:47 PM**

Simpler to use "is dated"; see MSDC 1.15.

Page 1: Comment	**Kenneth A. Adams**	**10/28/08 3:47 PM**

Inappropriate for a template; see MSCD 1.27.

Page 1: Comment	**Kenneth A. Adams**	**10/28/08 3:48 PM**

Use just "between"; see MSCD 1.34.

Page 1: Comment	**Kenneth A. Adams**	**10/28/08 3:49 PM**

Using all capitals helps party names to stand out; see MSCD 1.38.

Page 1: Comment	**Kenneth A. Adams**	**10/28/08 3:58 PM**

Using the definite article "the" results in prose that is less stilted; see MSCD 1.73.

Page 1: Comment	**Kenneth A. Adams**	**10/28/08 3:51 PM**

Redundancy; see MSCD 16.17.

Page 1: Comment	**Kenneth A. Adams**	**10/28/08 3:51 PM**

Stodgy lawyerism; see MSCD 16.36.

Page 1: Comment	**Kenneth A. Adams**	**10/28/08 3:52 PM**

Place defined-term parenthetical at the end of the definition; see MSCD 5.40.

Page 1: Comment	**Kenneth A. Adams**	**1/22/08 2:26 PM**

Place defined-term parenthetical at the end of the definition; see MSCD 5.40.

Page 1: Comment	**Kenneth A. Adams**	**11/18/08 5:00 PM**

Suggests that SOWs are agreed to at signing, but section 3.1 states that SOWs can be agreed to after signing. That should be made clearer.

Page 1: Comment	**Kenneth A. Adams**	**10/28/08 3:53 PM**

Unnecessary; see MSCD 4.54.

Page 1: Comment	**Kenneth A. Adams**	**10/28/08 3:55 PM**

Emphasizing exhibit references doesn't help the reader; see MSCD 15.31.

Page 1: Comment	**Kenneth A. Adams**	**10/28/08 3:51 PM**

Address this in the recitals and the body of the contract, not in the introductory clause.

Page 1: Comment	**Kenneth A. Adams**	**10/28/08 3:56 PM**

Unnecessary; see MSCD 4.76.

Page 1: Comment	**Kenneth A. Adams**	**10/28/08 3:59 PM**

Omit the zero after article numbers; see MSCD 3.8.

Page 1: Comment	**Kenneth A. Adams**	**10/28/08 4:00 PM**

Awkward; see MSCD 16.50.

Page 1: Comment	**Kenneth A. Adams**	**10/28/08 4:00 PM**

One space, not two, between sentences; see MSCD 15.50.

Page 1: Comment	**Kenneth A. Adams**	**1/22/08 2:26 PM**

Stodgy lawyerism; see MSCD 16.36.

Page 1: Comment	**Kenneth A. Adams**	**11/17/08 7:53 PM**

Better to lead with deal terms; see MSCD 3.49. And it would be more efficient to define "Contractor" using an

integrated definition; see MSCD 5.33.

Page 1: Comment	Kenneth A. Adams	11/3/08 7:22 PM

Use instead "may" to express discretion; see MSCD 2.86. But rendered moot by following comment.

Page 1: Comment	Kenneth A. Adams	10/28/08 4:14 PM

Phrase as obligation; cf MSCD 2.82.

Page 1: Comment	Kenneth A. Adams	11/24/08 11:23 PM

Use instead "resume"?

Page 1: Comment	Kenneth A. Adams	10/28/08 4:15 PM

Awkward.

Page 1: Comment	Kenneth A. Adams	10/28/08 4:15 PM

Wordy lawyerism; see MSCD 16.36.

Page 1: Comment	Kenneth A. Adams	11/17/08 7:05 PM

Redundant, given the definition of Contractor.

Page 1: Comment	Kenneth A. Adams	10/28/08 4:16 PM

Avoid "here-" and "there-" words unless they add real value; see MSCD 12.99.

Page 1: Comment	Kenneth A. Adams	11/17/08 7:06 PM

Redundant.

Page 1: Comment	Kenneth A. Adams	10/28/08 4:36 PM

Don't use "such" instead of "this," "that," "these," or "those"; see MSCD 12.349.

Page 1: Comment	Kenneth A. Adams	11/17/08 7:11 PM

Don't use "shall" in language of policy; see MSCD 2.161. And "remain" is redundant.

Page 1: Comment	Kenneth A. Adams	10/28/08 4:19 PM

Rhetorical emphasis; see MSCD 16.29.

Page 1: Comment	Kenneth A. Adams	11/17/08 7:14 PM

Covered in section 8.

Page 1: Comment	Kenneth A. Adams	1/22/08 2:27 PM

Avoid "here-" and "there-" words unless they add real value; see MSCD 12.99.

Page 1: Comment	Kenneth A. Adams	10/28/08 4:21 PM

Don't use the passive voice to express obligations; see MSCD 2.15 and 2.78.

Page 1: Comment	Kenneth A. Adams	11/17/08 7:15 PM

More efficient to build this concept into the definition of Services.

Page 1: Comment	Kenneth A. Adams	10/28/08 4:21 PM

Rhetorical emphasis; see MSCD 16.29

Page 1: Comment	Kenneth A. Adams	10/28/08 4:22 PM

Buried verb; see MSCD 16.7.

Page 1: Comment	Kenneth A. Adams	11/17/08 7:28 PM

InappropriateUnnecessary; see MSCD 2.11. Instead, have Vendor acknowledge; see MSCD 2.190.

Page 1: Comment	Kenneth A. Adams	10/28/08 4:24 PM

Needless elaboration; see MSCD 16.24.

Page 1: Comment	Kenneth A. Adams	11/17/08 7:22 PM

Clearer to address explicitly in section 6.1.

Page 1: Comment	Kenneth A. Adams	10/28/08 4:24 PM

Redundancy; see MSCD 16.17.

Page 1: Comment	Kenneth A. Adams	11/17/08 7:45 PM

Omit?

Page 1: Comment	Kenneth A. Adams	10/28/08 4:25 PM

Redundancy; see MSCD 16.17.

Page 1: Comment	Kenneth A. Adams	10/28/08 4:27 PM

Clarify the scope of the definition; see MSCD 5.44.

Page 1: Comment	Kenneth A. Adams	11/17/08 7:26 PM

This defined term is used only twice, so it's not worth defining; see MSCD 5.74.

Page 1: Comment	Kenneth A. Adams	1/20/08 7:16 PM

In writing?

Page 1: Comment	Kenneth A. Adams	10/28/08 4:27 PM

Say instead "any Contractor."

Page 1: Comment	Kenneth A. Adams	11/17/08 7:36 PM

Could be structured more economically, as this refers to essence of previous sentence.

Page 1: Comment	Kenneth A. Adams	10/28/08 4:27 PM

Redundancy; see MSCD 16.17.

Page 1: Comment	Kenneth A. Adams	11/17/08 7:33 PM

Use the active voice; see MSCD 2.15. Also, use "will not be required to"; see MSCD 2.142.

Page 1: Comment	Kenneth A. Adams	11/17/08 7:36 PM

Move to previous sentence.

Page 1: Comment	Kenneth A. Adams	10/28/08 4:29 PM

Use colon only after full independent clause; see MSCD 3.23.

Page 1: Comment	Kenneth A. Adams	11/17/08 8:02 PM

Why not use "Contractor"?

Page 1: Comment	Kenneth A. Adams	11/17/08 7:45 PM

Redundant?

Page 1: Comment	Kenneth A. Adams	11/17/08 7:47 PM

Be more specific—refer to performance of Services.

Page 1: Comment	Kenneth A. Adams	10/28/08 6:26 PM

Need transitional language; see MSCD 5.52.

Page 1: Comment	Kenneth A. Adams	11/17/08 7:56 PM

Used only once, so not worth defining; see MSCD 5.74.

Page 1: Comment	Kenneth A. Adams	11/17/08 7:49 PM

Word choice.

Page 1: Comment	Kenneth A. Adams	10/28/08 4:30 PM

Redundant.

Page 1: Comment	Kenneth A. Adams	10/30/08 7:51 PM

Use "that"; see MSCD 11.27.

Page 1: Comment	Kenneth A. Adams	11/17/08 7:59 PM

Omit extraneous "the"; see MSCD 16.49.

Page 1: Comment	Kenneth A. Adams	11/17/08 7:59 PM

Only time this word is used; omit.

Page 1: Comment	Kenneth A. Adams	11/17/08 7:57 PM

Used only once, so not worth defining; see MSCD 5.74.

Page 1: Comment	Kenneth A. Adams	1/22/08 2:16 PM

Don't use "such" instead of "this," "that," "these," or "those"; see MSCD 12.349.

Page 1: Comment	Kenneth A. Adams	11/18/08 4:52 PM

Using this defined term doesn't serve to make this clause (b) apply to anyone other than Contractors.

Page 1: Comment	**Kenneth A. Adams**	**11/17/08 8:04 PM**

Redundant.

Page 1: Comment	**Kenneth A. Adams**	**1/22/08 2:27 PM**

Stodgy lawyerism; see MSCD 13.36.

Page 1: Comment	**Kenneth A. Adams**	**10/28/08 6:27 PM**

Stodgy lawyerism; see MSCD 13.36.

Page 1: Comment	**Kenneth A. Adams**	**11/19/08 10:33 PM**

Use instead "SoW"? Also, this suggests that there will always be only a singled SOW; that wouldn't seem to be the case.

Page 1: Comment	**Kenneth A. Adams**	**11/19/08 10:51 PM**

The preceding sentence seems unnecessary.

Page 1: Comment	**Kenneth A. Adams**	**10/28/08 6:29 PM**

Rephrase as language of discretion.

Page 1: Comment	**Kenneth A. Adams**	**8/17/10 10:45 PM**

Refer instead to giving notice, as Widget wouldn't be "requesting" anything. Also, specify that notice would be given to the Vendor.

Page 1: Comment	**Kenneth A. Adams**	**11/19/08 10:38 PM**

Could be understood as meaning "all Statements of Work"; see MSCD 10.65.

Page 1: Comment	**Kenneth A. Adams**	**11/19/08 10:40 PM**

It would be clearer to unbundle Unbundling these four components.

Page 1: Comment	**Kenneth A. Adams**	**10/28/08 6:35 PM**

Use "if" instead; see MSCD 16.36.

Page 1: Comment	**Kenneth A. Adams**	**11/19/08 5:33 PM**

Unnecessary defined term; see MSCD 5.74.

Page 1: Comment	**Kenneth A. Adams**	**1/22/08 2:16 PM**

Don't use "such" instead of "this," "that," "these," or "those"; see MSCD 12.349.

Page 1: Comment	**Kenneth A. Adams**	**10/28/08 6:36 PM**

Omit "the"; see MSCD 16.49.

Page 1: Comment	**Kenneth A. Adams**	**10/28/08 6:37 PM**

Rhetorical emphasis; see MSCD 16.29.

Page 1: Comment	**Kenneth A. Adams**	**1/22/08 2:17 PM**

Don't use "such" instead of "this," "that," "these," or "those"; see MSCD 12.349.

Page 1: Comment	**Kenneth A. Adams**	**10/28/08 6:42 PM**

Use small "s"; see MSCD 3.75.

Page 1: Comment	**Kenneth A. Adams**	**11/19/08 6:40 PM**

Moving text to this section from section 2.2.2 would allow you to delete this.

Page 1: Comment	**Kenneth A. Adams**	**10/28/08 6:44 PM**

Redunddant.

Page 1: Comment	**Kenneth A. Adams**	**11/19/08 5:37 PM**

Use "(a)" enumeration hierarchy; see MSCD 3.18.

Page 1: Comment	**Kenneth A. Adams**	**11/19/08 5:37 PM**

Add "promptly."

Page 1: Comment	**Kenneth A. Adams**	**11/19/08 10:44 PM**

What about payment for services remaining to be performed after termination?

Page 1: Comment	Kenneth A. Adams	10/28/08 6:47 PM

Use full independent clause before colon; see MSCD 3.23.

Page 1: Comment	Kenneth A. Adams	11/19/08 10:42 PM

But services might be performed for an affiliate.

Page 1: Comment	Kenneth A. Adams	11/19/08 6:27 PM

Revise to specify payment of only amounts then unpaid.

Page 1: Comment	Kenneth A. Adams	11/19/08 6:18 PM

What "all" means would depend on what's being terminated; revise accordingly.

Page 1: Comment	Kenneth A. Adams	11/19/08 5:34 PM

This concept would be better addressed elsewhere.

Page 1: Comment	Kenneth A. Adams	11/19/08 5:35 PM

Unnecessary defined term; see MSCD 5.74.

Page 1: Comment	Kenneth A. Adams	11/19/08 10:41 PM

Redundant, given the "if any"?

Page 1: Comment	Kenneth A. Adams	11/19/08 5:38 PM

Say instead "before termination."

Page 1: Comment	Kenneth A. Adams	11/19/08 10:44 PM

What about with respect to Services remaining to be performed after termination?

Page 1: Comment	Kenneth A. Adams	11/19/08 6:33 PM

Redundant, given reference to "unearned."

Page 1: Comment	Kenneth A. Adams	11/19/08 6:30 PM

Too narrow, in that some payments might be for Deliverables?

Page 1: Comment	Kenneth A. Adams	1/22/08 2:17 PM

Don't use "such" instead of "this," "that," "these," or "those"; see MSCD 12.349.

Page 1: Comment	Kenneth A. Adams	11/19/08 5:41 PM

Wouldn't this be covered by the nondisclosure agreement?

Page 1: Comment	Kenneth A. Adams	10/28/08 6:49 PM

Delete.

Page 1: Comment	Kenneth A. Adams	10/28/08 6:50 PM

Rhetorical emphasis; see MSCD 16.29.

Page 1: Comment	Kenneth A. Adams	11/19/08 5:43 PM

Where?

Page 1: Comment	Kenneth A. Adams	10/28/08 6:53 PM

Don't use "shall," as this is language of policy; see 2.162.

Page 1: Comment	Kenneth A. Adams	1/22/08 2:17 PM

Don't use "such" instead of "this," "that," "these," or "those"; see MSCD 12.349.

Page 1: Comment	Kenneth A. Adams	11/19/08 5:43 PM

Say instead "then."

Page 1: Comment	Kenneth A. Adams	1/22/08 2:28 PM

Don't use "shall" in language of policy; see MSCD 2.161.

Page 1: Comment	Kenneth A. Adams	1/22/08 2:17 PM

Don't use "such" instead of "this," "that," "these," or "those"; see MSCD 12.349.

Page 1: Comment	Kenneth A. Adams	11/19/08 5:45 PM

Covered in section 2.1.

Page 1: Comment	Kenneth A. Adams	1/22/08 2:17 PM

Don't use "such" instead of "this," "that," "these," or "those"; see MSCD 12.349.

| **Page 1: Comment** | **Kenneth A. Adams** | **10/28/08 6:55 PM** |

Rhetorical emphasis; see MSCD 16.29.

| **Page 1: Comment** | **Kenneth A. Adams** | **10/28/08 6:56 PM** |

Inappropriate use of "shall" in restrictive relative clause; see MSCD 2.196.

| **Page 1: Comment** | **Kenneth A. Adams** | **11/19/08 10:54 PM** |

Also refer to Services to be performed after termination other than under an SoW.

| **Page 1: Comment** | **Kenneth A. Adams** | **1/22/08 2:17 PM** |

Don't use "such" instead of "this," "that," "these," or "those"; see MSCD 12.349.

| **Page 1: Comment** | **Kenneth A. Adams** | **1/22/08 2:29 PM** |

Avoid "here-" and "there-" words unless they add real value; see MSCD 12.99.

| **Page 1: Comment** | **Kenneth A. Adams** | **10/29/08 7:45 PM** |

Use small "s"; see MSCD 3.75.

| **Page 1: Comment** | **Kenneth A. Adams** | **11/19/08 5:49 PM** |

Move to section 2.1.

| **Page 1: Comment** | **Kenneth A. Adams** | **1/22/08 2:30 PM** |

Don't use "shall" in language of policy; see MSCD 2.161.

| **Page 1: Comment** | **Kenneth A. Adams** | **1/22/08 2:30 PM** |

Avoid "here-" and "there-" words unless they add real value; see MSCD 12.99.

| **Page 1: Comment** | **Kenneth A. Adams** | **11/19/08 7:17 PM** |

Omit; see MSCD 5.70. Also, the term is defined as "Services Order," with an "s."

| **Page 1: Comment** | **Kenneth A. Adams** | **11/19/08 7:18 PM** |

To narrow, as service orders aren't the only way to order Services.

| **Page 1: Comment** | **Kenneth A. Adams** | **10/28/08 7:06 PM** |

Omit; see MSCD 12.356.

| **Page 1: Comment** | **Kenneth A. Adams** | **10/29/08 5:18 PM** |

Use "shall" instead; see MSCD 2.58.

| **Page 1: Comment** | **Kenneth A. Adams** | **1/22/08 2:31 PM** |

Omit; see MSCD 5.70.

| **Page 1: Comment** | **Kenneth A. Adams** | **10/29/08 5:20 PM** |

Redundant, strictly speaking, given how "Services" is defined.

| **Page 1: Comment** | **Kenneth A. Adams** | **11/19/08 10:48 PM** |

Move this concept to the top of the body of the contract.

| **Page 1: Comment** | **Kenneth A. Adams** | **8/17/10 10:45 PM** |

Defined term "Widget Entity" would be more useful.

| **Page 1: Comment** | **Kenneth A. Adams** | **10/29/08 5:24 PM** |

Redundant; see MSCD 2.132.

| **Page 1: Comment** | **Kenneth A. Adams** | **1/22/08 2:16 PM** |

Don't use "shall" in language of policy; see MSCD 2.161.

| **Page 1: Comment** | **Kenneth A. Adams** | **10/29/08 5:25 PM** |

Say "terms"; see MSCD 16.17.

| **Page 1: Comment** | **Kenneth A. Adams** | **11/19/08 11:03 PM** |

Confusing to refer to Services Orders before you tell the reader what they are. And this is too narrow; what about purchase orders?

| **Page 1: Comment** | **Kenneth A. Adams** | **1/22/08 2:18 PM** |

Don't use "shall" in language of policy; see MSCD 2.161.

Page 1: Comment	Kenneth A. Adams	10/29/08 5:26 PM

Say "terms"; see MSCD 16.17.

Page 1: Comment	Kenneth A. Adams	11/19/08 10:57 PM

This makes sense only after you read section 3.2; restructure.

Page 1: Comment	Kenneth A. Adams	10/29/08 5:33 PM

Grant discretion to a party, not to a thing. Otherwise, "may" could be read as "might"; see MSCD 2.103.

Page 1: Comment	Kenneth A. Adams	10/29/08 5:34 PM

Use instead "orders"; see MSCD 2.196.

Page 1: Comment	Kenneth A. Adams	10/29/08 5:36 PM

Redundant; see MSCD 2.132.

Page 1: Comment	Kenneth A. Adams	11/19/08 10:58 PM

Unnecessary.

Page 1: Comment	Kenneth A. Adams	10/29/08 5:37 PM

Preferable not to impose a duty in an inanimate object; see MSCD 2.79.

Page 1: Comment	Kenneth A. Adams	10/29/08 5:39 PM

Clearer to say instead "fees for those services."

Page 1: Comment	Kenneth A. Adams	10/29/08 5:40 PM

Use the active voice; see MSCD 2.15.

Page 1: Comment	Kenneth A. Adams	10/29/08 5:41 PM

Say "terms"; see MSCD 16.17.

Page 1: Comment	Kenneth A. Adams	11/19/08 11:02 PM

Move to top of the body of the contract and rephrase.

Page 1: Comment	Kenneth A. Adams	10/29/08 5:45 PM

Use instead "signed"; see MSCD 4.13.

Page 1: Comment	Kenneth A. Adams	8/17/10 10:45 PM

Suggests just one; presumably Widget might deliver many Service Orders in connection with one Statement of Work.

Page 1: Comment	Kenneth A. Adams	10/29/08 5:42 PM

Say instead "of."

Page 1: Comment	Kenneth A. Adams	10/29/08 5:28 PM

Emphasizing exhibit references doesn't help the reader; see MSCD 15.31.

Page 1: Comment	Kenneth A. Adams	10/29/08 5:45 PM

Use instead "are described"; see MSCD 2.196.

Page 1: Comment	Kenneth A. Adams	10/29/08 5:47 PM

Say instead "deliver to Vendor a signed Services Order"; see MSCD 12.72.

Page 1: Comment	Kenneth A. Adams	10/29/08 7:03 PM

This undercuts section 3.1.

Page 1: Comment	Kenneth A. Adams	11/19/08 11:19 PM

Prudent to have SoWs and other documents constitute part of this agreement. And move this to the top of the body of the contract.

Page 1: Comment	Kenneth A. Adams	10/29/08 7:05 PM

Use instead "if"; see MSCD 16.36.

Page 1: Comment	Kenneth A. Adams	10/29/08 7:05 PM

Use instead "terms"; see MSCD 16.17.

Page 1: Comment	Kenneth A. Adams	1/22/08 2:19 PM

Don't use "shall" in language of policy; see MSCD 2.161.

Page 1: Comment	Kenneth A. Adams	10/29/08 7:07 PM

Use full independent clause before colon; see MSCD 3.23.

Page 1: Comment	Kenneth A. Adams	10/29/08 7:08 PM

Use different enumeration; see MSCD 3.29.

Page 1: Comment	Kenneth A. Adams	10/29/08 7:08 PM

Redundant.

Page 1: Comment	Kenneth A. Adams	10/29/08 7:08 PM

Rhetorical emphasis; see MSCD 16.29.

Page 1: Comment	Kenneth A. Adams	10/29/08 7:10 PM

See MSCD 12.349.

Page 1: Comment	Kenneth A. Adams	1/22/08 2:19 PM

Don't use "shall" in language of policy; see MSCD 2.161.

Page 1: Comment	Kenneth A. Adams	11/19/08 11:16 PM

In this case, there wouldn't be a conflict.

Page 1: Comment	Kenneth A. Adams	10/29/08 7:10 PM

Redundant.

Page 1: Comment	Kenneth A. Adams	10/29/08 7:25 PM

Redundant; see MSCD 12.202.

Page 1: Comment	Kenneth A. Adams	10/29/08 7:11 PM

Use the active voice; see MSCD 2.15.

Page 1: Comment	Kenneth A. Adams	11/19/08 11:17 PM

Unnecessary.

Page 1: Comment	Kenneth A. Adams	1/22/08 2:19 PM

Don't use "shall" in language of policy; see MSCD 2.161.

Page 1: Comment	Kenneth A. Adams	11/19/08 11:18 PM

What about purchase orders?

Page 1: Comment	Kenneth A. Adams	11/24/08 11:34 PM

Move later in contract, with provisions contained in "Fees and Invoicing."

Page 1: Comment	Kenneth A. Adams	10/29/08 7:13 PM

Use "shall" to impose an obligation on the subject of the sentence; see MSCD 2.25.

Page 1: Comment	Kenneth A. Adams	11/19/08 11:20 PM

Not clear Clarify what this refers to. Also, needless elaboration? See MSCD 16.24.

Page 1: Comment	Kenneth A. Adams	11/19/08 11:37 PM

Encompassed by the following reference to Services?

Page 1: Comment	Kenneth A. Adams	10/29/08 7:14 PM

Use words for whole numbers up to ten; see MSCD 13.4.

Page 2: Comment	Kenneth A. Adams	11/19/08 11:29 PM

Could be read as "the first two years following ... the effective date"; evidently not what's intended, but causes reader miscue.

Page 2: Comment	Kenneth A. Adams	11/19/08 11:35 PM

This assumes only annual increases are permitted, but that isn't specified. And what does "annual" mean? During Any 12-month period or during any 12 months beginning January 1?

Page 2: Comment	Kenneth A. Adams	10/29/08 7:16 PM

Use the active voice (see MSCD 2.15) and then use "shall" to impose an obligation on the subject of the sentence (see MSCD 2.25).

Page 2: Comment	**Kenneth A. Adams**	**10/29/08 7:21 PM**

Wordy construction.

Page 2: Comment	**Kenneth A. Adams**	**10/29/08 7:21 PM**

Use instead language of prohibition.

Page 2: Comment	**Kenneth A. Adams**	**10/29/08 7:22 PM**

Use instead "any such."

Page 2: Comment	**Kenneth A. Adams**	**10/29/08 7:23 PM**

Use instead "previous," which is more consistent with standard English.

Page 2: Comment	**Kenneth A. Adams**	**10/29/08 7:23 PM**

Use numerals for numbers 11 and up; see MSCD 13.4.

Page 2: Comment	**Kenneth A. Adams**	**10/29/08 7:28 PM**

Logic requires "and" instead; see MSCD 12.383.

Page 2: Comment	**Kenneth A. Adams**	**10/29/08 7:26 PM**

Use words for whole numbers up to ten; see MSCD 13.4.

Page 2: Comment	**Kenneth A. Adams**	**1/20/08 4:34 PM**

Is this a condition or an obligation? In its current form, it is, strictly speaking, neither. And it's not clear whether this notice triggers negotiations or is given after the rate is negotiated. The former would seem to make more sense.

Page 2: Comment	**Kenneth A. Adams**	**10/29/08 7:33 PM**

Word more suited to narrative prose than contracts; see MSCD 12.456.

Page 2: Comment	**Kenneth A. Adams**	**10/29/08 7:32 PM**

Use "shall not" in language of prohibition; see MSCD 2.150.

Page 2: Comment	**Kenneth A. Adams**	**10/29/08 7:32 PM**

Use the active voice; see MSCD 2.15.

Page 2: Comment	**Kenneth A. Adams**	**10/29/08 7:34 PM**

Place earlier in the sentence.

Page 2: Comment	**Kenneth A. Adams**	**11/19/08 11:46 PM**

Rephrase using conditional clause.

Page 2: Comment	**Kenneth A. Adams**	**10/29/08 7:36 PM**

Use "shall" to impose an obligation on the subject of the sentence; see MSCD 2.25.

Page 2: Comment	**Kenneth A. Adams**	**10/29/08 7:34 PM**

Awkward.

Page 2: Comment	**Kenneth A. Adams**	**11/19/08 11:50 PM**

Redundant, given "pays."

Page 2: Comment	**Kenneth A. Adams**	**10/29/08 7:37 PM**

Inappropriate, given how "Contractor" is defined.

Page 2: Comment	**Kenneth A. Adams**	**10/29/08 7:37 PM**

Omit.

Page 2: Comment	**Kenneth A. Adams**	**11/19/08 11:48 PM**

Move to section 1.

Page 2: Comment	**Kenneth A. Adams**	**10/29/08 7:41 PM**

Not defined. And it's preferable not to use "party" as a defined term; see MSCD 1.76.

Page 2: Comment	**Kenneth A. Adams**	**10/29/08 7:42 PM**

Say instead that Statement of Work will not be effective.

Page 2: Comment	**Kenneth A. Adams**	**10/29/08 7:43 PM**

Redundancy.

Page 2: Comment	Kenneth A. Adams	10/29/08 7:44 PM

Use instead "signed"; see MSCD 4.13.

Page 2: Comment	Kenneth A. Adams	10/29/08 7:46 PM

See MSCD 3.75.

Page 2: Comment	Kenneth A. Adams	10/29/08 7:47 PM

Use instead "signing"; see MSCD 4.13.

Page 2: Comment	Kenneth A. Adams	10/29/08 7:48 PM

Use instead "will be deemed to have indicated"; see MSCD 12.65.

Page 2: Comment	Kenneth A. Adams	10/29/08 7:48 PM

Buried verb; see MSCD 16.7.

Page 2: Comment	Kenneth A. Adams	1/20/08 5:19 PM

Unnecessary.

Page 2: Comment	Kenneth A. Adams	10/29/08 7:52 PM

Should be a period.

Page 2: Comment	Kenneth A. Adams	1/20/08 5:20 PM

Clearer to say that any such claim won't be valid.

Page 2: Comment	Kenneth A. Adams	1/20/08 5:21 PM

But should apply to affiliates too.

Page 2: Comment	Kenneth A. Adams	10/30/08 7:52 PM

Use "that"; see MSCD 11.27.

Page 2: Comment	Kenneth A. Adams	10/29/08 7:54 PM

What specifications?

Page 2: Comment	Kenneth A. Adams	1/20/08 5:21 PM

Only time this "request for proposals" is mentioned.

Page 2: Comment	Kenneth A. Adams	10/29/08 7:54 PM

Use instead "before"; see MSCD 16.36.

Page 2: Comment	Kenneth A. Adams	10/29/08 7:55 PM

Buried verb; see MSCD 16.7. And refer instead to signing; see 4.13.

Page 2: Comment	Kenneth A. Adams	10/29/08 7:55 PM

See MSCD 12.349.

Page 2: Comment	Kenneth A. Adams	1/20/08 5:22 PM

What about service orders and purchase orders?

Page 2: Comment	Kenneth A. Adams	10/30/08 7:25 PM

Use "terms"; see MSCD 16.17.

Page 2: Comment	Kenneth A. Adams	10/30/08 7:26 PM

Buried verbs; see MSCD 16.7.

Page 2: Comment	Kenneth A. Adams	10/30/08 7:28 PM

Redundancy.

Page 2: Comment	Kenneth A. Adams	10/30/08 7:29 PM

Unnecessary.

Page 2: Comment	Kenneth A. Adams	1/20/08 5:28 PM

This would better be addressed by boilerplate provisions regarding amendment (see section 10.5) and waiver.

Page 2: Comment	Kenneth A. Adams	1/22/08 2:19 PM

Don't use "shall" in language of policy; see MSCD 2.161.

Page 2: Comment	Kenneth A. Adams	10/30/08 7:31 PM

Unnecessary.

Page 2: Comment	Kenneth A. Adams	10/30/08 7:31 PM

Unnecessary; see MSCD 4.54.

Page 2: Comment	Kenneth A. Adams	10/30/08 7:37 PM

Use clearer alternative; see MSCD 12.217.

Page 2: Comment	Kenneth A. Adams	10/30/08 7:41 PM

Use instead "shall not"; see MSCD 2.151.

Page 2: Comment	Kenneth A. Adams	10/30/08 7:44 PM

Omit.

Page 2: Comment	Kenneth A. Adams	10/30/08 7:38 PM

Be more concise.

Page 2: Comment	Kenneth A. Adams	10/30/08 7:38 PM

See MSCD 12.349.

Page 2: Comment	Kenneth A. Adams	10/30/08 7:47 PM

Use clearer alternative; see MSCD 12.279.

Page 2: Comment	Kenneth A. Adams	10/30/08 7:48 PM

Use the active voice; see MSCD 2.15.

Page 2: Comment	Kenneth A. Adams	1/22/08 2:35 PM

Use clearer alternative; see MSCD 12.279.

Page 2: Comment	Kenneth A. Adams	1/20/08 6:03 PM

Not sure what this means.

Page 2: Comment	Kenneth A. Adams	10/30/08 7:50 PM

Omit; see MSCD 12.202.

Page 2: Comment	Kenneth A. Adams	1/20/08 6:04 PM

Presumably in writing, but in what document?

Page 2: Comment	Kenneth A. Adams	10/30/08 7:54 PM

Use instead "may"; see MSCD 2.86.

Page 2: Comment	Kenneth A. Adams	10/30/08 7:55 PM

Use instead "will not be required to"; see MSCD 2.139.

Page 2: Comment	Kenneth A. Adams	1/20/08 5:52 PM

Unnecesssary.

Page 2: Comment	Kenneth A. Adams	1/22/08 2:05 PM

Break up this section; see MSCD 3.17.

Page 2: Comment	Kenneth A. Adams	1/22/08 1:53 PM

Should be covered by first section.

Page 2: Comment	Kenneth A. Adams	1/22/08 1:54 PM

Use instead "may"; see MSCD 2.139.

Page 2: Comment	Kenneth A. Adams	1/22/08 1:56 PM

See MSCD 16.17.

Page 2: Comment	Kenneth A. Adams	1/22/08 1:56 PM

Redundancy; see MSCD 16.11.

Page 2: Comment	Kenneth A. Adams	1/20/08 6:28 PM

Unnecessary?

Page 2: Comment	Kenneth A. Adams	10/30/08 8:02 PM

Omit; see MSCD 2.111.

| **Page 2: Comment** | **Kenneth A. Adams** | **1/22/08 2:12 PM** |

Use "shall" to state an obligation imposed on the subject of the sentence; see MSCD 2.25.

| **Page 2: Comment** | **Kenneth A. Adams** | **1/22/08 2:00 PM** |

Ideally one would word any "Notices" provision so as to eliminate the need to refer elsewhere in the agreement to notices being "in writing."

| **Page 2: Comment** | **Kenneth A. Adams** | **1/20/08 6:28 PM** |

What about notification of failure?

| **Page 2: Comment** | **Kenneth A. Adams** | **10/30/08 8:01 PM** |

Structure differently.

| **Page 2: Comment** | **Kenneth A. Adams** | **1/22/08 2:03 PM** |

Buried verbs; see MSCD 16.7.

| **Page 2: Comment** | **Kenneth A. Adams** | **1/22/08 2:03 PM** |

Use instead "before"; see MSCD 16.36.

| **Page 2: Comment** | **Kenneth A. Adams** | **1/22/08 2:04 PM** |

Don't use "such" instead of "this," "that," "these," or "those"; see MSCD 12.349.

| **Page 2: Comment** | **Kenneth A. Adams** | **1/22/08 2:41 PM** |

Restructure remainder of this section.

| **Page 2: Comment** | **Kenneth A. Adams** | **10/30/08 8:04 PM** |

Stodgy lawyerism; see MSCD 16.36.

| **Page 2: Comment** | **Kenneth A. Adams** | **10/30/08 8:05 PM** |

Say instead "all or part of any Deliverable."

| **Page 2: Comment** | **Kenneth A. Adams** | **10/30/08 9:25 PM** |

Use full independent clause before colon; see MSCD 3.23.

| **Page 2: Comment** | **Kenneth A. Adams** | **10/30/08 9:25 PM** |

Use words for numbers below ten; see MSCD 13.4.

| **Page 2: Comment** | **Kenneth A. Adams** | **10/30/08 9:26 PM** |

Redundant; see MSCD 12.202.

| **Page 2: Comment** | **Kenneth A. Adams** | **10/30/08 9:27 PM** |

Unnecesssary; see MSCD 12.243.

| **Page 2: Comment** | **Kenneth A. Adams** | **10/30/08 9:27 PM** |

Buried verb; see MSCD 16.7.

| **Page 2: Comment** | **Kenneth A. Adams** | **10/30/08 9:27 PM** |

See MSCD 12.349.

| **Page 2: Comment** | **Kenneth A. Adams** | **1/20/08 7:34 PM** |

Since this section contemplates that the Vendor might not succeed, it would make sense to make this subject to a reasonable-efforts standard.

| **Page 2: Comment** | **Kenneth A. Adams** | **1/22/08 2:08 PM** |

Use numerals for numbers eleven and above; see MSCD 13.1.

| **Page 2: Comment** | **Kenneth A. Adams** | **1/22/08 2:08 PM** |

Omit.

| **Page 2: Comment** | **Kenneth A. Adams** | **1/20/08 7:37 PM** |

What if the Vendor is unable to fix the problem?

| **Page 2: Comment** | **Kenneth A. Adams** | **1/22/08 2:12 PM** |

Use "shall" to state an obligation imposed on the subject of the sentence; see MSCD 2.25.

| **Page 2: Comment** | **Kenneth A. Adams** | **10/30/08 9:29 PM** |

Don't use the passive voice to express obligations; see MSCD 2.15 and 2.78.

Page 2: Comment	Kenneth A. Adams	1/20/08 7:46 PM

State more clearly. And wouldn't this be a third review?

Page 2: Comment	Kenneth A. Adams	10/30/08 9:30 PM

Omit; see MSCD 2.111.

Page 2: Comment	Kenneth A. Adams	10/30/08 9:31 PM

Needless elaboration; see MSCD 16.24.

Page 2: Comment	Kenneth A. Adams	10/30/08 9:33 PM

Redundant.

Page 2: Comment	Kenneth A. Adams	1/22/08 2:13 PM

Unnecessary to refer to termination?

Page 2: Comment	Kenneth A. Adams	10/30/08 9:37 PM

Redundant.

Page 2: Comment	Kenneth A. Adams	10/30/08 9:37 PM

Use instead "under this agreement; see MSCD 12.99.

Page 2: Comment	Kenneth A. Adams	10/30/08 9:37 PM

Redundancy; see MSCD 16.17.

Page 2: Comment	Kenneth A. Adams	1/22/08 2:20 PM

Don't use "shall" in language of policy; see MSCD 2.161.

Page 2: Comment	Kenneth A. Adams	10/30/08 9:39 PM

See MSCD 12.349.

Page 2: Comment	Kenneth A. Adams	10/30/08 9:39 PM

Redundant; see MSCD 12.202.

Page 2: Comment	Kenneth A. Adams	10/30/08 9:40 PM

But what if they're unable to agree?

Header and footer changes

Text Box changes

Header and footer text box changes

Footnote changes

Endnote changes

MASTER PROFESSIONAL SERVICES AGREEMENT

This master professional services agreement is dated _____, 200_, and is between WIDGET CORPORATION, a _____ ("**Widget**"), and _____, a [insert jurisdiction of organization and type of entity] (the "**Vendor**").

The parties agree as follows:

1.   **Services.** (a) Widget hereby engages the Vendor to perform, and the Vendor shall perform, in the United States in accordance with this agreement and for any given Widget Entity those services specified (1) in any statements of work that reference this agreement and that the Vendor and that Widget Entity enter into during the term of this agreement (each such statement of work, an "**SoW**") and (2) in any a service order in the form of exhibit A or any standard form of purchase order of that Widget Entity, which service order or purchaser order references this agreement and any applicable SoW and is issued by that Widget Entity during the term of this agreement (any such services, "**Services**"). For purposes of this agreement, "**Widget Entity**" means any of (1) Widget and (2) any entity that is controlled by Widget and is designated as a Widget Entity in a notice from Widget to the Vendor.

(b)   The parties anticipate that any given SoW will contain information regarding how much any given Services will cost and when they are to be provided.

(c)   If any Widget Entity determines that any Services that it wishes to order are sufficiently straightforward, it may order those Services by issuing a service order or purchase order in accordance with section 1(a) without entering into an SoW with respect to those Services.

(d)   Each SoW and each service order or purchase order issued in accordance with this agreement constitutes part of this agreement. If any such documents conflict with this agreement (excluding any such documents), this agreement (excluding any such documents) will govern. If any service order or purchase order issued under any SoW conflicts with that SoW, the SoW will govern.

2.   **Contractors.** (a) At the written request of Widget, the Vendor shall provide Widget with the resume of, and any relevant background information pertaining to, any individual whom the Vendor assigns, or proposes to assign, to perform Services (each such individual performing Services, a "**Contractor**") and shall disclose to Widget what the Vendor pays any Contractor for performing Services.

(b)   If Widget notifies the Vendor that any one or more Contractors performing Services are unacceptable to Widget, the Vendor shall promptly replace those Contractors with other similarly qualified Contractors. The Vendor shall not without Widget's consent terminate or reassign any Contractor that Widget deems to be important to continuity in performance of Services. The Vendor shall appoint a qualified Contractor to act as primary liaison between the Vendor and Widget Entities with respect to performance of Services.

(c)   The Vendor acknowledges that the Vendor and each Contractor are independent contractors and are not employees, agents, joint venturers, or partners of any Widget Entity for any purposes, including for purposes of any employee benefit or compensation plan offered by any Widget Entity, and that no Widget Entity will be required to pay benefits to any Contractor. The Vendor shall inform all Contractors in writing of the terms of this section 2(c).

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3.   **Termination.** (a) Widget may terminate this agreement by giving notice to the Vendor, effective upon receipt. Termination of this agreement will serve to terminate all SoWs then in effect, unless the notice of termination provides otherwise. After termination, this agreement will continue in effect solely for purposes of any SoW that is not terminated or any Services ordered but not yet performed.

(b)   Any Widget Entity may terminate any one or more SoWs to which it is party by giving notice to the Vendor. Any such notice will be effective upon receipt unless it provides otherwise. In addition, any given SoW will terminate in accordance with its terms or, if an SoW does not otherwise provide for termination, when the Vendor completes all Services under that SoW and the applicable Widget Entity accepts all Deliverables, if any, under that SoW.

(c)   Except as provided in any SoW, termination of any given SoW will not affect any other SoWs then in effect. Any terminated SoW will continue in effect solely for purposes of any Services ordered under that SoW but not yet performed.

(d)   Promptly after termination of this agreement (or any given SoW), the applicable one or more Widget Entities shall pay the Vendor any amounts owed for Services performed and Deliverables accepted, if any, under this agreement (or that SoW) before termination. The applicable one or more Widget Entities shall also pay the Vendor promptly after performance any amounts owed for Services performed and Deliverables accepted, if any, under this agreement (or any given SoW) after termination of this agreement (or that SoW).

(e)   Promptly after termination of this agreement (or any given SoW) the Vendor shall, at no cost to the applicable one or more Widget Entities, refund any amounts prepaid by any Widget Entity under all SoWs (or that SoW) and unearned by the Vendor, except with respect to any Services that in accordance with this agreement remain to be performed after termination.

4.   **Changes to Services.** (a) If the Vendor claims that it is precluded from performing Services in accordance with any SoW, service order, or purchase order due to circumstances relating to any facility of any Widget Entity, that claim will be invalid if (1) those circumstances are as contemplated by that SoW, service order, or purchase order, as applicable, and any related plans and specifications or (2) the Vendor knew or reasonably should have known of those circumstances before signing that SoW or accepting that service order or purchase order, as applicable.

(b)   Changes to Services specified in a SoW, service order, or purchase order will not be effective unless authorized by a change order in the form of exhibit B signed by the applicable Widget Entity. If the applicable Widget Entity reimburses the Vendor for reasonable out-of-pocket costs it incurs before effectiveness of that change order, the Vendor shall not decline to accept any change order because it reduces cost of performance. If the changes provided for in any change order do not fundamentally change the nature of the Services in question and the applicable Widget Entity and the Vendor agree in writing on the Vendor's compensation for those changes, the Vendor shall not decline to accept that change order because it increases the cost or scope of performance.

5.   **Deliverables.** (a) If as part of any Services the Vendor is required to deliver any Work Product or other items to a given Widget Entity (any such item, a "**Deliverable**"), the applicable Widget Entity may perform an acceptance review to determine whether any given Deliverable complies with this agreement. That Widget Entity shall notify the Vendor of the results of any such acceptance review. If that Widget Entity pays for or uses a Deliverable before an acceptance review, that will not constitute acceptance of that Deliverable by that Widget Entity.

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(b)   Except as provided in the applicable SoW, no later than five business days after a given Widget Entity notifies the Vendor that it is not accepting a given Deliverable, the Vendor shall at no additional cost to that Widget Entity use reasonable efforts to correct all deficiencies and shall redeliver that Deliverable to that Widget Entity.

(c)   No later than 30 days after delivery of a corrected Deliverable, the applicable Widget Entity shall review that Deliverable. If that Widget Entity determines that the corrected Deliverable still fails the acceptance review, the Vendor will have five more business days from the date of that determination to correct the Deliverable at no additional cost to that Widget Entity. If the Deliverable subsequently fails a third acceptance review, the applicable Widget Entity shall do one of the following, without prejudice to any other rights and remedies of that Widget Entity:

(1)   grant the Vendor additional time to correct all outstanding deficiencies at no additional cost to that Widget Entity;

(2)   return that Deliverable to the Vendor, in which case the Vendor shall refund promptly to that Widget Entity the total amount paid by that Widget Entity to the Vendor under this agreement in connection with that Deliverable; and

(3)   retain that Deliverable, except that it is a condition to this alternative that (A) the Vendor and that Widget Entity agree in writing to the total compensation to which the Vendor is entitled in connection with that Deliverable, taking into account the remaining deficiencies, and (B) the Vendor or that Widget Entity, as applicable, pays the other any amount necessary to ensure that Widget Entity has paid in the aggregate no more or less than the amount specified.

[Place next section later in contract, with provisions currently in section 6 (Fees and Invoicing).]

6.   **Fixed Costs.** (a) Until two years after the date of this agreement (in the case of Services ordered in accordance with section 1(b)) or until two years after the date of the applicable SoW (in the case of any other Services), the Vendor shall not increase the rates it charges for Services. The parties shall negotiate in good faith any subsequent rate increases, but any subsequent rate increases during any given 12-month period may not exceed the lesser of (1) the increase in the Consumer Price Index for Urban Consumers, All Items, as issued by the Bureau of Labor Statistics, U.S. Department of Labor, during that 12-month period and (2) 5%. The Vendor shall not implement any rate increase unless at least 60 days in advance it informs Widget that it intends to implement that rate increase.

(b)   If the Vendor promotes any Contractor who is performing Services for a given Widget Entity, the Vendor shall not increase the rates that it charges that Widget Entity for work performed by that Contractor.

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